



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]: 33/50 = 66% some good knowledge displayed but weak identification of issues in Q4.

Commented [WPA2]: 8/10

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

Commented [WPA3]: B is correct

(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.

Commented [WPA4]: D is correct

QUESTION 2 (direct questions) [10 marks]

Commented [WPA5]: 7/10

Question 2.1 [maximum 5 marks]

Commented [WPA6]: 2/5 re i) a supervisor of a CVA may also bring an action; ii) the Sec of State or OR on the instructions of the Sec of State; iii) 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?

i. **Section 423**

This section is the parties have the right to attack transactions which are designed to defraud the creditors. An application may be made under the section by anyone who is victim of the transaction.

Unless the company is being wound up or subject to an administration then the application is done by the liquidator or the administrator.

ii. **Section 6**

The court must make the disqualification order against a person. This is when the court is satisfied that:

- *The person is or has been the director when the company became insolvent.*
- *The conduct of the director of the company makes him unfit to manage the company.*

iii. **Section 246ZB**

The application can only be made by the liquidator and not the creditor or contributory. This is done under Section 214

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.

5 Debts that do not form the payment holiday:

1. *The monitors remuneration or expenses.*
2. *Goods and services supplied during the moratorium.*
3. *Rent in respect of the moratorium period.*
4. *Wages and salaries under the contracts of employment.*
5. *Redundancy payments.*

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

Commented [WPA8]: 13/15

Question 3.1 [maximum 6 marks]

Commented [WPA9]: 6/6 a good answer

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?

For an administration, the following sections are applicable where companies are in administration and where companies enter a CVA.

- Section 233 of the Act

The appointment of an administrator does not automatically terminate the companies' executory contracts. The administrator will need to obtain or retain certain essential supplies. This is the supply of gas, electricity, water, and communication services. Suppliers are not permitted to require payment of outstanding debts to secure a new or continued supply to the company administration. But under S233, it permits a supplier to stipulate that the administrator must personally guarantee the payment of charges in respect of the supply.

- Section 233A

This section prohibits the termination by utility, communications, and IT suppliers.

- Section 233B

This section opens the restriction to all other suppliers (with a few exceptions). It prohibits clauses which allow the supplier of goods and services to terminate anything in relation to that contract if the company enters formal insolvency procedures. The provision of a contract is of no effect when a company is in insolvency procedures. But it also prevents suppliers from making a condition of continued supply and a supplier cannot insist on personal guarantee from the administrator. Under 233B a contract can still be terminated by supplier if the office holder consents or on court application and approval.

There are Prepacks which involve financially distressed companies entering into an agreement with a prospective administrator to sell the business of the company immediately after the administrator is appointed. This happens the same day. This allows the suppliers not to be worried and alleviates the need for funding to continue trading during the administration.

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?

Commented [WPA10]: 7/9 a generally strong answer but more clarity around the different types of preferential creditors would have been helpful and regarding floating charges, s 176A required explanation.

Order of priority payments

Main expenses that are payable in priority to creditors and paid in the following order:

- *Expenses properly incurred by the administrator.*
- *Cost of security provided by the administrator.*
- *Costs of the applicant where an order was made.*
- *Appointment costs where not appointed by the court.*
- *Amount payable in respect of statement of affairs.*
- *Disbursements by the administrator.*
- *Remuneration of persons employed by administrator.*
- *Administrator remuneration.*
- *Corporate tax.*

Preferential creditors

The preferential debts regime applies to all insolvency procedures under the act. Administrators must act in accordance and cannot alter the priority.

Once the expenses of the liquidation have been paid in full, the assets are then used to pay the preferential creditors. This is mainly employees and taxation. There are 2 types, these rank equally and are paid in equal proportion of assets if insufficient to pay them all.

- *Ordinary*
Paid before secondary.
- *Secondary*

Preferential creditors include:

- 1. Sum owed on account on employees' contribution to pension funds. Contributions deducted from earnings of the company's employees paid for the period of 4 months prior to commencement of winding up.*
- 2. Sum owed by company on account the contribution to pension scheme in person of 12 months before date.*
- 3. Remuneration owed to person who is employee of debtor and is payable in respect f 4 months prior to commencement.*
- 4. Amounts owed by company of holiday remuneration for any period of employment before winding up.*
- 5. Claims for monies advanced to pay wages/ holiday remuneration will rank as preferential.*
- 6. Levies on production of coal and steel*
- 7. Claims for so much of any amount under the reserve forces act*
- 8. Amount owed by the company in respect of an eligible deposit as does not exceed the compensation that would be payable in respect of the deposit under the financial services compensation scheme.*

9. *Amount owed by the company to one or more persons in respect of an eligible deposit as exceeds any compensation that would be payable under the Financial services compensation scheme to that person.*
10. *Amount owed by a company to persons eligible of a deposit that was made through non UK brand of a credit institution authorised by competent authority of the UK and would have been eligible deposit if had been made through a UK branch.*
11. *PAYE income tax deductions, national insurance deductions, VAT payments, construction Industry scheme deductions and student loan repayments.*

Floating charge holder

This is the next creditor that will be paid. If there is more than one, then it would be first would be first created.

Unsecured creditors

No security, normally trade creditors, they are paid last out of the creditors.

Shareholders

If there are sufficient funds to pay the creditors, then any surplus is distributed to the shareholders prorated to % ownership.

Change in priority - Moratorium under Part A1 of the Insolvency Act 1986 during the 12-week period prior to the commencement of the liquidation.

A peculiarity of the moratorium is that if the company is not rescued as a going concern but instead enters into administration or liquidation within 12 weeks of the end of the moratorium, 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 or moratorium debts such as debts owed to the employees or financial services debts are paid in the subsequent liquidation, in priority to the liquidator's fees and expenses.

Therefore, section 174S gives certain unsecured debts a super priority in a subsequent liquidation. Unsecured pre moratorium bank debt, falling into the definition of financial services will also get super priority.

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

Commented [WPA11]: 5/15

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]

The floating charge in favour of Fretus Bank plc;

The preferential debts regime applies to all insolvency procedures under the act. Once all of the expenses of the liquidation have been paid in full, the assets of the company are then used to pay preferential creditors before any payment can be made to floating charges or to unsecured creditors. Therefore, floating charges will be after the preferential creditors.

After preferential creditors have been paid, the next creditor to be paid is the floating charge holders. Before any payment can be made, the liquidator must consider the application of section 176A of the act.

Under the duty to make a prescribed part of the company's net property available for the satisfaction of unsecured debts and must not distribute any of this part to a floating charge holder except if the excess satisfies as unsecured debt. This is calculated after payment of the liquidation expenses and preferential debts have been paid.

Under section 245 of the act, it applies where the company is in liquidation and the provision is used to prevent preexisting unsecured creditors obtaining the security of

Commented [WPA12]: 3/5 a reasonable answer but the issue is s 245 and more specific detail was needed in explaining and applying it to the facts.

a floating charge shortly before a company goes into formal insolvency procedures. This is also for when the person who is in favour of the floating charge is connected with the company the relevant time is 2 years prior to the onset of the insolvency proceedings and where not connected anytime within 12 months. At the time of the creation of the floating charge where the company was either unable to pay its debts or became unable to do so due to the consequent of the transaction.

If it falls into the two types then it is rendered to be invalid. The debentures were granted within 12 months of the entity going into liquidation to assist with the repayment of the loans when the entity was aware of its inability to repay the loans.

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

Wrongful trading may be applicable and is aimed at ensuring that when directors become aware of the insolvency liquidation is in prospect, that they do everything possible to minimize the potential losses of the companies creditors. Section 214 could grant the court to discretion to declare that Rita should make a contribution to the companies assets due to this sale of assets being made to a director at a very low cost compared to the purchase price and no other offers or attempts to get more money for the creditors was attempted.

The court must be satisfied that:

- *The company has gone into insolvency*
- *That at some point prior before the commencement of the winding up of the company that person knew to have concluded that there was no reasonable prospect that the company would avoid going into liquidation procedures.*
- *That the person was the director at that time the conclusion was reached.*

Under the act section 238, it is to treat all unsecured creditors fairly and equally. And that any transactions entered into shortly before the company entered into the formal insolvency are open to attack. This is when transactions are seen to be undervalued. This transaction must have taken place at a relevant time to the commencement of the liquidation, which is in the period of two years prior to the commencement of the liquidation.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

Hard and Fast would be seen as unsecured creditors which are Trade creditors. They are normally paid out last in the statutory order. This is after the liquidation expenses, the secured creditors, and the preferential creditors.

Commented [WPA13]: 2/6 - the wrongful trading suggestion is unlikely to be realistic and the s 238 argument required a good deal more detailed explanation.

Commented [WPA14]: 0/4 s 239 cannot apply as the payment occurred after the commencement of liquidation. The issue was under s 127.

There cannot be any preferences in creditors' payments. And therefore, under section 239 of the act, it is to prevent the company which is before it enters into liquidation procedures that it cannot place one of its creditors in a better position than others. It prevents such preferences such as payment in full where the creditor could have expected only a dividend as an unsecured creditor.

This will open the option of attack of the security given to the creditor who was previously only an unsecured creditor. For the preference to have occurred, it must have occurred within the two years prior to the onset of the insolvency if it is with a connected person or within the 6 months with a person who is not connected to the company. This transaction happened 4 months in favour of a non-connected person who was approved for payment by a director potentially knew about the current circumstances.

If section 123 of the act fell due and was unable to pay its debts then it is assumed that preference was given.

There must be proof that the company influenced by the desire to put the preferred party into a position which would be better than the position that they would have been in if preference had not been given.

*** End of Assessment ***