



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]: 33/50 = 66%

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

Commented [WPA2]: 7/10

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.*

Commented [WPA3]: C is correct

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

Commented [WPA4]: B is correct

(c) 10

(d) 12

Commented [WPA5]: 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 [WPA6]: 7/10

Question 2.1 [maximum 5 marks]

Commented [WPA7]: 3/5 - the Secretary of State (or the OR at their instruction) have the power to bring an action under s 6 CDDA; 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?

(i) **Section 423**

- a. *Where the Company is being wound up or is in administration the official receiver, the liquidator, the administrator and (with the leave of the court) any victim of the transactions such as a creditors*
- b. *Where a victim is bound by a CVA, the supervisor or the CVA or any victim of the the transaction (where bound by the CVA or not)*
- c. *In any other case by a victim of the transaction*

(ii) **Section 6 of the Company Directors Disqualification Act 1986**

- a. *The Court*

(iii) **Section 246ZB of the Insolvency Act 1986**

Question 2.2 [maximum 5 marks]

Commented [WPA8]: 4/5 - two of these answers are effectively the same

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. *Rent in respect of a period during the moratorium*
2. *Goods or services supplied during the moratorium*
3. *Rent in respect of a period*
4. *Wages or salary arising under a contract of employment*
5. *Debts or other liabilities arising under a contract or other instrument involving financial services*

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

Commented [WPA9]: 10/15

Question 3.1 [maximum 6 marks]

Commented [WPA10]: 3/6 a reasonable answer but more detail is needed on how ss 233 and 33A operate. In addition, the answer needed to consider 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?

Firstly, the appointment of an administrator does not automatically terminate the company's executory contracts. Under Section 233 of the Insolvency Act 1986 ("IA 1986"), should the administrator wish to continue to operate the business of the company then there will be a number of essential supplies which the administrator will need obtain or retain, such as gas, water, electricity and communication of services. Communication services generally includes, but is not limited to, computer hardware and software, data storage, advice and technical assistance, web hosting etc

It would be important to mention that the IA 1986 does provide some protection for these suppliers. Whilst suppliers are not required to have existing debts settled to continue providing services during the administration, the supplier as per 233(A) (5) that the supplier can write to the administrator saying that the service will be terminated unless the administrator personally guarantees the payment of any charges

in respect of continuation of the supply after 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 assets of the Company can only be used to distribute to the creditors of the Company and the remuneration and /or expenses of the joint liquidators. Where assets are subject to a hire charge, retention of title clauses or assigned to a receivables financier then the liquidator will have no right to these assets.

The order of priority of payments in a liquidation is as follows. The list below will go from highest priority to lowest priority, in that order. Following any fixed charge payments, the first payment from the estate will be the expenses of the liquidation, including the liquidator's remuneration. Under 115 of the Act a number of expenses are given priority. These are expenses incurred by the liquidator in preserving, realizing of obtaining assets; cost of security provided by the liquidator; necessary disbursements by the liquidator in the course of winding up; remuneration of the liquidator; remuneration of anyone employed by the liquidator; corporation tax accruing on chargeable gains. Interestingly the liquidator's remuneration lies behind a number of expenses in the liquidation,

Once the expenses of the liquidators have been fully paid out, then the assets are then used to pay preferential creditors. Preferential creditors payments are made to certain employee claims and some taxation liabilities. There are two types of preferential payments, ordinary and secondary. Ordinary payments are paid out before secondary payments. Preferential debts in each class rank equally amongst themselves.

The next creditor to be paid out, after the preferential creditors is the floating charge holders. If there are more than one floating charge holder then priority is usually given to the charge created first. Before a payment is to a floating charge holder, the liquidator must consider whether the charge was created on or after 15 September 2003. If so then section 176A of the Act will apply. The liquidator will create a prescribed part for the remaining unsecured creditors using the net property available to the floating charge holder. This prescribed part must not be used to satisfy floating charge holders. Additionally, a floating charge holder who may have an outstanding unsecured debt owing to them is not permitted to participate in the distribution of the prescribed part

Commented [WPA11]: 7/9 a good answer which would have been even better with more detail in places eg details of preferential creditors / s 176A prescribed part.

The last remaining stakeholders to be paid will be unsecured creditors and finally shareholders. However frequently, once all payments have been made to the expenses, secured and preferential creditors then there is likely to be little left to pay by a way of a dividend unsecured creditors. It is very rare in an insolvent liquidation that there will be a surplus to pay the shareholders.

Should the Company have 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, then the priority of payments might be different to the period prior to the Moratorium. Section 174A identifies that a number of debts which existed pre the moratorium such as some employees costs that were before the moratorium, rent due before the moratorium, the monitor remuneration and expenses and goods supplied before the moratorium are paid out in priority to even the liquidators remuneration and expenses, during a subsequent liquidation.

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

Commented [WPA12]: 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]

The floating charge in favour of Fretus Bank plc;

The Company went into liquidation on 23rd December 2022 and granted a debenture containing a floating charge over the whole company's undertaking in favour of Fretus Bank Plc in February 2022. Firstly, we must assess what is the relevant period. Under section 245 of the Act the relevant time within the period for an entity who is connected is two years. For an unconnected entity the relevant time is 12 months. This is applicable if the company was unable to pay its debts under section 123 of the act. We understand from the passage that the Company was under pressure from Fretus, potentially going to issue a demand for payment. However, to understand whether it was unable to pay its debts as per section 123, then the liquidator would need to investigate this further. The debenture was granted to Fretus in February 2022, which is within the 12 months up to the Company going into liquidation on 23 December 2022.

Section 245 also only applied to floating charges and not any other types of security. However, Section 245 does not apply to lenders who are providing fresh funding to the company from taking a floating charge. Here we can see that the lender Fretus Bank has not provided fresh funding and its obtaining the security of the floating charge over pre-existing loans.

Given that there has not been an injection of new funds to warrant the floating charge, the liquidator can take action under 245 of the Act

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

The sale of the marble cutting machines to a director for GBP 10,000 in cash, when they were bought for GBP 25,000 a year before.

As per section 238, a liquidator can attack a transaction which was entered into by the Company prior to the commencement of the insolvency proceeding which was at an undervalue. In order for the liquidator to take action then the transaction must have taken place at a relevant time which is two years prior to the commencement of insolvency proceeding. Under 238 the liquidator must be able to show a) that the company made a gift; b) entered into a transaction with another person on terms that provided for the Company to receive no consideration; c) entered into a transaction with another person's, for consideration which, in money or moneys worth was at the date of the transaction significantly less than the consideration provided by the Company.

Where this applies is the third option, where the consideration received is far less than what the Company paid for, even though the Company had bought them a year earlier.

Commented [WPA13]: 4/5 a good answer which might have applied all the s 245 requisites in a little more detail to the facts.

Commented [WPA14]: 5/6 again a good answer which could have considered one or two points in more detail eg the valuation point

The liquidator also needs to consider section 123 of the Act. The Company was having cash flow problems so would not be able to pay its debts as they fell due. Given the company made the transaction to a connected person, the Company is deemed to be insolvent as a result of the transaction unless there was evidence to suggest otherwise.

The liquidator would be able to take action and make an application to court under section 238 given the information we know about the transaction. Protection can only be awarded should the acquisition be in good faith and value. The liquidator would need to understand the value of the marble cutting machines and whether this was an appropriate value at the time.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

Section 239 of the insolvency act relates to preference and provides advice as to where the Company has given preference to any persons then the officeholder may apply to court for an order under this section.

The Company can give preference to a person if

- a) ***That the person is one of the company creditors or a surety or guarantor for any of the company's debts or other liabilities;***
- b) ***The company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done***

In the case of Hard and Fast Ltd. and based on the provisions highlighted above, the Company has made a payment to a creditor and has made a payment to settle all liabilities in full, prior to the winding up order being made, which might not have been the case should the company have been in liquidation at the time, and therefore benefiting the creditor's position in this case. Section 239 prevents payments in full when the creditor would have expected a dividend as an unsecured creditor.

However, pressure to make payment by the creditor is not relevant and pressure can only be considered if there is a requisite desire to make that payment. The time frame is also important and given that Hard and Fast Ltd. is unconnected then the time frame to consider this transaction is within six months prior to the onset of insolvency, in this case the transaction was made in the last month before the winding up order was made.

However, only when the liquidator can establish whether the creditor, Hard and Fast Ltd. was put in a favourable position and that it didn't determine the continuation of trading of the company, the liquidator must establish whether the transaction was in fact a desire to prefer or whether there is a desire to continue trading. Given the supply of marble is

Commented [WPA15]: 0/4 unfortunately, s 239 cannot apply as the payments were made after the commencement of the liquidation. Section 127 is the relevant provision.

needed to continue trading then this would suggest that there is no desire to prefer but only a desire to continue trading. Given that Hard and Fast Ltd. is not a connect person then it is rare of any action to be brought under section 239.

*** End of Assessment ***