



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: **[student number.assessment3B]**. An example would be something along the following lines: 202021IFU-314.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 “studentnumber” 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 2021**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2021. 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 2021** or by **23:00 (11 pm) BST on 31 July 2021**. If you elect to submit by 1 March 2021, you **may not** submit the assessment again by 31 July 2021 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **7 pages**.

ANSWER ALL THE QUESTIONS

Commented [WA1]: 46/50 = 92% an excellent effort

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

Commented [WA2]: 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

What is the initial period for a Moratorium under Part 1A of the Insolvency Act 1986 where the directors file relevant documents at court?

- (a) 20 days.
- (b) 20 business days.**
- (c) 40 days.
- (d) 40 business days.

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 which 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

What percentage of creditors must approve a Scheme of Arrangement under Part 26 of the Companies Act 2006?

- (a) A majority in number and in value.
- (b) A majority in number and 50% or more in value.
- (c) A majority in number and 75% or more in value.
- (d) 75% or more in value.

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) £500
- (b) £750
- (c) £1,000
- (d) £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 make a statement setting out proposals for achieving the purpose of administration. He or she must send out the statement of proposals as soon as reasonably practicable, and in any event 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 has the power to bring an action for wrongful trading under the Insolvency Act 1986?

- (a) A monitor of a Moratorium.
- (b) A supervisor of a Company Voluntary Arrangement.
- (c) An administrator.**
- (d) An administrative receiver.

Question 1.10

Under section 176A of the Insolvency Act 1986, the prescribed part deducted from floating charge assets in favour of unsecured creditors is calculated as follows:

- (a) 20% of the floating charge assets.
- (b) 50% of the first £10,000 in value plus 20% of the excess in value above the £10,000 subject to a maximum amount of the prescribed part of £600,000.
- (c) 20% of the first £50,000 in value plus 50% of the excess in value above the £50,000 subject to a maximum amount of prescribed part of £800,000.
- (d) 50% of the first £10,000 in value plus 20% of the excess in value above the £10,000 subject to a maximum amount of prescribed part of £800,000.**

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 6 marks]

What is the difference between cash flow insolvency and balance sheet insolvency?

Section of the Insolvency Act refers to two tests for establishing insolvency: cash flow insolvency and balance sheet insolvency. The Court examined the difference between cash flow and balance sheet insolvency in the decision BNY Corporate Trustee Service Ltd v Eurosail UL 2001 3BL Plc. One difference is the timeframe for the debts to be

Commented [WA3]: 9/10

Commented [WA4]: 5/6 a good answer - direct reference to s 123 was omitted and the point where one test crosses over to the other might have been further considered.

paid. On the cash flow test, a petitioner merely needs to show that the company is unable to pay its debts as they fall due. To remain within the cash flow test, the debt due should be payable in the reasonably near future. Reasonably near future will vary depending on the individual circumstances of the company. One is not applying the cash flow test if they try to determine debts that may become due ie contingent debts or debts that are due in the distant future, ie future debts.

On the other hand, balance sheet insolvency is determined by assessing the value of the company's assets and whether the company's assets is less than the amount of its liabilities taking into account future/prospective and contingent liabilities. There arises a problem when a petitioner tries to quantify a future or contingent debt to establish that the company's assets exceed its liabilities. The furthest the Court have gone according to Eurosail into the future of a business to assess its assets versus liabilities is ten years. This is because there is a projection of future profits that

Question 2.2 [maximum 4 marks]

Commented [WA5]: 4/4

List **four (4)** elements of the statutory moratorium imposed when a company enters administration.

4 elements of statutory moratorium imposed on a company in administration include:

1. No resolution may be made by the company for its winding up or no administrative receiver may be appointed;
2. No winding up order may be made against the company other than on public interest ground;
3. No steps can be taken to enforce security over the company's property except with the consent of the administrator or the court's permission; and
4. No legal process including legal proceedings or execution of judgment can be executed, instituted or continued against the company except with the consent of the administrator or the Court's permission.

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

Commented [WA6]: 15/15

Question 3.1 [maximum 6 marks]

Commented [WA7]: 6/6 very well explained

Explain the main differences between a Part 26 Scheme of Arrangement and a Part 26A Restructuring Plan.

The main differences between a Part 26 Scheme of Arrangement and a Part 26 A Restructuring Plan are 3 fold as follows: i) the conditions to be met for adopting the process; ii) the approval percentage required to enter into the arrangement and iii) the cram down of dissenting creditors.

Conditions for a Part 26 Scheme of Arrangement – it was designed for the reorganisation of a solvent company but can be used for a solvent or insolvent company. On the other hand a Part 26 A restructuring plan is only available where two conditions are met: (i) the relevant company has encountered or is likely to encounter financial difficulties that are affecting or will affect its ability to carry on business as a going concern; (ii) a compromise or arrangement is proposed between the company and its creditors or any class of them or proposed between the company and its members or any class of them and the purpose of the compromise is to eliminate, reduce, prevent or mitigate the effect of the financial difficulties.

The voting approval needed for a Part 26 Scheme of Arrangement is that each meeting or class meeting must approve the scheme by a simple majority in number plus a majority of

75% or more in value of the creditors or members present and voting. For the Part 26A restructuring, the vote required is 75% or more in value of the creditors or class of creditors or members or class of members, as is relevant, approving the restructuring plan.

Finally, on a Part 26, a scheme can be made binding on creditors of a same class who have voted against it. The scheme cannot however be made binding on creditors of a different class. For a Part 26A restructuring, the plan can be made binding on creditors of a different class if Conditions A and B are met. Condition A provides that the Court must be satisfied that if sanctioned, none of the dissenting class would be any worse off than they would be in the event of the relevant alternative ie liquidation or administration. Condition B considers if the arrangement has been agreed by 75% in value of at least one class of creditors or members who would receive a payment or have a genuine economic interest in the company in the event of the "relevant alternative" being its liquidation or administration.

Question 3.2 [maximum 9 marks]

Explain the different ways in which overseas officeholders may be recognised and request the assistance of the court in England and Wales.

There are currently 4 ways overseas officeholders may be recognised and request the assistance of the court in England and Wales. They are as follows: i) EU Regulation on Insolvency Proceedings the effects of Brexit on this option are yet to be seen; ii) Model Law on Cross Border insolvency; iii) Section 426 of the Insolvency Act and iv) common law jurisdiction.

EU Regulation on Insolvency Proceedings (the "Regulation") is useful to cross border proceedings which involve companies with their centre of main interests in any EU Member State apart from Denmark. The Regulation does not try to harmonise the different insolvency regimes in the EU but instead provides rules for deciding which of the individual jurisdictions' insolvency regime applies in a particular case. If a company's COMI is determined to be the UK for example, using its registered office or main place of business, it is UK insolvency laws that will apply to the company placed in liquidation or insolvency across the EU with some exceptions. Further, only the UK will have jurisdiction to open main insolvency proceedings such as administration. Other EU jurisdictions will automatically recognise the procedure and the officeholder will be able to exercise all his powers over assets situated in other member states. The Regulations operate to across the EU for inward bound and outward-bound insolvencies. The inward bound refers to a Member state office holder being automatically recognised in the UK and the outward bound insolvency applies to a UK officeholder being recognised in other Member states.

UNCITRAL Model Law on Cross Border Insolvency (the "Model Law") is another option. The UK incorporated the Model Law into UK law by the Cross Border Insolvency Regulations 2006. There are no reciprocity provisions so there is not much limit on inward bound insolvencies- ie recognising insolvency practitioners from overseas, they are able to apply to the UK court and be recognised. However, outward bound recognitions are limited only to other States that have adopted the Model Law. There are approximately 44 countries that have adopted the Model Law. Another limitation is the fact that while recognition of foreign insolvency proceedings is automatic with the Regulation, it is not automatic with Model Law but requires an application to the court to obtain recognition and relief.

Section 426 of the Insolvency Act gives the UK power to assist overseas court from certain listed jurisdictions. By this provision orders made in insolvency matters by a court in the UK are enforceable in all parts of the United Kingdom. There is a positive obligation on the courts of any "relevant country or territory" which include the Channel Islands and Isle of Man and

Commented [WA8]: 9/9 an excellent explanation

any other country specified by the Secretary of State to assist each other. Countries that can enjoy the benefit of having the officeholder automatically recognised in the UK ie the inward bound effect, are Australia, Canada, Hong Kong, Ireland, Malaysia, New Zealand and South Africa. The UK Court retains discretion to determine whether any assistance should be granted. The Court will generally offer assistance unless it would be improper to do so. The laws to be applied will be UK law or the law of the overseas territory.

Fourth option is the common law. The common law position has become more circumscribed by case law. Originally it was considered that the Court had power at common law to exercise any powers which would be available to the overseas jurisdiction requesting assistance in a domestic insolvency. The Privy Council decision Cambridge Gas Transport Corp v The Official Committee of Unsecured Creditors of Navigator Holdings Plc originally embraced the principles of modified universalism where 3 principles were embraced: i. a domestic court has a common law power to assist a foreign insolvency office holder as far as it can be subject to domestic law and public policy; ii. A domestic court has a common law power to assist a foreign court by doing whatsoever it could have done in a domestic insolvency including exercising any domestic statutory powers and iii. A domestic court has jurisdiction over the parties in an insolvency by virtue of its power to assist even if the court has no in rem or in personam jurisdiction over the party. However, Singularis Holdings Ltd v Pricewaterhouse Coopers decision has altered this second principle and provides that the power of assistance exists where the power sought to be exercised first exists in the jurisdiction of principal liquidation and the power exists in the assisting jurisdiction. The decision Rubin v Eurofinance SA has also altered the third principle and provides that the criteria under common law for recognition of foreign judgments will not change for insolvency related proceedings. The common law route is therefore more restrictive than statutory options.

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

Commented [WA9]: 12/15

Prior to going into liquidation in November 2020, under pressure from its bank, Stercus Bank plc, and in order to prevent it from demanding repayment of the company's loans, Cork-In Limited granted a debenture in favour of Stercus Bank plc in January 2020. The debenture contained a floating charge over the whole of the company's undertaking.

In June 2020, as the company continued to struggle, the directors approved the sale of a company delivery van to Paul Watson (a director) for £5,000 in cash. The van had been bought for £10,000 a year before.

A month before the company went into liquidation, Paul Watson received an irate phone call from one of the company's key suppliers, Gary's Grapes Limited. The supplier demanded immediate payment of all sums owing to it (even those invoices that had not become payable). Fearing being cut off by the supplier, Paul arranged for a cheque for the full amount to be sent that day.

The liquidator has asked for advice whether any action may be taken in respect of the floating charge in favour of Stercus 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 Stercus Bank plc;

The relevant provision is section 245 of the Insolvency Act which deals with the avoidance of floating charges if three criteria are not met. The section operates to prevent, for companies in liquidation or administration, pre-existing unsecured creditors obtaining the security of a floating charge shortly before the company enters formal insolvency procedure. The liquidator has to therefore assess whether there is some new consideration from Stercus Bank plc which justifies the grant of the floating charge. There is nothing in the facts to say that Stercus Bank plc is connected to the company the relevant period will be 12 months prior to the onset of insolvency. The liquidator would be assessing to see whether as a result of the floating charge to Stercus Bank, the company becomes unable to pay its debts as they fall due or because of the transaction, they become insolvent. According to the facts, the transaction falls within the 12 month period, there is nothing to indicate any new consideration was granted by the Bank, and it would appear the company became unable to pay its debts. The liquidator can therefore seek to avoid this floating charge as invalid.

Commented [WA10]: 4/5 a good answer but more specific explanation of the s 245 criteria would have been helpful

Question 4.2 [maximum 5 marks]

The sale of the van; and

The relevant section is 238 of the Insolvency Act which addresses the power of a liquidator to attack a transaction which was entered into prior to the company going into liquidation where the transaction was at an undervalue. The liquidator is required to show that the company made a gift to another person, or entered into a transaction with another person on terms that provided for the company to receive no consideration or 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 relevant issue for the liquidator to consider is whether the sale by the company of the van to the director is a transaction at an undervalue. The transaction must have taken place at a relevant time which is the period of 2 years prior to the commencement of liquidation. It is easy to consider in money's worth whether the transaction is an undervalue to the extent the vehicle for sold for half its value from the previous year when it was purchased. As the sale of the van is to a director, who the statute regards as a connected person, the is important to show under section 238 of the Act that at the time of the transaction, the company was either unable to pay its debts as they fall due or became unable to pay its debts within the meaning of section 123 of the Insolvency Act as a result of the sale of the van. Where the sale was made to a connected person, within the relevant period, there is a presumption that the company is insolvent or has become insolvent as a result of the transaction unless the contrary is proved. If the transaction is deemed to be at an undervalue, the liquidator can seek an order setting aside the transaction and ordering the restoring of the position to what it would have been if the preference had not been given or the transaction had not been entered into.

Commented [WA11]: 4/5 again a good answer - it might also have considered the possible defence under s 238

Question 4.3 [maximum 5 marks]

The payment to Gary's Grapes Ltd.

Commented [WA12]: 4/5 a good answer but states there are four criteria and only deals with three under s 239. Although there is a good discussion of desire the other criteria are not really applied to the facts.

The relevant section is 239 of the Insolvency Act which relates to preferences. These are transactions that a liquidator can apply to the Court to set aside. The provision is aimed at preventing a company, shortly before entering a formal insolvency procedure, from placing one of its creditors in a better position than others. Gary's Grapes Ltd demanded and received payment for all monies owed to it including monies not yet owed. To challenge this payment to Gary's Grapes Ltd, the liquidator must apply to the Court and has the burden to prove 4 things: i) The person who is alleged to be preferred was at the time of the transaction a creditor of the company; ii) Something was done by the company which had the effect of putting that person in a better position in the event of the company going into insolvent liquidation than the position he would have been in if the transaction had not been done ie this company was not preferred; iii) the company was, in giving preference, influenced by a desire to produce the effect referred to of putting that creditor in a better position and the preference was given at a relevant time. If Gary Grapes Ltd were shown to be connected to the company then there would be a presumption that the company intended to prefer Gary Grapes and the burden would shift to Gary Grapes Ltd to rebut the presumption. The relevant period for a preference transaction is 2 years before liquidation for connected person and 6 months before liquidation for a non-connected person. It is relevant for the office holder to bear in mind that it is usually very difficult to show that the company intended to prefer a creditor. This is because the pressure applied by a creditor to the company is not relevant to showing preference. It would only be relevant to show whether there is the requisite intention. The authority Re MC Bacon Ltd is a useful guide as the court in this case found that an intention to prefer will not of itself amount to a desire to prefer. In the Re MC Bacon case, it was contended that the grant by the company of a debenture for past indebtedness was a preference. The Court considered the company's dependence on the bank for support and to continue trading and avoid immediate liquidation. The grant of the debenture in these circumstances did not amount to an intention to prefer. Other cases have held that where the company is influenced solely by commercial considerations, specifically attempts to ensure continued trading, no desire by the company to prefer can be imputed.

The facts state that the company made the payment out of fear of being cut off by the supplier. It may therefore be difficult to show an intention to prefer.

The liquidator can however consider bringing an action against the directors for wrongful trading under section 214 and 246ZB under the Act. Wrongful trading is aimed at ensuring that when directors become aware that an insolvent liquidation is in prospect, they do everything possible to minimise the potential losses to the company's creditors. The court has discretionary power to determine whether a director of an insolvent company should make a contribution to the company's assets. The grounds to be satisfied are: a) the company has gone into insolvent liquidation; b) at some point before the commencement of the winding up of the company, the person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation and that, c) at the time the person reached that conclusion or ought to have reached the conclusion, they were a director of the company. The defence available to the director would be that once he knew or ought to have known the company was insolvent, he took every steps with a view to minimising the potential loss to the company's creditors as he ought to have taken.

*** End of Assessment ***