



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% some very strong answers

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

Commented [WPA2]: 7/10

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 the correct answer

(c) 10

(d) 12

Commented [WPA4]: 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 [WPA5]: D is correct

QUESTION 2 (direct questions) [10 marks]

Commented [WPA6]: 8/10

Question 2.1 [maximum 5 marks]

Commented [WPA7]: 3/5 the answer to (i) is generally sound but the reference to receivership is inaccurate. Only the Secretary of State or the OR at their instruction can bring an action under s 6 and 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?**

*As prescribed under section 423 of the 1986 Act a victim of the relevant transaction may bring an action. Where under an administration, receivership or within a liquidation the office holder of any of these processes the office holder may bring an action, furthermore with the leave of the court a victim may bring an action. Within a CVA the supervisor of the CVA may bring an action in addition to the victim of the transactions, the victim must have the leave of the court*

*Actions can be brought by both liquidators or administrators under section 6 of the Company Directors Disqualification Act 1986 and section 246ZB of the Insolvency Act 1986.*

Question 2.2 [maximum 5 marks]

Commented [WPA8]: 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.**

*Redundancy payments, rent due from period during Moratorium, wages or salary from a contract of employment, goods or services supplied during the Moratorium, the remuneration or expenses of the Monitor.*

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

Commented [WPA9]: 14/15

Question 3.1 [maximum 6 marks]

Commented [WPA10]: 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?**

*In the past clauses within contracts specifying automatic termination of supplier contracts upon commencement of administration proceedings had been largely effective, though there are now a significant number of exceptions to these cases. Under Section 233 of the Insolvency Act of 1986 certain suppliers such as those of gas, electricity, water, and communication services may not rely on "insolvency-related term" within contracts that would allow the supplier to terminate the supply or alternatively, offer adverse terms of supply upon initiation of an insolvency proceeding.*

*Although suppliers cannot require the payment of previously incurred debts to continue service to the company in administration, they are allowed to require that the administrator guarantee payment of the charges incurred during the administration.*

*Within the updated 2020 Act, section 233B expanded these protections for companies in a similar manner to section 233 of the Act by prohibiting clauses within executory contracts that let a supplier terminate a contract to supply goods or services if a company enters a formal insolvency procedure.*

*The key difference being that under 233 only utility, communication and IT supplier were covered whereas under section 233B all suppliers bar several key exceptions are included. These exceptions include securitization companies, insurers, banks, clearing houses etc.*

*Although key to note, a contract may still be terminated under section 233B either by the consent of the insolvency office holder or by the court upon application if it is satisfied that the continued provision of goods and/or services would cause the supplier hardship.*

*In conclusion the Act is able to provide solution to the Administrator in order to continue the provision of key suppliers of the company, however given the scope of these suppliers is limited and the terms for the ongoing provision of services is unique, the Administrator should take ample time to evaluate the companies business as well as the Act before making any action.*

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 priority of payments in a liquidation is explicitly set out with the Insolvency 1986 Act (the "Act") and can be broken down into different classes based on priority, these are expense incurred in the liquidation, preferential creditors, priority creditors, floating charge holders, unsecured creditors and shareholders. Within each class is a further hierarchy that is further expanded on within this answer.*

*Under Section 115 of the Act a series of expenses incurred during the liquidation hold priority over the company's preferential creditors. The following are the primary expenses which have a priority status to creditors and are ranked in the in the descending priority. Expenses properly incurred during the winding up by the liquidator in order to realizing, preserve or obtain the assets of the company; any costs of security provided by the liquidator, monies payable to people who have helped in the production of a statement of affairs or accounts; required disbursements by the liquidator during the course of the liquidation; remuneration of any people that have been under the employment of the liquidator to perform services for the company; the liquidators remuneration; accrued corporation tax on gains attributed to realisations of company assets, any other miscellaneous expenses properly incurred by the liquidators in carrying out the winding up.*

*The above noted priority expenses of the liquidation are followed by preferential creditors which are defined within sections 386, 387 and schedule 6: section 175 of the Act. These can be split into two categories, ordinary and secondary preferential*

**Commented [WPA11]:** 8/9 a very good answer. There is no mention of the priority of debts secured by a fixed charge but that minor omission apart a detailed and clear explanation.



*creditors, ordinary preferential creditors are paid before their secondary counterparts, within each individual category all creditors are given equal rank against each other, thereby meaning assets will be paid pari passu in the event there are insufficient funds to meet all debt obligations within a category.*

*Notwithstanding, the following are some of the debts that have been classes as ordinary preferential debts according to the Act: funds owed to employees as contributions to pensions schemes from their earnings, funds owed to employees from employers pension contributions, unpaid remuneration to employees for the four months prior to commencement of winding up (up to GBP 800), accrued vacation pay for period of employee employment.*

*Furthermore the following are listed within the Act as secondary preferential debts: income tax deductions under PAYE, national insurance deductions, VAT payments, student loan payments, amounts owed by the company to eligible people in respect of certain deposits, amounts owed by the company to eligible persons due from deposits that exceed the compensation that would have been payable for the deposit under the Financial Services Compensation Scheme.*

*Following the aforementioned expenses and priority debts of the liquidation the next creditor in line to be paid by the liquidator(s) are floating charge holders. If there is more than one floating charge holder, priority is typically given to the floating charge that was made first. Nonetheless prior to payment to any floating charge the office holder must set aside a "prescribed part" of the company's net assets that will be available to satisfy unsecured debts and cannot distribute this amount to a floating charge holder unless they company is able to satisfy all unsecured debts.*

*In the event that the company's net property is GBP 10,000 or less, the "prescribed part" required to be held back is 50% of this net property. Although where the net distributable assets are less than GBP 10,000 and the office holder believes that cons of the instruction of a distribution to unsecured creditors would be outweigh the positives the office holder can be relieved of their responsibility to make a distribution of a "prescribed part". Alternatively, where the net distributable assets of the company is in excess of GBP 10,000 the prescribed part is 50% for the first 10,000 and 20% of amounts over 10,000, up to a maximum prescribed part of GBP 800,000. Also, a floating charge holder or secured creditor which also has an unsecured debt is not allowed to receive a prescribed part distribution.*

*Finally, the last payments to be made in a distribution are to unsecured creditors and shareholders. Unsecured creditors are often left with little to nothing left after all other payments are made out of the liquidation estate to parties above them in the payment waterfall, furthermore they are typically at made at the final stages of the liquidation sometimes after several years. To their benefit unsecured debts accrue interest at a statutory rate for creditors, although given this is paid out after all debts are satisfied it is very rare for interest to be paid out. That being said if interest is able to be paid out, the surplus of any additional funds is paid out to shareholders of the company.*

*Although this is the standard 'waterfall' of payments in a liquidation there are several ways this traditional order may be altered, the first of which is through the subordination of claims. Regardless of their place in the waterfall, creditors over any priority all have the right subordinate their claims, this meaning that they may choose to place themselves lower down the payment 'waterfall' giving other parties a higher priority claim relative to theirs.*

*Another way that the liquidation payment 'waterfall' may be altered is if the company was is a Moratorium within 12 weeks of the commencement of the liquidation several debts of the company received a higher "super priority status" placing their debts in priority to even the expenses of the liquidation and the liquidators fees. Under section 174A pre-moratorium debts that are not stayed under a Moratorium process are included in this "super priority" category.*

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

Commented [WPA12]: 11/15

*Prior to going into compulsory liquidation on 23<sup>rd</sup> December 2022, under pressure from its bank, Fretus Bank plc, and in order to prevent it from demanding repayment of the company's loans, Marbley Q Limited ("the Company"), granted a debenture in favour of Fretus Bank plc in February 2022. The debenture contained a floating charge over the whole of the Company's undertaking.*

*The winding up order followed a creditor's winding up petition issued on 14<sup>th</sup> October 2022.*

*In July 2022, as the Company continued to suffer cash flow problems, the directors approved the sale of two (2) marble cutting machines to Rita Perkins (a director) for GBP 10,000 in cash. The machines had been bought for GBP 25,000 a year before.*

*A month before the winding up order was made, Rita Perkins received an email from Hard and Fast Ltd, one of the Company's key suppliers. The supplier demanded immediate payment of all sums owing to it and informed the Company that further supplies would only be made on a cash on delivery basis. As the continued supply of marble was seen as essential by the Company, the board authorised a payment of GBP 8,000 to cover existing liabilities and agreed to further payments, on a cash on delivery basis, for further supplies which amounted to further payment of GBP 3,000 up to the date of the winding up order.*

*The liquidator has asked for advice whether any action may be taken in respect of the floating charge in favour of Fretus Bank plc and the two subsequent transactions. Using the facts above, answer the questions that follow.*

Identify the relevant issues and statutory provisions and consider whether the liquidator may take any action in relation to:

Question 4.1 [maximum 5 marks]

**The floating charge in favour of Fretus Bank plc;**

*The main question that the liquidator will need to answer with respect to the floating charge placed in favour of Fretus Bank plc was whether the issuance of charge would be considered a preference.*

*Ordinarily an application to have a transaction classed as a preference must satisfy several criteria under section 239, with the burden of proof for the application resting with the officeholder. To succeed they must show that the preference was given at a relevant time, for these purposes a relevant time is in the 6 months prior to the start of insolvency, or in the case where the beneficiary of the preference is an employee, 2 years. In an ordinary case as this preference was given over 6 months prior to onset of insolvency proceedings it would fall outside the scope of a preference, however since a floating charge was provided this is dealt with entirely separately in section 245.*

*A key point of Section 245 is that it does not prevent lenders from taking floating charges where they are providing additional consideration, however this is not the case in this situation as the charge was provided as consideration for Fretus Bank not calling on their existing loans. Also, to note, unlike the case of regular preferences the relevant period for floating charge preferences is 12 months prior to the onset of proceedings which Fretus Bank plc does fall within. As a result of this the liquidator may invalidate the floating charge, however the debt arising from the loans to Fretus Bank plc will remain valid.*

*Moving on, another typical action which can be taken by a liquidator is to target voidable dispositions, unfortunately in this case an action could not be taken against Fretus Bank. This is due to the fact that voidable dispositions only relate to transactions made after the petition date, whereas the provision of the floating charge to Fretus was made over 6 months before the petition date.*

Question 4.2 [maximum 6 marks]

**The sale of the marble cutting machines; and**

*The sale of the marble cutting machines would be a very likely target of a claim for transactions at undervalue by the liquidator under section 238 of the Act. To be proved under this section the liquidator will need to show that the transaction for the cutting machines was entered in for an amount of consideration that was significantly less than the consideration provided by the company. In this case the cutting machines were sold for GBP 10,000, significantly less than the GBP 25,000 the company paid for them a year prior. Furthermore, the transaction is well within the relevant time as prescribed by the act, of 2 years prior to the commencement of insolvency proceedings.*

**Commented [WPA13]:** 3/5 the s 239 and s 127 points are not relevant for the reasons given. Section 245 is the issue and more detailed explanation and application to the facts was needed.

**Commented [WPA14]:** 6/6

*The difficulty with bringing a claim under section 238 arises at the requirement for the company to have been insolvent at the time of the transaction. This could be difficult to argue against the defendant as although we know the company had 'cash flow problems' we can't ascertain from this information whether it would be considered insolvent under section 123. However, in this case as the buyer of the machines was a director they are a connected person and therefore the company is automatically presumed insolvent for these purposes.*

*Notwithstanding if the director can prove to the court that the transaction for the cutting machines was entered into in good faith, it was done for the purpose of continuing the business and there were reasonable grounds to believe the transaction would be to the benefit of the company a claim cannot be brought. In the event the court concluding the transaction was at undervalue then it would be able to make an order restoring the position prior to the transaction, i.e., had the transaction not happened.*

*Although the decision to grant the order in this case would be at the discretion of the court it is within reason to conclude that the director did purchase the cutting machines in good faith for the continuance of the business likely to inject cash into the struggling business.*

*Another similar avenue the liquidator may take is an action under section 423 for transactions defrauding creditors. Like that under section 238 it must be proved that a transaction was entered into where the company received significantly less consideration than was offered as was the case with the cutting machines. Additionally, it must be shown that the company entered into the transaction for the purpose of putting assets of the company beyond reach of someone who may make a claim against the company. As is the case under the section 238 action, the primary defense here is that the transaction was made in good faith and not with the intent to defraud creditors.*

Question 4.3 [maximum 4 marks]

**The payments to Hard and Fast Ltd.**

*The liquidator would likely look to pursue a claim of wrongful trading against the directors of the company under section 214 and 246ZB of the act for the payments made to Hard and Fast Ltd. The purpose of the wrongful trading action is to encourage directors to make every effort to minimize losses to company creditors once they are made aware that the company is likely to be put into an insolvent liquidation.*

**Commented [WPA15]:** 2/4 - the issue here is s 127. It is likely that validation would only be made for the new supply not the old supply. Section 214 cannot apply as the payments were made after the commencement of the winding up. Section 214 only applies to trading prior to the commencement of the winding up.

*If proved under section 214 the court can stipulate for a director to provide a contribution to the company's assets, for this to happen several criteria must first be made though. Firstly, the company must be in liquidation, secondly the person must have known/concluded prior to commencement of insolvency proceedings that there was no reasonable prospect that the company would not enter liquidation, finally the person that person was a director at this time.*

*The main defense of course for an action brought under section 214 is that the directors made every effort to minimizing the potential loss to the company's creditors once they knew the company was heading for insolvency.*

*In this case the first and last criteria are met, being that company is insolvent and the person in question, Rita, was a director, this leads us to the second point, whether she should have known the company was heading for an insolvent liquidation. Given the circumstances it is reasonable to believe that the liquidator could be able to prove that Rita ought to have known of the company's insolvency at the time payment terms to Hard and Fast were altered. This is because at the time of the payments, she had already provided Fretus bank with a floating charge to remain insolvent 9 months prior. Furthermore, the company had been required to sell company assets to Rita in order to receive a short-term injection of cash to keep trading. Finally, the payments and changing of terms with Hard and Fast were made 1 month before the winding up order, which was also 1 month after the petition for appointment of insolvency practitioners was placed in court.*

*It is reasonable to assume there is a strong case to be brought against Rita for this claim. The defense of minimizing creditor loss would likely be used, albeit to little effect as these payments clearly disadvantaged other creditors.*

*It is unlikely that the liquidator will be able to bring a claim under section 127 for a voidable disposition against Hard & Fast. As the repayment of debt would likely be sanctioned by the court as a payment necessary to ensure the continued trading of the business. Meanwhile the change of terms to cash on delivery of goods would be considered by the court, but likely approved in the end as it allowed the business to continue.*

**\* End of Assessment \***