



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]: 32/50 = 64% some good answers

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.*

Commented [WPA3]: C is correct

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 [WPA4]: 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

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 not quite complete or accurate. In i) a supervisor of a CVA may bring an action - in ii) the Sec of State or the OR on the instructions of the Sec of State may do so and in iii) only an administrator may bring the action

**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?**

**Answer:**

- (i) Under section 423 of the Insolvency Act of 1986 the following parties may bring action against transaction designed to defraud creditors:  
Where a company is being wound up or is in administration
- the official receiver,
  - the liquidator,
  - the administrator (with leave of the court)
  - a creditor (victim of the transaction) or

- in any other case, by the victim of the transaction.

(ii) The court must make a disqualification order when the requirements of S6 or S9A of the Company Directors Disqualification Act are satisfied however it is possible for the Secretary of State to accept a disqualification undertaking.

(iii) Where a liquidator can sue directors (or others) they have wide powers under section 246ZD of the Act, to assign causes of action to a third party.

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.**

**Answer:**

1. The monitor's remuneration or expenses;
2. Goods or services supplied during the Moratorium;
3. Wages or salary arising under a contract of employment;
4. Redundancy payments; or
5. Debts or other liabilities arising under a contract or other instrument involving "financial services" which terms is somewhat inexactly defined as including a contract consisting of lending, financial leasing or providing guarantees.

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

Commented [WPA9]: 11/15

Question 3.1 [maximum 6 marks]

Commented [WPA10]: 6/6 very 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?**

**Answer:**

Since a company's executory contracts does not automatically terminate, upon the appointment of an Administrator, the Administrator will need to obtain or retain certain essential supplies. Section 233 of the Act applies to a supply of gas, electricity, water and communications services which in large entails IT work. Although suppliers are not permitted to require payment of outstanding debts in order to secure a new or continued supply to the company in administration, section 233 of the Act permits a supplier to stipulate that the administrator must personally guarantee payment of charges in respect of the supply.

In terms of S233A a supplier who cannot rely on a "insolvency-related term" in a contract of supply services and supplies which ordinarily would entitle the supplier to terminate the supply, would now opt to alter the terms of the supply or demand higher payments for the continued supply.

In terms of the 2020 Act, Section 233B was added to incorporate better protection for insolvent companies by including clauses that prohibits suppliers of goods or services to terminate or “do any other thing” concerning that contract if or when a company enters a formal insolvency procedure. Therefore, Section 233B prevents suppliers to terminate a supply when a company enters insolvency procedures or prevent suppliers from making it a condition of continued supply that arrear amounts must be paid and prevents them from making changes to a contract to, for example, increasing the prices. Under this section no supplier can insist on a personal guarantee for the administrator. However, under the same section it is stated that a contract can still be terminated by a supplier where the company or insolvency office holder consents, or by an application to court. If the court is of the opinion that the continuation of the contract will cause hardship to the supplier, the court can grant permission to terminate.

**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?**

**Answer:**

Priority of Payments in a liquidation are:

Holders of fix charges

Then the expenses of the procedure (including the remuneration of the officeholder)

Preferential creditors

Floating charge holder

Unsecured creditors

Shareholders

The nature of rights of each class is:

- Holders of fix charges will be paid first
- Unsecured creditors get to vote on:
  1. Whether to approve an administrator’s proposals;
  2. Whether to approve a proposal for a company voluntary arrangement
  3. Who is appointed as liquidator;
  4. How an office-holder is to be remunerated
  5. Unsecured creditors are normally paid out last in the statutory order.
- Preferential creditors are paid in full before any other unsecured creditors receive any dividend under the CVA
- A floating charge holder only receives payout after preferential creditors have been paid out. A floating charge holder can appoint an administrator.  
A charge holder can consent to the appointment of a liquidator rather than an administrator. A floating charge holder will be paid out according to the charge holder’s priority.  
A floating charge holder or any secured creditor who may have an outstanding unsecured amount owing to it, is prohibited from participating in the distribution of the prescribed part

**Commented [WPA11]:** 5/9 the answer is broadly correct but is lacking detail in places eg expenses / pref creditors / floating charge prescribed part and also seems to bring in procedures apart from liquidation which does not help the clarity of the answer as the question is limited to liquidation.



- If there are sufficient funds to pay all the creditors any surplus is distributed amongst the shareholders

**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?**

**Answer:**

One must keep in mind that the intention of entering a Moratorium is to rescue the company as a going concern. The directors are still in charge of the company and debts incurred during the Moratorium is paid as it is incurred.

The priority of payment, during this period, differs in that Section 174A affords certain unsecured debts a form of "super priority" in a subsequent liquidation. This section stipulates that unpaid pre-Moratorium (or Moratorium debts) such as employee salaries are paid in the subsequent liquidation in priority to the liquidator's fees and expenses. The author explains that the unsecured debt of a director pre-Moratorium will acquire "super priority" when the company enters liquidation.

The same applies to secured or unsecured pre-Moratorium bank debt which falls within the definition of "financial services" however there is an exception preventing such liability to obtain such "super priority" where the debt is accelerated debt.

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

Commented [WPA12]: 6/15

***Prior to going into compulsory liquidation on 23<sup>rd</sup> 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 14<sup>th</sup> 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;**

**Answer:**

My advice to the liquidator will be that before payment can be made to a floating charge holder, he must first consider the application of section 176A of the Act. This section applies to a company with a floating charge that was created on or after 15 September 2003 and the company has gone into either administration or liquidation. The debenture in favour of Fretus Bank plc contains a floating charge over the entire Companies undertaking which was made after 15 September 2003.

The liquidator must take note that he has a duty to make available a "prescribed part" of the company's property for paying unsecured debts and must not distribute any of this prescribed part to the floating charge holder. Only the excess amount after paying the unsecured debts can then be utilized paying towards a floating charge holder. However, a floating charge holder who has an outstanding unsecured balance owing to it, is prohibited in participating in the distribution of the prescribed part.

**Question 4.2 [maximum 6 marks]**

**The sale of the marble cutting machines; and**

**Answer:**

In terms of the sale of the marble cutting machines the liquidator must look at how the company in liquidation conducted its business, especially towards the end of its trading life. A close look must be given to the conduct of the directors for possible forms of breach of duty. Directors should always act in the best interest of the company. By disposing of company assets, before liquidation, where the transaction was undervalued is acting in contravention of their duty. In terms of Section 238 of the Act a liquidator may question the transaction.

The sale of the marble cutting machines which were sold to the director of the company was a transaction at undervalue. In terms of Section 238 of the Act the liquidator must prove that the company "entered into a transaction with another person for a consideration which, in money or money's worth, was, at the date of the transaction, significantly less than the value, in money or money's worth, of the consideration provided by the company".

- The criteria must be that the transaction must have taken place in the period of two years prior to the commencement of the liquidation or administration.
- It is a prerequisite of liability under section 238, that at the time of the transaction, the company was either unable to pay its debts as they fell due within the meaning of

**Commented [WPA13]:** 1/5 although the answer is accurate it misses the issue that the charge will almost certainly be void under s 245.

**Commented [WPA14]:** 5/6 good on explaining s 238 but application to the facts might have been more detailed. It is not clear how s 239 could apply.

section 123 or the company became unable to pay its debts within the meaning of that section in consequence of the transaction. In the case of a transaction with a connected person, i.e the director of the company, it is presumed that the company to have been insolvent or to have become insolvent because of the transaction, unless the contrary is proved.

However, if the Company entered into the transaction in good faith to carry on business and in the belief that the transaction would benefit the company then there is no reliance on section 238. If however, it is concluded that the transaction was made at an undervalue or a preference, the liquidator may approach the court in terms of section 238 of the act, and request the court to make an order restoring the position to what it would have been if the transaction had not been entered into.

Section 239 of the Act may also be applicable. The liquidator must determine whether the director was or could have been a creditor in the normal course of the liquidation thereby preferring the director by placing her in a better financial position, then there is a presumption that the company was influenced by a desire to prefer that person which shifts the burden of proof onto the connected person to rebut that presumption.

**Question 4.3 [maximum 4 marks]**

***The payments to Hard and Fast Ltd.***

My advice to the liquidator is to ascertain whether the payment to Hard and Fast Ltd constitutes preferring Hard and Fast Ltd above the other creditors of the company. Section 238 and 239 is applicable in this instance as the purpose of Section 239 of the Act is to prevent a company, just before entering a formal insolvency procedure, from placing one of its creditors in a better position than other creditors. Especially where an arrangement for payment was made with one creditor, thereby giving it preference where previously this creditor only had priority as an unsecured creditor.

The liquidator in terms of section 239 must show that Hard and Fast Ltd whom was alleged to have been preferred, at the time of the agreement and subsequent payment, was in fact a creditor of the company; and or that the company had done something which had the effect of putting Hard and fast Ltd in a better position in relation to other creditors and or when Hard and Fast was given preference the company was influenced by a desire to produce the effect of preference and that this preference was given at a relevant time. The burden of prove rests on the officeholder. The fact that pressure was applied by Hard and fast is not relevant. The question of pressure should be considered relevant only to whether there was requisite desire, and it is a difficult fact to establish.

**\* End of Assessment \***

**Commented [WPA15]:** 0/4 a preference must occur prior to the company entering liquidation. Here the payment was after that date and so the issue required consideration of s 127.