



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]: 34/50 = 68% - some very strong answers

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

Commented [WPA2]: 7/10

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

Question 1.1

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

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

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

Question 1.2

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

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

Question 1.3

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

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

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

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

Question 1.4

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

(a) The administrator.

(b) Any secured creditor with the benefit of a qualifying floating charge.

(c) The purchaser.

(d) The company's auditor.

Commented [WPA3]: C is correct

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 [WPA4]: 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.

Question 1.10

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

(a) 6 months.

(b) 12 months.

(c) 2 years.

(d) 5 years.

Commented [WPA5]: D is correct

QUESTION 2 (direct questions) [10 marks]

Commented [WPA6]: 8/10

Question 2.1 [maximum 5 marks]

Commented [WPA7]: 3/5 each answer is not quite correct – the OR needs to be included in i), the Sec of State in ii) and only an administrator is the answer to iii)

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?

Under section 423 of the Insolvency Act 1986, an application may be made by any person who is a victim of the transaction made. However, if the Company is being wound up, the application may be made by the appointed administrator (where the Company is in administration), or by the liquidator.

Under section 6 of the Company Directors Disqualification Act 1986, the Official Receiver may take action.

Under section 246ZB of the Insolvency Act 1986, the liquidator or an administrator may bring action.

Question 2.2 [maximum 5 marks]

Commented [WPA8]: 5/5

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

The five qualifying decisions procedures by which creditors may make decisions in the context of an insolvency company are:

- a) Correspondence
- b) Electronic voting
- c) Virtual meeting
- d) Physical meeting

- e) Any other decision making procedure which will enable all creditors entitled to participate in the making of decisions to participate equally

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

Commented [WPA9]: 12/15

Question 3.1 [maximum 6 marks]

Commented [WPA10]: 5/6 a good answer but a little more detail especially on the differences between the sections would 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?

An administrator who wishes to continue to operate the business of the company can require suppliers to continue to supply certain goods and services during the administration. These are usually essential supplies such as under Section 233 of the Insolvency Act 1986 ("Act"), which includes the supply of gas, electricity, water and communication services. Communication services extend to point of sale terminals, computer hardware, computer software, information, advice and other technical assistance, data storage, processing and website hosting.

Although the administrator is able to require this supply, and it is likely that the company had outstanding debts owing to these supplies prior to administration, Section 233 of the Act permits suppliers to stipulate that the administrator must personally guarantee the payment of charges for this supply. However, supplies are not permitted to require the settlement of outstanding debts to secure new/continued supply during the administration.

Section 233B of the 2020 Act further prohibits any clauses that allow suppliers to terminate or 'do any other thing' in relation to the contract where the company enters formal insolvency procedures. That being said, under Section 233B, a contract may be terminated by a supplier where the insolvency office holder consents, or the court believes that continuation of the contract would cause the supplier hardship.

Question 3.2 [maximum 9 marks]

Commented [WPA11]: 7/9 good but what about fixed charges and where is the line drawn between the different classes of preferential creditors?

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.

The order of priority of payments in a liquidation are as follows:

- A) Liquidator Expenses (Section 115)
- 1) Expenses that the liquidator properly incurs to preserve, realize or get in any of the assets of the company;
 - 2) Cost of security provided by the liquidator
 - 3) Amounts payable to a person to assist in preparation of statement of affairs
 - 4) Disbursements by the liquidator in the course of winding up
 - 5) Remuneration of persons employed by the liquidator for services for the company
 - 6) Liquidator remuneration
 - 7) Corporate tax charged on gains in the realisation of company assets
 - 8) Expenses properly charged by the liquidator to carry out liquidator functions in the winding up.

- B) Preferential creditors (Section 386, 387, Schedule 6: Section 175)
Preferential debts fall into two classes: Ordinary and Secondary. Each debt within their respective classes are treated as equal priority.
- 1) Sums owed on an employee's contribution to occupational pension scheme, including contributions paid four months prior to the period of winding up
 - 2) Sums owed on an employee's contribution to occupational pension scheme in the period 12 months prior to relevant date
 - 3) Remuneration owed by the company to an employee, for the period of four months prior to the commencement of the winding up to a maximum of GBP\$800.
 - 4) Amounts owed to an employee in respect of accrued holiday remuneration. This includes holiday remuneration, and absence from work through sickness or other good causes.
 - 5) Funds that lenders provided to fund employee remuneration. The lender effectively takes over the right that the employee would have had should funding have not been provided
 - 6) Levies on production of coal and steel
 - 7) Claims for amounts ordered to be paid by the company under the Reserve Forces (Safeguard of Employment) Act 1985
 - 8) Amounts owed by the company in relation to eligible deposits as does not exceed the compensation payable under the Financial Services Compensation Scheme
 - 9) Amounts owed by the company to eligible persons in respect of eligible deposits as exceeds any compensation payable under the Financial Compensation Scheme
 - 10) Amount owed by the Company to eligible persons on deposits made through non-UK branch of creditor institutions authorised by the UK authority and would have been an eligible deposit if made in a UK branch of that institution
 - 11) PAYE income tax deductions, national insurance deductions, VAT payments, Construction Industry Scheme deductions and student loan repayment

- C) Floating charge holder
Where there are more than one floating charge holders, priority is based on which floating charge was created first.

For this class of creditors, where there is a floating charge created on or after 15 September 2003, a 'prescribed part' of the company's net property, being assets available after liquidation expenses and preferential debts, is available to floating charge holders.

If the net property is less than GBP\$10,000, 50% is the prescribed part. Where it is greater than GBP\$10,000, the prescribed part is 50% of the first \$10,000 plus 20% of the excess, to a maximum of GBP\$800,000. However, if the net property is less than \$10,000 and the liquidator thinks that a distribution to unsecured creditors will be disproportionate, the prescribed part will not apply.

Where a floating charge holder also has an unsecured balance, they are not permitted to participate in the distribution of the prescribed part.

- D) Unsecured creditors
E) Shareholders

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

Commented [WPA12]: 7/15

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;

A floating charge was made by the Company in favour of Stercus Bank plc (the "Bank") by way of a debenture in February 2021, and covers the whole of the Company's undertaking.

Until a floating charge crystallises, the Company is free to deal with its assets in its normal course of business without the consent of the bank.

It appears from the case that the Bank opted for the appointment of a liquidator rather than an administrator, which gives the liquidator the power to realize the charged assets, and pay the Bank, as a floating charge holder, in the order of priority under the Act. That is, any expense in the liquidation and any preferential creditors must be paid prior to the Bank's floating charge.

Before making a distribution, however, the liquidator will need to consider Section 176A of the Act, which covers floating charges created on or after 15 September 2003.

Commented [WPA13]: 4/5 a good answer but more detail needed on s 245 and its application

Under the Act, the liquidator will have a duty to make a 'prescribed part' of the company's net property (after settling expenses in the liquidation and preferential creditors), available for unsecured creditors. This portion of the company's assets cannot be distributed to a floating charge holder, unless it is in excess of the amount required to settle all unsecured debts.

The prescribed part is computed as follows:

- i) Where the Company's net property is not in excess of GBP\$10,000, the prescribed part is 50%. However, if the liquidator can determine that making a distribution to unsecured creditors will be disproportionate to the benefits, the payment of the prescribed part does not apply.
- ii) Where the Company's net property is in excess of GBP\$10,000, the prescribed part is the sum of 50% of the first GBP\$10,000, plus 20% of the excess value above GBP\$10,000, to a limit of GBP\$800,000

Another consideration of the floating charge in favor of the Bank that the liquidator may want to be aware of is Section 245 of the Act, which deals with situations where pre-existing unsecured creditors obtain security of a floating charge shortly before formal insolvency procedures.

Under Section 245, if a floating charge was created within a 'relevant period', being 2 years for a party connected to the Company; and 1 year for a party not connected with the Company, it is possible that the floating charge may be rendered invalid. However, this only applies if at the time of the charge, the company was either unable to pay its debts or became unable to do so in consequence of the transaction.

Two aspects can keep the floating charge valid, however it requires that new consideration be provided.

In this case, no new consideration was provided, and the floating charge was created less than one year from the commencement of insolvency proceedings. Based on the facts of this case, the floating charge may be invalidated. However, the original debt is valid.

Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

The liquidator will want to consider the transaction of the Company in July 2021 whereby the Company, via its directors, approved the sale of 5 coffee roasting machines (the "Machines") to Ann Young, another director, for GBP\$10,000.

For this transaction, the liquidator can consider section 423 of the Act which deals with transactions which may defraud creditors. There are two requirements for this section to apply:

- i) The liquidator will need to show that the Company entered into a transaction with another person at an undervalue. That is, the Company received no consideration or significantly less consideration than provided;

Commented [WPA14]: 3/6 a reasonable answer but s 238 may be easier to prove on the facts than s 423 – certainly s 238 needed to be considered.

- ii) The Company entered into a transaction for the purpose of putting assets beyond the reach of a person who is making, or may make, a claim against the Company.

In this case, the Company had purchased the Machines for GBP\$25,000 one year prior. The sale to Ann Young for GBP\$10,000 constitutes a discount of 60%, which may be in excess of depreciation from everyday wear and tear. The Liquidator will want to consider the market value of these assets and whether the sale to the director was indeed undervalue and eroded the funds available to creditors.

Under this section, it does not matter whether the party to the transaction was related or not, or a 'relevant period' for the date of the transaction. The Liquidator should therefore consider an application to the Court against the director for the undervalued transaction, with the possibility of reversing the transaction or having the director pay the fair market value.

Similarly, as the party to the transaction was a director, who had an interest of purchasing the assets at a significant discount, the transaction would have had a conflict of interest and may not have been made in the best interest of the Company.

Under Section 212 of the Act, the liquidator can also consider misfeasance or breach of duty based on the above conflict of interest and apply to the court for rectification.

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

An area of consideration for the Liquidator is Section 214 and 246ZB of the Act which relates to wrongful trading. Also, Section 213 and 246ZA can be considered which relate to fraudulent trading, although the former is a more likely an area to consider based on the fact of the case.

Wrongful trading attempts to ensure directors, when they become aware of possible insolvency prospects, that they do everything to minimise the potential losses to the Company's creditors.

Where the Court determines that the section applies to the situation, an application can be made by the liquidator for the director to make a contribution to the Company's assets.

Nonetheless, the following conditions must be satisfied:

- i) The company has gone into insolvent liquidation;
- ii) Prior to the commencement of the winding up, the person knew that there was no reasonable prospect that the Company would avoid going into insolvent liquidation; and
- iii) At the time the person reached that conclusion, that person was a director.

From the facts of the case, it was determined that the supplies of Beans and Leaves Ltd (the "Supplier") was essential for the running of the Company. That is, without the supplies, the Company would not be able to function and would have been put in a worse situation that if it had not received the supplies.

Commented [WPA15]: 0/4 unfortunately the issue is not identified correctly. Due to the timing the issue cannot be s 213 or 214. It can only be s 127.

The conditions above are all met, and it can be said that the payments made of GBP\$8,000 and a further \$3,000 would have reduced the amount available to creditors. Given the timing of the transactions, the directors would have known that insolvency proceedings were imminent and that the Company was in a dire financial situation.

While it can be argued that the directors made the transactions with the intent of continuing the operation of the Company with the best interest of the Company in mind, it can also be argued that if the Company continued to trade and to increase its net liabilities while at the same time the directors knew or ought to be able to conclude that there is no reasonable prospect of avoiding insolvent liquidation, then it can be concluded that wrongful trading occurred and the Court may be able to issue an award for the directors to compensate the Company.

*** End of Assessment ***