



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**

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

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.**

Commented [WPA1]: 30/50 = 60% some good answers but generally weaker on the application of the law to the facts in Q4

Commented [WPA2]: 10/10 excellent

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]: 7/10

Question 2.1 [maximum 5 marks]

Commented [WPA4]: 2/5 the answer to 1 is incomplete. Section 6 proceedings may also be brought by the Official Receiver on the instructions of the Sec of State. Only an administrator may 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?**

**1. Sec. 423 of the Insolvency Act 1986**

*Section 423 of the Insolvency Act 1986 provides that, in a liquidation or administration already opened, the "official receiver", "liquidator" or "administrator" may attack transactions intended to defraud creditors.*

**2. Sec. 6 of the Company Directors Disqualification Act 1986.**

*The Insolvency Service may institute proceedings on behalf of the Secretary of State under the CDDA, including under section 6 of the CDDA. The proceedings are civil*

*proceedings. The review and possible subsequent disqualification order is then made by the court or the directors in turn offer to give a disqualification undertaking.*

### **3. Sec. 246ZB of the Insolvency Act 1986**

*Sections 214 and 246ZB of the Insolvency Act 1986 make directors of insolvent companies liable for wrongful acts and personally responsible for at least part of the debts and liabilities of the company. An application to the court to hold the directors personally liable can only be made by the liquidator. Creditors or other interested parties not entitled to apply.*

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

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

Commented [WPA6]: 9/15

Question 3.1 [maximum 6 marks]

Commented [WPA7]: 3/6 a generally good answer but lacks detail on the provisions of ss 233, 233A and 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?**

*If insolvency proceedings are opened against the assets of a company and a corresponding administrator is appointed, this does not initially have the effect of automatically terminating existing contracts. Typically, the administrator will at least temporarily continue the business and in this context is dependent on the continuation of supplies of the necessary materials. § Section 233 of the Insolvency Act 1986 provides for the insolvency administrator ability to insist on the continuation of supplies under existing contracts.*

*Suppliers are required to continue supplies at the insolvency administrator's request to the insolvent company but have the right to request a guarantee from the administrator that payment of the supplier's fees will be made.*

*Suppliers of the insolvent company are not allowed to rely on so-called "insolvency clauses" from the underlying contracts, which provide that in case of insolvency the contract can be terminated.*

*Under section 233B of the Insolvency Act 1986, a supply contract can only be terminated if they are in agreement with the company or the insolvency practitioner or the court is satisfied on application that the continuation of such contract would cause hardship to the supplier.*

**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?***

*First, under section 115 of the Insolvency Act 1986, various expenses have priority for payment from the insolvency estate over the company's otherwise preferential creditors the holders of floating charges unsecured creditors. This relates to expenses, including the remuneration of the insolvency practitioner, properly incurred, for example: the cost of any security provided by the liquidator, any amount payable to a person to assist in the preparation of a statement of affairs or accounts, the remuneration of any person who has been employed by the liquidator to perform any services for the company and so on.*

*Once these expenses have been paid, the remaining assets are used in the next step to pay the liabilities to so-called preferential creditors. Such creditors are first essentially the employees of the elementary company as well as typically the tax office with regard to open tax liabilities. In most insolvencies, very statutory employee protections under the Employment Rights Act 1996 provide further protection for employees.*

*Among the preferential liabilities, a differentiation is made between the so-called ordinary and secondary liabilities, whereby the ordinary liabilities must always be paid first. Ordinary liabilities include in particular all liabilities to employees. Arrears of tax payments, on the other hand, belong to the secondary liabilities and are therefore settled after the ordinary due dates.*

*Once the preferential creditors have been considered, the next step is to satisfy the holders of floating charges. If there are several such secured creditors, payment is made according to a priority system based on the time at which the collateral was provided.*

*If the secured creditors have been taken into account, the attention of the participation in the proceeds of the company is lastly directed to the unsecured creditors. If there are any assets remaining, these will then be distributed to the secured creditors.*

**Commented [WPA8]:** 6/9 a reasonable answer which lacks detail on some important areas eg the prescribed part deduction for floating charges under s 176A



*If assets are still available after even the unsecured creditors have been satisfied, any surplus assets will be distributed among the holders of shares in the company so that they are triggered.*

*If the company was in a moratorium before entering insolvency, the order of liabilities to be settled later may change. Under section 174A of the Insolvency Act 1986, certain unpaid debts that do not fall within the "payment holiday", such as debts owed to employees, are paid in priority to the liquidator's fees and costs. Liabilities acquire an overriding priority.*

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

Commented [WPA9]: 4/15

*Prior to going into compulsory liquidation on 23<sup>rd</sup> 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 14<sup>th</sup> 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]: 2/5 most of the answer is discounting certain actions. The only realistic action, s 245, required a more detailed consideration and application.

*The floating charge in favour of Fretus Bank plc.;*

*The ability of a liquidator to act against the directors of an insolvent company depends essentially on the extent to which the directors of the insolvent company may have breached their duties to it. If the liquidator concludes that a breach has occurred, he may bring proceedings against the directors on behalf of the company.*

*At issue is whether the directors breached their duties by granting Fretus Bank plc a floating charge to avoid the bank's demand for repayment of loan instalments.*

*It could be a case of misfeasance under sec. 212 of the insolvency act 1986 on the part of the management. This typically occurs when directors order the restoration, repayment or accounting of funds and assets or the contribution of assets and the company consequently loses corresponding assets. Since in the present case the granting of the floating charge precisely prevented the outflow of money, it cannot be assumed that there was misfeasance on the part of the management.*

*It may be a case of wrongful trading under sections 214 and 246ZB of the Insolvency Act 1986. The ability to hold the directors to account for this is intended to ensure that directors, when they are aware that a liquidation is imminent, do all they can to minimize potential losses to creditors. By granting the floating charge, the company was prevented from being confronted with repayment claims by Fretus Bank plc, so that it cannot be assumed that it traded wrongfully.*

*There are no indications of fraudulent trading.*

*Overall, it is not apparent that the liquidator can take any action against the directors as a result of the grant of the floating charge to Fretus bank plc.*

*Since it cannot be assumed that there was a transaction under value, a challenge to the security granted to the bank cannot in any case be considered on the basis of section 238 of the Insolvency Act 1986.*

*A challenge to the security on the basis of section 239 of the Insolvency Act 1986 cannot therefore be considered as the company cannot be said to have wished to put the bank in a better position than other creditors. The statement of Millet J that if the company was wholly dependent on the support of the bank for the continuation of its business and the bank would withdraw its support if the security was not granted and ultimately the company must respond immediately, the motivation to better serve the bank is not assumed.*

*However, the granting of the floating charge can be contested on the basis of section 245 of the 1986 insolvency act. This provision is intended to prevent creditors from receiving a floating charge just before the company goes into liquidation. This does not apply to new funds that are issued.*

*Since the floating charge was to be granted in this case precisely in order to prevent immediate repayment being demanded with regard to the loans already granted, Section 245 of the insolvency act 1986 constitutes an offense.*

Question 4.2 [maximum 6 marks]

**The sale of the marble cutting machines; and**

*It could be a case of misfeasance under sec. 212 of the insolvency act 1986 on the part of the management. Misfeasance by the directors does not necessarily lie in selling the two machines to Rita Perkins £10,000 in the first place. Thus, no direct loss of monetary value was created, but the company initially obtained liquidity through the sale. However, the concept of "misconduct" also includes acts of misapplication of assets and breaches of fiduciary or other duties.*

*The fact that the machines in question were purchased the year before for £25,000 and are now being sold to a director for only £10,000 suggests that the directors breached their duty of care to the company. It is readily apparent that the machinery was manifestly sold for less than its value, some five months before liquidation. Since the management is typically informed about the economic and financial situation of their company and in particular has insight into the investments, it is obvious that a party involved in this transaction must have been aware of the damage to the company. Misfeasance can consequently be assumed.*

*Wrongful trading or even fraudulent trading under sections 213, 214 and 246ZB of the Insolvency Act 1986 can also be assumed. Wrongful trading" is less than "fraudulent trading", which is also relevant under criminal law. If it turns out that transactions that have harmed the company were conducted with the intention of defrauding creditors, fraudulent trading can be considered. Since the management in this case sold machines among themselves for significantly less than half of their value in the previous year and it can be assumed that the management was already aware of the deteriorating economic and financial situation at that time, it can be assumed that they acted with the intention to gain an advantage for themselves and to deprive the company's creditors of the actual value of the machines.*

*In connection with the sale of these subject machines to Rita Perkins, on first summary examination, the liquidator has the power to act against the directors. On the basis of the measures, the directors may be held personally liable for the pecuniary loss of at least £15,000 suffered as a result of the disposal of the machinery.*

*Action against Ms Rita Perkins on the basis of a transaction below value under section 238 of the Insolvency Act 1986 therefore, it cannot be considered as for the application of this provision the injurious action must have taken place immediately before the liquidation. This is not currently the case as the sale took place in July 2022 and the liquidation occurred on 23 December 2022.*

**Commented [WPA11]:** 2/6 although it might be possible to bring an action under s 212, the requirements of s 238 all appear to be satisfied here. The answer needed to consider in more detail how s 238 applies here.

**Question 4.3 [maximum 4 marks]**

**The payments to Hard and Fast Ltd.**

*Hard & Fast Ltd is a supplier to the company, which later went into liquidation. The fact that Rita Perkins, in her capacity as a director of the company, decided with the management that £8,000 in outstanding payments would be paid to the aforementioned supplier and that a further £3,000 would be paid in order for the supplies to continue, argues in principle against liability on the part of the management.*

*This supplier is the main supplier of the company, which was later liquidated. A cessation of supply by this supplier must have meant for the company later in regulation that this company is also no longer capable of acting. Consequently, the company was always dependent on the continuation of deliveries for the continuation of business operations and on the cooperation of the suppliers. It is true that suppliers in liquidation are obliged to continue to offer their services at the request of the liquidator, even if they are allowed to remain a guarantor of payment for their services. However, prior to the occurrence of liquidation, suppliers are free to cease continuing to supply if they are no longer paid for their performance.*

*Even if the management's decision was made just one month before entering into liquidation and thus in a foreseeable period before liquidation, what is also in the interest of the subsequent liquidator that the supplier continues to offer its service in order to maintain business operations. In any case, payment on delivery for the continued deliveries appear to be justified against this background.*

*In any case, liability of the management should not be considered, since if the outstanding payments had not been settled, deliveries would have been stopped and the company would have had to go into liquidation prematurely. With regard to the settlement of arrears amounting to the £8000, a transaction under value action could be considered.*

*Under section 238 of the Insolvency Act 1986, in order for such a payment to be attacked, it must be shown that either a gift has been made, consideration is not received in principle or there has been a transaction under value. As it is not apparent that the payments to the supplier were made without consideration, as deliveries have already been made in respect of the £8,000 and were to be made in respect of the £3,000, and as there is no evidence that they were or are to be made for less than value, there is no possibility of an attack under section 238 of the Insolvency Act 1986.*

*Nevertheless, the payment of the £8000 to the supplier will be open to challenge on the basis of section 239 of the Insolvency Act 1986, as the supplier in question was placed in a better position than other creditors by the payment of the arrears. § 239 of the Insolvency Act 1986 is relevant here as the supplier was already a creditor of the*

**Commented [WPA12]:** 0/4 unfortunately, there is no realistic cause of action identified. Section 239 cannot apply as the payments occurred after the commencement of the liquidation (date of petition). The only cause of action for the liquidator would be to rely upon s 127 under which the supplier would need to ask the court for a validation order to hold onto the money paid.

*company later in the legend, the payment was made only one month before the company entered insolvency and the company had to make the payment in order for supplies to continue.*

*In this respect, it must also be assumed that the company was basically no longer able to service all its liabilities and consequently there was also knowledge that the settlement of the overdue liabilities to the supplier must put the supplier in a better position than other creditors.*

**\* End of Assessment \***