



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]: 28/50 = 56% a good grasp of general principles but lacking in detailed explanation and application in places

Commented [WPA2]: 7/10

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.*

Commented [WPA3]: C is correct

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 [WPA4]: 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.

Commented [WPA5]: A is correct

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 [WPA6]: 8/10

Question 2.1 [maximum 5 marks]

Commented [WPA7]: 3/5 - a CVA supervisor has standing also under s 423, only the Sec of State (or the OR on the instructions of the Sec of State can bring an action under s 6) and only an administrator can bring an action under s 246ZB - a liquidator's cause of action is under s 214.

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?

[It is important to state from the outset that Section 423 of the Insolvency Act 1986 deals with transactions defrauding the Creditors. In other words section 423 seeks to protect victims of fraudulent transactions. Thus, in cases where the company is in liquidation or under administration the Liquidator, Official Receiver or Administrator may bring an action under section 423 of the Insolvency Act, 1986. Further, a victim of the transaction with leave of Court may equally bring an action under Section 423 of the Insolvency Act. The aim of the Company Directors Disqualification Act 1986 and the disqualification regime set out in the Act is to protect the public, raise the bar of behaviour of directors and to deter would be wrong doing Directors. Thus, section 6 of the Company Directors Disqualification Act 1986 is silent on who can bring an action however, section 9A of the CDDA provides that the application may be made by the OFT or by a specified regulator. Since the Court can only make a disqualification order whenever the requirements of Sections 6 and 9A of the CDDA are met it therefore follows that the OFT or a specified regulator who can bring the action under section 6 of the CDDA. Furthermore the Liquidator or Administrator has statutory duty to bring an action under section 6 of the CDDA. In terms of Section 246ZB of the Insolvency Act, 1986, it is the Liquidator or a third party assigned by the Liquidator who can bring an action under the said section]

Question 2.2 [maximum 5 marks]

Commented [WPA8]: 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 moratorium offers payment holiday to a company in order rescue the company as a going concern. To every general there is an exception therefore, the following debts do not form part of the payment holiday under Part A1 of the Insolvency Act, 1986;

1. Debt for goods and services supplied during the period of the moratorium
2. Debt for wages or salaries under the contract of employment
3. Rent payable during the moratorium
4. The remuneration or expenses for the Monitor
5. Redundancy payments]

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

Commented [WPA9]: 8/15

Question 3.1 [maximum 6 marks]

Commented [WPA10]: 2/6 there is more to be said about the provisions ie ss 233A and especially the more general 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?

[The purpose of administration is to try to rescue the company from going into liquidation. Therefore, the main role of the Administrator is to take control of the company assets and to manage the affairs of the company with the view of turning around the fortunes of the company so that it remains a going concern. In view of the

preceding, the Administrator may require suppliers of goods and services to continue supplying the goods and services during the period of administration especially essentials goods and services. Thus, Section 233 of the Insolvency Act 1986 lists gas, electricity, water has some of the essential services the Administrator may often require during the period of 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?

[The order of priority of payments in liquidation is a matter of statutory law hence, section 115 of the Insolvency Act, 1986 gives priority to the following expenses over the preferential creditors, holders of floating charges and the unsecured creditors,

1. Expenses properly incurred by the Liquidator in preserving, realizing or obtaining in any of the assets of the company including legal costs.
2. Cost of any security provided by the liquidator
3. Payment due to a person to assist in the preparation of a statement of affairs or accounts of the company
4. The remuneration of any person who has been employed by the liquidator to render any services for the company
5. Any necessary disbursements by the Liquidator in the course of the winding up

It is important to note that once the preceding expenses are paid in full, the assets of the company in liquidation are channeled towards payments of preferential debts. The class of preferential creditors is largely made of limited claims of employees and taxation liabilities. It is worthy of note that Schedule 6 of the Insolvency Act is prescriptive of the preferential debts. Thus, preferential creditors have the right to be paid immediately expenses provided for under section 115 are paid. The holders of floating charges follow below the preferential creditors in as far as priority of payment is concerned. It is important to note that there may be more than one floating charge holder, in that case priority among or between them is in order of the dates on which the floating charges were created. After the floating charge holders are paid, the unsecured creditors who are often creditors without security have priority to receive payments provided the expenses of the liquidation have been paid and distribution is done to secured and preferential creditors. Last on the ladder of priority are the Shareholders and their payment is dependent on whether there are sufficient funds to pay all the creditors. Thus, the shareholders are paid from the surplus after priority payments have been made to all the creditors and payments to the shareholders if any is made according to the company constitution.

The preceding priority of payment may change if the company had been a subject of a moratorium under Part A1 of the Act during the 12 week period prior to commencement of the liquidation. Thus, section 174A of the Insolvency Act, 1986 enacts that certain unpaid pre moratorium or moratorium debts such as debts owed

Commented [WPA11]: 6/9 a good answer but more detail was needed on eg fixed security, classes of preferential debts, s 176A prescribed part

to the workers of financial services debts are paid in succeeding liquidation, in priority to the Liquidator's fees and expenses. In other words, Section 174A affords certain unsecured debts a form of priority in a subsequent liquidation.]

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

Commented [WPA12]: 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]

Commented [WPA13]: 2/5 the fact of commercial pressure from the bank would negate any suggestion of desire by the company under s 239. A stronger argument would be s 245.

The floating charge in favour of Fretus Bank plc;

[The Court has jurisdiction on the application of the Liquidator or Administrator to set aside or avoid any transaction executed by the company that places one of the creditors in a better position than other creditors. It is very clear from the Excerpts of the question that the debenture in favour of Fretus Bank Plc which contained a floating charge over the whole of the company's undertaking prior to the compulsory liquidation was clearly meant to place the Bank in a better position than other creditors. Therefore, in terms of section 239 of the Insolvency Act, 1986 the Liquidator

can apply to set aside the floating charge on the ground it was executed for purposes of placing Fretus Bank in a better position than other creditors]

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

[An analysis of the excerpt of the question reveals that the Marble cutting machines were bought at GBP 25,000.00 and sold to Rita Perkins a Director at GBP 10,000.00. The marble cutting machines were sold to Rita Perkins at an undervalue price and it was sold during the time the company was having cash flow problems and prior to the company going into liquidation. Thus, section 238 of the Insolvency Act, 1986 allows the Liquidator or Administrator to attack a transaction which was entered prior to the company going into liquidation as the case with the question at hand. The Liquidator is enjoined by section 238 to show that the transaction was for a consideration significantly below the actual value of the property. The sale of the marble cutting machines to Rita Perkins at GBP10, 000.00 was significantly below the actual value of the machines even if depreciation was to be factored in. Therefore, the transaction can be attacked especially that it took place two years prior to the commencement of the liquidation and it was made at the time the company has cash flow challenges.]

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

[It is clear from the facts of the question that Hard and Fast Limited was paid a month before the winding up order was made and a payment of GBP 8,000.00 was authorized to cover existing liabilities. The preceding narrative clearly shows that the company placed Hard and fast Limited in a better position than other creditors a month before the winding up was made. Therefore, the transaction can be attacked under section 239 of the Insolvency Act, 1986.]

* End of Assessment *

Commented [WPA14]: 3/6 a reasonable attempt but the requisites of s 238 are not fully explained / applied especially around the need for insolvency and the presumption against a connected person.

Commented [WPA15]: 0/4 as the payment was made after the commencement of the winding up (the date of the petition) the payment is not subject to s 239 but would be capable of attack under s 127.