



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]: 40/50 = 80% a very good effort

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

Commented [WPA2]: 10/10 excellent

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

(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 [WPA3]: 8/10

Question 2.1 [maximum 5 marks]

Commented [WPA4]: 3/5 Although perhaps implied the answer does not explain that it is the Sec of State who can take action under s 6 CDDA. Only an administrator can bring an action under s 246ZB.

Who may bring an action under: (i) section 423 of the Insolvency Act 1986; (ii) section 6 of the Company Directors Disqualification Act 1986; and (iii) section 246ZB of the Insolvency Act 1986?

According to section 423 of the Insolvency Act 1986, the following parties are entitled to intervene in transactions designed to defraud creditors: (i) 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; (ii) 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 (iii) in any other case, by a victim of the transaction.

Under section 6 of the Company Directors Disqualification Act 1986, as well as the court disqualifying a director, the Secretary of State may also accept a disqualification undertaking to save time and costs.

Under 246ZB of the Insolvency Act 1986, the liquidator can bring an action.

Question 2.2 [maximum 5 marks]

Commented [WPA5]: 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.

Enforcement of pre-Moratorium debts is stayed (that is, debts that fall due before the Moratorium and fall due during the Moratorium due to pre-Moratorium obligations) except where such debts relate to:

- 1) the monitor's remuneration or expenses;*
- (2) goods or services supplied during the Moratorium;*
- (3) rent in respect of a period during the Moratorium;*
- (4) wages or salary arising under a contract of employment;*
- (5) redundancy payments; or*
- (6) 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 [WPA6]: 12/15

Question 3.1 [maximum 6 marks]

Commented [WPA7]: 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?

An administrator can continue to trade the business to preserve its value. A company's executory contracts are not automatically terminated by the appointment of an administrator. In the past, automatic termination clauses in supply contracts have generally been effective, but now there are increasing statutory exceptions to such clauses that render them invalid (or ipso facto).

Section 233 of the Act applies to the supply of gas, electricity, water, and communications services. For the company in administration to receive new or continued supplies, suppliers cannot demand payment of outstanding debts. However, section 233 allows a supplier to stipulate that the administrator must personally guarantee payment of charges for the supply.

With the addition of section 233B to the 2020 Act, these protections for insolvent companies have now been expanded. According to Section 233B, a supplier cannot terminate or "do anything" with respect to a contract if the company enters a formal insolvency proceeding. Therefore, section 233B prevents suppliers from terminating a supply upon the company's insolvency, but it also prevents suppliers from requiring payment of pre-insolvency arrears and from altering the contract, such as increasing prices, as a condition of continued supply. As part of s 233B, a supplier may terminate a contract if the company or insolvency office has consented or if, on application to the court, the court is satisfied that the continuation of the contract would cause the supplier hardship, and grants permission to terminate it. Under 233B, the supply cannot insist on a personal guarantee from the administrator.

Sections 233, 233A and 233B apply in administration and CVAs. 233B also applies to a Moratoriums or a Restructuring Plan.

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?

There are certain priority payments and preferential creditors are paid prior to other unsecured creditors.

Pursuant to 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. Below are the main expenses which are payable in priority in the liquidation:

*(a) 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); *

Commented [WPAB]: 6/9 generally a sound answer which required some explanation of s 176A and some further detail in places eg the operation of s 174A.

(b) the cost of any security provided by the liquidator;

(c) any amount payable to a person to assist in the preparation of a statement of affairs or accounts;

(d) 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);

(e) the remuneration of any person who has been employed by the liquidator to perform any services for the company;

(f) the remuneration of the liquidator (which is subject to effectively the same rules as those which apply to administrators, specifically including fees estimate regime where a time cost basis for the liquidator's fees is adopted);

(g) the amount of any corporation tax on chargeable gains accruing on the realisation of any asset of the company; and

(h) any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up.

Preferential creditors as defined in section 386,387 and Schedule 6: section 175 are subject to the preferential debts regime applies to all insolvency procedures under the Act, not only limited to liquidation. As soon as the liquidation expenses are paid in full, the assets of the company are used to pay preferential creditors (before any payments may be made to floating charge holders or unsecured creditors). The category of preferential creditors largely comprises limited claims of employees and some taxation liabilities but there are some other types of liability. There are two classes of preferential debts, ordinary and secondary, and ordinary preferential debts are paid prior to secondary. If the company's assets cannot pay these debts, these preferential debts rank equally among themselves.

A floating charge will not crystallise during the Moratorium, and the directors may carry on ordinary business as usual with any major decisions subject to the monitor's consent. If the company is not resecured as a going concern and subsequently an administrator or liquidator is appointed. Within 12 weeks of the end of the Moratorium, the priority of debts in the liquidation may be different to the priority of debts that existed before the Moratorium. Under section 174A, certain unpaid pre-Moratorium or Moratorium debts (not part of the payment holiday), such as debts owed to employees or "financial services", are paid in the liquidation prior to the liquidators' fees. Certain debts are given a form of "super priority".

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

Commented [WPA9]: 10/15

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]

Commented [WPA10]: 5/5

The floating charge in favour of Fretus Bank plc;

According to the facts, in February 2022, the Company granted a debenture containing a floating charge over the whole of the Company's undertaking. This was under pressure from Fretus Bank plc. The purpose of the transaction was to prevent the bank from demanding repayment. This transaction happened within the period of 12 months prior to the liquidation as a non-connected person (Fretus Bank plc is not connected to the Company).

The liquidator may apply to the court to void the above transaction under section 245 of the Act. The provision applies when a company is in administration or liquidation and is intended to prevent pre-existing unsecured creditors from obtaining security by means of floating charges shortly before the company is placed in a formal insolvency

procedure. However, this provision does not prevent lenders from providing fresh funding to the company and taking a floating charge for that new funding. The case fact has not confirmed whether Fertus Bank plc has provided a new loan to the Company. It is assumed that the floating charge was taken to secure the "old debt/loan" prior to the Company's liquidation.

The liquidator needs to satisfy that at the time of the creation of the charge the Company was either unable to pay its debts (within the meaning of section 123 of the Act) or became unable to do so as a result of the transaction.

In the event the floating charge granted to Fertus Bank plc is invalid but the underlying debt remains valid.

Question 4.2 [maximum 6 marks]

Commented [WPA11]: 5/6 generally a good answer but the consequence of the transaction being with a connected person is not explained.

The sale of the marble cutting machines; and

In July 2022, the Directors approved the sale of two marble-cutting machines to Rita Perkins (a director) for GBP 10,000 in cash to ease the company's cash flow problems. These machines were bought for GBP 25,000 a year before. According to the facts, the sale of two cutting machines to one of the directors may qualify as a transaction at undervalue under section 238 (3) of the Act as the consideration paid may be significantly less than the value. Even though the two cutting machines cost GBP 25,000 a year ago and after depreciation, a director's payment of GBP 10,000 may still be undervalued. The liquidator should conduct an independent valuation of the two machines in order to determine the damage caused to the Company by the directors entering this transaction.

In order to pursue the undervalue transaction, the transaction must have taken place in the period of two years prior to the commencement of the liquidation. This transaction took place in July 2022 within the "relevant time" period.

At the time of the transaction, there are indications that the Company suffered cash flow problems. The liquidator should run balance sheet and cash flow tests to determine whether the company was unable to pay its debts as they fell due within the meaning of section 123 or became unable to pay its because of this transaction to satisfy the transaction was with a connected person, a prerequisite of liability under section 238 of the Act.

The liquidator should be aware that if the respondent to an application satisfies the court that the transaction was entered into by the company in good faith and for the purpose of carrying on its business and that at the time it did so, there were reasonable grounds for believing that the transaction would benefit the company, then an order under section 238 will not be made. However, this transaction was

made by the directors to Rita Perkins (a director). Both directors would have knowledge of whether the company was insolvent at the time or not.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

In accordance with section 239 of the Act, the court may void the payment of £8,000 to Hard and Fast as a potential preference. Here are some relevant points to consider:

(a) the person whom it is alleged has been preferred was, at the time of the transaction, a creditor of the company (or a surety or guarantor for any of the company's debts or liabilities). - Hard and Fast was a creditor at the time of the time of the transaction;

(b) something was done, or suffered to be done, by the company which had the effect of putting that person in a better position, in the event of the company going into insolvent liquidation, than the position he or she would have been in if that thing had not been done (that is, that the person has been preferred) - Hard and Fast received the full outstanding payments which could be in a better position than other creditors in the liquidation.

(c) the company was, in giving the preference, influenced by a desire to produce the effect referred to in (b) above (the desire to prefer) in relation to the person preferred. - The facts indicate that Hard and Fast pressured the Company into entering into the transaction by withholding continued supplies, and that they may have been influenced by the desire to secure additional marble, which was considered essential, which prompted them to enter into the transaction.

(d) the preference was given at a relevant time. - Hard and Fast does not appear to be a connected person and the transaction occurred within the relevant time, being 6 months from insolvency.

Based on the above factors and considerations, the liquidator may have a valid claim to avoid the preference payment under section 239 of the Act by making a court application. However, the liquidator should be aware that the burden of proof to the above and to satisfy a prerequisite of liability under section 239 of the Act, at the time the preference was given, either the company was unable to pay its debt as they fell due within the meaning of section 123 of the Act or became unable to pay its debts within the meaning of that section in consequence of the preference. During their investigations, the liquidator may assess the solvency position of the company so that they can form their opinion on the merits of pursuing this transaction.

Considering that the subsequent payments totaling £3,000 were not repayments of debt (being made on a cash-on-delivery basis), and that they were for new consideration, the liquidator may not avoid them.

Commented [WPA12]: 0/4 unfortunately, the answer misidentifies the issue. Section 239 cannot apply as the payments occurred after the commencement of the winding up. Consequently, s 127 provides the remedy for the liquidator.

* End of Assessment *