



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]: 47/50 = 94% an excellent 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.**

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 [WPA3]: 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.

Commented [WPA4]: D is correct

QUESTION 2 (direct questions) [10 marks]

Commented [WPA5]: 10/10

Question 2.1 [maximum 5 marks]

Commented [WPA6]: 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?

Under section 434 of the Insolvency Act 1986, (a) where the company is being wound up/is in administration, the official receiver, liquidator, administrator and/or (with leave of the court) any victim of the transaction; (b) where a victim is bound by a creditor voluntary arrangement ("CVA"), the supervisor of the CVA or any victim of the transaction (whether bound by the CVA or not); or (c) in any other case, by a victim of

*the transaction, may bring an action to attack a transaction designed to defraud creditors.*

*Under section 6 of the Company Directors Disqualification Act 1986, an application for a disqualification order against a director may be made either by (a) the Secretary of State, or (b) in the case of a person who is or has been a director of a company that is being, or has been, wound up by the court, and if the Secretary of State so directs, the official receiver.*

*Under section 246ZB of the Insolvency Act 1986, an action against a director of a company in administration in respect of wrongful trading must be made by the administrator.*

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.**

*The following 5 debts do not form part of the payment holiday under Part A1 of the Insolvency Act 1986 when a company is subject to a Moratorium:*

- (1) Amounts payable in respect of goods or services supplied during the Moratorium;*
- (2) Rent in respect of a period during the Moratorium;*
- (3) Redundancy payments;*
- (4) The monitor's remuneration and expenses; and*
- (5) Debts or liabilities arising under a contract/other instrument involving "financial services", which includes a contract consisting of lending, financial leasing or providing guarantees.*

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

Commented [WPA8]: 14/15

Question 3.1 [maximum 6 marks]

Commented [WPA9]: 6/6

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

*In effect, yes. An administrator will generally need to obtain, or retain, essential supplies and goods and services, and the prospect of contracting with an insolvent company is not always an encouraging one. To combat this, by section 233 of the Insolvency Act, if a request is made by an administrator for the giving of the essential supplies mentioned in section 233(3) (which includes gas, electricity, water and communication services), the supplier is not permitted to require payment of outstanding debts owed in order to secure new, or continue to provide, the essential service to the company in administration. Moreover, section 223A of the Insolvency*

*Act prevents a supplier of such services from relying up an "insolvency-related term" in a contract of supply, which means that the supplier cannot rely on such a term as a basis to alter the terms of service, require higher payments or terminate the supply.*

*Recent amendments have expanded these protections, and section 233B of the Insolvency Act now prohibits clauses that allow the supplier of goods or services (generally, regardless of whether they are classified as "essential", albeit subject to some exceptions) to terminate or "do any other thing" in relation to the contract if the company enters a formal insolvency procedure, including administration. The effect of this section that suppliers, generally, are prohibiting from terminating their supply of goods or service upon, and as a result of, the company's insolvency. Moreover, as a result of that same section, suppliers cannot make it a condition of continued supply that any pre-insolvency arrears are paid or otherwise amend the terms of the contract.*

*It follows that, in light of these protections, if an existing supplier of goods or services was to seek to terminate the supply of those goods or services during the administration, and purported to rely upon either an insolvency-related term in their contract of services or outstanding debts owed to him at the time of the administration as the basis on which he was doing so - the administrator can generally rely upon sections 223, 223A and/or 223B, depending on the nature of the services, to compel the supplier to continue to provide the services, without any changes to the pre-agreed terms. Note, however, that if the services being provided fall within the essential services set out in section 223, the supplier can require the administrator to personally guarantee payment of charges in respect of the continued supply. Further, the provisions of section 223B do not apply to all services, as exceptions have been carved out for, for example, insurers, banks and electronic money institutions. And, finally, under section 233B, a contract may still be terminated by a supplier where the administrator consents or on an application to the court in circumstances where the court is satisfied that the continuation of the contract would cause the supplier hardship and grants permission for its termination.*

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 order and manner in which the proceeds received from the liquidator's realization of the company's assets is prescribed by the Insolvency Act. More particularly, the order of priority of payments in a liquidation, generally, is as follows:*

- (1) Expenses of the winding-up, including the liquidator's remuneration. By 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 (including preferential claims, those of holders of floating charges and unsecured claims). Rules 6.42 and 7.108 of the*

**Commented [WPA10]:** 8/9 an excellent answer - there is no mention of how fixed charges are dealt with in this context - a minor omission



*Insolvency (England and Wales) Rules 2016 (the "Rules" expand upon what, in particular, is included in the expenses of the winding-up, and, by Rule 6.42(4), further prescribe the priority amongst those expenses. In that regard, the expenses are payable in the following order of priority:*

- a. expenses which are properly chargeable or incurred by the liquidator in preserving, realising or getting in any of the assets of the company or otherwise in the preparation, conduct or assignment of any legal proceedings, arbitration or other dispute resolution procedures,;*
- b. the cost of any security provided by the liquidator;*
- c. any amount payable to a person employed or authorized to assist in the preparation of a statement of affairs or of accounts;*
- d. the costs of employing a shorthand writer on the application of the liquidator;*
- e. any necessary disbursements by the liquidator in the course of the administration of the winding up (including any expenses incurred by members of the liquidation committee or their representatives and allowed by the liquidator under rule 17.24, but not including any payment of corporation tax in circumstances referred to in sub-paragraph (i));*
- f. the remuneration or emoluments of any person who has been employed by the liquidator to perform any services for the company;*
- g. the remuneration of the liquidator (up to a fixed amount that is prescribed by the Rules);*
- h. the amount of any corporation tax on chargeable gains accruing on the realisation of any asset of the company;*
- i. the balance, after payment of any sums due under sub-paragraph (g) above, of any remuneration due to the liquidator; and*
- j. any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up.*

(2) Preferential creditors. *Once the expenses of the liquidation have been paid in full in the above order, the remaining assets of the company are then used, first, to pay those creditors who qualify as "preferential creditors", as defined by sections 386 and 387 of the Act and Schedule 6: section 175. While there are significant limitations upon their claims, this category is historically largely comprised of the claims of employees. There are two classes of preferential debts: ordinary and secondary, and they are paid in that order. Preferential debts rank equally amongst themselves within their respective classes (i.e. ordinary and secondary) and are abated in equal proportions where the company's assets are insufficient to pay them all.*

- a. Ordinary preferential debts are comprised of the following obligations, as listed under Schedule 6 of the Act:*
  - i. Any sum owed on account on an employee's contribution to an occupational pension scheme, deducted from earnings of the company's employees paid in the period of 4 months prior to the commencement of the winding up;*

- ii. *Any sum owed by the company on account of an employer's contribution to an occupational pension scheme in the 12 month period before the relevant date;*
  - iii. *Remuneration owed by the company to a person who is/has been an employee and is payable in respect of the whole or any part of the period of 4 months prior to the commencement of the winding-up, up to 800GBP;*
  - iv. *Any amounts owed by way of accrued holiday remuneration before the winding-up;*
  - v. *Claims for monies advanced to pay wages or holiday remuneration*
  - vi. *Levies on the production of coal and steel (referred to in the European Coal and Steel Community Treaty);*
  - vii. *Claims for an amount ordered to be paid by the company under the Reserve Forces (Safeguard Employment) Act in respect of a default made by the company in its discharge of its obligations thereunder;*
  - viii. *So much of any amount owed by the company in respect of an eligible deposit as does not exceed the compensation that would be payable in respect of the deposit under the Financial Services Compensation Scheme ("FSCS") to the person to whom it is owed;*
- b. *Secondary preferential debts, which will be paid once the ordinary preferential debts listed above are satisfied, and prorated amongst themselves if there are insufficient assets to satisfy them all in full, are comprised of the following obligations, as per section 386 of the Act:*
- i. *So much of any amount owed by the company to one or more eligible persons in respect of an eligible deposit as exceeds any compensation that would be payable in respect of the deposit under the FSCS to that person;*
  - ii. *An amount owed by the company to one or more eligible persons in respect of a deposit that, (a) was made through a non-UK branch of a credit institution authorized by the competent authority of the UK; and (b) would have been an eligible deposit if it had been made through a UK branch of that credit institution.*
  - iii. *PAYE income tax deductions, national insurance deductions, VAT payments, Construction Industry Scheme deduction and student loan repayments.*
- (3) *Floating charge holder. Once the debts of all preferential creditors (both ordinary and secondary) have been repaid, floating charge holders will be paid. If there is more than one floating charge holder, priority between them will generally be determined by the date on which the charge was created, with the earlier in time being given priority. However, it should be noted that, before payments can be made to floating charge holders, the liquidator must give due consideration to section 176A of the Act, which applies to all companies now in liquidation with floating charges that were created on or after September 15, 2003. By this section, the liquidator is obliged to make a "prescribed part" of*

*the net property of the company available for the satisfaction of claims of unsecured creditors and must ensure that this prescribed part is retained and not distributed to a floating charge holder. The company's "net property" is calculated after the expenses of the liquidation and preferential creditors have been paid, and is comprised of the company's property that would otherwise be available for the satisfaction of debts of floating charge holders (if there was not a requirement to retain the prescribed part). When the company's net property is GBP 10,000 or less, the prescribed part is 50% of that property, but the liquidator retains a discretion not to distribute the prescribed part to unsecured creditors where the net property is less than GBP 10,000 and making a distribution to unsecured creditors would be disproportionate to the benefits. Where the company's net property exceeds GBP 10,000, the prescribed part is 50% of the first GBP 10,000, plus 20% of the excess, subject to a maximum amount of the prescribed part of GBP 800,000. Once the prescribed part has been accounted for, where applicable, floating charge holders will be repaid the remainder of their claim. It should be noted that a floating charge holder or any secured creditors who may be owed an outstanding unsecured balance is not permitted to participate in the distribution of the prescribed part ( *Thorniley v Harris [2008] EWHC 124 (Ch)*).*

- (4) Unsecured creditors. **Creditors with no security, whose debts are not preferred, are paid last in the statutory order, after all of the above creditors. Unsecured creditors rank equally amongst themselves, and will be paid on a prorated basis out of the remainder of the estate.**

*If the company in question had been subject to a Moratorium under Part A1 of the Insolvency Act during the 12-week period prior to the commencement of the liquidation, section 174A of the Act would have taken effect and resulted in significant changes to the order of priority of payments discussed above. Particularly, in such circumstances, by section 174A, certain unpaid debts that accrued prior to and during the Moratorium period (referred to in the Act as "moratorium debts and priority pre-moratorium debts"), which were not part of the payment holiday associated with the Moratorium, and the fees and expenses of the official receiver would be afforded a "super priority" in the liquidation, ranking even above the liquidator's fees and expenses. The priority pre-moratorium debts payable in priority to claims would include, for example, pre-moratorium debts that are payable in respect of goods and services that were supplied during the moratorium and pre-moratorium debts that consist of a liability to make a redundancy payment.*

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

Commented [WPA11]: 15/15

**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]

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

*In respect of the floating charge in favour of Fretus Bank plc, the Liquidator may consider whether the granting of the charge to Fretus Bank plc amounts to a preference which may be avoided by the court, on his application, under section 239 of the Insolvency Act.*

*The underlying purpose of section 239 is to prevent a company from placing one of its creditors in a better position than the others shortly before entering into a formal insolvency procedure, and thereby disrupting the statutorily prescribed order of priority. One common form of transaction that is susceptible to attack as a preference is the granting of security to an existing creditor, whose debt was previously unsecured, as was done here in favour of Fretus Bank.*

*In order to be successful in any challenge commenced under section 239 of the Insolvency Act, the Liquidator must be able to satisfy the following conditions, which are each assessed in turn:*

- (1) The person whom it is alleged has been preferred was, at the time of the transaction, a creditor of the company. The Company had outstanding loans from Fretus Bank plc, for which it feared it may demand payment. As such, at the time of the transaction (i.e., the granting of a debenture containing a*

**Commented [WPA12]:** 5/5 very good on s 245 - the time limit for s 239 is incorrectly quoted and the charge would therefore fall outside the time limit for attack under s 239.

*floating charge over the company's undertaking), Fretus Bank plc was a creditor of the Company.*

- (2) Something was done by the company which put that person in a better position in the event of the company going into liquidation than the position he would have been in if that thing had not been done. From the background provided, it is understood that the monies owed to Fretus Bank plc by the Company were, prior to February 2022, unsecured, and that the debenture granted in February 2022 was the first of such. Accordingly, by granting a debenture in favour of Fretus Bank plc containing a floating charge over the whole of the Company's undertaking to Fretus Bank plc, the Company elevated Fretus Bank plc from an ordinary unsecured creditor, who would be repaid in the liquidation on a pari passu basis with all other unsecured creditors, to the holder of a floating charge, who will be entitled to be repaid prior to unsecured creditors and immediately after preferential creditors have been satisfied. As such, the Company's granting of the floating charge put Fretus Bank plc in a better position in the liquidation than it would have otherwise been.*
- (3) In giving the preference, the company was influenced by a desire to give that creditor such a preference. This is the condition that is often most difficult to establish. Although Fretus Bank plc placed the Company under pressure to provide the debenture, the fact that pressure was applied by a creditor is not relevant in determining the company's desire. However, relevant here is the case of *Re MC Bacon Ltd.*, in which the facts were of striking similarity. While the liquidator in that case contended that the granting of a debenture in favour of the company's bank to secure past indebtedness was a preference, the court found that where the company was dependent upon the bank for continued trading such that if the debenture were not granted the bank would withdraw its support, forcing it into liquidation, the granting of the debenture was motivated by the desire to avoid the calling in of the overdraft and the continued trading of the company - and not by a desire to prefer the bank. Indeed, subsequent decisions have also confirmed that there will be no desire to prefer where the company was influenced by commercial considerations, particularly ensuring that the company continued trading. In this case, the Company granted a debenture to Fretus Bank plc to prevent it from demanding repayment of the Company's loans - calling in the overdraft and, presumably, thereby bringing an end to the Company's trading. In accordance with *Re MC Bacon Ltd.*, it is very likely that, in these circumstances, a court may be reluctant to conclude that the Company was influenced by a desire to give Fretus Bank a preference, in the absence of any other evidence to the contrary.*
- (4) The preference must have been given at a "relevant time", which is within the period of two years prior to the commencement of the liquidation. The "commencement of the winding up" is the date on which the petition to wind up was presented or issued. In this case, that is October 14, 2022. Thus, any preferences after October 14, 2020 will be considered to have*

*occurred at a relevant time. The debenture was granted in February 2022 and will, therefore, fall within that period.*

- (5) *The preference must have been given at a time when the company was unable to pay its debts as they fell due, or the company must have become unable to pay its debts in consequence of the preference. The Company's concerns surrounding Fretus Bank plc demanding payment of its loans suggest that the Company was likely unable to pay its debts as they became due at the time of the preference, but this is something that the Liquidator will need to explore, and evidence, further.*

*On the assessment above, the Liquidator may want to proceed with caution before applying to have the debenture avoided as a preference under section 239 of the Act, as it is very difficult to show that the company was influenced by a desire to prefer the creditor (discussed at 3 above) in the absence of the presumption that kicks in where the creditor is connected to the company. In circumstances where the facts suggest that the Company was motivated by desires other than to prefer Fretus Bank, the application is unlikely to succeed due to evidential difficulties surrounding that particular condition.*

*Instead, the Liquidator may pursue avoiding the floating charge under section 245 of the Insolvency Act, which deals strictly with floating charges and no other type of security. Where a company in liquidation gives a floating charge within the "relevant time", section 245 of the Insolvency Act renders the floating charge invalid, unless "new" consideration is provided for the charge. Where the person in whose favour the floating charge is granted is not connected to the company, the "relevant time" is any time within the period of 12 months prior to the onset of the insolvency, but only where the company was unable to pay its debts or became unable to do so as a result of the charge at the time that the charge was created. As the charge was created in February 2022, it was given by the Company within the "relevant time", being less than 12 months prior to the commencement of the liquidation in October 2022. As mentioned above, the Company's concerns surrounding Fretus Bank plc demanding payment of its loans suggest that the Company was likely unable to pay its debts as they became due at the time that the charge was created, but this is subject to further exploration and assessment by the Liquidator. Once that can be shown, the charge is likely to be avoided, as there is nothing to suggest that the charge was created to secure "new" consideration. To the contrary, it appears that the floating charge was granted to secure pre-existing loans to the Company. As such, the floating charge is likely to be rendered invalid by section 245, rendering the need to apply for it to be voided as a preference, moot.*

Question 4.2 [maximum 6 marks]

Commented [WPA13]: 6/6

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

*In reviewing this transaction, the Liquidator should consider whether the sale of the marble cutting machines to Rita Perkins can be attacked under section 238 of*

*the Insolvency Act as a transaction at an undervalue.* [note also her involvement in the comp]

*Under section 238 of the Insolvency Act, a liquidator can challenge a transaction that was the company undertook prior to its entering into liquidation where the said transaction was at an undervalue. To be successful in its challenge, the liquidator must satisfy the following conditions, which are each assessed in turn:*

- (1) The company must have entered into a transaction with another person for consideration which was, at the date of the transaction, significantly less than the value of the consideration provided by the company. The Company purchased the cutting machines in 2021 for GBP 25,000 and sold them in July 2022 for GBP 10,000. In selling the machines to Rita Perkins, the Company, therefore, entered into a transaction for consideration that was more than 50% less than the value of the consideration it provided for the cutting machines only a year before. More than 50% less than the value paid is very likely to be considered "significantly less" and the transaction will likely satisfy this condition.*
- (2) The transaction must have taken place at a "relevant time", which is within the period of two years prior to the commencement of the liquidation. The "commencement of the winding up" is the date on which the petition to wind up was presented or issued. In this case, that is October 14, 2022. Thus, any transactions after October 14, 2020 will be considered to have occurred at a relevant time. The sale of the cutting machines having taken place in July 2022, the transaction will also satisfy this ground.*
- (3) The transaction, generally, must occur at a time when the company was unable to pay its debts as they fell due, or the company must have become unable to pay its debts in consequence of the transaction. However, in instances where the transaction is with a "connected person", the company is presumed to have been insolvent, or to have become insolvent as a result of this transaction, and automatically satisfies this condition unless the contrary is proved. Under the Insolvency Act, a director is considered a connected person. As such, as the purchaser of the marble cutting machines, Rita Perkins, was a director of the Company at the time, this condition will be presumed to have been satisfied, unless the contrary is proven.*

*As the sale of the marble cutting machine appears to satisfy all requirements of a transaction at an undervalue, the Liquidator is advised to make an application under section 238 for orders declaring the transaction to be one at an undervalue and restoring the position to that which it would have been had the transaction not occurred. He should note, for completeness, that if the respondent to his application is able to satisfy the court that the transaction was entered into by the company in good faith and for the purpose of carrying on its business and that there were reasonable grounds for believing that the transaction would benefit the company, then the court may refuse to exercise its discretion to grant the orders sought.*

Question 4.3 [maximum 4 marks]

Commented [WPA14]: 4/4

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

*With regard to these payments, the Liquidator should consider whether they are automatically voided by virtue of section 127 of the Insolvency Act. In furtherance of one of the primary purposes of liquidation (i.e. to ensure that a company's property is distributed to its creditors according to the statutory order), section 127 of the Insolvency Act avoids any disposition of property of a company that is made after the commencement of winding up, unless the court otherwise orders. The "commencement of the winding up" is the date on which the petition to wind up is presented or issued. In this case, that is October 14, 2022. As the demand for payment from Hard and Fast Ltd was made the month before the winding up order was made (that is, in November 2022), the payments to Hard and Fast Ltd. of GBP 8,000 and GBP 3,000 would have been made between then and the winding-up order on December 23, 2022. They were, therefore, dispositions made after the commencement of the winding-up and will, without more, be voided by virtue of section 127 of the Insolvency Act.*

*However, the Liquidator should note that the avoidance of the disposition under section 127 is not absolute, and the court retains a discretion to grant a "validation order", declaring that the dispositions (here, the payments to Hard and Fast Ltd.) are not void. If any application is made to the court for a validation order, then the issue for the court will become: whether the circumstances indicate that the payments were made for the benefit of the general body of unsecured creditors. Indeed, one instance in which a court is likely to sanction payments made after the commencement of the winding up is where they were necessary to ensure continued supplies to enable the company to continue trading, in cases where the court considers that the continuation of trading was in the best interests of creditors. In this instance, Hard and Fast Ltd was a key supplier to the company, and its continued supply of marble to the company was considered "essential" by the board. As Hard and Fast Ltd. made it known that its continued supply was dependent on immediate payment and cash-on-delivery going forward, the payments made were necessary to ensure this essential supply and continue trading. In those circumstances, the Liquidator should be advised that a court is likely to grant a validation order, validating the payments despite their prima facie avoidance.*

**\* End of Assessment \***