



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]: 36/50 = 72% some strong answers

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

Commented [WPA2]: 6/10

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.

Commented [WPA3]: B is correct

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.**

Commented [WPA4]: D is correct

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.**

Commented [WPA5]: D is correct

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.

Commented [WPA6]: D is correct

QUESTION 2 (direct questions) [10 marks]

Commented [WPA7]: 9/10

Question 2.1 [maximum 5 marks]

Commented [WPA8]: 4/5 under s 6 the OR may also bring an action on the instruction 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?

Section 423 of the Insolvency Act allows an official receiver, the liquidator, the administrator and with leave of the court any victim of the transaction, such as a creditor in a winding-up or administration to bring an action. In a Company Voluntary Arrangement the supervisor of the CVA can bring an action in terms of section 423 along with any victim of the transaction.

Section 6 of the Company Directors Disqualification Act allows the Secretary of State an appointee of the Insolvency Service for Business, Energy and Industrial Strategy to bring the action.

Section 246ZB of the Insolvency Act allows a liquidator or administrator to bring the action for fraudulent trading only. It must be brought for the benefit of all creditors, not just the victims of the transaction.

Question 2.2 [maximum 5 marks]

Commented [WPA9]: 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. Goods or services supplied during the moratorium
2. Rent in respect of a period during the moratorium
3. Wages or salaries arising under a contract of employment
4. Redundancy payments
5. Debts or liabilities arising under a contract or other instruments involving "financial services", which would include a contract consisting of lending, financial leasing or providing guarantees.

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

Commented [WPA10]: 12/15

Question 3.1 [maximum 6 marks]

Commented [WPA11]: 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, the administrator can continue to operate the business. The appointment of an administrator doesn't automatically terminate a company's executory contracts. Contracts of supply which provide for automatic termination on administration are subject to statutory exceptions which make the *ipso facto* clauses void. Administrators will often need the continued supply of goods and services in order to operate. Section 233 of the Insolvency Act applies to the supply of gas, electricity, water and communication services. Communication services include point of sale terminals, data storage and web hosting. Suppliers are not permitted to require payment of outstanding debts in order to secure new or continued supply of services. Section 233 does allow the supplier to stipulate that the administrator personally guarantee payment of the accounts which are supplied. Section 233A prevents a

supplier from generally relying on “insolvency related terms” in a contract which would entitle them to terminate the supply, alter the terms of supply or require higher payments for services. Section 233B goes further by prohibiting clauses which allow suppliers of goods and services to terminate or “do any other thing” in relation to the contract if the company enters a formal insolvency procedure. These sections also apply to companies under administration. Section 233B also prevents a supplier from insisting on a personal guarantee from the administrator, unlike section 233A. Under section 233B the supplier may terminate the contract under consent from the administrator or on application to court. In order for the court to grant the application it must be satisfied that the continued contract would cause hardship to the supplier. There are certain suppliers of services which are excluded from the section such as insurers, banks. Electronic money institutions, recognized investment exchanges, clearing houses, securitization companies and overseas companies with similar functions.

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 first payments to be made are expenses incurred during the course of winding-up in terms of section 115 of the Insolvency Act. Certain expenses are given priority over preferent creditors, holders of floating charges and company unsecured creditors. These expenses are paid in the following order of priority:

1. Expenses properly incurred by the liquidator in preserving, realizing or obtaining any of the assets of the company
2. The cost of any security provided by the liquidator
3. Any amount payable to a person for their assistance in preparation of the statement of affairs or accounts
4. Disbursements incurred by the liquidator during the winding-up process
5. Remuneration by any person who was employed by the liquidator to perform any service to the company
6. Remuneration of the liquidator
7. Amounts of corporation tax and/ or gains tax accruing from the sale of a company asset
8. Any other expenses properly charged by the liquidator while carrying out his duties in the winding-up

Preferential debts are paid next in terms of section 386, 387 and schedule 6: section 175. Preferential creditors are divided into two categories, ordinary and secondary. The ordinary preferential creditors are paid first followed by the secondary preferential creditors. In each group the preferential creditors are paid in equal portions. Schedule 6 lists the following ordinary preferential creditors:

Commented [WPA12]: 6/9 the answer does not explain the position of fixed charge holders nor floating charge holders and the prescribed part deduction under s 176A.

- a) *Any amount owed in respect of an occupational pensions scheme being contributions deducted from earnings of the company's employees paid in for the period of four months prior to liquidation*
- b) *Any amount owed by the company for any employers contribution to an occupational pension scheme in the period of 12 months before the relevant date*
- c) *Remuneration owed by the company to a person who is or has been an employee of the debtor and is payable in respect of the whole or any part of the period of four months prior to the commencement of the winding-up, up to a maximum amount of £ 800*
- d) *Any amounts owed by the company by way of accrued holiday remuneration in respect of any period of employment before the winding-up*
- e) *Claims for monies advanced to pay wages or holiday remuneration will rank as preferential.*
- f) *Levies on the production of coal and steel referred to in article 49 and 50 of the European Coal and Steel Community Treaty*
- g) *Claims which are ordered to be paid by the company in terms of the Reserve Forces Act of 1985*
- h) *Any amount owed by the company in respect of an eligible deposit as does not exceed the compensation that would be payable in respect of the deposit under the Financial Services Compensation Scheme to the person to whom the amount is owed*
- i) *Any amount owed by the company to one or more persons in respect of an eligible deposit as exceed compensation that would be payable in respect of an eligible deposit under a Financial Services Compensation Scheme to that person.*
- j) *An amount owed by the company to one or more eligible persons in respect of a deposit that:*
 - *Was made through a non-UK branch of a credit institution*
 - *Would have been an eligible deposit if it had been made through a UK branch of the credit institution.*
- k) *PAYE income tax deductions, national insurance deductions, VAT payments, Construction Industry Scheme deductions and student loan repayments*

If the company had been under a moratorium prior to liquidation the following would occur to priority. Section 174A provides that if the company is placed in liquidation within 12 weeks of the end of the moratorium, the priority of debts in the subsequent liquidation may be different. Certain pre-moratorium debts and moratorium debts which were not part of the payment holiday are paid in the subsequent liquidation in priority to the liquidator's fees and expenses. These debts are given a "super priority". These debts would include secured and unsecured debts. The only exception to the rule is where the debt is accelerated debt.

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

Commented [WPA13]: 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;

Section 245 of the Insolvency Act applies to existing floating charges when a company is placed in liquidation. The purpose of the section is to prevent pre-existing unsecured creditors from obtaining security in the form of a floating charge shortly before the company goes into liquidation. It doesn't apply to new lenders who take a floating charge but existing lenders who had existing loans which weren't secured with a floating charge. The section renders the floating charge invalid if given to the company at a relevant time, except to the extent, that "new" consideration is provided for the charge. Where the person in whose favour the floating charge is connected to the company the relevant time is two years prior to the onset of insolvency. Where the person is unconnected the period is twelve months prior to insolvency. The liquidator must prove that at the time the transaction was entered into, either the company was unable to pay its debts as they fell due within the meaning of section 123 or became unable to pay its debts within the meaning of

Commented [WPA14]: 4/5 good on the law but the application to the facts fails to recognise that the charge is securing existing indebtedness

that section as a result of the transaction. Consideration as set out in section 245 would include monies paid or services supplied; the discharge or reduction of any debt of the company and any interest that is payable on the loan.

Applying the facts I believe that the floating charge would still be secured. The floating charge was created in February 2022, which is within the twelve month period required in terms of section 245. At the time of the creation of the floating charge, being February 2022, there was indication that Marbley Ltd was having trouble paying its debts as they fell due within the meaning of section 123 because Fretus Bank required some security on their loans. Thus the second requirement is met. The reason I don't believe the floating charge will be invalidated is because of the final requirement which was not met; that of consideration. There is no indication that once the floating charge was created Marbley Ltd failed to pay the debt to Fretus Bank. So if Marbley Ltd continued to meet the debt obligations with Fretus Bank directly after the creation of the floating charge, the floating charge would not be invalidated.

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

Section 238 of the Insolvency Act allows a liquidator to attach certain transactions which were entered into prior to liquidation, where the transaction was for undervalue. The reasoning for this section is to treat all unsecured creditors equally. In order for the transaction to be set aside the liquidator must show that:

- There was a gift to another person
- The company entered into a transaction with another person on terms that provided for the company to receive no consideration
- The company entered into a transaction with another person for consideration, which in money or money's worth, was at the date of the transaction, significantly less than the value, in money or money's worth, of the consideration provided by that company

In order for the transaction to be attached, the transaction must have taken place at the "relevant time" which is two years prior to liquidation. The idea of "transaction" is defined widely to include any gifts or agreements. Where consideration was received for the sale of assets the liquidator must prove that at the time the transaction was entered into, either the company was unable to pay its debts as they fell due within the meaning of section 123 or became unable to pay its debts within the meaning of that section as a result of the transaction. In the case where transactions took place between connected persons, the company is presumed to have been insolvent or to have become insolvent as a result of the transaction, unless a contrary is proved. The respondent must satisfy the court that the transaction was entered into in good faith. As the sale of the machines took place in July 2022 for a value of less than half that had been paid just a year prior, I believe that a case could be made to attack the transaction. Marbley Q Ltd approved a transaction within the

Commented [WPA15]: 5/6 a good answer. Perhaps some consideration of the possible defence and also possible court orders could have been considered.

two year period prior to liquidation for half the assets value. One of the prerequisites for being successful in attacking transactions is to prove that at the time of the transaction, either the company was unable to pay its debts as they fell due or it became unable to pay its debts. One could see that Marbley Q Ltd was having trouble paying its debts as far back as February 2022 because Fretus Bank was making constant demands for repayment, which shows that Marbley Q Ltd wasn't making regular payments to creditors. Furthermore the assets were sold to the director of the Marbley Q Ltd. This would be considered a connected sale so there would be a presumption that the company was insolvent or became insolvent due to the transaction.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

Section 239 of the Insolvency Act allows the avoidance of preferent payments on application by the liquidator. The defined terms share commonality with those of section 238. The purpose of the section is to prevent a company, shortly before going insolvent from preferring one creditor above another, thus placing that creditor in a better position than the other creditors. It prevents a creditor receiving a higher payment whereas they should have only received a dividend. In order for the application to succeed the liquidator must prove the following:

1. The person who was alleged to have been preferred, was at the time of the transaction a director of the company (surety or guarantor of the company's debts);
2. Something was done, or suffered to be done, by the company which had the effect of putting that person in a better position, in the event of the company going insolvent, than the position he or she would have been in if that something, had not been done;
3. The company was, in giving the preference, influenced by a desire to produce the effect referred to in point (2) above, in relation to the person preferred;
4. The preference was given at the relevant time

The burden of proof is on the liquidator however if preference was given to somebody connected to the company; there is a presumption that the company was influenced by a desire to prefer that person. Pressure for payment by the creditor is not considered a defense. The relevant time referred to in point (4) above is two years prior to liquidation for a connected preferred person or six months prior to liquidation for an unconnected preferred person. As with section 239, the liquidator must prove that where the consideration was received for the sale of assets the liquidator must prove that at the time the transaction was entered into, either the company was unable to pay its debts as they fell due within the meaning of section 123 or became unable to pay its debts within the meaning of that section as a result of the transaction. There is also a presumption that the company had the desire to prefer a creditor if that creditor was connected to the company. Based on the facts I

Commented [WPA16]: 0/4 this is a good explanation of s 239 but s 239 cannot apply here as the payments took place after the commencement of the winding up not before. The only possible action would be under s 127.

do not believe that the liquidator would be successful in proving that the payment made by the Marbley Q Ltd to Hard and Fast Ltd a month before Marbley Q Ltd.'s liquidation because not all the elements in terms of section 239 can be proved.

The first requirement would be proved i.e. that Hard and Fast Ltd was a creditor of Marbley Q Ltd

*The second requirement would also be met i.e. payment in the amount of £ 8 000 from Marbley Q Ltd to Hard and Fast Ltd. The third requirement would not be able to be proved by the liquidator. Firstly there would be no presumptions in this scenario because the preference was not made to a connected person. Secondly the liquidator would have to prove that there as a desire to prefer. In *MC Bacon Ltd* [1990] BCC 78 the court distinguished between intention (which is objective) and desire (which is subjective). The court in that case decided that granting security involves the intention to prefer but not necessarily a desire to prefer. The court also found that where the company was entirely dependent upon the banks support for continued trading, the payments were made out of intention not desire to continue trading. I believe in this case Marbley Q Ltd paid the £ 8000 out of intention to continue to receive stock which was essential for them to continue to trade. Thus they would have intent to trade not desire and the requirement would not be met. The preference was given within the six month time however point (3) would not have been proved.*

*** End of Assessment ***