



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

Commented [WPA1]: 38/50 = 76% a generally strong effort

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

Commented [WPA2]: 8/10

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.

Commented [WPA3]: D is correct

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.

Commented [WPA4]: A is correct

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 [WPA5]: 9/10

Question 2.1 [maximum 5 marks]

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?

Commented [WPA6]: 4/5 a good answer but there is some misunderstanding of the provisions of the CDDA. Section 7 limits actions under s 6 to the SoS or the OR at the SoS's instruction in cases of compulsory winding up. Section 9 has been repealed. The s.16 provision deals with applications under different sections of the CDDA.

- (i) *An application for an order under section 423 of the Insolvency Act, 1986, which deals with 'transactions defrauding creditors' can be made in a case where the debtor is been made bankrupt, or is being wound up, or is under administration, then by the official receiver, by the trustee of the bankrupt's estate, or the liquidator or administrator respectively as the case may be and can be made by the victim of the transaction as well, but with the leave of the court. In the event the victim of such a transaction is bound by a voluntary arrangement which has been approved under Part I or Part VIII of the Insolvency Act, 1986, then the said application can be made by the supervisor of such a voluntary arrangement or by the victim. In any other miscellaneous case, the application under section 423 can be made by the victim of the transaction. The aforementioned power to apply for such an application is under section 424.*
- (ii) *In accordance with section 16 of the Company Directors Disqualification Act 1986, an application under section 6 of the Act can be made by the Secretary of State, the official receiver, the Financial Conduct Authority or the Prudential Regulation Authority (PRA) (if the company is a financial institution) or The Competition and Markets Authority<sup>1</sup>, the liquidator or a specified regulator<sup>2</sup>.*
- (iii) *Section 246ZB of the Insolvency Act, 1986 deals with the modus to tackle wrongful trading at the time of administration. Section 246ZB(1), lays down that while a company is in administration and it appears that at some time before the company entered administration, a person who was the director of the company at this relevant time knew or ought to have known that there was no reasonable prospect that the company would avoid any insolvency event (and go into either administration or liquidation), then vide an application filed by the administrator, the court can as it deems fit declare such a director to make contributions to the assets of the company.*

Question 2.2 [maximum 5 marks]

Commented [WPA7]: 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.**

*In accordance with Section A18 under Chapter 4 'Effect of Moratorium', Part A1 of the Insolvency Act, 1986 (the "Act"), moratorium essentially includes restrictions on the enforcement of the debts which are pre-moratorium debts and for which the company has a payment holiday<sup>3</sup>. Pre-moratorium debts are its debts which have fallen due*

<sup>1</sup> Company Directors Disqualification Act 1986, Section 16(4)(c): the Competition or Markets Authority

<sup>2</sup> *Ibid*, Section 9(e)

<sup>3</sup> Section A18 (Part 1A of the Insolvency Act, 1986), sub-section 2

before the moratorium or that fall due during the moratorium<sup>4</sup>. Section A18(3) further lists the debts which do not fall under the benefit of a payment holiday on the commencement of a moratorium, they are as follows:

- i. *Monitors remuneration or expenses<sup>5</sup>; however, this component will exclude the remuneration in respect of anything done by a proposed monitor before the moratorium begins<sup>6</sup>;*
- ii. *Good or services supplied during the moratorium<sup>7</sup>;*
- iii. *rent in respect of a period during the moratorium<sup>8</sup>;*
- iv. *wages or salary arising under a contract of employment<sup>9</sup>; The phrase wages and salaries used herein, includes a sum payable in respect of a period of holiday, any sums payable with respect to any leave of absence due to any illness or any other good cause, a sum payable in lieu of a holiday, or any contribution which ought to be made to any pension scheme<sup>10</sup>;*
- v. *Any redundancy payment<sup>11</sup> under Part 11 of the Employment Rights Act 1996 or Part 12 of the Employment Rights (Northern Ireland) Order 1996, or a payment made to a person who agrees to the termination of their employment in circumstances where they would have been entitled to a redundancy payment under that Part if dismissed<sup>12</sup>;*
- vi. *Any debt or obligation which is arising under any financial contract which involves a financial institution. Hence any coupon, or installment or repayment which falls due on the company during the period of moratorium under any debt instrument (debentures or a traditional bank loan), is not covered under the payment holiday.*

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

Commented [WPA8]: 13/15

Question 3.1 [maximum 6 marks]

Commented [WPA9]: 5/6 a strong answer but a little thin on s 233B

**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?**

*The essence of administration lies in turning around or rescuing the business of the debtor company and handing over the same back to its directors and management after that period. One of the main elements and concepts that encompasses this whole objective is to make sure that the company remains as a going concern and for the same the uninterrupted supply of essential goods and services is indispensable. Given the nature or the perception of an 'insolvency' event or an 'administration', etc. will*

<sup>4</sup> *Ibid*, sub-section 3

<sup>5</sup> *Ibid*, sub-section 3(a)

<sup>6</sup> Section A18 (Part 1A of the Insolvency Act, 1986), sub-section 7

<sup>7</sup> *Idem*, point no. 5, sub-section 3(b)

<sup>8</sup> *Ibid*, sub-section 3(c)

<sup>9</sup> *Ibid*, sub-section 3(d)

<sup>10</sup> *Idem*, point no. 6

<sup>11</sup> *Idem*, point no. 9, sub-section 3(e)

<sup>12</sup> *Idem*, point no. 6



*obviously deter suppliers and traders from engaging or trading with the debtor company almost immediately. Hence the law has plugged in certain safeguards which are discussed herein below:*

i. Supplies of gas, water etc.: **Section 233 of the Insolvency Act, 1986 ("Act"), covers supplies and services such as<sup>13</sup>:**

- **Gas;**
- **Electricity;**
- **Water;**
- **Supply of communications or communication services (but excludes services which are used for broadcasting or likewise<sup>14</sup>);**
- **Supplies essential for enabling or facilitating anything to be done by electronic means such as; point of sale terminals, computer hardware and software, information, advice and technical assistance, data storage and processing, website hosting<sup>15</sup>**

*It further stipulates that any one who is supplying the aforementioned services and supplies to the company debtor after the company has entered into administration, can make a request or representation to the administrator to personally guarantee the payment of the same<sup>16</sup>. However, no such supplier will hold a ransom to the effect that the said supplies and services will only be supplied if the outstanding payments, pertaining to pre-administration should be cleared first<sup>17</sup>.*

ii. Ipso Facto Clauses: **The Insolvency (Protection of Essential Supplies) Order 2015 inserted a Section 233A in the Act, to further protect the enforcement of any ipso facto clause, or an insolvency related term for contract of goods and services under which the contract would terminate because the company enters into administration, or the supplier would be entitled to terminate the same or the supplier would be entitled to terminate the same because of an event which happens before the company enters into administration<sup>18</sup>. The Act, essentially provides that such an insolvency related clause or an ipso facto clause shall cease to have effect once the company enters into administration<sup>19</sup>. However, the Act also equally protects the suppliers of such goods, as it also provides that where such a clause in the contract ceases to have effect the supplier can terminate the contract<sup>20</sup> if the administrator consents to it<sup>21</sup>, or the court has granted this permission<sup>22</sup>, or if any payment remains outstanding for more than 28 days**

<sup>13</sup> The Insolvency Act, Section 233(3)

<sup>14</sup> *Idem*, point no. 13, Section 233(5)(d)

<sup>15</sup> *Idem*, point no. 13, Section 233(5)(3A)

<sup>16</sup> *Idem*, point no. 13, Section 233(2)(a)

<sup>17</sup> *Idem*, point no. 13, Section 233(5)(b)

<sup>18</sup> The Insolvency Act, 1986, Section 233A(8)

<sup>19</sup> *Idem*, point no. 13, Section 233A(1)

<sup>20</sup> *Idem*, point no. 13, Section 233A(3)(a)

<sup>21</sup> *Idem*, point no. 13, Section 233A(4)(a)

<sup>22</sup> *Idem*, point no. 13, Section 233A(4)(b)

after the effective date of administration<sup>23</sup>. There is also an option for the supplier to terminate the supply whilst keeping the contract alive<sup>24</sup>, unless the administrator personally guarantees the payment of the bills<sup>25</sup> and such a guarantee is not given within 14 days from the date when the guarantee was requested<sup>26</sup>.

- iii. Further Protection qua supply of essentials: **Section 233B of the Act, which was inserted by the Corporate Insolvency and Governance Act 2020, further also bars the exercise of entitlement of a supplier to terminate the contract of supply in relation to such an insolvency related clause before the company enters into administration<sup>27</sup>, unless either the administrator<sup>28</sup> or the company consents to it<sup>29</sup> or the court is satisfied that the continuation of the contract would cause the supplier hardship<sup>30</sup>.**

*For the administrator, its essential to consider factors such as the date of the supply contract, the ipso facto clauses in them, if there is one contract governing the supply of different types of essentials and the possible navigation during any attempt to terminate, if the supply contracts are governed by a foreign law etc.<sup>31</sup>*

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?**

*The priority of distribution or the waterfall during liquidation under the Insolvency Act, 1986 ("Act"), is explained hereinbelow (in the order of priority):*

- i. Secured Creditors: **A secured creditor is a creditor who holds in respect to their debt a security over property of the company<sup>32</sup>, which can be in the nature of a mortgage, charge, lien or other security<sup>33</sup>. The priority accorded to them is in consonance to the typical quantum of the money lent by them under very sophisticated financial instruments which is usually for a specified end use, and can be either towards to the capital requirements or**

<sup>23</sup> *Idem*, point no. 13, Section 233A(4)(c)

<sup>24</sup> *Idem*, point no. 13, Section 233A(3)(b)

<sup>25</sup> *Idem*, point no. 13, Section 233A(5)(a)

<sup>26</sup> *Idem*, point no. 13, Section 233A(5)(b)

<sup>27</sup> Section 223B(4), The Insolvency Act, 1986

<sup>28</sup> *Idem*, point no. 22, Section 223B(5)(a)

<sup>29</sup> *Idem*, point no. 22, Section 223B(5)(b)

<sup>30</sup> *Idem*, point no. 22, Section 223B(5)(c)

<sup>31</sup> An Overview of The Essential Supplier Regime: Key Issues For Insolvency Practitioners, << [An overview of the essential supplier regime: Key issues for insolvency practitioners - Stevens & Bolton LLP \(stevens-bolton.com\)](#) >>, accessed on February 24, 2023.

<sup>32</sup> The Insolvency Act 1986, Section 248(a)

<sup>33</sup> The Insolvency Act 1986, Section 248(b)

**Commented [WPA10]:** 8/9 a very strong answer. It might have been helpful to explain the nature of the first class of secured creditors as it appears, without more, to include floating charges which is clearly not intended. The nature of HMRC's preferential status might have been further explained as HMRC is usually the most significant preferential creditor.

*liquidity/working capital requirements of the company. This is also, because, they would have anyways recovered their outstanding amounts in a normal scenario, however, the priority is only to the value of the security. In the event the value of the security is less than the financial claim, then they are to claim the unpaid amount as an unsecured creditor;*

**ii.** The Liquidation Expenses: *All fees, costs, charges and other expenses incurred in the course of the winding up are to be treated as expenses of the winding up*<sup>34</sup>. *In accordance to Section 115 of the Act, all expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims. Also, as provided under the Chapter 6 and 14 of the The Insolvency (England & Wales) Rules, 2016, there is an inter-se priority accorded to even the liquidation expenses which has be followed in the following order:*

- *Expenses incurred by the liquidator in preservation of the company property/security interest, expenses incurred qua any litigation, settlement, arbitration, negotiation etc.;*
- *Cost of any security or guarantee provided by the liquidator;*
- *Remuneration of any special manager;*
- *Amounts payable to any person employed to prepare the statement of affairs/accounts;*
- *Cost to employee any shorthand writer;*
- *Any necessary payments made by the liquidator team;*
- *Remuneration of the professionals hired by the liquidators such as auditors, lawyers etc.;*
- *Remuneration of the liquidator;*
- *Corporation tax or chargeable gains from sale of asset;*
- *Any other expenses.*

**iii.** Preferential Creditors: *In accordance to the Act, there are certain types of preferential debts:*

- *Preferential Debts: which includes, contributions to occupational pension schemes; remuneration, &c. of employees; levies on coal and steel production, debts owed to the Financial Services Compensation Scheme, deposits covered by Financial Services Compensation Scheme, certain HMRC debts*<sup>35</sup>.
- *Ordinary Preferential Debts*<sup>36</sup>: *This includes, debt owed to the Pension Schemes Act 1993, remuneration to employees, any amount owed by way of accrued holiday remuneration, sum owed in respect of any money advanced, any money ordered to be paid under the Reserve Forces (Safeguard of Employment) Act 1985, remuneration*

<sup>34</sup> The Insolvency (England & Wales) Rules, 2016 , Chapter 6: Priority of payment of costs and expenses, etc.

<sup>35</sup> The Insolvency Act, 1986, Section 386

<sup>36</sup> The Insolvency Act, 1986, Schedule 6 "The Categories of Preferential Debts", 8-15A

*payable towards wages or salary (whether payable for time or for piece work or earned wholly or partly by way of commission) during that period, payments in relation to such an employee who has been adjudged bankrupt as a result of the company's liquidation, remuneration to a person in respect to a holiday, sickness or other good cause, levies on production of coal or steel including any surcharge or delay, debt owed to the scheme manager under Financial Services and Markets Act 2000, any amount payable to an eligible deposit which does not exceed the compensation as would have been payable under Financial Services Compensation Scheme.*

- Secondary Preferential Debts<sup>37</sup>: *Any amount payable to an eligible deposit which exceeds the compensation as would have been payable under Financial Services Compensation Scheme, any amount payable by the debtor to one or more eligible persons in respect to a deposit that was made through a non-UK branch of a credit institution, any amounts payable to the commissioner in respect to any value added tax or any other relevant deduction.*

*In accordance with Section 175 of the Act, the preferential debts are to be paid in priority (after the expenses). The Ordinary Preferential Debts are to rank equally amongst themselves and are to be paid in full unless the assets are insufficient, in which case they are to abate proportionally<sup>38</sup>. In relation to Secondary Preferential Debts, they are to rank *pari-passu* after the payment of the Ordinary Preferential Debts<sup>39</sup>. Also, Preferential debts in general, if the assets are insufficient to meet them, will have priority over the claims over debenture holders & floating charge holders<sup>40</sup>.*

- iv. Floating Charge Holders: *In accordance with Section 176A of the Act, the floating charge holders are paid from the assets covered by such a floating charge. However, a part of the proceeds from realizing the assets covered by any floating charge created on or after 15 September 2003 must be set aside and made available to satisfy unsecured debts, which are called "Prescribed Part". The Prescribed Part is calculated as 50% of the first GBP10,000 of net floating charge realizations and 20% of the remainder, subject to a cap of GBP600,000 (where the first ranking floating charge was created before 6 April 2020) or GBP800,000 (where the first ranking floating charge was created on or after 6 April 2020)<sup>41</sup>. However, the liquidator can elect to pay the Prescribed*

<sup>37</sup> The Insolvency Act, 1986, Schedule 6 "The Categories of Preferential Debts", 15AA, 15B, 15BA, 15BB & 15D

<sup>38</sup> Section 176(1A)

<sup>39</sup> Section 176(1B)

<sup>40</sup> Section 176(2)(b)

<sup>41</sup> Restructuring and Insolvency in the UK (England & Wales): Overview, <<

[https://uk.practicallaw.thomsonreuters.com/9-501-6812?originationContext=document&transitionType=DocumentItem&contextData=\(sc.Default\)&ppcid=f76dcd66d7bb443e9287f1dc01197f4d&comp=pluk#co\\_anchor\\_a500083](https://uk.practicallaw.thomsonreuters.com/9-501-6812?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&ppcid=f76dcd66d7bb443e9287f1dc01197f4d&comp=pluk#co_anchor_a500083) >>, accessed on February 25, 2023.

**Part if the company's property is less than GBP 10,000, or if the liquidator thinks that it leads to disproportionate benefits in their favor;**

- v. Unsecured Creditors: **The ones who are merely for example trade supplies or operational creditors and don't hold any security;**
- vi. Interest: **Interest incurred on all provable unsecured debts post-administration or liquidation;**
- vii. Shareholders: **As has been well documented in company law, the shareholders or the members suffer the maximum risk during a liquidation distribution.**

**In accordance to section 174A, where proceedings for the winding up of a company are begun before the end of the period of 12 weeks beginning with the day after the end of any moratorium for the company under Part A1, the following is the priority which is followed:**

- i. **Any fee or expense of an official receiver<sup>42</sup>;**
- ii. **Moratorium debts or priority pre-moratorium debts<sup>43</sup> which include, the remuneration of the monitor<sup>44</sup>, goods and services supplied during the moratorium<sup>45</sup>, rent payable during that period<sup>46</sup>, wages or salaries under any employment contract<sup>47</sup>, liability of redundancy payment<sup>48</sup>, debt which arises from a financial services instrument<sup>49</sup>, something which is not an accelerated debt<sup>50</sup>.**

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

**Commented [WPA11]: 8/15**

**Prior to going into compulsory liquidation on 23<sup>rd</sup> 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 14<sup>th</sup> October 2022.**

<sup>42</sup> The Insolvency Act, 1986, Section 174A(2)(a)

<sup>43</sup> *Idem*, Section 174A(2)(b)

<sup>44</sup> *Idem*, Section 174A(3)(a)(i)

<sup>45</sup> *Idem*, Section 174A(3)(a)(ii)

<sup>46</sup> *Idem*, Section 174A(3)(a)(iii)

<sup>47</sup> *Idem*, Section 174A(3)(a)(iv)

<sup>48</sup> *Idem*, Section 174A(3)(b)(i)

<sup>49</sup> *Idem*, Section 174A(3)(c)(i)

<sup>50</sup> *Idem*, Section 174A(3)(a)(iii)

**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]

**The floating charge in favour of Fretus Bank plc;**

**The fact set as provided above, states that Marbley Q Limited ("the Company"), prior to going into compulsory liquidation, to avoid Fretus Bank Plc ("Bank") from demanding payment of the loans which it had advanced to it, granted and issued debentures in its favor. This can be understood to mean that the Company had issued debentures to part refinance the existing loans, so that no immediate repayment is demanded under the repayment schedule of the loan. Further, we can also assume that the refinance would have been in part, because even after that, there would have been existing stress in the company due to which the Bank pressured it towards liquidation.**

**Having stated the aforesaid, the above transaction would then fall under the second exception of Section 245 of the Insolvency Act, 1986, which deals with avoidance of floating charge.**

**Section 245(2)(c) lays down this exception as follows:**

**"the amount of such interest (if any) as is payable on the amount falling within paragraph (a) or (b) in pursuance of any agreement under which the money was so paid, the goods or services were so supplied or the debt was so discharged or reduced."**

**However, this will not completely absolve the Bank and the said refinance debenture transaction, as we also have to take into account the difference between the value of the**

**Commented [WPA12]:** 3/5 it is not clear how the exception in s 245(2)(c) would apply here. The answer needed to explain and apply in more detail the requisites for a 245 avoidance.

*issue amount of the debentures and the enterprise value of the Company. Assuming that the existing debt of the Company was discharged to the extent of the debentures and hence the transaction cannot be avoided totally, a scrutiny still has to be made qua the fact was a floating charge on the entire undertaking of the Company really necessary to secure these debentures. Also, this transaction will also fall in the 'twilight' period, which is 1 year for a non-related party as per Section 245(3)(b) and hence can be called into question.*

*In conclusion, the liquidator should ideally, take the debenture amount (or the amount of refinance/reduction of debt) as the exception and forego that, meaning, only have the floating charge on the Company enterprise to that extent and treat the rest of the floating charge as invalid or unsecured.*

Question 4.2 [maximum 6 marks]

**The sale of the marble cutting machines; and**

**The liquidator can file an application to avoid the said transactions basis the following:**

1. Section 238- Undervalued Transaction & Section 423- Transactions defrauding creditors: **Where in the relevant period, which in this case shall be 2 years from the commencement of liquidation**<sup>51</sup>, **The Company has entered into a transaction for a consideration the value of which in money's and money's worth is significantly less than the value, in money or money's worth, of the consideration provided by the company**<sup>52</sup>. In the given fact set, two marble cutting machines were sold for GBP 10,000 to Rita Perkins (who was a director and hence a related party), while the company had only bought them an year ago for GBP 25,000. There can be some debate in terms of the valuation of machinery and the depreciation on them, given the nature of the transaction.
2. Section 213- Fraudulent Trading: **In accordance to Section 213 of the Act, if in the course of winding up of the Company, it appears that any business of the Company has ben carried on the with the intent to defraud the creditors of the Company or any other person**<sup>53</sup>, then on an application of the liquidator, the court may declare the persons who were knowingly parties to carrying on the business of the Company in the aforementioned way to be liable to make such contributors to the Company's asset as the court thinks fit<sup>54</sup>, In the given instance, the directors have disposed assets of the Company to a related director for a significantly less amount without any good reason, and hence can be subject to a claw-back.

<sup>51</sup> The Insolvency Act, 1986, Section 240(1)(a)

<sup>52</sup> *Ibid*, Section 238(4)(b)

<sup>53</sup> *Idem*, Section 213(1)

<sup>54</sup> *Ibid*, Section 213(2)

**Commented [WPA13]:** 4/6 a reasonable attempt but each of the potential actions is not really fully analysed and applied to the facts. There is a lot more that could be said about eg s 238 requisites and the problems the liquidator would face with any attempt to bring a 213 or 214 action.

3. Section 214- Wrongful Trading: *This application can be filed by the liquidator against a director and he court, may declare the director to be liable to make such contribution (if any) to the company's assets as the court thinks proper<sup>55</sup>. The instant case, meets all the 3 requirements which are laid down by this section, being that the company should be in liquidation<sup>56</sup>, at some time before the commencement of liquidation, the director ought to have known that there was no saving the company from liquidation<sup>57</sup>, and the person should be a director<sup>58</sup>. The directors ought to have known about the impending liquidation as it was facing cash crunch from February 2022, which was so grave that it was not able to pay its outstanding loans and hence there is more than enough evidence to persuade the court that the directors didn't do everything to minimize the risk of liquidation<sup>59</sup>.*

Question 4.3 [maximum 4 marks]

**The payments to Hard and Fast Ltd.**

*The fact that the supply of marble was seen as critical in continuation of business of the Company and the management resolved to cover the existing trade payables and also authorise cash on delivery payments to suppliers as they were not willing to supply otherwise, can firstly be used as defence to an application under Section 214, where the directors can demonstrate that they did everything to minimise the risk of liquidation. Secondly, the supply of marble which is specific to the Company is not an 'essential' as per Section 233. Further, it can be concluded that the supply was not essential as the company has now entered liquidation.*

\* End of Assessment \*

**Commented [WPA14]:** 1/4 although the points made are reasonable to some extent, the answer misses the issue which is the application of s 127. Section 214 is irrelevant as the payments were made after the commencement of the winding up.

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<sup>55</sup> *Idem*, Section 214(1)

<sup>56</sup> *Ibid*, Section 214(2)(a)

<sup>57</sup> *Ibid*, Section 214(2)(b)

<sup>58</sup> *Ibid*, Section 214(2)(c)

<sup>59</sup> *Ibid*, Section 214(3)