



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]: 30/50 = 60%

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

Commented [WPA2]: 6/10

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.**

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.**

Commented [WPA4]: D is correct

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

Commented [WPA5]: C is correct

Question 1.9

Which of the following statements is incorrect?

- (a) An insolvency officeholder from an EU Member State will be automatically recognised by the courts in the UK whether the officeholder was appointed before or after Brexit.
- (b) An insolvency officeholder from an EU Member State is automatically recognised by the courts in the UK if appointed before Brexit.
- (c) An insolvency officeholder from an EU Member State appointed after Brexit may apply to a UK court for recognition under the Cross Border Insolvency Regulations.
- (d) An insolvency officeholder from an EU Member State cannot apply to a UK court for recognition under section 426 of the Insolvency Act 1986.

Question 1.10

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

- (a) 6 months.
- (b) 12 months.
- (c) 2 years.
- (d) 5 years.

Commented [WPA6]: D is correct

QUESTION 2 (direct questions) [10 marks]

Commented [WPA7]: 8/10

Question 2.1 [maximum 5 marks]

Commented [WPA8]: 3/5 - only the Secretary of State (or the OR) can bring an action under s 6. 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?

Under section 423 of the Insolvency Act 1986, the Official Receiver, the Liquidator, and the Administrator have the right to bring proceedings in cases where the company is being wound up or is in administration. In cases where a victim is involved in a voluntary arrangement, the

supervisor of the voluntary arrangement or any victim of the transaction has the right to bring proceedings. In all other cases, the victim of the transaction has the right to bring an action.

Under Section 6 of the Company Directors Disqualification Act 1986, the court has the right to bring an action.

Under section 246ZB of the Insolvency Act 1986, the Liquidator and the administrator have the right to bring proceedings.

Question 2.2 [maximum 5 marks]

Commented [WPA9]: 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 following debts do not form part of the of payment holiday under Part A1 of the Insolvency Act 1986 where a company is subject to a moratorium:

- The monitor's allowance, which does not include remuneration for anything done by a proposed monitor before the commencement of the moratorium. The monitor must be a licenced insolvency practitioner;
- Goods or services supplied during the moratorium;
- Rent incurred during the moratorium;
- Wages or salaries accrued under the employment contract; and
- Debts or other liabilities arising under a contract for financial services under Schedule ZA2 in Part A1.

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

Commented [WPA10]: 10/15

Question 3.1 [maximum 6 marks]

Commented [WPA11]: 4/6 a number of accurate points are made but there is a lack of clarity on the different situations where ss 233, 233A and 233B apply.

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?

Section 233 of the Insolvency Act provides that the administrator may continue the business of a company in administration even if it requires the supply of goods and services from its supplier. Some of these provisions are:

- Suppliers may not require payment of outstanding debts in order to continue the supply of goods and services. However, suppliers may require a personal guarantee from the administrator;

- Suppliers may not invoke the insolvency-related clause in a contract that would entitle the suppliers to terminate the supply, change the terms of supply or demand higher payments for continued supply;
- The law was extended in 2020 to prohibit suppliers from terminating the contract if the company initiates formal insolvency proceedings. It also prevents the supplier from making continued supply conditional on payment of pre-insolvency arrears or making other changes to the contract, such as price increases;
- However, a contract may be terminated with the consent of the administrator or by application to the court if it is shown that continuation of the contract would cause hardship to the supplier;
- Contract termination is prohibited for utility and communications services, and IT. There are also limited exceptions for certain suppliers such as insurance companies, banks; e-money institutions, clearing houses, securitisation companies, and overseas companies with relevant functions in relation to the termination of the contract; and
- These provisions are also applicable if the company is into a Company voluntary arrangement, a moratorium, 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?

The holder of fixed charges is paid first, usually outside formal insolvency proceedings, from the proceeds of the sale of the assets subject to the fixed charges. An unpaid portion is treated as unsecured and cannot participate as an unsecured creditor in the prescribed part under section 176A of the Insolvency Act.

Next, the liquidator's fees and expenses will be paid, including fees incurred while maintaining the assets of the company.

Once the liquidator's fees and expenses are paid, the surplus is paid to the preferential creditors. Employees who are owed wages and taxes due to the state are considered preferential creditors. A maximum amount is applied.

Next in the order of priority are the holders of floating charges, similarly to the holders of fixed charges they are paid out of the proceeds of the sales of the assets subject to the floating charges and any unpaid portion is treated as unsecured and cannot participate as an unsecured creditor in the prescribed part under section 176A of the Insolvency Act.

Once all the above creditors are satisfied, the unsecured creditors will be paid. Unsecured creditors are creditors who have no security or title over the assets. These are usually suppliers and tax liabilities outside of the preferential creditors.

If there is any surplus remaining after payment to all creditors, it is paid to the shareholders in accordance with their rights under the company's statutory documents, such as the memorandum and articles of association.

Under Part A1, if a company goes into liquidation within 12 weeks of the end of the moratorium, certain unpaid moratorium debts, such as debts owed to employees and financial institutions,

Commented [WPA12]: 6/9 a reasonable answer but lacking in detail in some areas, eg what is the s 176A deduction? What classes of preferential debts are there?

including debts owed to unsecured creditors, will be paid before other debts, and in priority, even to the liquidator's fees and expenses. These debts will be deemed to have priority in the subsequent liquidation.

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

Commented [WPA13]: 6/15

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 [WPA14]: 1/5 the answer misidentifies the issue which is that the charge is almost certainly void under s 245 IA 1986

The floating charge in favour of Fretus Bank plc;

First, the liquidator must perform his duties for the benefit of all creditors, including unsecured creditors who do not have an interest in the Fretus Bank debenture.

The holder of the floating charge, Fretus Bank, had the option to enforce its charge by appointing an administrator, which would prevent the appointment of a liquidator until the administration of the charge is complete. However, this option is no longer available to Fretus Bank as a liquidator has already been appointed and this appointment prevents creditors,

including the holder of the floating charge, from taking any action against Marbley Q Limited without the permission of the court.

The liquidator may realise the asset in relation to the floating charge as if there were no charge. Once the costs have been paid in full under section 115 of the Act, the proceeds can be used to pay the holder of the floating charge.

Before making any payment to the floating charge holder, the insolvency practitioner must first have regard to section 176A, which applies to floating charges created on or after 15 September 2003. This means that a floating charge holder who may have a shortfall after realisation of the floating charge cannot share in the prescribed part available to unsecured creditors.

The prescribed part payable to unsecured creditors is 50% of the first £10,000 of net realisations subject to a floating charge plus 20% of net proceeds in excess of £10,000 up to a maximum of £800,000.

If there is another creditor attached to the same floating charge, the liquidation should consider giving priority to the floating charge first created.

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

The liquidator's aim is to obtain the maximum recovery for the creditors. If he finds that the assets have been sold or transferred below market value, he can apply to the court to have the transaction declared void.

First, the liquidator must ensure that the sale took place 2 years before the start of the liquidation. The sale of the marble cutting machines took place in July 2022, while the liquidation was initiated in December 2022. This is within the two-year period before the liquidation commenced; therefore, the liquidators can assess the validity of these sales.

The liquidator must assess, with the help of a valuation expert, whether the sale was at market value. Normally, machines like the marble cutter have a useful life of 7 years. As the machine is 1 year old, resulting in an estimated book value of £21,000, there is a possibility that the machinery was sold below its market value.

If the insolvency practitioner concludes that the machinery was sold below its market value, he can make an application to the court. In order for the court to reverse the transaction, the liquidators must prove:

- that the assets were sold below their market value and that the company was unable to pay its debts at the time of the transaction. In this scenario, this seems to be the case as the machines were sold to solve the cash flow problems and usually in cases such as this the seller is well to accept a discounted price.
- If the assets were sold below their value it may have caused the company to become insolvent. However, I need more information about the company and how important these machines are for the operational activities to be able to conclude on this point.

Commented [WPA15]: 4/6 a reasonable answer but more detail is needed eg effect of connected party on burden of proof of inability to pay debts, legislative wording of definition of undervalue.

A possible defense by the directors to these allegations is that the sales were made in good faith and for the benefit of the company. I require further information about the company to be able to assess this. However, as the sales were made to solve cash flow problems, the likelihood of this defense being effective is low.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

The liquidator may recover payments to creditors or suppliers made in the six months preceding the appointment of the liquidator. The payment of £8,000 to Hard and Fast Ltd was made one month before the liquidation commenced, so the liquidator has the power to apply to the court to recover the payment on the basis of unfair preference claims under section 239 of the Insolvency Act.

In respect of the outstanding payment of £3,000 to Hard and Fast Ltd (the Supplier). The supplier is not permitted to seek payment of outstanding debts in order to secure continued supplies to the company. In addition, section 233A of the Act prevents the supplier from relying on the insolvency related clause in the contract which would allow it to terminate the supply, vary the supply or require a higher payment for the continuation of the service.

In addition, section 233B of the Insolvency Act prevents suppliers from terminating the contract if the company initiates formal insolvency proceedings.

However, section 233B can be terminated if the continuation of the contract would cause hardship to the supplier.

*** End of Assessment ***

Commented [WPA16]: 1/4 - the main issue here was s 127. Section 239 cannot apply as the payments were made after the commencement of liquidation not before it. The s 233, 233A, 233B point is not clearly made out although there may well be a claim under those provisions.