



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]: 48/50 = 96% 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?**

(i) Per section 424(1) of the Insolvency Act 1986 (Act),<sup>1</sup> the following people may bring an action under section 423 of the Act:<sup>2</sup>

a) In the event of a company being wound up or being in administration:

i. The official receiver;

ii. The liquidator;

<sup>1</sup> Insolvency Act 1986, section 424, at

<<<https://www.legislation.gov.uk/ukpga/1986/45/section/424>>>, accessed 27 February 2023.

<sup>2</sup> Professor Peter A Walton, *Module 3B Guidance Text – Insolvency System of the United Kingdom (England and Wales)*, September 2022, p 70.

- iii. The administrator; or
  - iv. Any victim of the transaction (for example, a creditor), so long as leave of the court is granted).
- b) In the event where the victim is bound by a company voluntary arrangement:
- i. The supervisor of the company voluntary arrangement; or
  - ii. Any victim of the transaction (irrespective of whether that victim is bound by the company voluntary arrangement or not.
- c) In any other case, a victim of the transaction.
- (ii) Per section 7(1) of the Company Directors Disqualification Act 1986 (CDDA), if it appears to the Secretary of State that it is expedient in the public interest that a disqualification order under section 6 of the CDDA should be made against any person, an application for the making of such order may be made by the following:<sup>3</sup>
- a) The Secretary of State; or
  - b) If the Secretary of State so directs 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 in England and Wales, by the official receiver.
- (iii) Per section 246ZB of the Act, which deals with wrongful trading in administrations, only an administrator may bring an application for a director to be declared liable to make a contribution to the company's assets.<sup>4</sup>

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.**

The "payment holiday" under Part A1 of the Insolvency Act 1986 does not apply with respect to:<sup>5</sup>

- 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;
- e) Redundancy payments;
- f) Debts or other liabilities arising under a contract or other instrument involving 'financial services', this being a contract consisting of lending, financial leasing or providing guarantees.

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

Commented [WPA6]: 14/15

Question 3.1 [maximum 6 marks]

Commented [WPA7]: 5/6 a strong answer but perhaps a little more explanation of s 233B would have been helpful

<sup>3</sup> Company Directors Disqualification Act 1986, section 7, at <<  
<https://www.legislation.gov.uk/ukpga/1986/46> >>, accessed 27 February 2023.

<sup>4</sup> Insolvency Act 1986, section 246ZB, at  
 <<<https://www.legislation.gov.uk/ukpga/1986/45/section/246ZB>>>, accessed 27 Feb 2023

<sup>5</sup> Walton, *supra* note 2, p 38.

**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?**

Sections 233, 233A and 233B of the Insolvency Act 1986 (Act) provide protections for insolvent companies with respect to the provision of goods and services.

Section 233 applies to the supply of gas, electricity, water and communication services (which 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).<sup>6</sup> Under section 233, suppliers are not allowed to require payment of outstanding debts in return for securing new or continued supply to a company in administration. However, a supplier is allowed to require an administrator to personally guarantee payment of charges with respect to that supply.<sup>7</sup>

Furthermore, section 233A stipulates that a supplier is unable to rely on an 'insolvency-related' term in a supply contract, where such term would ordinarily allow the supplier to terminate supply, alter the terms of supply or require increased payments in return for continued supply.<sup>8</sup>

Lastly, section 233B contains a general prohibition on clauses empowering suppliers of goods or services to terminate or "*do any other thing*" regarding said contract in the event a company enters a formal insolvency procedure.<sup>9</sup> Section 233B also increases the protections from utility, communications and IT suppliers (which are covered by sections 233 and 233A of the Act), to cover all other suppliers, with the exception of insurers, banks, electronic money institutions, recognised investment exchanges and clearing houses, securitisation companies, and overseas companies with corresponding functions).<sup>10</sup>

However, section 233B still allows for a supply contract to be terminated if:<sup>11</sup>

- a) The company or the insolvency office holder agree to terminate; or
- b) If on application to the court, the court grants permission to terminate on the basis that continuation of the contract would cause hardship to the supplier.

Based on the protections provided by the Act as canvassed above, an administrator can effectively require suppliers of goods and services to continue to supply those goods and services during administration.

**Question 3.2 [maximum 9 marks]**

Commented [WPA8]: 9/9 excellent

**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?**

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<sup>6</sup> *Idem*, p 20.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Idem*, p 21.

<sup>11</sup> *Ibid.*



The order of priority of payments in a liquidation is set out in the Insolvency Act 1986 (Act). Of course, any creditors with fixed security will enforce their security outside of any informal insolvency. The Act's regime will apply to residual assets of the company in liquidation in the following order:

- 1) While priority is generally given to preferential creditors, section 115 of the Act, as well as rules 6.42 and 7.108 of the Insolvency Rules 2016 SI 2016/1024, give priority to a number of expenses over preferential creditors, as well as floating charge holders and unsecured creditors.<sup>12</sup>

As such, those expenses are paid first in a liquidation in the following order of priority:<sup>13</sup>

- a) Any expenses properly incurred by the liquidator in preserving, realising or obtaining any of the assets of the company. This included expenses incurred in relation to 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 disbursements necessary by the liquidator in the course of winding up the company. By way of example, this would include any expenses incurred by members of the liquidation committee;
- e) The remuneration of any person employed by the liquidator to perform any services to the company;
- f) The liquidator's remuneration;
- g) Any corporation tax on chargeable gains that are accruing on the realisation of any assets of the company;
- h) Any other expenses properly incurred and chargeable by the liquidator in carrying out his or her functions in the winding up of the company.

- 2) Following the above expenses, per section 175 of the Act, preferential creditors are paid.<sup>14</sup>

Preferential debts are divided into two classes – ordinary and secondary, with ordinary preferential debts required to be paid prior to secondary preferential debts.<sup>15</sup> However, preferential debts within their respective classes are ranked equal. This means they abate in equal proportion in the event the company's assets are insufficient to pay all preferential debts of the same class.<sup>16</sup>

The types of preferential debts are set out in Schedule 6 of the Act as follows:<sup>17</sup>

*Ordinary preferential debts:*<sup>18</sup>

- a) Any sum owed on account to an employee's contribution to an occupational pension scheme. This refers to contributions deducted from the earnings of the company's employees paid in the period of four months preceding the commencement of the company's winding up;

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<sup>12</sup> *Idem*, p 51.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Idem*, p 52.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Idem*, p 53.

<sup>18</sup> *Ibid.*

- b) Any sum owed by the company on account of an employer's contribution to an occupation pension scheme in the period of 12 month before the relevant date;
- c) Any remuneration owed by the company to anyone 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 company's winding up. The maximum total figure payable is capped at £800;
- d) Any amounts owed by the company as a result of accrued holiday remuneration in respect of any period of employment prior to the winding up of the company;
- e) Any claims for money advanced to pay wages or holiday remuneration. Wages includes any remuneration payable in respect of a period of holiday or absence from work as a result of sickness or other good cause;
- f) Levies on the production of coal and steel (per article 49 and 50 of the European Coal and Steel Community Treaty);
- g) Claims for any amount which a company is ordered to pay by virtue of the Reserve Forces (Safeguard of Employment) Act 1985 as a result of failing to discharge an obligation under that Act;
- h) Any amount owed by the company with respect to an eligible deposit that does not exceed the compensation payable in respect of that deposit under the Financial Services Compensation Scheme to the person that is owed that amount.

*Secondary preferential debts:*<sup>19</sup>

- a) Any amount owed by the company with respect to an eligible deposit that exceeds the compensation payable in respect of that deposit under the Financial Services Compensation Scheme to the person that is owed that amount;
  - b) Any amount owed by the company to an eligible person in respect of a deposit which:
    - i. Was made through a non-UK branch of a credit institution authorised by the competent authority of the UK; and
    - ii. If that deposit had been made through a UK branch of that credit institution, would have been an eligible deposit.
  - c) Any PAYE income tax deductions, national insurance deductions, VAT payments, Construction Industry Scheme deductions and student loan repayments.
- 3) Once the expenses set out above as well as all preferential creditors are paid, floating charge holders are next in priority.<sup>20</sup>

In the event there is more than one floating charge holder, priority between them will depend on which floating charge was created first.<sup>21</sup>

A floating charge holder's preference in a liquidation will be affected if the floating charge was created on or after 15 September 2003 as section 176A of the Act will come into play.<sup>22</sup>

Under section 176A, the liquidator must make a 'prescribed part' of the company's net property available for the satisfaction of unsecured creditors and consequently not

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<sup>19</sup> *Idem*, p 54.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

distribute any of this prescribed part unless it is in excess of what is required to satisfy all unsecured creditor claims.<sup>23</sup>

'Net property' for the purpose of section 176A is defined to mean the amount of the company's property which would ordinarily be available to meet the debts of the floating charge holders. Based on the above, this means the net property' is therefore calculated after the liquidation expenses and preferential debts have been deducted.<sup>24</sup>

The requirement to make available a prescribed part will not apply if the company's net property is less than GBP 10,000 and the liquidator determines that making such distribution would be disproportionate to the benefits obtained.<sup>25</sup>

Otherwise, the amount of the prescribed part depends on the amount of the company's net property. For example, if a company's net property does not exceed GBP 10,000, the prescribed part will be 50%.<sup>26</sup> If a company's net property exceeds that amount, the prescribed part is stipulated to be 50% of the first GBP 10,000, plus 20% of the excess in value above the first GBP 10,000.<sup>27</sup> The amount is capped at GBP 800,000.<sup>28</sup>

In addition, any secured creditor, and therefore including any floating charge holder, who has an outstanding unsecured debt owing, is prohibited from participating in the distribution of a prescribed part.<sup>29</sup>

- 4) Lastly, unsecured creditors will be paid, to the extent that their outstanding debt has not been satisfied by the prescribed part distributions described above.<sup>30</sup>
- 5) Although unsecured creditors are considered the last step in the Act's preferential debts regime, in the event there are surplus funds after unsecured creditors are paid, that will be distributed amongst shareholders in accordance with the relevant company's constitution (which will ordinarily result in a pro rata distribution based on the various shareholdings).<sup>31</sup>

The above priority would change as follows if the company had been subject to a Moratorium under Part A1 of the Act during the 12-week period prior to the commencement of the liquidation:

Section 174A of the Act would apply in this situation, which stipulates that certain unpaid pre-Moratorium or Moratorium debts (which are not part of the Moratorium payment holiday) as well as prescribed fees or expenses of the official receiver acting in any capacity in relation to the company, enjoy 'super priority' and are paid prior to the liquidator fees and expenses.<sup>32</sup> These debts include debts owed to employees as well as 'financial services' debts. 'Financial services' debts would also include pre-Moratorium bank debts unless such debt is accelerated debt (this being pre-Moratorium financial services debt falling due as a result of an acceleration or early termination provision in a financial services contract).<sup>33</sup>

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<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Walton, *supra* note 2, p 54 – 55.

<sup>26</sup> *Idem*, p 54.

<sup>27</sup> *Idem*, p 55.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, *Thorniley v Harris* [2008] EWHC 124 (Ch).

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Idem*, p 39.

<sup>33</sup> *Ibid.*

As such, if section 174A applies, the debts stipulated in that section would be prioritised over all other debts canvassed above.

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

Commented [WPA9]: 14/15

***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.***

***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 liquidator here may be able to render the floating charge granted to Fretus Bank plc invalid if section 245 of the Insolvency Act 1986 (Act) applies.

The purpose of section 245 is to prevent pre-existing unsecured creditors from obtaining security of a floating charge shortly before a company enters a formal insolvency procedure.<sup>34</sup> If the section applies, the floating charge will be rendered invalid.

<sup>34</sup> *Idem*, p 69.

Section 245 will apply if a company has granted a floating charge or new funding at a relevant time.<sup>35</sup>

The 'relevant time' will vary depending on who the floating charge was granted to. If the floating charge is created in favour of a person connected with the company, the relevant time is any time within the period of two years prior to the onset of insolvency. However, if the person in whose favour the charge is granted is not connected with the company, the relevant time will be any time within the period of 12 months prior to the onset of insolvency, so long as at the time of creation the company was unable to pay its debts within the meaning of section 123 of the Act or became unable to do so in consequence of the transaction.<sup>36</sup>

Here the floating charge was not provided to a connected person. As such, the shorter time period of 12 month applies. Given the floating charge was granted in February 2022 and petition to wind up was presented on 14 October 2022, the floating charge was created within 12 months prior to the onset of insolvency,<sup>37</sup> and therefore provisionally falls within the 'relevant time' for the purpose of section 245.

However, the Company must also have been unable to pay its debts or become unable to do so in consequence of the transaction. Per section 123, a company is deemed unable to pay its debts if:<sup>38</sup>

- A creditor owed more than £750 has served a demand on the company for payment, with the company failing to pay for three weeks thereafter; or
- Execution or other process issued on a judgment of any court in favour of the creditor has failed to be satisfied; or
- The company is proven to the satisfaction of the court to be cash flow insolvent; or
- The company is proven to the satisfaction of the court to be balance sheet insolvent.

Based on the facts provided, it is unclear whether section 123 is satisfied. Given the Company granted the debenture in order to prevent Fretus Bank plc from demanding repayment of the company's loans, it is possible that the Company was already experiencing cash flow insolvency as it was not able to pay the loans as they fell due. On that basis, section 245 may apply, and the floating charge may be rendered invalid.

However, it is important to note that section 245 will not prevent lenders who are providing fresh funding from taking a floating charge for that new funding.<sup>39</sup> As such, if section 245 applies, it will render a floating charge invalid, except to the extent that 'new' consideration is provided for the charge.<sup>40</sup>

Based on the facts, it does not appear that Fretus Bank plc provided fresh funding in exchange for the floating charge. As such, the floating charge applies to previous funding only, and the 'new' consideration exception will not apply.

The liquidator is therefore likely to be able to render the entirety of the floating charge invalid under section 245. Importantly, the underlying debt owing to Fretus Bank plc remains valid, notwithstanding the floating charge is invalidated.

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<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Per section 129 of the Insolvency Act 1986, where a winding up order is made, the liquidation is deemed to commence at the date of the petition

<sup>38</sup> Walton, *supra* note 2, p 47.

<sup>39</sup> *Idem*, p 69.

<sup>40</sup> *Ibid.*

In addition, the liquidator could also seek an order under section 239 of the Act on the basis that Fretus Bank plc was provided with a preference through the granting of the debenture. Under section 239, the court could then make an order to restore the position to what it would have been had the company not given a preference. However, if the preference was granted in favour of a person not connected to the company, such as Fretus Bank plc here, section 239 only applies if the preference occurred within six months prior to the onset of insolvency.<sup>41</sup> Given the debenture was granted in February 2022, and the onset of insolvency was 14 October 2022 (per section 129, where a winding up order is made, the liquidation is deemed to commence at the date of the petition), the six month time frame is not met, and section 239 will therefore not be satisfied.

As such, a claim under section 245 remains the best option with respect to avoidance of the floating charge.

**Question 4.2 [maximum 6 marks]**

Commented [WPA11]: 6/6

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

The liquidator may be able to attack the sale of the marble cutting machines under section 238 of the Act, which gives a liquidator or administrator the ability to attack a transaction which was entered prior to the company entering liquidation or administration where the transaction was at an undervalue.<sup>42</sup>

There are several elements that must be satisfied in order for section 238 to apply. Firstly, the liquidator would have to prove either that the company:<sup>43</sup>

- Made a gift to another person; or
- Entered into a transaction with another person on terms that provided for the company to receive no consideration; or
- Entered into a transaction with another person for a consideration which, in money, was at the date of the transaction, significantly less than the value in money of consideration provided by the company.

Here, the company sold the marble machines for GBP 10,000 even though it purchased them for GBP 25,000 the year before. On the face of it, section 238 may therefore apply as the consideration at the date of the transaction was significantly less than the consideration provided by the company when the machines were originally purchased.

Secondly, the transaction must also have taken place at a 'relevant time' (this being in the period of two years prior to the commencement of the liquidation) in order to be attacked.<sup>44</sup> This element is also satisfied given the transaction occurred in July 2022, with winding up petition being made on 14 October 2022 (per section 129, where a winding up order is made, the liquidation is deemed to commence at the date of the petition).

Thirdly, at the time of the transaction, the company must have been either unable to pay its debts as they fell due within the meaning of section 123 of the Act or become unable to pay its debts as a result of the transaction.<sup>45</sup> If the transaction was with a connected person, the

<sup>41</sup> *Idem*, p 68.

<sup>42</sup> *Idem*, p 66.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Idem*, p 67.

<sup>45</sup> *Ibid*.

company is presumed to have been insolvent, or to have become insolvent as a result of the transaction, unless the contrary is proved.<sup>46</sup>

Given the marble machines were sold to Rita Perkins, who is a director, the transaction was with a connected person. As such, the above presumption applies and an order may be sought under section 238.

The court may accordingly make an order restoring the position to what it would have been if the transaction had not been entered.<sup>47</sup>

However, there is a possible defence under section 238, which holds that the court should not make an order if the transaction was entered into by the company in good faith and for the purpose of carrying on its business, and that at the time it did so, there were reasonable grounds for believing that the transaction would benefit the company.<sup>48</sup>

Based on the facts, it appears the sale was authorised amid continuing cash flow problems. It is therefore possible that the transaction was entered into in order to allow the company to carry on business and in good faith. If the court is satisfied accordingly, an order would not be made.

Furthermore, if the court made an order for the return of the cutting machines to the company, Rita Perkins may be protected by section 241 of the Act, under which an order shall not prejudice any interest in property which was acquired from a person in good faith and for value.<sup>49</sup> Given Rita Perkins is a director of the company, she ought to have been well aware of the cash flow issues. As such, it is unlikely that the good faith requirement is made out, and the protection is unlikely to apply.

#### Question 4.3 [maximum 4 marks]

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

The liquidator may be able to rely on section 127 of the Act to void the payments made to Hard and Fast Ltd.

Section 127 applies in a compulsory winding up and avoids any disposition of property of the company made after the commencement of winding up, unless the court orders otherwise.<sup>50</sup> The commencement date is the date of the presentation of the petition to wind up.<sup>51</sup> Any dispositions made between the presentation of petition to wind up, and the winding up order, will therefore be void, unless the court orders otherwise.<sup>52</sup>

Here, the petition to wind up was presented on 14 October 2022, with the Company then going into compulsory liquidation on 23 December 2022. The payments to Hard and Fast Ltd were made a month prior to the winding up order and up until the date of the winding up order. Those payments are therefore captured by section 127.

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<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Idem*, p 65.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

**Commented [WPA12]:** 3/4 a good answer but the s 239 argument is misconceived and contradicts the s 127 answer. Section 239 cannot apply where actions take place after the commencement of the winding up only if they occur before commencement (6 months or 2 years depending upon who is preferred)

However, the court may order that the payments to Hard and Fast Ltd ought not to be voided on the basis that the transactions were entered into bona fide in the ordinary course of business. The burden of providing that such validation order should be made rests on the person bring the application.<sup>53</sup>

Here, the continued supply of the marble was seen as essential by the company. Furthermore, some of the payments were made on a cash on delivery basis in order to allow the company to obtain further supplies, and therefore enable business to continue. Given the transaction allowed the company to continue to trade, the court is likely to validate them.<sup>54</sup> However, it is noteworthy that the court has previously refused to grant validation orders where the disposition was going to benefit only one creditor to the detriment of other unsecured creditors of the company.<sup>55</sup> This is precisely the situation here, as Hard and Fast Ltd is only one creditor.

As such, the advice to the liquidator ought to be that while section 127 applies, and the dispositions are therefore likely void, there is a possibility that the court may grant a validation order on application for the reasons outlined above.

The liquidator may also attack the payments made to Hard and Fast Ltd under section 239 of the Act, on the basis that Hard and Fast Ltd has been given a preference. The preference here was given within the relevant time (within the six-month period prior to the onset of insolvency). However, there is a requirement for the company to have had a desire to put Hard and Fast Ltd in a better position in the event the company was going into insolvent liquidation, than the position Hard and Fast Ltd would have been in if the payments were not made. That element is unlikely to be made out given the company was likely influenced to make the payments to Hard and Fast Ltd simply to ensure the company continued trading, rather than to give it a preference in the event of insolvency.

As such, an action under section 127 of the Act remains the most feasible in order to attack the payments to Hard and Fast Ltd.

**\* End of Assessment \***

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Idem*, p 66.

<sup>55</sup> *Ibid.*