



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

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

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

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

### INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

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

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

**ANSWER ALL THE QUESTIONS**

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

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

Question 1.1

Please select the most correct ending to the following statement:

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

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

Question 1.2

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

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

Commented [WPA1]: 28/50 = 56% some strong answers but some where the issues are not fully identified or where the law is not fully applied.

Commented [WPA2]: 7/10

Question 1.3

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

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

Question 1.4

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

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

Question 1.5

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

- (a) Administration.**
- (b) Restructuring Plan.**
- (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 the correct answer

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.

Commented [WPA4]: A is the only incorrect statement here

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

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

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

Question 1.10

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

(a) 6 months.

(b) 12 months.

(c) 2 years.

(d) 5 years.

Commented [WPA5]: D is the correct answer

QUESTION 2 (direct questions) [10 marks]

Commented [WPA6]: 2/10

Question 2.1 [maximum 5 marks]

Commented [WPA7]: 2/5 the answer to the s 423 question fails to distinguish between the possible different scenarios - there is a lack of clarity for example around when a supervisor of a CVA can apply. Under the CDDA s 6, there is no power in a liquidator or administrator to bring an action. Only an administrator can bring an action under s 246ZB.

**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 of the Insolvency Act 1986

**If an entity is being wound up or is in process of administration, the following person may initiate actions under section 423 of the Insolvency Act 1986;**

1. the liquidator;
2. the official receiver;
3. A supervisor as per CVA;
4. the administrator
5. With the approval of the Court, any person who has been victim as creditors

6. *Any victim which is a victim of the transaction (bound by the CVA or not); and*
7. *A victim which form part of the transaction.*

Under section 6 of the Company Directors Disqualification Act 1986

*The Liquidator or an administrator and the can bring legal action and under the CDDA, the Court has this discretionary power to disqualify the director..*

Under section 246ZB of the Insolvency Act 1986

*The Liquidator or an administrator can bring legal action.*

Question 2.2 [maximum 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.**

*The following debts will not form part of the payment holiday under Part A1 of the Insolvency Act 1986:*

1. *capital market debt of at least an amount of GBP 10 million;*
2. *insurance companies;*
3. *banks;*
4. *electronic money institutions; and*
5. *recognised investment exchanges and clearing houses.*

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

Question 3.1 [maximum 6 marks]

**Can an administrator who wishes to continue to operate the business of the company in administration require suppliers of goods and services to continue to supply those goods and services during the administration?**

*The administrator may continue to trade and hence may require continuance supplies of goods and services. Upon appointment of an administrator, the contracts which exist before his/her appointment will continue. Under section 233 of the Act, the administrator is protected for the supplies of communications services, gas and electricity but the administrator will be personally liable for these debts.*

*Section 233A of the Act prevent suppliers of the same services to use the process of insolvency to change or terminate the contract and request for higher payment to continue to provide these services.*

*The 2020 act has amplified the laws for insolvent company under section 233B which prevent suppliers to end the contract or amend it although it is stipulated in the contact that once the company in process of administration, it can be amended or terminated.*

**Commented [WPA8]:** 0/5 unfortunately the question has not been correctly understood. It lists some of the companies not eligible to enter a moratorium when the question assumes there is a moratorium and asks about its effect in terms of which debts do not form part of the payment holiday eg rent payments during the moratorium.

**Commented [WPA9]:** 11/15

**Commented [WPA10]:** 4/6 along the correct lines but there is a lack of detail in relation to each of the provisions mentioned eg the potential for personal liability of the administrator is not fully explained

*Suppliers are not in position to force the administrator to settle pre-insolvency arrears before they shall continue to provide the services.*

*Also, the administrator is protected against new increase in price. No personal guarantee may be claimed against the administrator before providing these services. The contract may be terminated with the consent of the administrator.*

*The suppliers may make application to the court to terminate the contracts and the court will determine his order base of the use a balance whether it will cause hardship toward the Company and or toward the suppliers.*

*Under section 233B, there is a limited exception for the contacts to be terminated like for banking institutions, insurance entities; recognised investment exchanges, electronic money institutions; and clearing houses.*

*Termination of contract will also be applied for securitisation entities; and comparable services for overseas entities.*

*Administration does not also terminate the contract of employment. If employees are kept for 14 days once the administrator is appointed, the contract will continue as before the appointment of the insolvency practitioner.*

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 process shall be the liquidation fees and expenses, afterward will come the secured creditors (those creditors who hold fixed charges on the asset of the company, then will come the preference creditors, the unsecured creditors will be the next creditors to received payments and if there are still some available fund, the liquidator shall distribute it to the members of the company.*

*All payments will be made depending on the availability of fund after having paid the different classes of creditors as listed above.*

*The liquidator shall first settle the expenditure which he/she has incurred during the liquidation which are super priority as mentioned below:*

- 1. process to protect, realise or recoup an assets including expenses made on legal proceeding;*
- 2. cost in respect of security incurred by the liquidator;*
- 3. expenses in respect of the preparation of the statement of affairs;*
- 4. cost incurred in the normal course of the liquidation including cost incurred for liquidation committee;*
- 5. the expenses of employing, contracting people to assist the liquidator in his duties; if the liquidator has continued the contract of employment of the*

**Commented [WPA11]:** 7/9 a strong answer generally. There is some confusion around how fixed charges are dealt with - they are generally enforced outside of the liquidation and there is a lack of detail around the different types of preferential creditor.



*existing employees, the amount due to the employees during the liquidation process are rank as super priority;*

- 6. The liquidator's fees will rank afterward as he has to settle all cost and expense, he has incurred during the liquidation;*
- 7. Any corporation tax arises on disposal of asset;*
- 8. Remaining expenses incurred by the liquidator.*

*Then the liquidator will pay the secured creditors having fixed charged in rank and priorities as per the date the charged have been inscribed.*

*The preference creditors will rank afterward. The preference creditor may be categorised as ordinary and secondary. Ordinary are ranked in priority to secondary one and shall be claimed received from employees where the employees were not paid before the liquidation started, the maximum amount would be £ 800 for any four months period.*

*Recently compensation which have to be made to the Financial Services Compensation is also rank as preference claim.*

*Crown preference to HRMC also hold some preference in term of PAYE, national insurance deduction, VAT, Construction Industry Scheme deductions and student loan repayments.*

*The floating charges will be settled afterward but the liquidator will have to abide by section 176A of the Act where there is a prescribed part of the proceeds which have to be kept and distribute to the unsecured debts on disposing assets which are burdened by the floating charge. The prescribed part shall be a percentage of the asset normally 50% of the first £10,000 of net charge recouped and an additional 20% of anything after, up to a maximum prescribed part of £800,000. In circumstances where the prescribed part is less than £10,000, the insolvency practitioner believes that distributing an amount to unsecured creditors would not be fair, then the obligation under the prescribed part will not apply.*

*Also note that Section 176A applies to floating charge which was inscribed on or after 15 September 2003 and the entity is in liquidation.*

*The remaining funds if available will be distributed among the unsecured creditors and any fund left after the distribution to unsecured creditors will go the shareholder in pro-rata to the shareholdings.*

*The insolvency practitioner would also have to consider if there has been any subordination.*

*One important aspect is that the liquidator cannot sell any property which does not belong to the company as Hire Purchase or Retention of Title or Receivables Financier without the holder of the asset consenting to same or without the leave of the court. Hence the amount recouped have to be distributed to the proprietor and any deficit has to be recouped from the company asset.*

*The priority will change if there was a Moratorium under Part A1 of the Act within 12 weeks before the start of the liquidation and the moratorium fails, the priority of debts in liquidation will defer. For example, as per Section 174A some debts which have not been settled pre-Moratorium or Moratorium debts such as claims received from employees or "financial services" debts, which were not part of the payment holiday are ranked as super priority in the subsequent liquidation even before the liquidator's fees and expenses. Some unsecured creditors may also form part of the super priority like director who was not paid for months before the Moratorium will also rank as super priority. There are also bank debt, which are defined as financial services", will also ranked as super priority but there is an exception like accelerated debt will not form part as super priority claimed.*

*Hence we can see that the super priority claimed can change if a company had been in the process of Moratorium under Part A1 of the Act for the past the 12 week period before the start of the liquidation process.*

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

Commented [WPA12]: 8/15

*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]**

The floating charge in favour of Fretus Bank plc;

*Section 245 of the Act regulates floating charges only and aims at prohibiting pre-existing unsecured creditors from prescription floating charges for existing debts prior to a company initiate winding up process. It applies when the company is in administration or liquidation. But, when new fund is recouping for example taking new debt and raising fund, this section does not apply. This section will invalid the floating charge inscribed.*

*Where a floating charge is in respect to a connected person, a relevant time for floating charge to be inscribed is two year before the commencement of the winding up and if the person inscribing the charge is not connect to the company, the relevant time will be 12 months before the start of the winding up process and when the charge is taken, the company has to be in a position where it is not possible to meet its liabilities as per section 123 of the Act or is unable to meet its debts in consequence to the transaction.*

*To invalid the charge, Section 245 of the Act states that there are two categories of new considerations as follow:*

- 1. The consideration in respect of money paid or supply of goods and services to the company has to be at the same time or the money, the goods or services received should be at the same time as the floating charge is inscribed or just after the charge is inscribed. The lapse of time shall be minimal (just as a coffee-break).*
- 2. The discharge or reduction of that consideration at the same time or after the inscription of the charge shall be in respect of the debt of the Company only. In Re Fairway Magazines, the consideration made in the directors to release the liability in respect of their personal guarantee was made invalid as it was not an exemption under section 245 of the Act. If the consideration was toward reducing or discharging the debt of the company, it would be valid. The charge is be invalid if the company goes in administration or liquidation, but the debt will still exist although the charge is invalid.*

*From the scenario, we can note that the Company went under liquidation process on 23 December 2022 and the Company granted the floating charge to the bank on February 2022, which is less than one year. The liquidator make attack the inscription of the charge by using section 245 of the Act as mentioned above as the conditions stated above was not in line with the law.*

*But in MC Bacon, Millet J found that if an entity was solely depends on the Bank plc to be able to continue trading and if the bank will stop providing financial support because the company has refused to provide the charge and as a result, the Company will force to be in immediate winding up process. Providing the floating charge is not*

**Commented [WPA13]:** 3/5 a reasonable answer but one lacking specific application to the facts. It is not sufficient to leave the examiner to apply the law to the facts. Also, it is not clear how MC Bacon assists the answer. There is a more obvious reason why s 239 is not applicable - time frame.

*a preference but a must to be able to continue trading and it was for commercial reason.*

**Question 4.2 [maximum 6 marks]**

**The sale of the marble cutting machines; and**

*The liquidator may attach the sale of the two-marble cutting machine under section 238 of the Act as it seems to be a transaction at undervalue as the machines were acquired one year before at GBP 25,000 and disposed at GBP 10,000. The liquidator must prove that the transaction in money or money worth as at the date the transaction occurs was much lesser than the value of the asset.*

*The transaction must also be a period of two years preceding the start of the winding up process. Although, it is difficult to prove that the asset has been sold at an undervalue as compare to gift, arrangement, or agreement. As the transaction was related to a connected person, it is presumed that the entity due to the sale of the asset at an undervalue has been insolvent.*

*If Rita Perkins is able to show that the sale was made in good faith and enable the company to continue trading, no order will be made by the court under section 238.*

*If the contrary is proved, the court may order Rita to restore the Company to the initial position before the transaction occurred and Rita may find herself disqualify under the section 10 section of the CDDA.*

*The liquidator may also request an order under section 127 to declare the transaction as void.*

**Question 4.3 [maximum 4 marks]**

The payments to Hard and Fast Ltd.

*The main reason to appoint a liquidator is to ensure an equitable distribution of the assets in rank and priority to the creditors. As the Company is under compulsory winding up, the appointment of the liquidator will take effect as at the petition was presented to the court and not when the order of the winding up has been issued unless the court ordered otherwise. The liquidator can attack the payments made to Hard and Fast in respect to disposition of asset as per section 127 of the Act but the court may refuse and give a validation order (that the transaction shall not be void). Hard and Fast would have to satisfy the court that such order must be made as the transaction was bona fide.*

*Before the court give such order, it will take into account the following guidelines:*

- 1. The court will normally not march out on the fact that distribution must be made on a pari passu basis which will provide preference to a pre-liquidation debt.*
- 2. If the payments were imperative for the continuously procurement of material to be able to trade and same was in the best benefit of the creditors.*

**Commented [WPA14]:** 3/6 - the s 238 discussion is relevant but lacking in detailed application to the facts eg the wording of s 238 as to what an undervalue is needs to be fully explained and applied. It is not clear how s 10 CDDA or s 127 could be relevant here.

**Commented [WPA15]:** 2/4 again, the law is generally accurately explained but there is a lack of clear application to the facts eg whether both types of payment would be validated or is one far more likely to be validated by the court as it falls within the case law where such payments are seen as in the best interests of the creditors generally?

3. *The transaction has protected and/or increased the value of the net assets.*
4. *Hard and Fast was not aware of the petition of winding up against the Company.*
5. *The payment of cash on delivery will be advantageous to the Company in respect to continuance supply of material and help the Company to continue trading.*
6. *The court may approve or reject the payment and approve the continuous trading of the Company.*

*Hence the liquidator will have to satisfy the court that the transaction has to be null and void as per section 127 of the Act for payment made before the winding up order was issued and also take actions as the payments has preferred one creditor at the expense of the other creditors as per section 238 and 239 of the Act. As their defense, Hard and Fast may applies for a validation order.*

*\* End of Assessment \**