



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3B

**THE INSOLVENCY SYSTEM OF THE UNITED KINGDOM
(ENGLAND AND WALES)**

This is the **summative (formal) assessment** for **Module 3B** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 3**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for Module 3B. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment3B]**. An example would be something along the following lines: 202223-336.assessment3B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 3B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2023**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 3B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2023** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. If you elect to submit by 1 March 2023, you **may not** submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

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Commented [WPA1]: 37/50 = 74%

QUESTION 1 (multiple-choice questions) [10 marks in total]

Commented [WPA2]: 7/10

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Please select the **most correct ending** to the following statement:

The Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021 restrict pre-pack sales which constitute a substantial disposal of the company's property to connected parties where the disposal occurs . . . :

- (a) within 10 weeks of the commencement of the administration.
- (b) **within 8 weeks of the commencement of the administration.**
- (c) within 4 weeks of the commencement of the administration.
- (d) on the day the company enters administration.

Question 1.2

What is the **maximum length** of a Moratorium under Part 1A of the Insolvency Act 1986 to which creditors can consent without any application to the court?

- (a) 40 business days.
- (b) One year and 20 business days.
- (c) One year and 40 business days.
- (d) **One year.**

Question 1.3

Which of the following **is not** a requirement for a company that wishes to enter into a Restructuring Plan under Part 26A of the Companies Act 2006?

- (a) The company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.
- (b) A compromise or arrangement is proposed between the company and its creditors, or any class of them, or its members, or any class of them.
- (c) The purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the said financial difficulties.
- (d) The company is, or is likely to become, unable to pay their debts, as defined under section 123 of the Insolvency Act 1986.

Question 1.4

In cases where the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021 apply and an independent report from an Evaluator is obtained, the independent report must be obtained by whom?

- (a) The administrator.
- (b) Any secured creditor with the benefit of a qualifying floating charge.
- (c) The purchaser.
- (d) The company's auditor.

Commented [WPA3]: C is the correct answer

Question 1.5

Which one of the following **is not** a debtor-in-possession procedure?

- (a) Administration.
- (b) Restructuring Plan.
- (c) Scheme of Arrangement.
- (d) Company Voluntary Arrangement.

Question 1.6

A liquidator may pay dividends to small value creditors based upon the information contained within the company's statement of affairs or accounting records. In such circumstances, a creditor is deemed

to have proved for the purposes of determination and payment of a dividend where the debt is **no greater than how much?**

- (a) GBP 500
- (b) GBP 750
- (c) **GBP 1,000**
- (d) GBP 2,000

Question 1.7

Which one of the following **is not**, in itself, a separate ground for disqualification of a director under the Company Directors Disqualification Act 1986?

- (a) **Wrongful trading.**
- (b) Breach of fiduciary duty.
- (c) Being found guilty of an indictable offence in Great Britain.
- (d) Being found guilty of an indictable offence overseas.

Commented [WPA4]: B is the correct answer

Question 1.8

The administrator is under a general duty to provide a statement for creditors' consideration setting out proposals for achieving the purpose of administration. He or she must obtain a creditors' decision on whether or not to approve the proposals **within how many weeks** of the date the company entered administration?

- (a) 6
- (b) 8
- (c) **10**
- (d) 12

Question 1.9

Which of the following statements is **incorrect**?

- (a) **An insolvency officeholder from an EU Member State will be automatically recognised by the courts in the UK whether the officeholder was appointed before or after Brexit.**

- (b) An insolvency officeholder from an EU Member State is automatically recognised by the courts in the UK if appointed before Brexit.
- (c) An insolvency officeholder from an EU Member State appointed after Brexit may apply to a UK court for recognition under the Cross Border Insolvency Regulations.
- (d) An insolvency officeholder from an EU Member State cannot apply to a UK court for recognition under section 426 of the Insolvency Act 1986.

Question 1.10

Under section 216 of the Insolvency Act 1986, a director of a company which has been wound up insolvent may not, unless an exception applies, be a director of a company that is known by a prohibited name **for what period of time?**

- (a) 6 months.
- (b) 12 months.
- (c) 2 years.
- (d) 5 years.

Commented [WPA5]: D is the correct answer

QUESTION 2 (direct questions) [10 marks]

Commented [WPA6]: 9/10

Question 2.1 [maximum 5 marks]

Commented [WPA7]: 4/5 the answer to (ii) is somewhat unclear but it appears to be accurate overall. The answer to (iii) is not correct. Under s 246ZB only an administrator may bring an action. A liquidator would need to bring an action under s 214.

Who may bring an action under: (i) section 423 of the Insolvency Act 1986; (ii) section 6 of the Company Directors Disqualification Act 1986; and (iii) section 246ZB of the Insolvency Act 1986?

Ans:-

1. As given in Section 423 of the Insolvency Act 1986:

the following parties have the right to take objection/ attack transactions which are designed to defraud creditors:

- (i) where the company is being wound up or is in administration, the official receiver, the liquidator, the administrator and (with the leave of the court) any victim of the transaction such as a creditor;
- (ii) where a victim is bound by a CVA, the supervisor of the CVA or any victim of the transaction (whether bound by the CVA or not); or
- (iii) in any other case, by a victim of the transaction.

2. Section 6 of the Company Directors Disqualification Act 1986:

If the Official Receiver comes across evidence of unfit behaviour by the directors of the company the Official Receiver may take action to disqualify the directors from being involved in the management of a company for up to 15 years under the Company Directors Disqualification Act 1986

A liquidator (and administrator) has a statutory duty to report any directors who may be “unfit” to be directors under the Company Directors Disqualification Act 1986. The Secretary of State may decide, based upon such a report, to take action against directors whereby the court may disqualify them from being directors of companies for up to 15 years.

Under section 6 of the Company Directors Disqualification Act 1986, the court is required to make a disqualification order against a person in any case where it is satisfied:

- (a) that the person is or has been a director of a company which has at any time become insolvent (whether while he was a director or subsequently); and
- (b) that his conduct as a director of that company (either taken alone or taken together with his conduct as a director of one or more other companies or overseas companies) makes him unfit to be concerned in the management of a company.

3. Section 246ZB of the Insolvency Act 1986:

An application for wrongful trading can be brought by a liquidator or administrator who brings it for the benefit of all creditors and not merely for the benefit of the actual victims themselves. Individual creditors cannot bring an action for fraudulent trading

Question 2.2 [maximum 5 marks]

Commented [WPA8]: 5/5

List any **five (5)** of the debts which do not form part of the payment holiday under Part A1 of the Insolvency Act 1986 when a company is subject to a Moratorium.

The Moratorium provides a stay on actions in relation to debts incurred prior to the Moratorium only. There are restrictions on the company paying most of its pre- Moratorium debts, the so-called “payment holiday”.

There is a stay on enforcement of pre-Moratorium debts (that is, debts falling due before the Moratorium and which fall due during the Moratorium by reason of a pre-Moratorium obligation) except in so far as they consist of amounts payable in respect of:

- (a) the monitor’s remuneration or expenses;
- (b) goods or services supplied during the Moratorium;
- (c) rent in respect of a period during the Moratorium;

- (d) wages or salary arising under a contract of employment or
- (e) redundancy payments.

QUESTION 3 (essay-type questions) [15 marks in total]

Commented [WPA9]: 14/15

Question 3.1 [maximum 6 marks]

Commented [WPA10]: 6/6

Can an administrator who wishes to continue to operate the business of the company in administration require suppliers of goods and services to continue to supply those goods and services during the administration?

Ans:-

An administrator will often need to obtain or retain certain essential supplies. Section 233 of the Act applies to a supply of gas, electricity, water and communications services. The definition of communications services includes the supply of goods and services such as point of sale terminals, computer hardware and software, information, advice, and technical assistance, data storage and processing and website hosting. Suppliers are not permitted to require payment of outstanding debts in order to secure a new or continued supply to the company in administration. However, section 233 of the Act permits a supplier to stipulate that the administrator must personally guarantee payment of charges in respect of the supply.

In addition, under section 233A a supplier of such services is generally unable to rely upon an "insolvency-related term" in a contract of supply which would otherwise entitle the supplier to terminate the supply, alter the terms of the supply or compel higher payments for continued supply.

The 2020 Act has now expanded these protections for insolvent companies by adding section 233B to the Act. Section 233B prohibits clauses which allow the supplier of goods or services to terminate or "do any other thing" in relation to that contract if the company enters a formal insolvency procedure.

A provision of a contract for the supply of goods or services to the company is of no effect when the company enters an insolvency procedure, if, under that provision the contract would terminate or the supplier would be entitled to terminate the contract or to "do any other thing" upon the company entering an insolvency procedure. Section 233B therefore prevents suppliers from terminating a supply upon the company's insolvency but also prevent suppliers from making it a condition of continued supply that pre-insolvency arrears are paid and from making other changes to the contract such as increasing prices. Under section 233B, a supplier cannot insist on a personal guarantee from the administrator (as it can under section 233).

As given in section 233B, a contract may still be terminated by a supplier where the company or insolvency office holder consents or, on application to the court, the court is satisfied that the continuation of the contract would cause the supplier hardship, and grants permission for termination.

Section 233B complements the existing sections 233 and 233A of the Act which, in similar terms, prohibit termination by utility, communications and IT suppliers. Section 233B opens up the restriction on termination to all other suppliers (with a limited number of exceptions, for example, insurers; banks; electronic money institutions; recognised investment exchanges and clearing houses; securitisation companies; and overseas companies with corresponding functions).

Question 3.2 [maximum 9 marks]

Explain the order of priority of payments in a liquidation and explain the nature of the rights enjoyed by each class of creditor or expense. How would this priority change if the company had been subject to a Moratorium under Part A1 of the Insolvency Act 1986 during the 12 week period prior to the commencement of the liquidation?

Ans:-

As given in the code, Order of priority of payments and Nature of rights enjoyed by each creditor or expense:

Secured creditors are the first to get paid when a debtor's assets are realised - sold or disposed of to raise money. For example, a creditor who holds a fixed charge - a security interest taken to protect against non-payment of debt - or security on an asset such as a mortgage has the right to sell the asset to recover their debt.

After the secured debts have been repaid, the liquidator distributes the remaining proceeds to pay the following - in strict order of priority:

- Expenses of liquidation including liquidator's remuneration:

The liquidation expenses are to be paid in the following order of priority:

- (a) expenses that are properly incurred by the liquidator in preserving, realising or getting in any of the assets of the company (including the conduct of any legal proceedings);
- (b) the cost of any security provided by the liquidator;
- (c) any amount payable to a person to assist in the preparation of a statement of affairs or accounts;
- (d) any necessary disbursements by the liquidator in the course of the winding up (including, for example, any expenses incurred by members of the liquidation committee);
- (e) the remuneration of any person who has been employed by the liquidator to perform any services for the company;

Commented [WPA11]: 8/9 a very detailed answer but perhaps s 176A required some further explanation.

(f) the remuneration of the liquidator (which is subject to effectively the same rules as those which apply to administrators, specifically including the fees estimate regime where a time cost basis for the liquidator's fees is adopted);

(g) the amount of any corporation tax on chargeable gains accruing on the realisation of any asset of the company; and

(h) any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up process.

- Debts due to preferential creditors:

Those entitled to certain payments in priority over other unsecured creditors - including wages owed in the four months before the date of the insolvency order, as well as all holiday pay and contributions to occupational pension schemes.

The category of preferential creditor largely comprises limited claims of employees and some taxation liabilities.

There are two classes of preferential debts:- ordinary and secondary.

Ordinary preferential debts are paid before secondary preferential debts. Preferential debts, in their respective classes, rank equally amongst themselves and so abate in equal proportion if the company's assets are insufficient to pay them all.

The following debts are listed as preferential as given in the code:

(1) any sum owed on account on an employee's contribution to an occupational pension scheme, being contributions deducted from earnings of the company's employees paid in the period of four months prior to the commencement of the winding up;

(2) any sum owed by the company on account of an employer's contribution to an occupational pension scheme in the period of 12 months before the relevant date;

(3) remuneration owed by the company to a person who is or has been an employee of the debtor and is payable in respect of the whole or any part of the period of four months prior to the commencement of the winding up to a maximum total figure which is currently £800 (a figure that has remained unchanged since 1976);

(4) any amounts owed by the company by way of accrued holiday remuneration in respect of any period of employment before the winding up;

Any remuneration payable by the company to a person in respect of a period of holiday or absence from work through sickness or other good cause, is deemed to be wages.

(5) claims for monies advanced to pay wages or holiday remuneration will rank as preferential. This provision is designed to protect lenders where their money has been used to pay wages or holiday remuneration of the employees of their customer, and allows them to take over the benefit which the employees would have had, had the lender not made the monies available for the specific purpose of seeing them paid.

(6) levies on the production of coal and steel referred to in article 49 and article 50 of the European Coal and Steel Community Treaty ,

(7) claims for so much of any amount which is ordered to be paid by the company under the Reserve Forces (Safeguard of Employment) Act 1985, and is so ordered in respect of a default made by the company in the discharge of its obligations under that Act.

In recent years a number of additional preferential debts have been added to the regime which relate to payments which may have been made to those with deposits, where the financial institution holding those deposits has become insolvent and compensation payments have been made by the Financial Services Compensation Scheme to those depositors. In such cases, the following are now preferential debts:

(8) So much of any amount owed by the company in respect of an eligible deposit as does not exceed the compensation that would be payable in respect of the deposit under the Financial Services Compensation Scheme to the person or persons to whom the amount is owed.

(9) So much of any amount owed by the company to one or more eligible persons in respect of an eligible deposit as exceeds any compensation that would be payable in respect of the deposit under the Financial Services Compensation Scheme to that person or those persons.

(10) An amount owed by the company to one or more eligible persons in respect of a deposit that—

(a) was made through a non-UK branch of a credit institution authorised by the competent authority of the UK, and

(b) would have been an eligible deposit if it had been made through a UK branch of that credit institution.

In addition to the above, the UK has reintroduced a form of Crown preference for certain debts owed to the taxation authority (Her Majesty's Revenue and Customs):

(11) PAYE income tax deductions, national insurance deductions, VAT payments, Construction Industry Scheme deductions and student loan repayments.

The debts listed above at points (9), (10) and (11) are defined as secondary preferential debts under section 386 of the Act and are paid after the “ordinary” preferential debts which includes all the other preferential debts explained above.

- Any creditor holding a floating charge over an asset, such as a debenture:

There may be more than one floating charge holder and if that is the case, priority between them usually turns upon which floating charge was created first.

The liquidator is under a duty to make a “prescribed part” of the company’s net property available for the satisfaction of unsecured debts and must not distribute any of this prescribed part to a floating charge holder except insofar as it is in excess of the amount required to satisfy all the unsecured debts. For this purpose, “net property” is the amount of the company’s property which otherwise would be available for the satisfaction of debts of floating charge holders. It is thus calculated after the liquidation expenses and preferential debts have been paid.

- All unsecured creditors:

Creditors with no security, often ordinary trade creditors, are paid out last in the statutory order. Frequently, once the expenses of the liquidation have been paid and distributions have been made to secured and preferential creditors, there is little or nothing left to pay a dividend to unsecured creditors

- The shareholders:

If there are sufficient funds to pay all the creditors (and interest on their debts) any surplus is distributed amongst the shareholders according to the company’s constitution, which will normally permit a distribution pro rata the shareholders’ respective shareholdings

Change in priority if the company had been subject to a Moratorium under Part A1 of the Insolvency Act 1986:

A peculiarity of the Moratorium is that if the company is not rescued as a going concern but instead enters administration or liquidation within 12 weeks of the end of the Moratorium, the priority of debts in that subsequent administration or liquidation may be different to the priority of debts which existed prior to the Moratorium.

Section 174A provides that certain unpaid pre- Moratorium or Moratorium debts (the debts which are not part of the payment holiday), such as debts owed to employees or “financial services” debts, are paid in the subsequent liquidation, in priority to even the liquidator’s fees and expenses. Section 174A therefore affords certain unsecured debts a form of “super priority” in a subsequent liquidation.

Unsecured (or secured) pre-Moratorium bank debt, falling within the definition of “financial services”, will also acquire such a “super priority” although there is an exception which prevents such liabilities

acquiring such “super priority” where the debt is accelerated debt, that is, any pre-moratorium financial services debt which fell due by reason of the operation of, or exercise of rights under, an acceleration or early termination provision in the financial services contract.

QUESTION 4 (fact-based application-type question) [15 marks in total]

Commented [WPA12]: 7/15

Prior to going into compulsory liquidation on 23rd December 2022, under pressure from its bank, Fretus Bank plc, and in order to prevent it from demanding repayment of the company’s loans, Marbley Q Limited (“the Company”), granted a debenture in favour of Fretus Bank plc in February 2022. The debenture contained a floating charge over the whole of the Company’s undertaking.

The winding up order followed a creditor’s winding up petition issued on 14th October 2022.

In July 2022, as the Company continued to suffer cash flow problems, the directors approved the sale of two (2) marble cutting machines to Rita Perkins (a director) for GBP 10,000 in cash. The machines had been bought for GBP 25,000 a year before.

A month before the winding up order was made, Rita Perkins received an email from Hard and Fast Ltd, one of the Company’s key suppliers. The supplier demanded immediate payment of all sums owing to it and informed the Company that further supplies would only be made on a cash on delivery basis. As the continued supply of marble was seen as essential by the Company, the board authorised a payment of GBP 8,000 to cover existing liabilities and agreed to further payments, on a cash on delivery basis, for further supplies which amounted to further payment of GBP 3,000 up to the date of the winding up order.

The liquidator has asked for advice whether any action may be taken in respect of the floating charge in favour of Fretus Bank plc and the two subsequent transactions.

Using the facts above, answer the questions that follow.

Identify the relevant issues and statutory provisions and consider whether the liquidator may take any action in relation to:

Question 4.1 [maximum 5 marks]

Commented [WPA13]: 3/5 a good account of the law but very little application to the facts.

The floating charge in favour of Fretus Bank plc;

As given, Section 245 of the Act applies only to floating charges and not to any other type of security. It applies where a company is in administration or liquidation and the provision is aimed at preventing pre-existing unsecured creditors obtaining the security of a floating charge shortly before a company enters a formal insolvency procedure. It does not prevent lenders who are providing fresh funding to the company from taking a floating charge for that new funding. It renders invalid floating charges given by a company at a relevant time, except to the extent, in substance, that “new” consideration is provided for the charge.

Where the person in whose favour the floating charge is created is connected with the company, the relevant time is any time within the period of two years prior to the onset of insolvency. Where the person in whose favour the floating charge is created is not connected with the company, the relevant

time is any time within the period of 12 months prior to the onset of insolvency, but only if at the time of the creation of the charge the company was either unable to pay its debts (within the meaning in section 123 of the Act) or became unable to do so in consequence of the transaction.

There are two main categories of “new” consideration set out in section 245 of the Act, which, if satisfied mean the floating charge will not be invalid:

(1) the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the company at the same time as, or after, the creation of the charge. The consideration must be given at the same time as or after the creation of the charge. Where an agreement is made to execute a charge, followed by payments made to the company, followed in turn by the formal execution of the charge, any delay between the making of the payments and the execution of the charge must be minimal, such as the time to take a coffee-break.³⁴

(2) the value of so much of that consideration as consists of the discharge or reduction, at the same time as, or after, the creation of the charge, of any debt of the company. In *Re Fairway Magazines*,³⁵ it was suggested that consideration by way of payments by directors to the company for a specific purpose which was for the benefit of the directors, in helping to release their personal liability under guarantees, were not within the exemption in section 245. This category, however, specifically provides that a floating charge is not to be invalidated to the extent of consideration by way of discharge or reduction of a debt of the company. If, therefore, the payments in *Fairway Magazines* had been made directly to the bank, rather than to the company for the purpose of repaying the bank, the payments would have fallen within this category.

If a floating charge is caught by section 245 then, save to the extent of any new consideration as discussed above, it is rendered invalid. The invalidity can only arise, however, in the event that the company goes into liquidation or administration. It does not invalidate anything done under the authority of the vulnerable floating charge prior to the commencement of the winding up. Although the floating charge is invalidated, the underlying debt remains valid.

Marble Q Limited (“the Company”), granted a debenture in favour of *Fretus Bank plc* in February 2022. The debenture contained a floating charge over the whole of the Company’s undertaking. This debenture with floating charge was granted shortly before the commencement of liquidation.

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

As given in section 238 of the Act, a liquidator may take an action in respect of a transaction which was entered prior to the company entering liquidation or administration where the transaction was at an undervalue.

Under section 238, the liquidator must show that the company:

(1) made a gift to another person; or

Commented [WPA14]: 4/6 again, the explanation of the law is sound but the application to the facts is limited.

(2) entered into a transaction with another person on terms that provided for the company to receive no consideration; or

(3) entered into a transaction with another person for a consideration which, in money or money's worth, was, at the date of the transaction, significantly less than the value, in money or money's worth, of the consideration provided by the company.

In order to take an action, the transaction must have taken place at a "relevant time" which is in the period of two years prior to the commencement of the liquidation or administration.

Whether or not the transaction was with a connected person, it is a prerequisite of liability under section 238 that, at the time the transaction was entered into, either the company was unable to pay its debts as they fell due within the meaning of section 123 or became unable to pay its debts within the meaning of that section in consequence of the transaction. In the case of a transaction with a connected person, however, the company is presumed to have been insolvent, or to have become insolvent as a result of the transaction, unless the contrary is proved.

Marbley Q Limited had purchased the 2 marble cutting machines for GBP 25,000 during July 2021. The company was suffering cashflow problems. Hence, during July 2022, these machines were sold for GBP 10,000 to Rita Perkins, one of the directors of the company, as approved by the company's Board of directors. The company was unable to make repayment of its loan to Fretus Bank plc. A creditor's winding up petition was issued on 14th October 2022. The company went into compulsory liquidation on 23rd December 2022.

Thus, the company sold its assets at a value lower than its market value to a connected party prior to entering into liquidation.

If directors have acted deliberately to avoid payment of company liabilities by continuing to trade, accepting supplier credit or taking payment on credit from customers knowing that orders will be unfulfilled prior to liquidation, it is considered as Fraudulent trading. Selling company's assets for "undervalue" or lower than their market value prior to the liquidation is also considered as a Fraudulent trading under section 213 of Insolvency Act, 1986.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

As provided in Section 239 of the Act, there are number of defined terms in common with section 238 of the Act and the wide range of possible orders available to the court under section 238 of the Act also apply to section 239 of the Act. The underlying purpose of section 239 of the Act is to prevent a company, shortly before entering a formal insolvency procedure, from placing one of its creditors in a better position than others. It prevents such preferences such as a payment in full where the creditor could have expected only a dividend as an unsecured creditor. It will also open up to attack a security given to a creditor, or other property of the company made available to the creditor, who previously only had priority as an unsecured creditor.

Commented [WPA15]: 0/4 unfortunately neither s 239 nor s 214 are feasible on the facts as the transactions took place after the commencement of the liquidation not before it. Only s 127 will be of any use to the liquidator.

An application may be made only if the company has gone into liquidation or administration. In order to succeed on an application under section 239 must show that:

- (a) the person whom it is alleged has been preferred was, at the time of the transaction, a creditor of the company (or a surety or guarantor for any of the company's debts or liabilities);
- (b) something was done, or suffered to be done, by the company which had the effect of putting that person in a better position, in the event of the company going into insolvent liquidation, than the position he or she would have been in if that thing had not been done (that is, that the person has been preferred);
- (c) the company was, in giving the preference, influenced by a desire to produce the effect referred to in (b) above (the desire to prefer) in relation to the person preferred; and
- (d) the preference was given at a relevant time.

The burden of proof in relation to each of the above matters normally rests with the officeholder. However, if the person to whom the preference was given is connected with the company (otherwise than by reason merely of being an employee of the company), then there is a presumption that the company was influenced by a desire to prefer that person. This shifts the burden onto the connected person to rebut that presumption.

In determining whether the thing done amounts to a preference, the fact that pressure was applied by the creditor (whether in requiring the company to do something, or in preventing the company from stopping the creditor exercising a self-help remedy) is not relevant. Pressure should be considered relevant only to whether there is the requisite desire.

In this case, the Board of Marbley Q Limited had authorised a payment of GBP 8,000 to Hard and Fast Ltd. to cover existing liabilities. This authorization was made a month prior to the date of winding up order. Thus, preference was given to make payments to Hard and Fast Ltd. than other creditors.

When the company becomes insolvent, the interests of the company's creditors as a whole must be at the forefront of directors' actions and no preference should be shown to some creditors more than others.

Board of Marbley Q Limited had agreed to make further payments to Hard and Fast Ltd. for further supplies of Marble, on a cash on delivery basis. The amount paid for further supplies was GBP 3,000 up to the date of the winding up order. Marbley Q Limited was suffering cashflow problems. Hence, 2 marble cutting machines were sold during July 2022. The company was unable to make repayment of its loan to Fretus Bank plc. A creditor's winding up petition was issued on 14th October 2022. Hence, the directors should have known that there was no reasonable prospect of avoiding insolvency. However, the directors continued to trade and receive supplies of marble. An amount of GBP 3,000 was also paid for the same. This amount could have been utilized for making repayment of loans of the company. Therefore, the directors have failed to minimise the potential loss to the company's creditors.

When directors continue to trade past the point when they knew or should have known that there was no reasonable prospect of avoiding insolvency and they fail to minimise the potential loss to the company's creditors, it is clearly a case of wrongful trading as per Section 214 of Insolvency Act, 1986.

*** End of Assessment ***