



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 very good 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]: 10/10

Question 2.1 [maximum 5 marks]

Commented [WPA5]: 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?

Under section 423 of the Insolvency Act 1986 (the "IA") (which concerns transactions defrauding creditors), the following may attack transactions which are designed to defraud creditors:

- a. If a company is in administration or being wound up, the administrator, liquidator and any victim of the transaction, like the creditor (with leave of the Court);**
- b. Where a victim is bound by the CVA, the CVA's supervisor or any victim of the fraud (whether bound or not by the CVA); or**
- c. Victims of the transaction, in any other case.**

An application for a disqualification order under section 6 of the Company Directors Disqualification Act 1986 (the "CDDA") may be made by the Secretary of State or the Secretary of State so directs in the case of persons who are or have been a director which is being wound up in England and Wales, by the official receiver (pursuant to section 7 of the CDDA).

If a company is in administration and it appears that a director knew or ought to have concluded that there was no reasonable prospect that the company would avoid entering insolvent administration or going into insolvent liquidation, the administrator may apply to the Court for a declaration that the director is liable to make such contribution (if any) to the Company's assets as the Court thinks proper (pursuant to section 246ZB(1) and (2) of the IA).

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.

The payment holiday under Part A1 of the IA does not apply to the following debts when the company is subject of a moratorium:

- a. Goods and services supplied during period of the moratorium;**
- b. Salaries and wages pursuant to employment contracts;**
- c. Redundancy payments;**
- d. Remuneration or expenses of the monitor;**
- e. Rent during period of the moratorium.**

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

Commented [WPA7]: 12/15

Question 3.1 [maximum 6 marks]

Commented [WPA8]: 4/6 along the correct lines but there is some confusion over the parameters of the respective sections.

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?

An administrator is empowered to do anything necessary or expedient for the management of the company's affairs, business or property (pursuant to section 59 of Schedule B1 of the IA). This comes with it, a wide array of powers specified in Schedule 1 of the IA.

Section 233 of the IA relates to the supply of gas, electricity water and communication services.

Section 233A generally prevents a supplier from relying upon any insolvency-related term in a supply contract that would otherwise enable the supply to terminate the contract, alter its terms or compel higher payment for continued supply (or payment of arrears before continued service is provided), by reason of the company's entry into administration. Any provision that seeks to terminate the contract or enable the supplier to do anything during the period of a company's insolvency proceedings will be of no effect, due to section 233B. Further, a supplier of goods or services cannot require a personal guarantee from the administrator, like it can under section 233. An administrator can therefore require the suppliers of goods and services to continue to supply those goods and services during the administration.

Section 233B therefore complements sections 233 and 233A, which prohibit the termination by any utility, communication and IT suppliers, and opens up the restriction on termination of supply to all other suppliers (there are some limited exceptions for things like insurers, banks, investment exchanges, overseas companies with corresponding functions, etc.).

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?

Pursuant to section 115 of the IA (and Rules 6.42 and 7.108), certain expenses of the liquidation are afforded priority ahead of a company's preferential creditors, floating charge holders and unsecured creditors. The following expenses are payable in priority to creditors and in the following priority order:

- a. Liquidator expenses for preserving, realising or getting in any company assets, including conducting legal proceedings;**
- b. Cost of security given by the liquidator;**
- c. Payments to persons for preparation of statements of affairs;**
- d. Necessary disbursements incurred in course of winding up, including expenses of the liquidation committee;**
- e. Remuneration of employees of the liquidator who perform any services for the company;**

Commented [WPA9]: 8/9 a very good answer. There was no mention of how fixed charge holders fit within the scheme but that apart a very clear and complete answer.

- f. Liquidators remuneration;**
- g. Corporate tax payable on chargeable gains arising on the realisation of company assets;**
- h. Any other properly incurred expense of the liquidator in carrying out their functions.**

The preferential debts regime applies to all insolvency proceedings under the IA, including liquidation. Once the expenses of the liquidation have been paid in full, the company's assets can then be used to pay preferential creditors. Preferential creditors largely include:

- a. Limited claims of employees (employees in the UK have more extensive protections afforded under the Employment Rights Act 1996); and**
- b. Some taxation liabilities.**

Further, preferential debts are placed into two classes: ordinary (paid first) and secondary. Within each class, preferential debts rank equally, and abate in equal proportion where assets of a company are insufficient to fully pay all debts.

Pursuant to Schedule 6 of the IA, the following are preferential debts:

- a. Ordinary:**
 - a. Amounts owed by employee's contribution to employee pension schemes, which are contributions deducted from company earnings paid in the four months before commencement of liquidation;**
 - b. Amounts owed by employer's contribution to employee pension schemes, in 12 month period preceding the relevant date;**
 - c. Employee remuneration (including annual leave and sick leave) for period of four months prior to liquidation commencing to a max of GBP 800.**
 - d. Accrued holiday remuneration for any period prior to liquidation;**
 - e. Monies advanced to pay wages or holiday remuneration;**
 - f. Coal and steel production levies;**
 - g. Claims re orders to pay reserved forces;**
- b. Secondary (pursuant to section 386 of the IA, and which are paid following ordinary preferential debts):**
 - a. Eligible deposits;**
 - b. Certain eligible deposits made through a non-UK branch of a credit union and which would have been eligible had it been made through a UK branch of that credit union. Debts owed to the taxation authority.**
 - c. Income tax deductions, VAT payments, construction industry scheme deductions and student loan repayments.**

Following preferential debts being paid, floating charge holder creditors are paid next. If there are multiple floating charge holders, priority will usually be determined by which floating charge was created first. Liquidators must consider the application

of 176A before any floating charge holder payments can be made. The liquidator must make a prescribed part of the net property of the company available to satisfy the debts of unsecured creditors. The prescribed part is 50% of the net property where a company's net property does not exceed GBP 10,000. Where net property exceeds GBP 10,000, the prescribed part is the sum of 50% of the first GBP 10,000 and 20% thereafter, to a max of GBP 800,000.

Unsecured creditors (those without any security) are paid last in the statutory priority regime.

If all creditors are paid out in full (including interest), any surplus is distributed to shareholders normally pro rata based on their shareholding.

If the company had been subject of a Part A1 moratorium for the 12 weeks preceding liquidation, the above priority regime would be altered slightly. In particular, section 174A provides that certain pre-moratorium or moratorium debts (not forming part of the payment holiday), such as debts owed to employees or financial services debts, will be paid in the subsequent liquidation in priority of the liquidator's fees and expenses - thereby affording what are unsecured debts a form of super priority.

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

Commented [WPA10]: 7/15

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 issues concerns whether the liquidator can do anything to set aside or avoid the floating charge granted to the bank. Section 245 of the IA applies to floating charges, and it applies where a company is in liquidation or administration and is aimed at preventing pre-existing unsecured creditors from obtaining security by way of floating charge shortly before the company enters formal insolvency procedures. It will not prevent a lender from providing fresh funding to the company taking a floating charge in respect of that funding; but it may be applicable on these facts. The debenture (and floating charge) was demanded in respect of pre-existing debt, and section 245 may render the floating charge as invalid as it was given by the company at a relevant time where no new consideration was provided for it. As the bank does not here appear to be connected to the company, the relevant time is any time within the 12 months prior to commencement of insolvency, but only where at the time of creation of the floating charge, the company was either unable to pay its debts (per section 123 of the IA) or became unable to do so as a result of the transaction.

As consideration was not provided by the bank (by way of money, goods or services at or after the creation of the charge or the discharge or reduction of debt), the liquidator should be able to have the charge rendered invalid. An alternative would be to challenge the preference made by way of section 239 of the Act, which would also require that it be shown that the company was giving a preference, influenced by a desire to produce the preference.

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

There are two potential ways the liquidator could attack the sale of these machines.

First, the liquidator may seek to attack the sale pursuant to section 423 of the IA (Transactions defrauding creditors). This may be available where the liquidator can show that the company entered into the transaction with the Ms Perkins (a director - connected person) at an undervalue (defined in section 238 as those which the company received no or considerably less consideration than it provided) and that the transaction was made for the purposes either of putting those machines (assets) beyond the reach of creditors or otherwise prejudicing the interests of creditors. On these facts, the transaction clearly took place at an undervalue (sold for 15,000 less

Commented [WPA11]: 4/5 a good answer - the inability to pay debts point might have been more fully applied to the facts. Also, s 239 would fail due to time frame.

Commented [WPA12]: 3/6 s238 would be a stronger argument on the facts and the detail of s238 needed to be considered here.

than the purchase price one year earlier) and it is arguably prejudicial to creditors, given that a potentially higher value (and hence more money would have been available in the liquidation) could have been obtained.

Second, if it could be shown that the sale was entered into in order to ensure that creditors do not have access to the asset in liquidation, then the avoidance provisions contained in section 238 and 239 may also be open to the liquidator. We do not have enough information on these facts to decide if this is reasonably open to the liquidator, but the fact that the counterparty to an undervalued sale is a director of the company is highly questionable. The deprivation, however, must be triggered by the insolvency of the company. A commercial good faith argument is available to the counterparty in face of such an allegation, however, this transaction does not lend itself obviously to any commercial good faith nature.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

These payments may be challenged via the avoidance provisions, including sections 238 and 239. It must however be shown that the payments were made because of the insolvency, otherwise the transactions will not be able to be avoided. Further, as the transaction is not bone fide, and potentially has as part of its purposes, the deprivation of an insolvent party's property, the bone fide transaction defence will not assist Hard and Fast Ltd (nor will the commercial good faith argument).

A section 238 challenge is open on these facts because the transaction was entered into at an undervalue (in that no value was afforded to the company - no debt was forgiven) and was otherwise prejudicial to creditors.

Unfortunately, the change in terms and urgent payment for continued provision of services will not be rendered invalid by Hard and Fast pursuant to sections 233, 233A and 233B, as those provisions apply to administration, CVAs, moratorium and or restructuring plans (and not in liquidations).

* End of Assessment *

Commented [WPA13]: 0/4 Unfortunately, the issue here is s127. The winding up is deemed to have commenced at the date of the petition (before the payments were made) so s238 cannot apply as it only applies to transactions entered prior to the liquidation commencing not after.