INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

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.

Question 1.3

Commented [WPA1]: 37/50 = 74% some very good knowledge shown but in places a lack of detailed and considered application to the facts is a comparative weakness.

Commented [WPA2]: 7/10

Commented [WPA3]: D is correct

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.

Commented [WPA4]: C is correct

(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.

Commented [WPA5]: B is correct

(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]: 10/10

Question 2.1 [maximum 5 marks]

Commented [WPA7]: 5/5 the answer to ii) also should include the OR on the instructions of the Sec of State and the answer to iii) could have been more specific in identifying the administrator. There is a lot of information contained in this answer which is not asked for by the question.

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?

ANS:

(i) **Section i.e S.423**, of the Insolvency Act 1986 is intended to prevent debtors from disposing the assets so as to frustrate the creditors. It allows for avoidance of such transactions which were intended to defraud the creditors.

The following parties can attack such transactions:

a) The official receiver, liquidator or the Administrator with the leave of court when the company is in administration or is being wound up.
b) The victim of the transaction whether he is bound by CVA or not. If he is bound by CVA then through the supervisor of CVA.
c) A victim of the transaction.

In the case of Arbuthnot Leasing International Ltd v Havelet Leasing Ltd (No 2) [1990],The Director of Havelet whose business of airplane and coach hire had gone insolvent. It was found the that the assets were put out of reach of Arbuthnot Leasing. This was done by transferring the assets to an associated company which the director controlled. The scheme was found to be fraudulent as it had prioritised Havelet over the creditors, Arbuthnot.

J. Scott ordered the reversal of the transfer of assets from Havelet Finance to Havelet leasing and in doing so, the benefit was given to the Plaintiffs.

(ii). S.6 of CDDA 1986

It sets out provisions related to the duty of the court to disqualify the unfit directors of insolvent companies.The consideration here is that the conduct as director of the company taken alone or with more companies or overseas companies, makes them unfit for managing the company.

The Secretary of State can bring about legal proceedings against the director . They do so on the basis that the court will be satisfied that the person concerned ,the director of an insolvent company, or dissolved without becoming insolvent, his conduct makes him unfit to be concerned in the management of a company. The definition of director in S.6 of CDDA includes shadow director. The director misconduct can be inside and outside jurisdiction of England &Wales.

The consideration for disqualification can be base upon:

- Conduct that deprives creditors of assets
- Continuing to trade when it is detrimental to creditors when a company is insolvent
- Fraudulent behaviour
- Not keeping proper accounting records
- Not having prepared and filed accounts
- Failure to submit tax returns or pay the tax due
- Failure to comply with other regulatory requirements
- Failure to co-operate with the official receiver and/or insolvency practitioner.

For the purposes of this section, a company becomes insolvent if–

1. the company goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up,
2. the company enters administration,
3. an administrative receiver of the company is appointed.

Such an individual can be disqualified from acting as a director for up to 15 years under the Company Directors Disqualification Act 1986 (CDDA).

The court has discretion to make a disqualification order.

* In Re Sevenoaks Stationers (Retail) Ltd (1990), the Court of Appeal divided the maximum 15 year period of disqualification into three distinct brackets.

*In (Re Cargo Agency Ltd (1992)), leave to act in some other managerial capacity but not as director.

*In (Re Ipcon Fashions Ltd (1989)) leave to continue to act as a director for a short period of time, in order to enable the disqualified director to arrange his business

affairs

*In (Re Lo-Line Electric Motors Ltd (1988) leave to continue as a director of a named Company,subject to conditions.

(ii) S.246ZB of Insolvency Act 1986

This section S.246ZB (Administration) along with the section 214(liquidation) of the Act make the directors of companies which have gone insolvent, liable for wrongful trading. This is aimed at ensuring that when the directors become aware that the insolvent liquidation is in prospect, they do everything possible to minimise the losses to the creditors.

The main essence is thus as follows: That the company has gone into insolvent liquidation or insolvent administration. Its director knew or ought to have concluded that there was no prospect that the company would avoid into going into liquidation or administration and the director failed to take every step to minimise the losses to the creditors.

The steps which the director ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both—the general knowledge, skill and experience

For the purposes of this section—

a company enters insolvent administration if it enters administration at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the administration.

Directors can be personally liable for the company debts if the directors continue to trade wrongfully.

A director should obtain the necessary degree of financial information and introduce reasonable financial controls. It is important, that the directors show that, at the time, their decision making was reasonable, prudent and justifiable.

In the case of Re Ralls builders limited, it was held that directors can not escape wrongful trading claim by making payments to some creditors and leaving the others. This case emphasizes on taking professional advice may help them defend themselves following a finding of wrongful trading.

Dorchester Finance Co v Stebbing [1989] BCLC 498 is is a case under wrongful trading. The director of a company must act in good faith and in the interests of the company, he must display such skill as may reasonably be expected of a person with his knowledge and experience, and he must take such care as a prudent man would take on his own behalf.

Wrongful trading is a civil, rather than a criminal, offence, however, there can still be severe consequences for directors found guilty of this act, including being held personally liable for

company debts and/or banned from acting as the director of a limited company for a period of up to 15 years.

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.

ANS:

Part A1 : moratorium

It is designed to allow financially distressed companies (and some other entities) a short breathing space from enforcement action by certain types of creditors while they organise their affairs to make their rescue viable.
A moratorium for up to 40 business days can be obtained without creditor or court consent. The moratorium is a "debtor in possession" process in that the entity's management will remain in control of it during the process. However, the functioning of the moratorium is overseen by an insolvency practitioner appointed as a monitor.
The debts which do not form part of payment holiday are mentioned in A18 (Effects of moratorium):

(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 debts or other liabilities arising under a contract or other instrument involving financial services.

The rules may make provision as to what is, or is not, to count as the supply of goods or services for the purposes of subsection (3)(b).

- Redundancy payment means—

  a redundancy payment under Part 11 of the Employment Rights Act 1996

  a payment made to a person who agrees to the termination of their employment in circumstances where they would have been entitled to a redundancy payment under that Part if dismissed;

- "wages or salary" includes—

  a sum payable in respect of a period of holiday

  a sum payable in respect of a period of absence through illness or other good cause,

a sum payable in lieu of holiday, and

a contribution to an occupational pension scheme.

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

Question 3.1 [maximum 6 marks]

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?

ANS:

Administration is a process by which an insolvency practitioner is appointed with the aim of rescuing the company as a going concern or achieving a better result for creditors compared to a liquidation.

The Insolvency Act 1986 has prevented suppliers of essential supplies such as gas and electricity from holding insolvent companies and insolvency practitioners into trouble by demanding payment of outstanding invoices as a condition of continued supply.

A supplier will not want to have a contract under which it has no prospect of getting paid. An insolvency practitioner who is continuing to operate the company will often want to ensure that essential supplies remain in place in order that trading can continue. Also more so till either until a purchaser can be found or until assets are realised.

The IA has always acknowledged the importance to an insolvent company of supplies such as gas, electricity and water. This has been done by preventing suppliers of these services from making it a condition of continuing supply that outstanding charges are met by the company.

Section 233 of the Act applies to a supply of gas, electricity, water and communications services. Section 233 of the Act permits a supplier to stipulate that the administrator must personally guarantee payment of charges in respect of the supply.

Under section 233A a supplier of such services is generally unable to rely upon an "insolvency-related term" in a contract of supply.

The 2020 Act has been expanded and have been provided 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.

As of 1 October 2015, the range of supplies protected by this prohibition is extended to include IT-related goods and services.

In addition the IA now restricts the validity of insolvency-related termination clauses by such suppliers.

Commented [WPA9]: 12/15

Commented [WPA10]: 5/6 although most of the law is mentioned in the answer, the explanation is not as clear as it might have been. The answer seems to suggest that amendments were made to s 233B in 2015 which is clearly not the case.

The definition of essential supplies has been expanded to cover a wide range of products and services used in connection with a company's IT and communications systems. It includes:

- computer hardware and software
- point of sale terminals
- communication services by a person whose business includes providing communication services
- information, advice and technical assistance in relation to the use of information technology
- data storage and processing and
- website hosting.

Amendments to the IA that took effect on 1 October 2015.This has expanded the definition of "essential supplies" to cover a wide range of IT-related goods and services.

It is very important for suppliers to have a right to terminate a supply contract if their customer becomes insolvent. This is often achieved by including a clause in the contract that allows termination by one or both parties if the other enters an insolvency process or if there are earlier indicators of insolvency.

If, because of the changes in the legislation, (S.233B)an insolvency-related contract term ceases to have effect, the supplier can terminate the contract if:

- the insolvency practitioner consents;
- the court gives permission on grounds that continued supply will cause hardship to the supplier; or
- charges that are incurred after the company entered administration or from the commencement of a CVA are not paid within 28 days of the due date.

In addition, suppliers of essential supplies can terminate the supply if the insolvency practitioner fails, within 14 days of notice from the supplier, to give a personal guarantee in respect of payments that are incurred after the date of the administration or CVA.

Sections 233, 233A and 233B apply in administration and where a company enters a CVA. Section 233B, in addition, also applies where a company has entered into a Moratorium or a Restructuring Plan.

If there is supplier to a company that has gone into Administration there is a good chance that it will be owed money. That makes it a “creditor” of the company and entitled to participate in the Administration process.

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?

ANS:

Commented [WPA11]: 7/9 a generally good answer which would have benefitted from further clear explanation of some points eg more detail on expenses and explanation of s 176A.

An official 'hierarchy' is laid down by the Insolvency Act, 1986, that determines which group of creditors is paid first during an insolvent liquidation. When a company enters liquidation, each class of creditors must be paid in full before funds are allocated to the next.
Creditors are ranked in order of priority as given below:

*Secured creditors with a fixed charge.
*Administrator Fees/Liquidator Fees
*Preferential Creditors
*Secondary preferential Creditors- include HMRC for certain taxes
*Secured creditors with a floating charge
*Unsecured creditors - including all other HMRC debt
*Share holders

Secured creditors with a fixed charge-These are often banks and other asset based lenders who hold the title. The company does not have the right to sell. These assets may include plant ,machinery and vehicles. These can be sold by liquidator or charge holder.

Preferential Creditors*:* include employees entitled to arrears of wages and holiday pay

Secondary Preferential Creditors:
If there is an outstanding His Majesty's Revenue and Customs (HMRC) debts, whether it's Income Tax, NI or VAT arrears, it has to be dealt with as soon as possible. These are classed as priority debts. These debts are only preferential if the insolvent business entered a formal insolvency procedure on or after 1 December 2020.

Secondary creditors with a floating charge*:*
Assets include stock, raw materials, fittings and fixtures. These can be traded during normal business. This class of creditors are entitled to receive distribution from net property of the company after application of costs.

Unsecured Creditors: These include unsecured loans from banks or lenders, suppliers, trade creditors, family or friends loans to business.

Shareholders*:* This is the final class to be paid .They are not entitled to a distribution until all other creditor classes have been paid.

In summary, the priority of payments in a company liquidation is as follows: secured creditors, preferential creditors, unsecured creditors, and finally, shareholders.
Secured creditors are paid first as they are usually those who have security over some or all of the company assets. The secured creditor will take back the property they've secured, or will be entitled to the proceeds from the liquidation of that specific property.

The priority changes 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 priority of debts in that subsequent administration or liquidation may be different to the priority of debts which existed prior to the Moratorium.

Section 174A : This comes into play and debts owed to employees or "financial services" debts, are paid in the subsequent liquidation, in priority to even the liquidator's fees and expenses. These are unpaid pre- Moratorium or Moratorium debts i.e the debts which are not part of the payment holiday. Section 174A also provides for certain unsecured debts a form of "super priority" in a subsequent liquidation. If a director has not been paid for months prior to a Moratorium, if the Moratorium leads to an unsuccessful rescue attempt and the

company enters liquidation, the pre-Moratorium unsecured debt of the director will acquire "super priority" in the liquidation.

Unsecured (or secured) pre-Moratorium bank debt, falling within the definition of "financial services", will also acquire such a "super priority".

There is One exception which prevents such liabilities acquiring such "super priority" is when the debt is accelerated debt, that is, any pre-moratorium financial services debt which fell due by reason of the operation of, or exercise of right upon early termination provision in the financial services contract.

S.174A Moratorium debts etc: priority(Quoted from the Act)

(1)This section applies where proceedings for the winding up of a company are begun before the end of the period of 12 weeks beginning with the day after the end of any moratorium for the company under Part A1.

(2)In the winding up, the following are payable out of the company's assets (in the order of priority shown) in preference to all other claims—

(a)any prescribed fees or expenses of the official receiver acting in any capacity in relation to the company;

(b)moratorium debts and priority pre-moratorium debts.

(3)In subsection (2)(b) "priority pre-moratorium debt" means—

(a)any pre-moratorium debt that is payable in respect of—

(i) the monitor's remuneration or expenses,

(ii)goods or services supplied during the moratorium,

(iii)rent in respect of a period during the moratorium, or

(iv)wages or salary arising under a contract of employment, so far as relating to a period of employment before or during the moratorium,

(b) any pre-moratorium debt that—

(i) consists of a liability to make a redundancy payment, and

(ii)fell due before or during the moratorium, and

(c)any pre-moratorium debt that—

(i)arises under a contract or other instrument involving financial services,

(ii)fell due before or during the moratorium, and

(iii)is not relevant accelerated debt (see subsection (4)).

(4)For the purposes of subsection (3)(c)—

- "relevant accelerated debt" means 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;
- "the relevant period" means the period—

  beginning with the day on which the statement under section A6(1)(e) is made, and

  ending with the last day of the moratorium.

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:

Question 4.1 [maximum 5 marks]

Commented [WPA13]: 2/5 the answer jumps around a lot without really being very specific about any of the possible actions. The only realistic option is s 245 and more needed to be explained about its provisions and how they would apply here.

The floating charge in favour of Fretus Bank plc;

ANS:

The act of granting debenture by the company in favour of Bank was a wrongful action i.e preference granted to it. Section 239 relates to preferences which may be avoided by the court on the application of a liquidator or an administrator. The S.239 provides to prevent a

company entering insolvency procedure , to place one creditor in preference to the other i.e placing it in a better position

In *Re MC Bacon Ltd,* 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. Here it was found that the company was totally dependent on the bank and if the support from bank was not available the company would go into liquidation immediately. The grant of debenture was not desired to prefer the bank but the intention was to continue trading in the company.

Section 245 of the Act applies only to floating charge. It does not prevent lenders who are providing fresh funding to the company from taking a floating charge for that new funding.

The floating charge is rendered invalid when given by a company at a relevant time, except to the extent, in substance, that "new" consideration is provided for the charge.

The directors of the company could be held liable for their action. The defence available to a director under section 214 is that once he knew or ought to have known that insolvent winding-up was inevitable , he took all steps to minimize the loss to the company creditors.

The burden of proof is on the liquidator to prove that the director knew or ought to have known that there was no reasonable prospect of avoiding an insolvent liquidation. Once this is shown, the burden of proof shifts to the director to show that what he did was to take every step to minimise loss to creditors. The court will usually make an award for the directors to compensate the company .

The civil remedy is contained in sections 213 and 246ZA of the Act. In order to fall within section 213 (or section 246ZA), the behaviour must amount to real moral blame.

The main purpose of the disqualification is to protect the public. This will act as a deterrent to wrongdoing directors and in raising the standards of behaviour of directors.

Question 4.2 [maximum 6 marks]

Commented [WPA14]: 3/6 again the answer jumps around too much without being clear and complete on each claim. The most likely claim here is s 238 and the law and its application to the facts needed to be more detailed and clear.

The sale of the marble cutting machines; and

ANS:

A company which is ordered to be wound up by the court i.e Compulsory Winding up, the court will usually appoint the Official Receiver**.** He shall be the initial liquidator of the company. The Official Receiver is an employee of the Government.

The reasons for the company's liquidation will be investigated by liquidator, the official receiver. He will often remain as liquidator of the company get in the assets and distribute the proceeds to the creditors. If the Official Receiver notices evidence of unfit behaviour by the directors of the company the Official Receiver can take action to disqualify the directors. They will be disqualified from management of a company for up to 15 years under the Company Directors Disqualification Act 1986.

The sale of marble cutting machines were given at a consideration which was undervalued causing loss to the company.

Any transfer at an undervalue is in effect depriving the creditors of money owed to them. This is outlined in s238 of The Insolvency Act 1986.

The persons who can attack this kind of transaction; any victim of the transaction such as a creditor attracting S.423 of the Act. Unlike section 238 of the Act, there are no time limits in respect of which the transaction must have been entered. However in the given facts of the case the transaction happened just 3 months before the issuance of the winding up order. This shall be actionable. The company received consideration which was undervalued for the marble cutting machines. An application may be made in this regard. Even gifts given many years before are also questionable and will be capable of attack.

The Act permits certain transactions which were entered into shortly before the company entered formal insolvency to be open to attack. Under section 238 of the Act, a liquidator may attack.

If the company has at a relevant time, typically 2 years if a connected party and 6 months if an unconnected party, entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section, the court shall, 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. Court can reverse that sale.

If the respondent to an application made in the court satisfies the court that the transaction was entered into by the company in good faith. It may be able to demonstrate that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company, then the court shall not make an order under section 238.

Following an investigation by an insolvency practitioner director may face the following consequences:

- Disqualification
- Personal liability for the company debt if the asset's true value cannot be recovered.
- Fines

A case that illustrates the law relating to transactions at an undervalue in action.

Phillips and Another v Brewin Dolphin Bell Lawrie Ltd and another, House of Lords,18 January 2001:It was ordered that the defendants pay the first plaintiff ,the liquidator of the second plaintiff a sum , following the sale of part of the second plaintiff's business and some of its assets to the defendants at an undervalue.

Question 4.3 [maximum 4 marks]

Commented [WPA15]: 3/4 again it is not made entirely clear which action is being favoured. The only realistic action here would be s 127 which is explained quite well.

The payments to Hard and Fast Ltd.

ANS:

Hard and fast was a supplier of the essential goods for the running of the company. The Act has always acknowledged the importance to an insolvent company of supplies as is the case here.

Suppliers are not permitted to require payment of outstanding debts in order to secure a new or continued supply to the company in administration.

Section 233 prevents a supplier from demanding that outstanding charges incurred pre-insolvency are paid as a condition of continuing its supply. However, the section also allows the supplier to require the insolvency office holder personally guarantees payment for the ongoing supply after insolvency.

Section 233 of the Act permits a supplier to mention that the administrator must personally guarantee payment of charges in respect of the supply.

In 2020 Act has been expanded by providing protections for insolvent company by adding section 233B to the Act. This 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.

Section 233B holds that there is restriction on termination to all other suppliers. However there are exceptions for example, insurers; banks; electronic money institutions; recognised investment exchanges and clearing houses; securitisation companies.

Where goods have been paid for on terms of cash on delivery the court will consider the benefit to the company including whether the payment will enable further supplies to be received and so enable the business to continue.

In a compulsory winding up, section 127 of the Act avoids any disposition of property of the company made after the commencement of winding up, unless the court orders otherwise.

The court has a discretionary power to declare that dispositions shall not be void. Such an order is called a validation order.

A validation order or sanction order will only be made in relation to an insolvent company where the circumstances show that the disposition has been made for the benefit of the unsecured creditors.

In deciding whether or not to permit dispositions, the court will consider the general guidelines of which one of the guidelines is :

Where goods have been paid for on terms of cash on delivery the court will consider what benefit the company had. Also whether the payment will enable further supplies to be received and so as to enable the business to continue.

If the transaction allows the company to continue to trade, it will generally be validated.

In Electrical Express Limited V Beavis &Ors(2016) 1 WLR principles were followed in Grabal Alok (UK) Limited showing that the payments were for the benefit of the company.

In: Barber v CI 8 June 2006, Ch D (Manchester) (Judge Hodge QC). Held that

A payment in satisfaction of an antecedent debt can be both a preference under section 239 of the UK Insolvency Act 1986 and therefore a transaction at an undervalue pursuant to section 238 of the UK Insolvency Act 1986 showing an overlap between S. 238 and S.239.

*** End of Assessment ***