



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]: 38/50 = 76% some very strong answers

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

Commented [WPA2]: 10/10 excellent

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

Question 1.1

Please select the most correct ending to the following statement:

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

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

Question 1.2

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

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

Question 1.3

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

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

Question 1.4

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

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

Question 1.5

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

- (a) **Administration.**
- (b) *Restructuring Plan.*

(c) Scheme of Arrangement.

(d) Company Voluntary Arrangement.

Question 1.6

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

(a) GBP 500

(b) GBP 750

(c) GBP 1,000

(d) GBP 2,000

Question 1.7

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

(a) Wrongful trading.

(b) Breach of fiduciary duty.

(c) Being found guilty of an indictable offence in Great Britain.

(d) Being found guilty of an indictable offence overseas.

Question 1.8

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

(a) 6

(b) 8

(c) 10

(d) 12

Question 1.9

Which of the following statements is incorrect?

(a) An insolvency officeholder from an EU Member State will be automatically recognised by the courts in the UK whether the officeholder was appointed before or after Brexit.

(b) An insolvency officeholder from an EU Member State is automatically recognised by the courts in the UK if appointed before Brexit.

(c) An insolvency officeholder from an EU Member State appointed after Brexit may apply to a UK court for recognition under the Cross Border Insolvency Regulations.

(d) An insolvency officeholder from an EU Member State cannot apply to a UK court for recognition under section 426 of the Insolvency Act 1986.

Question 1.10

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

(a) 6 months.

(b) 12 months.

(c) 2 years.

(d) 5 years.

QUESTION 2 (direct questions) [10 marks]

Commented [WPA3]: 10/10

Question 2.1 [maximum 5 marks]

Commented [WPA4]: 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?

- Section 423 of the Insolvency Act: **(i) Where the company is being wound up or is in administration, the official receiver, the liquidator, the administrator and (with leave of the Court) any victim of the transaction such as a creditor; (ii) where a victim is bound by a CVA, the supervisor of the CVA or any victim of the transaction (whether or not bound by the CVA); or (iii) in any other case, by a victim of the transaction.**
- Section 6 of the CDDA: **The Secretary of State.**
- Section 246ZB of the Insolvency Act: **The administrator.**

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.

- **The monitor's remuneration or expenses**
- **Goods or services supplied during the moratorium**
- **Rent in respect of a period during the moratorium**
- **Wages or salaries under contracts of employment**
- **Redundancy payments**

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

Commented [WPA6]: 11/15

Question 3.1 [maximum 6 marks]

Commented [WPA7]: 5/6 a good answer but more detail on s 233B is needed

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, the administrator can continue to operate the business and require suppliers to continue supplying goods and services during administration. The administrator will frequently need to maintain certain essential supplies in order to continue to operate the business.**
- **The appointment of an administrator does not automatically terminate contacts.**
- **Section 233 of the Act applies to a supply of gas, electricity, water and communication services (which includes the supply of goods and services such as point of sale terminals, computer hardware and software, information, advice and technical assistance, data storage and processing and website hosting).**
- **However, section 233 permits a supplier to stipulate that the administrator personally guarantee payment of the charges for the relevant supply.**
- **Section 233A generally prevents a supplier of such services from relying upon an 'insolvency-related term' in a contract of supply, which would otherwise entitle them to terminate, alter or compel higher payments for the supply.**

- Section 233B *prohibits clauses which allow the supplier of goods and services to terminate or “do any other thing” in relation to that contract if the company enters a formal insolvency procedure.*

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?

Priority of payments

- **It will usually be the case that payments flow in the following order:**
 - *holders of fixed charges will be paid first - usually outside of any formal insolvency (from the proceeds of sale of the assets subject to fixed charges).*
 - *expenses of the procedure (including the remuneration of the officeholder).*
 - *preferential creditors (in practice, this class of creditor is limited to reasonably modest claims from employees owed money by insolvent employers)*
 - *those with floating charges*
 - *unsecured creditors*
- **Rule 3.51 of the Rules lists the order of priority in which expenses incurred by an administrator are to be paid. It first lists those contractual liabilities with “super priority” under paragraph 99 of Schedule B1 to the Act - followed by:**
 - *Expenses properly incurred by the administrator in performing its functions*
 - *The cost of any security provided by the administrator*
 - *Where an administration order was made, the costs of the applicant*
 - *Where the administrator was appointed otherwise than by court order, the costs of doing so*
 - *Any amount payable to a person in respect of the statement of affairs*
 - *Any necessary disbursements for the administrator in the course of the administration*
 - *Remuneration of any person employed by the administrator*
 - *Administrator’s remuneration*
 - *The amount of any corporation tax of chargeable gains accruing on the realisation of any asset of the company during the administration*

Changes if company had been subject to a moratorium under Part A1 during 12 week period prior to the commencement of the liquidation

- **If the company is not rescued as a going concern but instead enters administration within 12 of the end of the moratorium, the priority of debts might be different to the priority of debts which existed prior to the Moratorium.**

Commented [WPAB]: 6/9 a reasonable answer but more detail is needed eg different classes of preferential debtors, prescribed part under s 176A in relation to floating charges

- Section 174A provides that certain unpaid pre-Moratorium debts (the debts which are not part of the payment holiday) such as those owed to employees or “financial services” debts, are paid in the subsequent liquidation, in priority to even the liquidator’s fees and expenses.
- Section 174A affords certain unsecured debts a form of “super priority” in a subsequent liquidation. For example, if a director has not been paid for months prior to the moratorium, if it leads to an unsuccessful rescue attempt and the company enters liquidation, the pre-moratorium unsecured debt of the director will acquire “super priority” in the liquidation.
- Unsecured (or secured) pre-moratorium bank debt, falling within the definition of financial services, will also acquire “super priority” although there is an exception which prevents such liabilities acquiring such priority where it is an accelerated debt.

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;

- *Section 239 of the Insolvency Act concerns preferences which may be avoided by the Court on the application of a liquidator or an administrator. The underlying purpose of the section is to prevent a company, shortly before entering a formal insolvency procedure, from placing one of its creditors in a better position than others.*
- *The relevant time within which a preference needs to have been given to come within section 239 differs depending upon whether or not the preference is given to a connected person (i.e. a director or their associate). In this instance, the Bank is not a connected person.*
- *For unconnected persons, the relevant time period within which a claim can be made is six months prior to the onset of insolvency. In this case, the debenture was granted in February 2022 and the insolvency process commenced on 23 December 2022. On this basis, it is not possible to avoid the payment under section 239.*
- *Meanwhile, section 245 of the Insolvency Act applies to floating charges only. It applies where a company is in administration or liquidation and the provision is aimed at preventing pre-existing unsecured creditors obtaining the security of a floating charge shortly before a company enters a formal insolvency procedure.*
- *Note that it does not prevent lenders who are providing fresh funding to the company from taking a floating charge for that new funding. It will render invalid any floating charges given by the company at a relevant time, except to the extent that the new consideration is provided for the charge.*
- *In this case, it is unknown whether the debenture was sort over the funds already lent to the company - or if it was in relation to further funding. It seems likely, however, that the debenture was given in relation to the funding already provided by the bank and therefore is voidable under section 245.*

Commented [WPA10]: 3/5 a reasonable attempt but more detail needed on s 245 which is the only realistic action open to the liquidator on the facts.

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

Section 238

- *Under section 238, a liquidator may attack a transaction entered prior to the company entering liquidation or administration where the transaction was at an undervalue.*
- *In this case, the machines were sold to the director months ahead of the insolvency procedure commencing - and so the section is prima facie applicable.*
- *It is necessary to establish that the Company:*
 - *made a gift to another person; or*

Commented [WPA11]: 4/6 the explanation of s 238 is reasonable but does not consider possible defences nor eht presumption regarding insolvency at the time. It is not clear how the s 239 discussion assists.

- entered into a transaction with another person on terms that provided for the company to receive *no* consideration; or
- 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.
- In this case, subsection 3 would apply given that the machines cost \$25000 and were sold for \$10000 - being a substantially lower money's worth for the items.
- It is necessary to show that the transaction occurred within two years of the commencement of the insolvency proceedings. As above, this happened in July 2022 - which falls within two years of the liquidation commencing.
- Thus, a claim for sale at undervalue under s 238 could be made out.

Section 239

- Under section 238, preference payments may be avoided. An application can only be made if the company has gone into liquidation or administration - which is the case here.
- To succeed in the application, it must be shown that:
 - The person who has been preferred, at the time of the transaction, was a creditor (or a surety or guarantor for any of the company's debts or liabilities);
 - Something was done by the company which had the effect of putting that person in a better position than he would have been otherwise;
 - The company was influenced by a desire to prefer;
 - The preference was given at a relevant time.
- On the facts, it does not appear that Rita was a creditor, surety or guarantor. On that basis, a claim under this section would fail.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

- In contrast to question 4.2, this situation does involve a creditor - Hard and Fast.
 - Hard and Fast was a creditor at the time;
 - Something was done by the company which had the effect of putting Hard and Fast in a better position than he would have been otherwise - that is, by making payments to them on a cash delivery basis;
 - The preference was given at a relevant time - being within 6 months of insolvency.
 - The Company was influenced by a desire to prefer Hard and Fast - however, there is the fact that the marble was critical to the company being able to continue to operate. This element is the most difficult to establish. As stated by Millett J in *Re MC Bacon Ltd*, "a man is taken to intend the necessary consequences of his actions [but a] man can choose the lesser of two evils without desiring either". On this basis, it would be difficult to assert that the desire was to simply prefer Hard and Fast

Commented [WPA12]: 0/4 unfortunately the issue is not identified. It cannot be s 239 as the payments occurred after the commencement of liquidation not before. The only action is that under s 127.

over other creditors - but rather, that in the circumstances, it was a necessary step in order for the company to continue to trade.

- *On this basis, I do not think a claim would be successful.*

*** End of Assessment ***