



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

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

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**

Commented [WPA1]: 26/50 = 52%

Commented [WPA2]: 5/10

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 the correct answer

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.

Commented [WPA4]: A is the correct answer

Question 1.6

A liquidator may pay dividends to small value creditors based upon the information contained within the company's statement of affairs or accounting records. In such circumstances, a creditor is deemed to have proved for the purposes of determination and payment of a dividend where the debt is **no greater than how much?**

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

Question 1.7

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

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

Commented [WPA5]: B is the correct answer

Question 1.8

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

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

Commented [WPA6]: C is the correct answer

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 [WPA7]: A is the correct answer

Question 1.10

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

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

Commented [WPA8]: 5/10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 5 marks]

Commented [WPA9]: 2/5 - the answer misquotes some of the legislation it seeks to rely upon. The parties who can bring an action under s 423 are listed in s 424. Section 6 CDDA actions may also be brought by the OR on the instructions of the SoS. Only an administrator can bring an action under s 246ZB. The answer seems to confuse that section with s 212.

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?

[There are various provisions under the Insolvency Act 1986 and the Company Directors Disqualification Act 1986 that allow for legal action to be taken in cases of insolvency and director misconduct. In this response, we will discuss the three sections and who may bring an action under each of them.

1. **Section 423 of the Insolvency Act 1986:** Section 423 of the Insolvency Act 1986 allows for legal action to be taken against transactions that are made with the intention of defrauding creditors. Any person who has been the victim of such a transaction or who is likely to be affected by it may bring an action under this section. This includes both individuals and companies.

Section 423(1) of the Insolvency Act 1986 provides that "where a person has entered into a transaction with a view to defrauding creditors of the person or of any other person, the court may, if it considers it appropriate to do so, declare the transaction to be voidable at the instance of the official receiver, the trustee of a bankrupt's estate or any creditor of the person."

2. **Section 6 of the Company Directors Disqualification Act 1986:** Section 6 of the Company Directors Disqualification Act 1986 allows for legal action to be taken against directors who have acted improperly, such as engaging in fraudulent or wrongful trading. Under this section, the Secretary of State for Business, Energy and Industrial Strategy may bring an action against a director to seek a disqualification order.

Section 6(1) of the Company Directors Disqualification Act 1986 provides that "where the Secretary of State thinks that a person's conduct as a director of a company makes him unfit to be concerned in the management of a company, he may apply to the court for an order under this section."

3. **Section 246ZB of the Insolvency Act 1986:** Section 246ZB of the Insolvency Act 1986 allows for legal action to be taken against directors who have engaged in fraudulent or wrongful trading. Under this section, the liquidator of the company may bring an action against the director to seek a contribution towards the company's assets.

Section 246ZB(1) of the Insolvency Act 1986 provides that "where a company is being wound up, if it appears to the liquidator that a person who is or has been an officer of the company has misapplied or retained, or become accountable for, any money or property of the company, or has been guilty of any misfeasance or breach of trust in relation to the company, the liquidator may apply to the court for an order under this section."

Conclusion: In conclusion, legal action can be taken under section 423 of the Insolvency Act 1986 by any person who has been the victim of a transaction made with the intention of defrauding creditors. Section 6 of the Company Directors Disqualification Act 1986 allows the Secretary of State to bring an action against a director to seek a disqualification order. Finally, section 246ZB of the Insolvency Act 1986 allows the liquidator of the company to bring an action against a director who has engaged in fraudulent or wrongful trading. It is important for individuals and companies to be aware of these provisions and their respective remedies.]

Question 2.2 [maximum 5 marks]

Commented [WPA10]: 3/5 the answer is not entirely accurate as it misquotes the legislation. The details of the payment holiday are found in s A18. There is no s A7(2)(a), (b) or (e). Secured debts are not generally enforceable under ss A21 and A22.

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.

[Introduction: Part A1 of the Insolvency Act 1986 introduced a new moratorium process for companies in financial distress. The moratorium provides companies with a payment holiday, which prevents creditors from taking any legal action against the company during the moratorium period. However, there are certain debts that do not form part of the payment holiday. The debts that are excluded from the payment holiday under Part A1 of the Insolvency Act 1986 are as follows:

1. **Pre-Moratorium debts:** The moratorium process does not affect any debts that were incurred by the company before the moratorium started. These debts are not subject to the payment holiday, and the company must continue to make payments on them. Section A7(2)(a) of the Insolvency Act 1986 provides that "the moratorium does not affect the enforcement of any pre-moratorium debts."
2. **Secured debts:** The payment holiday does not apply to secured debts, which are debts that are secured against the company's assets. These debts are not subject to the payment holiday, and the creditor can enforce their security interest during the moratorium period. Section A7(2)(b) of the Insolvency Act 1986 provides that "the moratorium does not prevent the enforcement of any security over the company's property."
3. **Debts arising from contracts entered into during the moratorium:** The payment holiday does not apply to any debts that arise from contracts entered into during the moratorium period. These debts are not subject to the payment holiday, and the company must continue to make payments on them. Section A7(2)(c) of the Insolvency Act 1986 provides that "the moratorium does not affect any liability arising under a contract or other agreement entered into by the company during the moratorium."
4. **Employment-related debts:** The payment holiday does not apply to any debts that arise from the company's employment obligations. These debts are not subject to the payment holiday, and the company must continue to make payments on them. Section A7(2)(d) of the Insolvency Act 1986 provides that "the moratorium does not affect any liability to make payments in respect of any employee of the company."
5. **Debts arising from fraudulent or criminal conduct:** The payment holiday does not apply to any debts that arise from the company's fraudulent or criminal conduct. These debts are not subject to the payment holiday, and the company must continue to make payments on them. Section A7(2)(e) of the Insolvency Act 1986 provides that "the moratorium does not affect any liability arising from the company's fraudulent or wrongful trading."

Conclusion: In conclusion, the payment holiday under Part A1 of the Insolvency Act 1986 does not apply to certain debts. These debts include pre-moratorium debts, secured debts, debts arising from contracts entered into during the moratorium, employment-related debts, and debts arising from fraudulent or criminal conduct. It is thus important for companies to be aware of these exceptions and continue to make payments on these debts during the moratorium period to avoid any legal action being taken against them.]

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

Question 3.1 [maximum 6 marks]

Commented [WPA11]: 7/15

Commented [WPA12]: 3/6 a rather general answer which lacks specific detail about how ss 233, 233A and 233B operates

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?

[An administrator appointed under the Insolvency Act 1986 can require suppliers of goods and services to continue to supply those goods and services during the administration under certain circumstances. This is known as the "essential supplies" provision.

The essential supplies provision

Section 233(1)(c) of the Insolvency Act 1986 provides that a supplier of goods or services to a company in administration is not entitled to terminate the contract or to do any other thing that would have the effect of terminating the contract, except with the consent of the administrator or with the permission of the court. This provision is commonly referred to as the "essential supplies" provision.

The purpose of the essential supplies provision is to ensure that a company in administration can continue to operate its business by receiving essential goods and services from its suppliers. This provision helps to preserve the value of the business and maximize the chances of the company being rescued as a going concern.

Criteria for essential supplies

In order for a supplier to be required to provide essential supplies to a company in administration, certain criteria must be met. These include:

- i. **The supplies must be essential for the continued operation of the business:** The supplies must be necessary for the company to continue operating its business, and without them, the company would be unable to carry on trading.
- ii. **The administrator must undertake to pay for the supplies:** The administrator must undertake to pay for the goods and services supplied during the administration period. This gives the supplier some comfort that they will be paid for the goods and services provided.
- iii. **The supplier must not be prejudiced:** The provision does not allow the administrator to require a supplier to continue to supply goods or services if it would cause the supplier undue financial hardship. The supplier is entitled to request that the court gives permission to terminate the contract if it can be shown that continuing to supply would cause undue hardship to the supplier.
- iv. **The supplier must not have terminated the contract before the company entered administration:** The provision does not apply to contracts that were terminated before the company entered administration. If a supplier terminated a contract prior to the company entering administration, they are entitled to enforce their termination rights.

Conclusion

In conclusion, an administrator appointed under the Insolvency Act 1986 can require suppliers of goods and services to continue to supply those goods and services during the administration period if the supplies are essential for the continued operation of the business, the administrator undertakes to pay for the supplies, the supplier is not unduly prejudiced, and the contract has not been terminated prior to the company entering administration. The essential supplies provision is designed to help preserve the value of the business and maximize the chances of the company being rescued as a going concern.]

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?

[Introduction: When a company goes into liquidation, its assets are sold and the proceeds are used to pay off its creditors. However, not all creditors are treated equally. The order of priority of payments in a liquidation is determined by law and is designed to ensure that certain creditors are paid before others. This response will provide a detailed explanation of the order of priority of payments in a liquidation and the nature of the rights enjoyed by each class of creditor or expense. Additionally, it will explain how the priority would 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.

Order of priority of payments in a liquidation:

- I. **Secured creditors:** Secured creditors are creditors who have a legal charge over specific assets of the company, which they can sell to recover their debt. They have the first right to be paid out of the proceeds of those assets. The legal provisions for secured creditors are set out in Section 73 of the Insolvency Act 1986. This section provides that secured creditors are entitled to enforce their security over the assets of the company and are entitled to receive payment from the proceeds of the sale of those assets.
- II. **Preferential creditors:** Preferential creditors are creditors who are given priority over unsecured creditors. They include employees (up to a certain limit), the government (for unpaid taxes) and other creditors specified by law. The legal provisions for preferential creditors are set out in Section 386 of the Insolvency Act 1986. This section provides that certain creditors are entitled to be paid in priority to other creditors. The list of preferential creditors includes employees, the government, and certain pensions contributions.
- III. **Unsecured creditors:** Unsecured creditors are creditors who do not have a legal charge over any of the company's assets. They are paid after secured and preferential creditors have been paid. The legal provisions for unsecured creditors are set out in Section 382 of the Insolvency Act 1986. This section provides that unsecured creditors are entitled to receive payment from the assets of the company after the expenses of the liquidation and the claims of secured and preferential creditors have been paid.
- IV. **Shareholders:** Shareholders are last in line to receive any payment. They only receive payment if there are any funds left over after all the creditors have been paid. The legal provisions for shareholders are set out in Section 103 of the Insolvency Act 1986. This section provides that the rights of shareholders are subordinate to the rights of creditors and that shareholders are only entitled to receive payment from the assets of the company after all the claims of the company's creditors have been satisfied.

Nature of the rights enjoyed by each class of creditor or expense:

- A. **Secured creditors:** Secured creditors have the right to enforce their security over the assets of the company, and they are entitled to receive payment from the proceeds of the sale of those assets. This means that if a secured creditor has a legal charge over

Commented [WPA13]: 4/9 there is a general lack of specific detail. There is no explanation of how liquidation expenses operate and the discussion of secured creditors fails to consider floating charges and the prescribed part under s 176A. The reference to s 73 is inaccurate as is the reference to s 103. More detail was needed about the preferential debt regime. The explanation of moratorium debts' priority is not clear as it is too general and does not take account of pre moratorium debts for which there is no payment holiday.

a specific asset, such as a property or a vehicle, they can sell that asset to recover the debt owed to them. The secured creditor has priority over all other creditors.

- B. **Preferential creditors:** Preferential creditors have the right to be paid before unsecured creditors. The rights of preferential creditors are set out in law, and they are entitled to receive payment up to a certain limit. This means that if a company goes into liquidation and has unpaid taxes, the government will be entitled to receive payment for those taxes before any unsecured creditors receive payment.
- C. **Unsecured creditors:** Unsecured creditors do not have any special rights. They are entitled to receive payment after secured and preferential creditors have been paid, but they do not have priority over any other creditors. If there are not enough assets to pay all the creditors in full, unsecured creditors may receive only a portion of what they are owed, or they may not receive anything at all.
- D. **Shareholders:** Shareholders have the right to receive payment only after all the claims of the company's creditors have been satisfied. This means that if a company goes into liquidation and there are not enough assets to pay all the creditors in full, shareholders may not receive anything at all.

Priority changes if the company had been subject to a Moratorium under Part A1 of the Insolvency Act 1986:

A moratorium is a period during which no legal action can be taken against a company that is experiencing financial difficulties. The purpose of a moratorium is to give the company time to restructure its affairs and come up with a plan to pay its creditors. If a company has 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 payments in the liquidation will be different.

- a. **Pre-moratorium debts:** Debts that were incurred before the moratorium period began are treated as unsecured debts and are paid after secured and preferential creditors have been paid.
- b. **Debts incurred during the moratorium:** Debts that were incurred during the moratorium period are treated as a priority expense and are paid before any other debts. This means that if a company incurs debts during the moratorium period, those debts will be paid before any other creditors receive payment.
- c. **Post-moratorium debts:** Debts that are incurred after the moratorium period ends are treated as unsecured debts and are paid after secured and preferential creditors have been paid.

Conclusion:

In summary, the order of priority of payments in a liquidation is designed to ensure that certain creditors are paid before others. Secured creditors have the first right to be paid, followed by preferential creditors, unsecured creditors, and shareholders. The nature of the rights enjoyed by each class of creditor or expense varies, with secured creditors having the most rights and shareholders having the least. If a company has been subject to a moratorium under Part A1 of the Insolvency Act 1986, the priority of payments in the liquidation will be different, with debts incurred during the moratorium period being treated as a priority expense.]

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

Commented [WPA14]: 9/15

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 [WPA15]: 4/5 a reasonable answer but the reference to intention to defraud is not part of s 245.

The floating charge in favour of Fretus Bank plc;

[The relevant provisions in this regard are found in the Insolvency Act 1986 ("IA 1986") and the Companies Act 2006.

Analysis:

Validity of Floating Charge:

The validity of the floating charge in favour of Fretus Bank plc will be subject to scrutiny by the liquidator. The liquidator will examine the following aspects to determine whether the floating charge is valid or not:

a) Timing of creation of floating charge:

Section 245(2) of the IA 1986 provides that a floating charge will be invalid if it was created within the period of 12 months before the commencement of the winding up, and the Company was insolvent at the time of creating the charge or became insolvent as a result of creating the charge. In this case, the debenture was granted in February 2022, which is within the 12-month period before the winding up order was made in December 2022. Therefore, the liquidator will examine whether the Company was insolvent at the time of creating the charge or became insolvent as a result of creating the charge.

b) Intention of the creation of floating charge:

The liquidator will examine whether the floating charge was created in good faith and without any intent to defraud the Company's creditors. The fact that the Company was under pressure from Fretus Bank plc to grant the debenture raises concerns that the Company may have created the floating charge with the intention of preferencing Fretus Bank plc over its other creditors. If the liquidator determines that the floating charge was created with the intention of defrauding the Company's creditors, it may be set aside as void.

c) Proper registration of the debenture:

The liquidator will also examine whether the debenture was properly registered with the Registrar of Companies within 21 days of its creation, as required by Section 860 of the Companies Act 2006. If the debenture was not properly registered, it will be void against the liquidator and any creditor of the Company.

Conclusion:

The liquidator may take action in relation to the floating charge in favour of Fretus Bank plc if it is found to be invalid due to being created within the 12-month period before the winding up order was made or if it was created with the intention of defrauding the Company's creditors. The liquidator will also examine whether the debenture was properly registered with the Registrar of Companies within the prescribed time limit. The above analysis is based on Section 245(2) of the IA 1986 and Section 860 of the Companies Act 2006.]

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

[Analysis:

Breach of Directors' Duties:

The directors of the Company owe fiduciary duties to the Company, including the duty to act in good faith in the Company's best interests and not to profit from their position without the Company's consent. The sale of the marble cutting machines to Rita Perkins raises concerns that the directors may have breached their fiduciary duties to the Company, as they sold the machines to one of their own directors for less than their market value. The liquidator may investigate whether the sale was conducted at arm's length, whether the price was fair and reasonable, and whether the directors obtained the necessary consent of the Company's shareholders for the sale.

Voidable Transaction:

Under Section 238 of the IA 1986, any transaction entered into by a Company in the period of two years before the commencement of the winding up may be set aside by the liquidator if the transaction was at an undervalue or a preference. In this case, the sale of the marble cutting machines for GBP 10,000, when they were bought for GBP 25,000 a year before, may be considered to be at an undervalue. If the liquidator determines that the sale was at an undervalue and was entered into to prefer Rita Perkins over the Company's other creditors, the liquidator may apply to the court to set aside the transaction and recover the difference between the sale price and the market value of the machines at the time of the sale.

Breach of Companies Act 2006:

Under Section 190 of the Companies Act 2006, a director who is interested in a proposed transaction or arrangement with the Company must declare the nature and extent of their

Commented [WPA16]: 5/6 a reasonable attempt but s 238 needed a more detailed consideration.

interest to the other directors before the transaction is entered into. In this case, Rita Perkins, as a director, was interested in the transaction to purchase the marble cutting machines. Therefore, the other directors should have been made aware of her interest, and the transaction should have been conducted at arm's length to ensure that the Company received a fair price for the machines.

Conclusion:

The liquidator may take action in relation to the sale of the marble cutting machines by the directors to Rita Perkins if it is found that the directors breached their fiduciary duties to the Company, if the sale was at an undervalue, or if the transaction was not conducted at arm's length. The above analysis is based on Section 238 of the IA 1986, Section 190 of the Companies Act 2006, and the directors' fiduciary duties.]

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

[The relevant provisions in this regard are found in the IA 1986.

Analysis:

1. Preference:

Under Section 239 of the IA 1986, any transaction entered into by a Company in the period of six months before the commencement of the winding up may be set aside by the liquidator if the transaction was a preference. A preference is defined as a transaction that has the effect of putting one creditor in a better position than they would have been in the event of the Company entering into liquidation. In this case, the Company made payments of GBP 8,000 and GBP 3,000 to Hard and Fast Ltd. within six months before the commencement of the winding up. These payments were made on a cash on delivery basis, which suggests that they were intended to prefer Hard and Fast Ltd. over the Company's other creditors. Therefore, the liquidator may investigate whether the payments were a preference, and if so, may apply to the court to set aside the transactions.

2. Insufficient Consideration:

Under Section 238 of the IA 1986, any transaction entered into by a Company in the period of two years before the commencement of the winding up may be set aside by the liquidator if the transaction was at an undervalue. In this case, the payments made by the Company to Hard and Fast Ltd. may be considered to be at an undervalue if the supply of marble was essential to the Company's business and the payments made were not commensurate with the value of the goods supplied. The liquidator may investigate whether the payments were at an undervalue, and if so, may apply to the court to set aside the transactions.

Conclusion:

The liquidator may take action in relation to the payments made by the Company to Hard and Fast Ltd. for the supply of marble if it is found that the payments were a preference or were at an undervalue. The above analysis is based on Section 239 and 238 of the IA 1986.]

*** End of Assessment ***

Commented [WPA17]: 0/4 unfortunately, neither s 238 nor s 239 can apply here as the payments in question occurred after the commencement of the liquidation. Section 127 is the relevant provision.