



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**

Commented [WPA1]: 38/50 = 76% some strong answers

Commented [WPA2]: 9/10

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]

Question 2.1 [maximum 5 marks]

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) The following parties have the right to bring under Section 423 of the Insolvency Act 1986:
 - (a) Where a company is being wound up or is in administration:
 - The Official Receiver;
 - The Liquidator;
 - The Administrator; and
 - Any victim of the transaction such as a creditor (with the leave of the court).

Commented [WPA4]: 8/10

Commented [WPA5]: 3/5 - only the Sec of State or OR can bring an action under s 6 CDDA and only an administrator may do so under s 246ZB

- (b) Where a victim is bound by a Company Voluntary Arrangement (CVA):
The supervisor of the CVA; or
Any victim of the transaction (whether bound by the CVA or not)
- (c) In any other case a victim
- (ii) The following parties have the right to bring under Section 6 of the Company Directors Disqualification Act 1986:
 - (a) Official Receiver
 - (b) Liquidator
 - (c) Administrator
- (iii) The following parties have the right to bring under Section 246ZB of the Insolvency Act 1986:
 - (a) Liquidator
 - (b) Administrator

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.

- (a) The monitor's remuneration or expenses
- (b) Goods or services supplied during the Moratorium
- (c) Rent in respect of a period during the Moratorium
- (d) Wages or salary arising under the contract of employment
- (e) Redundancy payments
- (f) Debts or other liabilities arising under a contract or other instrument involving "financial services".

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

Commented [WPA7]: 15/15

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 has the powers to run the business of the company under administration. Even if the Moratorium is imposed when the administration procedure starts, if the Administrator wishes to run and operate the company as a going concern, all the executory contracts with respect to the supply of goods and services essential for the running the company as a going concern shall not be terminated. Even if an executory contract has an automatic termination clause, it is now considered as void and cannot be enforced against a company under administration. The Insolvency Clause in a contract entitles the supplier to terminate the supply, alter the terms of the supply, or compel higher payment for continued supply. Upon the introduction of Section 233A of the Insolvency Act, 1986 (Insolvency Act) in the year, the supplier unable to rely on the 'insolvency' clause in a contract of supply.

Section 233 of the Insolvency Act deals with the supply of essential services and goods such as gas, electricity, water, and communication services. Suppliers are not permitted to demand

payment of outstanding debts in order to secure a new or continued supply to the company under administration. However, Section 233 of the Insolvency Act permits a supplier to take personal guarantee against the payment of charges related to supply of goods and services during the period of administration of the company.

Such protection has now been expanded after the introduction of Section 233B of the Insolvency Act in 2020, wherein it prohibits the clauses which allow the supplier of goods or services to terminate or change the terms of the contract if the company enters into formal insolvency procedure. A supplier cannot insist on a personal guarantee from the administrator under Section 233B of the Insolvency Act as it can do under Section 233 of the Insolvency Act.

Thus, in light of the above provisions, it is understood that a supplier cannot terminate a supply upon the company entering into insolvency / administration. Moreover, the supplier cannot make a condition that only upon pre-insolvency arrears that the supplier can continue the supply of goods and services once the company enters into administration.

Question 3.2 [maximum 9 marks]

Commented [WPA9]: 9/9 excellent

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?

During liquidation, the creditors who hold fixed security is able to sell the secured asset to recover their money. Hence, the below distribution would not cover such secured creditors.

Winding Up Expenses:

The first priority of payment is given to expenses properly incurred in the winding up, including the liquidator's remuneration. Section 115 of the Insolvency Act specifically states that such expenses (subject to Section 174A of the Insolvency Act as explained below) shall be paid out of the company's assets in priority to all other claims.

Preferential Creditors:

Thereafter, the balance amount is first distributed among the preferential creditors. There are two classes of preferential debts, Ordinary Preferential Debts and Secondary Preferential Debts. The categories of the each class of preferential debts are enshrined under Schedule 6 of the Insolvency Act read with Section 386 of the Insolvency Act. Ordinary Preferential Debts are paid before the Secondary Preferential Debts. In each class, preferential debts are ranked equally amongst themselves for distribution as well as the abatement.

Major categories of the preferential debts include employees and workmen dues, and certain statutory / tax liabilities towards government agencies (including Inland Revenue, Customs and Excise, Insurance premium tax, landfill tax, climate change levy, and social security contributions)

Prescribed Part to Unsecured Creditors:

Even though the next priority of payment is to the Floating Charge Holders, in order to protect the Unsecured Creditors, a new provision, Section 176A of the Insolvency Act, was introduced in 2003.

According to Section 176A of the Insolvency Act, the Liquidator is under duty to make a Prescribed Part of the company's net property for satisfaction of unsecured debt.

Net Property is the value of the company's property which otherwise would be available for the satisfaction of debts of floating charge holders. In other words, amount left after the payment of liquidation expenses and preferential debts.

If Net property is Below GBP 10,000, then no Prescribed Part is allotted.

If Net Property exceeds GBP 10,000, then 50% of the first GBP 10,000 and Plus 20% of the excess value above GBP 10,000, subject to maximum of GBP 800,000.

This allotment under Section 176A of the Insolvency Act shall only apply to the floating charges created on or after 15th September 2003.

In case the Prescribed Part allocated exceeds the satisfaction of the unsecured debt, the surplus shall be distributed to Floating Charge Holders.

Floating Charge Holders:

After safeguarding the Prescribed Part to be payable to the unsecured creditors (as applicable), the rest of the monies are distributed to the Floating Charge Holders for its full and final satisfaction. The priority among the Floating Charge Holders is determined to the date of creation of floating charge. The Floating Charge Holders in favour of whom the first charge is created shall be given priority.

Unsecured Creditor:

Over and top of the payment of the Prescribed Part, after paying the Floating Charge Holders, any monies left is distributed among the unsecured creditors proportionately.

Shareholders:

The Surplus amount after paying all the dues of the creditors is distributed among the shareholders in accordance with the company's constitution.

Inter se priority among the creditors is valid as long as they do not affect the priority of other creditors. It is only considered as a contractual arrangement between two or more creditors.

Pre-Moratorium Debt:

However, in case the company was undergoing moratorium under Part A1 of the Insolvency Act during the 12 week period prior to the commencement of the liquidation, the expenses incurred during the moratorium shall have priority over any claims by the creditors including the expenses incurred in the winding up. Section 174A of the Insolvency Act states that certain unpaid pre-moratorium or moratorium debts, 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. The consequence of the same is that, certain unsecured debts which are eligible to be the pre-moratorium debt shall have super priority over secured creditors in liquidation.

The priority pre-moratorium debt includes the following:

- Monitor's remuneration or expenses;
- Goods or services supplied during moratorium;

- Rent in respect of a period during the moratorium;
- Wages and salary for the period of employment before or during the moratorium;
- Liability to make redundancy payment that fell due before or during moratorium; and
- Debt involving financial services that fell before or during moratorium and the same is not an accelerated debt.

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

Commented [WPA10]: 6/15

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]: 3/5 the only realistic action here is s 245 and the application to the facts needed to be a little clearer

The floating charge in favour of Fretus Bank plc;

Action against the creation of floating charge in favour of Fretus Bank plc prior to the compulsory liquidation of Marbley Q Limited (Company) can be brought by the Liquidator of the Company under Section 239 of the Insolvency Act, 1986 (Insolvency Act) (Preferential Transaction) and Section 245 of the Insolvency Act (Floating Charge Avoidance).

Preferential Transaction under Section 239 of the Insolvency Act:

As per Section 239 of the Insolvency Act, an office holder (Liquidator in the present case) shall make an application before the court if the Company has done anything or suffers anything to be done, by giving a preference to such creditor, which has the effect of putting that creditor into a position which, in the event of the Company going into liquidation, will be better than the position the creditor would have been in if that thing had not been done.

In the present scenario, the Company has created a Floating Charge in favour of Fretus Bank plc prior to the compulsory liquidation of the Company just to give Fretus Bank plc the position of secured creditor in case of liquidation.

However, the relevant time period for the action under Section 239 of the Insolvency Act is enshrined under Section 240 of the Insolvency Act which is 2 years for connected persons and 6 months for unconnected persons from the date of commencement of the winding up. In the present scenario, the transaction happened in February 2022 and hence does not fall under the 6 months period prior to liquidation. However, if the Liquidator can establish that Fretus Bank plc is a connected person to the Company, an action can be brought by the Liquidator under Section 239 of the Insolvency Act for reversal of such a transaction.

Floating Charge Avoidance under Section 245 of the Insolvency Act:

According to Section 245 of the Insolvency Act, a liquidator can bring action against the transaction which happened 12 months prior to winding up order, in case of an unconnected person, wherein a floating charge has been created in favour of an unsecured creditor without fresh consideration or funding. In the current scenario, it is understood that a fresh consideration (viz. Debentures issued by the Company in favour of Fretus Bank plc) is given against the creation of floating charge / security. The test that is to be applied in the present scenario is that of whether the consideration is given after the creation of charge, at the same time, or just before the creation of charge. If the same is satisfied, then the present scenario need not be considered as a case of Floating Charge Avoidance and the Liquidator may not bring an action against such transaction.

Thus, if the Liquidator can establish that the Debenture issued was a fraud transaction, an action can also be brought by the Liquidator under Floating Charge Avoidance for invalidation of the floating charge creation under Section 245 of the Insolvency Act.

Moreover, under Section 214 of the Insolvency Act, the Liquidator may also take action against the Directors of the Company at the time of such a transaction for disqualification as the Directors were well aware that the Company would go into Insolvency and still undertook such a transaction as such actions amounts to wrongful trading.

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

The Sale of Marble cutting machines is a clear case of undervalued transaction under Section 238 of the Insolvency Act and an action under the same can be brought by the Liquidator for reversal of such transaction.

As per Section 238 of the Insolvency Act, the office holder (Liquidator in the present scenario) can file an application before the Court for restoring the earlier position of the Company, if the Company has at the relevant time entered into a transaction with any person at an undervalued price.

The relevant time period for the action under Section 238 of the Insolvency Act is enshrined under Section 240 of the Insolvency Act which is 2 years for connected persons and 6 months for unconnected persons from the date of commencement of the winding up.

In the present scenario, the directors approved the sale of two (2) marble cutting machines to Rita Perkins (a director) for GBP 10,000 in July 2022. The machines had been bought for GBP

Commented [WPA12]: 3/6 although a number of claims are considered, s 238 would be the strongest action. More detailed application would have been helpful on the valuation point and the time limit was mis stated (although it did not matter on the facts). The requirement for insolvency and the presumption against a connected party needed to be considered. Despite some assertions that the other causes of action are strong, they would not be.

25,000 a year before. Thus, being a director of the Company, Rita Perkins is a connected person and thus the transaction falls within the relevant time period viz. 2 years. Even if Rita Perkins is not a connected person. The transaction falls within the relevant time period, viz. 6 months. The value of sale of the marble cutting machines is undervalued as the machines were new and even if we consider the depreciation of the machines, the transaction is manifestly undervalued.

In addition to the above, action against the sale of marble cutting machines at an undervalued price can be brought before the Court by the Liquidator of the Company or any victim of such transaction (with the leave of the Court) under Section 423 of the Insolvency Act as the same clearly falls under the ambit of transaction defrauding creditors as well.

As per Section 423 of the Insolvency Act, similar to Section 238 of the Insolvency Act, any undervalued transactions for the purpose of putting the assets beyond the reach of the creditors or are prejudicial to the interests of the Creditors.

In the present scenario, it is manifestly clear that the sale of marble cutting machines are undervalued even if we consider the depreciation and is intended to get the assets beyond the reach of the creditors of the Company.

Moreover, under Section 214 of the Insolvency Act, the Liquidator may also take action against the Directors of the Company at the time of such a transaction for disqualification as it is clearly visible from such a scenario that the Directors were well aware that the Company would go into Insolvency and still undertook such a transaction as such actions amounts to wrongful trading.

Section 213 of the Insolvency Act also deals with fraudulent trading and the same is an adequate reason for the disqualification of the Directors of the Company. In the present scenario, the business was done with the intent of defrauding the creditors of the Company. Thus, the Liquidator can also initiate civil and criminal action against the Directors of the Company under Section 213 of the Insolvency Act read with Section 993 of the Companies Act, 2006.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

Under Section 214 of the Insolvency Act, the Liquidator can take action against the Directors of the Company at the time of such a transaction for disqualification as it is clearly visible from such a scenario that the Directors were well aware that the Company would go into Insolvency and that there was no reasonable prospect for the Company to avoid going into liquidation and still undertook such a transaction and such actions amounts to wrongful trading.

Action can also be taken by the Liquidator against the Directors of the Company under Section 213 of the Insolvency Act (Fraudulent Trading). Section 213 of the Insolvency Act deals with fraudulent trading and the same is an adequate reason for the disqualification of the Directors of the Company. A transaction is considered Fraudulent Trading if it appears that any business of the Company has been carried on with intent to defraud its creditors or for any fraudulent purpose. In the present scenario, the directors sanctioned a large amount business was done with the intent of defrauding the creditors of the Company. Thus, the Liquidator can also initiate civil actions under Section 213 of the Insolvency Act and criminal action Section 993 of the Companies Act, 2006 against the Directors of the Company.

Commented [WPA13]: 0/4 both WT and FT relate to conduct before the commencement of the winding up. Here the payments made occur after the commencement of winding up. The only realistic available cause of action is s 127.

*** End of Assessment ***