



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]: 47/50 = 94% an excellent 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]

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 the answer to ii) is not accurate. It is only the SoS or OR who can bring an action under s 6. The other parties listed in s 26(4) refer to applications under other sections of the CDDA.

- (i) These are the persons who may bring an action under s 423 of the Insolvency Act 1986:
 - a. In a case where the company is being wound up or is in administration: the official receiver, liquidator, the administrator and any victim of the transaction (with leave of the court)
 - b. Where a victim is bound by a company voluntary arrangement ("CVA"): the supervisor of the CVA, or any victim of the transaction (whether bound by the CVA or not) may bring an action;
 - c. In any other case, a victim of the transaction may bring an action.
- (ii) The list of persons who may apply for a disqualification order under s 6 of the CDDA are set out in s 16(4) of the CDDA. This includes: a) the Secretary of State; b) the official receiver; c) the Competition Markets Authority; d) the liquidator; e) a specified regulator (within the meaning of s 9(e)).
- (iii) The administrator is the person who can bring an application under s 246ZB of the Insolvency Act 1986: s 246ZB(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.

Debts which, insofar as they consist of amounts payable in respect of the following:

1. The monitor's remuneration or expenses;
2. Rent in respect of a period during the Moratorium;
3. Wages or salary arising under a contract of employment;
4. Redundancy payments;
5. Goods or services supplied during the Moratorium; and
6. Debts or liabilities arising under a contract or other instrument (ie, a contract consisting of lending, financial leasing or providing guarantees)

do not form part of the payment holiday.

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

Commented [WPA6]: 13/15

Question 3.1 [maximum 6 marks]

Commented [WPA7]: 6/6 good

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 do so. It should be noted that an administrator's appointment does not automatically terminate a company's executory contracts. Contracts for the supply of goods and services, being executory contracts, are thus unaffected. Even if such supply contracts contain terms providing for automatic termination in the event of insolvency, they will not be effective. The basis for this is expressed in the following provisions under the Insolvency Act 1986 (the "Act"). I turn now to discuss these provisions.

First, s 233 of the Act. This applies to a supply of gas, electricity, water and communications services (which includes the supply of goods and services such as point of sale terminals, computer hardware and software). Suppliers cannot require payment of outstanding debts in order to secure a new or continued supply to the company in administration. However, the

supplier can stipulate that the administrator must personally guarantee payment of charges in respect of the supply.

Second, s 233A of the Act. This provision generally prohibits suppliers from relying on an insolvency-related term in a contract of supply which would otherwise entitle them to terminate the supply, alter its terms, or demand a higher payment for continued supply.

Finally, s 233B (introduced by the Corporate Insolvency and Governance Act 2020) – this provision prohibits clauses which allow suppliers of goods or services to terminate or “do any other thing” in relation to that contract if the company enters a formal insolvency procedure. This provision prevents suppliers from terminating a supply upon the company’s insolvency and also prevents suppliers from making it a condition, in order for the supply to continue, that pre-insolvency arrears are paid. It also prevents suppliers from making other changes to the contract such as increasing prices. The supplier also cannot insist on a personal guarantee from the administrator.

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?

This is the order of priority of payments in a liquidation.

Holders of fixed charges will be the first to be paid, from the proceeds of the sale of assets which are the subject of the security (ie, the fixed charge), outside of any formal insolvency. The fixed charge works by attaching to a particular asset, or class of assets, and the debtor cannot deal with those assets without the consent of the secured creditor.

The expenses of the procedure, which includes the remuneration of the officeholder (ie, the liquidator) are next to be paid off. This is provided for by s 115 of the Insolvency Act 1986 (the “Act”). These expenses are to be paid in the following order:

1. Expenses properly incurred by the liquidator in preserving, realizing or getting in any of the assets of the company (including the conduct of any legal proceedings);
2. Cost of any security provided by the liquidator;
3. Amounts payable to a person to assist in preparing a statement of affairs or accounts;
4. Necessary disbursements by the liquidator incurred in the course of winding up (including expenses incurred by members of the liquidation committee);
5. Remuneration of any person employed by the liquidator to perform any services for the company;
6. The liquidator’s remuneration;
7. Corporation tax on chargeable gains accruing on the realization of any asset of the company;
8. Any other expenses properly chargeable by the liquidator in carrying out his/her functions in the winding up.

The third group to be paid are the preferential creditors (Schedule 6 of the Act sets out the debts which are preferential) – in practice, this class of creditor is limited to employees who are owed reasonably modest sums by their employer and taxation debts owed to the Government (where the company has acted as a tax collector). Specifically, ordinary preferential debt holders are paid before secondary debt holders.

Commented [WPAB]: 7/9 a good answer which might have benefitted from more detail on preferential debts and s 176A.

The fourth group to be paid off are holders of floating charges (subject to any prescribed deductions under s 176A of the Act). A floating charge “hovers” over an asset, or class of assets until it crystallises and becomes fixed in nature. Until a floating charge crystallises, the assets subject to a floating charge can be dealt with by the debtor in the normal course of business without the creditor’s consent. A creditor who has a qualifying floating charge (ie, a charge over the whole, or substantially the whole of a company’s property) usually has the power to appoint an administrator who will take control of the charged assets and attempt to realise them to pay off the creditor.

The fifth group to be paid off are the unsecured creditors – these are creditors who have no security or title to the debtor’s assets.

The final group to be paid off (assuming that there are sufficient funds to pay all creditors as well as the interest on their debts) are the shareholders. The surplus funds are distributed amongst the shareholders on a *pro rata* basis according to their respective shareholdings.

If there is a Moratorium under Part A1 of the Insolvency Act 1986, the priority of debts in the subsequent administration or liquidation may be different to that which existed prior to the Moratorium. S 174A of the Act provides that unpaid debts which do not fall under the payment holiday (such as debts owed to employees or financial services debts) are paid, in the subsequent liquidation, in priority to even the liquidator’s fees and expenses. Certain unsecured debts are thus afforded, pursuant to s 174A, a form of super priority in the subsequent liquidation.

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

Commented [WPA9]: 15/15

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]: 5/5 good

The floating charge in favour of Fretus Bank plc;

The liquidator can take action in relation to the floating charge in favour of Fretus Bank – the issue is whether the floating charge may be avoided. The applicable provision is s 245 of the Insolvency Act 1986 (the “Act”). Here, the floating charge was created in favour of Fretus Bank, which is a person who is not connected with the Company. Therefore, the relevant time is any time within the period of 12 months prior to the onset of insolvency – however, at the time the floating charge was created, it must be shown that the Company was either unable to pay its debts (within the meaning of s 123 of the Act) or had become unable to do so as a result of the transaction.

The floating charge, however, will not be invalid except to the extent that Fretus bank had provided new consideration for the charge. Section 245 of the Act sets out two main categories of what comprises “new” consideration. First, the value of so much of the consideration for the creation of the charge as consists of paid, or goods supplied to the company. The consideration must be given at the same time as, or after the creation of the charge. Second, the value of so much of the consideration as consists of the discharge or reduction of any debt of the company, at the same time as, or after, the creation of the charge.

Based on the available facts, it does not appear that Fretus bank had provided any “new” consideration, as defined in s 245 of the Act. The floating charge will thus likely be invalidated in its entirety, but the underlying debt remains valid.

One other issue is whether the Company had given a preference to Fretus Bank – here, the relevant provision is s 239 of the Insolvency Act 1986. The crux of the issue here is whether the Company was influenced by a desire to prefer Fretus Bank in granting the floating charge. The mere fact that Fretus Bank had exerted pressure on the Company is only relevant insofar as it can be used to show that the Company did have the requisite desire. There are, however, insufficient facts given to draw any concrete conclusions on this.

Question 4.2 [maximum 6 marks]

Commented [WPA11]: 6/6 good

The sale of the marble cutting machines; and

The liquidator may, pursuant to s 238 of the Act, attack the sale of the marble cutting machines as an undervalued transaction. The liquidator must show that the company:

- a. Made a gift to another person; or
- b. Entered into a transaction with another person on terms which provided that the company would receive no consideration;
- c. Entered into a transaction with another person for consideration which, in monetary value was, at the date of the transaction, significantly less than the value, in monetary terms, of the consideration provided by the company.

The transaction must have taken place in the period of two years prior to the commencement of the liquidation. The transaction in question does fall within the relevant period.

The difficulty in proving that this was a transaction at an undervalue is a practical one involving questions as to the valuation of the marble cutting machines. Both machines were purchased for GBP 25,000 a year prior. They were sold to the director for GBP 10,000. Depreciation must be taken into account. Assuming that the value of the machines had depreciated such that they were worth less than GBP 10,000, the transaction may not be considered one made at an undervalue. In assessing the value of the machines, one would, presumably, also have to assess, amongst other things, the condition in which the machines were in when they were sold to the director.

The liquidator would also be able to rely on the presumption that, at the time of the transaction, the Company is insolvent or has become insolvent as a result of the transaction unless the contrary is proved because the transaction was with a director of the Company (who is considered a “connected” person).

The liquidator’s action, however, will fail if the respondent (ie, the director), can show that the transaction was entered into by the Company in good faith and for the purpose of carrying on its business, and at the time of the transaction, there was a reasonable belief that the transaction would benefit the Company.

If, however, the court finds for the liquidator, an order can be made to restore the position to what it would have been if the transaction had not been entered into.

Question 4.3 [maximum 4 marks]

Commented [WPA12]: 4/4 good

The payments to Hard and Fast Ltd.

The payment to Hard and Fast (“HF”) was made after the commencement of winding up. Rita Perkins received an email from HF a month before the winding up order was made. Here, s 127 of the Insolvency Act 1986 is relevant. It provides that any disposition of property of the company made after the commencement of winding up is avoided unless the court otherwise orders.

The definition of “disposition of property” in s 127 is broad, and the payments to HF do fall within this definition (ie, payment of money). The crux of the issue is whether a validation order may be obtained – the court has a discretionary power to declare that such dispositions shall not be void. Assuming that no validation order is granted, the liquidator can pursue HF to claw back the sums paid to it.

It is however, in my view, likely that a validation order will be obtained. In deciding whether to permit dispositions, the court will consider general guidelines – for example, transactions that do not deplete the company’s net assets, or that increase the value of the company’s assets or preserve them from harm will normally be validated. The court will also consider, in cases where goods have been paid for, on terms of cash on delivery, whether payment will enable further supplies to be received so as to enable the business to continue. Further, payments which are necessary to ensure continued supplies to enable trading will be likely sanctioned if the court is convinced that continued trading is in the best interest of the creditors.

Here, the Company’s board had considered that the continued supply of marble was essential, presumably on the basis that such a supply was essential in order for the business to continue, and that continued business operations would be in the best interests of the creditors as it would increase the pool of assets available for distribution. If this can be shown, a validation order will likely be obtained.

*** End of Assessment ***