



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**

[Type here]

202223-786.assessment3B

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.

[Type here]

202223-786.assessment3B

Commented [WPA1]: 38/50 = 76% a good effort which would have been even better with clearer identification of issues and more detailed explanation / application of the law relevant to those issues.

Commented [WPA2]: 7/10

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.*

[Type here]

20223-786.assessment3B

(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

[Type here]

202223-786.assessment3B

Commented [WPA3]: B is correct

(c) 10

(d) 12

Commented [WPA4]: C is correct

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.

Commented [WPA5]: D is correct

QUESTION 2 (direct questions) [10 marks]

Commented [WPA6]: 9/10

Question 2.1 [maximum 5 marks]

Commented [WPA7]: 4/5 the OR on the instructions of the Sec of State may also bring an action under s 6 and under s 246ZB only an administrator may bring an action - a liquidator's cause of action for WT is under s 214.

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?

[Type here]

202223-786.assessment3B

(i) Section 423 of the Insolvency Act 1986 allows for the avoidance of transactions which were designed to defraud creditors. It relates to transaction entered into at an undervalue; and a person enters into such transaction.

The following may bring application under the section:

- a. Where the company is being wound up or is in administration:
 - The official receiver
 - The liquidator
 - The administrator and
 - The victim of the transaction such as a creditor (this with leave of the Court).
- b. Where a victim is bound by a CVA
 - Supervisor of the CVA or
 - Any victim of the transaction (whether bound by CVA or not).
- c. In any other case
 - Victim of the transaction.

(ii) Section 6 of the Company Directors Disqualification Act 1986 deals with findings of unfitness against directors of insolvent companies. The main purpose of the disqualification regime is to protect the public and to act as a deterrent to wrongdoing directors so as to assist in raising the standards of behaviour of directors.

Where a company has entered into formal insolvency proceedings, the office holders such as Official Receiver, Liquidators, Receiver or Administrators must submit to the Secretary of State for Business and Trade a report on the conduct of all directors who were in the office during the last 3 years of the company's trading.

The office holder should make the necessary returns within 3 months of the relevant date. If it appears to the Secretary of State, then it is expedient in the public interest that a disqualification order must be set. The application should be made to the court by the Secretary of State. To save the court costs and time, it is possible for the Secretary of State to accept a disqualification undertaking.

This procedure has the same consequences as though a disqualification order has been moved by the court.

Disqualification undertaking by any person that for a period of time (specified in the undertaking document) he/she will not be a director etc, of any company and will not act as insolvency practitioner.

(iii) Section 246ZB of the Insolvency Act 1986 makes directors of insolvent companies liable for wrongful trading, and thereby making them, in certain circumstances, liable for some of the debts and liabilities of the company.

Wrongful trading is aimed at ensuring that when directors become aware that an insolvent liquidation (or administration) is in the prospects, they do everything possible to minimize the potential losses to the company's creditor. The action under this section can only be brought by the liquidator, not the creditor or contributor.

[Type here]

20223-786.assessment3B

ype your answer here]

Question 2.2 [maximum 5 marks]

Commented [WPA8]: 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 debts which do not form part of the payment holiday (or pre-moratorium debts) when a company is subject to a moratorium. These debts are as stated in Section A183 of the Insolvency Act, 1986 as follows:

- The monitor's remuneration or expenses
- Goods or services supplied during the moratorium
- Rent in respect of a period during the moratorium
- Wages or Salary arising under a contract of employment
- Redundancy payments or
- Debts or other liabilities arising under a contract or other instruments involving financial services.

Type your answer here]

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

Commented [WPA9]: 14/15

Question 3.1 [maximum 6 marks]

Commented [WPA10]: 6/6 a good answer even though it contains a number of things not asked for by the question

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?

[Administration is a temporary procedure designed to give the company the benefit of an experienced external manager, the administrator, and also some time free from creditor's harassment during the administration may be able to rescue the company or business or at least improve matters for creditors relative to their likely position in an immediate winding up.

An administrator has a general power to do anything necessary or expedient for the management of the affairs, business and property of the company (para 50(1) of the Schedule B1).

Administrator has powers to trade and manage the business as an administrator receiver (Schedule 1, 1A86).

Administrator has the power in Section 233 to require supplies from a utility company.

As an agent of the company, the administrator can bring the company to contracts with third parties.

Under paragraph 59 of Schedule B1 of the Act, the administrator has the power to do any necessary or expedient for the management of the affairs, business and property of the Company.

[Type here]

20223-786.assessment3B

In exercising his functions under Schedule B1 of the Act, the administrator acts as the company's Agent. A company in administration or an officer of a company in administration may not exercise a management power without the consent of the administrator.

The appointment of an administrator does not automatically terminate a company's executory contracts. Terms in contracts of supply which provide for automatic termination have historically been generally effective but have now become subject to increasing statutory exceptions which largely make such automatic termination (or ipso facto) clauses void .

An administrator will frequently need to obtain or retain certain essential supplies. Section 233 of the Act applies to a supply of gas, electricity, water and communications services. The definition of communications services includes the supply of goods and services such as point of sale terminals, computer hardware and software, information, advice, and technical assistance, data storage and processing and website hosting.

Suppliers are not permitted to require payment of outstanding debts in order to secure a new or continued supply to the company in administration. However, section 233 of the Act permits a supplier to stipulate that the administrator must personally guarantee payment of charges in respect of the supply.

In addition, under section 233A a supplier of such services is generally unable to rely upon an "insolvency-related term" in a contract of supply which would otherwise entitle the supplier to terminate the supply, alter the terms of the supply or compel higher payments for continued supply.

The 2020 Act has now expanded these protections for insolvent company by adding section 233B to the Act. Section 233B prohibits clauses which allow the supplier of goods or services to terminate or "do any other thing" in relation to that contract if the company enters a formal insolvency procedure.

A provision of a contract for the supply of goods or services to the company is of no effect when the company enters an insolvency procedure, if, under that provision the contract would terminate or the supplier would be entitled to terminate the contract or to "do any other thing" upon the company entering an insolvency procedure. Section 233B therefore prevents suppliers from terminating a supply upon the company's insolvency but also prevent suppliers from making it a condition of continued supply that pre-insolvency arrears are paid and from making other changes to the contract such as increasing prices. Under section 233B, a supplier cannot insist on a personal guarantee from the administrator (as it can under section 233).

Under section 233B, a contract may still be terminated by a supplier where the company or insolvency office holder consents or, on application to the court, the court is satisfied that the continuation of the contract would cause the supplier hardship, and grants permission for termination.

Section 233B complements the existing ss 233 and 233A of the Act which, in similar terms, prohibit termination by utility, communications and IT suppliers. Section 233B opens up the restriction on termination to all other suppliers (with a limited number of exceptions, for example, insurers; banks; electronic money institutions; recognised investment exchanges

[Type here]

202223-786.assessment3B

and clearing houses; securitisation companies; and overseas companies with corresponding functions

Type your answer here]

Question 3.2 [maximum 9 marks]

The order of priority of payment in a liquidation is as follows:

(i) Expenses of winding up, including the liquidator's remuneration (Section 115)

Under section 115 of the Act (and rules 6.42 and 7.108 of the Rules) a number of expenses are given priority over the company's preferential creditors, any holders of floating charges and the company's unsecured creditor. The following are the main expenses which are payable in priority to those creditors and are payable in the following order of priority.

Expenses that are properly incurred by the liquidator in preserving, realizing or getting in any of the assets of the company (including the conduct of any legal proceedings);

- a) The cost of any security provided by the liquidator;
- b) Any amount payable to a person to assist in the preparation of a statement of affairs or accounts;
- c) Any necessary disbursements by the liquidator in the course of the winding up (including, for example, any expenses incurred by members of the liquidation committee);
- d) The remuneration of any person who has been employed by the liquidator to perform any services for the company;
- e) The remuneration of the liquidator (which is subject to effectively the same rules as those which apply to administrators, specifically including the fees estimate regime where a time cost basis for the liquidator's fees is adopted);
- f) The amount of any corporation tax on chargeable gains accruing on the realization of any asset of the company; and
- g) Any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up.

It is notable that the liquidator's own remuneration lies behind number of categories of expenses

(ii) Preferential creditors, as defined in Sections 386, 387 and Schedule 6: Section 175

Once the expenses of the liquidation have been paid in full, the assets of the company are then used to pay preferential creditors (before any payment may be made to holders of floating charges or to unsecured creditors). The category of preferential creditor largely comprises

[Type here]

20223-786.assessment3B

Commented [WPA11]: 8/9 another strong and full answer. Some extraneous material again included and there is no explanation as to how creditors with fixed security are dealt with.

limited claims of employees and some taxation liabilities but there are some other types of liability. It has always been a characteristic of the statutory preferential debts' regime that employees' remuneration (and later contributions to their pension schemes) has been given some priority. There are significant limits on such claims. In most insolvencies, the statutory protection afforded to employees under the Employment Rights Act 1996 provides a much more extensive protection for employees.

There are two classes of preferential debts, ordinary and secondary. Ordinary preferential debts are paid before secondary preferential debts. Preferential debts, in their respective classes, rank equally amongst themselves and so abate in equal proportion if the company's assets are insufficient to pay them all.

The following debts are listed as preferential under Schedule 6 of the Act:

- (1) any sum owed on account on an employee's contribution to an occupational pension scheme, being contributions deducted from earnings of the company's employees paid in the period of four months prior to the commencement of the winding up;
- (2) any sum owed by the company on account of an employer's contribution to an occupational pension scheme in the period of 12 months before the relevant date;
- (3) remuneration owed by the company to a person who is or has been an employee of the debtor and is payable in respect of the whole or any part of the period of four months prior to the commencement of the winding up to a maximum total figure which is currently £800 (a figure that has remained unchanged since 1976);
- (4) any amounts owed by the company by way of accrued holiday remuneration in respect of any period of employment before the winding up;
Any remuneration payable by the company to a person in respect of a period of holiday or absence from work through sickness or other good cause, is deemed to be wages.
- (5) claims for monies advanced to pay wages or holiday remuneration will rank as preferential. This provision is designed to protect lenders where their money has been used to pay wages or holiday remuneration of the employees of their customer and allows them to take over the benefit which the employees would have had, had the lender not made the monies available for the specific purpose of seeing them paid.
- (6) levies on the production of coal and steel referred to in article 49 and article 50 of the European Coal and Steel Community Treaty (as there are very few independent producers of coal and steel remaining in the UK such preferential claims are extremely rare);
- (7) claims for so much of any amount which is ordered to be paid by the company under the Reserve Forces (Safeguard of Employment) Act 1985 and is so ordered in respect of a default made by the company in the discharge of its obligations under that Act (again such claims are extremely rare).

In recent years a number of additional preferential debts have been added to the regime which relate to payments which may have been made to those with deposits, where the financial institution holding those deposits has become insolvent and compensation payments have been made by the Financial Services Compensation Scheme to those depositors. In such cases, the following are now preferential debts:

- (8) 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 to the person or persons to whom the amount is owed.

[Type here]

20223-786.assessment3B

(9) 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 Financial Services Compensation Scheme to that person or those persons.

(10) 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 authorised 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.

In addition to the above, the UK has reintroduced a form of Crown preference for certain debts owed to the taxation authority (Her Majesty's Revenue and Customs):

(11) PAYE income tax deductions, national insurance deductions, VAT payments, Construction

Industry Scheme deductions and student loan repayments.

The debts listed above at points (9), (10) and (11) are defined as secondary preferential debts under section 386 of the Act and are paid after the "ordinary" preferential debts which includes all the other preferential debts explained above .

(iii) Floating charge holder and the "prescribed part"

After preferential creditors have been paid, the next creditor to be paid will be any floating charge holder. There may be more than one floating charge holder and if that is the case, priority between them usually turns upon which floating charge was created first.

Before any payment can be made to any floating charge holder, the liquidator must first consider the application of section 176A of the Act. Section 176A applies to a company with a floating charge created on or after 15 September 2003 and the company has gone into liquidation

The liquidator is under a duty to make a "prescribed part" of the company's net property available for the satisfaction of unsecured debts and must not distribute any of this prescribed part to a floating charge holder except insofar as it is in excess of the amount required to satisfy all the unsecured debts. For this purpose, "net property" is the amount of the company's property which otherwise would be available for the satisfaction of debts of floating charge holders. It is thus calculated after the liquidation expenses and preferential debts have been paid.

Where the company's net property does not exceed GBP 10,000, the prescribed part is 50% of that property. However, in such circumstances, where the property is less than the "prescribed minimum" of GBP 10,000 and the liquidator thinks that making a distribution to unsecured creditors would be disproportionate to the benefits, then the duty to make the distribution of the prescribed part does not apply.

Where the company's net property exceeds GBP 10,000, the prescribed part is the sum of 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 amount of the prescribed part of GBP 800,000.

A floating charge holder (or indeed any secured creditor), who may have an outstanding unsecured balance owing to it, is not permitted to participate in the distribution of the prescribed part.²⁶

[Type here]

20223-786.assessment3B

(iv) Unsecured creditors

Creditors with no security, often ordinary trade creditors, are paid out last in the statutory order. Frequently, once the expenses of the liquidation have been paid and distributions have been made to secured and preferential creditors, there is little, or nothing left to pay a dividend to unsecured creditors.

(v) Shareholders

If there are sufficient funds to pay all the creditors (and interest on their debts) any surplus is distributed amongst the shareholders according to the company's constitution, which will normally permit a distribution pro rata the shareholders' respective shareholding.

3.2b. How would the 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 2020 Act introduced the new Moratorium by way of a new Part A 1 to the Act. This Moratorium is a standalone procedure and not linked to any other procedure. The Moratorium is a debtor-in-possession procedure whereby the directors remain in, control of the company, subject to the supervision of a monitor. The intention behind entering the Moratorium is to rescue the company as a going concern.

The Moratorium provides a stay on actions in relation to debts incurred prior to the Moratorium only. There are restrictions on the company paying most of its pre-Moratorium debts, the so-called "payment holiday".

Prior to the commencement of the Moratorium, the monitor has to state that the company is an eligible company and that, in his or her view, it is likely that a Moratorium for the company would result in the rescue of the company as a going concern.

The Moratorium does not prevent enforcement of creditor actions in relation to debts incurred during the Moratorium but does impose restrictions on the enforcement or payment of the debts which are pre- moratorium debts for which a company has a payment holiday during the moratorium.

There is a stay on enforcement of pre-Moratorium debts (that is, debts falling due before the Moratorium, and which fall due during the Moratorium by reason of a pre-Moratorium obligation) except in so far as they consist of amounts payable in respect of:

- (a) the monitor's remuneration or expenses;
- (b) goods or services supplied during the Moratorium;
- (c) rent in respect of a period during the Moratorium;
- (d) wages or salary arising under a contract of employment;
- (e) redundancy payments; or
- (f) debts or other liabilities arising under a contract or other instrument involving "financial services" which term is somewhat inexactly defined as including a contract consisting of lending, financial leasing or providing guarantees.

[Type here]

20223-786.assessment3B

During the Moratorium, the company cannot generally enter liquidation ; no landlord can exercise a right of forfeiture, generally security rights cannot be enforced and again, generally no legal process may be instituted or continued against the company.

Floating charges will not crystallize during the Moratorium and the directors may continue to run the company in the ordinary course of business with any major decisions being subject to the consent of the monitor or the court.

Section 174A provides that certain unpaid pre-Moratorium or Moratorium debts (the debts which are not part of the payment holidays such as debts owed to employees or "financial services" debts, are paid in the subsequent liquidation, in priority to even the liquidator's fees and expenses. Section 174A therefore affords certain unsecured debts a form of "super priority" in a subsequent liquidation

[Type your answer here]

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

Commented [WPA12]: 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:

[Type here]

20223-786.assessment3B

Question 4.1 [maximum 5 marks]

The floating charge in favour of Fretus Bank plc;

The liquidator may take action against Marble Q Limited, the company under Section 239 of the Act.

The underlying purpose of Section 239 of the Act is to prevent a company shortly before entering a formal insolvency procedure from placing one of its creditors in a better position than others. This is what the company did to Fretus Bank Plc., by granted a debenture while in order to prevent it from demanding payment of the company's debt while the bank applied pressure.

The application likely to succeed because of the following:

- (a) The company, Fretus Bank, has been preferred, at the time of the transaction, a creditor of the company.
- (b) Something was done, or suffered to be done, by the company which had the effect of putting that company in a better position, the event of the company going into insolvent liquidation, than the position he or she would have been in if that thing had not been done (that is, that the company has been preferred).
- (c) The company was, in giving the preference, influenced by a desire to produce the effect to in (b) above (the desire to prefer) in relation to the person preferred; and
- (d) The preference was given at a relevant time.

This could be corroborated with:

In MC Bacon it was contended by the liquidator that the granting of a debenture in favour of the company's bank to secure past indebtedness was a preference. Millet J found that, where the company was entirely dependent upon bank support for continued trading, such that if the debenture were not granted the bank would withdraw its support, and where, if the bank withdrew its support, the company would be forced into immediate liquidation, the granting of the debenture was motivated, not by a desire to prefer the bank, but by the desire to avoid the calling in of the overdraft and the continuation of trading by the company.

The liquidator may also take action against the company under S245 of the Act which applies only to floating charge. This applies where a company in liquidation and the provision is aimed at preventing pre-existing unsecured creditor obtained the security of a floating charge shortly before a company enters a formal insolvency procedure.

In this case, Marble Q Limited granted a debenture in favour of Fretus Bank Plc, a creditor of the company and within the relevant time within the period of 12

Commented [WPA13]: 3/5 - the preference explanation appears contradictory as the effect of MC Bacon is that there is no desire if the debenture is executed due to commercial pressure as here. Section 245 is the only realistic option here and more explanation / application of s 245 would have been helpful.

[Type here]

20223-786.assessment3B

month prior to the onset of insolvency and at the time of the creditor of the charge the company was unable to pay its debts in consequence of the transaction.

[Type your answer here]

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

[The Sale of the Marble Cutting Machines

Liquidator may take action under Section 238 because the transaction was at an undervalue. The Act permits such transaction, Sale of two (2) Marble Cutting Machines which was brought in 2021 at GBP25,000 for GBP10,000 in July 2022 which was shortly before the company entered formal insolvency. There is a presumption that the company was insolvent of the time of transaction.

The transaction did take place within 3 months to the commencement of the liquidation which falls into a 'relevant time' which is in the period of two years prior to the commencement of the liquidation.

It is a prerequisite of liability under S238 that, at the time the transaction was entered into, the company was unable to pay its debts as they fell due within the meaning of Section 123. The overriding power of the court, if it concludes that there has been a transaction at an undervalue, is to make an order restoring the position to what it would have been if the transaction not entered.

There also may be an action against the company under S239 with a presumption that the company was influenced by a desire to prefer the connected person (director of the company).

The liquidator may also take action against the company under Section 423 of the Act; transaction defrauding creditors.

The transaction qualified for such because the company entered into the transaction with a director of the company at an undervalue.

The liquidator may bring action on the director, Rita Perkins under Section 212, this action is in respect of misfeasance or breach of duty in relation to the company.

This is an action for the breach of the duty or care and skill and fiduciary duties such as the duty to act where the director has a conflict of interest and duty. If directors continue to trade on, the duty owed by the directors shifts from one owed to the company, taking into account what would be in the best interest of its members, to one owed to the company taking into account the interest of its creditors.

[Type here]

20223-786.assessment3B

Commented [WPA14]: 3/6 the strongest and most likely action here is s 238 which required a more detailed consideration. Although some of the other actions suggested are possible they are not all directly related to the transaction in question. The s 239 suggestion is misconceived as the recipient was not a creditor/surety.

The liquidator may bring action on wrongful trading under Section 214 and 246 of the Act which make directors of insolvent Companies liable for wrongful trading.

Wrongful trading is aimed at ensuring that, when directors become aware that an insolvent liquidator is in prospect, they do everything to minimize the potential losses to the company's creditors.

Section 214 given the court a discretion to declare that a director of a company which is in insolvent liquidation should make a contribution to the company's assets. The application to the court can only be made by the liquidator, not a creditor or contributory. The Court must be satisfied that the following conditions are satisfied:

- (1) That the company has gone into insolvent liquidation;
- (2) That at some point before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company avoid going into insolvent liquidation; and
- (3) That at the time the person reached that conclusion or ought to have reached that conclusion that person was a director of the company.

Type your answer here]

Question 4.3 [maximum 4 marks]

Commented [WPA15]: 2/4 - more clarity around the requirements of s 127 is needed.

The payments to Hard and Fast Ltd.

[Hard and Fast Ltd

In a situation where the liquidation proceedings had commenced, the directors had no power to transact any business without approval of liquidator.

The liquidator may bring action of misfeasance against Rita Perkins, a director. This may be brought under S212.

In another breadth this type of disposition may be permitted by the court. This transaction can be regarded as a disposition. The court usually consider the benefit to the company where goods have been paid for on terms of cash on delivery. This is the case in this respect, and it stated that the payment will enable further supplies to be received and so enable the business to continue.

4.1.

ype your answer here]

*** End of Assessment ***

[Type here]

20223-786.assessment3B