



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: 20222-514.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 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. 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 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (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 [WPA1]: 37/50 = 74% some good work

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

Commented [WPA2]: 8/10

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Please select the **most correct ending** to the following statement:

The Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021 restrict pre-pack sales which constitute a substantial disposal of the company's property to connected parties where the disposal occurs:

- (a) within 10 weeks of the commencement of the administration.
- (b) within 8 weeks of the commencement of the administration.**
- (c) within 4 weeks of the commencement of the administration.
- (d) on the day the company enters administration.

Question 1.2

What is the **maximum length** of a Moratorium under Part 1A of the Insolvency Act 1986 to which creditors can consent without any application to the court?

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

Question 1.3

Which of the following **is not** a requirement for a company that wishes to enter into a Restructuring Plan under Part 26A of the Companies Act 2006?

- (a) The company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.
- (b) A compromise or arrangement is proposed between the company and its creditors, or any class of them, or its members, or any class of them.

(c) The purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the said financial difficulties.

(d) The company is, or is likely to become, unable to pay their debts, as defined under section 123 of the Insolvency Act 1986.

Question 1.4

In cases where the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021 apply and an independent report from an Evaluator is obtained, the independent report must be obtained by whom?

- (a) The administrator.
- (b) Any secured creditor with the benefit of a qualifying floating charge.
- (c) The purchaser.
- (d) The company's auditor.

Question 1.5

Which one of the following **is not** a debtor-in-possession procedure?

- (a) Administration.
- (b) Restructuring Plan.
- (c) Scheme of Arrangement.
- (d) Company Voluntary Arrangement.

Question 1.6

A liquidator may pay dividends to small value creditors based upon the information contained within the company's statement of affairs or accounting records. In such circumstances, a creditor is deemed to have proved for the purposes of determination and payment of a dividend where the debt is **no greater than how much**?

- (a) £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 provide a statement for creditors' consideration setting out proposals for achieving the purpose of administration. He or she must obtain a creditors' decision on whether or not to approve the proposals **within how many weeks** of the date the company entered administration?

- (a) 6
- (b) **8**
- (c) **10**
- (d) 12

Commented [WPA3]: C is correct

Question 1.9

Which of the following statements is **incorrect**?

- (a) An insolvency officeholder from an EU Member State will be automatically recognised by the courts in the UK whether the officeholder was appointed before or after Brexit.
- (b) An insolvency officeholder from an EU Member State is automatically recognised by the courts in the UK if appointed before Brexit.
- (c) An insolvency officeholder from an EU Member State appointed after Brexit may apply to a UK court for recognition under the Cross Border Insolvency Regulations.
- (d) An insolvency officeholder from an EU Member State cannot apply to a UK court for recognition under section 426 of the Insolvency Act 1986.

Commented [WPA4]: A is correct

Question 1.10

Under section 216 of the Insolvency Act 1986, a director of a company which has been wound up insolvent may not, unless an exception applies, be a director of a company that is known by a prohibited name **for what period of time**?

- (a) 6 months.
- (b) 12 months.
- (c) 2 years.
- (d) **5 years.**

QUESTION 2 (direct questions) [10 marks]

Commented [WPA5]: 9/10

Question 2.1 [maximum 5 marks]

Commented [WPA6]: 4/5 the official receiver may in certain circumstances also bring an action under s 6 CDDA

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?

Section 423 of the Insolvency Act 1986:

In a case where the debtor has been bankrupted, is a body corporate which is being wound up or is in administration by the official receiver, by the trustee of the bankrupt's estate or the liquidator or administrator of the body corporate or (with the leave of the court), a victim of the transaction can bring an action; or

In a case where a victim of the transaction is bound by a voluntary arrangement approved under Part I or Part VIII of this Act, the supervisor of the voluntary arrangement or any person who (whether or not so bound) is such a victim can bring an action; or

In any other case, by a victim of the transaction.

Section 6 of the Company Directors Disqualification Act 1986:

The Secretary of State.

Section 246ZB of the Insolvency Act 1986:

The administrator of the relevant company.

Question 2.2 [maximum 5 marks]

Commented [WPA7]: 5/5

List the **five (5)** qualifying decision procedures by which creditors may make decisions in the context of an insolvent company.

Correspondence, electronic voting, virtual meetings, physical meetings or any other decision making procedure that enables all creditors entitled to participate to participate equally.

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

Commented [WPA8]: 11/15

Question 3.1 [maximum 6 marks]

Commented [WPA9]: 5/6 a very good answer – a little more detail on s 233B might have been helpful

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?

The appointment of an administrator does not automatically terminate the company's contracts. Historically termination clauses (that provided for the termination of a contract upon one or both of the parties entering into a liquidation procedure) have been effective, meaning that if such a clause was included in the contract the administrator would no longer have the benefit of the contract.

However, sections 233, 233A and 233B of the Insolvency Act 1986 have limited the effectiveness of such clauses.

Sections 233 and 233A applies to suppliers of gas, electricity, water and communication services. Such suppliers are not able to rely on insolvency related termination clause when a company is placed into administration. They are also not able to require payment of outstanding debts before they will continue to provide services, but they are able to require a personal guarantee from the administrator.

The addition of section 233B took this protection even further, stipulating that providers of any goods and services are not entitled to rely on an insolvency related termination clauses when a company is placed into administration. Such a contract can still be terminated but the administrator's consent is required.

Thus in most circumstances a contract with a company will not be terminable as a result of the company being placed into liquidation. The administrator is entitled to rely on the existing contracts of the company and as long as the company continues to meet its obligations under that contract, the service or goods providers will be required to continue to provide goods and services.

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.

A liquidator's role includes bringing in the assets of the company, assessing claims made against the company and then paying out approved claims to the company's creditors. Creditors are paid out in an order of priority that is prescribed in the Act.

The order of priority in the United Kingdom (England and Wales) is as follows:

1. Fixed charge holders.
2. The liquidator's costs, including expenses that are properly incurred by the liquidator in preserving, realising or getting in the company assets, the cost of any security provided by the liquidators, fees incurred by the liquidators that were incurred in carrying out the winding up (see section 115 of the Act and rules 6.42 and 7.108 for the full list).
3. Ordinary preferred creditors; (see Schedule 6 of the Act)
4. Secondary preferred creditors; (see Schedule 6 of the Act)
5. Floating charge holders (see section 176A of the Act).
6. Unsecured creditors.
7. Interest incurred on all unsecured debts post-liquidation.
8. Shareholders.

The members of each class rank pari passu amongst themselves (when there is more than one member). The first class of creditors (in the UK – fixed charge holders) are entitled to payment in full before the second class of creditor (here – the liquidator(s)) is/are entitled to any funds and so on.

The above order can be impacted by a subordination agreement, which is an agreement between creditors where they agree to vary the above order of priority.

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

Commented [WPA10]: 6/9 a clear and correct answer but lacking detail in some respects e.g. how are fixed charges dealt with, what are the different categories of preferential creditors comprised of, and how does s 176A operate?

Commented [WPA11]: 9/15

Prior to going into compulsory liquidation on 23rd December 2021, under pressure from its bank, Stercus Bank plc, and in order to prevent it from demanding repayment of the company's loans, Corfee Zero Limited ("the Company"), granted a debenture in favour of Stercus Bank plc in February 2021. The debenture contained a floating charge over the whole of the Company's undertaking.

The winding up order followed a creditor's winding up petition issued on 14th October 2021.

In July 2021, as the Company continued to suffer cash flow problems, the directors approved the sale of 5 coffee roasting machines to Ann Young (a director) for £10,000 in cash. The machines had been bought for £25,000 a year before.

A month before the winding up order was made, Ann Young received an email from Beans and Leaves 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 coffee beans was seen as essential by the Company, the board authorised a payment of £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 £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 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 issue is whether or not the floating charge is a preference that should be void. The relevant provisions are sections 239, 240 and 241 of the Act.

Under section 239, where a company has at a relevant time given a preference to any person, the court shall (on application) make such orders it thinks fit for restoring to position to what it would have been if the company had not given that preference. A company gives a preference when it does anything or suffers anything to be done which (in either case) has the effect of putting one of its creditors into a position which, in the event of the company going into insolvent liquidation, will be better than the position it would have been in if that thing had not been done, and the company desired such an outcome when it entered into the transaction. The relevant period for a preference that was not made to someone connected with the company, is any time in the six months preceding the liquidation when the company is also unable to pay its debts (or becomes unable to as a result of the transaction) within the meaning of section 123.

Commented [WPA12]: 1/5 – the s 239 argument is untenable for the reasons given – s 245 needed consideration and application.

Here the transaction took place outside of the six-month relevant period and therefore cannot be deemed a preference.

Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

The issue is whether the sale of the coffee machines is void due to it being made to a director at an undervalue.

Pursuant to sections 238 - 241 of the Act, where a company has at a relevant time entered into a transaction with any person at an undervalue, being when the consideration provided by the company is significantly less than that of the other person, and when the company did not enter into the transaction in good faith for the purposes of carrying on its business and there were no reasonable grounds for believing that the transaction would benefit the company, the liquidator can apply to the court for orders designed to restore the position to what it would have been if the company had not entered into the transaction. A relevant time, when the transaction relates to a person connected to the company, such as a director, is any time in the two years preceding the liquidation when the company is also unable to pay its debts (or becomes unable to as a result of the transaction) within the meaning of section 123.

Therefore, if the liquidator considers that the coffee machines were sold for significantly less consideration than they were worth (i.e. they are worth significantly more than 10,000), that they were sold at a time when the company was unable to pay its debts (which appears likely given its "cash flow problems"), were not sold in good faith and there were no reasonable grounds for believing the transaction would benefit the company (the assessment of this requiring more information), the liquidators could make an application under section 238 for orders restoring the position to what it would have been had the transaction not been entered into (here likely an order that the company return the 10,000 and Ms Young return the coffee machines).

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

The relevant issue is whether these are void and should be validated.

The payments under the agreement with Beans and Leaves Ltd. took place after the winding up petition was filed. Under section 127 of the Act, "*in a winding up by the court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void.*" Therefore, any payments made under this agreement will require retrospective validation or will be void.

It is therefore open to the liquidators to seek validation of the payments made under this agreement or to treat them as void and seek repayment.

*** End of Assessment ***

Commented [WPA13]: 5/6 good – needed to include explanation of presumption against connected party regarding insolvency of the company at the time of the transaction.

Commented [WPA14]: 3/4 good identification of issues but more application to the facts would help especially regarding how the different payments would be viewed on a validation application.