



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).**
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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

Commented [WPA1]: 45/50 = 90% an excellent effort

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

Commented [WPA2]: 10/10 excellent

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.*

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.

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.

QUESTION 2 (direct questions) [10 marks]

Commented [WPA3]: 10/10

Question 2.1 [maximum 5 marks]

Commented [WPA4]: 5/5

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?

The following persons may bring an action under:

- (i) Section 423 of the Insolvency Act 1986 (pursuant to section 424):
 - a. If the company is being wound up or in administration:
 - i. The official receiver;

- ii. *The liquidator;*
 - iii. *The administrator;*
 - iv. *Any victim of the transaction (i.e. a person who is, or is capable of being, prejudiced by the transaction, such as a creditor), with the leave of the court;*
- b. *If the victim of the transaction is bound by a Company Voluntary Arrangement:*
- i. *The supervisory of the Company Voluntary Arrangement;*
 - ii. *Any victim of the transaction (whether bound by the Company Voluntary Arrangement or otherwise);*
- c. *In any other case: by a victim of the transaction.*
- (ii) *Section 6 of the Company Directors Disqualification Act 1986 (pursuant to section 7):*
- a. *Secretary of State; or*
 - b. *the official receiver, if so directed by the Secretary of State in the case of a person who is or has been a director of a company which is being (or has been) wound up by the court; and*
- (iii) *Section 246ZB of the Insolvency Act 1986:*
- a. *The administrator.*

Question 2.2 [maximum 5 marks]

Commented [WPA5]: 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.

1. *The monitor's (an insolvency practitioner that is an officer of the court) remuneration or expenses;*
2. *Goods or services supplied during the Moratorium;*
3. *Rent in respect of a period during the Moratorium;*
4. *Wages or salary arising under a contract of employment; and*
5. *Redundancy payments.*

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

Commented [WPA6]: 14/15

Question 3.1 [maximum 6 marks]

Commented [WPA7]: 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?

It is likely that an administrator can require suppliers of goods and services to continue to supply those goods and services during the administration.

If such contracts are deemed to be executory contracts, the appointment of an administrator does not automatically terminate those contracts. Previously, suppliers have been able to rely successfully on automatic termination provisions upon insolvency. However, the legislative framework has increasingly included exceptions to make any automatic termination clauses in those contracts, by virtue of insolvency, void:

- *Section 233 of the Insolvency Act 1986 applies to supplies of gas, electricity, water; communications services and for the purpose of enabling or facilitating anything to be done by electronic means (e.g. Point of Sale terminals, website hosting, data storage etc.) (together, the "Essential Supplies"). In respect of the Essential Supplies:*
 - *the suppliers cannot make it a condition of giving supply that any outstanding charges in respect of a supply given to the company before the date on which the company entered into administration are paid;*
 - *however, the suppliers can make it a condition of giving supply that the office-holder personally guarantees the payment of any charges in respect of the supply.*
- *Section 233A of the Insolvency Act 1986 affords further protection of the Essential Supplies by stipulating that any insolvency-related term of contract for the supply of Essential Supplies ceases to have effect if the company enters into administration. This protects the company in administration from the suppliers of Essential Supplies to terminate the supply, modify the terms of the supply or require higher payment for the continued supply.*
- *Section 233B of the Insolvency Act 1986 is a more recent protection (inserted in 2020), which stipulates that a provision of a contract for the supply of goods or services to the company more generally (with limited exceptions for insurers, banks etc.) ceases to have effect on administration (as well as other insolvency procedures) if, and to the extent that:*
 - *the contract or the supply would terminate, or any other thing would take place, because the company becomes subject to administration; or*

- *the supplier would be entitled to terminate the contract or the supply, or to do any other thing, because the company becomes subject to administration.*

Not only does section 223B stop suppliers from terminating a supply upon administration, it also stops suppliers from:

- *making it a condition of continued supply that any outstanding charges in respect of a supply made to the company before administration are paid;*
- *making any other changes, such as uplifting prices; or*
- *insisting on a personal guarantee from the administrator.*

For completeness, there are grounds for the supplier to terminate by consent or on application to the court on the basis of hardship.

Question 3.2 [maximum 9 marks]

Commented [WPAB]: 8/9 very good - a little more detail on preferential creditors would have been helpful.

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?

The order of priority of payments, and a brief explanation of the nature of rights enjoyed by each class of creditor or expense, is below:

- 1. Expenses of winding up (including the liquidator's remuneration) - pursuant to section 115 of the Insolvency Act 1986: These expenses have the highest priority of payments, and include (in the order of priority):*
 - a. expenses properly incurred by the liquidator in preserving, realizing or getting in any of the assets of the company (which includes any legal proceedings);*
 - b. the cost of any security provided by the liquidator;*
 - c. the amount payable to persons assisting in the preparation of a statement of affairs or accounts;*
 - d. necessary disbursements of the liquidator in the course of winding up (including expenses incurred by the liquidation committee members);*
 - e. remuneration of any person employed by the liquidator to perform services for the company;*

f. remuneration of the liquidator;

g. corporate tax following realization of any asset of the company; and

h. any other expenses properly chargeable by the liquidator in carrying out the functions on winding up.

2. Preferential creditors (as defined in ss 386, 387 of the Insolvency Act 1986 and Schedule 6 to the Insolvency Act 1986) - pursuant to section 175 of the Insolvency Act 1986: preferential creditors are next in priority for payment, ahead of payments of floating charges and unsecured creditors. Preferential creditors can be broken down into (in the order of priority):

a. Ordinary preferential creditors; and

b. Secondary preferential creditors.

Preferential debts rank equally amongst themselves in their respective classes.

Preferential debts also include various employee remuneration/contributions and some taxation liabilities (see Schedule 6).

3. Floating charge holders subject to the "prescribed part": Floating charge holders are next in line to be paid. However, part of the proceeds from the realization of a floating charge that was created on or after 15 September 2003 must be set aside as a "prescribed part" and be made available to satisfy unsecured debts (pursuant to section 176A of the Insolvency Act 1986) unless that prescribed part would be greater than the amount required to satisfy all the unsecured debts.

If the company's net property (i.e. after payment of liquidation expenses and preferential debts):

a. does not exceed GBP10,000: then the prescribed part is 50% of the net property, unless the liquidator considers that making a distribution to unsecured creditors would be disproportionate to the benefits of doing so;

b. exceed GBP10,000: then the prescribed part is the sum of 50% of the first GBP10,000 of the net property and then 20% of the net property in excess of GBP10,000; subject to a cap on the prescribed part of GBP800,000.

*A floating charge holder with an outstanding unsecured balance is not permitted to participate in the distribution of the prescribed part (see *Thorniley v Harris* [2008] EWHC 124 (CH))*

4. **Unsecured creditors:** these are the lowest priority creditors. Usually, once the higher priority expenses and creditors have been paid, there is usually very little left for unsecured creditors. Though the prescribed part may be used to satisfy unsecured creditor claims at least in part.

5. **Shareholders:** Finally, any surplus after paying all creditors will be returned to shareholders according to the company's constitution - usually on a *pro rata* basis unless expressed otherwise therein. It is very unlikely for there to be a surplus for shareholders, given the insolvent nature of the companies entering into liquidation to begin with.

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, then the priority changes pursuant to Section 174A. Under that section, in the event of a liquidation, the following are payable out of the company's assets (in the order of priority shown) in preference to all other claims (i.e. in "super priority"):

1. any prescribed fees or expenses of the official receiver acting in any capacity in relation to the company; and
2. moratorium debts and priority pre-moratorium debts.

Priority pre-moratorium debts include those debts which do not form part of the payment holiday pursuant to the Moratorium, such as (i) the monitor's remuneration or expenses; (ii) goods or services supplied and rent accrued during the moratorium; and (iii) wages or salary relating to a period of employment before or during the moratorium. Certain financial services debt also fall under this definition, subject to the exclusion of any "relevant accelerated debt" (see section 174A(4) of the Insolvency Act 1986).

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

Commented [WPA9]: 11/15

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 [WPA10]: 5/5

The floating charge in favour of Fretus Bank plc;

The floating charge in favour of Fretus Bank plc ("Fretus") was granted in February 2022, to 'prevent' (or at least forbear) Fretus from demanding repayment of the loans owed by the Company. Those loans were presumably initially unsecured, which is why Fretus demanded a floating charge.

The effect of this floating charge would be to elevate Fretus' priority in the event of a liquidation. This warrants consideration of two provisions of the Insolvency Act 1986.

Section 245

The floating charge may be invalid under section 245 of the Insolvency Act 1986. This provision seeks to prevent existing unsecured creditors obtaining a floating charge shortly prior to the Company entering into liquidation (or another formal insolvency procedure).

To succeed under s 245, the liquidator must be able to establish that:

- 1. the floating charge was granted at the relevant time (i.e. 2 years prior to the onset of insolvency in the case of a person connected with the Company or 12 months in any other case); and**
- 2. the Company was either insolvent at the time or as a cause of the transaction under which the floating charge was created.**

The first element is made out, since the creation of the charge was within the 12 month period prior to insolvency.

The second element is arguable and it will be a contested question of fact whether the Company was insolvent at the time of granting the charge. From the limited facts available, it was likely that the Company was indeed insolvent, which was why it had to comply with Fretus' demands so as to ensure that the loans would not be enforced at that time.

Assuming both elements are made out, then the floating charge will be invalidated if it is not "new" consideration, i.e. except to the extent of:

- 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;*
- 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, and*
- 3. the amount of interest (if any) payable on the amounts above.*

There is no evidence that there was any new consideration at the time of, or after, the creation of the charge. On this basis, the entirety of the charge should be invalidated.

Section 239

For completeness, the liquidator might also consider section 239 of the Insolvency Act 1986, which may trigger by virtue of the Company giving a voidable preference to a certain creditor. The aim of section 239 is to prevent a Company, shortly before entering into liquidation (or some other form of formal insolvency process), from putting one creditor in a better position than others.

To succeed on a preference claim under s 239, the liquidator must be able to establish that:

- 1. Fretus was, at the time of the transaction:*
 - a. a creditor of the Company; or*
 - b. a surety or guarantor for any of the Company's debts or liabilities;*
- 2. The Company did anything (or suffered anything to be done), which had the effect of putting Fretus in a better position which, in the event of the Company going into insolvent liquidation, than the position it would have been in if that thing had not been done;*

3. *The Company was influenced in deciding to give the preference (at point 2 above) by a desire to prefer Fretus; and*

4. *The preference was given at a relevant time (i.e. 6 months prior to the onset of insolvency, unless the preference was given to a connection person, in which case the relevant time is 2 years prior).*

The first two elements are clearly met:

1. *Fretus was a creditor; and*

2. *The Company granted a floating charge in favour of Fretus, thereby elevating Fretus' priority above those of the other unsecured creditors (of which Fretus otherwise presumably was).*

It is arguable whether the third criteria is met and will require more facts. The fact that Fretus applied pressure on the Company (by the threat of demanding repayment of loans) might afford a defence to the Company that it did not "desire" to put Fretus in a better position - rather, the desire might be for the Company not to be wound up.

Additionally, the fourth criteria is not met, unless Fretus is a connected person (of which there is no evidence). This is because the preference must be given 6 months prior to the onset of insolvency. Given the alleged preference was granted in February 2022 whilst the winding up petition was issued in October 2022 and the entry into compulsory liquidation in December 2022, the granting of the floating charge could not be captured under s 239 as a voidable preference.

Question 4.2 [maximum 6 marks]

Commented [WPA11]: 6/6

The sale of the marble cutting machines; and

The Company purchased the marble cutting machines for GBP 25,000 in 2021. Due to purported cash flow problems, the directors approved the sale of the marble cutting machines to Rita Perkins (as director) for GBP 10,000 in July 2022 (the "Disposal").

The Disposal occurred before the liquidation of the Company, so there are no validation issues.

It might be arguable that the Disposal was at an undervalue, given that it sold at 60% of purchase price one year later, pursuant to section 238.

To succeed under section 238, the liquidator must be able to establish that:

1. *The Company:*

- a. *made a gift to another person; or*
 - b. *entered into a transaction to which the Company received no consideration; or*
 - c. *entered into a transaction 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;*
2. *the transaction was entered into at a relevant time (i.e. 2 years before the onset of insolvency); and*
 3. *the Company was unable to pay its debts at the time of the transaction or became unable to pay its debts as a result.*

As to each element:

1. *It would be arguable that 1(c) applies, i.e. that the value of the Disposition was significant less than the consideration provided by the Company because it was sold at 60% of the value;*
2. *The Disposition was within the 2 year relevant time period prior to the onset of insolvency; and*
3. *It is unclear on the limited facts whether the Company was unable to pay its debts at the time of the Disposition. However, because the Disposition was to a connected party (Rita Perkins being a director of the Company), there is a presumption that the Company was insolvent, unless proven otherwise.*

On this basis, there are strong grounds that the liquidator can make out each of these grounds. If the Court so orders, then the Court can make an order restoring the position to what it would have been if the transaction had not been entered into.

However, the Court retains discretion not to make an order under section 238 if it is satisfied that:

1. *the Company entered into the Disposition in good faith and for the purpose of carrying on its business, and*
2. *at the time it did so there were reasonable grounds for believing that the Disposition would benefit the Company.*

It would be open for Rita Perkins to argue that the Disposition was made in order to manage cash flow problems, and that it was in good faith, for the purpose of carrying on the Company's business and for the benefit of the Company.

There is also a statutory exception under section 241, whereby any order shall not prejudice any interest in property which was acquired from a person other than the Company, and which was acquired in good faith and for value. As a result, if Rita Perkins had on-sold the marble cutting machines for value, then those marble cutting machines cannot be transferred away from that good-faith purchaser. Instead, any order would be in monetary terms payable by Rita Perkins.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

Sections 233 and 233A of the Insolvency Act 1986 would not extend to Hard and Fast Ltd, since the supply of marble is not considered "essential" under those provisions (notwithstanding marble being a commercial necessity in the eyes of the Company). Whilst Section 233B of the Insolvency Act 1986 would extend to Hard and Fast Ltd, insistence of payment before the continued supply of goods was prior to liquidation and would therefore not apply.

Instead, this could arguably be a preference claim under section 239 of the Insolvency Act 1986, by paying one creditor in preference other unsecured creditors. As noted above, the aim of section 239 is to prevent a Company, shortly before entering into liquidation (or some other form of formal insolvency process), from putting one creditor in a better position than others.

To succeed on a preference claim under s 239, the liquidator must be able to establish that:

- 1. Hard and Fast Ltd was, at the time of the transaction:
 - a. a creditor of the Company; or*
 - b. a surety or guarantor for any of the Company's debts or liabilities;**
- 2. The Company did anything (or suffered anything to be done), which had the effect of putting Hard and Fast Ltd in a better position which, in the event of the Company going into insolvent liquidation, than the position it would have been in if that thing had not been done;*
- 3. The Company was influenced in deciding to give the preference (at point 2 above) by a desire to prefer Hard and Fast Ltd; and*
- 4. The preference was given at a relevant time (i.e. 6 months prior to the onset of insolvency, unless the preference was given to a connection person, in which case the relevant time is 2 years prior).*

Commented [WPA12]: 0/4 unfortunately the answer misidentifies the issue. Section 239 cannot apply as the payments were made after the commencement of the winding up not before. The solution is s 127 void dispositions with possible validation for the cost of the new supply.

As to the elements:

- 1. Hard and Fast Ltd was a creditor;*
- 2. The Company paid Hard and Fast Ltd's outstanding debts in favour of other unsecured creditors ;*
- 3. It is arguable whether the third criteria is met and will require more facts. The threat by Hard and Fast Ltd to not supply any further marble (a key supply), thereby jeopardizing the entire Company's business, might afford a defence to the Company that it did not "desire" to put Hard and Fast Ltd in a better position - rather, the desire might be for the Company to continue as a going concern;*
- 4. The fourth criteria is met because the payment of Hard and Fast Ltd's outstanding debt was done 1 month prior to the winding up order being made.*

Therefore, it is likely that a claim against Hard and Fast Ltd under s 239 could be made out.

** End of Assessment **