



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

Commented [WPA1]: 38/50 = 76% a generally strong effort.

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

Commented [WPA2]: 9/10

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

Question 1.1

Please select the most correct ending to the following statement:

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

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

Question 1.2

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

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

Question 1.3

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

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

Question 1.4

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

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

Question 1.5

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

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

(c) Scheme of Arrangement.

(d) Company Voluntary Arrangement.

Question 1.6

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

(a) GBP 500

(b) GBP 750

(c) GBP 1,000

(d) GBP 2,000

Question 1.7

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

(a) Wrongful trading.

(b) Breach of fiduciary duty.

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

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

Question 1.8

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

(a) 6

(b) 8

Commented [WPA3]: B is correct

(c) 10

(d) 12

Question 1.9

Which of the following statements is incorrect?

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

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

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

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

Question 1.10

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

(a) 6 months.

(b) 12 months.

(c) 2 years.

(d) 5 years.

QUESTION 2 (direct questions) [10 marks]

Commented [WPA4]: 8/10

Question 2.1 [maximum 5 marks]

Commented [WPA5]: 3/5 - under s 6 CDDA only the Sec of State or the PR can bring an action and under s 246ZB only an administrator may do so.

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?

- (i) Under section 423 of the Insolvency Act 1986, the following parties have right to attack transactions which are designed to defraud creditors. They include: (1) 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; (2) 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 (3) in any other case, by a victim of the transaction.
- (ii) A liquidator of the company
- (iii) A liquidator of the company

Question 2.2 [maximum 5 marks]

Commented [WPA6]: 5/5

List any five (5) of the debts which do not form part of the payment holiday under Part A1 of the Insolvency Act 1986 when a company is subject to a Moratorium.

- (a) The monitor's remuneration or expenses
- (b) Goods or services supplied during the Moratorium
- (c) Rent in respect of a period during the Moratorium
- (d) Wages or salary arising under a contract of employment
- (e) Redundancy payments
- (f) 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 [WPA7]: 13/15

Question 3.1 [maximum 6 marks]

Commented [WPA8]: 6/6

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?

It depends on the type of goods and services the supplier is providing. Historically, terms in contracts of supply which provide for automatic termination have been generally effective, but now it has become subject to increasing statutory exceptions which largely make such termination clauses void.

Section 233 of the Insolvency Act applies to supply of gas, electricity, water and communication services, which 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. 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 permits a supplier to stipulate that the administrator must personally guarantee payment of charges in respect of the supply.

Under section 233A a supplier of such services is generally unable to rely upon an 'insolvency-related term' in a contract of supply which would otherwise entitle the supplier to terminate the supply, alter the terms of the supply or compel higher payments for continued supply.

In addition, section 233B of the Insolvency Act prohibits clauses which allow the supplier of goods or services to terminate or 'do any other thing' in relation to that contract if the company enters a formal insolvency procedure. Consequently, it prevents suppliers from terminating a supply upon the company's insolvency but also prevents suppliers from making it a condition of continued supply that pre-insolvency arrears are paid and from making other changes to the contract such as increasing prices. Under section 233B, a supplier cannot insist on a personal guarantee from the administrator.

Section 233B complements the existing ss 233 and 233A of the Act and also opens up the restriction on termination to all other suppliers with a limited number of exceptions, for example, insurers; banks; electronic money institutions; recognized investment exchanges and clearing houses; securitization companies; and overseas companies with corresponding functions.

Under s.233B, a contract may still be terminated by a supplier where the administrator consents or, on application to the court, the court is satisfied that the continuation of the contract would cause the supplier hardship and grants permission for termination.

Question 3.2 [maximum 9 marks]

Explain the order of priority of payments in a liquidation and explain the nature of the rights enjoyed by each class of creditor or expense. How would this priority change if the company had been subject to a Moratorium under Part A1 of the Insolvency Act 1986 during the 12 week period prior to the commencement of the liquidation?

The order of priority of payments in a liquidation is as follows:

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) a number of expenses are given priority over the company's preferential creditors, any holders of floating charges and the company's unsecured creditors. The following are the main expenses which are payable in priority to those creditors and are payable in the following order of priority:***

- 1. 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);***
- 2. the cost of any security provided by the liquidator;***

Commented [WPA9]: 7/9 a good answer. Perhaps a little more detail on preferential debts and how s 176A operates would have been helpful.

3. *any amount payable to a person to assist in the preparation of a statement of affairs or accounts;*
4. *any necessary disbursements by the liquidator in the course of the winding up (including, for example, any expenses incurred by members of the liquidation committee);*
5. *the remuneration of any person who has been employed by the liquidator to perform any services for the company;*
6. *the remuneration of the liquidator (which is subject to effectively the same rules as those which apply to administrators, specifically including the fees estimate regime where a time cost basis for the liquidator's fees is adopted);*
7. *the amount of any corporation tax on chargeable gains accruing on the realisation of any asset of the company; and*
8. *any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up.*

II. Preferential creditors: *The category of preferential creditor largely comprises limited claims of employees and some taxation liabilities but there are some other types of liabilities. It has always been a characteristic of the statutory preferential debts regime that employees' remuneration and contributions to their pension schemes have been given some priority. There are two classes of preferential debts, ordinary and secondary. Ordinary preferential debts are paid before secondary preferential debts. Preferential debts, in their respective classes, rank equally amongst themselves and so abate in equal proportion if the company's assets are insufficient to pay them all.*

III. Floating charge holder: *After preferential creditors have been paid, the next creditor to be paid will be any floating charge holder. 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. Before any payment can be made to any floating charge holder, the liquidator must first consider the application of section 176A of the Act. Section 176A applies to a company with a floating charge created on or after 15 September 2003 and the company has gone into liquidation (or administration).*

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 shareholdings.*

If the company is not rescued as a going concern but instead enters administration or liquidation within 12 weeks of the end of the Moratorium under Part A1 of the

Insolvency Act 1986, the priority of debts in that subsequent administration or liquidation may be different to the priority of debts which existed prior to the Moratorium. Section 174A 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. For example, if a director has not been paid for months prior to a Moratorium, if the Moratorium leads to an unsuccessful rescue attempt and the company enters liquidation, the pre-Moratorium unsecured debt of the director will acquire "super priority" in the liquidation. Unsecured (or secured) pre-Moratorium bank debt, falling within the definition of "financial services", will also acquire such a "super priority" although there is an exception which prevents such liabilities acquiring such "super priority" where the debt is accelerated debt, that is, any pre-moratorium financial services debt which fell due by reason of the operation of, or exercise of rights under, an acceleration or early termination provision in the financial services contract.

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

Commented [WPA10]: 8/15

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;

The granting of the floating charge in favour of Fretus Bank plc. is invalid.

Section 245 of the Act prevents pre-existing unsecured creditors from obtaining the security of a floating charge shortly before a company enters a formal insolvency procedure. As it is only "under pressure from its bank, Fretus Bank plc, and in order to prevent it from demanding repayment of the company's loans" that the company granted it the floating charge, Fretus Bank plc. is a pre-existing unsecured creditor for the purpose of section 245. Furthermore, there is no 'new' consideration provided for the charge.

Where the person in whose favour the floating charge is created is not connected with the company, the relevant time is any time within the period of 12 months prior to the onset of insolvency, but only if at the time of the creation of the charge the company was either unable to pay its debts or became unable to do so in consequence of the transactions. As the floating charge was granted in February 2022, less than 1 year prior to the onset of insolvency, it is made within the statutory time period. It is also very likely that the company was unable to pay its debts as the charge was granted so that the bank would not demand repayment of the company's loans.

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

The sale of the marble-cutting machines is likely to be a transaction at undervalue and could be set aside by the courts.

Under section 238 of the Act, a liquidator may attack a transaction which was entered prior to the company entering liquidation where the transaction was at an undervalue.

Under section 238, the liquidator must show that the company entered into a transaction with another person for a consideration which, in money or money's worth, was, at the date of the transaction, significantly less than the value, in money or money's worth, of the consideration provided by the company. As the machines had been bought for GBP 25,000 a year before and were then sold to Rita Perkins for GBP 10,000 in cash, it is likely that it will be caught by s.238 of the Act. The transactions also took place within the period of two years prior to the commencement of the liquidation as provided in the legislation.

Commented [WPA11]: 3/5 a reasonable answer but there is a little more to s 245 than appears here. The application to the facts might also have been a little more specific.

Commented [WPA12]: 4/6 again a reasonable answer but there are further points which needed to be made about eg s 238 presumption of insolvency? There is no real evidence of fraud but if you are suggesting it you need to explain why you think it is a feasible argument.

It is a prerequisite of liability under section 238 that at the time the transaction was entered into, either the company was unable to pay its debts as they fell due within the meaning of section 123 or became unable to pay its debts in consequence of the transaction. This is likely the case for the Company.

In addition, as Rita Perkins is a director of the company, the transaction is also susceptible to claims such as fraudulent trading with intent to defraud the creditors. Sections 213 and 246ZA of the Act provide that if in the course of the winding up of a company, it appears that any business of the company has been carried on with intent to defraud its creditors or the creditors of any other person, the court may on the application of the liquidator declare that any person who was knowingly parties to the carrying on of the business in that manner is to be liable to make such contribution to the company's assets as the court thinks proper. Although the threshold is high and requires 'real moral blame', it is a risk that Rita Perkins needs to consider as a director of the company.

Furthermore, Rita Perkins could also be disqualified as a director under section 4 of the Company Directors Disqualification Act 1986 if she is found guilty of an offence of fraudulent trading or has been found guilty of any breach of duties to the company.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

The payments to Hard and Fast Ltd amount to preference and could be set aside by the courts.

Section 239 of the Act provides that preferences may be avoided by the court on the application of a liquidator or an administrator. By making payments to Hard and Fast Ltd., the Company put it in a better position than other creditors. The payments were also made by the company with a desire to prefer Hard and Fast Ltd.

As the amounts paid by the company (GBP 8,000 and GBP 3,000 respectively) was made within a month before the winding up order was made, it is clearly within the statutory time period of six months prior to the onset of insolvency.

In addition, section 233B of the Insolvency Act prohibits clauses which allow the supplier of goods or services to terminate or 'do any other thing' in relation to that contract if the company enters a formal insolvency procedure. Consequently, it prevents suppliers from making it a condition of continued supply that pre-insolvency arrears are paid and from making other changes to the contract such as increasing prices. Hard and Fast Ltd.'s demands and threats to the company are therefore likely to be void under s.233B. Nevertheless, Hard and Fast Ltd. may be able to terminate the contract under s.233B of the Act on application to the court, if the court is satisfied that the continuation of the contract would cause the supplier hardship and grants permission for termination.

Commented [WPA13]: 1/4 unfortunately, s 239 is not relevant here as the payments took place after the commencement of the liquidation not before it. Only s 127 can assist the liquidator here in retrieving the payments. There would be no need to consider s 233B but there is a potential argument there.

*** End of Assessment ***