



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3B  
THE INSOLVENCY SYSTEM OF THE UNITED KINGDOM  
(ENGLAND AND WALES)

***This is the*** summative (formal) assessment ***for*** Module 3B ***of this course and is compulsory for all candidates who*** selected this module as one of their compulsory modules from Module 3. ***Please read instruction 6.1 on the next page very carefully.***

***If you selected this module as*** one of your elective modules, ***please read instruction 6.2 on the next page very carefully.***

The mark awarded for this assessment will determine your final mark for Module 3B. ***In order to pass this module, you need to obtain a mark of 50% or more for this assessment.***

### INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. **You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
2. **All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
3. **No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
4. **You must save this document using the following format: [studentID.assessment3B]. An example would be something along the following lines: 202223-336.assessment3B. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. **Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 **If you selected Module 3B as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 6.2 **If you selected Module 3B as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not**

submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of 8 pages.

**ANSWER ALL THE QUESTIONS**

Commented [WPA1]: 44/50 = 88% a generally excellent effort

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

Commented [WPA2]: 9/10

Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Please select the most correct ending to the following statement:

The Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021 restrict pre-pack sales which constitute a substantial disposal of the company's property to connected parties where the disposal occurs . . . :

- (a) within 10 weeks of the commencement of the administration.
- (b) within 8 weeks of the commencement of the administration.**
- (c) within 4 weeks of the commencement of the administration.
- (d) on the day the company enters administration.

Question 1.2

What is the maximum length of a Moratorium under Part 1A of the Insolvency Act 1986 to which creditors can consent without any application to the court?

- (a) 40 business days.
- (b) One year and 20 business days.
- (c) One year and 40 business days.
- (d) One year.**

Question 1.3

**Which of the following is not a requirement for a company that wishes to enter into a Restructuring Plan under Part 26A of the Companies Act 2006?**

- (a) *The company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.*
- (b) *A compromise or arrangement is proposed between the company and its creditors, or any class of them, or its members, or any class of them.*
- (c) *The purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the said financial difficulties.*
- (d) *The company is, or is likely to become, unable to pay their debts, as defined under section 123 of the Insolvency Act 1986.***

Question 1.4

**In cases where the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021 apply and an independent report from an Evaluator is obtained, the independent report must be obtained by whom?**

- (a) *The administrator.*
- (b) *Any secured creditor with the benefit of a qualifying floating charge.*
- (c) *The purchaser.***
- (d) *The company's auditor.*

Question 1.5

**Which one of the following is not a debtor-in-possession procedure?**

- (a) *Administration.***
- (b) *Restructuring Plan.*

**(c) Scheme of Arrangement.**

**(d) Company Voluntary Arrangement.**

Question 1.6

**A liquidator may pay dividends to small value creditors based upon the information contained within the company's statement of affairs or accounting records. In such circumstances, a creditor is deemed to have proved for the purposes of determination and payment of a dividend where the debt is no greater than how much?**

**(a) GBP 500**

**(b) GBP 750**

**(c) GBP 1,000**

**(d) GBP 2,000**

Question 1.7

**Which one of the following is not, in itself, a separate ground for disqualification of a director under the Company Directors Disqualification Act 1986?**

**(a) Wrongful trading.**

**(b) Breach of fiduciary duty.**

**(c) Being found guilty of an indictable offence in Great Britain.**

**(d) Being found guilty of an indictable offence overseas.**

Question 1.8

**The administrator is under a general duty to provide a statement for creditors' consideration setting out proposals for achieving the purpose of administration. He or she must obtain a creditors' decision on whether or not to approve the proposals within how many weeks of the date the company entered administration?**

**(a) 6**

**(b) 8**

(c) 10

Commented [WPA3]: C is correct

(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 [WPA4]: 10/10

Question 2.1 [maximum 5 marks]

Commented [WPA5]: 5/5

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?

*Section 423 of the Insolvency Act 1986 provides that the following categories of persons may bring an action for defrauding creditors: (a) where the company is being wound up or is in administration, the official receiver, the liquidator, the administrator and/or any victim of the transaction such as a creditor (where the victim has obtained leave of court) may bring such an action; (b) where the victim is part of a Company Voluntary Administration (CVA) proceeding, the CVA's supervisor or any victim of the transaction, whether that victim is bound by the CVA or not; and (c) in any other case, the victim of the transaction.*

*Section 6 of the Company Directors Disqualification Act 1986, which concerns findings of unfitness against directors of insolvent companies, permits persons falling within s 16(4) of the CDDA to make an application for disqualification. That provision provides that: (a) the Secretary of State; (b) the official receiver; (c) the Competition and Markets Authority; (d) the liquidator; and (e) a specified regulator within the meaning of s 9E of the CDDA, may bring an application under s 6 of the CDDA.*

*Section 246ZB of the Insolvency Act 1986, which deals with the liability of directors of insolvent companies for wrongful trading prior to the company's entering into an administration, permits an administrator to make such an application.*

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.**

*The five kinds of debts which do not form part of the payment holiday 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; and (e) redundancy payments (see s A18 of Part A1 of the Insolvency Act 1986).*

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

Commented [WPA7]: 12/15

Question 3.1 [maximum 6 marks]

Commented [WPA8]: 4/6 good on ss 233 and 233A but more detail is needed on the wider provision in 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?**

*Yes, it is possible for an administrator to require suppliers of goods and services to continue to supply those goods and services during the administration. However, the scope of such supply of goods and services are prescribed under s 233 of the Insolvency Act 1986 ("IA"). In particular, the supply of goods and services relate to supply of gas, electricity, water and communication services (s 233(3) of the IA). Section 233(3A) of the IA further defines the supply of electronic communication services as including point of sale terminals, computer hardware and software, information, advice and technical assistance in connection with the use of information technology, data storage and processing, and website hosting.*

*Further, s 233(2) of the IA permits the supplier of such goods and services may require, as a condition for the continued supply, that the office-holder personally guarantees the payment of any charges in respect of the supply, except that such condition cannot relate to the payment of outstanding charges that are due and payable prior to the company entering into administration.*

*Section 233A(1)(a) also provides that, following a company's entering into of administration, the supplier cannot rely on an "insolvency-related term" in a contract of supply which would permit for the termination of the contract or the supply, alter the terms of supply, or compel higher payments. This is subject to other requirements, such as where:*

- (a) the administrator consents to the termination of the contract, the court grants permission to terminate the contract where doing so would cause the supplier hardship, or that charges in respect of supply that are incurred after the company entered administration are not paid within the period of 28 days beginning with the day on which payment is due (s 233A(4) of the IA).*
- (b) the supplier gives written notice to the administrator that the supply will be terminated unless the administrator personally guarantees the payment of any charges in respect of the continuation of the supply after the company entered administration or the voluntary arrangement took effect, and no such guarantee is given within the period of 14 days beginning with the day the notice is received (s 233A(5) of the IA).*

*Moreover, it is important to note that s 233B of the IA states that a supplier cannot insist on a personal guarantee from the administrator that the pre-insolvency arrears are paid.*

Question 3.2 [maximum 9 marks]

Commented [WPA9]: 8/9 generally very good although the initial reference to secured creditors needed to be more specific ie creditors with fixed security not secured creditors generally



**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?**

*In a liquidation, creditors are paid according to the rank of their claims as prescribed under the Insolvency Act 1986 ("IA"). It is an accepted principle that each group must be paid in full before the liquidator can start to repay the next group.*

*Turning to the first category, which is secured creditors, this class of creditors include those who have provided borrowing to the company, taking security on one or more business assets.*

*The second category would be the expenses of the liquidation. Section 115 of the IA prescribes that several expenses are given priority over the company's preferential creditors, holders of floating charges and unsecured creditors. These would include expenses incurred by the liquidator in preserving, realising or getting in any of the assets of the company including the bringing of legal proceedings, the costs of security provided, and any other administrative costs incurred in the liquidation such as statutory advertising, auctioneers' fees, valuation fees, and the liquidator's remuneration.*

*The third category would be preferential creditors of the company. Section 175(1) of the IA provides that preferential debts of the company shall be paid in priority to all other debts save the two mentioned above. It is also important to note that there are two categories of preferential debts which must be paid in order. The first is ordinary preferential debts, which rank equally amongst themselves and must be paid first (s 175(1A) of the IA), whereas secondary preferential debts which also rank equally among themselves and are paid after the ordinary preferential debts (s 175(1B) of the IA). Preferential creditors are listed under Schedule 6 of the IA, and ordinary preferential creditors include employees of the company who are owed wages or holiday pay, the first £800 of employee wage arrears, up to six weeks of unpaid holiday and pension contribution arrears and so on, whereas secondary preferential debts are stated under s 386 of the IA and include "eligible deposits" made by persons, and PAYE income tax deductions and VAT payments, to name a few.*

*After preferential creditors have been paid, the next creditor to be paid will be any floating charge holder. It is important to note that for floating charges created on or after 15 September 2003, the liquidator must first consider s 176A of the IA. That provision requires the liquidator 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 prescribed part to a floating charge holder except insofar as it is in excess of the amount required to satisfy all the unsecured debts. It is intended to help unsecured creditors to receive some form of dividend from the company's liquidation, as it is often the case that unsecured creditors receive no repayment at all. The prescribed*

part consists of 50% of the first £10,000 received from the sale of assets with a floating charge, and a further 20% between £10,000 and £800,000 of realisations. Where, however, the property has less than £10,000 in value, the liquidator may, if it thinks that making a distribution to the unsecured creditors would be disproportionate to the benefits, consider that it does not have a duty to make the distribution of the prescribed part. It is important to note, however, that a floating charge holder may not participate in the distribution of the prescribed part if it has an outstanding unsecured balance owing to it. This is because the meaning of the phrase "unsecured debts" under s 16 of the IA must be construed as being for the benefit of the unsecured creditors alone (*Thorniley v Harris* [2008] EWHC 124 (Ch) at [27]).

Finally, it is the unsecured creditors who are paid out last in the statutory order. If, despite this, there remains a sum, that sum would be paid out to the shareholders on a *pro rata* distribution based on their respective shareholdings.

If, however, the company was subject to a moratorium, and if it is not rescued as a going concern and instead enters administration or liquidation within 12 weeks of the end of the moratorium, there is a change in the priority. In particular, s 174A states that certain unpaid pre-Moratorium or Moratorium debts (ie, debts which are not part of the payment holiday, such as debts owed to employees or "financial services" debts), are paid in the subsequent liquidation in priority to even the liquidator's fees and expenses. In effect, this grants "super priority" status to some unsecured debts. Further, unsecured or secured pre-Moratorium bank debt, falling within the definition of "financial services", will also acquire such a "super priority". The exception to granting such debts a "super priority" status is where the debt is accelerated debt, that is, any pre-moratorium financial services debt which fell due by reason of the operation of, or exercise of rights under, an acceleration or early termination provision in the financial services contract.

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

Commented [WPA10]: 13/15

**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 [WPA11]: 5/5 very good

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

*There are two actions that the liquidator may potentially take with respect to the floating charge granted in favour of Fretus Bank plc ("FB"). The first is an action for the avoidance of floating charges, and the second is an action for unfair preference. I consider that only the first action may have a chance of succeeding, contingent on the fulfilment of some requirements.*

*Section 245(2) of the Insolvency Act 1986 ("IA") prescribes that a floating charge given by a company at a relevant time is invalid except to the extent that fresh consideration is provided for the charge. Further, the relevant time for assessment, where the person in whose favour the floating charge is created is not connected with the company, is*

any time within the period of 12 months prior to the onset of insolvency (s 245(3) of the IA), but only if at the time of the creation of the charge the company was either unable to pay its debts (within the meaning in section 123 of the IA) or became unable to do so in consequence of the transaction (s 245(4) of the IA).

In the present case, no fresh consideration was advanced by FB in exchange for the floating charge. Further, the floating charge was created under the relevant time. The company went into compulsory liquidation on 23 December 2022, and hence the relevant period would commence on 23 December 2021. Given that the floating charge was granted in February 2022, the floating charge thus falls within the relevant time period. That being said, it is not immediately clear from the facts whether the Company was unable to pay its debts within the meaning of s 123 of the IA. Nothing suggests that this is the case, and hence the liquidators would need to undertake the relevant investigations.

Turning to the action for unfair preference under s 239 of the IA, s 239(4) of the IA states that a company gives a preference to a person if:

- (a) the person was a creditor of the company at the time of the transaction;
- (b) the effect of the transaction was to put the creditor in a better position, in the event of the company going into insolvent liquidation, than the position he or she would have been in if that thing had not been done;
- (c) the company was influenced by a desire to prefer the creditor; and
- (d) the preference was given at the relevant time.

In respect of (a), it is undisputed that FB is an existing creditor of the company. As for (b), given that FB was originally an unsecured creditor, to grant FB a floating charge over the whole of the Company's undertaking essentially provides FB some form of security, and this would undoubtedly benefit FB by allowing it to have priority over all other unsecured creditors (save for secured creditors and preferred creditors) in the event of an insolvency, than if the floating charge was not granted.

The problem, however, is with requirements (c) and (d).

For requirement (c), it is necessary to draw a distinction between intention and desire; an intention to prefer does not amount to a desire. In *Re MC Bacon Ltd* [1990] BCC 78, the court held that where a company granted security to a bank in order to prevent the bank from withdrawing its support for continued trading, the company would not have been motivated by a desire to prefer in granting security. In the present case, it is unclear from the facts whether the Company was facing the same situation as that in *MC Bacon*. While it is true that FB had threatened the Company that it would demand repayment of its loans, it is unclear whether FB was the Company's only financing bank, or whether the Company had any other sources of financing. It is also unclear whether there would be any detrimental effect on the Company's business if FB were to withdraw its loan. Accordingly, more of such information is required before providing a complete evaluation of whether the Company was motivated by a desire to prefer in providing the floating charge.

*As for requirement (d), nothing on the facts shows that FB is a connected person to the Company. Accordingly, s 240(1)(b) of the IA prescribes the relevant time for assessing when the preference needs to have been given as at six months “ending with the onset of insolvency”; that term is then defined under s 240(3)(e) as the date of commencement of the winding up. In the present case, given that the company went into compulsory liquidation on 23 December 2022, the relevant period commences on 23 June 2022. Given that the floating charge was granted in February 2022, the floating charge thus falls beyond the relevant time period.*

Question 4.2 [maximum 6 marks]

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

*The liquidator may consider taking the following action against Rita and/or the directors.*

*The first is to consider whether the sale of the machines to Rita can be attacked as an undervalued transaction under s 238(2) of the IA. For this to be made out, it must be shown under s 238(4)(b) that the company, through its directors, entered into a transaction with Rita for a consideration which, in money or money’s worth, was, at the date of the transaction, significantly less than the value, in money or money’s worth, of the consideration provided by the company. Further, it must be shown that the transaction took place at a “relevant time”. Section 240(1)(a) of the IA states that the relevant time is in the period of two years prior to the commencement of the liquidation or administration.*

*At the present moment, there is no doubt that the transaction took place within the relevant time of two years. The fact that the machine, which was procured just a year before for £25,000, was sold by the directors for only £10,000, calls into question the proper valuation of the machine. This is because the sale price, even after accounting for depreciation, may appear to be unusually low. It is thus necessary for the liquidator to obtain evidence as to the market value of the machine in assisting it with determining whether the consideration paid by Rita was significantly less than the value of the machine.*

*The second action that the liquidators may consider, but which I submit may be unlikely to be made out in the absence of further information, is an action under s 423 of the IA for defrauding creditors. To make out this action, s 423(1) of the IA states that such a transaction may be void if it was an undervalued transaction which the company entered into with the recipient. Further, s 423(3) states that the company must be shown to have entered into the transaction for the purpose either of putting assets beyond the reach of a person who is making, or may at some time make, a claim against the company, or of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.*

**Commented [WPA12]:** 4/6 a good answer but there is more to say under the s 238 analysis eg effect of connected person, requirement for inability to pay debts, defence

*As stated above, this is likely to be an undervalued transaction, subject to further evidence. However, it is unclear whether the machine was sold in order to put it beyond the reach of creditors. Accordingly, it is necessary for the liquidators to undertake a further investigation as to the rationale for the sale.*

Question 4.3 [maximum 4 marks]

Commented [WPA13]: 4/4 very good

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

*The following actions against Rita Perkins may be considered by the liquidators of the Company. It must be noted that the payments to Hard and Fast Ltd ("H&F") were made one month prior to the winding-up order made by the court, but shortly after the creditor's winding-up petition was issued on 14th October 2022. This is therefore a case where a disposition of property was made in the course of a winding up by the court.*

*The relevant and potential action that may be taken is thus the voiding of disposition under s 127 of the IA, which seeks to avoid any disposition of property of the company made after the commencement of winding up via the filing of the petition to wind up the Company. This is of course unless the court validates the transaction. In particular, the term "disposition of property" under s 127 of the IA is interpreted broadly and includes the payment of money. In the present case, the payment of money to H&F is a conduct that falls within the relevant time period and scope of this provision.*

*The issue, however, is whether Rita may apply to the court to validate the transaction. In considering the validation of the transaction, the court will consider whether the disposition was or has been made for the benefit of the general body of unsecured creditors, and whether the payments are necessary to ensure continued supplies enabling the company to continue trading in cases where the court considers that the continuance of trading was in the best interests of creditors, and whether the net value of the company's assets are increased.*

*In the present case, we note that H&F is one of the Company's key trade creditors as it supplies marble to the Company, which presumably forms a core aspect of the Company's business. Further, the Company's board of directors have noted that this supply was seen as essential by the Company. If, therefore, it can be shown that the continued supply of marbles was essential for H&F to continue trading to generate revenue which can then be used to pay off its creditors, the court may consider validating the transaction. A crucial fact that Rita would have to show is that the profits reaped from the Company's continued operation outweigh the costs incurred to pay off H&F, in other words, the transaction is profitable, as this can go towards supporting Rita's case that the payment was made in good faith and for the benefit of the company and its creditors.*

*If Rita cannot show this, then the payment to H&F is void and the liquidators can pursue H&F for return of the money paid.*

**\* End of Assessment \***