



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]: 34/50 = 68% a generally sound attempt which was weakened by poor identification of issues, depth of legal exposition and application to the facts in Q4.

Commented [WPA2]: 8/10

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

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?

Section 423 of the Insolvency Act 1986

The parties which can bring an action under section 423 of the Insolvency Act 1986 include: the official receiver, liquidator and the administrator where a company is being wound up or is in administration; victims of a transaction to defraud such as creditors (who have been granted leave by the court; A victim bound by a CVA, the supervisor of the CVA or any victim

of the transaction (whether bound by a CVA or not); victims of transactions to defraud and in any other case, by a victim of the transaction such as one entered into undervalue and one where assets are placed beyond the reach of a person who is making a claim against a company or which would otherwise prejudice the interests of such a person.

Section 6 of the Company Directors Disqualification Act 1986;

Pursuant to section 7 of the CDDA the Secretary of State can in the public interest or the official receiver (if 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 wound up by the court in England and Wales) bring an action under Section 6 of the Company Directors Disqualification Act.

Section 246ZB of the Insolvency Act 1986

The Administrator of a company which is in administration can bring an action under section 246ZB of the Insolvency Act 1986.

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.

Debts not subject to a payment holiday

1. The monitor's remuneration or expenses
2. goods or services supplied during the moratorium,
3. wages or salary arising under a contract of employment,
4. redundancy payments, and
5. debts or other liabilities arising under a contract or other instrument involving financial services

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

Commented [WPA8]: 11/15

Question 3.1 [maximum 6 marks]

Commented [WPA9]: 4/6 a reasonable answer but some more detail on how ss 233 and 233A operate generally and whether s 233B covers the same or different types of supply would have been useful.

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?

A company is placed under the control of an administrator, a professional in insolvency, during the official insolvency procedure known as administration. The administrators will evaluate the company's financial state and determine whether there is sufficient support (from customers, suppliers, etc.) to keep it operating. Contracts do not automatically end when you enter into administration unless there is an express stipulation that says otherwise.

The law recognizes the necessity of maintaining the continuance of necessary supplies such as gas, electricity, water and communication serviced for the company in an effort to allow either a rescue of the company or a better return to creditors, therefore IA 1986, s 233A also puts specific restrictions on termination where the company falls into administration. These suppliers are not allowed to require payment of outstanding debts in order to secure a new or continued supply to the company in administration.

A supplier's right to terminate a contract because of a company's insolvency is also subject to stricter regulations as a result of the Corporate Insolvency and Governance Act 2020 (CIGA 2020). (known as ipso facto clauses). In order to prevent providers of goods or services from relying on contractual provisions providing for termination in the event of the counterparty's insolvency or restructuring, CIGA 2020 included a new IA 1986, s 233B. (with some limited exceptions).

Suppliers of products or services cannot rely on contractual provisions allowing for termination in the event of the counterparty's insolvency or reorganization under the new IA 1986, s 233B. Due to the insolvency or restructuring, the supplier is not able to demand payment of pre-insolvency debts in order to secure future supplies, nor are they able to do "any other thing." For instance, the supplier is restricted from raising its pricing or requiring unfavorable terms for payment.

The new restrictions go a step further and forbid the termination of a contract or supply if a supplier already has a right to terminate that emerged before the relevant insolvency or restructuring began but that creditor did not exercise.

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?

In a liquidation the order of priority is:

- Expenses of winding up including the liquidator's remuneration.
- Preferential creditors as defined in sections 386,387 and schedule 6: section 175
- Floating Charge holders and the prescribed part (a portion of the company's net property available for the satisfaction of unsecured debt.)

Commented [WPA10]: 7/9 a good answer but one where some of the detail is not fully explained eg the explanation of preferential creditors does not seem entirely consistent and the answer appears to place secondary prefs after floating charges which is not correct.

- Secondary preferential creditors (expanded to include HMRC for certain taxes)- For insolvencies that commence from 1st December 2020, HMRC will become a secondary preferential creditor for certain payments - outstanding taxes the company holds on behalf of HMRC such as PAYE, employee NI contributions, VAT, and Construction Industry Scheme (CIS) payments.
- Unsecured creditors (including all other HMRC debt)
- Shareholders

The nature of the rights enjoyed by each class of creditor or expense.

Section 115 of the Insolvency Act (IA) 1986 provides that all expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims. For the legitimate purposes of the liquidation, when the liquidator has continued or made a contract, it will be counted as an expense. According to Section 176ZA, in the event that the assets of the company available for payment of general creditors are inadequate to cover them, the expenditures of winding up have precedence over any claims to property included in or subject to any floating charge created by the company.

In relation to preferential (or preferred) creditors/debts section 175 IA states that in a winding up the company's preferential debts shall be paid in priority to all other debts after the payment of—

- a) any liabilities to which section 174A applies (i.e when a firm's winding-up procedures are started before the conclusion of the 12-week term starting on the day after any moratorium for the company under Part A1), and
- (b) expenses of the winding up.

Pursuant to section 175 1 (B) Secondary preferential debts rank equally among themselves after the ordinary preferential debts and are to be paid in full, unless the assets are insufficient to meet them, in which case they abate in equal proportion.

Thus, creditors in this class have the right to payment before others. Preferential creditors are prioritised before unsecured creditors in liquidation but below creditors with a fixed charge on assets such as property. Employees of the company are given higher priority as these people put their time and effort into the company. Any unpaid wages (up to a maximum of £800), pension scheme contributions and holiday pay are entitled to be paid. Employees have had and will continue to have, long-standing title as preferential creditors.

A floating charge as created ranks behind the preferential creditors. Payment to this class of creditors is subject to IA 1986, s 40 which provides that "... payments made under this section shall be recouped, as far as may be, out of the assets of the company available for payment of general creditors." Under section 176A(2) of the Insolvency Act 1986 an insolvency office holder is obliged to set aside the prescribed part and not distribute it to the holder of a floating charge except in so far as it exceeds the amount required for the satisfaction of unsecured debts.

An unsecured creditor does not hold any security or collateral against the debt owed to them. Unsecured creditors may include providers of unsecured loans, suppliers, contractors, and landlords, but they all rank equally and are paid a percentage of available funds, if any exist. Company shareholders are placed at the bottom of the priority list in liquidation.

The order of priority listed above changes if the company had been subject to a Moratorium under Part A1 of the Insolvency Act 1986 during the 12-week period prior to the commencement of the liquidation. A new Part A1 was inserted into the Insolvency Act 1986 by the Corporate Insolvency and Governance Act 2020 (CIGA 2020), which went into effect on June 26, 2020. The following are payable out of the company's assets in preference to all other claims in the following order of priority when section 174A of the Insolvency Act 1986 is in effect (proceedings for the winding up of a business are initiated within a period of 12 weeks commencing with the day after the end of a moratorium under Part A1).

The prescribed fees or expenses of the official receiver acting in any capacity in relation to the company and moratorium debts and pre-moratorium debts for which the company did not have a payment holiday during the moratorium are payable in the following order of priority:

- amounts payable in respect of goods or services supplied during the moratorium under a contract where, but for section 233B(3) or (4) of that Act, the supplier would not have had to make that supply;
- wages or salary arising under a contract of employment;
- other debts or other liabilities apart from the monitor's remuneration or expenses;
- the monitor's remuneration or expenses.

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

Commented [WPA11]: 5/15

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]

The floating charge in favour of Fretus Bank plc:

Under Insolvency Act 1986, a liquidator can act where it is alleged that a preference took place when a transaction was conducted. Section 239 provides that a transaction can be avoided where a preference is given by an individual or company doing or suffering to be done anything which has the effect of improving the position of a creditor, in the event of insolvent liquidation.

The floating charge in favour of Fretus Bank Plc will be rendered invalid if the transaction took place within the relevant time. The relevant time applicable in this scenario is 12 months prior to the onset of the insolvency. The onset date (date of winding up petition) was 14th October 2022 and the debenture was granted in February 2022. Thus, the transaction which took place 8 months prior to the onset of insolvency falls within the section 245 3 (b) which states that "the time at which a floating charge is created by a company is a relevant time for the purposes of this section if the charge is created—(b)in the case of a charge which is created in favour of any other person, at a time in the period of 12 months ending with the onset of insolvency."

The debenture was not in favour of any fresh loans but on pre-existing ones and falls within a preference given under section 239. It does not appear that Fretus Bank Plc is a connected person within the meaning of section 249 IA 1986 (such as a director or an associate of a director).

Also it is apparent that the company was insolvent and the time of the creation of the charge the company was insolvent and unable to pay its debts within the meaning of section 123 of IA 1986.

Therefore, the transaction and floating charge will be invalidated upon the liquidation order being made in accordance with section 245.

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines:

Commented [WPA12]: 1/5 this is a confused answer which seems to run ss 239 and 245 together without really explaining the separate rules for each action. There is no convincing attempt to apply to the facts. On the facts s 239 is not really arguable whereas s 245 does require more detailed consideration.

Commented [WPA13]: 4/6 a reasonable attempt but one which would have benefited from a more detailed consideration of the meaning of undervalue and an explanation of the presumption regarding insolvency.

Under Section 249 IA 1986 a person is connected with a company if (a) he is a director or shadow director of the company or an associate of such a director or shadow director, or (b) he is an associate of the company. It is noted that Rita Perkins is a director of the Company and is therefore a connected person.

Pursuant to the Insolvency Act 1986, the liquidator in the winding up of a company can attack a transaction at an undervalue. It is noted that the marble cutting machines were sold for GBP 10,000 in cash whereas the machines were bought for GBP 25,000 a year before. It is unlikely that the value of the machines would have depreciated so drastically in one year. Consequently upon obtaining a valuation of the machines at the time of sale and it is proven that they were sold at an undervalue the liquidator of the company is empowered under Section 238 to attack this transaction and file an application to the court to avoid the transaction. The liquidator must show to the court that the company entered into the transaction for a consideration at the date of the transaction significantly less than the value of the consideration provided by the company pursuant to sections 238 (2), (3), and (4).

Section 240 provided that in relation to an undervalue transaction, of a connected person (other than someone who is only connected as an employee), by a company, the relevant time is any time in the period of two years ending with the 'onset of insolvency'; The onset of insolvency is the presentation of a petition for administration, or the commencement of liquidation. Additionally it must be proven that the company was insolvent as per the meaning of section 123 IA 1986 i.e it was unable to pay its debts as they fell due or became unable to to pay its debts as a result of that transaction. It is noted that the company suffered cash flow problems at the time of the purchase and therefore for the purposes of the IA 1986 can be deemed to be insolvent at the relevant time.

This transaction took place in July 2022 and the creditor's winding up petition issued on 14th October 2022. Thus, this transaction took place within the relevant time. In her defence Rita Perkins can claim that she entered into the transaction in good faith, and there were reasonable grounds for believing that the transaction would benefit the company. However, it is unlikely that a court will accept this defence she was a director and should have known of the financial situation of the company and consequently by her actions of purchasing the machines at undervalue breached her duty to the company.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

In this scenario it is noted that Hard and Fast Ltd, was one of the Company's key suppliers. The request was for immediate payment of all sums owing to it and that any further supplies would only be made on a cash on delivery basis. The continued supply of marble was seen as essential by the Company, and 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.

Commented [WPA14]: 0/4 unfortunately, s 239 cannot apply here as the transaction took place after the onset of insolvency i.e the date of the petition - a point recognised in the answer. The only possible action would be under s.127.

Under Section 239 of IA 1986 the liquidator can file an application to the court to avoid a preferential transaction. The payment to Hard and Fast was made a month before the winding up order. This order was made on 23rd December 2022 therefore the payment was made around 23rd November 2022. It is noted that the winding up petition was made in October 2022. Thus, this took place shortly before the formal insolvency procedure was entered into. Section 239 prohibits preferences such as payments made to creditors.

The liquidator must show to the Court that 1. Hard and Fast was a creditor of the company , 2. it was placed in a better position that it would have been if the payments as demanded were not done and 3. that the company in giving the preference was influenced by a desire to put Hard and Fast in a better position (that is a desire to prefer) and 4. the preference took place at the relevant time. 5. This preference must take place within 6 months prior to the onset of insolvency (Based on the facts given it was within 6 months). Additionally, the company must be unable to pay its debts as they fell due within the meaning of section 123 (Based on the facts given this criterion is satisfied).

It is noted however that the continued supply of marble was seen as essential by the Company and thus the payment was approved by the board. Therefore, it cannot be said based on the facts the company was influenced by a desire to produce the effect set out in s 239(4)(b). Thus, on the facts and the authority of Re Mc Bacon Ltd. It can be said that there was not a desire to prefer. Consequently, the court would not grant the application of the liquidator to avoid this transaction.

*** End of Assessment ***