



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]: 39/50 = 78% a very good effort

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

Commented [WPA2]: 10/10

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

(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 [WPA3]: 9/10

Question 2.1 [maximum 5 marks]

Commented [WPA4]: 4/5 - there is no answer to ii) the answer is the Sec of State or the OR on the instructions of the Sec of State

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) Under section 423 of the Insolvency Act 1986, the following may bring an action:

- *Where the company is being wound up or is in administration: the official receiver, the liquidator, the administrator and any victim of the transaction such as a creditor.*
- *Where a victim is bound by a CVA: The supervisor of the CVA or any other victim.*
- *In any other case, the victim of the transaction.*

(ii) According to the section 6 of the CDDA, the court shall make a disqualification order against a person if the requirements are met.

(iii) The court, on the application of the administrator, according to section 246ZB of the Insolvency Act 1986 (1).]

Question 2.2 [maximum 5 marks]

Commented [WPA5]: 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.

[According to Part A1 of the Insolvency Act 1986, Chapter 4, A18:

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

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

Commented [WPA6]: 12/15

Question 3.1 [maximum 6 marks]

Commented [WPA7]: 5/6 a good answer but a little more detail would have been helpful eg on the differences between s 233/ 233A and 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, under section 233 of the Act, the administrator is provided with the power to require suppliers to continue supplying goods or services to the company in administration on existing terms, subject to certain conditions. This provision is known as the "essential supplies" provision.

Suppliers are also prohibited from demanding payment of existing debts as a condition for providing goods or services to a company in administration. However, under section 233 of the Act, a supplier is allowed to require the administrator to personally guarantee payment for the supplies provided during the administration period.

Section 233A prevents suppliers from using "insolvency-related terms" to terminate the supply or demand higher payments. The 2020 Act introduced section 233B, which prohibits clauses allowing suppliers to terminate contracts due to insolvency.

However, there are exceptions. A supplier can still terminate the contract with the consent of the company or the insolvency office holder. Alternatively, the supplier can apply to the court for permission to terminate if the continuation of the contract would cause hardship to the supplier, and the court is satisfied with the reasons for termination.

So, in conclusion, the Act provides various tools to protect the business to be left without providers due to the insolvency procedure.]

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?

[In the context of a liquidation, the first expenses to be paid are those relating, mostly, to the liquidation itself:

- (a) expenses that are properly incurred by the liquidator in preserving, realising or getting in any of the assets of the company (including the conduct of any legal proceedings);*
- (b) the cost 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 the winding up (including, for example, any expenses incurred by members of the liquidation committee);*
- (e) the remuneration of any person who has been employed by the liquidator to perform any services for the company;*
- (f) the remuneration of the liquidator (which is subject to effectively the same rules as those which apply to administrators, specifically including the fees estimate regime where a time cost basis for the liquidator's fees is adopted);*
- (g) the amount of any corporation tax on chargeable gains accruing on the realisation of any asset of the company; and*
- (h) any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up.*

Once these payments are met, the assets of the company would be used to pay the preferential creditors. These creditors are divided in Ordinary preferential and secondary preferential. The ordinary debts are paid before secondary preferential debts. The schedule 6 of the Act defines which are the preferential creditors (including points 9, 10 and 11 which are secondary preferential creditors).

Commented [WPA8]: 7/9 a good answer - perhaps more detail in places would have helped eg fixed charge secured creditors? Detail on preferential creditors? Section 176A prescribed part deduction?

Once preferential creditors have been settled, the subsequent creditor in line to receive payment is any floating charge holder. It is possible for multiple floating charge holders to exist, and in such cases, their priority is typically determined by the chronological order of the creation of their floating charges. The floating charge holder with the earliest creation date will have priority over those with later creation dates.

Lastly, unsecured creditors will be paid if there are remaining assets. If there is enough to pay even unsecured creditors (including interests), the shareholders shall receive whatever is remaining.

In regard of what would happen during a Moratorium, if a company does not successfully continue as a going concern and instead enters administration or liquidation within 12 weeks after the Moratorium ends, the order of debt priority in that subsequent administration or liquidation may differ from the pre-Moratorium period.

Section 174A of the Insolvency Act 1986 establishes that certain unpaid debts incurred before or during the Moratorium, excluding those covered by the payment holiday, such as employee debts or "financial services" debts, are given priority over even the liquidator's fees and expenses in the subsequent liquidation. This provision grants a form of "super priority" to certain unsecured debts in the liquidation process.

For instance, if a director has unpaid wages for months preceding the Moratorium, and the Moratorium does not result in a successful rescue attempt, the director's pre-Moratorium unsecured debt will acquire "super priority" in the liquidation. Similarly, pre-Moratorium bank debts (secured or unsecured) falling under the definition of "financial services" will also acquire this "super priority." However, there is an exception to prevent liabilities from acquiring this "super priority" if they are accelerated debts, meaning debts that became due to the operation 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 [WPA9]: 8/15

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;

[As stated in Section 245 of the Act, under UK insolvency law, if a floating charge is created within a certain time before the commencement of winding up, it may be susceptible to challenge as a voidable preference or as an invalid floating charge. If there is a connection between the person in whose favor the floating charge is created, the relevant time would be two years prior to the procedure. If there is not any connection between the parties, the relevant time would be 12 months and only if at that time was either unable to pay its debts or became unable to do so in consequence of the transaction. Although the given facts do not explicitly specify that this transaction resulted in insolvency, it is mentioned that the transaction was conducted under pressure from the bank. Consequently, the liquidator may take action to challenge the validity of the floating charge.]

Question 4.2 [maximum 6 marks]

The sale of the marble cutting machines; and

[The given facts raise concerns about a potential undervalued transaction, as the machines were sold for GBP 10,000 despite being purchased a year earlier at a price twice that amount. Under section 238, the may attack this type of transactions: (...) "(3) entered into a transaction with another person 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."

Commented [WPA10]: 3/5 quite good but there is more to say about s 245 eg the possibility of a fresh advance

Commented [WPA11]: 5/6 again a good answer - some consideration of possible defences would be helpful

The transaction must have taken place 2 years prior the commencement of the liquidation, which it does in this given case.

For liability under section 238, two conditions must be met when the transaction took place: either the company was already unable to pay its debts as they became due, or it became unable to pay its debts as a direct result of the transaction, as defined in section 123. However, when it comes to a transaction with a connected person, there is a presumption that the company was insolvent at the time of the transaction or became insolvent because of it, unless evidence is provided to the contrary. Again, in this particular facts there is no clarity among the "connected" status, but, for the purpose of the three questions, we will assume it's not.

If action succeeds, the result will be that the court would restore the position as if that given transaction never took place.]

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

[Section 239 of the Act gives the liquidator the action to avoid "Preferences" in payments prior the commencement of the liquidation. It's being clear that the company paid Hard and Fast Ltd in preference before the other unsecured creditors and, this company abused their position by being a supplier.

In order to succeed on an application under section 239 must show that:

(a) the person whom it is alleged has been preferred was, at the time of the transaction, a creditor of the company (or a surety or guarantor for any of the company's debts or liabilities);

In this case it's clear that the company was a creditor and that they artificially accelerated their credit.

(b) something was done, or suffered to be done, by the company which had the effect of putting that person 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 (that is, that the person has been preferred);

By being paid all the debt before entering the procedure, their position was clearly upgraded. Also, Hard and Fast Ltd took advantage from the tough position the company was that needed to keep their suppliers.

(c) the company was, in giving the preference, influenced by a desire to produce the effect referred to in (b) above (the desire to prefer) in relation to the person preferred;

Commented [WPA12]: 0/4 unfortunately the wrong issue is identified. It cannot be s 239 as the transaction took place after the commencement of the WU. Only s 127 can apply to the payment.

There is no doubt that the pressure of losing an important provider had a direct influence upon the decision of giving the preference. So, by paying all of the debts, they kept the provider and make sure that, in comparison with the position they would have in a normal liquidation procedure, they would certainly be paid. Although it's hard to prove this desire, given the fact that they were basically forced to give a better position to their creditors, the intention behind the operation is certainly clear.

This particular issue may be a reason not to grant the recognition of a "Preference" because, as it has being called in prior cases, because of the need to have this supplier (which may be essential to avoid, at that time, immediate liquidation) there can't be a desire to upgrade a position but simply the continuity of the company.

(d) the preference was given at a relevant time.

Taking into account that the operation was made a month prior the commencement of the liquidation, it's very clear that it was done in a relevant time.]

*** End of Assessment ***