



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3B

**THE INSOLVENCY SYSTEM OF THE UNITED KINGDOM
(ENGLAND AND WALES)**

Commented [INS 11]: MARK REDUCED TO 50% AS A RESULT OF PLAGIARISM.

COURSE LEADER.

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 [WPA2]: 43/50 = 86% a very good effort

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

Commented [WPA3]: 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

(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.

QUESTION 2 (direct questions) [10 marks]

Commented [WPA5]: 10/10

Question 2.1 [maximum 5 marks]

Commented [WPA6]: 5/5 under s 6 the OR may also do so on the instructions of the SoS

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 423 of the Insolvency Act 1986, the following categories may challenge transactions which defraud creditors. First, where the company is being wound up or is in administration, the official receiver, the liquidator, the administrator and (with the leave of the court) any victim of the transaction such as a creditor may bring the action. Second, 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). Third, a victim of the transaction may bring an action under this section in any other case.

Under s 6 of the Company Directors Disqualification Act 1986, the Secretary of State may 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 (or it was dissolved without becoming insolvent), and the directors' conduct makes them a 'person unfit to be concerned in the management of a company'.

Under s 246ZB of the Insolvency Act 1986, the administrator may bring an action for wrongful trading.

Question 2.2 [maximum 5 marks]

Commented [WPA7]: 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 pre-moratorium debts not subject to a payment holiday are listed in section A18(3) of the Insolvency Act 1986 are: (a) the monitor's remuneration or expenses; (b) goods or services supplied during the moratorium; (c) rent in respect of a period during the moratorium; (d) wages or salary arising under a contract of employment; (e) redundancy payments; or (f) debts or other liabilities arising under a contract or other instrument involving financial services. In addition, moratorium debts such as (a) any debt or other liability to which the company becomes subject during the moratorium, other than by reason of an obligation incurred before the moratorium came into force; and (b) any debt or other liability to which the company has become or may become subject after the end of the moratorium by reason of an obligation incurred during the moratorium need to be paid as they fall due.

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

Commented [WPA8]: 11/15

Question 3.1 [maximum 6 marks]

Commented [WPA9]: 5/6 a very good answer but the distinction between ss 233 and 233A on the one hand and s 233B might have been made a little clearer

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, the administrator can require suppliers to continue supplying the goods and services in the administration.

Pursuant to s 233(2)(b) of the of the Insolvency Act 1986, if the administrator makes a request for the supply of gas, water, electricity or communications services (as defined in s 233(3) to 233(3A) of the Act) (“essential goods and services”), the supplier is not allowed to “make it a condition of the giving of the supply, or do anything which has the effect of making it a condition of the giving of the supply, that any outstanding charges in respect of a supply given to the company before the effective date are paid”. However, according to s 233(2)(a) of the Act, the supplier may make it a condition that the administrator personally guarantees the payment of any charges in respect of the supply.

Next, under s 233A(1) of the Act, an “insolvency-related term” in a contract for the supply of essential goods and services will cease to have effect if the company enters administration. An “insolvency-related term” is defined in s 233A(8) of the Act as a provision that (a) terminates the contract or provides that any other thing would take place by reason of the company entering into administration; or (b) entitles the supplier to terminate the contract or supply or to do any other thing, by reason of the company entering into administration or because of an event occurring before the administration. However, the supplier may still terminate the contract with the administrator’s consent, the court’s permission (if the court is satisfied that continuation of the contract would cause the supplier hardship), or if any charges incurred after the company entered administration are not paid within 28 days from the time when payment became due (s 233A(4)).

Finally, per s 233B(3) of the Act, a provision in a contract will cease to have effect when the company enters administration if that provision would, by reason of the company’s administration, (a) terminate the contract or supply, or any other thing would take place; or (b) entitle the supplier to terminate the contract or supply, or to do any other thing. Section 233B(4) stipulates that the supplier is entitled to terminate the contract by reason of an event occurring before the administration, but that the entitlement shall not be exercised for the period that the company is in administration. Furthermore, the supplier is not allowed to make it a condition of continued supply of goods and services after the company enters administration, or to do anything which has the effect of making it a condition of such a supply, that any outstanding charges in respect of a supply made to the company before that time are paid (s 233B(7)).

Question 3.2 [maximum 9 marks]

Explain the order of priority of payments in a liquidation and explain the nature of the rights enjoyed by each class of creditor or expense. How would this priority change if the company had been subject to a Moratorium under Part A1 of the Insolvency Act 1986 during the 12 week period prior to the commencement of the liquidation?

In a liquidation, the order of priority of payments is usually as follows (beginning with (a) and ending last with (f)): (a) holders of fixed charges outside of any formal insolvency (ie, secured creditors); (b) the expenses of the procedure (including the

Commented [WPA10]: 6/9 a generally good answer but more detail in places would be helpful, eg expenses, different classes of preferential creditors, s 176A. The explanation of s 174A appears to incorporate part of the law on administration which is not correct.

remuneration of the officeholders) pursuant to s 115 of the Insolvency Act 1986; (c) preferential creditors such as employees with unpaid wages according to s 175 of the Act; (d) holders of floating charges; (e) unsecured creditors; and (f) shareholders.

For a fixed charge holder, the nature of the right of the mortgage or charge over the asset(s) of a debtor is one which holds priority over all else and fixes or attaches to a particular asset or a class of assets.

With the remuneration of liquidation expenses, the right is statutorily conferred under s 115 of the Act as a result of the policy imperative to ensure that the costs of the administration of the liquidation is properly met. The same is the case for the right held by preferential creditors as this is provided for in s 175 of the Act. The preferential creditors comprise *inter alia* limited pension claims by employees and taxation liabilities. There are similarly strong public interest considerations in ensuring their priority in the payment of debts.

Within the category of floating charge holders, the priority between holders in the same category turns on when the charge was created. If the floating charge was created on or after 15 September 2003, the liquidator or administrator holds a duty to make a prescribed part of the company's net property available for the satisfaction of unsecured debts and must not distribute any of this prescribed part to a floating charge holder except insofar as it is in excess of the amount required to satisfy all the unsecured debts (s 176A(2) of the Act).

Finally, the unsecured creditors and the shareholders have a stake in the limited remaining assets.

If the company had been subject to a Part A1 moratorium during the 12 weeks prior to the commencement of the liquidation, any employees whose contracts are adopted by being kept on by the administrator for at least 14 days are entitled to super priority for sums owed them for the period after the adoption (s 174A of the Act). In addition, a party who has contracted with the company in administration, such as a lender who has provided funding, is also entitled to super priority where these liabilities are paid out ahead of the administrator's own remuneration.

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

Commented [WPA11]: 13/15

Prior to going into compulsory liquidation on 23rd December 2022, under pressure from its bank, Fretus Bank plc, and in order to prevent it from demanding repayment of the company's loans, Marbley Q Limited ("the Company"), granted a debenture in favour of Fretus Bank plc in February 2022. The debenture contained a floating charge over the whole of the Company's undertaking.

The winding up order followed a creditor's winding up petition issued on 14th October 2022.

In July 2022, as the Company continued to suffer cash flow problems, the directors approved the sale of two (2) marble cutting machines to Rita Perkins (a director) for GBP 10,000 in cash. The machines had been bought for GBP 25,000 a year before.

A month before the winding up order was made, Rita Perkins received an email from Hard and Fast Ltd, one of the Company's key suppliers. The supplier demanded immediate payment of all sums owing to it and informed the Company that further supplies would only be made on a cash on delivery basis. As the continued supply of marble was seen as essential by the Company, the board authorised a payment of GBP 8,000 to cover existing liabilities and agreed to further payments, on a cash on delivery basis, for further supplies which amounted to further payment of GBP 3,000 up to the date of the winding up order.

The liquidator has asked for advice whether any action may be taken in respect of the floating charge in favour of Fretus Bank plc and the two subsequent transactions.

Using the facts above, answer the questions that follow.

Identify the relevant issues and statutory provisions and consider whether the liquidator may take any action in relation to:

Question 4.1 [maximum 5 marks]

The floating charge in favour of Fretus Bank plc;

In relation to the floating charge granted in February 2022 in favour of Fretus Bank plc ("Fretus") over the whole of the Company's undertaking, the liquidator may commence an action to avoid the floating charge.

Generally, a floating charge on the company's undertaking or property created at a relevant time is invalid except for the exceptions under s 245(2) of the Insolvency Act 1986. The "relevant time" for the purposes of s 245 is contingent on whether the person in whose favour the floating charge is created is connected with the company. According to s 245(3), the "relevant time" is: (a) the period of 2 years ending with the onset of insolvency for a charge created in favour of a person connected with the company; and (b) the period of 12 months ending with the onset of insolvency for a charge created in favour of any other person, but only if at the time the charge was created the company was either unable to pay its debts within the meaning of s 123 of the Act or became unable to do so in consequence of the transaction.

The date on which the winding up of the Company is deemed to have commenced is the date on which the winding-up petition was presented on 14 October 2022 (s 129 of the Act).

Fretus was not a connected person of the Company. The relevant time would be 12 months, subject to the caveat that at the time the charge was created the company was

Commented [WPA12]: 4/5 a good answer which perhaps needed some more consideration of the company's potential inability to pay its debts

unable to pay its debts (s 123 of the Act) or became unable to do so as a result of the floating charge.

Assuming that the floating charge was within the relevant time period as it was created in February 2022, none of the exceptions for a floating charge on the Company's undertaking or property created at a relevant time under s 245(2) of the Act applied. There is no evidence that any fresh consideration was provided by Fretus for the floating charge over the Company's entire undertaking. It also did not discharge or reduce the loan owed by the Company to Fretus.

The floating charge may therefore be avoided.

Question 4.2 [maximum 6 marks]

Commented [WPA13]: 5/6 a good answer which might have explained more fully the meaning of undervalue under s 238.

The sale of the marble cutting machines; and

The liquidator may apply to set aside the sale of the marble cutting machines for being a transaction at an undervalue as the machines were purchased for GBP 25,000 but sold at GBP 10,000.

Under s 238(2) of the Insolvency Act 1986, it is presumed that the Company was insolvent at the time of, or became insolvent as a result of the sale as Rita Perkins ("Perkins"), a director of the Company and thus a connected person in relation to the Company was involved in the sale. The sale occurred within two years of the date of commencement of the winding up (i.e. 14 October 2022) per ss 240(3)(e) and 129 of the Act and therefore fell within the "relevant time" for s 238 of the Act. It is likely that the sale was entered into 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)(b) of the Act) given the disparity in the initial purchase price and the eventual sale price.

However, it could be argued that the Company entered the sale in good faith for its business and there were reasonable grounds to believe this was so at the time. The directors purportedly approved of the sale of the marble cutting machines and allowed Perkins to facilitate the sale in order to alleviate the Company's cash flow problems. Pursuant to s 240(5), the court will not make an order under s 238 if it is satisfied that this was so. This turns on the court's assessment of the facts presented by the directors, and whether the sale could be said to have been under the reasonable belief and in good faith for the purpose of carrying on the business.

Question 4.3 [maximum 4 marks]

Commented [WPA14]: 4/4 good

The payments to Hard and Fast Ltd.

The liquidator may apply to set aside the payments to Hard and Fast Ltd ("HFL") as they involved the disposition of the Company's property made after the commencement of

winding up (s 127 of the Insolvency Act 1986). The payments would be void as they were made after 14 October 2022 (i.e, the date of the commencement of the winding up), in November 2022.

However, the court may exercise its discretion to declare that the dispositions are not void by the imposition of a validation order. It appears that the Company decided to pay HFL as because it demanded immediate payments of all sums owing to it and informed the Company that further supplies would only be made on a cash on delivery basis. As HFL was one of the Company's key suppliers and the continued supply of marble was regarded as essential to the Company's business, the payments to HFL were likely necessary for continued trading, and made honestly and in the ordinary course of business for the benefit of the company. On balance, if the Company applied to validate the payments made to HFL, this will likely be granted over the liquidator's application to void the payments to HFL.

*** End of Assessment ***