



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

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

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 [WPA1]: 38/50 = 76% a very good attempt with some weakness in identification of issues in Q4

Commented [WPA2]: 10/10 excellent

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]: 9/10

Question 2.1 [maximum 5 marks]

Commented [WPA4]: 4/5 it is primarily the Secretary of State who brings actions under s 6 CDDA - the OR can do so if instructed to bring the action in compulsory winding up cases by the Sec of State.

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 following parties can bring actions: (i) the official receiver, the liquidator, the administrator and (with permission of the court) any victim of the transaction, e.g. a creditor, where the company is in administration or being wound up; (ii) the supervisor of a Company Voluntary Arrangement ("CVA") where a victim is bound by a CVA, or any victim of the transaction (whether bound by the CVA or otherwise) and; (iii) a victim of the transaction, in any other case.

Under section 6 of the Company Directors Disqualification Act 1986, Official Receivers may bring an action to disqualify directors from being involved in the management of a company for up to 15 years. Under this Act, liquidators and administrators can also report any directors deemed to be 'unfit' to be directors.

Under section 246ZB of the Insolvency Act 1986 ("the Act"), administrators may bring an action, in addition to liquidators who historically were the only parties able to bring wrongful trading and fraudulent trading actions, under sections 214 and 213 of the Act. Administrators were granted powers to bring actions under the new section 246ZB of the Act following the introduction of the Small Business, Enterprise and Employment Act 2015.

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.

Under Part A1 of the Act, the following debts do not form part of the payment holiday:

- (i) The monitor's remuneration or expenses;**
- (ii) Services or goods provided during the Moratorium;**
- (iii) Rent in respect of the period of the Moratorium;**
- (iv) Wages or salaries arising under a contract or employment;**
- (v) Redundancy payments; and**
- (vi) Liabilities or other debts that arise under a contract or other instrument that involve "financial services", e.g. 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 who wishes to continue to operate the business of the company in administration is permitted to retain certain essential supplies under Section 233 of the Act. These essential supplies encompass the following: supply of gas, electricity, water and communication services. 'Communication services' are defined as including the supply of goods and services such as computer hardware and software, point of sale terminals, information, advice, and technical assistance, data storage and processing and website hosting. Suppliers of these goods and services are not permitted under the Act to require payment of outstanding debts in order to secure a new or continued supply to the company in administration. Notwithstanding this,

section 233 of the Act allows for suppliers to stipulate that the administrator must provide a personal guarantee of payment of charges in respect of the supply of these goods and services.

Further to this, under section 233A of the Act, a supplier of goods and services to a company in administration is generally unable to rely upon an 'insolvency-related term' in a contract of supply that would otherwise enable the supplier to terminate the supply, alter the terms of the supply or demand higher payment for the continued supply. Section 233B added under the 2020 Act has further expanded the protections for insolvent companies against suppliers by prohibiting clauses which enable the supplier of goods or services to terminate or "do any other thing" related to the initial supply contract if the company enters a formal insolvency procedure. Section 233B further prevents suppliers from making it a condition of continued supply of goods or services that pre-insolvency arrears are paid and from making any additional changes to the contract such as raising prices. Under Section 233B, a supplier can also not insist on a personal guarantee from the administrator as it can under section 233. Section 233B complements the existing sections 233 and 233A of the Act, and it also opens up the restriction on termination to all other suppliers, with some exceptions e.g., banks, insurers, recognized investment exchanges and clearing houses.

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 as follows: (i) holders of fixed charges will be paid first, usually outside of any formal insolvency, with the proceeds from the sale of the assets over which they hold fixed charges; (ii) any expenses of the liquidation, including liquidators' remuneration; (iii) preferential creditors (in practice, this creditor class is restricted to generally modest claims from (e.g.) employees who are owed monies from their insolvent employers, taxation debts owed to the Government; (iv) holders of floating charges (subject to any part deduction under section 176A of the Act; (v) unsecured creditors, being those without the benefit of any security or title to assets, (e.g.) ordinary trade suppliers and non-preferential taxation liabilities. If, at the conclusion of the insolvency proceedings, the company is found to ultimately be solvent i.e., that there is surplus cash following settlement of all liabilities, this surplus will be returned to the member of the company according to their rights under the company's articles of association.

With regards to the rights enjoyed by each class of creditor or expense, secured creditors are given primacy under the insolvency regime. Unsecured creditors do however have a number of significant rights under the legislation. For example, unsecured creditors often have the opportunity to vote on the following: (i) whether

Commented [WPA8]: 6/9 a good answer but one which does not fully explain the nature of certain rights eg s 176A prescribed part, different classes of preferential debt.

to approve an administrator's proposals; (ii) whether to approve a proposal for a company voluntary arrangement ("CVA"); (iii) how an office-holder is to be paid; and (iv) who is appointed as liquidator.

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 the subsequent administration or liquidation may differ from the priority of payments that existed prior to the Moratorium. Under Section 174A of the Act, debts that are not part of the payment holiday under the Moratorium, such as debts owed to employees or 'financial services' debts are, in the subsequent liquidation, paid in priority to even the liquidators' remuneration and disbursements. These unsecured creditors are therefore given a form of "super priority" in the subsequent liquidation. An example of this is the payment of the wages of a director who has not been paid for months leading up to the Moratorium. If the Moratorium results in an unsuccessful rescue attempt and the company enters liquidation, this pre-Moratorium unsecured debt of the director's wages will be given "super priority" in the liquidation. A further example of this "super priority" is unsecured (or secured) pre-Moratorium bank debt that falls under the definition of "financial services", albeit there is an exception preventing such liabilities being granted "super priority" where the debt is accelerated debt, i.e., debt that fell due by way of the operation of, or exercise of rights under, an early termination provision or acceleration in the financial services contract.

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

Commented [WPA9]: 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;

Fretus Bank plc holds a floating charge over the whole of the Company's undertaking in the form of a debenture as of February 2022. The issue at hand is as to when the floating charge over the Company's undertaking crystallises.

With regards to priority of payments, holders of floating charges are typically paid following the settlement of (i) debts owed to holders of fixed charges; (ii) expenses of the liquidation; and (iii) preferential creditors.

A floating charge over the 'whole of the Company's undertaking' can be interpreted as including all of Marbley Q Limited's property both present and future, including the right to carry on the business of the Company.

Marbley Q Limited (the "Company") granted the debenture to Fretus Bank plc in February 2022, which is prior to the discounted sale of the marble cutting machines to Rita Perkins and the payment of the Company's outstanding liabilities of GBP 8,000 to Hard and Fast Ltd. The debenture contained a floating charge over 'the whole of the Company's undertaking' meaning that Fretus Bank plc may be entitled to payment if it can be determined that the floating charge it had over the whole of the Company's undertaking had crystallised before these transactions took place. If the crystallization of the floating charge occurred prior to the sale of the marble-cutting machines to Rita Perkins, this was incorrectly sold to Ms. Perkins as Fretus Bank plc's floating charge would have been converted into a fixed charge and any asset (the marble-cutting machines) subject to a fixed charge cannot be dealt with by the debtor (the Company) without the consent of the secured creditor (now Fretus Bank plc). If the crystallization had not yet occurred at this time, then the Company was free to sell the Company's asset in the normal course of business and without the consent of Fretus Bank plc.

A qualifying floating charge holder is entitled to apply for an administration order for the Company when it believes the Company is unable to pay its debts, provided that the court is satisfied that the floating charge holder would be able to appoint an administrator out-of-court, so some evidence of insolvency is needed. From the detail provided in the question, it is clear that the Company was suffering from cashflow

Commented [WPA10]: 1/5 the answer is off the point. It is not possible to appoint an administrator out of court as the company is in liquidation. The issue is the validity of the floating charge. Section 245 would almost certainly apply so that it was void against the liquidator.

insolvency issues as early as July 2022, when it sold the marble-cutting machines to a director at a heavily discounted price. Fretus Bank plc can also be defined as a 'qualifying floating charge holder' as they hold a floating charge over the whole or substantially the whole of Marbley Q Limited's property, both present and future.

As it could be determined that Marbley Q Limited was experiencing an inability to meet its debts as they fall due as early as July 2022 when they sold the machinery to Rita Perkins, Fretus Bank plc would have been entitled to appointment an administrator to realise its fixed charge in the Company. Fretus Bank plc would have had to apply for the appointment of the administrator out-of-court, under the changes introduced by the Enterprise Act 2002.

Question 4.2 [maximum 6 marks]

Commented [WPA11]: 5/6 a good answer. Perhaps needed to consider possible defences available to the director.

The sale of the marble cutting machines; and

The marble cutting machines were sold to the Company's director prior to the filing of the creditor's winding up petition in October 2022 and subsequently the winding up order. Following the filing of the winding up order, the Company's powers of dealing with its property would have been significantly limited. However, as these machines were sold to the director in July 2022, this is not applicable in this case.

Notwithstanding this, the machines were sold to a director of the Company at a heavily discounted price (a total discount of GBP15,000 from their purchase price a year previous). As Rita Perkins would have been an unsecured creditor of the Company, being a director of the Company, this transaction falls under the remit of the transactions at undervalue provision under section 238 of the Act.

Under the Act, all unsecured creditors must be treated fairly and equally. The Act permits that therefore, certain transactions that were entered into shortly before the Company was placed into formal insolvency (in December 2022), are open to scrutiny by the liquidators. Under section 238 of the Act, an administrator or liquidator may attack a transaction that was entered into prior to the Company entering administration/liquidation where the transaction was at an undervalue. This is the case with regards to the sale of the machinery to Ms. Perkins. The sale of the machinery to Ms. Perkins would fall under the category of 'a transaction with another person for a consideration which, in money or money's worth, was, at the date of the transaction, significantly less than the value, in money or money's worth, of the consideration provided by the company', under section 238 of the Act.

In order to dispute the transaction, it must have taken place at a 'relevant time' which is during the two-year period prior to the commencement of the liquidation or administration. The term 'transaction' encompasses any gift, agreement or arrangement. In this case it can be determined that the sale of the machinery to Ms. Perkins was for a price significantly less than the consideration provided by the Company. At the time of the sale in July, it can further be determined that the Company

was already experiencing cashflow insolvency issues, as that was one of their reasons for making the sale to Ms. Perkins.

The sale was with a connected person, being a director of the Company. Under section 238 of the Act, whether or not the transaction was with a connected person, it is a prerequisite of liability that at the time the transaction took place, either the Company had an inability to pay its debts as they fell due within the meaning of section 123 or that the Company became unable to pay its debts within the meaning of section 123 as a consequence of the transaction. With respect to a transaction with a connected person (which is the case in this particular instance) the Company is presumed to have been insolvent, or to have become insolvent as a result of the transaction, unless evidence to the contrary is provided.

The liquidators in this case have the authority to petition the court to make an order restoring the position of the Company had the sale never have taken place.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

Hard and Fast Ltd. demanded immediate payment of the remaining sums owed to them in September, one month prior to the filing of the winding up petition and subsequent winding up order in October. As this demand was prior to the Company's winding up, there was no Moratorium on claims and therefore Hard and Fast Ltd. were entitled to request payment of their outstanding balance. However, the priority of payment of creditors must be taken into account by the liquidators regarding payment of the GBP 8,000.

Regarding the continued supply of marble to the Company to the sum of GBP 3,000 up to October 2022, the question arises as to whether the marble is deemed as an 'essential supply' under Section 233 of the Act. Under Section 233 of the Act, suppliers of what are deemed 'essential supplies' (e.g., gas, electricity, water and communications services) are not permitted to require payment of outstanding debts in order to secure new or continued supply. Although the Company itself deemed the marble as 'essential' for continued operation of its business, marble would not be deemed an 'essential supply' under the Act.

However, Section 233B of the Act introduced some further provisions related to suppliers that complement the existing Sections 233 and 233A of the Act. Section 233B prevents suppliers from terminating a supply upon the Company's insolvency but also prevents the suppliers from demanding that pre-insolvency arrears are paid as a condition of continued supply and from making any other changes to the supply contract such as raising prices. As the Company was not in compulsory liquidation in July 2022 when Hard and Fast Ltd. demanded payment of its outstanding debts and mandated a cash on delivery basis for further supplies, this provision under Section 233B may not apply. Notwithstanding this, Section 233B also included all other

Commented [WPA12]: 1/4 an interesting argument but it is difficult to see how any of the sections mentioned would allow any clawback of monies paid to suppliers. The actual issue is the more straightforward application of s 127 IA 1986

suppliers (with some limited exceptions such as banks, insurers and recognized investment exchanges and clearing houses) in the restriction on termination of supply to companies and so Hard and Fast Ltd., under this provision, should not have been able to demand a cash on delivery basis for continued supply and should also have been treated amongst the other creditors pari-passu regarding payment of its outstanding debt.

* End of Assessment *