



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

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

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

1. **You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
2. **All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
3. **No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
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- 6.1 **If you selected Module 3B as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 6.2 **If you selected Module 3B as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not**

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

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

ANSWER ALL THE QUESTIONS

Commented [WPA1]: 46/50 = 92% an excellent effort

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

Commented [WPA2]: 9/10

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.

Commented [WPA3]: D is correct

Question 1.3

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

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

Question 1.4

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

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

Question 1.5

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

- (a) **Administration.**
- (b) *Restructuring Plan.*

(c) Scheme of Arrangement.

(d) Company Voluntary Arrangement.

Question 1.6

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

(a) GBP 500

(b) GBP 750

(c) GBP 1,000

(d) GBP 2,000

Question 1.7

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

(a) Wrongful trading.

(b) Breach of fiduciary duty.

(c) Being found guilty of an indictable offence in Great Britain.

(d) Being found guilty of an indictable offence overseas.

Question 1.8

The administrator is under a general duty to provide a statement for creditors' consideration setting out proposals for achieving the purpose of administration. He or she must obtain a creditors' decision on whether or not to approve the proposals within how many weeks of the date the company entered administration?

(a) 6

(b) 8

(c) 10

(d) 12

Question 1.9

Which of the following statements is incorrect?

(a) An insolvency officeholder from an EU Member State will be automatically recognised by the courts in the UK whether the officeholder was appointed before or after Brexit.

(b) An insolvency officeholder from an EU Member State is automatically recognised by the courts in the UK if appointed before Brexit.

(c) An insolvency officeholder from an EU Member State appointed after Brexit may apply to a UK court for recognition under the Cross Border Insolvency Regulations.

(d) An insolvency officeholder from an EU Member State cannot apply to a UK court for recognition under section 426 of the Insolvency Act 1986.

Question 1.10

Under section 216 of the Insolvency Act 1986, a director of a company which has been wound up insolvent may not, unless an exception applies, be a director of a company that is known by a prohibited name for what period of time?

(a) 6 months.

(b) 12 months.

(c) 2 years.

(d) 5 years.

QUESTION 2 (direct questions) [10 marks]

Commented [WPA4]: 10/10

Question 2.1 [maximum 5 marks]

Commented [WPA5]: 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?

Pursuant to s 423 of the Insolvency Act 1986 ("IA"):

- Where the debtor has been made bankrupt or a body corporate is being wound up or is in administration, the official receiver, the trustee of the bankrupt's estate or the liquidator or administrator of the body corporate, or the victim of the transaction with leave of the court
- Where a victim of the transaction is bound by a voluntary arrangement approved under Part I or Part VIII of the IA, by the supervisor of the voluntary arrangement or by any other person who is such a victim;
- Or a victim of the transaction in any other case than those stipulated above (see s 424 IA).

Notably, an application that is made under any of the above points is treated as made on behalf of every victim of the transaction (s 424(2) IA).

Pursuant to s 6 of the Company Directors Disqualification Act 1986: The Secretary of State or, where the Secretary of State so directs in the case of a person who is or has been a director of a company which is being or has been wound up by the court in England and Wales, by the official receiver (s 7(1)). The liquidator or administrator has a statutory duty to report any such 'unfit' directors.

Pursuant to s 246ZB of the IA: The administrator (s 246ZB(1) IA).

Question 2.2 [maximum 5 marks]

Commented [WPA6]: 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.

- (1) the monitor's remuneration or expenses
- (2) goods or services supplied during the moratorium
- (3) rent in respect of a period during the moratorium
- (4) wages or salary arising under a contract of employment
- (5) redundancy payments

(see s A18(3) of the IA)

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

Commented [WPA7]: 12/15

Question 3.1 [maximum 6 marks]

Commented [WPA8]: 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 general position is that the administrator can require suppliers of goods and services to continue to perform the contract, unless the supplier is entitled under a term of the supply contract to automatically terminate the contract upon the commencement of administration (or other related insolvency procedures, as the case may be) (referred to as an “automatic termination clause”).

Even so, such automatic termination clauses are subject to a number of statutory exceptions under the IA. These statutory exceptions apply to contracts for the supply of gas, electricity, water and communications services (as defined in ss 233(3) and 233(3A) of the IA; also referred to as “essential goods or services” under s 233A(7) of the IA) and contracts for the “supply of goods and services” (s 233B(3) of the IA).

Supply of Gas, Electricity, Water etc

Where the contract is one for gas, electricity, water and communications under s 233 IA, s 233(2) IA envisages that the administrator may make a request for the giving of said supplies by the supplier. In turn, the supplier may make it a condition of the giving of the supply that the administrator personally guarantees the payment of any charges in respect of the supply (s 233(2)(a) IA), but cannot make it a condition of giving the supply that any outstanding charges in respect of a supply given to the company prior to the commencement of administration must be paid (s 233(2)(b) IA).

Further, s 233A(1)(a) IA provides that an “insolvency-related term” of a contract for the supply of essential goods and services ceases to have effect if the company enters administration. Such “insolvency-related term[s]” include provisions where the supplier would be entitled to terminate the contract or supply, or do “any other thing” because of administration such as altering the terms of supply (see s 233A(8) IA). The effect of s 233A(1) of the IA is only ‘released’ and the supplier entitled to terminate the contract/supply upon the fulfilment of the conditions listed in s 233A(4) and s 233A(5). This includes (amongst other conditions): the consent of the administrator (s 233A(4)(a)); where the court grants permission for the termination of the contract (s 233A(4)(b)); and only if satisfied that continuing the contract would cause the supplier hardship); or where the supplier gives notice to the administrator that supply will be terminated unless the administrator personally guarantees the payment of any charges for the continuation of supply after administration, and where the administrator fails to give that guarantee within 14 days of receipt of the notice (s 233A(5)).

Supply of Goods and Services

Under s 233B of the IA, a provision of a contract for the supply of goods or services to the company ceases to have effect when the company commences administration to the extent that under that provision, the contract or supply would terminate (or any other thing would take place) because of the administration (s 233B(3)). In other words, 233B prevents suppliers from “terminating a supply upon the company’s insolvency... and from making other changes to the contract such as increasing prices”. It also prevents suppliers from “making it a condition of continued supply that pre-insolvency arrears are paid” (Guidance Text at p 21; s 233B(7)).

A contract may still be terminated by a supplier where the company or administrator consents to it (s 233B(5)(b)), or where the court is satisfied that the continuation of the contract would cause the supplier hardship and grants permission for the termination of the contract (s 233B(5)(c)).

Notably, s 233B complements s 233 and s 233A of the IA insofar as it applies more broadly to a wider range of suppliers, save for those set out in Schedule 4ZZA of the IA. This includes insurers; banks; and electronic money institutions to name a few.

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?

The order of priority of payments in a liquidation is, in general and descending terms:

- (a) Payments to secured creditors - these are not technically payments that strictly have to be made in the context of a formal insolvency procedure/statutory strictures, but may usually be paid first.*
- (b) the liquidation-related expenses (per s 115 of the IA). This includes expenses such as the remuneration of the liquidator;*
- (c) preferential debts (per ss 175(1), 175(2), 386, 387 and Schedule 6 of the IA)*
 - a. ordinary preferential debts (certain employment-related remuneration and levies, etc). These rank equally among themselves and shall be paid in full unless the assets are insufficient to meet them, in which case they abate in equal proportions (s 175(1A) of the IA).*
 - b. secondary preferential debts (certain payments made under the Financial Services Compensation Scheme; income tax deductions, VAT payments etc (s 386 IA)). Holders of secondary preferential debts are paid after the ordinary preferential debts. These rank equally among themselves and shall be paid in full unless the assets are insufficient to meet them, in which case they abate in equal proportions (s 175(1B) of the IA)*
- (d) floating charge holders (with priority between floating charge holders usually determined based on which floating charge was created first). Liquidators making payments to this class of creditor must bear in mind s 176A of the IA, which applies to a company with a floating charge created on or after 15 Sep 2003 and where the company has gone into liquidation or administration. Under s 176A of the IA, the liquidator is generally under a duty to make a "prescribed part" of the company's net property (ie the amount of the company's property available for the satisfaction of debts of floating charge holders) available for the satisfaction of unsecured debts, and cannot distribute any of this prescribed part to a floating charge holder*

Commented [WPA9]: 6/9 a good answer but would have benefitted from some further detailed explanation in places eg secured creditors with fixed security only? Meaning of expenses? Ranking? Fuller detail about s 176A? The position under s 174A - priority over liquidator's expenses?

unless it is in excess of the amount required to satisfy the unsecured debt. The extent of the liquidator's duty is, in turn, determined by whether the net property exceeds GBP 10,000. If it does not, the prescribed part is 50% - but where the liquidator thinks the benefit to the unsecured creditor is disproportionate to the benefits, the duty to make distribution of the prescribed part does not apply (s 176A(3); an application for a court order to this effect may also be made under s 176A(5)).

(e) Unsecured Creditors

(f) Shareholders. **The surplus of funds (if any) once all creditors are paid may be distributed amongst the shareholders according to the company's constitution.**

Where a moratorium under Part A1 of the IA is in effect; then, in order of priority, (a) any prescribed fees or expenses of the official receiver and (b) moratorium debts and priority pre-moratorium debts take precedence over any other payments including preferential debts (ss 174A and 175 read with s 115 IA).

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

Commented [WPA10]: 15/15 very good application of the law

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 [Nov 2022], Rita Perkins received an email from Hard and Fast Ltd, one of the Company's key suppliers. The supplier demanded immediate payment of all sums owing to it and informed the Company that further supplies would only be made on a cash on delivery basis. As the continued supply of marble was seen as essential by the Company, the board authorised a payment of GBP 8,000 to cover existing liabilities and agreed to further payments, on a cash on delivery basis, for further supplies which amounted to further payment of GBP 3,000 up to the date of the winding up order.

The liquidator has asked for advice whether any action may be taken in respect of the floating charge in favour of Fretus Bank plc and the two subsequent transactions.

Using the facts above, answer the questions that follow.

Identify the relevant issues and statutory provisions and consider whether the liquidator may take any action in relation to:

Question 4.1 [maximum 5 marks]

Commented [WPA11]: 5/5 very good

The floating charge in favour of Fretus Bank plc;

Answer: **The liquidator may consider taking steps to avoid the floating charge pursuant to s 245 of the IA. Section 245 of the IA applies where a company is in liquidation and is aimed at preventing pre-existing unsecured creditors from obtaining the security of a floating charge before the company enters a formal insolvency procedure. Whether the liquidator may successfully bring an application under s 245 of the IA may depend on the following issues:**

- Whether the floating charge is created within the “relevant time”: **Pursuant to s 245(3) of the IA, the “relevant time” within which a floating charge may be invalidated is (a) in the case of a charge created in favour of a person connected with the company, a time in the period of 2 years ending with the onset of insolvency; or (b) for a charge created in favour of a non-connected person, a time period of 12 months ending with the onset of insolvency.**
 - **In this case, whether Fretus Bank is a connected person as defined in s 249 read with 435 of the IA may depend on whether the person in control of the Company is associated with the persons in control of Fretus Bank (or controls the Company himself) (see s 435(6) of the IA).**
 - **Even if it were assumed that the shorter timeframe applies (ie, that Fretus Bank is not a connected person), the creation of the floating charge falls within the definition of a relevant time. For the purposes of s 245, the “onset of insolvency” is where (amongst other grounds) the date of the commencement of the winding up (s 245(4)(d)). As such, the liquidation is deemed to have commenced at the date of the petition (rather than the date of the winding up order (s 129 of the IA). Liquidation is thus deemed to have commenced on 14 October 2022, and the creation of the floating charge in February 2022 thus falls within the 12 months timeframe from the onset of insolvency.**
- Whether, when the floating charge is created and assuming Fretus Bank is not a connected person, the company is: **(a) unable to pay its debts as defined in s 123 of the IA; or (b) becomes unable to pay its debts in consequence of the transaction under which the charge is created. (see s 245(4) IA)**
 - **In this case, it is not entirely clear whether the Company is solvent (per s 123 of the IA) though it would appear that it has been struggling from cash flow issues. The granting of the floating charge itself may suggest that the Company is unable to meet its debt to Fretus Bank if so called.**
- Whether there is fresh consideration: **The liquidator should note that s 245 does not prevent lenders who are providing fresh funding to the company from**

taking a floating charge for that new fundings, and only renders invalid floating charges except to the extent of the 'fresh' consideration for the charge (per s 245(2) of the IA). Whether this exception applies would turn on the precise terms and nature of the debenture granted to Fretus Bank. To elaborate, Section 245(2) provides for the following main categories of fresh consideration such that the floating charge does not fall within s 245 to the extent of said consideration:

- S 245(2)(a): **the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the company at the same time/after the creation of the charge (s 245(2)(a)). It has been held that a delay of any substantial length (more than a coffee break) between the making of payments pursuant to the agreement giving rise to the charge and the execution of said charge would be fatal to the exception (*Re Shoe Lace Ltd* [1992] BCLC 636. Put in other words, the question posed "is whether a businessman having knowledge of the kind of time limits imposed by the Insolvency and Companies Acts and using ordinary language would say that the payments had been made at the same time as the execution of the debenture" (per Hoffman J at 639).**
- S 245(2)(b): **the value of so much of that consideration as consists of the discharge or reduction at the same time as, or after, the creation of the charge, of any debt of the company.**

Finally, the liquidator should note that even if the floating charge is invalidated, the underlying debt remains valid.

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

Answer:

Possible step (1): avoiding a transaction at undervalue

On the face of the current facts, it would appear that the sale of the two marble cutting machines to Rita Perkins ("RP") was made at an undervalue. Under s 238 of the IA, a liquidator may avoid a transaction that was entered prior to the company entering liquidation where the transaction was at an undervalue. The court has a broad discretion under s 238(3) to make an order restoring the position to what it would have been if the transaction had not been entered into (ie, reversing the sale) (*Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] UKHL 2 ("*Phillips*") at [34]). The following issues are relevant in assessing the liquidator's prospects of success in a s 238 IA application:

Commented [WPA12]: 6/6 very good on s 238. Not so convincing on the s 15A suggestion as CDDA proceedings cannot be commenced by the liquidator

- Whether the transaction was made at an undervalue pursuant to s 238(4): **Section 238(4) of the IA provides that a company enters into a transaction at an undervalue if (a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or (b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company. Here, it may be that the latter condition is met.**
- Whether the transaction was made at the relevant time (s 238(2)): **Section 240 of the IA defines the "relevant time" when given to a person who is connected with the company (otherwise than by reason only of being its employee), at a time in the period of 2 years ending with the onset of insolvency. The onset of insolvency is in turn defined in s 240(3), and for present purposes said onset is the date of the commencement of the winding up (s 240(3)(e)). The present transaction to RP (having been made within a few months of the commencement of winding up) thus falls within the relevant time.**
 - Notably, the transaction would only fall within the "relevant time" if, at the time the transaction is made, the company is unable to pay its debts as provided in s 123 of the IA; or becomes unable to pay its debts within the meaning of that section in consequence of the transaction (s 240(2) of the IA). Where the transaction is entered into by a company with a person who is connected with the company, the requirements of s 240(2) of the IA are presumed to be satisfied, unless the contrary is shown.
 - In this case, since RP is a director of the Company, she would be deemed "connected" with the Company (per s 249(a) of the IA). The presumption of insolvency thus arises in favour of the liquidator (or the applicant under s 238 as the case may be), though this may be rebutted with evidence of solvency.
- Whether there are other circumstances such that the court would not make an order under s 238: **Section 238(5) of the IA provides that the court shall not make an order where it is satisfied that (a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company. Whether this ground is made would turn on the relevant evidence before the court regarding the board's reasons for making the transfer to RP.**
- The liquidator should also be cognisant of s 241(2) of the IA, which provides that: **"An order under section 238... may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the company in question entered into the transaction ... ; but such an order—**
 - (a) shall not prejudice any interest in property which was acquired from a person other than the company and was acquired in good faith and for value, or prejudice any interest deriving from such an interest, and

- *(b) shall not require a person who received a benefit from the transaction or preference in good faith and for value to pay a sum to the office-holder, except where that person was a party to the transaction or the payment is to be in respect of a preference given to that person at a time when he was a creditor of the company."*

To this extent, the liquidator should also inquire into whether there are any other persons with a proprietary interest in the machines, and to that extent, whether any order sought by the liquidator would be affected by the operation of s 241 of the IA.

Possible Step (2): Transaction defrauding creditors

The liquidator may also consider an action under s 423 of the IA. Section 423 of the IA also relates to transactions entered into at an undervalue (per s 423(1)), and requires that the transaction was entered into for the purpose of (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make (s 423(3) of the IA)). Where these grounds are made out, the court may make such order as it thinks fit for (a) restoring the position to what it would have been if the transaction had not been entered into, and (b) protecting the interests of persons who are victims of the transaction.

However, it does not appear on the face of the present facts that RP and the board of the Company had this infringing purpose in making the sale. More information is required, though this is an option that the liquidator may still consider.

Possible Step (3): Action against RP and the board

- *While the facts do not clear indicate so, the liquidator may also consider taking action against RP (and the board, if relevant) for*
- *Notably, to the extent that the liquidator can prove that the actions of RP and the board should render them liable to disqualification under the Company Directors Disqualification Act 1986 ("CCDA"), s 15A of the CCDA provides that the court may subject the errant directors to a compensation order such whereby he or she will be liable to make a payment to specified creditors where the conduct of those directors caused loss to one or more creditors. Arguably, however, this may be more procedurally cumbersome than a direct application under s 238 of the IA, and thus the CCDA route should not be preferred.*

Question 4.3 [maximum 4 marks]

Commented [WPA13]: 4/4 very good

The payments to Hard and Fast Ltd.

Answer:

Possible step: Void disposition

Under s 127 of the IA, “any disposition of the company’s property, ... made after the commencement of the winding up is, unless the court otherwise orders, void”. The purpose of this provision is to preserve the assets of the company for the distribution of the same to the company’s creditors (*Changtel Solutions UK Ltd (In Liquidation) and others v G4S Secure Solutions (UK) Ltd* [2022] EWHC 694(Ch) (“*Changtel*”) at [64]). For the purposes of s 127, the commencement date of winding up is the date of the presentation of the petition to wind up. In the present case, the authorized payments of GBP 8,000 and 3,000 (if made) would have been caught by s 127 of the IA as the payment would have been made after the petition was issued (ie, 14 October 2022).

The liquidator should note that the court has the discretion to declare such dispositions validly made (ie, a validation order). Should the directors contest an application under s 127(1) of the IA, the burden falls on them to show that a validation order should be made (*Express Electrical Distributors Ltd v Beavis* [2016] 1 WLR 4783 (“*Beavis*”). Generally, a validation order would be made in relation to an insolvent company where the circumstances indicate that the disposition will be or has been made for the benefit of the general body of unsecured creditors. The following considerations are relevant:

- The overarching consideration is that the court is reluctant to depart from the basic principle of *pari passu* distribution among creditors in order to validate payments or transfer made in relation to pre-liquidation transactions where the effect is to give a preference to pre-liquidation creditor over other creditors (*Beavis* at [20]). As such, a validation order is only be made in relation to dispositions occurring after presentation of a winding up petition if there is some special circumstance which shows that the disposition in question will be (in a prospective application case) or has been (in a retrospective application case) for the benefit of the general body of unsecured creditors, such that it is appropriate to disapply the usual *pari passu* principle (*Beavis* at [56]; *Changtel* at [64(8)])
- Payments are likely to be sanctioned where necessary to ensure continued supplies enabling the company to continue trading in cases where the court considers that the continuance of trading was in the creditors’ best interests (*Beavis* at [20]) - in this case, the question that may arise is whether, at this late stage of the Company’s life (where it is apparent that the company is close to or already is insolvent and the directors’ duty is recast as a duty to act in the interest of the creditors rather than the company), continuing to trade in marble is in the creditors’ best interest.
- Transactions which do not diminish the company’s net assets/increase the value of the company’s assets/preserve assets from harm will normally be validated - in the present case, it could be possible that evidence of purchase orders for cut marble produced by the Company could improve its position (above and beyond the cash outlay for the supply of marble from Hard and Fast). In the overall scheme, this may benefit the creditors.

- Where the parties are unaware that a petition has been presented and so the disposition is in good faith and in the ordinary course of business, this is *not* in and of itself a 'special circumstance' justifying validation (*Beavis* at [56]), but the transaction will likely be sanctioned if it is likely to be for the benefit of the creditors generally (*Beavis* at [36]). In this case, however, it is clear that both the Company and Hard & Fast are aware of the winding-up petition, and cannot be said to have undertaken the disposition in good faith.
- 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 enable the business to continue.

The liquidator should also note that applications for validation can be made retrospectively, as will be relevant in this case (if the authorized payments to Hard & Fast have already been made). While the same considerations enumerated above apply, it should be noted that in the case of a retrospective application the court may have the benefit of hindsight in its assessment. In the words of ICC Judge Barber in *Changtel* at [64(6)]: "where a retrospective order is sought it may become clear whether a particular transaction or the carrying on of the company's general business in fact turned out to be for the benefit of the general body of creditors or not. Observations of Buckley LJ in *Gray's Inn Construction* [1980] 1 WLR 711 at pp 720B and 723F-724C suggest that, in a retrospective case, the court should look at the matter with the benefit of hindsight". Much will therefore depend on the effectiveness of the Company's maneuver in relation to the payments to Hard & Fast. Where the evidence shows that the company traded at a loss, validation orders would generally not be made in respect of the operation of its bank account used for its ordinary trading to the extent of such loss (*Changtel* at [64(9)]).

- To illustrate by way of example, in *Changtel*, a payment for the provision of security guards at the Company's premises (while the company continued trading at a loss) was considered retrospectively (amongst other payments). On an assessment of the evidence, ICC Judge Barber considered at [85] that "the post-petition period of trading appears to have been disastrous for the creditors as a whole and the Payments formed part of the overall cost of that trading. The argument that if the Respondent had ceased to provide security guards, the premises might have been broken into and the Applicants might have received less than £1.2m as a final settlement with Entatech UK is ... speculative and fanciful".

* End of Assessment *