



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]: 47/50 = 94% 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 123 of the Insolvency Act 1986 states that a company is deemed unable to pay its debts if (amongst others)

- it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due – Cash Flow Insolvency. In other words, a company is cash flow

Commented [WA3]: 9/10

Commented [WA4]: 5/6 a good answer but some explanation as to where the line is drawn between the two tests would have been helpful

insolvent where the cash flow generated from the trading activities of the company is insufficient to repay its debts as it falls due.

- if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities – Balance Sheet Insolvency. Therefore, a company is Balance Sheet insolvent where a company's liabilities exceed its assets.

It is noted that a company may be Balance Sheet insolvent but is not cash flow insolvent and vice versa.

In order for a court to issue a winding up order, the creditor is required to prove at petition that the debtor (company) is either (or both) balance sheet insolvent and cash flow insolvent. This can be observed in *BNY Corporate Trustee Services v Eurosail-UK 2007-3BL plc [2013] UKSC 285*, where Lord Walker took into consideration both the Cash flow insolvency and Balance Sheet insolvency of Eurosail when arriving at a decision.

Question 2.2 [maximum 4 marks]

Commented [WA5]: 4/4

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

The following are elements of the statutory moratorium imposed when a company enters administration under Schedule B1 of the Insolvency Act 1986:

1. Under paragraph 42(2) and paragraph 42(3) No resolution may be passed for the winding up of the company and no order may be made for the winding up of the company (some exceptions apply)
2. Under paragraph 43(2) no step may be taken to enforce security over the company's property except with the consent of the administrator or with the permission of the court
3. Under paragraph 43(3) no step may be taken to repossess goods in the company's possession under a hire-purchase agreement except with the consent of the administrator or with the permission of the court
4. Under paragraph 43(4) A landlord may not exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company except with the consent of the administrator or with the permission of the court
5. Under paragraph 43(6) no legal process may be instituted or continued against the company or property of the company except with the consent of the administrator or with the permission of the court

It is noted that according to Nicholls LJ in *Re Atlantic Computer Systems Plc [1992] Ch 505*, the purpose of a moratorium is to "give the administrator time to formulate proposals and lay them before the creditors, and then implement any proposals approved by the creditors". A moratorium is intended to assist the company, under the management of the administrator, to achieve the purpose of the administration.

Notwithstanding the above, it is noted that a creditor could apply for leave of the court to exercise its proprietary rights. The court in arriving at a decision, would need to balance the interests of the debtor(company) against the aforementioned creditor (along with the interests of all other remaining creditors who may be affected by the court's decision). The underlying principle is that an administration for the benefit of unsecured creditors should not be conducted at the expense of those who have proprietary rights which they are seeking to exercise.

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

Commented [WA6]: 14/15

Question 3.1 [maximum 6 marks]

Commented [WA7]: 6/6

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

The difference between Part 26 Scheme of Arrangement and Part 26A Restructuring Plan is as tabled below:

	Part 26 Scheme of Arrangement	Part 26A Restructuring Plan
Applicability	May be used by companies which are solvent and insolvent	An arrangement or compromise under Part 26A is only available where: <ol style="list-style-type: none"> 1. The company has encountered, or is likely to encounter, financial difficulties affecting, or will or may affect, its ability to carry on business as a going concern; and 2. a. that a compromise or arrangement is proposed between the company and: <ol style="list-style-type: none"> i. Its creditors, or any class of them or ii. Its members, or any class of them, and b. the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of financial difficulties.
Approval/ Votes required	Simple majority in number and a majority of 75% or more in value of the creditors or members present and voting	Number representing 75% or more in value of the creditors, or members or class of members
Cram down	A scheme can lead to an element of cram down on minority creditors in particular classes but cannot cram down on a whole dissenting class	There exists an ability to cram down on a whole dissenting class. As long as Conditions A and B* below are satisfied, one class of creditor can impose, via a court order, the Restructuring Plan on all classes of creditor, even dissenting creditor classes.
Sanction by the court	In order for the proposal to be sanctioned by the court as a Scheme of Arrangement, all classes of creditor will need to vote in favour. Any rejection by a class of creditor will prevent the Scheme from being approved	In circumstances where one or more classes dissent, if Conditions A and B* below are met, the court may still sanction the Restructuring Plan

*Condition A: The court is satisfied that, if sanctioned, none of the dissenting class would be worse off than they would be in the event of the "relevant alternative". "Relevant alternative" being liquidation or administration.

Condition B: the compromise or arrangement has been agreed by 75% in value of at least one class of creditors or members, who would still receive a payment under the “relevant alternative”.

Both conditions A and B seeks to ensure that the position/ economic interest of the class of creditors or members under the Restructuring Plan is no different than the position/ economic interest of the same class of creditors or members in a “relevant alternative” scenario.

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.

Commented [WA8]: 8/9 very good although the common law also required to be mentioned

Method 1: Under the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (EIR Recast). This is assuming that the current status quo is preserved despite “Brexit”.

- The EIR Recast is an EU Instrument of private international law, governing jurisdiction for opening insolvency proceedings and actions directly deriving from them.
- The EIR Recast is a binding piece of EU legislation and is therefore directly applicable in all Member State (except Denmark)
- Under Recital 25, the EIR Recast shall apply to proceedings (e.g. administration, liquidation) in respect of a debtor whose centre of main interest is located in the EU.
- Therefore, where a company’s COMI is located in England and Wales, the courts in England and Wales will have jurisdiction to open main insolvency proceedings.
- Similarly, where a company has its COMI in another EU member State, outside of England and Wales, the appointment of the overseas officeholder in another Member State will be recognised automatically in England and Wales and the officeholder will be able to exercise all powers in England and Wales (subject to limited exceptions).
- Under Article 20 EIR Recast, the judgement opening main insolvency proceedings in a Member State will be automatically recognised and effected with no further official recognition by the local Courts (in England and Wales) required. In other words, the Insolvency Practitioner of the foreign main insolvency proceedings (insolvency proceedings opened in the Company’s COMI outside of England and Wales, still within EU, except Denmark) need not apply to local courts (within England and Wales) for recognition before seeking assistance / assistance being provided by local courts.
- The EIR Recast works across the EU for both “inward bound” and “outward bound” insolvencies.

Method 2: Under the UNCITRAL Model Law on Cross-Border Insolvency (“Model Law”)

- The Model Law is incorporated into UK Law however; it is noted that there is no concept of reciprocity within the Model Law. Rather the Model Law focuses on encouraging cooperation between jurisdictions (over unification of law) in order to promote predictability and enhance recoverability.
- Under the Model Law, the overseas officeholder of foreign insolvency proceedings would need to seek recognition in the courts of the enacting State.
- As a result of this, from the time of filing an application by the overseas officeholder for the recognition of foreign insolvency proceedings until the application is decided upon, the court may, at the request of the overseas officeholder, (where relief is urgently needed to protect the assets of the debtor or the interest of the creditors), grant relief of a provisional nature.
- As mentioned above, the Model Law is silent on the law applicable to the insolvency proceedings as the Model Law was drafted to offer guidance. Therefore, the actual administration of the insolvency proceedings in the enacting State are subject to the law of the recognising state (in this case, England and Wales).

Method 3: Section 426 of the Insolvency Act 1986 contains provisions for the UK Courts to provide assistance to overseas courts from certain listed jurisdictions (countries/ jurisdictions which were previously a part of the British empire and were therefore, former colonies). Under Section 426, court orders made in insolvency matters by a court in the United Kingdom are enforceable in all the parts of the United Kingdom. Assistance may be provided by the UK Courts to the following countries/ territories: Channel Islands and the Isle of Man, and possibly Australia, Canada, Hong Kong, Ireland, Malaysia, New Zealand and South Africa. In this instance, assistance may be provided by the court in England and Wales to overseas officeholders from the abovementioned countries noting that it remains in the court's discretion on whether assistance should be granted.

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

Commented [WA9]: 14/15

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 [WA10]: 5/5

The floating charge in favour of Stercus Bank plc;

In determining if the floating charge granted in favour of Stercus Bank plc is invalid and should be set aside, one can refer to Section 245 of the Insolvency Act 1986 which states the following (amongst others):

2. Subject as follows, a floating charge on the company's undertaking or property created at a relevant time is invalid except to the extent of the aggregated of:

- a. The value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the company at the same time as, or after, the creation of the charge,
- b. The value of so much of that consideration as consists of the discharge or reduction, at the same time as, or after, the creation of the charge, of any debt of the company, and

- c. The amount of such interest (if any) as is payable on the amount falling within paragraph (a) or (b) in pursuance of any agreement under which the money was so paid, the goods or services were so supplied or the debt was so discharged or reduced.
- 3. Subject to the next subsection, the time at which a floating charge is created by a company is a relevant time for the purposes of this section if the charge is created –
 - a. In the case of a charge which is created in favour of a person who is connected with the company, at the time in the period of 2 years ending with the onset of insolvency,
 - b. In the case of a charge which is created in favour of any other person, at a time in the period of 12 months ending with the onset of insolvency
- 4. Where a company creates a floating charge at a time mentioned in the case of a charge which is created in favour of any other person, at a time in the period of 12 months ending with the onset of insolvency, and the person in favour of whom the charge is created is not connected with the company, that time is not a relevant time for the purposes of this section unless the company -
 - a. Is at that time unable to pay its debts within the meaning of section 123, or
 - b. Becomes unable to pay its debts within the meaning of that section in consequence of the transaction under which the charge is created
- 5. The onset of insolvency is –
 - a. In a case where this section applies by reason of a company going into liquidation, the date of the commencement of winding up

Therefore, in consideration of the statutes above, the liquidator may take action in relation to seeking a court order to deem the floating charge granted by Cork-In Limited in favour of Stercus Bank plc as invalid. This is as according to the facts of the case,

1. Section 245(2)(a), (b) and (c) are not applicable. The charge was provided to Stercus Bank plc in order to prevent Stercus Bank plc from demanding repayment of the company's loans.
2. The charge was granted at a time when Cork-In Limited was unable to pay its debts;
3. The charge was provided to Stercus Bank plc within the stipulated period of 12 months ending with the onset of insolvency (the charge was provided to Stercus Bank plc in January 2020, Cork-In Limited entered into liquidation in November 2020)

Question 4.2 [maximum 5 marks]

The sale of the van; and

In determining if the sale of the van for half the consideration paid by the company a year ago constitutes a Transaction at undervalue, one can refer to the following Statutes:

1. Section 238 Insolvency Act 1986, where the company has at a relevant time (defined Under Section 240 (1)(a), "relevant time" is defined as a period of 2 years ending with the onset of insolvency) entered into a transaction with any person at an undervalue, the office-holder (liquidator) may apply to the court for an order under Section 238.
2. Under Section 238(4)(b), a company enters into a transaction with a person at an undervalue if the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, of the consideration provided by the company.
3. Section 240(2) where a company enters into a transaction at an undervalue or gives a preference, that time is not a relevant time for the purposes of Section 238 or 239 unless the company
 - a. Is at that time unable to pay its debts within the meaning of Section 123
 - b. Becomes unable to pay its debts within the meaning of that section in consequence of the transaction or preference;

Commented [WA11]: 4/5 a good answer but it needed to explain the significance of the recipient being a connected person under s 238

Therefore, in consideration of the above statutes, the liquidator may take action in relation to the sale of the van as:

1. The van was sold to a connected person, being Mr. Watson, director of Cork-In Limited;
2. The van was sold within 2 years (van was sold in June 2020) ending with the onset of insolvency (November 2020);
3. The company was unable to pay its debt when the company entered into the transaction; according to the facts of the case, the company was struggling at the time of sale of the van to the connected person (director of the company), therefore indicating that the company is unable to pay its debts under Section 123 of the Insolvency Act 1986.

In consideration of Section 238(3) of the Insolvency Act 1986, the court shall, on application of the liquidator, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.

On that basis, the liquidator may take action in relation to the sale of the van to the director by applying to the court for an order under Section 241(1)(a) and Section 241(1)(g), to "clawback" the van/ set aside the undervalue transaction.

It is noted that consideration was also given to Section 127 Insolvency Act 1986 when determining the impacts of the sale of the van on the liquidation of Cork-In Ltd. Setting aside the fact that the sale occurred prior to the commencement of the winding up of Cork-In Ltd, in order for a validation order to be granted vis-à-vis the sale of the van to Mr. Watson, a connected person, the circumstances surrounding the sale would prove it difficult to demonstrate that the sale has in fact benefitted the general body of Cork-In Limited's creditors. This is notwithstanding the fact that Cork-In Limited, as applicant of the validation order, would bear the burden of proving that the order should be made.

Question 4.3 [maximum 5 marks]

Commented [WA12]: 5/5 very well reasoned

The payment to Gary's Grapes Ltd.

In determining if the payment to Gary's Grapes Ltd constitutes a preference to Gary's Grapes Ltd, reference to Section 239 Insolvency Act 1986 has been made, which states (amongst others) the following:

2. Where the company has at a relevant time given a preference to any person, the office-holder may apply to the court for an order under this section
3. Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference.
4. A company gives a preference to a person if –
 - a. That person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities, and
 - b. The company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.
5. The court shall not make an order under this section in respect of a preference given to any person unless the company which gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (4)(b).

Therefore, based on the facts of the case,

1. As payment was made to a person not connected to the company, Gary's Grapes Ltd, one month (October 2020) before Cork-In Limited went into liquidation (November 2020), the preference is actionable, as it occurred within six months prior to the onset of insolvency;
2. Gary's Grapes Ltd's position is better than the position it would have been in if there wasn't this preference payment;
3. Payment was made by Cork-In Limited for all invoices (even ones that were not due) for the purpose of avoidance of supply being cut off by Gary's Grapes Ltd.

In consideration of the above, while Gary's Grapes Ltd's position is better than the position it would have been in if payment was not made by Cork-In Limited, it is difficult to argue that there exists a desire to prefer as the action undertaken by Cork-In Limited appears to be driven by commercial considerations. The payment was made to avoid being cut off by its supplier which if it were to occur, would have impacted Cork-In Limited's ability to continue trading.

Furthermore, per the guidance provided by Millett J. in *Re MC Bacon Ltd [1990] BCC 78*, there is a distinction between intention and desire. Therefore, it appears the action taken by Cork-In Limited in making (and advancing) payment to Gary's Grapes Ltd was taken with the intention of appeasing its supplier so as to circumvent Gary's Grapes Ltd from taking any action that would have an impact on Cork-In Limited's ability to continue trading, which in this case is to cut off its supply to Cork-In Limited. Thus, even if there may exist an intention to prefer Gary's Grapes Ltd, it is difficult to ascertain that Cork-In Limited had a desire to prefer Gary's Grapes Ltd over all of its other creditors.

In conclusion, whilst action may be taken by the liquidator in regards to the Stercus Bank plc floating charge and the sale of the van to a connected person of Cork-In Limited, it would be difficult to take action against payment to Gary's Grapes Ltd.

*** End of Assessment ***