



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]: 45/50 = 90% an excellent effort

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

Commented [WPA2]: 9/10

Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Please select the most correct ending to the following statement:

The Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021 restrict pre-pack sales which constitute a substantial disposal of the company's property to connected parties where the disposal occurs . . . :

- (a) within 10 weeks of the commencement of the administration.
- (b) within 8 weeks of the commencement of the administration.**
- (c) within 4 weeks of the commencement of the administration.
- (d) on the day the company enters administration.

Question 1.2

What is the maximum length of a Moratorium under Part 1A of the Insolvency Act 1986 to which creditors can consent without any application to the court?

- (a) 40 business days.
- (b) One year and 20 business days.
- (c) One year and 40 business days.
- (d) One year.**

Question 1.3

Which of the following is not a requirement for a company that wishes to enter into a Restructuring Plan under Part 26A of the Companies Act 2006?

- (a) *The company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.*
- (b) *A compromise or arrangement is proposed between the company and its creditors, or any class of them, or its members, or any class of them.*
- (c) *The purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the said financial difficulties.*
- (d) *The company is, or is likely to become, unable to pay their debts, as defined under section 123 of the Insolvency Act 1986.***

Question 1.4

In cases where the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021 apply and an independent report from an Evaluator is obtained, the independent report must be obtained by whom?

- (a) *The administrator.*
- (b) *Any secured creditor with the benefit of a qualifying floating charge.*
- (c) *The purchaser.***
- (d) *The company's auditor.*

Question 1.5

Which one of the following is not a debtor-in-possession procedure?

- (a) *Administration.***
- (b) *Restructuring Plan.*
- (c) *Scheme of Arrangement.*
- (d) *Company Voluntary Arrangement.*

Question 1.6

A liquidator may pay dividends to small value creditors based upon the information contained within the company's statement of affairs or accounting records. In such circumstances, a creditor is deemed to have proved for the purposes of determination and payment of a dividend where the debt is no greater than how much?

- (a) GBP 500
- (b) GBP 750
- (c) GBP 1,000**
- (d) GBP 2,000

Question 1.7

Which one of the following is not, in itself, a separate ground for disqualification of a director under the Company Directors Disqualification Act 1986?

- (a) Wrongful trading.
- (b) Breach of fiduciary duty.**
- (c) Being found guilty of an indictable offence in Great Britain.
- (d) Being found guilty of an indictable offence overseas.

Question 1.8

The administrator is under a general duty to provide a statement for creditors' consideration setting out proposals for achieving the purpose of administration. He or she must obtain a creditors' decision on whether or not to approve the proposals within how many weeks of the date the company entered administration?

- (a) 6
- (b) 8**
- (c) 10
- (d) 12

Question 1.9

Commented [WPA3]: C is correct

Which of the following statements is incorrect?

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

Question 1.10

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

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

QUESTION 2 (direct questions) [10 marks]

Commented [WPA4]: 10/10

Question 2.1 [maximum 5 marks]

Commented [WPA5]: 5/5

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

- a) In respect of transactions defrauding creditors, under section 423 of the Insolvency Act 1986, the following parties may bring an action: (i) the official receiver, the liquidator, the administrator and (with leave of the court) any victim of the transaction (ie a creditor) where the company is being wound up

or is in administration; (ii) the supervisor of the company voluntary arrangement (CVA) where the victim is bound by a CVA or any victim of the transaction (whether bound by the CVA or not); or (iii) a victim of the transaction in any other case.

- b) In respect of the disqualification of directors under section 6 of the Company Directors Disqualification Act 1986, the following parties may bring an action: (i) the Secretary of State; or, (ii) if the Secretary of State so directs in the case of a person who is or has been a director of a company which is being wound up by the court in England and Wales, by the official receiver;
- c) In respect of wrongful trading under section 246ZB of the Insolvency Act 1986, the administrator may bring an action.

Question 2.2 [maximum 5 marks]

Commented [WPA6]: 5/5

List any five (5) of the debts which do not form part of the payment holiday under Part A1 of the Insolvency Act 1986 when a company is subject to a Moratorium.

The following debts do not form part of the payment holiday under Part A1 of the Insolvency Act 1986 when a company is subject to a Moratorium:

- a) *the monitor's remuneration or expenses;*
- b) *goods or services supplied during the moratorium;*
- c) *rent incurred during the moratorium;*
- d) *wages or salary arising under a contract of employment; and*
- e) *redundancy payments.*

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

Commented [WPA7]: 12/15

Question 3.1 [maximum 6 marks]

Commented [WPA8]: 5/6 a good answer. It would have been helpful to know what constitutes essential supplies under s 233 and how ss 233 and 233A interact if at all with s 233B

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?

Yes, sections 223, 223A and 223B of the Insolvency Act applies in such a situation to protect the supply of goods and services to companies in administration.

Under sections 233(2) and 233(3)(f), a supplier can make it a condition of the supply of goods and services that the administrator personally guarantee the payment of the goods and services, but cannot make it a condition that any outstanding charges (prior to the administration) must first be paid.

Under section 233A(1), an insolvency related term of a contract for the supply of essential goods or services to a company ceases to have effect if the company enters administration. This means that a supplier of goods and services will generally be unable to rely upon a insolvency related term in the contract of supply which would entitle the supplier to terminate the supply, change the terms of the supply, or require

higher payments for continued supply. Section 233A protects essential supplies and also only allows the supplier to terminate the contract or supply under certain conditions.

Section 233B(3) prohibits clauses which allow a supplier of goods or services to terminate or "do any other thing" in relation to the supply contract if the company enters into administration. This means that section 233B prevents suppliers from terminating a supply upon a company's administration and prevents suppliers from making it a condition of continued supply that pre-insolvency charges are paid and from making other changes to the contract including increasing prices. A supplier also cannot insist on a personal guarantee from an administrator under section 233B. Section 233B does however allow a contract to be terminated by a supplier where the company or administrator consents, or the court grants permission on the basis that the continuation of the contract would cause the supplier hardship.

The effect of the provisions means that an administrator can require suppliers to continue supplying goods and services even where the suppliers might wish to terminate the contract because of the fact that the company has entered into administration.

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 Insolvency Act 1986 provides a regime for priority of distributions in the context of a liquidation:

1. *Under section 115 of the Act, certain expenses of the liquidation are given priority over a company's preferential creditors, any holders of floating charges, and the company's unsecured creditors. These expenses include (in order of priority):*
 - a. *expenses that are properly incurred by the liquidator in preserving, realizing or getting in any of the assets of the company (including the conduct of any legal proceedings);*
 - 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;*
 - e. *the remuneration of any person employed by the liquidator to perform services for the company;*
 - f. *the remuneration of the liquidator;*

Commented [WPA9]: 7/9 a strong answer. No mention of how fixed charges are dealt with and some further detail on the different classes of preferential creditors would have been helpful.

- g. any corporation tax on chargeable gains arising from the realization of any assets of the company;*
 - h. any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up;*
- 2. Under sections 386 and 387 and Schedule 6 of the Act, once the expenses of the liquidation have been paid, the assets of the company are used to pay preferential creditors. Preferential creditors include certain claims by employees (ie for remuneration and contributions to pension schemes) and tax liabilities. Preferential debts are classed as ordinary or secondary debts, with ordinary preferential debts being paid before secondary preferential debts.*
- 3. After preferential creditors are paid, the next creditor to be paid are holders of floating charges. Priority between floating charge holders will depend on which floating charge was created first. In any liquidation, the liquidator should consider the applicability of section 176A of the Act which requires, for companies with a floating charge created on or after 15 September 2003, a prescribed part of the company's assets to be available for the satisfaction of unsecured debts. This requires a calculation of the net property available (being calculated after the liquidation expenses and preferential debts have been paid) - where the company's net property does not exceed GBP10,000, the prescribed part is 50% of the property (however, where the property is less than GBP10,000 and the liquidator thinks that making a distribution to unsecured creditors would be disproportionate to the benefits, then the duty to make the distribution of the prescribed part does not apply). Where the net property exceeds GBP10,000, the prescribed part is 50% of the first GBP10,000 in value, plus 20% of the excess value above GBP10,000, subject to a maximum amount of the prescribed part of GBP800,000.*
- 4. The next class of creditors are unsecured creditors, who will be paid. These are creditors with no security.*
- 5. After all creditors have been paid, any surplus will be distributed amongst shareholders according to the company's constitution.*

If however, the company had been subject to a moratorium under Part A1 of the Act during the 12 week period prior to the commencement of the liquidation, then the priority would change. Section 174A provides for priority of debts in the context of a moratorium and provides that certain unpaid pre-moratorium (such as the monitor's remuneration or expenses, goods or services supplied or rent during the moratorium, wages paid during the moratorium or financial services debts) or moratorium debts (which are not part of the payment holiday), are paid in priority in any subsequent liquidation, (including in priority to the liquidator's fees and expenses). This effectively provides a form of "super priority" if the company has been subject to a moratorium.

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

Commented [WPA10]: 14/15

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 [WPA11]: 5/5

The floating charge in favour of Fretus Bank plc;

The liquidator may take action in respect of the floating charge in favour of Fretus Bank Plc under section 245 of the Insolvency Act.

Section 245 provides for the avoidance of floating charges which are given for pre-existing funding and created:

- a) *within 12 months prior to the onset of insolvency if at the time of the creation of the charge, the company was either unable to pay its debts or became unable to do so in consequence of the transaction; or*
- b) *within 2 years prior to the onset of insolvency if the charge is created in favour of a person connected with the company.*

That is, section 245 will not apply to avoid floating charges given to lenders who provide fresh funding to the company (ie where new consideration is provided for the charge).

Under section 129 of the Act, the liquidation is deemed to have commenced at the date of the petition, which means here, the liquidation is deemed to have commenced on 14 October 2022.

Based on the facts provided, the Company provided Fretus Bank Plc with a debenture (containing floating charge) in February 2022 for what appears to be existing loans. As such, section 245 appears to be applicable to void the floating charge because:

- a) the floating charge was given within 12 months prior to the insolvency (ie 8 months prior to the insolvency to a non connected person) and appears to have been made at a time where the Company was unable to pay its debts (as defined under section 123 of the Insolvency Act) (ie because the debenture was entered into to prevent the bank from demanding repayment of the Company's existing loans which suggests that the company was unable to pay its debts as they fell due); and*
- b) the floating charge was given in respect of existing loans and as such, it appears that no new consideration was given for the floating charge. Based on the facts, Fretus Bank Plc did not provide any money to the company at the time of the creation of the floating charge.*

Question 4.2 [maximum 6 marks]

Commented [WPA12]: 6/6

The sale of the marble cutting machines; and

The liquidator may take action in respect of the sale of the marble cutting machines on the basis that the sale was a transaction at undervalue under section 238 of the Insolvency Act.

Under section 238, a transaction can be attacked where: (a) the company entered into a transaction with another person for 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; (b) the transaction was entered into within 2 years prior to the commencement of the liquidation; and (c) the transaction was entered into at a time where the company was unable to pay its debts as they fell due (within the meaning of section 123) or became unable to pay its debts (within the meaning of section 123) as a result of the transaction.

Here, the transaction took place 3 months before the presentation of the winding up petition (and therefore the commencement of the liquidation, being the relevant date pursuant to section 240(3)(e)) and was entered into for significantly less value than what the Company had paid a year before (ie GBP10,000 when the machines had

been purchased for GBP25,000 a year before). The transaction also appears to have been entered into at a time where the company was unable to pay its debts as they fell due because the company was suffering from cash flow problems and in any event, because the sale was made to a connected person (ie a director), there is a presumption that the company was insolvent at the time of the transaction (unless the contrary is proved).

If the sale is successfully attacked, the court can make an order to restore the position to what it would have been had the sale not occurred.

The director can however, defend the attack by showing 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. The director might argue that the transaction was entered into in good faith so as to provide the Company with cash to continue carrying on its business (and as such, it was believed that the transaction would benefit the Company).

For completeness, based on the facts, it doesn't appear that the sale of the marble cutting machines would fall within:

- a) section 423 of the Insolvency Act, which allows a liquidator to attack transactions which are designed to defraud creditors. Section 423 applies where: (a) the company entered into a transaction with another person at an undervalue; and (b) the company entered into the transaction for the purpose either of putting assets beyond the reach of the person who is making or may make a claim against the company or prejudice the interests of such a person. Here, the facts do not suggest that the company sold the machines for the purpose of putting the assets beyond the reach of creditors; or*
- b) the anti-deprivation rule which prevents an insolvency estate from being deprived of an asset which would otherwise be available for the benefit of creditors. Here, the deprivation was not triggered by the insolvency proceedings as the sale occurred 3 months before the presentation of the winding up petition.*

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

As set out above, under section 129 of the Insolvency Act, the liquidation is deemed to have commenced at the date of the petition, which means here, the liquidation is deemed to have commenced on 14 October 2022 even though the winding up order was not made until 23 December 2022

Commented [WPA13]: 3/4 a good answer on the s 127 point although validation is likely only for some of the payments. The s 239 discussion is misconceived as the payments were made after the commencement of the winding up not before it.

Based on the facts provided, the payments to Hard and Fast Ltd fall into two categories: (a) the payment of GBP8,000 for existing liabilities a month before the winding up order but after the winding up petition was issued; and (b) further payments of GBP3,000 on a cash on delivery basis for further supplies up until the winding up order but after the winding up petition was issued.

Both categories of payments were made after the winding up petition was presented (and therefore the time at which the liquidation commenced) and are therefore void unless validated under section 127 of the Insolvency Act.

Section 127 avoids any disposition of property made after the commencement of winding up unless the court otherwise orders. However, the court has a discretionary power to declare that the dispositions shall not be void. Here, Hard and Fast Ltd can apply for a validation order if it can be shown that the transactions were necessary to ensure continued supplies to enable the company to continue trading (where the continuance of trading was in the best interests of creditors), or, for the payments made on a cash on delivery basis, if it can be shown that there was a benefit to the company (ie if payment enabled further supplies to be received so as to enable the business to continue).

The Court will also consider whether the dispositions were made for the benefit of the general body of unsecured creditors and whether the effect of the dispositions were to give a preference to Hard and Fast Ltd over other creditors. Here, if Hard and Fast Ltd can show that the continued supply and payments were for the benefit of the creditors and not to give a preference (ie because it allowed the company to continue to trade), then Hard and Fast Ltd is likely to be able to obtain a validation order.

For completeness, it should be noted that the payment of GBP8,000 to Hard and Fast Ltd cannot be avoided on application by the liquidator under section 239 of the Insolvency Act which relates to preferences. Section 239 applies to avoid preferences where:

- (a) the person, alleged to have been preferred was, at the time of the transaction, a creditor of the company;*
- (b) something was done by the company which had the effect of putting that person in a better position than the position he would have been in if that thing had not been done;*
- (c) the company was, in giving the preference, influenced by a desire to put the person in a better position in relation to the person preferred; and*
- (d) the preference was given at a relevant time (ie within 2 years prior to the onset of insolvency if in favour of a connected person or within six months prior to the onset of insolvency if in favour of a person not connected to the company).*

*Here given the pressure applied by Hard and Fast Ltd to pay all sums outstanding, and the fact that the continued supply of marble was essential to the Company, it appears that there was no desire by the Company to prefer Hard and Fast Ltd. The position is comparable to *Re MC Bacon Ltd* where Millet J found that where the company was*

entirely dependent upon bank support for continued trading such that if the debenture were not granted, the bank would withdraw its support and the company would be forced into immediate liquidation, the granting of the debenture was motivated by the desire to avoid the calling in of the overdraft as opposed to a desire to prefer the bank. Here, the payments made to Hard and Fast were arguably made with the desire to avoid losing the supply of marble that was seen as essential by the Company.

*** End of Assessment ***