



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]: 38/50 = 76% some strong answers

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]: 9/10

Question 2.1 [maximum 5 marks]

Commented [WPA4]: 4/5 only an administrator can bring an action under s 246ZB - the reference to a precedent is unexplained.

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) Parties that can bring action under section 423 if the Insolvency Act 1986 are stated below:

- The Company that is being wound up or is in administration, the liquidator, the receiver, the administrator or any victim of the transaction such as a disgruntled creditor

- A Victim that is bound by a Company Voluntary Arrangement, supervisor of the CVA or any victim of the transaction (whether bound by the CVA or not) or a victim of the transaction

(ii) Under Section 6 of the Company Directors Disqualification Act the parties include:

- The Secretary of State*
- The Official Receiver*

(iii) Under Section 246ZB of the Insolvency Act 1986 parties include:

- Both liquidators and administrators can now bring wrongful trading claims under Section 246ZB of the Insolvency Act 1986 and this precedent is drafted from the perspective of a liquidator bringing such a claim.]*

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. The monitor's remuneration or expenses*
- 2. goods or services supplied during the moratorium*
- 3. rent in respect of a period during the moratorium*
- 4. wages or salary arising under a contract of employment*
- 5. redundancy payments]*

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

Commented [WPA6]: 10/15

Question 3.1 [maximum 6 marks]

Commented [WPA7]: 4/6 some relevant points made but not always clearly explained.

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?

[If an administrator is appointed in the liquidation that does not necessarily mean that the contracts the company has with its suppliers will be automatically terminated. In these cases of these clauses an administrator can require a supplier to supply those goods or services:

Sec 233B of the 2020 Act prohibits clauses within a contract of supply that allows the supplier of goods and services to terminate or do any other thing in relation to that

contract if the company enters a formal insolvency procedure. If the Act states that 'an administrator will frequently need to obtain or retain certain essential supplies'. Section 233 of the Act applies to essential services which are listed as the supply of gas, water, electricity and communication services. This section of the Act prohibits a supplier to place stipulations that forces the administrator to personally guarantee payment charges regarding the supplies.

Section 233B also complements section 233 in that it prohibits the termination of utilities, communications and IT services by suppliers. 233B opens the restriction on termination to all suppliers, with a limited number of exceptions.]

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:

- The holder of the fixed charges*
- Expenses of the procedure*
- Preferential creditors*
- Floating charges*
- Unsecured creditors*
- Shareholders*

The holder of fixed charges will be paid usually outside of any normal insolvency.

The expenses of the procedure which includes remuneration of the administrator or liquidator and any additional expenses incurred regarding the insolvency process.

The preferential creditors are paid following this. They are the class of creditors that are limited to reasonably modest claims (eg. Owed employees' wages, tax debts owed to government). Among the preferential creditors, there are two classes: Ordinary and Secondary. It is important to note that ordinary preferential debts are paid before secondary preferential debts.

Unsecured Creditors are without the benefit of any security or title to assets. Typically unsecured creditors would be ordinary trade suppliers.

If the company is found to be solvent after payment of all of the above-mentioned liabilities then the surplus is paid out to the shareholders. This is obviously quite rare in practice as most liquidations will commence based on the company being insolvent. The Articles of Association typically outlay how the payments to shareholders are structured should this be the case.

Commented [WPAB]: 6/9 a reasonable answer but lacking in detail in certain areas and omits any mention of the nature of floating charge interests affected by the prescribed part deduction under s 176A.

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 then the priority of debts in that subsequent administration or liquidation may be different to the priority of debts which existed prior to the Moratorium.

Section 174A provides that certain unpaid pre-Moratorium debts (the debts that do not form part of the payment holiday), such as debts owed to employees or financial services debts, are paid in the subsequent liquidation, in priority to even the liquidator's fees and expenses.

Essentially this section affords certain unsecured debts a form of "super priority" in a subsequent liquidation. An example of this would be unsecured or secured pre-moratorium bank debt, falling within the definition of financial services - it would acquire a 'super priority'.]

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

Commented [WPA9]: 9/15

Prior to going into compulsory liquidation on 23rd December 2022, under pressure from its bank, Fretus Bank plc, and in order to prevent it from demanding repayment of the company's loans, Marbley Q Limited ("the Company"), granted a debenture in favour of Fretus Bank plc in February 2022. The debenture contained a floating charge over the whole of the Company's undertaking.

The winding up order followed a creditor's winding up petition issued on 14th October 2022.

In July 2022, as the Company continued to suffer cash flow problems, the directors approved the sale of two (2) marble cutting machines to Rita Perkins (a director) for GBP 10,000 in cash. The machines had been bought for GBP 25,000 a year before.

A month before the winding up order was made, Rita Perkins received an email from Hard and Fast Ltd, one of the Company's key suppliers. The supplier demanded immediate payment of all sums owing to it and informed the Company that further supplies would only be made on a cash on delivery basis. As the continued supply of marble was seen as essential by the Company, the board authorised a payment of GBP 8,000 to cover existing liabilities and agreed to further payments, on a cash on delivery basis, for further supplies which amounted to further payment of GBP 3,000 up to the date of the winding up order.

The liquidator has asked for advice whether any action may be taken in respect of the floating charge in favour of Fretus Bank plc and the two subsequent transactions.

Using the facts above, answer the questions that follow.

Identify the relevant issues and statutory provisions and consider whether the liquidator may take any action in relation to:

Question 4.1 [maximum 5 marks]

Commented [WPA10]: 1/5 does not really identify the issue with any clarity. The question required an explanation and application of s 245.

The floating charge in favour of Fretus Bank plc;

[Marbley Q Limited (the Company) has granted a debenture in favor of Fretus Bank plc in February 2022 in order to prevent them from demanding repayment on their loans (debenture contains the floating charge), and Fretus Bank has gone into compulsory liquidation on 23 December 2022. As this event happens within 12 months prior to the onset of insolvency, the floating charge may be different to the priority of debts which existed previously. The floating charge may not have to be paid due to the company's inability to pay the debt.]

Having said that a floating charge usually gives the secured creditor the power to appoint an administrator who will take control of the charged assets and can sell them. If default occurs, depending on when the floating charge was created, the chargeholder may be able to appoint an administrative receiver or an administrator. To issue in this case is as to when the floating charge crystallises. If the crystallisation of the floating charge happened prior to the sale of the marble cutting machines to Rita Perkins, this was incorrectly sold to Rita as Fretus Bank's floating charge would have been converted into a fixed charge and any asset (machines) subject to a fixed charge can't be dealt with by the debtor (Marbley Q) without the consent of the secured creditor which is Fretus. If the crystallisation had not happened at this time then the Company was free to sell the Company's assets during the normal course of business and without obtaining consent from Fretus. It is important to note that a floating charge over the whole of the Company's undertaking can be interpreted as including all of the Company's property both present and in the future, which includes the right to carry on the business operations of the company.]

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

[The directors approved the sale of 2 marble cutting machines to Rita Perkins who is a director for GBP10k which has been bought for GBP25k the year before. This is covered in section 238 of the Act; Transactions at undervalue. The machines were sold for 15k less than their purchase price. The Act permits certain transactions which were entered into shortly before the company entered formal insolvency to be open to attack. In this case the approval of the sale took place in July 2022, and the company entered into insolvency in December 2022. Under section 238 of the Act a liquidator may attack a transaction which was entered into prior to the company entering liquidation where the transaction was at an undervalue. It is part of the underlying policy to treat all unsecured creditors the same.]

The liquidator must show that the company made a gift to another person or entered into a transaction with another person for a 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 the Company. The 'relevant time' is the period of 2 years prior the commencement of the liquidation or administration.]

Commented [WPA11]: 5/6 a much clearer answer - some of the application to the facts especially around value could have been in more detail.

Here, the transaction was with a connected person in Rita (a director), and a prerequisite of liability under the Act is that at the time of the transaction either the company was unable to pay its debts as they fell due or became unable to pay its debts within the meaning of that section in consequence of the transaction.

In the case of a transaction with a connected person like this one, the company is presumed to have been insolvent, or to have become insolvent as a result of the transaction, unless the contrary is proved. In July it is said that the company suffered cash flow problems suggesting that they were in fact insolvent at this time, and also were under pressure from their Bank. In conclusion the company entered into the transaction in good faith and for the purpose of carrying on its business.]

Question 4.3 [maximum 4 marks]

Commented [WPA12]: 3/4 a good answer which might have applied s 127 to the facts in a little more detail.

The payments to Hard and Fast Ltd.

[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.

Marbley Q viewed the continued supply of marble as essential to the company.

In a compulsory winding up case like this, Section 127 of The Act avoids any disposition of property of the Company made after the commencement of the winding up. The commencement date is defined as the date of the petition which in the case of Marbley is 14 October, 2022. The company carried on its business activities and then approx. a month prior to the winding up order on 23 December, 2022 they received an immediate payment request from Hard and Fast for goods they supplied them. Given that this payment request occurred after the presentation of the petition, it is likely that the court will consider these payments as items that the Company has the inability to pay, and that the suppliers are merely unsecured creditors. The Court should ensure that the company's assets are distributed to its creditors according to the statutory order, and given that Marbley's powers of dealing with that property/assets are limited significantly, the court could order that the assets/monies are returned to Marbley and distributed to creditors as per the order.

Finally it should be noted that the court has a discretionary power to declare that dispositions shall not be void.

The court should consider the following general guidelines: The court will be reluctant to depart from the principle of pari passu distribution among creditors in order to validate payments or transfers made in relation to pre-liquidation transactions where the effect is to give a preference to a pre-liquidation creditor over other creditors. Payments are likely to be sanctioned where necessary to ensure continued supplies enabling the company to continue trading in cases where the court considers that the continuance of trading was in the best interests of creditors.]

* End of Assessment *