



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]: 37/50 = 74% some strong answers

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

Commented [WPA3]: 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.**

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?

- i. Where the company is being wound up, the official receiver, the liquidator, the administrator and (with leave of the court), any victim of the transaction may bring an

action to attack transactions under s 423 of the Insolvency Act 1986. Where a victim is bound by a CVA, the supervisor of the CVA or any victim of the transaction may apply to attack the transaction. In any other case, a victim of the transaction may bring an action.

- ii. The Secretary of State.
- iii. The administrator.

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.

1. The monitor's remuneration or expenses;
2. Goods or services supplied during the Moratorium;
3. Rent in respect of a period during the Moratorium;
4. Wages or salary arising under a contract of employment; and
5. Redundancy payments.

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

Commented [WPA7]: 9/15

Question 3.1 [maximum 6 marks]

Commented [WPA8]: 4/6 a good answer but more detail is needed on ss 233, 233A and 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?

Essential supplies or services may be necessary for administrator to continue operating a company. There are a number of statutory exceptions which deem automatic termination (or ipso facto) clauses void which helps achieve this outcome.

For example, section 233 of the Insolvency Act 1986 prevents suppliers from requiring payment of outstanding debts to secure a new or continued supply of gas, electricity, water and communication services. Similarly, section 233B of the Act prevents termination of contracts by utility, communications and IT suppliers and all other suppliers (subject to a number of exceptions).

However, under s 233B of the Act, a supplier may apply to the Court to terminate a contract. The Court must be satisfied that continuation of the contract would cause hardship to the supplier before granting permission to terminate it. Accordingly, a contract may be terminated against an administrator's wishes in these circumstances.

Question 3.2 [maximum 9 marks]

Commented [WPA9]: 5/9 a clear answer but lacking detail on eg expenses, preferential creditors, s 176A and s 174A

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 expenses of the winding up have first priority in a liquidation. The nature of the rights enjoyed by each expense are

Preferential creditors are next in line of priority. Preferential creditors are often comprised of limited claims of employees and certain taxation liabilities. Within the class of preferential creditors, ordinary preferential debts will be paid before secondary preferential debts. Schedule 6 of the Act lists preferential debts and identifies those which are secondary preferential debt. Preferential debts are paid out of the company's assets pari passu within their respective classes if there are inadequate assets to satisfy all amounts owing to preferential creditors.

Floating charge holders are paid after preferential debt holders. Unlike preferential debts, floating charge holders are paid in order of temporal priority with those that were created first being paid first. However, section 156A of the Act requires that the liquidator retain a prescribed part of the company's assets for unsecured creditors before any payment is made to floating charge holders. The prescribed part of the company's assets will vary depending on the company's net property (being the amount of property which would otherwise be available for the satisfaction of debts of floating charge holders (ie, after liquidation expenses and preferential debts have been paid). Floating charge holders or any secured creditor with an outstanding unsecured balance owing are not entitled to a distribution of the prescribed part.

Unsecured creditors are the last to be paid in a liquidation. The unsecured nature of the debts is reflective of the rights afforded to these creditors who are often left unpaid in liquidations.

If all outstanding expenses and debts are paid, any remaining assets of the company will be distributed to shareholders in accordance with the constitution (often in proportion to their respective shareholding).

The priority of payments detailed above will change if the company had been subject to a Moratorium under Part A1 of the Act during the 12 week period prior to the commencement of liquidation if the company is not rescued and enters into liquidation. Specifically, certain unpaid pre-Moratorium or Moratorium debts as set out in section 174A of the Act are paid first, in place of the expenses of the liquidation (or, super priority). However, there are exceptions which prevent accelerated debt from obtaining super priority.

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

Commented [WPA10]: 9/15

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 floating charge in favour of Fretus Bank plc was issued in February 2022, approximately eight months before the winding up order was issued on 14 October 2022.

The relevant time for the avoidance of preferential transactions under s 239 of the Act is six months prior to the onset of insolvency if made in favour of a person not connected to the company. Given Fretus bank is not a person connected to the company, s 239 is may not be invoked as the transaction was issued outside the six month period.

However, s 245 of the Act permits the avoidance of floating charges issued in favour of persons not connected to the company within 12 months prior to the onset of insolvency, if, at the time of creation of the charge, the company was unable to pay its debts or became unable to do so as a result of the transaction. Given the debenture issued to Fretus Bank plc contained a floating charge over the whole of the Company's undertaking and was issued within 12 months of the winding up order being made, s 245 may have some application.

As noted, it is necessary to determine whether the floating charge was issued at a time the company was unable to pay its debts (as defined in s 123 of the Act) or that the company became unable to do so as a result of the transaction. The debenture was created under pressure and in order to prevent the bank from demanding repayment of its loans. Section 123(e) of the Act deals with cash flow insolvency and is interpreted

by the court to include debts which will become due in the reasonably near future. In the circumstances of this case, it is likely that the company was unable to pay its debts at the time that the debenture was created, such that the criteria of s 245 of the Act are met.

It is necessary to consider whether the new consideration exceptions apply which would render the floating charge valid. As the floating charge did not involve the provision of money paid or goods or services supplied as consideration by the bank as at the time of or after the creation of the charge, the first exception will not apply. Similarly, the value of the consideration provided by the bank did not consist of the discharge or reduction of debt at the same time or after the creation of the charge. Accordingly, neither of the new consideration exceptions apply.

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

Section 238

The sale of the marble cutting machines may be attacked under s 238 of the Act as an undervalue transaction. In the circumstances, the liquidator may be able to show that the company entered into a transaction (sale of the cutting machines) with another person (Rita Perkins) which was at the date of the transaction, significantly less the value of the consideration provided. Given the machines were bought for GBP 25,000 and sold to Rita Perkins a year later, the value of the machines seems to be significantly greater than the consideration paid to the company.

It is necessary to show that, as at the date of the transaction, the Company was unable to pay its debts as they fell due, or became unable to do so as a result of the transaction. As the sale was to a Rita Perkins, who is a connected person, it is presumed that the company was insolvent.

It is also a requirement that the transaction took place at a relevant time, which is two years prior to the commencement of the liquidation. This temporal requirement is satisfied given the sale occurred approximately three months before the winding up order was made.

Section 239

The transaction may also be preferential such that it can be avoided under s 239 of the Act. There are a number of requirements that must be satisfied in order to make a successful application under s 239. As Rita Perkins is a director of the company, and as such, is a connected person, Rita will have the evidential burden of proof when the requirements are considered by the court.

In order to satisfy the first requirement of s 239, it is necessary to show that the preferred person was a creditor, surety, or guarantor for any of the company's debts or liabilities at the time of the transaction. Further information is required to determine whether Rita Perkins is a creditor, surety or guarantor of the Company.

It is also necessary to show that the transaction had the effect of putting the person in a better position than they would have otherwise been in, had the transaction not occurred. Given the transaction has the effect of placing assets outside of the company's control, and into Rita Perkins' possession, and that the cutting machines

Commented [WPA12]: 4/6 the s 238 is good although more detail around defences and possible orders of the court might have been included. The s 239 is misconceived as the requisites for the section are not even arguably satisfied eg that RP should be a creditor, guarantor or surety is not satisfied.

were sold at what is ostensibly undervalued, it is likely the court will determine that Rita Perkins has been preferred.

The third requirement of s 239 is that the company was influenced by a desire to produce the effect referred to above in relation to Rita Perkins. Desire to prefer is a subjective concept. Further, as Rita Perkins is a connected person, there is a presumption that desire to prefer exists, unless proven to the contrary.

The final requirement is that the preference was given at a relevant time. As the sale of the marble cutting machines was made to a director of the company, being a connected person, the relevant time for the avoidance of preferential transactions under s 239 of the Act is two years in order to be actionable. Given the sale occurred approximately three months before the winding up order was made, the transaction is within the actionable period imposed by s 239.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

The payments to Hard and Fast Ltd might also be considered as preferential under s 239 of the Act. With respect to the four requirements detailed above:

1. Hard and Fast Ltd was a creditor at the time of the transaction.
2. The payments likely put Hard and Fast Ltd in a better place than it would have otherwise been in;
3. The company may have been influenced by a desire to prefer Hard and Fast Ltd. However, proving desire, a subjective concept, may be difficult in circumstances where the Company deemed Hard and Fast Ltd's supply of marble as essential. Parallels may be drawn with the case of *Re MC Bacon Ltd* [1990] BCC 78 where the court determined that dependence on bank support to continue trading was held to be motivated by a desire to avoid the calling in of the overdraft and continuation of trading by the company.
4. The preference was given at a relevant time, being within six months prior to the onset of insolvency.

*** End of Assessment ***

Commented [WPA13]: 0/4 the question required explanation and application of s 127. Section 239 cannot apply as the payments occurred after the commencement of the winding up not before.