



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).**
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- 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]: 37/50 = 74% a generally full answer which might have benefitted in places with more specific identification of the issues. Still a good effort.

Commented [WPA2]: 9/10

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 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.

QUESTION 2 (direct questions) [10 marks]

Commented [WPA4]: 9/10

Question 2.1 [maximum 5 marks]

Who may bring an action under: (i) section 423 of the Insolvency Act 1986; (ii) section 6 of the Company Directors Disqualification Act 1986; and (iii) section 246ZB of the Insolvency Act 1986?

Commented [WPA5]: 4/5 there is a deal of information included which is not asked for by the question. Under ii the OR on the instructions of the SoS may also bring an action and under iii only an administrator not a liquidator may bring the action.

Section 423 of the Insolvency Act 1986 (the Act), enables the liquidator, administrator or office holder (in case the company is being wound up or under administration) or any person who is "a victim" of the transaction "entered into at an undervalue" which includes the creditors to bring an action.

An undervalued transaction is defined under section 238 of the Act to be a transaction entered into with a person

- a. "on terms that provide for the company to receive no consideration" or "for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company" and*
- b. where the transaction was entered into for the purpose of putting the assets beyond the reach of creditors or any victim of the transaction to bring a claim against the company or an individual or the individual who approved the transaction or "otherwise prejudice the interests of such a person in relation to the claim which he is making or may make".*

Should such a transaction occur, section 423 (2) allows for the High Court to among others, to make an order to restore the company to the position it would have been if the transaction had not taken place.

On the other hand, Section 6 of the Company Directors Disqualification Act 1986 (the CDDA) allows for the Secretary of State to apply to the court and seek disqualification of directors and deal with findings of unfitness against directors of insolvent companies. It is noted that the court will only make a disqualification order if the requirements under section 6 or 9A of the CDDA are met.

On an application for disqualification, the Secretary of State must show that the person against whom the order is sought was or is a director of the insolvent company and his or her actions or inactions makes him unqualified to be involved in the management of a company.

Aside from the above, the court can on its motion and at its discretion make a disqualification order against a director of an insolvent company if found guilty of a criminal offence linked to managing, forming, and promoting a company among others in Great Britain and elsewhere or found guilty of the offence of fraudulent trading or fraud in respect to a company or of any breach of duty among others.

Once a disqualification order has been made by the court against a director of an insolvent company, the said person cannot among other things, act as an insolvency practitioner as or be appointed a director of a company unless with the permission of the court. One can be disqualified for a minimum period of 2 years or for the maximum of 15 years.

Under section 246ZB of the Insolvency Act 1986, an action for misfeasance and breach of fiduciary duty can be brought by the liquidator or administrator, not a creditor, of

the insolvent company. The action when commenced is initiated for the benefit of all creditors.

This section makes directors (past and present) of insolvent companies legally responsible for wrongful trading in the company. This thus makes directors responsible for some of the debts and liabilities of the insolvent company.

For a court to make a director responsible for the debts of the insolvent company, the applicant must satisfy the following;

- a. That the company is insolvent and going through liquidation or administration*
- b. That before the winding up or administration of the company, the person (director) knew or ought to have known that the company would go through insolvent liquidation or insolvent administration.*
- c. That at the time the fact under point (b) arose, the person in question was a director of the insolvent company.*

It must be added that if the court finds out that the person in question could not have known of the fact in point (b) above, then the applicant would not have met the requirements for the order of the court.

Question 2.2 [maximum 5 marks]

Commented [WPA6]: 5/5 again much information is included even though only the final passages actually address the question.

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.

Generally, Part A1 of the Insolvency Act 1986 (Act) set out "provisions that enables an eligible company, in certain circumstances, to obtain a moratorium, giving it various protections from creditors".

A Part A1 Moratorium is a debtor-in-possession process which allows directors of the company to remain in control of the company during the process. Though the directors continue to be in control, the moratorium period is overseen by a monitor. Essentially, what the moratorium does is afford the company some breathing space from enforcement actions by some creditors whilst the company organizes its affairs and implements a rescue plan. The moratorium allows a company to take a "payment holiday" from pre-moratorium debts. It is noted that this does not serve as a bar on creditor actions for debts accrued during the moratorium.

A company or the directors of a company will be able to get an initial 20 business days moratorium period. The initial period can be extended for a further 20 business days subject to the company or the directors filing the relevant documents in court or with the consent of creditors, the period may be extended to one year. In sum moratorium for up to 40 business days can be obtained without a requirement for a court hearing or creditor consent. A moratorium period commences when the conditions under Part A7 are complied with and a monitor is appointed.

Part A18 of Chapter 4 of the Act explains the main effect of the moratorium on a company to be the limits on the “enforcement or payment of” pre-moratorium debts during the moratorium. “Pre-moratorium debts for which a company has a payment holiday during moratorium debts that have fallen due before the moratorium or that fall due during the moratorium”.

The limitation placed therefore implies that though some debts accrued before the commencement of the moratorium, the company is temporarily relieved of its payment obligations of those debts. Thus, “payment holiday” is granted to debts incurred before the moratorium and debts which became due because of the pre-moratorium debts. There are however exceptions.

These exceptions arise because one of the conditions for a moratorium is that the company should be able to pay its debts as they fall due. Thus, during the moratorium period, the company should be in a position to pay debts that are incurred. Therefore, though a company will be under the moratorium process, the following debts do not fall within the debts that the company may fail to honor its payment obligations. These payments which fall due during the moratorium process must be paid for the company to enjoy the benefits of the moratorium.

1. A debt which is not subject to or does not fall within the debts for which a company may defer payments are debts or other liabilities resulting from a contract for the provision of financial services. In *Re Corbin & King Holding Ltd.* the court resolved that financial services include “money owed under a guarantee to a bank”. In the referenced case, though the guarantee debt arose under a financial contract it was not subject to any payment holiday under the moratorium. The company was thus required to pay such a debt.
2. A company is not precluded from paying debts arising from employment contracts.
3. In addition to the above, payments made in connection with agreements for the supply of goods or services during the moratorium
4. Rent concerning any period “during the moratorium” and
5. “the monitor’s remuneration or expenses.”

It is noted that should a monitor form the opinion that the company is unable to pay such debts then the monitor must take steps to bring the moratorium process to an end.

Unlike moratorium debts, not all outstanding pre-moratorium debts not subject to a payment holiday have priority in a subsequent insolvency proceeding commenced within 12 weeks of the end of the moratorium.

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

Commented [WPA7]: 11/15

Question 3.1 [maximum 6 marks]

Commented [WPA8]: 6/6 a very strong answer. Perhaps mention of the hardship defence under s 233B would also be worth considering.

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

The essence of an administration procedure is the chance to take steps to survive. During administration, it is essential for the administrator to continue or secure essential supplies and services to keep the company afloat. Hence, the appointment of an administrator does not automatically terminate a company's contracts which are yet to be fully or partially performed.

In this regard, section 233 bars a supplier of "essential supplies" from demanding payment of outstanding payments to be made before the continuation of such supplies. The contracts for the supply of goods and services form part of the types of contracts anticipated during the period of administration. The said section deals with supplies of gas, water, electricity etc.

Section 233 (3) defines "supplies" to include "a supply of goods or services mentioned in subsection 3A by a person who carries a business which includes giving such supplies", where the supply is to enable or facilitate "anything to be done by electronic means".

Section 233A explains the goods and services referenced under section 233 (3) (f) to be "point of sales terminals"; computer hardware and software"; information, advice and technical assistance in connection with the use of information technology'; data storage and processing; website hosting".

Also, this section stipulates that a supplier cannot terminate the contract simply because the company has entered into administration. In this regard, the supplier cannot make changes to the payment terms or require the payment of higher fees for the supply simply because the company has entered into administration.

Per section 233A, though there are restrictions in place, the supplier can require the administrator to provide a personal guarantee to repay for the services should the company fail to pay. As a result, if the company is unable to pay for the cost of the goods or suppliers, the administrator will be held personally liable for the debts of the company.

Section 233B, offers protection of supplies of goods and services. This section dictates that the failure of the company to honor its payment obligations should not be a condition for refusal to continue the supply of the "essential supplies". This section further enforces restrictions on termination of such contracts or doing "any other thing" simply because the company has entered into administration.

Unlike section 233 A, section 233B, does not give the supplier the option to require a personal guarantee from the administrator. However, if the administrator or a court on an application consents to the termination of such a contract, a contract of such a nature cannot be terminated.

Though there are restrictions in place to prohibit suppliers of goods and services from terminating such services simply because the company has entered into

administration or to demand more payment or payment of accrued debts before the provision of such services, generally, during the period of administration, an administrator "who wishes to continue to operate the business of the company in administration" cannot "require suppliers of goods and services to continue to supply those goods and services" under pre-existing contracts.

The combined effect of the above section is that suppliers of goods and services are legally obliged to continue to supply during the administration period of the company. This is because the administration is a temporary period where the administrator seeks to restructure the business and repay the debts of the company. The conditions under which such a contract may be terminated during the period of administration are with the consent of the administrator or by an order of the court.

In any event, should the administration be converted to a liquidation, the debts resulting from the provision of the goods and services would take precedence in the order of payment.

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?

Generally, in a liquidation process, the order of priority in making payments to creditors is as follows;

- a. Secured creditors: these creditors are paid first from the sale of the secured assets. These creditors are those creditors who have secured their debt against some assets of the company. These creditors have priority rights to receive payment from the proceeds of the assets of the company.*
- b. Preferential creditors: these creditors though unsecured, are given priority over unsecured creditors. These types of creditors include employees of the company. These creditors are entitled to receive a fixed amount of their debts before payment to other unsecured creditors.*
- c. Unsecured creditors: these creditors are those creditors who do not have a secured interest in any of the assets of the company. These include suppliers, contractors and those who have provided goods and or services to the company but have not been paid for such services. An unsecured creditor will only receive payment after secured and preferential creditors have been paid in full.*
- d. Shareholders: shareholders are the last to receive payment from the liquidation process. This is because as owners, they do not have a priority right to receive payment during the liquidation process. The shareholders receive payments after all creditors have been paid in full.*

Commented [WPA9]: 5/9 although good on the moratorium point the general explanation of the priority of payments lacks detail eg liquidator's expenses/preferential debts/ s 176A prescribed part.

Though the above outlines the priority of payments during liquidation, should a company be subjected to a Part A1 moratorium, the order in which payments are made during liquidation may differ from that which subsisted before the moratorium.

During a Part A1 moratorium, a company is given the breathing space to sort out its affairs. Thus, during this period, the company is given a "holiday" from honouring its repayment obligations for debts which occurred pre-moratorium moratorium.

The whole moratorium period allows the company to sort out its affairs and also, offers a break on the payment of debts accrued before the moratorium. Basically, the company is given a "payment holiday" during the moratorium period. As a debtor in possession procedure, the directors continue to control the affairs of the company but under the supervision of a monitor. The moratorium process, however, demands that the company should be in a position to pay its debts as and when they fall due during the moratorium period. It is noted that during the moratorium period, creditors are not barred from enforcing actions against the company for debts which accrued during the moratorium period. The limitations imposed relate to payments or debts accruing before the moratorium.

Should the case be that after the moratorium, the company is not rescued or that the company is found to be insolvent and enters into liquidation within 12 weeks of the end of the moratorium, the order of priority in the liquidation may change. This is because the debts which accrued before and during the moratorium which could not be enforced would take precedence or have priority in the payment order when the company is in liquidation.

Section 174 A of the Insolvency Act provides the debts accrued before and during moratorium as having priority as follows;

- a. "prescribed fees or expenses of the official receiver"*
- b. remuneration and expenses of the monitor,*
- c. goods and services delivered during the moratorium period,*
- d. rent accrued during the moratorium period,*
- e. wages or salaries resulting from employment contracts entered "before and during the moratorium",*
- f. any redundancy payments accruing "before or during the moratorium" and*
- g. any debts arising before or during the moratorium that arose "under a contract or other instrument involving financial services" and is not "any pre-moratorium debt that fell due during the relevant period by reason of the operation of, or the exercise of rights under, an acceleration or early termination clause in a contract or other instrument involving financial services".*

In sum, the precedence of payments in a liquidation process is determined by whether a creditor is secured or not. However, where a company goes through a moratorium period and subsequently goes into liquidation, the payment order changes to include the debts accruing before and during the moratorium which creditors are barred from enforcing their right of payment. Though these debts are unsecured, they acquire a

superiority in the hierarchy of payment of debts when the company goes into liquidation.

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

Commented [WPA10]: 8/15

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 [WPA11]: 4/5 although s 245 is explained reasonably clearly its application to the facts appears to be slightly confused. It is difficult to understand how it does not apply if the company was unable to pay its debts at the time of the charge.

The floating charge in favour of Fretus Bank plc;

A floating charge, as the name suggests, is a charge which "floats" over some assets of the debtor until the occurrence of some events. Once the events occur, the charge settles on the assets for use by the person in whose favour the charge was created. It is important to note that until the charge settles or crystallizes, the debtor can deal with the assets without first obtaining the consent of the one in whose favour the charge was created.

Under section 245 (2) of the Insolvency Act, a floating charge created over the assets of a company "at a relevant time is invalid" unless it falls within the exceptions under section 245 (2) (a) to (c).

In reckoning the "relevant time", section 245 (3) states that, if the floating charge is created in favour of a person who is "connected with the company" the relevant time is "a time in the period of 2 years "before the "onset of the insolvency". An "onset of the insolvency" is defined under section 245 (5) as "the date of the commencement of the winding up" if the company is going through liquidation and "the date of the presentation of the petition on which" the administration order was made if the company is going through administration.

Section 249 states that a person is "connected" with a company if the person is "a director or shadow director of the company or an associate of such a director or shadow director or he is an associate of the company."

Conversely, if a floating charge is created in favour of a person who is not "connected with the company", the "relevant time" is 12 months ending with the onset of insolvency. (see section 245 (3) (b)). In addition to this, it must be evident that the company was "unable to pay its debts within the meaning of section 123" of the Act or following the transaction under which the charge was created, the company was unable to pay its debts-section 245 (4) (a) and (b)).

Considering the law and the facts at hand, the main issue is whether or not the debenture created which includes the floating charge is invalid. Arising out of this main issue are these sub-issues;

- a. is the Bank a connected person within the meaning of the provisions of section 245?*
- b. was the floating charge created in favour of the Bank created at a time when the Company was unable to pay its debts or was the Company unable to pay its debts as a result of the after the transaction between the Company and the Bank?*

Determination of the issue (s)

The general position is, a floating charge created over the assets of a company is invalid if it is created in favour of a connected person, 2 years before insolvency. This can however be validated if the charge created complies with the exceptions under section 245 (2). In case the person in whose favour the charge is created is not connected, the floating charge is invalid if created 12 months before insolvency. Again, the charge so created can be validated if it meets the requirements under section 245 (2).

Thus, if it can be determined that the charge created falls within the exceptions, the charge created is not invalid simply because it was created 2 years or 12 months before the insolvency.

In addition to the exception under 245 (2), time is irrelevant (time is not considered) in the case where;

- a. the person is not connected to the company and*

- b. *at the time the charge was created the company was unable to pay its debts or the company became "unable to pay its debts" as a result of the transaction that created the charge over the assets.*

Considering the provisions of the Insolvency Act, the floating charge created is valid.

Firstly, considering sections 245 (2) and (3) and 249, I think that the Bank is not connected to the Company as contemplated under the provisions of the Act. In this regard, in reckoning the "relevant time", the period is 12 months before the commencement of the winding up of the Company. From the facts, the debenture (which includes the floating charge) was created in "favour of Fretus Bank plc in February 2022." The Company went into compulsory liquidation on 23rd December 2022. Again, the creditors of the Company commenced the liquidation by a petition order issued and obtained on 14th October 2022. The period between the creation of the floating charge and the commencement of the liquidation process is 8 months. The period of 8 months falls within the time contemplated under section 245 (3) (b).

It is inferred from the facts that the Company was unable to pay its debts at the time the floating charge was created and after the transaction was concluded between the parties. The inference is made by the fact that as of July 2022, the Company "continued to suffer cash flow problems."

Secondly, the charge created over the Company's assets does fall under the exceptions under sections 245 (2) (3) and (4). Also, in reckoning the relevant time for the charge, the Bank is not a connected person thus, the "relevant time" is 12 months before the onset of the insolvency. As already noted, the charge was created 8 months before the insolvency of the Company commenced.

As it has been determined that the Bank is not connected to the Company, the other matter to consider is if time is relevant under the circumstances.

Concerning section 245 (4), it can be inferred that at the time the charge was created, the Company was unable to pay its debts as prescribed under section 123.

From the facts, it is again inferred that the Company was unable to pay its debts before and after the commencement of the liquidation process. In my view, the "pressure" from the Bank to create the charge over the company's assets was a result of the Company's inability to pay its debts (loans) to the Bank as and when they fell due. In addition, I believe the creditors were able to show to the court that the Company was unable to pay its debts as they fell due hence the grant of their petition to wound up the Company.

In sum, but for the fact that the charge created finds itself within the exceptions provided under section 245, the same could have been determined to be invalid. Under these circumstances, the issue of "relevant time" is not primary as the transaction meets the requirements under 245 (4).

In answering whether the liquidator may take action in respect of the charge created in favour of the Bank, I am of the opinion that the charge so created was valid within the provisions of section 245 thus, the liquidator may not take steps to invalidate or avoid the floating charge created in favour of the Bank.

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

Section 238 of the Insolvency Act deals with "transactions at undervalue" or transactions for which preference was given. This section of the Act deals with companies going through administration or liquidation. For purposes of addressing the issues, I will emphasize the specific provisions on liquidation under section 238 and other related sections in the Act.

Section 238 (1) and (2) states that, where a company goes into liquidation and at "a relevant time...entered into a transaction with any person at an undervalue" or where preference was given, the liquidator "may apply to the court for an order" per the provisions of section 238. The relevant time is defined under section 240 to be; in case the person is connected to the company, 2 years "ending with the onset of the insolvency and in the case where the person is not connected, 6 months "ending with the onset of insolvency. In both cases, the time is at the time the petition for liquidation was made before the court (section 240 (a), (b) and (c)). However, if at the time the transaction was entered, the person was not connected with the company or preference was not given and it is shown that the company could not pay its debts or as a result of the transaction the company was unable to pay its debts then time will not be relevant for the transaction at an undervalue. see Section 240 (2). A person is said to be connected with the company if the person is "a director or shadow director of the company or an associate of such a director or shadow director or he is an associate of the company." See Section 249

Also, for the purposes of section 240 (1), "onset of insolvency" in case the company involved in the undervalued transaction is going through liquidation is defined under section 240 (3) to be "at any other time, the date of the commencement of the winding up."

Section 238 (3) adds that where an application has been brought by the liquidator, the court if it finds merit in the application, makes an order "restoring the position [of the company] to what it would have been if the company had not entered into the transaction.

Section 238 (4) describes an undervalue transaction to be;

- a. where "the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration" or*

Commented [WPA12]: 4/6 it is not clear how s 239 can apply to the facts. The application of s 238 needed to be more specific and reach a clearer conclusion. The answer does not explain clearly the consequences on the facts of Rita being a connected person.

- b. where the “company enters into a transaction with that person for a consideration the value of which, in money or money’s worth, is significantly less than the value, in money or money’s worth, of the consideration provided by the company”.

Where a liquidator determines that the transaction falls within any of the scenarios of section 238 (4), the liquidator can apply to the court and if the court finds that there is merit in the application, the court may, among other orders, put the company back in the position it was before the company entered the transaction with the person.

Section 238 allows for the court to consider an application brought by a liquidator in light of subsection 5. To obtain a favourable order from the court, the liquidator must, show that the transaction was not entered in “good faith and for the purpose of carrying on its business” and also that “at the time” the transaction was entered, there were no “reasonable grounds for believing that the transaction would benefit the company.”

Section 239 is read together with section 238. Section 239 (4) states that preference is said to be given to a person under an undervalue transaction where;

- a. The person given the preference is one of the company’s “creditors or a surety or guarantor for any of the company’s debts or other liabilities” and
- b. The company “does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.”

Considering the provisions cited above, the main issue is whether the sale of the marble cutting machines to Rita Perkins, a director, can be set aside by the court per the provisions under the Act.

I concede that arising out of the above issue are some sub-issues that will need to be considered to advise the liquidator on the matter.

The first point to make is that the Company has gone into liquidation. Before going into liquidation, it sold its marble cutting machines to Rita Perkins, a director of the Company. In determining the main issue, we first have to determine if the transaction was done within the “relevant time.” To answer this, we must also determine whether Rita Perkins is a “connected” person within the provisions of the cited sections.

From the facts, Rita Perkins is a director of the Company. In addition, the Company went into liquidation on 23rd December 2023. From the facts and the cited sections, Rita Perkins is a connected person under the provisions of section 249. The relevant time for a connected person is 2 years after insolvency which in this case is 23rd December 2022.

The next issue for consideration is whether the sale transaction entered into is an undervalued one or that Rita Perkins was given some preference under the sale.

Section 239(4) (a) and (b) requires that one of two situations must occur before a transaction can be termed as undervalued.

From the facts, the marble machines we bought for "GBP 25,000 a year before" the Company went into liquidation (in 2021). The Company in July 2022, sold the same machines to Rita Perkins at GBP10,000.

Considering section 239 (a) and (b), it is clear that the Company did not give the machines to Rita Perkins for free nor was it a gift. However, the amount paid by Rita Perkins for the machines was less than the price at which the machines were bought a year before the liquidation. I am of the opinion that the price at which the machines were bought was "significantly less than the value." One might say that the machines are at best over a year old hence their value has reduced. I do agree in part should such an argument be made, however, and subject to the provision of a report on an assessment of the two machines, I infer that the machines would not have deteriorated to such a point that they are worth less than half the price at which it was bought just a year before the liquidation.

For the above reason, I think the machines were undervalued under the provision of section 238 (4).

In any case, assuming the machines are not undervalued, can it be said that Rita Perkins was given preference under section 239 (4) of the Act? Per this section, the Company can be said to have given preference to the director if subsection (a) and (b) are met. I find that under the circumstances, the provisions of section 238 rather applies.

From the above facts and law, I find that the transaction entered into between the Company and the Director is an undervalued transaction. However, from the facts, it is indicated that "In July 2022, as the Company continued to suffer cash flow problems, the directors approved the sale of the two (2) marble cutting machines to Rita Perkins (a director) for 10,000 in cash." It can therefore be presumed that the sale and purchase of the machines took place in July 2022, about 5 months before the Company went into liquidation in December 2022.

I have already concluded that Rita Perkins is connected with the Company. In this regard, the sale transaction does not fall within the exceptions provided in subsection 2 (a) and (b) as it can be shown that Rita Perkins is connected to the Company. With regard to section 240 of the Act, the Company entered into the sale transaction with Rita Perkins before commencement of the liquidation. The facts indicate that the undervalued transaction took place before and not after the Company went into liquidation. Time will not be considered under the circumstances if it was found that at the time the Company sold the machines, the Company was unable to pay its debts or that the Company became unable to pay its debts as a result of the undervalued transaction and Rita Perkins is not connected with the company.

From above, Rita Perkins is a connected person but the transaction for the sale of the machines did not occur after the commencement of the liquidation.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

* End of Assessment *

Commented [WPA13]: 0/4 no answer - needed to consider and apply s 127.