



**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**

Commented [WPA1]: 32/50 = 64% some strong answers

Commented [WPA2]: 5/10

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.

Commented [WPA4]: A is correct

**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 [WPA5]: B is correct

**Question 1.8**

The administrator is under a general duty to provide a statement for creditors' consideration setting out proposals for achieving the purpose of administration. He or she must obtain a

creditors' decision on whether or not to approve the proposals within how many weeks of the date the company entered administration?

- (a) 6
- (b) 8**
- (c) 10
- (d) 12

Commented [WPA6]: 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.**

Commented [WPA7]: A is correct

#### 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]**

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**Question 2.1 [maximum 5 marks]**

Commented [WPA9]: 4/5 although arguably implicit the answer does not deal with the question of who may bring an action under s 6 CDDA.

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?

Answer: The details of the parties who may bring an action as per the aforementioned provision is as under:

(i) section 423 of the Insolvency Act 1986: As per the provision of Sec. 423 of the Insolvency Act, 1986, any transaction which are designed to defraud the creditors can be pursued by the following parties: (a) where the company is being wound up or is in administration, the official receiver, the liquidator, the administrator and (with the leave of the court) any victim of the transaction such as a creditor; (b) where a victim is bound by a CVA, the supervisor of the CVA or any victim of the transaction (whether bound by the CVA or not); or (c) in any other case, by a victim of the transaction.

(ii) section 6 of the Company Directors Disqualification Act 1986  
The court shall make a disqualification order under Sec. 6 of the Company Directors Disqualification Act 1986. Further, in order to save court time and costs, it is possible for the Secretary of State to accept a disqualification undertaking.

(iii) section 246ZB of the Insolvency Act 1986

As per provision of Sec 246ZB of the insolvency Act 1986, the court, on the application of the administrator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.

**Question 2.2 [maximum 5 marks]**

Commented [WPA10]: 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.

Answer: Under Part A1 of the Insolvency Act 1986, the following are five debts that do not form part of the payment holiday when a company is subject to a moratorium:

- (i) amounts payable in respect of the monitor's remuneration or expenses
- (ii) goods or services supplied during the Moratorium
- (iii) rent in respect of a period during the Moratorium;
- (iv) wages or salary arising under a contract of employment
- (v) redundancy payments;
- (vi) debts or other liabilities arising under a contract or other instrument involving "financial services" which term is somewhat inexactly defined as including a contract consisting of lending, financial leasing or providing guarantees.

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

Commented [WPA11]: 11/15

**Question 3.1 [maximum 6 marks]**

Commented [WPA12]: 4/6 quite good generally but lacking detail on s 233B

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?

Answer:

The purpose of the administration is to rescue the company as a going concern with the retention of all or a material part of the business of the company together with a restoration to solvency with all the creditors being paid in full. Accordingly, an administrator needs to obtain or retain certain essential supplies. Terms in contracts of supply which provide for automatic termination have historically been generally effective but have now become subject to increasing statutory exceptions which largely make such automatic termination (or ipso facto) clauses void.

Section 233 of the Insolvency Act ensure supply of essential service to the administrator during the proceeding and applies to a gas, electricity, water and communications services. Further it may be noted that the definition of communications services includes the supply of goods and services such as point of sale terminals, computer hardware and software, information, advice, and technical assistance, data storage and processing and website hosting. During this period suppliers are not permitted to require payment of outstanding debts in order to secure a new or continued supply to the company in administration. However, section 233 of the Act makes it a condition of the giving of the supply that the office-holder personally guarantees the payment of any charges in respect of the supply.

In continuation to this, Section 233A of the act provides that the insolvency-related term of a contract for the supply of essential goods or services to a company ceases to have effect if the company enters administration. Section 233B of the Act by the Corporate Insolvency and Governance Act 2020 with effect from 26 June 2020 provides that, if a company goes into a formal insolvency process, a supplier to that company is not entitled to cease supplying goods or services under their contract simply because of the insolvency process.

Accordingly, provisions of the act ensure continued supply of essential services to the administrator to keep the debtor as a going concern.

### 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?

Answer: In a liquidation, the order of priority of payments is as under:

- (i) Expenses of winding up, including the liquidator's remuneration (section 115): Under section 115 of the Act (and rules 6.42 and 7.108 of the Rules) various expenses are given priority in payment over the company creditors. The major expenses are as under:
- expenses incurred by the liquidator in preserving and realising the assets of the company.
  - security expenses incurred by the liquidator
  - amount payable to person who assisted in preparation of statements of affairs or accounts.
  - disbursements made by the liquidator in the course of the winding up.
  - remuneration to persons who are employed to provide services to the company.
  - fees of the liquidator
  - corporation tax on chargeable gains accruing on the realisation of any asset of the company
  - any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up.

Commented [WPA13]: 7/9 a good answer but more detail in places would have been helpful eg preferential debts

(ii) Preferential creditors, as defined in sections 386, 387 and Schedule 6: section 175  
The second order of priority subsequent to the payment of liquidation expenses is payment to preferential creditors. This category generally comprises of claims of employees, taxation liabilities and some other types of liabilities.

(iii) Floating charge holder and the “prescribed part”:  
The next creditors to be paid will be the floating charge holders. It is possible that there may be more than one floating charge holder and if that is the case, priority between them usually turns upon which floating charge was created first. The liquidator (or administrator) is under a duty to make a “prescribed part” of the company’s net property available for the satisfaction of unsecured debts and must not distribute any of this prescribed part to a floating charge holder except insofar as it is in excess of the amount required to satisfy all the unsecured debts. It may be further noted that where the company’s net property does not exceed GBP 10,000, the prescribed part is 50% of that property. However, in such circumstances, where the property is less than the “prescribed minimum” of GBP 10,000 and the liquidator (or administrator) thinks that making a distribution to unsecured creditors would be disproportionate to the benefits, then the duty to make the distribution of the prescribed part does not apply. Where the company’s net property exceeds GBP 10,000, the prescribed part is the sum of 50% of the first GBP 10,000 in value, plus 20% of the excess in value above the GBP 10,000, subject to a maximum amount of the prescribed part of GBP 800,000.

(iv) *Unsecured creditors*  
Creditors with no security, often ordinary trade creditors, are paid out last in the statutory order. Frequently, once the expenses of the liquidation have been paid and distributions have been made to secured and preferential creditors, there is little or nothing left to pay a dividend to unsecured creditors.

(v) *Shareholders*  
If there are sufficient funds to pay all the creditors (and interest on their debts) any surplus is distributed amongst the shareholders according to the company’s constitution, which will normally permit a distribution *pro rata* the shareholders’ respective shareholding.

However, if company is not rescued as a going concern and enter into the administration or liquidation proceeding within 12 weeks of the end of the moratorium, the priority of debts in that subsequent administration or liquidation may be different to the priority of debts which existed prior to the moratorium. Accordingly, Section 174A of the act provides that provides that certain unpaid pre-Moratorium or Moratorium debts (the debts which are not part of the payment holiday), 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. Section 174A therefore affords certain unsecured debts a form of “super priority” in a subsequent liquidation. Accordingly, priority of payment changes subsequent to the moratorium under Part A1 of the Insolvency Act 1986.

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

Commented [WPA14]: 7/15

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;

Answer:

**Validity of Floating Charge:**

The validity of the floating charge in favour of Fretus Bank plc will be subject to scrutiny by the liquidator. The liquidator will examine the following aspects to determine whether the floating charge is valid or not:

**a) Timing of creation of floating charge:**

Section 245(2) of the IA 1986 provides that a floating charge will be invalid if it was created within the period of 12 months before the commencement of the winding up, and the Company was insolvent at the time of creating the charge or became insolvent as a result of creating the charge. In this case, the debenture was granted in February 2022, which is within the 12-month period before the winding up order was made in December 2022. Therefore, the liquidator will examine whether the Company was insolvent at the time of creating the charge or became insolvent as a result of creating the charge.

**b) Intention of the creation of floating charge:**

The liquidator will examine whether the floating charge was created in good faith and without any intent to defraud the Company's creditors. The fact that the Company was under pressure from Fretus Bank plc to grant the debenture raises concerns that the Company may have created the floating charge with the intention of preferencing Fretus Bank plc over its other creditors. If the liquidator determines that the floating charge was created with the intention of defrauding the Company's creditors, it may be set aside as void.

**c) Proper registration of the debenture:**

The liquidator will also examine whether the debenture was properly registered with the Registrar of Companies within 21 days of its creation, as required by Section 860 of the

**Commented [WPA15]:** 3/5 more detailed consideration and application was needed in relation to s 245. The second ground is unclear - the answer appears to consider parts of s 423 and s 239. It is not clear how either would succeed on the facts eg time limit for s 239. The registration point is a valid matter which would need to be checked.

Companies Act 2006. If the debenture was not properly registered, it will be void against the liquidator and any creditor of the Company.

**Conclusion:**

The liquidator may take action in relation to the floating charge in favour of Fretus Bank plc if it is found to be invalid due to being created within the 12-month period before the winding up order was made or if it was created with the intention of defrauding the Company's creditors. The liquidator will also examine whether the debenture was properly registered with the Registrar of Companies within the prescribed time limit. The above analysis is based on Section 245(2) of the IA 1986 and Section 860 of the Companies Act 2006.

**Question 4.2 [maximum 6 marks]**

The sale of the marble cutting machines; and

Answer:

**Breach of Directors' Duties:**

The directors of the Company owe fiduciary duties to the Company, including the duty to act in good faith in the Company's best interests and not to profit from their position without the Company's consent. The sale of the marble cutting machines to Rita Perkins raises concerns that the directors may have breached their fiduciary duties to the Company, as they sold the machines to one of their own directors for less than their market value. The liquidator may investigate whether the sale was conducted at arm's length, whether the price was fair and reasonable, and whether the directors obtained the necessary consent of the Company's shareholders for the sale.

**Voidable Transaction:**

Under Section 238 of the IA 1986, any transaction entered into by a Company in the period of two years before the commencement of the winding up may be set aside by the liquidator if the transaction was at an undervalue or a preference. In this case, the sale of the marble cutting machines for GBP 10,000, when they were bought for GBP 25,000 a year before, may be considered to be at an undervalue. If the liquidator determines that the sale was at an undervalue and was entered into to prefer Rita Perkins over the Company's other creditors, the liquidator may apply to the court to set aside the transaction and recover the difference between the sale price and the market value of the machines at the time of the sale.

**Breach of Companies Act 2006:**

Under Section 190 of the Companies Act 2006, a director who is interested in a proposed transaction or arrangement with the Company must declare the nature and extent of their interest to the other directors before the transaction is entered into. In this case, Rita Perkins, as a director, was interested in the transaction to purchase the marble cutting machines. Therefore, the other directors should have been made aware of her interest, and the transaction should have been conducted at arm's length to ensure that the Company received a fair price for the machines.

**Conclusion:**

The liquidator may take action in relation to the sale of the marble cutting machines by the directors to Rita Perkins if it is found that the directors breached their fiduciary duties to the Company, if the sale was at an undervalue, or if the transaction was not conducted at arm's

**Commented [WPA16]:** 4/6 a reasonable attempt but more detail is needed generally. The directors' duty issue is a real possibility but the answer is in very general terms and appears to be partly referring to the s 190 point below. The requirement to declare the interest is under s 175 CA not s 190 which itself is subject to a number of financial hurdles which may or may not be a problem here. It might have been possible to explain in more detail the requisites for a s 238 action which is the most likely action on the facts as known.

length. The above analysis is based on Section 238 of the IA 1986, Section 190 of the Companies Act 2006, and the directors' fiduciary duties.

**Question 4.3 [maximum 4 marks]**

The payments to Hard and Fast Ltd.

Answer:

The relevant provisions in this regard are found in the IA 1986.

**Analysis:**

**1. Preference:**

Under Section 239 of the IA 1986, any transaction entered into by a Company in the period of six months before the commencement of the winding up may be set aside by the liquidator if the transaction was a preference. A preference is defined as a transaction that has the effect of putting one creditor in a better position than they would have been in the event of the Company entering into liquidation. In this case, the Company made payments of GBP 8,000 and GBP 3,000 to Hard and Fast Ltd. within six months before the commencement of the winding up. These payments were made on a cash on delivery basis, which suggests that they were intended to prefer Hard and Fast Ltd. over the Company's other creditors. Therefore, the liquidator may investigate whether the payments were a preference, and if so, may apply to the court to set aside the transactions.

**2. Insufficient Consideration:**

Under Section 238 of the IA 1986, any transaction entered into by a Company in the period of two years before the commencement of the winding up may be set aside by the liquidator if the transaction was at an undervalue. In this case, the payments made by the Company to Hard and Fast Ltd. may be considered to be at an undervalue if the supply of marble was essential to the Company's business and the payments made were not commensurate with the value of the goods supplied. The liquidator may investigate whether the payments were at an undervalue, and if so, may apply to the court to set aside the transactions.

**Conclusion:**

The liquidator may take action in relation to the payments made by the Company to Hard and Fast Ltd. for the supply of marble if it is found that the payments were a preference or were at an undervalue. The above analysis is based on Section 239 and 238 of the IA 1986.]

**\* End of Assessment \***

**Commented [WPA17]:** 0/4 unfortunately the issue is not identified. Neither s 238 nor s 239 could be relevant as the transactions took place after the commencement of the liquidation - the date of the petition. Only s 127 would be a viable cause of action here.