



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]: 39/50 = 78% a strong performance

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.

Commented [WPA3]: B is correct

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 [WPA4]: 9/10

Question 2.1 [maximum 5 marks]

Commented [WPA5]: 4/5 - the OR can if instructed by the Sec of State also bring an action under s 6 in certain cases. 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) An action under s. 423 of the Insolvency Act 1986 may be brought by:
 - a) the official receiver;
 - b) a liquidator;
 - c) administrator;

- d) *the supervisor of a company voluntary arrangement; or*
- e) *an affected creditor.*

(ii) *An action pursuant to s. 6 of the CDDA, 1986 can be taken out by the Secretary of State*

(iii) *An action under s.246ZB of the Insolvency Act, 1986 may be brought by a liquidator.*

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.

- (i) *A debt for goods and services supplied to the company during the moratorium;*
- (ii) *A debt of rent for occupancy during the period of the moratorium;*
- (iii) *Employee earnings accruing under an employment contract;*
- (iv) *Employee redundancy dues; and*
- (v) *Remuneration lawfully earned and expenses lawfully incurred by the monitor who is supervising the moratorium as a standalone procedure.*

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

Commented [WPA7]: 13/15

Question 3.1 [maximum 6 marks]

Commented [WPA8]: 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?

The administrator would, generally speaking, be able to do so and ensure continuity of the supply of the goods and services for the period of administration. This is fortified by the operation of sections 233, 233A and 233B of the Insolvency Act, 1986 (the "Act") which, would as a general rule, preclude suppliers from unilaterally:

- (i) *imposing a pre-condition that pre-administration arrears are settled before continued supply;*
- (ii) *increasing the prices for the supply just because of the event of administration;*
or
- (iii) *terminating the supply simply on account of the company being in administration.*

The exceptions to the above safeguards for continuity of supply are those services which relate to banking, insurance, electronic money, recognized investment exchanges, clearing houses, securitization or any of the said services if provided by a foreign company.

The administrator would also have to be mindful that if the continued supply that he seeks relates to utilities (water, electricity or gas) or to communication services then the providers could elect to impose a pre-condition that the administrator personally guarantees the payment for the supply. Such would be possible under s. 233 of the Act.

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 order of priority of payments in a liquidation procedure, ranked from first to last would be:

- (i) *expenses of the liquidation process (including the liquidator's remuneration) - this is in accordance with s.115 of the Insolvency Act 1986 and Rules 6.42 and 7.108 of the Insolvency Rules 2016) and this cluster would be entitled to payment ahead of preferential creditors, floating charge holders, unsecured creditors and shareholders;*
- (ii) *preferential creditors within the meaning of s.386,387 and schedule 6 to the Insolvency Act 1986 and s. 95 of the Finance Act 2020 - they would be entitled to be paid ahead of floating charge holders, unsecured creditors and shareholders but as between themselves the ordinary preferential creditors such as employee pension claimants would be paid ahead of secondary preferential debts such as VAT, PAYE, student loan recoveries and national insurance deductions;*
- (iii) *floating charge holders - they would be entitled to payment ahead of unsecured creditors, subject to the applicability of s.176A of the Insolvency Act 1986 depending on when the charge was created. In any event the order of payment as amongst the floating charge holders would be determined by date of creation (first in first out);*
- (iv) *unsecured creditors - they would be second last in the pecking order and entitled to payment before any surplus distribution to shareholders; and*
- (v) *shareholders - if there is anything left of the assets of the company after the payments to the above clusters, they would receive the proceeds thereof typically in proportion to their respective shareholding unless otherwise stipulated by the company's constitutive documents.*

Commented [WPA9]: 7/9 a good answer which would have been even better with a little more detail in places, eg preferential debts, s.176A prescribed part deduction.

However, if the company had been the subject of a moratorium (under Part A1 of the Insolvency Act 1986) in the 12 weeks preceding the onset of liquidation then the priority would change by operation of s.174A of the Act. The change would be that certain debts (whose right of recovery was not suspended by the Part A1 moratorium) would enjoy a superior priority in the liquidation process and be payable even ahead of the expenses of liquidation. It is noteworthy that debts resulting from a contract based acceleration would not enjoy the superior priority.

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

Commented [WPA10]: 8/15

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]: 4/5 a little more specific application to the facts of s.245 would have been helpful.

The floating charge in favour of Fretus Bank plc;

Ordinarily the liquidator should have been able to challenge the debenture as an avoidable preference pursuant to s.239 of the Insolvency Act, 1986 as:

- (i) *the company has gone into liquidation;*
- (ii) *Fretus Bank Plc (the "Fretus") was an existing creditor of the company at time of creation of the debenture; and*
- (iii) *the debenture put Fretus in a better position (from unsecured to secured creditor) in the event of a liquidation.*

However, it cannot be said that that the company had a desire to prefer Fretus as the evidence shows that the company had cashflow problems and the debenture was created to forestall the calling in of the company's facilities by Fretus. Authority for this proposition is Re Mc Bacon Ltd. (1990) BCC 78.

Further, the creation of the debenture did not take place at a relevant time for purposes of s.239 as its creation date (February 2022) was more than 6 months before the deemed liquidation process date of 14th October 2022 in term of s.129 of the Act (since Fretus is not a connected person to the company).

That said, if the liquidator can prove that at date of creation of the debenture, the company was unable to pay its debts (in terms of s.123 of the Act), then the liquidator could apply to Court pursuant to s.245 of the Act to have the debenture invalidated.

Subject to the above burden of proof being discharged, the s.245 avenue would be possible because:

- (i) *the debenture constituted a floating charge;*
- (ii) *Fretus was a pre-existing creditor of the company and did not provide any new consideration for the debenture whether (such as availing further facilities or taking a haircut on the debt under the existing facilities); and*
- (iii) *the transaction took place within the relevant period being within 12 months from the deemed start date of the liquidation process under s. 129 of the Act (14th October 2022 being date of the petition).*

If the debenture is successfully invalidated, Fretus would be relegated to the position of an unsecured creditor as it would not extinguish the company's debt but only the security.

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

The liquidator could apply to the Court pursuant to s. 238 to set aside the transaction as:

- (i) *the cutters were sold at a significant undervalue of GBP10,000 when compared to the purchase price of GBP25,000 only a year ago;*

Commented [WPA12]: 4/6 a little too general. It would have been helpful to explain the s 238 requisites in more detail.

- (ii) *the transaction took place at a relevant time that is within 2 years prior to commencement of the liquidation process (deemed by s.129 of the Act to be 14th October 2022 being date of filing of the petition); and*
- (iii) *the purchaser was a person connected to the company (a director) thereby creating a rebuttable presumption that the company was insolvent (within the meaning of s.123 of the Act) or became insolvent as a result of it.*

Such would be consistent with the anti-deprivation principle to ensure recovery of the cutters by the company, which cutters would thereafter fall into the pool of the company's assets to be realized and applied towards the purpose of the liquidation.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

The liquidator could apply for an administration order pursuant to paragraph 13 of schedule B1 of the Act with a view to seeking a better result for the company's creditors as a whole than if there was an outright escalation to conclude the actual winding up. The liquidator could then rely on s.233B of the Act to prevent enforcement of the 'cash on delivery term' imposed by Hard and Fast Ltd and allow for some breathing space for the company to operate for purposes of achieving the better result for the entire body of creditors as alluded to.

* End of Assessment *

Commented [WPA13]: 0/4 - the answer misidentifies the issue which is that dispositions of company property after the commencement of the winding up (petition) are void unless validated by the court.