



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]: 45/50 = 90% a very good effort showing good understanding and application

Commented [WPA2]: 9/10

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**
- (c) 10
- (d) 12

Commented [WPA3]: C is correct

Question 1.9

Which of the following statements is incorrect?

- (a) An insolvency officeholder from an EU Member State will be automatically recognised by the courts in the UK whether the officeholder was appointed before or after Brexit.
- (b) An insolvency officeholder from an EU Member State is automatically recognised by the courts in the UK if appointed before Brexit.
- (c) An insolvency officeholder from an EU Member State appointed after Brexit may apply to a UK court for recognition under the Cross Border Insolvency Regulations.
- (d) An insolvency officeholder from an EU Member State cannot apply to a UK court for recognition under section 426 of the Insolvency Act 1986.

Question 1.10

Under section 216 of the Insolvency Act 1986, a director of a company which has been wound up insolvent may not, unless an exception applies, be a director of a company that is known by a prohibited name for what period of time?

- (a) 6 months.
- (b) 12 months.
- (c) 2 years.
- (d) 5 years.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 5 marks]

**Who may bring an action under: (i) section 423 of the Insolvency Act 1986; (ii) section 6 of the Company Directors Disqualification Act 1986; and (iii) section 246ZB of the Insolvency Act 1986?**

- (i) the liquidator, the official receiver or the victim of the transaction such as a creditor.
- (ii) the secretary of state, the official receiver, the Competition and Markets authority, the liquidator or a specified regulator within the meaning of s 9E CDDA

Commented [WPA4]: 8/10

Commented [WPA5]: 3/5 - the answer to i) is not complete - CVA supervisor or administrator - the answer to ii) contains s 9A actions for unfitness based on competition law breaches which are not covered by s 6 so the list in the answer contains incorrect parties as the question is limited to s 6.

(iii) An administrator

Question 2.2 [maximum 5 marks]

Commented [WPA6]: 5/5

**List any five (5) of the debts which do not form part of the payment holiday under Part A1 of the Insolvency Act 1986 when a company is subject to a Moratorium.**

- (a) the monitor's remuneration or expenses;
- (b) goods or services supplied during the Moratorium;
- (c) rent in respect of a period during the Moratorium;
- (d) wages or salary arising under a contract of employment; and
- (e) redundancy payments

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

Commented [WPA7]: 13/15

Question 3.1 [maximum 6 marks]

Commented [WPA8]: 4/6 - good on ss 233 and 233A but needed to consider s 233B also.

**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, an administrator can. The relevant section is s 233 of the IA. This section prohibits the suppliers of certain goods and services from requiring payment of outstanding debt in order to secure new or continued supply to the company in administration. The goods and services covered by this section are gas, electricity, water and communications services. Communications services include point of sale terminals, computer hardware and software, information, advice, and technical assistance, data storage and processing and website hosting. The administrator should be aware, however, that the suppliers are entitled under s 233(2) to stipulate that the administrator personally guarantee payment of charges in respect of the supply.*

*If the company's contract with the supplier contains a term which stipulates that supply is to be terminated upon insolvency, or that higher payments are required to continue supply, s 233A prevents a supplier from relying on such a term.*

Question 3.2 [maximum 9 marks]

Commented [WPA9]: 9/9 a very good answer

**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 liquidation, the group of creditors given first priority are secured creditors. These are creditors who have secured their debt against specific assets of the company. They are able to recover their debt by realising their security.*

*Next, a number of expenses will be covered by the insolvency estate. Section 115 of the IA provides that the following expenses are to be paid in priority over claims by preferential creditors, holders of floating charges, and unsecured creditors. These expenses are: (a) the expenses of the liquidator incurred in preserving, realising or getting in any of the assets of the company (including the conduct of any legal proceedings); (b) the costs of any security provided by the liquidator; (c) any amount payable to a person to assist in the preparation of a statement of affairs or accounts; (d) any necessary disbursements by the liquidator in the course of winding up; (e) the remuneration of any person employed by the liquidator to perform services for the company.*

*After this, the claims of preferential creditors will be paid (s 175 IA). Preferential creditors are those persons listed in Schedule 6 of the IA, such as employees of the company (with claims limited to an extent) and the tax authorities. Within this category of payments, there are payments of ordinary preferential debts and payments of secondary preferential debts. Ordinary preferential debts are given priority. The list of preferential debts can be found in Schedule 6, and the secondary preferential debts are specified in s 386 IA.*

*Following this, holders of floating charges are paid. If there are multiple holders of floating charges, they are paid in order of which charge was created first. Before payment can be made, however, the liquidator must set aside a prescribed part of the company's net property for unsecured creditors (s 176A). This applies if the floating charge was created after 15 September 2003. "Net property" here refers to the property available for distribution to floating charge holders. The "prescribed part" depends on the size of the company's net property. If the net property is equal to or less than GBP 10,000, the prescribed part is 50%. In such cases, however, the liquidator need not set aside the prescribed part if it thinks that making a distribution to unsecured creditors would be disproportionate to the benefits. Where the company's net property is higher than GBP 10,000, the prescribed part is 50% of the first GBP 10,000 plus 20% of any sums in excess of GBP 10,000. The maximum value of the prescribed part is GBP 800,000. It should also be noted that the prescribed part is only available to unsecured creditors - it cannot be used to pay secured creditors or holders of floating charges whose debts have not been fully satisfied by their security: *Thorniley v Harris* [2008] EWHC 124 (Ch).*

*Finally, the unsecured creditors will be paid out of whatever remains of the company's assets. As mentioned, the unsecured creditors can be paid out of the "prescribed part". At this juncture, secured creditors and holders of floating charges whose claims exceed what they were able to recover through security will also be paid.*

*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 priorities above would be slightly different. Instead of the liquidator's expenses being given first priority, certain debts owed pre-Moratorium that were not part of the payment holiday will be given first priority (after secured creditors) (s 174A). For example, this would include employee's wages which were not paid for months prior to the beginning of the moratorium.*

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

Commented [WPA10]: 15/15

***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;***

***Section 245 of the IA allows a liquidator to avoid a floating charge under circumstances. The aim of this section is to prevent unsecured creditors (like Fretus Bank) from gaining security shortly before the debtor enters insolvency proceedings.***

*Section 245 provides that a floating charge given by a company during a prescribed period is invalid except to the extent of the value of fresh consideration provided for the charge, the value of the reduction in debt and the interest payable on such amounts. Where the creditor is not connected to the debtor company and (a) the debtor is unable to pay its debts within the meaning of s 123 IA at the time of granting the charge; or (b) the debtor becomes unable to pay its debts as a consequence of granting the charge, the prescribed period referred to is 12 months prior to the onset of insolvency (s 245(3) and 245(4) IA).*

*In this case, no fresh consideration was given for the floating charge, nor was the Company's debt to Fretus Bank reduced at all. Thus, if the floating charge was given during the relevant time, it will be completely invalid. The onset of insolvency for the Company was 23 December 2022, when it went into compulsory liquidation (s 245(5)(d)). 12 months prior to this would have been 23 December 2021. However, what is not clear from the given facts is when the Company became unable to pay its debts for the purposes of s 123 IA. For the liquidators to have a claim in respect of the floating charge, the Company must have either been unable to pay its debts in February 2022, or must have been made unable to pay its debts as a result of the transaction which created the floating charge. Thus, further information is required to determine whether the liquidators can take action in relation to the floating charge under s 245 IA.*

**Question 4.2** [maximum 6 marks]

Commented [WPA12]: 6/6 very good

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

*Section 238 of the IA allows liquidators to challenge transactions made prior to insolvency that were at an undervalue.*

*To successfully challenge the sale of the marble cutting machines, the liquidator must be able to show that the sale was made at an undervalue and that it took place within the relevant time prescribed by the IA. The IA (s 238(4)) defines a transaction at an undervalue as one in which: (a) a gift is made by a company to a person, or the company enters a transaction in return for no consideration; or (b) the company enters a transaction in return for consideration which, in money's worth, is significantly less than the money's worth of the consideration provided by the company. Here, the marble cutting machines were sold for GBP 10,000 (i.e., there was consideration given). The question is therefore whether the value of the marble cutting machines was significantly more than GBP10,000 at the time they were sold to Rita Perkins. The only available information that is relevant to determining the value of the machines is the fact that they were purchased for GBP 25,000 the year before. On its face, this could suggest that the machines were indeed sold to Rita Perkins for a significant undervalue. However, it must be noted that the fact that the machines were purchased the year before for GBP 25,000 is not definitive of their money's worth when they were sold to Rita Perkins. It could be the case that the demand for second-hand marble*

cutting machines is significantly less than brand new machines, and that their value is accordingly much less. If so, it may not be true that GBP 10,000 is significantly less than their moneys worth. Thus, the liquidators will need to obtain more information on the market value of two second-hand marble cutting machines at the time they were sold to Rita Perkins. They will have a claim if this market value significantly exceeds GBP 10,000.

The next question is whether the transaction took place during the relevant time. Where a company enters a transaction with a person connected with the company, the relevant time is two years prior to the onset of insolvency (s 240(1)(a)). Rita Perkins is a director and is therefore connected to the Company. The sale of the cutting machines undoubtedly falls within the relevant period of two years prior to December 2022. That said, s 240 provides that for the time of the sale to constitute a relevant time, the Company must have been unable to pay its debts at the time or the Company must have been made unable to pay its debts as a result of the sale. There is no evidence here that the latter is true. As for the former, it is true that the Company was suffering "cash flow problems" when the sale was made. That said, more information is required to determine whether these cash flow problems constituted an inability of the company to pay its debts under s 123. Fortunately for the liquidators, however, they will not need to prove this (s 240(2)). It will be presumed, until the contrary is shown, that the Company was unable to pay its debts since the transaction was entered into with Rita Perkins, who is connected with the company.

Finally, the liquidators should note that there will be a defence to their claim if the sale was entered into in good faith and for the purpose of the Company carrying out its business, and if at the time there were reasonable grounds to believe that the sale would benefit the Company. On the facts given, there is nothing to suggest that this was the case.

Question 4.3 [maximum 4 marks]

Commented [WPA13]: 4/4 very good again

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

The first point to make is that the payments to Hard and Fast Ltd ("HF") were made on 23 November 2022. This is after the creditor's winding up petition was filed on 14 October 2022, but before the Company went into compulsory liquidation on 23 December 2022.

Section 127 of the IA provides that a disposition of property made after the filing of a winding up petition is void, unless the court orders otherwise. The payments to HF constitute a disposition of Company property. They were not made pursuant to an order of court. Accordingly, they are void and the liquidators can recover them.

Of course, it is possible for Rita Perkins or HF to apply to court for an order validating the payments. When hearing such an application, the court will exercise its discretion to determine whether the payments to HF were made for the benefit of the general

*body of unsecured creditors. In this case, it could be argued that this was true since the payments made to HF were necessary to secure the continued business of the Company, which could have ultimately increased the pool of assets available to unsecured creditors in the liquidation. Essentially, the court will consider whether the payments to HF were made in good faith, in the ordinary course of business, and for the benefit of the Company. The key point in this regard will be whether the continued business of the Company was profitable. If it was, then its certainly possible for Rita to argue that the payments should be validated as they benefited the unsecured creditors as a whole.*

**\* End of Assessment \***