



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]: 40/50 = 80% a very good effort

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

Commented [WPA2]: 7/10

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.

Commented [WPA3]: B is correct

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 [WPA4]: 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.

Commented [WPA5]: D is correct

QUESTION 2 (direct questions) [10 marks]

Commented [WPA6]: 8/10

Question 2.1 [maximum 5 marks]

Commented [WPA7]: 3/5 the answers are broadly correct but not entirely accurate eg what if there is no insolvency proceeding under s 423? The OR on the instructions of the SoS can also bring an action under s 6. Only an administrator can bring an action under s 246ZB which is not quite what the answer says.

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?

Under section 243 of the Insolvency Act 1986 (the Act), where a Company is being wound up or is in administration, either the official receiver, the liquidator or the administrator can bring an action with leave of the Court as well as the victim of any fraudulent transaction. If the victim of the transaction is bound by a CVA then the supervisor of the CVA can also bring such an action.

Section 6 of the Company Director Disqualification Act 1986 gives the Secretary of State the ability to bring legal proceedings against a director where they consider the Court will be satisfied that the person concerned was a director of an insolvent company and their conduct makes them a 'person unfit to be concerned in the management of a company'.

Actions for wrongful trading were previously only available in respect of companies which were in liquidation but the Small Business Enterprise and Employment Act, 2015 introduced the concept to administrations and an action can be commenced by the liquidator in respect of an insolvent liquidation or an insolvent administration.

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.

- (1) The monitor's remuneration and expenses;
- (2) Goods or services supplied during the moratorium;
- (3) Rent accruing during the moratorium period;
- (4) Wages or salary under any contract of employment accruing during moratorium; and
- (5) Redundancy payments.

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

Commented [WPA9]: 14/15

Question 3.1 [maximum 6 marks]

Commented [WPA10]: 5/6 a good answer but a little more detail on s 233B might have been helpful

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?

Although suppliers of services may ordinarily be able to rely on certain standard 'insolvency' contractual terms to cease the supply of services to a company in an insolvency process, s.233 of the Act seeks to ensure that, an administrator intending to operate the business of a company, who requires access to essential goods and services, can avail of access to gas, electricity, water and communication services (this is interpreted broadly and can extend to internet and technological services required by the administrator to operate the business). Suppliers of these services cannot insist on payment of outstanding debts as a condition of supplying services to a company in administration. However, suppliers can require an administrator to personally guarantee the costs of such services. Section 233B of the 2020 Act now puts this on a statutory footing and prohibits clauses which would allow the supplier of essential services to terminate the contract where a company has entered a formal insolvency procedure. It also prevents the supplier from insisting on payment of the arrears or making changes to the contract (such as increasing prices etc).

Question 3.2 [maximum 9 marks]

Commented [WPA11]: 9/9 very good

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?

When a company enters liquidation, the liquidator will try to ascertain all of the assets of the company. However, he will have no right to deal with assets which have been secured by way of fixed charge or other assets which are otherwise assigned or pledged (e.g. assets which are subject to retention of title clauses or hire purchase agreements).

Once fixed charge holders have realised their security, the order of priority of payment to creditors is generally as follows:

- (1) Expenses of the relevant insolvency process;
 - (2) Payments to certain unsecured creditors whose claims are given a special statutory priority (known as preferential creditors – see below);
 - (3) Claims of creditors who hold security that, when it was created, was floating charge security;
 - (4) Unsecured creditors; and
 - (5) Shareholders.
- (1) Section 115 of the Act confirms that certain liquidation expenses will have priority over other classes of creditors including a company's preferential creditors, holders of floating charges and unsecured creditors. These priority expenses include the following and are payable in this order:
- Expenses properly incurred by liquidator in the course of the liquidation;
 - Costs of any security provided by liquidator;
 - Amounts payable in connection with preparation of statement of affairs or accounts;
 - Properly incurred disbursements of liquidator;
 - Remuneration of anyone employed by liquidator to assist with liquidation;
 - Liquidator's remuneration on whatever basis agreed at the outset;
 - Any corporation tax on any chargeable gains; and
 - Any other liquidation expenses properly incurred.
- (2) Sections 386, 387 and schedule 6 to section 175 governs which debts are deemed preferential debts and distinguish between ordinary preferential debts and secondary preferential debts – the – with the former being given priority. Preferential debts in each class rank equally where there are insufficient funds to meet all claims. The preferential debts listed under Schedule 6 of the Act and include funds relating to the employee's pension contributions in the period prior to the winding up, wages and holiday pay owed by the employee company (the foregoing are classed as ordinary preferential debts) and sums due in respect of PAYE, VAT etc. (secondary preferential debts).
- (3) The next class of creditors to be paid will be floating charge holders with priority usually determined by the date their security was created. However the liquidator is obliged to take account of section 176A of the Act before any distribution is made to a floating charge holder. This section applies to any charge created on or after 15 September 2003 and obliges the liquidator to make a certain 'prescribed part' of the company's assets (being the company's property available to satisfy the debts of unsecured creditors after liquidation expenses and preferential debts have been paid) available for the satisfaction of unsecured debts to the exclusion of the floating charge holders (unless the sum is sufficient to cover all unsecured debts). The 'prescribed part' where the company's asset are less than GBP10,000 is deemed to be 50%, and where more than GBP10,000, it is deemed to be 50% for the first GBP10,000, plus 20% of the amount exceeding GBP10,000 to a maximum of GBP800,000.
- (4) Unsecured creditors are the last to be paid in the statutory prescribed order and will often only receive a small dividend (if anything).
- (5) Shareholders will only receive a payment if there is any surplus of funds left over after the payment of all creditors' claims.

However, if a company has availed of a Moratorium under Part A1 of the Act during the 12 week period prior to the commencement of the liquidation, the above priorities will change. Section 174A affords certain pre-Moratorium debts or Moratorium debts which do not form part of the payment holiday under the Moratorium (e.g. employee or 'financial services' debts) priority in a subsequent liquidation - even over liquidators fees and expenses.

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

Commented [WPA12]: 11/15

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]: 5/5 very good

The floating charge in favour of Fretus Bank plc;

Section 245 of the Act applies exclusively to the grant of floating charges and operates to prevent existing unsecured creditors obtaining increased security by way of a floating charge shortly before a company enters a formal insolvency procedure. It does not apply where new funds are made available and the security is taken by a lender in the ordinary course, but is instead concerned with the granting of floating charge security which has the effect of unfairly favouring one creditor in the period before the insolvency procedure commences. It serves to invalidate any such floating charges given by a company.

Where the beneficiary of the floating charge is connected to the company, the relevant lookback period will be two years – i.e. any floating charge given within 2 years of the commencement of the insolvency process will be deemed invalid. Where the beneficiary is not a connected person, the relevant period is 12 months. However, the company must have been unable to pay its debts at the time the security was given.

In the present case, Fretus Bank plc was applying pressure to the company in respect to existing indebtedness, including threatening to demand repayment of existing loans. As a result of this pressure, the company agreed to grant a debenture in favour of the bank in February 2022, approximately 10 months before the company entered liquidation. There is no evidence that the bank extended any fresh consideration to the company in exchange for the security (consideration must be given at the same time as the creation of the charge), or that the company otherwise benefitted. Accordingly, the liquidator is right to examine whether the granting of the security is valid.

The key question will be if, at the time the floating charge was granted, the company was able to pay its debts within the meaning of s.123 of the Act. Although it is not clear from the above facts, that the bank was applying pressure and threatening to demand repayment of their existing loans indicates that the company would not have been in a position to meet that repayment demand. In those circumstances, it seems likely that the company may have been deemed unable to pay their debts as they fell due within the meaning of s.123 of the Act and that the floating charge would be invalidated.

Question 4.2 [maximum 6 marks]

Commented [WPA14]: 6/6 very good

The sale of the marble cutting machines; and

The sale of the two marble cutting machines to a director of the company warrants investigation by the liquidator given that the dispositions appear to be at an undervalue (given that both machines were only recently purchased for more than double the sale price) and entered into with a connected person shortly before the company entered liquidation.

Section 238 of the Act enables the liquidator to unwind any transaction entered into at an undervalue within the two years prior to the commencement of the liquidation. Section 238 states that a company enters into a transaction with a person at an undervalue if:

"(a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or

(b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company" (s.238(4))

The word transaction is interpreted broadly but clearly the sale of the machines would qualify as a transaction. The test for the liquidator to succeed in an action under s.238 is (i) if the transaction was entered into at an undervalue, and (ii) if at the time the transaction was entered into, the company was unable to pay its debts as they fell due per s.123 of the Act, or became unable to pay its debts as a consequence of the transaction. However, in this instance, as the transaction was with a director of the company (i.e. a connected person), there will be a presumption that the company was insolvent or became insolvent as a result of the transaction. This will assist the liquidator in seeking to unwind the transaction under s.238 and, if he brings such action, Ms. Perkins will need to satisfy the Court that the transaction

was entered into by the company in good faith and that there were reasonable grounds to believe that the transaction would benefit the company.

Based on the description provided, it appears that the consideration received for the machines, which were only purchased by the company last year for GBP25,000 each, may well be less than could have been realised by the liquidator and the burden will be on Ms Perkins to satisfy the Court that there were reasonable grounds to believe the sale at that price was reasonable and would benefit the company.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

The liquidator has been tasked with determining if the payments to Hard and Fast Ltd constitute a voidable preference as they had the effect of placing one creditor in a better position than others immediately before the company entered liquidation. Section 239 of the Act operates to prevent such preferences where, if the company did not receive the preferential payment, it could have expected to receive less or only a partial payment the same as other unsecured creditors.

The liquidator can only bring an application under s.239 where the company is in liquidation (as is the case here) and must prove:

- The person who benefitted from the preference was, at the time of the transaction, a creditor of the company;
- The company's actions had the effect of putting that person in a better position than they would otherwise have been in in the event of an insolvent liquidation;
- The company intended to put the beneficiary in a better position than they would otherwise have been in in the event of an insolvent liquidation; and
- The preference was given within 6 months before the liquidation (it would be 2 years in the case of a connected person which does not apply here).

Similarly to dispositions at an undervalue under s.238, in order to succeed in an application under s.239 it is also necessary to establish that at the time the preference was given either (i) the company was unable to pay its debts as they fell due within the meaning of s.123 of the Act, or (ii) became unable to pay its debts as a result of the preference. It appears from the facts outlined above that the company was unable to pay its debts as they fell due at the time that the payment to Hard and Fast Ltd was made.

It does not appear that Hard and Fast Ltd were a connected party so the burden of proving the above factors remains with the liquidator. It is also irrelevant that Hard and Fast Ltd applied pressure to the company to make the preferential payments – all that matters is that the company, by the preference, had a desire to put Hard and Fast Ltd in a better position than they would have been if there was a liquidation. This was considered by Millet J in *RE MC Bacon* [1990] BCC 78 where he drew a distinction between intention, which he said was objective, and desire, which is subjective. Accordingly, in this instance, the liquidator will need to show that the company's actions actively intended to put the supplier in a better position. If the company can show that they were in fact motivated solely by commercial considerations and not any desire to prefer the supplier, the Court may find there was no desire to prefer Hard and Fast Ltd.

Commented [WPA15]: 0/4 due to the timing of the payment being after the commencement of the liquidation, s 239 cannot apply. The matter is dealt with by s 127.

* End of Assessment *