



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 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 [WPA1]:** 35/50 = 70% overall a good effort showing good knowledge of the law

**Commented [WPA2]:** 7/10

**Commented [WPA3]:** D is correct

### Question 1.3

Which of the following **is not** a requirement for a company that wishes to enter into a Restructuring Plan under Part 26A of the Companies Act 2006?

- (a) The company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.
- (b) A compromise or arrangement is proposed between the company and its creditors, or any class of them, or its members, or any class of them.
- (c) The purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the said financial difficulties.
- (d) The company is, or is likely to become, unable to pay their debts, as defined under section 123 of the Insolvency Act 1986.

Commented [WPA4]: D is correct

### 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.

Commented [WPA5]: C is correct

### 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

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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 [WPA6]: 8/10

#### Question 2.1 [maximum 5 marks]

Commented [WPA7]: 3/5 very good on s 423 but no answer to ii and iii

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?

[Answer:

Under section 423 of the Act, any of the following parties have the right to attack transactions which are designed to defraud creditors:

(i) the official receiver, the liquidator, the administrator and (with the leave of the court) any victim of the transaction such as a creditor in cases where the company is being wound up or is in administration,

(ii) the supervisor of the CVA or any victim of the transaction (whether bound by the CVA or not) in cases where a victim is bound by a Company Voluntary Arrangement (CVA)

(iii) in any other case, by a victim of the transaction.

Following are two requirements to satisfy under section 423 of the Act:

(1) It is essential to prove that the company is engaged in a transaction with another party at an undervalue (defined as receiving no payment or substantially less consideration than it has provided, in accordance with section 238 of the Act); and

(1) It is also necessary to show that the company entered into the transaction in order to harm the interests of the person who is making or may make a claim against the company by either placing assets beyond the reach of that person or by otherwise placing assets beyond the reach of that person's claim.

There are no time restrictions on when the transaction must have been engaged into. The company does not have to be insolvent or be involved in insolvency procedures, nor do the applicants have to be insolvency officeholders.

Any person who was a victim of the transaction may submit an application under this clause. However, the liquidator or administrator will often submit the application if the firm is being wound up or is under an administration. The application is considered to have been submitted on behalf of each victim of the transaction, regardless of who submitted it.]

**Question 2.2 [maximum 5 marks]**

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.

[Answer:

Following 5 five 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. Monitor's expenses or remuneration
2. Goods or services supplied during the Moratorium;
3. Rent for a period during the Moratorium;
4. Salaries and Wages under a contract of employment;
5. Redundancy payments

The monitor's job is to keep an eye on the company's business activities in order to determine if it is still likely that the Moratorium will lead to the company being saved as a going concern. The monitor is required to end the Moratorium if such a rescue is no longer likely. Likewise, if the monitor believes that the company will not be able to pay any of its pre-Moratorium debts (or bills for which the Moratorium does not grant the company a payment holiday), the monitor must terminate the Moratorium. A major problem for a business is thinking about adopting a moratorium that will typically need the backing of its bank or other secured creditor. As The payment vacation does not stop these creditors from demanding payment during the moratorium; nevertheless, if they do, it will likely lead to the company's inability to pay the

**Commented [WPA8]:** 5/5 a good answer which provides a good deal of information in addition to that asked for by the question

debt, in which case the monitor will need to end the moratorium.

Creditors have the right to file legal challenges against the monitors' and directors' activities in court.

The moratorium's stay on all operations is quite comparable to the stay imposed when a company enters administration. In general, the firm cannot enter liquidation or administration during the moratorium; no landlord may exercise a forfeiture right; security interests typically cannot be enforced; and once more, generally no legal proceedings may be started or continued against the company.

Floating charges won't solidify during the moratorium, and the directors may continue to manage the company as usual with the approval of the monitor or the court needed for any significant actions.

If a firm engages into a scheme, arrangement, or restructuring plan or initiates a pertinent insolvency procedure such as a CVA, administration, or liquidation, the moratorium will cease.

A peculiarity of the Moratorium is that the priority of debts in any subsequent administration or liquidation that occurs within 12 weeks of the end of the Moratorium may differ from the priority of debts that prevailed prior to the Moratorium if the company is not saved as a going concern. According to Section 174A, certain pre-moratorium or moratorium debts (obligations not covered by the payment holiday), such as debts owing to employees or "financial services" debts, are paid in full during the subsequent liquidation before even the liquidator's fees and expenses.]

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

Commented [WPA9]: 13/15

#### **Question 3.1 [maximum 6 marks]**

Commented [WPA10]: 6/6 excellent answer

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?

[Answer:

The executory contracts of a firm are not automatically terminated by the appointment of an administrator. Automatic termination clauses in supply contracts have previously been usually enforceable, but as will be detailed below, there are now a growing number of statutory exceptions that effectively nullify such clauses.

An administrator frequently needs to acquire or keep hold of specific necessary supplies. A supply of gas, electricity, water, or communications services is covered by Section 233 of the Act. The provision of goods and services including point-of-sale terminals, computer gear and software, information, advice, and technical assistance, data storage and processing, and



website hosting is included in the definition of communications services. Suppliers are not allowed to demand payment of past due accounts in order to start or continue providing services to the company that is in administration. However, a provider may specify that the administrator must personally guarantee payment of the charges related to the delivery under Section 233 of the Act.

Additionally, a provider of such services is typically prohibited under section 233A from relying on a "insolvency-related term" in a contract of supply that would otherwise provide the provider the right to end the supply, change the conditions of the supply, or demand increased payments for continuous supply.

Clauses that permit the provider of goods or services to end the contract or "do any other thing" in respect to it if the business initiates a formal insolvency procedure are prohibited by Section 233B.

When a company enters an insolvency procedure, a clause in a contract for the supply of goods or services has no bearing on whether the contract would end or whether the supplier would be allowed to end it or "do any other thing" upon the company's entry into the process. Therefore, Section 233B precludes suppliers from ending a supply upon the company's insolvency, but it also prevents suppliers from making the payment of pre-insolvency arrears a condition of ongoing supply and from making other changes to the contract, including raising pricing. In contrast to rule 233, section 233B prohibits suppliers from requesting a personal guarantee from the administrator.

According to Section 233B, a supplier may still cancel a contract if the company or insolvency office holder agrees or if the court allows the request after concluding that the provider would suffer hardship if the contract were to be kept in place.

With a few exceptions, such as insurers, banks, electronic money institutions, recognised investment exchanges and clearing houses, securitization companies, and foreign businesses with corresponding functions, Section 233B extends the termination restriction to all other suppliers.]

### **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?

[Answer:

Priority of Payments:

1. Liquidators' fees and expenses.
2. Preferential creditors.
3. Floating charge holders.
4. Unsecured creditors & Interest incurred on all unsecured debts post-liquidation.
5. Shareholders

#### **A - Expenses of winding up, including the liquidator's remuneration**

**Commented [WPA11]:** 7/9 a strong answer. Some explanation of how fixed security holders are dealt with would be helpful and the preferential debts explanation might have been presented more clearly to distinguish clearly ordinary and secondary preferential debts

A number of expenses are given precedence over unsecured creditors, holders of floating charges, and preferred creditors. The main costs that must be paid first to those creditors and in the following priority sequence are as follows:

1. costs legitimately incurred by the liquidator in order to preserve, realise, or acquire any of the company's assets (including the conduct of any legal procedures);
2. the price of whatever security the liquidator provides;
3. any payment made to a person to help with the creation of an account statement or statement of affairs;
4. Any essential expenditures made by the liquidator during the winding up, such as any costs expended by the members of the liquidation committee;
5. the compensation of any individual whom the liquidator has hired to render any services to the company;
6. the liquidator's compensation (which is subject to essentially the same laws that govern administrators, including the fees estimate regime when a time cost basis is chosen for the liquidator's fees);
7. the total of any company taxes owed on chargeable gains realised upon the sale of any corporate asset; and
8. any additional costs that the liquidator may legitimately levy for carrying out the liquidation's duties throughout the winding up.

Remuneration of the liquidator lies behind a number of categories of expenses.

#### **B- Preferential creditors**

After the full payment of the costs of the liquidation, the assets of the company are then used to pay preferential creditors.

There are a few other types of liability as well, although the bulk of preferential creditors are restricted claims of employees and some tax liabilities. Employee remuneration (and eventually contributions to their pension schemes) are given precedence under the statutory preferential debts framework. These claims are subject to significant limitations.

Various tax-related debts owed to the Crown (the Government) were included in the category of preferred creditors prior to 2002. section 95 of the Finance Act of 2020 has largely reinstated it after Enterprise Act of 2002 eliminated this advantage to the Crown.

Ordinary and secondary preferential debts fall under two different orders. Prior to secondary preferential debts, ordinary preferential debts are paid. Preferential debts rank equally within their separate classes and abate in proportionally if the company's means are inadequate to pay them altogether.

The following debts are listed as preferential debts:

1) Any amount outstanding on account of employees contribution to occupational pension plans, which were deductions made from salaries during the four months previous to the launch of the winding up;

2) Compensation owed by the company to a person who's or has been an employee of the debtor and the compensation is outstanding in respect of the whole or any part of the period of four months previous to the inception of the winding up, up to a maximum total quantum which is presently £ 800 since 1976.

2) any sum owed by the company on account of an employer's contribution to a pension scheme in the period of 12 months previous to the applicable date.

1) Any amount owed by the company for accrued vacation pay for any work before the winding up; Any compensation paid by the employer to a person for time off work due to a holiday , illness, or other valid reason is regarded as pay.

2) Priority will be given to claims for monies paid to pay vacation compensation.

1) levies on the product of coal and sword as described in papers 49 and 50 of the European Coal and Steel Community Treaty.

2) claims for a portion of any sum that the company is required to pay under the Reserve Forces( Safeguard of Employment) Act 1985, and that such an order is made in light of a failure on the part of the company to uphold its commitments under that Act.

1) The portion of any sum owed by the company to a person or persons for an eligible deposit that doesn't exceed the compensation that would be paid to the person or persons for the deposit under the Financial Services Compensation Scheme.

1) The portion of any sum owing by the company to one or more eligible persons in relation to an eligible deposit that's lesser than any compensation that would be paid to those individualities in relation to the deposit under the Financial Services Compensation Scheme.

2) The sum that the company owes to one or more good parties in relation to a deposit that —

a) was made by a credit institution's non-UK branch that was authorised by the UK's competent authority, and b) if it had been made through a UK branch of that credit institution, it would have qualified as an eligible deposit.

2) national insurance deductions, Construction Industry Scheme deductions, student loan repayments, PAYE income tax deductions and VAT payments,

**C - Floating charge holders:**

1. Any holder of a floating charge will be paid after preferential creditors have been paid.

However, the precedence amongst them generally depends on whose floating charge was produced first. If there are numerous holders of a floating charge. The liquidator must take section 176A of the Act into account before making any payments to floating charge holders. When a company has entered liquidation and has a floating charge that was created on or after September 15, 2003, then section 176A is applicable.

A "prescribed part" of the company's net property must be made available for the satisfaction of floating debts, and the liquidator may not distribute any of this prescribed part to a holder of a floating charge unless it exceeds the quantum demanded to pay off all floating debts. The net-property of the company's property that would else be available for the fulfilment of floating charge holders' debts is appertained to as "net property" for this purpose. therefore, it's determined after paying off preferential debts and liquidation costs.

The prescribed part is 50% of the company's net property if it doesn't exceed GBP 10,000. If the property is below the "prescribed minimum" of GBP 10,000 and the liquidator believes that making a distribution would be disproportionate to the benefits, the obligation doesn't apply.

When a company's net property exceeds GBP 10,000, the prescribed part is 50% of the first GBP 10,000 in value, plus 20% of the excess in value above the GBP 10,000, subject to a maximum of GBP 800,000 as prescribed part.

A floating charge holder having an outstanding unsecured balance also, is not allowed to participate in the distribution of the prescribed part.

**D- Unsecured Creditors:**

Ordinary trade creditors, without any security, are paid last under the law in the order of payment.

**E- Shareholders**

If there are any surplus funds left after paying all the above creditors and interest on their debts, that surplus is divided amongst the shareholders on pro-rata basis of the shareholders' respective shareholdings.]

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

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;

[Answer:

The relevant issues and statutory provisions to consider regarding the floating charge in favor of Fretus Bank plc are as follows:

Relevant Issue - The Company granted a debenture with a floating charge over its whole undertaking to Fretus Bank plc in February 2022.

The above issue is dealt with by Section 245 of the Insolvency Act 1986 (IA 1986) which deals with the avoidance of floating charges in certain circumstances.

Section 245 of the IA 1986 states the following:

(1) This section applies where a company goes into insolvent liquidation and the company has created a floating charge over the whole or any part of its undertaking or property.

(2) The floating charge is invalid except to the extent of the prescribed maximum in relation to the company's property unless it is a charge to which subsection (3), (4), or (5) applies.

(3) A floating charge on the undertaking or property of a company is valid to the prescribed extent if it is a charge created by a company—

- (a) on or after the appointed day, and
- (b) in favour of a person as trustee for one or more persons (whether or not including the company).

(4) A floating charge on the undertaking or property of a company is valid to the prescribed extent if it is a charge created outside the prescribed period and is a charge—

**Commented [WPA13]:** 4/5 a good answer but the application of the provision to the facts may have been more specifically detailed.

- (a) in favour of a person as trustee for one or more persons (whether or not including the company), and
- (b) in substitution for a charge which is a charge to which subsection (5) applies.

(5) A floating charge on the undertaking or property of a company is valid to the prescribed extent if it is a charge created in favour of—

- (a) a financial institution, or
- (b) a person whose ordinary business includes the lending of money, as security for the company's obligation, and was created, in relation to any property comprised in the charge, at the same time as the company's obligation.

Considering the relevant issue and the statutory provisions of Section 245, the liquidator may take action in relation to the floating charge in favor of Fretus Bank plc. The floating charge granted to Fretus Bank plc in February 2022 is subject to potential avoidance under Section 245(2) if it is determined that the Company went into insolvent liquidation and the charge was created within the relevant period.

The floating charge is invalid except to the extent of the prescribed maximum unless it falls within the exceptions specified in Section 245(3), (4), or (5). Based on the facts of the case, it does appear that the floating charge would fall within these exceptions, as it seems to have been created within the relevant period and for the benefit of a person as trustee for others or in substitution for a charge under subsection (5) as Fretus Bank plc is a financial institution.

Therefore, the liquidator cannot successfully challenge the floating charge granted to Fretus Bank plc..]

**Question 4.2 [maximum 6 marks]**

The sale of the marble cutting machines; and

[Answer:

Based on the facts of the case, the relevant issue and statutory provisions to consider regarding the sale of the marble cutting machines to Rita Perkins are as follows:

Relevant Issue: The sale of two marble cutting machines to Rita Perkins, a director of Marbley Q Limited, for GBP 10,000 in cash when they were originally bought for GBP 25,000 a year before.

Statutory Provision: Section 238 of the Insolvency Act 1986 (IA 1986) deals with transactions at an undervalue.

Section 238 of the IA 1986 states the following:

- 1- Subject as follows, where a company enters into a transaction with any person at an undervalue, the liquidator of the company may apply to the court for an order under this section.
- 2- The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.

**Commented [WPA14]:** 3/6 generally along the right lines but again the application to the facts needed to be more specific. The consequences of the recipient being a connected party needed to be considered in particular.

3- The court's order may—

- a) require the person who entered into the transaction to repay money or restore property, or any part of it, to the company, and
- b) make such further provision as the court thinks fit.

4- The court shall not grant an application under this section unless it is satisfied that the company—

- a) was insolvent at the time of the transaction, or
- b) became insolvent as a result of it.

Considering the relevant issue and the statutory provisions of Section 238, the liquidator may take action in relation to the sale of the marble cutting machines to Rita Perkins. The transaction involved selling the machines at a significantly lower price (GBP 10,000) compared to their original value (GBP 25,000) within a year, indicating a potential undervalue.

To succeed in the action, the liquidator would need to demonstrate the following:

- a) The Company was insolvent at the time of the transaction or became insolvent as a result of it.
- b) The transaction resulted in the Company receiving less value than the value of the consideration provided (i.e., an undervalue transaction).

If the liquidator can establish these elements, they may apply to the court for an order under Section 238 of the IA 1986. The court may then order Rita Perkins to repay the undervalue amount (i.e., the difference between GBP 25,000 and GBP 10,000) or restore the marble cutting machines to the Company.

The objective of such an action is to restore the position to what it would have been if the undervalue transaction had not taken place, ensuring that the assets of the Company are maximized for the benefit of all the creditors in the liquidation process.]

#### **Question 4.3 [maximum 4 marks]**

The payments to Hard and Fast Ltd.

[Answer:

Based on the facts of the case, the relevant issues and statutory provisions to consider regarding the payments made to Hard and Fast Ltd are as follows:

1. Relevant Issue: The Company made payments totaling GBP 11,000 to Hard and Fast Ltd in response to their demand for immediate payment of all sums owing and insistence on cash on delivery for further supplies.
2. Statutory Provisions: The relevant provisions to consider are Sections 239 and 240 of the Insolvency Act 1986 (IA 1986), which deal with preferences and how they may be

**Commented [WPA15]:** 0/4 unfortunately s 239 cannot apply here as the payment was made after the commencement of the winding up not before it. The only available provision is s 127

challenged.

Section 239 of the IA 1986 states the following:

- 1) This section applies where a company (in this section referred to as "the company") is influenced in deciding to make a gift to a person, or to confer a benefit on a person, by—

(a) desire to produce in relation to that person the effect mentioned in subsection (2), or  
(b) the fact that the effect mentioned in subsection (2) produced by the gift or the conferment of the benefit on that person is one of two or more effects that the company desires to produce and which taken together are such that they fall within that subsection.

- 2) The effect referred to in subsection (1) is the putting of that person into a position which, in the event of the company's going into insolvent liquidation, will be better than the position he would have been in if that gift or that benefit had not been made.

Section 240 of the IA 1986 states the following:

- 1) A gift of the company's property made, or a transaction defrauding creditors of the company entered into, by the company, is voidable at the instance of the liquidator (or, if there is more than one, of any of them) if it is made or entered into within the relevant period.
- 2) For this purpose "the relevant period" means the period of 2 years ending with the onset of the winding-up.

Considering the relevant issues and the statutory provisions of Sections 239 and 240, the liquidator may take action in relation to the payments made to Hard and Fast Ltd. The payments may be challenged as preferences under Section 239 of the IA 1986 if the Company was influenced to make the payments due to a desire to put Hard and Fast Ltd in a better position than they would have been in if the payments had not been made. This desire may be evident from Hard and Fast Ltd's demand for immediate payment and insistence on cash on delivery terms, which could indicate that the supplier exerted pressure on the Company to make the payments.

If the liquidator can establish that the payments were preferences, they may be voidable at the instance of the liquidator under Section 240 of the IA 1986. The relevant period for voidable transactions is the two years ending with the onset of the winding-up, which includes the period in which the payments were made (i.e., a month before the winding-up order).

If the payments are declared voidable, Hard and Fast Ltd may be required to repay the sums received, and these amounts would become part of the general pool of assets available for distribution among all the creditors in the liquidation process.]

**\* End of Assessment \***