



### **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

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

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.**

Commented [WA1]: 38/50 = 76% a good attempt showing some real thought and some good understanding

Commented [WA2]: 9/10

#### 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.

Commented [WA3]: b is the correct answer

### 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?

Balance sheet insolvency occurs when the total value of an entity's assets is less than the total value of its liabilities (including future or contingent liabilities).

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Commented [WA5]: 5/6 a good answer showing clear understanding. It would have been useful to explain where the line is drawn between the two under s 123.

Cash flow insolvency occurs when the entity is unable to pay its debts when they fall due, due to a shortfall in cash and other liquid assets (which can be quickly converted into cash without material loss in value).

It is possible for either or both states of insolvency to exist at any one time. In other words, it is possible for a company to have sufficient cash flow to pay the current debts as they fall due while having insufficient assets to cover all current (not yet due) and future / contingent liabilities. It is also possible for a company to have massive but illiquid assets which are in surplus over total current and future liabilities and yet suffering from a cashflow shortage temporarily, as the assets may be difficult to realise in a short period of time or during times of financial / economic turmoil (without material loss in value.)

**Question 2.2 [maximum 4 marks]**

Commented [WA6]: 4/4

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

Four elements of the statutory moratorium are:

- no passing of any resolution for the winding up of the company;
- no winding up order to be made against the company, except on grounds of public interest;
- no action to enforce security over the company's property, except with the agreement of the administrator or the court;
- no step may be taken to repossess the company's goods under a hire-purchase agreement, without agreement of the administrator or the court.

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

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**Question 3.1 [maximum 6 marks]**

Commented [WA8]: 4/6 an accurate answer but more detail was needed around entry requirements and the cramdown provisions

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

The differences are as follow. Only a company which has encountered or is likely to encounter financial difficulties that are affecting or will / may affect its ability to carry on business as a going concern may avail of Part 26A. Approval of a scheme requires approval by a majority in number of each class of creditors as well as 75% by value of creditors under Part 26 while under Part 26A, merely approval of 75% by value of creditors is sufficient. A cross class cram down provision is contained in Part 26A while Part 26 has no such provision.

**Question 3.2 [maximum 9 marks]**

Commented [WA9]: 6/9 a clear answer but more detail especially on the CBIR would have been helpful.

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

There are several ways in which overseas officeholders may be recognised and request the assistance of the court in England and Wales. These are through:

- the Recast EU Regulation on Insolvency Proceedings which involves companies with their Centre of Main Interests (COMI) within any EU member state (except Denmark). If the overseas officeholder is acting concerning a company with its COMI within an EU Member state, then there is automatic recognition and then the overseas office-holder may enforce in England and Wales the effects or judgement of an overseas procedure (opened in the company's COMI in any other EU member state, other than Denmark). The availability of this approach remain subject to the effects of post-Brexit negotiations;

- the Cross-Border Insolvency Regulations (CBIR), based on the UNCITRAL Model Law, where recognition is not automatic but instead requires an application to the court for recognition, relief and assistance;

- Section 426 of the Act where UK courts are allowed to provide assistance to courts from certain listed jurisdictions. These include Channel Islands, Isle of Man, Australia, Hong Kong, Ireland, Malaysia, New Zealand and South Africa. The court retains the discretion to determine whether any assistance should be granted, which they are generally obliged to provide unless it would be improper to do so under the circumstances. In providing assistance, Courts in the UK may apply UK law or the law of the overseas territory in providing assistance. Orders made by UK courts under Section 426 are enforceable all across the UK; or

- at common law, where it is not clear whether this path remains valid. At one time, case law (Cambridge Gas Transport Corp v The Official Committee of Unsecured Creditors of Navigator Holdings Plc) indicated UK courts may exercise any powers available to the overseas jurisdiction requesting assistance. Subsequently (Singularis Holdings Ltd v PricewaterhouseCoopers and in Rubin v Eurofinance SA), restrictive interpretations have been placed on the UK courts' cross-border jurisdiction.

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

Commented [WA10]: 10/15

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]**

Commented [WA11]: 5/5 a strong answer

The floating charge in favour of Stercus Bank plc;

Section 245 of the Act applies if, at the time of the creation of the floating charge, the company was either unable to pay its debts (according to Section 123 of the Act) or became unable to do so as a consequence of the creation of the floating charge.

In addition, floating charges created in favour of unsecured creditors who are not connected with the company within the 12 months period prior to the onset of insolvency, are rendered invalid unless new consideration (in substance) is provided in return. The relevant period extends to 2 years in the event the person in whose favour the floating charge was created is connected with the company.

Further, the invalidity of the floating charge only arises in the event the company goes into liquidation or administration and does not invalidate anything done under the authority of the floating charge prior to the commencement of insolvency.

Based on the following assumptions and / or facts:

- Stercus Bank's loans to Cork-In were unsecured prior to the creation of the floating charge in January 2020;
- Cork-In was unable to repay its debts to Stercus Bank in January 2020;
- It does not matter whether Stercus Bank was a connected or unconnected party. Onset of insolvency was in November 2020, which is less than 12 months after the creation of the floating charge in favour of Stercus Bank;
- No substantive new consideration was provided by Stercus Bank in exchange for the creation of the floating charge;

The liquidator may apply to avoid, from November 2020 onwards, the floating charge created in favour of Stercus Bank

#### **Question 4.2 [maximum 5 marks]**

The sale of the van; and

Under Section 423 of the Act, the liquidator has the right to attack the under-value sale of the van, at a value of GBP 5,000 when it was bought for GBP 10,000 just one year earlier.

Apart from proving the under-valuation, it is also necessary to prove that the transaction was intended to defraud future claimants or prejudicial to the interests of creditors. This is likely provable, considering the sale was to a director, Paul Watson, who would or should have been aware of both the under-valuation as well as expected liquidation.

Hence, the liquidator may take action to set aside the sale of the van to Paul Watson. There is no time limit restrictions on any such action.

#### **Question 4.3 [maximum 5 marks]**

The payment to Gary's Grapes Ltd.

Under the Anti-deprivation Rule, an insolvent estate may not be deprived of assets which would otherwise be available for the benefit of all creditors. This Rule only applies where the deprivation of assets was triggered by the insolvency of the company. Bona fide transactions, carried out in good faith, can be defended against the application of this Rule.

In Cork-In's case, Gary's Grapes demanded payment of all its invoices just one month before liquidation. In addition, the creditor demanded payment of even those invoices which

**Commented [WA12]:** 3/5 a reasonable attempt but s 238 might be an easier option

**Commented [WA13]:** 2/5 an interesting argument but one with no realistic chance of being successful as anti-deprivation will usually only operate where insolvency is stated as term triggering a change in legal rights. Section 239 is a better option here.



were not due for payment. Both the very short period prior to liquidation and the unusual demand for even not-due invoices to be paid indicates strongly that the trigger for the payment was the insolvency and pending liquidation, which the creditor may have got wind of.

As such, this is not a bona-fide payment to a creditor prior to liquidation. Instead, it is a 'preferred' treatment of one creditor to the detriment of other creditors of Cork-In.

Hence, the liquidator has the right to take action against the payment to Gary's Grapes.

**\* End of Assessment \***