



**SUMMATIVE (FORMAL) ASSESSMENT (RESIT SEPTEMBER 2022): MODULE 3B**

**THE INSOLVENCY SYSTEM OF THE UNITED KINGDOM  
(ENGLAND AND WALES)**

This is the **summative (formal) resit assessment** for **Module 3B** of this course. Please read the instructions 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.assessment3Bresit]**. An example would be something along the following lines: 202223-336.assessment3Bresit. **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. This assessment must be returned to [David.Burdette@insol.org](mailto:David.Burdette@insol.org) by e-mail no later than **23:00 (11 pm) BST (GMT +1) on Monday 26 September 2022**. When returning the assessment by e-mail, your e-mail must 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. Prior to being populated with your answers, this assessment consists of **8 pages**.

## ANSWER ALL THE QUESTIONS

Commented [DB1]: 31 out of 50 = 62%

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

Commented [DB2]: 7 out of 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. Yes**
- (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. Yes**

#### 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. **Yes**

#### 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. **Yes**
- (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 Yes

(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. Yes

(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. Yes

(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 [DB3]: 10 out of 10

##### Question 2.1 [maximum 5 marks] 5 marks

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

Under Section 423, where the company is being wound up, an action may be brought by the official receiver or a liquidator. Where the company is in administration, the administrator may bring the action. With the leave of court, any other victim of the transaction, such as a creditor, may also bring an action. Where there is a CVA in force, the supervisor of the CVA or any victim of the transaction who is bound by the CVA may also bring an action.

Under Section 6 of the CDDA, the Liquidator may bring an action against the subject Director.

Under Section 246ZB of the Insolvency Act, the Liquidator may bring an action against a director on account of wrongful trading.

##### Question 2.2 [maximum 5 marks] 5 marks

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.

These include:

- a) The monitor's remuneration or expenses.
- b) Wages or salaries arising under a contract of employment.
- c) Redundancy payments.
- d) Payments for goods or services supplied during the Moratorium.
- e) Rent in respect of the period during the moratorium.

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

Commented [DB4]: 8 out of 15

**Question 3.1 [maximum 6 marks] 3 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?

The administrator will certainly require the supply of specific goods and services during the administration. These are the essential supplies under Section 233 of the Insolvency Act which identifies the supply of gas, electricity, water and communications services as essential supplies. In such instances, the administration is guaranteed that suppliers will not terminate existing contracts merely because the company has failed to pay a pre-existing debt. Secondly, under Section 233A, a suppliers cannot rely on an insolvency - related term to terminate a contract or alter the terms of the contract or require higher payments for continued supply. Suppliers may, however, require the administrator to personally guarantee the payment of charges in respect of the supply.

Not a complete answer

**Question 3.2 [maximum 9 marks] 5 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 first are the main expenses in the following order:

- a) The expenses that are properly incurred by the liquidator in preserving, realising or getting in any of the assets of the company including the conduct of any legal proceedings.
- b) Next is the cost of any security provided by the liquidator.
- c) Any amount payable to a person to assist in the preparation of the statement of affairs or accounts.
- d) Any necessary disbursements by the liquidator while winding up
- e) The remuneration of any person who has been employed by the liquidator to perform any services for the company.

- f) The remuneration of the liquidator.
- g) The amount of any corporation tax on chargeable gains accruing on the realization of any asset of the company.
- h) Any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up.

1 mark

Next in rank are the preferential creditors which include debts owed to the Government and the claims of employees to a limited extent and all other claims contained in Schedule 6 to the Act. There are two classes of preferential debts, the Ordinary and the Secondary preferential debts. The Ordinary preferential debts are paid prior to the Secondary preferential debts. Preferential debts rank equally amongst themselves and are paid in the order of priority stipulated in the Schedule. They also abate equally if the assets are insufficient to meet them all. 2 marks

These are following by the holders of floating charges. Where there is more than one floating charge holder, the order of priority shall apply in favour of the creditor whose charge was create first in time. In these cases, before applying the proceeds from the realisation of the assets to settle the claims by floating charge holders, the Liquidator must first assess whether the charge was created on or after 23<sup>rd</sup> September 2003 under Section 176A. This is because of the Insolvency Act 1986 (Prescribed Part) Order, 2003 that requires the Liquidator to set aside a part of the proceeds arising out of the realisation of assets covered by the floating charge for the settlement of unsecured creditor. 2 marks

Lastly, the unsecured creditors' claims will be settled in *pari passu* and finally, any surplus after the distribution will return to the shareholders of the company.

The question requires a brief explanation of the rights of each type of creditor/expenses as well as getting the order correct - Fixed charges will be paid first unless assets subject to the fixed charge are realised by the liquidator in which case the liquidator's costs of realisation are paid first (1 mark); liquidator's costs and expenses (1 mark); preferential debts - ordinary and secondary (2 marks); floating charges subject to s 176A (2 marks); unsecured creditors (1 mark). Section 174A provides that certain unpaid pre-Moratorium or Moratorium debts, such as debts owed to employees or "financial services" debts, are paid in the subsequent liquidation, in priority to even the liquidator's fees and expenses (2 marks).

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

Commented [DB5]: 6 out of 15

Prior to going into compulsory liquidation on 23<sup>rd</sup> 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 14<sup>th</sup> 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] 4 marks**

The floating charge in favour of Fretus Bank plc;

The floating charge created in favour of Fretus Bank plc is voidable and may be set aside upon application by the liquidator **1 mark**. Under Section 245 **1 mark** of the Insolvency Act, 1986, where the charge is created within the relevant time, it is invalid. For purposes of ascertaining the relevant time, nothing the facts speaks to the Bank and the Company being related persons. As such, pursuant to Section 245(3)(b), the relevant time will be 12 months preceding the insolvency. **1 mark**

In this case, between the month on which the charge was created (February 2022) and December 2022, there is a period of 11 months. The charge was therefore created within the relevant period and since it was created with a view to secure "old money", and not a **fresh lending**, it would qualify as a voidable floating charge.

**Question 4.2 [maximum 6 marks] 2 marks**

The sale of the marble cutting machines; and

According to the facts, whereas the machines were purchased at GBP 25,000, a year later, they were sold at GBP 10,000. This would qualify as a transaction at an undervalue and the liquidator would be at liberty to apply to court to have the same set aside. **1 mark**

Under Section 238 of the Act, there is a rebuttable presumption that this transaction qualifies as a transaction at an undervalue because not only did it occur within the relevant period of 2 years **1 mark** preceding the insolvency but, as a result of the transaction, the company is unable to carry out its business and therefore, unable to pay its debts. Secondly, the value received from the transaction is significantly less than the consideration provided by the company.

Answer:

i) Company is in administration or liquidation - yes **(1 mark)**

ii) Has there been:

(a) a transaction at an undervalue? The company enters into a transaction for a consideration the value of which is significantly less than that provided by the company, in money or money's worth - seems yes **(1 mark)**

(b) at the relevant time

(c) the period of two years ending with the onset of insolvency - yes **(1 mark)**

(d) s.240(2) - the company was insolvent at the time or as a result of the transaction - presumed as connected person (presumption could be rebutted) **(1 mark)**

iii) Is there a defence?

- Was it in good faith for the purpose of carrying on the business?
- Were there reasonable grounds to believe it would benefit the company? Possible defence **(1 mark)**

Remedy would be to restore company to the position it would have been in if no such transaction for example

(1) Return of machines and refund of monies; or

(2) Rita Perkins ordered to pay more for the machines **(1 mark)**

**Question 4.3 [maximum 4 marks] 0 marks**

The payments to Hard and Fast Ltd.

There is nothing wrong with this transaction. The demand for the outstanding sums due was made in the ordinary course of business and was made in respect of supplies to the Company. This transaction is investigated alongside the Preferences under Section 239 of the Act and it is observed that the liquidator would not be able to prove the desire to prefer Hard and Fast Limited over other unsecured creditors. This is because the arrangement that

saw Hard and Fast Limited get paid was motivated by the desire to continue trading and not the desire to prefer a creditor.

**Answer:**

Section 127 of the Insolvency Act 1986 avoids any disposition of property of the company made after the commencement of winding up, unless the court otherwise orders (1 mark). The commencement date will be the date of the presentation of the petition to wind up not the date of the winding up order so the avoidance provision acts in a backdated manner (1 mark). On facts, prima facie void but court may validate - need to explain how the court approaches such a discretion - The court will be reluctant to depart from the basic principle of *pari passu* distribution among creditors in order to validate payments or transfers made in relation to pre-liquidation transactions where the effect is to give a preference to a pre-liquidation creditor over other creditors - 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 (1 mark). Unlikely to validate payments for past supplies but may well do so for cash on delivery supplies (1 mark)

**\* End of Assessment \***