



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3B
THE INSOLVENCY SYSTEM OF THE UNITED KINGDOM
(ENGLAND AND WALES)

This is the summative (formal) assessment ***for*** Module 3B ***of this course and is compulsory for all candidates who*** selected this module as one of their compulsory modules from Module 3. ***Please read instruction 6.1 on the next page very carefully.***

If you selected this module as one of your elective modules, ***please read instruction 6.2 on the next page very carefully.***

The mark awarded for this assessment will determine your final mark for Module 3B. ***In order to pass this module, you need to obtain a mark of 50% or more for this assessment.***

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. **You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
2. **All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
3. **No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
4. **You must save this document using the following format: [studentID.assessment3B]. An example would be something along the following lines: 202223-336.assessment3B. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. **Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 **If you selected Module 3B as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 6.2 **If you selected Module 3B as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not**

submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of 8 pages.

ANSWER ALL THE QUESTIONS

Commented [WPA1]: 45/50 = 90% a very good piece of work

QUESTION 1 (multiple-choice questions) [10 marks in total]

Commented [WPA2]: 8/10

Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Please select the most correct ending to the following statement:

The Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021 restrict pre-pack sales which constitute a substantial disposal of the company's property to connected parties where the disposal occurs . . . :

- (a) within 10 weeks of the commencement of the administration.
- (b) within 8 weeks of the commencement of the administration.
- (c) within 4 weeks of the commencement of the administration.
- (d) on the day the company enters administration.

Question 1.2

What is the maximum length of a Moratorium under Part 1A of the Insolvency Act 1986 to which creditors can consent without any application to the court?

- (a) 40 business days.
- (b) One year and 20 business days.
- (c) One year and 40 business days.
- (d) One year.

Question 1.3

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

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

Question 1.4

In cases where the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021 apply and an independent report from an Evaluator is obtained, the independent report must be obtained by whom?

- (a) The administrator.**
- (b) Any secured creditor with the benefit of a qualifying floating charge.**
- (c) The purchaser.**
- (d) The company's auditor.**

Question 1.5

Which one of the following is not a debtor-in-possession procedure?

- (a) Administration.**
- (b) Restructuring Plan.**
- (c) Scheme of Arrangement.**
- (d) Company Voluntary Arrangement.**

Question 1.6

A liquidator may pay dividends to small value creditors based upon the information contained within the company's statement of affairs or accounting records. In such circumstances, a creditor is deemed to have proved for the purposes of determination and payment of a dividend where the debt is no greater than how much?

- (a) GBP 500
- (b) GBP 750
- (c) **GBP 1,000**
- (d) GBP 2,000

Question 1.7

Which one of the following is not, in itself, a separate ground for disqualification of a director under the Company Directors Disqualification Act 1986?

- (a) Wrongful trading.
- (b) **Breach of fiduciary duty.**
- (c) Being found guilty of an indictable offence in Great Britain.
- (d) **Being found guilty of an indictable offence overseas.**

Commented [WPA3]: B is correct

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

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.**

QUESTION 2 (direct questions) [10 marks]

Commented [WPA5]: 10/10

Question 2.1 [maximum 5 marks]

Commented [WPA6]: 5/5

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

- (i) *In terms of Section 424 of the Insolvency Act 1986 the following persons may apply for an order under Section 423 of the said Act:*
 - (a) *Where the debtor is bankrupt, or is a body corporate being wound up or is in administration:*

- the official receiver; or
- trustee of the bankrupt's estate; or
- the liquidator or administrator of the body corporate; or
- with the leave of the court, the victim of the transaction.

(b) Where the victim of the transaction is bound by a voluntary arrangement ("VA"):

- the supervisor of the VA;
- or any victim of the transaction, whether the victim is bound by the VA or not;

(c) In any other case, the victim of the transaction.

(ii) In terms of Section 7 of the Company Directors Disqualification Act 1986, if it appears to the Secretary of State to be in the public interest that a disqualification order under Section 6 of the said Act be made, an application for such an order against that person may be made by:

(a) The Secretary of State; or

(b) If the Secretary of State so directs, by the official receiver where the person is or has been a director of a company which is being, or has been wound up by the court in England and Wales.

(iii) In terms of Section 246ZB, if while a company is in administration, the court may declare that a person who is or has been a director of the said company is liable to make such contribution to the company's assets as the court think proper. The court may make such an order upon application of the administrator.

Question 2.2 [maximum 5 marks]

Commented [WPA7]: 5/5

List any five (5) of the debts which do not form part of the payment holiday under Part A1 of the Insolvency Act 1986 when a company is subject to a Moratorium.

In terms of Section A18 of Chapter 4 of Part A1 of the Insolvency Act 1986 provides that the following are exceptions and do not form part of the payment holiday under Part A1 of the Insolvency Act, being amounts payable in respect of -

1. The monitor's remuneration or expenses;
2. Goods or services supplied during the moratorium;
3. Rent payable during the moratorium;
4. Wages or salary payable under a contract of employment;
5. Redundancy (severance) payments.

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

Commented [WPA8]: 13/15

Question 3.1 [maximum 6 marks]

Commented [WPA9]: 6/6 very good

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 opening of administration proceedings and the appointment of an administrator does not automatically terminate a company's executory contracts.

In terms of Section 233(2) of the Insolvency Act 1986 administrators may request the continued delivery of services. Section 233(2) read with Sections 233(1)(a), 233(3) and 233(3A) of the said Act therefore prevents suppliers of utilities (gas; electricity; water and communication services) and IT systems (point of sale terminals; computer hardware and software; information, advice and technical assistance with reference to the use of information technology; data storage and processing and website hosting) from terminating the supply of these services after the date on which the company entered administration. If a request for continued service delivery is made by the administrator, suppliers of these services are in terms of Section 233(2)(a) entitled to make it a condition for the continued supply of the services that the administrator must provide a personal guarantee for the payment of the services as supplied after the commencement of the administration. Section 233(2)(b) further prohibits the suppliers from making it a condition for the continued supply of services that any amounts that were outstanding prior to the commencement of the administration must be paid before they will render further services.

Section 233A of the said Act provides further protection of essential services. Section 233A(1)(a) provides that, where there is an insolvency-related term in a contract with a supplier of essential services in terms whereof the supplier would be entitled to terminate the supply, amend the terms of the contract or try to induce higher tariffs for the continued supply of services, the said insolvency-related term of the contract ceases to have effect if the company enters administration. In this event the supplier may only terminate these services if:

- 1. In terms of Section 233A(3)(a) read with Section 233A(4) of the said Act -
 - 1.1. The administrator consents to the said termination;*
 - 1.2. The court grants consent for the said termination if the court is satisfied that the continued service delivery will cause the supplier hardship;*
 - 1.3. Any of the amounts that are due and payable for the services delivery after commencement of the administration proceedings are not paid within 28 days from the date on which payment was due;**
- 2. In terms of Section 233A(3)(b) read with Section 233A(5) of the said Act -
 - 2.1. The supplier gives written notice to the administrator that the supply will be terminated unless the administrator provides a personal guarantee that the amounts payable for services that are rendered will be paid; and*
 - 2.2. The administrator does not give the guarantee within 14 days from the day the notice was received.**

Section 233B was inserted in the said Act by the Corporate Insolvency and Governance Act 2020 and expanded the protection for insolvent companies to cover all contracts for the supply of goods and services, with certain exceptions, inter alia insurers banks and electronic money institutions. Section 233B(3) of the said Act, read with Section 233B(1) and 233B(2)(b) provides that a provision of a contract for the supply of goods or services in terms whereof the contract or supply would terminate or something else will take place because the because the company commences administration proceedings, or in terms whereof the supplier would be entitled to terminate or do something else because the because the company commences administration proceedings, ceases to have effect. Section 233B(4) of said Act, read with Section 233B(1) and 233B(2)(b) further provides that where a provision of a contract for the supply of goods and services entitles the supplier to terminate the contract or supply because of an event that occurred before the commencement of the administration and the entitlement in fact arises before the commencement thereof, such entitlement may not be exercised during the administration period.

In considering what is stated hereinabove, Section 233B therefore prevents the termination of supply by a supplier once administration proceedings commences.

Section 233B(7) further prohibits the suppliers from making it a condition for the continued supply of services that any amounts that were outstanding prior to the commencement of the administration must be paid before they will render further services.

In terms of Section 233B(5) read with Section 233B(2)(b) the supplier may only terminate these services if:

- 1. The administrator consents to the said termination;*
- 2. The court grants consent for the said termination if the court is satisfied that the continued service delivery will cause the supplier hardship*

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?

Payments in a liquidation must be made in the following priority:

- 1.** Amounts payable out of the company's assets in preference to all other claims if the company had been subject to a Moratorium under Part A1 of the Insolvency Act 1986 ("the said Act") during the 12 week period prior to the commencement of the liquidation in terms of Section 174A of the Insolvency Act 1986.
 - 1.1.** *The amount are payable in the following order of priority:*

Commented [WPA10]: 7/9 a generally very good answer but there are one or two points of uncertainty / lack of detail e.g. the s 174A provision is not fully explained, s 176A is not fully explained, the ranking of expenses is not entirely clear.

- 1.1.1. Any prescribed fees or expenses of the official receiver of the company, which fees or expenses accrued while the official receiver acted in any capacity in relation to the company;
- 1.1.2. Moratorium debts and priority pre-moratorium debts, as envisaged in Section 174A(3) of the said Act.

Therefore 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 fees, expenses and debts would enjoy preference above all the claims listed below.

2. Winding-up expenses

- 2.1. Expenses payable in preference over the company's preferential creditors, holders of floating charges and unsecured creditors in terms of Section 115 of the said Act, read with Rules 6.42 (payable in a creditors' voluntary winding-up) and 7.108 (payable in the winding-up by the court) of the Insolvency Rules 2016;
- 2.2. Must be paid in full before preferential creditors, holders of floating charges and unsecured creditors can receive payment;
- 2.3. Rules 6.42 (payable in a creditors' voluntary winding-up) expenses are payable in the following order of priority:
 - 2.3.1. Expenses properly incurred by the liquidator in:
 - 2.3.1.1. attaching, preserving or realising the assets of the company,
 - 2.3.1.2. the preparation, conducting or assignment of legal proceedings, arbitration or other dispute resolution procedures;
 - 2.3.1.3. the preparation or conducting of negotiations in an attempt to reach a settlement or compromise of any legal action or dispute;
 - 2.3.2. Costs of security provided by the liquidator or special manager;
 - 2.3.3. Remuneration of the special manager (if any);
 - 2.3.4. Amount payable to a person instructed to assist the liquidator with the preparation of a statement of affairs or accounts;
 - 2.3.5. Costs of a shorthand writer employed by the liquidator;
 - 2.3.6. Any disbursements incurred by the liquidator in the administration of the winding-up, including the expenses allowed by the liquidator and incurred by a liquidation committee or their representatives;
 - 2.3.7. Remuneration of any person employed by the liquidator to perform any services for the company;
 - 2.3.8. Remuneration of the liquidator up to the maximum amount which is payable under Schedule 11 (determination of insolvency office-holder's remuneration);
 - 2.3.9. Corporation tax on chargeable gains which accrued as a result of the realisation of the assets of the company;

- 2.3.10. *The balance of any remuneration due to the liquidator after the amounts in terms of 2.8 above have been paid;*
- 2.3.11. *Any other expenses properly charged by the liquidator in carrying out his functions as such in the winding-up.*

2.4. Rule 7.108 (payable in the winding-up by the court) expenses are payable in the following order of priority:

- 2.4.1. *Expenses which rank equally in order of priority:*
 - 2.4.1.1. *Expenses properly incurred by the provisional liquidator in carrying out the functions conferred upon him / her by the court;*
 - 2.4.1.2. *Expenses properly incurred by the liquidator in:*
 - 2.4.1.2.1. *attaching, preserving or realising the assets of the company,*
 - 2.4.1.2.2. *the preparation, conducting or assignment of legal proceedings, arbitration or other dispute resolution procedures;*
 - 2.4.1.2.3. *the preparation or conducting of negotiations in an attempt to reach a settlement or compromise of any legal action or dispute;*
 - 2.4.1.3. *Costs of a shorthand writer employed by an order of court made on the request of the official receiver in connection with an examination;*
 - 2.4.1.4. *Expenses incurred in holding a hearing under Rule 7.104 based on an application by the official receiver;*
- 2.4.2. *Expenses incurred or disbursements made in the carrying on of the business of the company;*
- 2.4.3. *Fees payable under an order made under Section 414 or 415A(91);*
- 2.4.4. *Fees payable under an order made under Section 414 for the performance of general duties by the official receiver;*
- 2.4.5. *Costs of security provided by the provisional liquidator, liquidator or special manager*
- 2.4.6. *Remuneration of the provisional liquidator*
- 2.4.7. *Any sum deposited on an application for a provisional liquidator's appointment;*
- 2.4.8. *Costs of the petitioner;*
- 2.4.9. *Remuneration of the special manager (if any);*
- 2.4.10. *Amount payable to a person employed under Chapter 6 to assist in the preparation of the statement of affairs or accounts;*
- 2.4.11. *Allowance made by an order of court in respect of an application to be released from the obligation to submit a statement of affairs;*
- 2.4.12. *Costs of a shorthand writer employed by the liquidator in any other case than the one appointed by an order of court as referred to in 2.2.1.3 above;*
- 2.4.13. *Any disbursements incurred by the liquidator in the administration of the winding-up, including the expenses allowed by*

the liquidator and incurred by a liquidation committee or their representatives;

- 2.4.14. Remuneration of any person employed by the liquidator to perform any services for the company;*
- 2.4.15. Remuneration of the liquidator up to the maximum amount which is payable under Schedule 11 (determination of insolvency office-holder's remuneration);*
- 2.4.16. Corporation tax on chargeable gains which accrued as a result of the realisation of the assets of the company;*
- 2.4.17. The balance of any remuneration due to the liquidator after the amounts in terms of 2.8 above have been paid;*
- 2.4.18. Any other expenses properly charged by the liquidator in carrying out his functions as such in the winding-up;*

3. Preferential debts in terms of Section 175 of the said Act

3.1. Preferential debts must be paid in priority to all other debts, but only after the payment of:

3.1.1. Liabilities in terms of Section 174A;

3.1.2. Winding-up expenses in terms of Section 115 of the said Act, read with Rule 6.42 and 7.108 of the Insolvency Rules 2016

3.2. There are two classes of preferential debts:

3.2.1. Ordinary preferential debts -

3.2.1.1. Are paid before secondary preferential debts;

3.2.1.2. Rank equally among themselves and must be paid in full, unless there are insufficient funds to pay it in full. In such an event, the debts will be abated in equal proportions;

3.2.2. Secondary preferential debts

3.2.2.1. Are paid after ordinary preferential debts have been paid in full;

3.2.2.2. Rank equally among themselves and must be paid in full, unless there are insufficient funds to pay it in full. In such an event, the debts will be abated in equal proportions;

3.3. Preferential debts have priority over claims of debenture holders and floating charge holders.

3.4. Preferential debts include claims of employees and taxation liabilities and must be paid in full before floating charge holders will receive any payment;

4. Floating charge holder

4.1. After all preferential debts have been paid and if there are further funds available, floating charge holders will be paid next;

4.2. When there is more than one floating charge holder, the holder of the floating charge that was created first will receive priority and get paid first;

4.3. If the floating charge was created on / after 15 September 2003, the liquidator must take cognisance of the provisions of Section 176A of the said Act;

4.4. *In terms of Section 176A(2) a liquidator must make a prescribed part of the company's net property available for payment of unsecured debts and may not distribute the "prescribed part" to the floating charge holder unless the "prescribed part" exceeds the amount that is required for the payment of the unsecured debts;*

4.5. *Section 176A(2) is not applicable if the company's net property is less than GBP 10,000 and where the liquidator is of the opinion that the cost of making a distribution to unsecured creditors would be disproportionate to the benefits.*

5. Unsecured Creditors

5.1. *Creditors with no security are usually normal trade creditors;*

5.2. *Unsecured creditors are paid last (after all the above mentioned expenses and creditors are paid);*

5.3. *Unfortunately, in many instances there will be little or nothing left for payment to unsecured creditors once all of the liquidation expenses have been paid and distributions were made to secured and preferential creditors.*

6. Shareholders

6.1. *In the unlikely event that there are sufficient funds to pay all the liquidation expenses, secured, preferential and unsecured creditors, any surplus remaining after the payment of the amounts referred to above, are distributed to the shareholders in accordance with the company's constitution;*

6.2. *Such distribution to shareholders will normally be calculated proportionately based on the shareholding of the respective shareholders.*

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

Commented [WPA11]: 14/15

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 [WPA12]: 5/5 very good

The floating charge in favour of Fretus Bank plc;

In terms of Section 245(2) of the Insolvency Act 1986 ("the said Act") a floating charge granted by a company created at a relevant time is invalid, unless it is granted in respect of new funding received from the creditor. The floating charge was granted in favour of Fretus Bank Plc in February 2022 in order to prevent the Bank from demanding repayment of the Bank's loans. It was therefore granted in respect of the existing debt and not new funding and therefore the granting of the floating charge can be invalidated if it was granted at a relevant time.

In terms of Section 245(3) "a relevant time" is considered to be:

- (a) In the period of 2 years ending with the onset of insolvency if the floating charge was created in favour of a connected person;*
- (b) In the period of 12 months ending with the onset of insolvency if the floating charge was created in favour of any other person.*

If the definitions of "connected with a company" in Section 249, and "associate" in Section 435 of the said Act are considered, Fretus Bank PLC is not connected with the company, as it is neither a director / shadow director of the company, nor a family member or relative of a director / shadow director, and therefore the time period in terms of Section 245(3)(b) will be applicable.

In terms of Section 245(5)(d) "onset of insolvency" is the date of the commencement of the winding-up of the company. The "date of commencement of the winding-up" is further refined in Section 129(2) of the said Act, which Section provides that the winding-up is deemed to commence at the time of the presentation of the petition for the winding-up. The petition for the winding-up was issued by the creditor on 14 October 2022. As the floating charge was granted in February 2022, it was granted in the period referred to in Section 245(3)(b) of the said Act and can therefore be invalidated if, in terms of Section 245(4), the company was at the time of the granting

of the floating charge unable to pay its debts within the meaning of Section 123 of the said Act, or became unable to pay its debts as a result of the granting of the floating charge.

In considering the company's records, the liquidator will be able to prove in terms of Section 123(1)(e) that the company is unable to its debts as they fall due, based on the following:

- 1. Fretus Bank PLC was applying pressure on the Company to pay the debts and in an attempt to prevent a demand being issued, the Company granted the floating charge in favour of the bank in February 2022;*
- 2. During July 2022, as the company continued to suffer cash flow problems (more proof that it was already suffering cash flow problems at this stage), they sold two assets to the director to increase its cash position;*
- 3. A creditor issued the application for the winding-up of the Company in October 2022 and the winding-up order was granted in December 2022, which confirms that the company was unable to pay the debt to the said creditor;*
- 4. A month before the winding-up order was granted (±November 2022) Hard and Fast Ltd demanded immediate payment of all sums owing to it.*

As it is clear that the company already has cash flow problems when the floating charge was granted in favour of the Bank, the company was at that stage already unable to pay its debts.

In considering what is stated hereinabove, the granting of the floating charge in favour of the bank complies with the requirements of Section 245(2) of the said Act, read with the other Sections of the Act referred to hereinabove, and therefore the granting of the floating charge can be invalidated by the Liquidator.

Question 4.2 [maximum 6 marks]

Commented [WPA13]: 5/6 very good but the defence under s 238 might also have been considered

The sale of the marble cutting machines; and

In terms of Section 238(2) of the Insolvency Act 1986 ("the said Act"), read with Section 238(1)(b) of the said Act, a liquidator may apply to the court for an order under Section 238 if the company entered into a transaction with a person at a relevant time at an undervalue.

In terms of Section 240(1)(a) of the said Act, "relevant time" under Section 238 as referred to above, is, in the case of a transaction at undervalue with a person who is connected with the company, at a time in the period of 2 years ending with the onset of insolvency. As referred to under 4.1 above, a director of a company is a person connected with the company under Section 249 of the said Act. "Onset of insolvency" in terms of Section 240(3)(e) is the date of the commencement of the winding-up of the company. As referred to under 4.1 above, the "date of commencement of the winding-up" is further refined in Section 129(2) of the said Act, which Section provides that the winding-up is deemed to commence at the time of the presentation of the petition for the winding-up.

Section 240(2) of the said Act further provides that, at the time of the transaction, the company should have been unable to pay its debts within the meaning of Section 123 or should have become unable to pay its debts as a result of the transaction, however this requirement is presumed to be satisfied if the transaction was entered into with a person connected with the company (unless the contrary is proven).

The transaction was entered into by the company with a director of the company during July 2022 and the petition for the winding-up was issued on 14 October 2022. The transaction was therefore entered into with a connected person in the period of 2 years prior to the onset of the insolvency and the requirements of Section 240(2) is deemed to be satisfied. As a result hereof, the liquidator will be able to attack this transaction, if it was entered into at undervalue.

In terms of Section 238(4)(b), a company enters into a transaction at undervalue if the transaction was entered into for an amount significantly less in value (value being in money or money's worth) than the consideration paid by the company.

The transaction was entered into at an amount of GBP10,000.00 while the company paid GBP25,000.00 a year earlier. The transaction was therefore entered into for an amount significantly less in value than the consideration paid by the company and will be considered as taking place at undervalue.

In considering what is stated hereinabove, the liquidator will be able to attack this transaction by way of an application to court. In terms of Section 238(3) the court shall make an order that it thinks fit for restoring the position of the company to that what it would have been if the transaction had not taken place.

Question 4.3 [maximum 4 marks]

Commented [WPA14]: 4/4 very good

The payments to Hard and Fast Ltd.

The payments to Hard and Fast Ltd were made a month before the winding-up order was made. The winding-up order was granted on 23 December 2022 and therefore the payments were most probably made in November 2022. The petition for the winding-up was issued by the creditor on 14 October 2022. In terms of Section 129(2) of the Insolvency Act 1986 ("the said Act") the winding-up of a company is deemed to commence at the time of the presentation of the petition for the winding-up. The date of commencement of the winding-up is therefore 14 October 2022 and the payments to Hard and Fast Ltd were therefore made after the commencement of the winding-up.

In terms of Section 127 of the said Act, in a winding-up by the court, any disposition by a company of its property made after the commencement of the winding-up is void, unless the court orders otherwise.

In considering the above, the liquidator will be able to claw back / recover the amounts paid by the company to Hard and Fast Ltd during the period between the issuing of the petition for winding-up and the granting of the winding-up order as being void in terms of Section 127 of the said Act unless it is validated by way of an application for a validation order to be granted. If Hard and Fast Ltd does not repay the amounts, the Liquidator will be able to apply to the court for an order declaring the payments void.

In terms of the decision of Express Electrical Distributors Ltd v Beavis & Others [2016] 1 WLR 4783 the Hard and Fast Ltd will have to show that the validation of the payments to them was in the interests of the general body of creditors on the basis that the said payments were necessary to ensure continued supply of goods. If Hard and Fast Ltd can therefore show that the payment by the company and the subsequent supply of marble by Hard and Fast Ltd allowed the company to continue to trade, which trading was to the benefit of the creditors as it enable the company to generate an income, the court will generally validate the payments.

*** End of Assessment ***