



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]: 35/50 = 70% some good answers

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]

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?

Commented [WPA3]: 9/10

Commented [WPA4]: 4/5 in ii) it is either the Sec of State or the OR on the instructions of the Sec of State. In iii) only an administrator has standing and the section applies to wrongful not fraudulent trading.

The Insolvency Act 1986, Section 423, establishes that any liquidator, administrator, official receiver or any victim **may bring an action to defraud creditors, where a victim is bound by a CVA, the supervisor of the CVA, can also bring the mentioned action;**

Section 6 of Company Director Disqualification Act 1986, on the other hand, can be brought by the court or the Secretary of State. **This action takes place when the director of insolvent companies on the hypothesis of section 6 (1) (a) and (b): “(a)that he is or has been a director of a company which has at any time become insolvent (whether while he was a director or subsequently), and (b)that his conduct as a director of that company (either taken alone or taken together with his conduct as a director of any other company or companies) makes him unfit to be concerned in the management of a company”.**

Lastly, Section 246ZB of insolvency act 1986, which deals with Fraudulent Trading, can be filled by the Liquidator or Administrator **who brings it for the benefit of all creditors and not merely for the benefit of the actual victims themselves.**

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.

It is important to highlight that the moratorium provides stay to actions only with respect to debts incurred prior to the moratorium and the company must be able to pay its debts as they fall due during the moratorium.

In this sense, debts incurred during the moratorium period are not covered by the payment holiday. Other debts are not part on “payment holiday” form, which are: financial creditors, the company must keep its payments and fulfill its obligations under these contracts; Employee wages and salary; Rents due to the creditor’s landlord for the use during the Moratorium; Redundancy payments; Goods or Services supplied during this period.

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

Commented [WPA6]: 10/15

Question 3.1 [maximum 6 marks]

Commented [WPA7]: 3/6 a somewhat limited answer - more detail on ss 233, 233A and 233B was needed.

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?

According to what is provided in section 233 of Act 1986, the administrator can require the continuation of the contract.

It is important to bring the terms of the article 233B, added by Act 2020, which has expanded protections for insolvent company. This section prevents suppliers from

terminating a supply contract and also prevent suppliers from making different condition from those initially agreed upon due to the company's insolvency. The request can happen due to achieve the administrator goals on the proceeding (rescue the company from financial distress, for example). The suppliers, however, are not obligated to continue providing goods or services unless the established conditions are met.

Question 3.2 [maximum 9 marks]

Commented [WPAB]: 7/9 - a good answer but lacking detail in places eg preferential creditors / s 176A prescribed part deduction

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 there is an order of priority of payments to be respected:

- 1. Fixed Charges will be paid first usually outside of any formal insolvency - This type of credit has a specific form of security interest or collateral over certain assets, restricting the free negotiation of this asset by the debtor.*
- 2. Expenses of the procedure - including the remuneration of the officeholder - This credit consists of the expense incurred in the course of the liquidation process.*
- 3. Preferential Creditors - This classification includes unpaid employee wages, unpaid pension contributions and certain statutory redundancy payments. Those credits are subjected to statutory limits.*
- 4. Floating Charge Holders -*
- 5. Unsecured creditors*

Important to say that the Moratorium under Part A1 of the Insolvency Act is a standalone procedure, where the directors remains in control of the company under supervision of a monitor. Also is required to the company to be able to pay debts as they fall due during this proceeding, the stay affects only debts incurred prior to its initiation.

In a Moratorium proceeding, the company has a payment holiday, imposing restrictions on the enforcement or payments which are prior to the Moratorium start date.

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 beginning of the liquidation - which brings an end to the moratorium proceeding, the priority of payments can be modified.

Section 174A granted that some debts incurred during the period of Moratorium would be considered a priority expenses to even the liquidator's fees and expenses,

and other holiday payments. Also, some unsecured debts can obtain a “super priority”, such as pre-moratorium bank debt namely “financial services”.

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

Commented [WPA9]: 6/15

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 [WPA10]: 2/5 although the issue is correctly identified there is a lack of detailed explanation and application of s 245’s provisions to the facts.

The floating charge in favour of Fretus Bank plc;

Prima facie it is important to notice that the debenture was granted in February of 2022, within 12 months prior to the winding up request by the creditor, making this operation vulnerable to being invalid if verified any intentions of defraud (section 245 of the Act). In other words, if the floating charge was stipulated in order to guarantee the bank’s preference over other credits, since in its scenario, any holder of floating charges has priority over the company’s preferential creditors, it can be invalidated. (Section 115 of the Act).

By the time the floating charge was created, the company was already struggling with its accountability, since it was made in order to prevent the Bank from demanding repayment of the company's loans.

In this case, the liquidator must analyze if the transaction fall due the exemptions provided in the Section 245 (2) "a" to "c".

*On the other hand the transaction carried out between the company and the bank may be invalidated by the liquidator if it represents a prejudiced to creditors with a breach the principle of *pari passu* distribution.*

For example, in MC Bacon, the liquidator considered that the granting of a debenture in favour of a bank was a preference, bus Millet J, on the other hand, considered that the company was entirely dependent upon bank support to continuous its activity.

That being said, the liquidator may challenge the floating charge on the grounds of fraud if the desire of giving preference to the Bank is demonstrated.

Question 4.2 [maximum 6 marks]

Commented [WPA11]: 3/6 again although s 238 is identified as the issue, there is a lack of detail as to how it operates.

The sale of the marble cutting machines; and

As reported in the text, the marble-cutting machines were sold to Rita Perkins, a director of the company, for less than the amount paid by the company a year earlier. This fact should be carefully considered and analyzed by the liquidator, since the operation may represent a significant reduction in the market value of the asset, as an intention to defraud creditors (Section 238 of the Act).

As a rule, company directors must comply with their obligations to act in the best interests of the company, reducing the damage that may be caused to the business, creditors and shareholders, especially at a time of financial stress.

The liquidator may take an action to strike out the transactions at undervalued price, considering, as said before, that the company was already struggling with its accountability, according to section 238 and 241 of the Insolvency Act.

Section 240 (2) also establishes that the inability to pay its obligations is presumed when the transaction performed is between persons directly linked to the company, as is the case of director Rita.

It can also be said that there is a possible conflict of interest in the acquisition of the assets by the director.

On the basis of all the information presented here, the liquidator may bring an action, in the form of the section 241 (d) of the Act, to recover the full value of the machines sold.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

As can be seen, the Hard and Fast LTD 's request for payment of the outstanding amounts together with an accrual was accepted by Marbley Q Limited, notably with the authorization of the director Rita Perkins, a few months before the winding up order.

The request was accepted at a time when the company would already be going through a financial crisis.

In this scenario, the liquidator has the urgency of investigate if the transaction was, indeed, beneficial to the company, since the supply was essential for the continuity of the activity or was a preference towards Hard an Fast LTD, in accordance with section 239 of the Act.

It is also to be said that all the transactions herein described must attend to the anti deprivation rule, which operates to prevent an insolvent estate from being deprived of an asset which would be available for the benefit of creditors.

* End of Assessment *

Commented [WPA12]: 1/4 - the anti-deprivation point might be capable of being argued but s 239 cannot apply as the transaction occurred after the commencement of the winding up. Section 127 was the issue here.