



**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]: 40/50 = 80% a strong overall performance

Commented [WPA2]: 10/10 excellent

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.** (Student Note – this does not include the 20 business days that directors could by filing papers in court and also does not include the initial 20 day period. If the initial 20 day period is to be counted, the answer would be (b)).

#### 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]

#### 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?

Commented [WPA3]: 9/10

Commented [WPA4]: 4/5 - a strong answer with one or two minor omissions

**Section 423 of the Insolvency Act 1986:** Any “victim” of the transaction may bring an action under section 423 of the Insolvency Act 1986, which addresses transactions made to defraud creditors. That said, if a company is undergoing an administration or winding up proceedings, the administrator or liquidator will bring the action, and such an application will be deemed to be on behalf of every victim of the transaction in question.

**Commented [WPA5]:** Supervisor of a CVA may also bring an action

**Section 6 of the Company Directors Disqualification Act 1986:** While a liquidator can bring an action generally against the director on the company's behalf under the CDDA, it is the Secretary of State for Business that may decide whether to bring an action against directors under Section 6. They will likely base their decision on a report by the liquidator and administrator, which is part of their statutory duty. The report details which directors are deemed “unfit” and after the Secretary of State has made a decision, the action will be brought on behalf of them by the Insolvency Service — a government agency.

**Commented [WPA6]:** The OR on the instruction of the SoS may also do so

**Section 246ZB of the Insolvency Act 1986:** Section 246ZB of the Insolvency Act 1986 deals with wrongful trading. Under 246ZB(1), an administrator may bring an application under this section against a person, with the goal that such a person would be found liable to make some contribution (if any) to the company's assets, as decided by the court.

**Question 2.2 [maximum 5 marks]**

**Commented [WPA7]:** 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.

Pre-moratorium debts for which a company does not receive a payment holiday under A18(3) in Part 1 of the Insolvency Act include: (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 a contract of employment; (e) redundancy payments, or; (f) debts or other liabilities arising under a contract or other instrument involving financial services.

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

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**Question 3.1 [maximum 6 marks]**

**Commented [WPA9]:** 4/6 good on s 233B but there is little explanation of ss 233 and 233A where it is possible to stipulate personal liability of the administrator for continued supply - this is not possible under s 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?

An ipso facto clause effectively says that in the event one party is unable to pay debts or faces some liquidation or restructuring proceedings, then the other party is free to terminate the contract without penalty. However, the ability for one counter party to do so might cause extreme hardship on a debtor that is attempting to restructure or revive its business. As a result, bankruptcy laws across several jurisdictions extend some protection to these insolvent businesses by effectively nullifying such clauses.

Prior to the 2020 the Corporate Insolvency and Governance Act 2020, English insolvency law, through Sections 233 and 233A, enabled an administrator to only retain those contracts that were from utility and technology suppliers (such as gas, electricity, water, and IT communication services including among other things sales terminals, computer hardware and software, data storage, and website hosting). However, after the 2020 Act, the ambit of contracts an administrator expanded to include suppliers of goods and services. Today, through the inclusion of Section 233B, an administrator can continue relying on contracts with suppliers of goods and services, regardless of whether those contracts included any ipso facto clauses. Not only does Section 233B apply in an administration, but it covers a Company

Voluntary Arrangement, a Moratorium, a liquidation process, or a Restructuring Plan – giving it incredible reach and providing the debtor with some protection from suppliers of goods and services that may seek to renege or terminate contracts amidst the debtor's financial stress.

The scope of Section 233B is wide, enabling an administrator to use contracts for even non-essential goods and services. These contracts could include agreement with vendors, engineers, facilities managers — any supplier of a good or service will be covered. Notably, the key words used in the provision include protection from contract termination at will, or for a party to do “any other thing” once the debtor that the administrator is managing files for insolvency, or restructures under any of the aforementioned schemes. It is possible that “any other thing” includes even provisions that could threaten conditions to honour the contract amid an insolvency or restructuring, or even moratorium.

That being said, such goods and services contracts may still be terminated. If a showing is made to courts that continuing on with the contract poses a hardship on the supplier, the court may order termination of that contract anyway. Moreover, an administrator can also consent on behalf of the company to terminate the contract, in a manner that enables the restructuring professional to accept or assume or reject the executory contracts at hand.

The ultimate takeaway from the introduction of section 233B is that contracts cannot, at first blush, be terminated without court approval — regardless of how essential or non-essential the goods or services in question may be. Ultimately, a company should not be punished by its suppliers for facing some relevant insolvency procedure, unless the court grants the termination of such a contract or unless the company itself consents.

### 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?

Broadly, the priority of payments in a liquidation scenario are as follows: (1) first, liquidation/winding up expenses will be paid; (2) second, preferential creditors are paid; (3) third, secured creditors with floating charges are paid; (4) fourth, unsecured creditors will be paid and; (5) fifth, shareholders are paid. This essay will discuss the nature of each class of creditor or expense in turn. Where creditors hold fixed security, such creditors will typically enforce their collateral outside the liquidation proceedings, which is why fixed-charge holders are not listed.

**(1) Liquidation and Winding Up Expenses:** Before creditors may be paid, the liquidation expenses — including procedural costs in realizing/obtaining/preserving any company assets, and additional legal costs — must be covered. Here too, there is a priority to be followed: after expenses incurred by the liquidator comes payments of security costs that the liquidator provided, and next, payments (if any) to individuals that assisted in preparing statements of affairs or accounts. Subsequently, payments made by the liquidator for the process will be reimbursed, after which the fees of any person employed by the liquidator will be paid. Next, the liquidator's own fees are paid under a time-cost basis. The right to repayment enjoyed by the liquidator, interestingly, is not paid immediately — even the liquidator's fees come after several other types of payments for the liquidation estate process. The last two expenses to be paid under the liquidation expenses category are, respectively, corporation taxes on chargeable gains stemming from the sale or proceeds-realization of company assets, and any balance expenses “properly charged” by the liquidator in carrying out their own expenses.

**Commented [WPA10]:** 7/9 generally a strong answer but one or two points are not entirely accurate eg it is not all taxes due to the Crown which are preferential and the calculation of the s 176A prescribed part is not correct - it is 50% of the first £10,000 etc.

**(2) Preferential Creditors:** Next, a series of creditors deemed statutorily “preferential” are repaid, but only after the liquidation expenses mentioned above have been paid in full. First come payments of ordinary preferential debts, followed by secondary preferential debts. Each sub-class of preferential debts will rank *pari passu*, meaning that in the event that funds are not sufficient to pay everyone, the proceeds will be divided between each class *pro-rata*. Under Schedule 6 of the Insolvency Act ordinary preferential debts include: (a) employee contributions to pension schemes deducted from wages for four months before the liquidation commenced; (b) unpaid wages up to £800; (c) due sums from occupational pension schemes that employers contributed to for 12 months prior to liquidation commencement; (d) pending or advance pre-liquidation accrued holiday wages or sick leave; (e) coal and steel levies; (f) amounts owed under the Reserve Forces Act; and finally, sums owed by the company under the Financial Services Compensation Scheme. Among the secondary debts are: (a) amounts owed to eligible depositors under the Financial Services Compensation Scheme that exceeds any payable compensation in respect to the deposits; (b) amounts due to persons that made deposits through a non-UK branch of any UK-authorized credit institution that would have been an eligible deposit made through a UK branch; (c) tax dues to the Crown and; (d) finally, PAYE, VAT, student loan, and Construction Industry Scheme deductions.

**(3) Creditors with a Floating Charge:** As mentioned above, a secured creditor with a fixed charge would likely just enforce their collateral. Creditors with any floating charges, however, rank after preferential creditors in the liquidation waterfall but are not permitted to participate in the actual distribution process. The relevant statute here is Section 176A of the Insolvency Act and the accompanying Insolvency Act 1986 (Prescribed Part) Order 2003, which collectively state that a “prescribed part” of the proceeds stemming from the liquidation process must be used to pay unsecured debts. The “net property” amount – that is, the amount of proceeds from the company’s liquidated property that may be used to pay off floating charge creditors — are calculated after liquidation expenses and preferential debts are paid off. Calculating this “prescribed part” may be done by taking some percentage of the company’s net property, and then distributing it accordingly. This percentage changes based on whether the company’s net property exceeds £10,000. If yes, then the “prescribed part” will constitute the first £10,000 of net floating charge realisations and an additional 20% of anything in excess (but capped at £800,000). If no, then the prescribed part is just 50% of the property unless it is less than the prescribed minimum of £10,000 AND if the liquidator believes that making a distribution to unsecured creditors would be outweighed by disproportionality.

**(4) Unsecured Creditors:** Unsecured creditors, such as trade creditors, are paid after creditors with a floating charge, and are technical

**(5) Shareholders:** Technically, the liquidation waterfall ends with the unsecured creditors. However, should any proceeds be left after all creditors are paid off, shareholders will receive recoveries on a *pro rata* basis as per their holding amounts.

**Notably, if the company in question does not end up being rescued as a going concern and if the company commenced liquidation within the 12 within weeks but was subjected to the Moratorium, the priority described above would change based on debts owed to employees, pre-Moratorium bank debt, or financial services-debt would be paid in priority to even liquidation and winding up expenses, providing these unsecured claims with complete seniority and superpriority. However, for pre-Moratorium bank debt, accelerated claims (that is, claims accrued as a result of acceleration or early termination) will not be accorded superpriority.**

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

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

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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]**

The floating charge in favour of Fretus Bank plc;

The relevant issue triggered here is whether a floating charge may be avoided under Section 245 of the Act. In general, a floating charge may be avoided if the company has entered liquidation, a floating charge was created for a non-connected person at a specific time of one year prior the proceedings, the company was found insolvent either at that time or because of the floating charge, and that “new” consideration were not provided. The aim of this statutory provision is to ensure that a lender who has not provided fresh funding to a company is not able to take a floating charge for previously extended funding.

Under these circumstances, it may be possible for the liquidator to bring a floating charge avoidance action for the debenture granted in favour of Fretus Bank plc in February 2021: (1) first, the charge was created within a year of the Company’s liquidation proceedings commencement; and (2) second, the floating charge was granted to Fretus Bank for a previously extended loan facility to stave of repayment demands. The third requirement is that the Company should have been unable to pay its debts as a result of the granted floating charge, but to confirm this, we would require more information, such as whether the Company passed or failed a solvency test. It is likely, however, that granting the debenture in favour of Fretus put the Company in an insolvent position where it was unable to pay its debts. In general, it seems that Fretus receiving this floating charge was made in a manner that may be likened to a floating charge avoidance suit, especially since no “new” consideration was extended.

**Question 4.2 [maximum 6 marks]**

The sale of the marble cutting machines; and

Commented [WPA12]: 5/5 a good answer

Commented [WPA13]: 5/6 a good answer but more might have been made of the possible defence under s 238 and possible orders open to the court to make.

At issue is whether the sale of the marble cutting machines may have constituted an undervalued transaction under section 238 of the Act. This provision enables a liquidator (or administrator) to attack a transaction that was entered into prior to a company facing administration or insolvency, and requires a showing by the liquidator that either (1) a gift was made to another person by the company; (2) the company entered into a deal with another person that provided no consideration; or (3) the company entered into a transaction with another person for consideration that was worth significantly less in value than the what the company provided. The third aspect is likely at issue here: the two marble cutting machines were sold to director Rita for GBP 10,000 in cash, even though they were purchased just one year ago for GBP 25,000 — hardly enough time for their value to drop by over 50%.

Notably, the sale was to a director of the company, which made it a transaction with a connected person. While typically, making a case for an undervalued transaction would also require a showing that the Company was either already insolvent or rendered insolvent as a consequence of the transaction, where the sale includes a connected person — like Rita, such a transaction is presumed to have occurred when the company was insolvent. This is a rebuttable presumption. Since Rita was a connected person and absent any facts alluding to the contrary, we may presume the Company was insolvent and unable to pay its debts when it sold the marble cutting machines to Rita.

As a result, a liquidator could move the court for a reversal of the transaction, such that the company retains the marble cutting machine and puts the parties in the position they would've been in had the contract not been formed.

The anti-deprivation rule could also apply, this giving the liquidator another basis for the liquidator to reverse the transaction. Under this principle, an asset that could have been used to the benefit of the creditors may not be deprived from the insolvent state. From a public policy standpoint, this would preclude someone from depriving the insolvent entity's creditors of assets that could have bettered their recoveries. Here, presuming the company's contract with Rita was either NOT *bona fide* or NOT in commercial good faith, it is unlikely a court would approve the transaction.

#### **Question 4.3 [maximum 4 marks]**

The payments to Hard and Fast Ltd.

A liquidator may seek to void the payments to Hard and Fast as preferences under section 239 of the Act, though a showing of all elements for preference transactions may be difficult.

In making an application for a preference transaction and seek reversal, a liquidator must show: (1) the person who received the alleged preference was a creditor; (2) the company did an act that caused the person to be in a better position than they would have been in liquidation without the act; (3) the company was "influenced by the desire to produce" such an effect; and (4) the preference was given at a relevant time.

Requirements 1, 2, and 4 are easily satisfied: (1) Hard and Fast would have been a trade creditor of the company; (2) the "act" was conducted by the Company when the board authorized a payment of GBP 8,000 to cover existing liabilities and agreed to further payments, on a cash on delivery basis, for further supplies totaling GBP 3,000 up to the date of the winding up order; and (4) the timing was appropriate as it was made a month before the winding up order was made. The third requirement, however, requires a showing that the Company actually wanted to put Hard and Fast in a better position than they would have been without the Company's payments: this is difficult to show. However, the fact that a creditor put pressure on the debtor is not relevant in making this showing. Pressure might be relevant to a court in determining whether there was requisite desire on the Company's part. Here, the

**Commented [WPA14]:** 0/4 unfortunately the issue is not correctly identified. It cannot be s 239 as the payment occurred after the petition ie after the commencement of the liquidation. The only possible action is one based on s 127.

company wanted to ensure that the supply of marble be continued, given how essential it was to the business. They also had enough pressure to do make the payments, which are relevant to the desire inquiry. While they may not have had a desire that Hard and Fast would have been better off with the payments than in a liquidation scenario, they certainly had the desire to make sure Hard and Fast was paid, and that the Company receive the benefits. It is possible, then, that a court would accept Requirement (3) to also be fulfilled. However, as this is a fact-based inquiry that would be at the court's discretion.

**\* End of Assessment \***