



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]: 41/50 = 82% a very good effort

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]: 8/10

Question 2.1 [maximum 5 marks]

Commented [WPA4]: 3/5 an action under s 6 CDDA can only be brought by the Sec of State or the OR at the direction of the Sec of State. Only an administrator can bring an action under s 246ZB.

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

An action under section 423 of the Insolvency Act of 1986 may be brought by (a) the insolvency professional of a related winding up or administration, such as the official receiver, administrator, or liquidator, (b) the victim of the transaction designed to defraud creditors, such as a creditor themselves, if such victim obtains leave of court, (c) similarly, where a company voluntary arrangement is in place, either the victim or supervisor of the CVA may bring such an action, and (d) in any case, regardless of whether the company is in a winding up procedure, administration, or is subject to a CVA, the victim of the transaction may bring such an action.

An application to disqualify a director under Section 6 of the Company Directors Disqualification Act may be brought by the Secretary of State, an official insolvency professional, or by a member of the creditors committee. Hogan Lovells, "No company? No problem: disqualification of unfit directors possible despite company dissolution" <https://www.jdsupra.com/legalnews/no-company-no-problem-disqualification-1479783/> (Accessed 25, February 2023). Whether the application is undertaken by the Court or by the Secretary of State, the disqualifying effect is the same. The Insolvency Service, "Company Directors Disqualification Act 1986 and failed companies" <https://www.gov.uk/government/publications/company-directors-disqualification-act-1986-and-failed-companies/company-directors-disqualification-act-1986-and-failed-companies> (Accessed 25, February 2023).

An action under section 246ZB of the Insolvency Act 1986 may be brought by a liquidator or administrator to allow such insolvency professionals to pursue directors of insolvent companies for wrongful trading.

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.

1. Remuneration and expenses of the monitor
2. Goods or services purchased or supplied during the moratorium (but not before)
3. Rent payments due for the period during the moratorium (but not before)
4. Employees' wages and salary
5. Debts or liabilities incurred by reason of a contract for financial services

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

Commented [WPA6]: 13/15

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?

Yes, in most instances an administrator may compel a supplier of goods or services to continue supplying under Section 223, 233A, and/or 233B.

Under section 233, which applies to utility suppliers like gas and water services, such suppliers are prevented from requiring payment for pre-administration debts in order to continue utility service. An administrator can compel such suppliers to continue performing, but the suppliers can also stipulate to the administrator's personal guaranty of post-petition payments. Section 233A prevents a supplier from terminating the contract on account of an insolvency-related contract provision or from altering the terms of the contract, such as demanding additional payment.

Section 233B has gone further and prevents a supplier of any goods or services from doing anything on account of the insolvency once the company enters into an insolvency procedure. Unlike suppliers of utility services, suppliers under 233B cannot require a personal guaranty of the administrator. Certain types of suppliers are exempt from these restrictions, such as insurers and banks.

Because of the strength of sections 233, 233A, and 233B, an administrator has great power to generally require continued performance of suppliers under executory contracts.

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?

Under Section 115 of the Act, certain expenses associated with administering the liquidation are paid first and in higher priority than even preferential creditors or floating charge holders. Such expenses include those which the liquidator incurs in preserving the company's assets, the remuneration of the liquidator or person employed by the liquidator to perform services for the company - including the professional who assists in preparing the statement of affairs, the costs of security provided by the liquidator, and taxes incurred in realizing the company's assets.

Next, preferential creditors would receive payment. Preferential creditors are defined in Section 386 and 387. Preferential creditors are categorized as either ordinary or secondary and are paid in that order. Ordinary preferential debts include amounts owed under pension or similar employee contribution schemes (subject to timing restrictions), certain amounts due as remuneration to employees - including holiday remuneration, amounts advanced by lenders to pay such employee wages or holiday remuneration, levies associated with coal and steel production, and claims under the Reserve Forces Act. Some secondary preferential debts include certain payments for eligible deposits and certain debts owed to the taxation authority.

Commented [WPA8]: 7/9 a strong answer which would have been even better if fixed charge holders had been included and if the requirements of s 176A had been explained.

Next, floating charge holders are paid, subject to the withholding due to the "prescribed part" which is reserved and made available to unsecured creditors, the amount of which depends on the value of the estate. Unsecured creditors are paid next, but often receive very little. Finally, shareholders are entitled to the remainder.

If the company had been subject to a Moratorium during the 12 week period prior to the commencement of the liquidation, certain creditors would receive a "super priority" for the payment of their debt pursuant to Section 174A. This section allows certain pre-moratorium or moratorium debts to jump the line and be paid before even the liquidator's fees and expenses, ensuring creditors who were prevented from acting or required to continue servicing the company during the moratorium are not made worse off.

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

Commented [WPA9]: 10/15

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 [WPA10]: 5/5

The floating charge in favour of Fretus Bank plc;

Fretus Bank plc was presumably an unsecured creditor on account of unsecured loans extended to the Company prior to the February 2022 transaction in which Fretus took a floating charge over the entire undertaking of the Company. Pursuant to Section 245, it is highly likely that the floating charge can be avoided and Fretus will once again be reduced to an unsecured creditor

Pursuant to Section 245, a floating charge created in favor of someone unconnected to the company within 12 months prior to the onset of insolvency may be subject to avoidance. This is true when the company was either unable to pay its debts or became unable to do so as a consequence of the transaction. Because the Company was under pressure from Fretus to repay its loans, we can assume that the Company was unable to pay its debts at the time and therefore Fretus' floating charge is likely avoidable.

It is unlikely that Fretus' floating charge falls within the two exceptions to Section 245. Based on the above, Fretus did not extend new funds at the time it took the floating charge, nor did it reduce the outstanding balance on account of the additional security of the charge. Because of this, it is highly likely that the floating charge will be rendered invalid. While the underlying debt remains valid, Fretus will be reduced to an unsecured creditor.

Question 4.2 [maximum 6 marks]

Commented [WPA11]: 5/6 a good answer but a little more analysis and application of the meaning of undervalue was needed.

The sale of the marble cutting machines; and

It is likely that a Court would consider the sale of the marble cutting machines to director Rita Perkins for less than half of what the company paid for them just one year ago to be an undervalue transaction. As a result, the Court may enter an order restoring the Company's position to what it would have been without the transaction.

Under Section 238, gifts, transactions without consideration, and transactions with undervalue consideration may be attacked. The look-back period is two years prior to the commencement of the liquidation. It must be shown that the company was unable to pay its debts at the time of the transaction or became unable to do so as a result of the transaction. However, if the transaction involves a connected person, the company is presumed insolvent. Here, the transaction involving the marble cutting machines was a mere couple of months before the liquidation order, and thus falls within the relevant time period. Additionally, the sale of the one-year-old marble machines for less than 50% of their purchase price was likely an undervalue transaction. Finally, because Rita is a connected person, the company is presumed to be insolvent when the transaction was made. For these reasons, it is highly likely that the transaction will be attacked and unwound.

The only saving grace for Rita would be if she can satisfy the Court that the transaction was in good faith and that there were reasonable grounds for the believing the

transaction would benefit the company. Because Rita took necessary equipment for an undervalue price, a Court is unlikely to find in her favor.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

The payments to Hard and Fast Ltd could likely be attacked as a preferential transaction under Sections 238 and 239.

The first step in showing a preferential transaction is to show that the person who has been preferred was a creditor of the company at the time of the transaction. Hard and Fast was a creditor at the time of the GBP 8,000 payment to cover existing liabilities. However, the payments made pursuant to the cash on delivery requirement are unlikely to be attacked because Hard and Fast would not have been a creditor at that time, but rather was making a contemporaneous exchange.

Next, it must be shown that the creditor was put in a better position with respect to the subsequent insolvency because of the transaction. Hard and Fast effectively reduced the unsecured debt owed to it by GBP 8,000, receiving a 100% dividend. Had the transaction not occurred, Hard and Fast would likely have received a lesser dividend on those funds as an unsecured creditor. Therefore, Hard and Fast was preferred.

Next, the transaction must occur during the relevant time. Here, because Hard and Fast is an unconnected person, the relevant time is 6 months prior to the onset of insolvency. Because this transaction occurred only one month after the creditors winding up petition and one month before the compulsory liquidation order, the transaction occurred within the relevant time.

Finally, it must be proven that the company was influenced by desire to prefer Hard and Fast in entering into the transaction. Because Hard and Fast is an unconnected person, there is no presumption of desire to prefer them. In fact, an attack on the transaction may fail because it isn't clear the company had a desire to prefer Hard and Fast, but rather was influenced by a desire to continue operation and continue contracting with Hard and Fast as a supplier.

*** End of Assessment ***

Commented [WPA12]: 0/4 unfortunately, s 239 cannot apply here as the payments occurred after the commencement of the liquidation. The only cause of action on the facts is s 127.