



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]: 34/50 = 68% a good effort

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

Commented [WPA2]: 9/10

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

Commented [WPA3]: B is correct

(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 [WPA4]: 8/10

Question 2.1 [maximum 5 marks]

Commented [WPA5]: 3/5 - the answer to i) does not mention a CVA supervisor, there is no answer to ii) the court does not initiate the action it will be the Sec of State or the OR on the SoS's instructions, and under iii) only an administrator may bring an action. A liquidator may bring an action for WT but under s 214.

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?

According to section 423 of the Insolvency Act 1986, which enables transactions intended to deceive creditors to be investigated, there are several parties who can bring action against the company. Most notably, the liquidator or administrator of a company being wound up or in administration can investigate any transaction in question given that the transaction is either undervalue or if it was entered into with the aim to put assets out of reach of a person who is or who may make a claim against the company. In addition, the official receiver or any person who can be considered a victim of the transaction can make an application under the aforementioned section.

Section 6 of the Company Directors Disqualification Act ("CDDA") 1986 details the duty of the court to disqualify directors of insolvent companies if found to be unfit. Thus, under section 6 of the CDDA, the court is required to bring action and make a disqualification order against any person that is or has been a director of an insolvent company, which occurred while they were in office or after, and said directors conduct is deemed unfit to manage a company. The evidence used in many of the disqualification orders is pertaining to directors consenting a company to trade while insolvent with the intention to defraud creditors.

Further to the above, a liquidator of a company may bring action against directors of insolvent companies under section 246ZB of the Insolvency Act 1986. Upon learning that their company will likely be entered into an insolvent liquidation or insolvent administration, under section 246ZB of the Act, directors have a duty to minimise potential losses that would impact the company's creditors, therefore, holding them liable for wrongful trading and further debts of the company.

Question 2.2 [maximum 5 marks]

Commented [WPA6]: 5/5

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

The payment holiday, presented within Part A1 of the Insolvency Act 1986, is a phrase used to encompass the restrictions on companies that have been granted a Moratorium with regard to payment of debts. The payment holiday permits these companies a stay on enforcement against debts that have fallen due before the Moratorium, or that fall due during the Moratorium ("pre-Moratorium debts"). However, with that being said, there are some exceptions to the rule as there are several pre-Moratorium debts that are not subject to a payment holiday.

Debts in respect to the appointment of monitor's remuneration or expenses incurred during the Moratorium do not fall under the payment holiday. Debts in respect of goods and services supplied during the Moratorium as well as debts with regard to rent for a period during the Moratorium are also not included in the payment holiday. Additionally, wages or salary under a contract of employment that fall due and are considered pre-Moratorium debts must be upheld as it does not form part of the payment holiday. Furthermore, debts or other liabilities arising under a contract or

other instrument involving financial services i.e., banks or other secured creditors can demand payment.

If any of the aforementioned exceptions to the payment holiday cannot be paid as they fall due, the company is no longer a going concern, and the appointed monitor must conclude the Moratorium and consider other an alternative course of action.

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

Commented [WPA7]: 10/15

Question 3.1 [maximum 6 marks]

Commented [WPA8]: 4/6 a good answer but one which needed to explain clearly the different types of supply which the different sections apply to

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?

Upon appointment of an administrator, executory contracts in relation to the relevant company in administration are not automatically terminated. An executory contract is a contract in which both parties have material unperformed obligations or rather have ongoing obligations to perform. Section 233 of the Insolvency Act 1986 addresses the legal parameters by which administrators must abide regarding the supply of goods and services related to a company in administration. In short, an administrator can continue to operate the business of a company in administration with goods and services continuing to be supplied.

While the suppliers of goods and services cannot require payment of outstanding debts from administrators to agree to continue to supply as their contract stipulates or to initiate a new contract, they can request a personal guarantee under section 233 of the Insolvency Act 1986. The guarantee of payment must be made by the administrator and would provide the supplied protection as they continue to provide an essential supply to the insolvent company. According to section 233A of the Insolvency Act 1986, a supplier cannot terminate providing services regardless of insolvency terminology within the applicable contract or request changes in payment as a result of the company's insolvency.

Unlike section 233 of the Insolvency Act 1986, section 233B of the Insolvency Act 2020 does not authorize an administrator to provide a personal guarantee. Section 233B further protects insolvent companies that have been placed into administration in these circumstances, by preventing suppliers from being able to terminate a contract unless the court determines that it would be to the detriment to the supplier. While sections 233, 233A, and 233B all apply to administration or CVA's, section 233B extends to a company in a Moratorium or Restructuring Plan.

Question 3.2 [maximum 9 marks]

Commented [WPA9]: 6/9 a good answer but which would have benefitted from further detail in places eg expenses, preferential debts, s 176A. There is some confusion between liquidation and administration which does not help the explanation as a prior administration does not affect the statutory order of priority.

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?

A proof of debt must be submitted to the liquidator from which he or she has the authority to regulate whether it is allowed or rejected. If the creditor is not satisfied with the liquidator's conclusion, they can apply to court to appeal the decision. The statutory priority of creditors in a liquidation is as follows:

1. Fixed Charges
2. Liquidator's Fees and Expenses
3. Preferential Creditors
4. Floating Charge Holder
5. Unsecured Creditors
6. Shareholder

Fixed charge distributions tend to occur before any formal insolvency proceedings are initiated or commenced and they're typically paid from the sale of assets related to the fixed charges themselves. The next on the priority list is expenses of the winding up including remuneration to any party involved in the preparation of a statement of affairs, winding up proceedings, and remuneration of the liquidator or anyone employed by them to carry out tasks regarding the company.

*Preferential creditors, such as employees, financial institutions, and the Crown are the subsequent class of creditors. This class is further broken down into ordinary and secondary preferential debts which are distributed using the *pari passu* principle. Thereafter, floating charge holders have their own priority within their class of creditor because if there are multiple floating charge holders, it's first come first serve based on dates of the charges. There are a number of stipulations within this class in relation to the specifics of the relevant company's available assets which are calculated after distribution of liquidation expenses.*

*Under section 176A of the Insolvency Act 1986 floating charge provision, unsecured or non-preferential creditors an administrator requires court permission to approve distribution. However, upon payment of the secured and preferential creditors and if there are funds remaining, an administration can be converted to a creditors' voluntary liquidation ("CVL") where a liquidator can made distribution to unsecured creditors. Unsecured creditors do not usually get distributed much if any funds as it is not likely that there are many funds to do so at the bottom of the priority. Shareholders are the last on the priority list to be tended to and if there are funds remaining to pay all creditors, shareholders will be distributed on a *pro rata* basis which would reflect their shareholding.*

In certain circumstances where an English administrator has been appointed over a company registered in a foreign jurisdiction, said administrator may follow the local distribution and priority of payment rules. According to paragraph 65 of Schedule B1

of the Insolvency Act 1986, an administrator may do so if they can determine that it will benefit the administration overall.

If a company is subject to a Moratorium under Part A1 of the Insolvency Act 1986 during the 12 weeks prior to the commencement of the liquidation, the priority of creditors can be significantly altered. Section 174A of the Insolvency Act 1986 describes the debts that are excluded from the payment holiday and enables employees and financial services which are preferential creditors and unsecured creditors to have a "super priority" over liquidator's fees and expenses.

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

Commented [WPA10]: 7/15

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 [WPA11]: 3/5 a sensible answer but some more detailed explanation of s 245 would have been helpful

The floating charge in favour of Fretus Bank plc;

The debenture containing the floating charge is a document that details the terms of the loan and acknowledges the debt; In this case, the floating charge is over the whole Company and the debenture would typically include a fixed charge as well. It is likely that the existence of the floating charge hinders the possibility of payment for creditors.

Under section 245 of the Insolvency Act 1986, the validity of the Fretus Bank plc's floating charge is considered. The floating charge in favour of Fretus Bank plc was created within the 12 month period of the onset of any insolvency proceeding, winding up petition on 14th October 2022, and during this period the Company was facing financial uncertainty which led to the creation of the charge. Secondly, the charge was created because the Company were wary of Fretus Bank plc demanding repayment of a loan, therefore, the Company likely was aware that it could not pay its debts as they fell due.

The floating charge would be invalid based off of this time period of creation and rationale behind the charge. However, even if the floating charge is found to be invalid, the underlying debt still remains a priority to the liquidator of the Company. The liquidator has an option to go to court to challenge the floating charges validity.

Question 4.2 [maximum 6 marks]

Commented [WPA12]: 3/6 some reasonable suggestions but s
238 required some detailed analysis

The sale of the marble cutting machines; and

Upon appointment as liquidator of the Company, the liquidator must review all books and records to review all transactions that have occurred prior to the winding up. This includes the sale of the marble cutting machines to Rita Perkins. As a director of the Company, Rita Perkins is considered a connected person and the transactions regarding the marble cutting machines should be scrutinized as possible misfeasance.

Allegations against the officers of insolvent companies is commonplace and under section 238 of the Insolvency Act 1986, liquidators frequently pursue directors breach of duty as a claim of misfeasance. The liquidator has ample reason to question the sale of the marble cutting machines because they were sold undervalue by directors to another director during a time when the Company was having cash flow problems. The transaction presents a huge conflict of interest and with further investigation can be deemed to not be in the best interest of the Company or its creditors.

According to section 212 of the Insolvency Act 1986, if misfeasance or a breach of fiduciary duty is found against Ms. Perkins as a director, there would likely be an order to restore or repay the amount payable. With that being said, under section 1157 of the Companies Act 2006, the court could grant relief to Mrs. Perkins if it's found that she acted honestly and reasonably.

Question 4.3 [maximum 4 marks]

The payments to Hard and Fast Ltd.

The contract between the Company and Hard and Fast Ltd. is considered an executory contract due to the fact that there are still ongoing obligations to perform both parties; The Company has outstanding debts and Hard and Fast Ltd. has obligations per their original contract. It is not clear whether there was a new contract issued upon the board's agreement to pay the amounts due to Hard and Fast Ltd. but assuming that there was a change to cash payments, it is possible. The services provided by Hard and Fast Ltd. are essential to the Company, therefore, per section 223B of the Insolvency Act 2020, the services are required to continue.

Hard and Fast Ltd. can continue to demand payment of sums regardless of the Moratorium put in place upon petition of the winding up because the payment of debts in relation to goods and services are one of the debt exceptions from the payment holiday. However, Hard and Fast Ltd. cannot terminate or alter their contract with the Company which is set out under section 223B of the Insolvency Act 2020.

* End of Assessment *

Commented [WPA13]: 1/4 - although it might be possible to argue s 233B had some impact here, the liquidator would argue the payments were not requested by them and that the payments were void under s 127 as having occurred after the commencement of the liquidation.