



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

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

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.

Commented [WPA1]: 30/50 = 60% - some good answers. Identification of issues in Q4 lets down the paper overall.

Commented [WPA2]: 7/10

(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.

Commented [WPA3]: B is correct

- (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 – only the Sec of State or OR can bring an action under s 6 and only an administrator can bring an action under s 246ZB

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, the following parties have the right to bring an action:

- The official receiver;
- The liquidator;
- The Administrator;
- With the leave of the Court, any victim of the transaction such as a creditor;
- Where the victim is party to action caused by a CVA, the CVA supervisor;
- The victim of the transaction.

There are two requirements to be satisfied under section 423, as follows:

- It is required to show that the Company entered into a transaction at an undervalue;
- The transaction was at an undervalue for the purpose of putting the assets beyond the reach of the persons, or prejudicing the claim of the person in relation to claim that may be made.

The Court may bring action under section 6 of the Company Directors Disqualification Act 1986. This is in relation to making a disqualification order in cases where:

- The person has been, or currently is, a director of a company which has become insolvent; and
- His conduct as Director makes him unfit to be concerned with the management of a company.

Under section 246ZB of the Insolvency Act, the liquidator can bring action for wrongful and fraudulent trading. Wrongful trading is aimed at the principle that when Directors are aware of an insolvent liquidation prospect, they take all actions possible to minimise potential creditor losses.

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.

- 1 – Correspondence
- 2 – Electronic voting
- 3 – Virtual meeting
- 4 – Physical meeting
- 5 – Any other decision-making procedure which enables all creditors who are enabled to participate in the making of the decision to participate equally.

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

Commented [WPA9]: 10/15

Question 3.1 [maximum 6 marks]

Commented [WPA10]: 4/6 a reasonable answer but more detail needed on the specific provisions.

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?

It is common that an administrator will require suppliers to continue to supply good and services which are considered essential. Suppliers, under section 233 of the Act, are not permitted to require payment for outstanding debts in order to ensure the continuing provision of the goods and / or service. Examples may include electricity, water, gas and communication services. The supplier of the goods / services may require the administrator to personally guarantee that the payment for charges in respect of the supply.

Administrators can refer to section 233A of the Act in which it stipulates that any 'insolvency-related' clause must not impact the supply of essential goods / services.

Section 233B of the Act prohibits clauses in the contract of a supplier which allows the supplier to terminate the contract upon the company entering insolvency. Under section 233B of the Act, a contract may be terminated with the consent of the office-holder of the Company or upon the Court granting permission. The Court must be satisfied that the contract would cause hardship to the supplier.

Sections 233, 233A and 233B are applicable where a company has entered into a Moratorium, Restructuring Plan or CVA, in addition to in an administration.

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.

Payments in a liquidation would be paid in the following order:

- Expenses that are incurred by the liquidator in preserving, realising or getting in any of the assets of the Company;
- The costs of security provided by the liquidator;
- Any amounts payable to assist the preparation of a statement of affairs or accounts;
- Any disbursements by the liquidator during the course of the winding up;
- The expenses charged by anybody who has been employed by the liquidator to perform services for the company;
- The remuneration of the liquidator. This is subject to similar rules to administrators' fees estimate regime where a time cost basis is adopted;
- Corporation tax on any chargeable gains accruing on the realisation of any asset of the company;
- Any other expenses chargeable by the liquidator;
- Preferential creditors as defined in section 386, 387 and schedule 5 and section 175 of the Act;
- Ordinary, and then secondary debts;
 - Secondary debts include compensation to FSCS scheme, Crown preference, PAYE deductions, NI, VAT, and Construction Industry Scheme deductions.
- Floating charge holders.
 - If there is more than 1 floating charge, then pay them in priority to which the floating charge was created first, in consideration with section 176A of Act.
- Unsecured creditors
 - These will often be trade creditors such as suppliers of good and / or services.
- Interest on creditor claims; and finally
- Shareholders, on pro rata basis.

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

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

Commented [WPA11]: 6/9 a reasonable answer but lacking detail on preferential debts, s 176A and the position of fixed charge holders.

Commented [WPA12]: 5/15

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;

In ordinary course, the liquidator may realise the charged assets in the course of the liquidation and pay the floating charge holder in accordance with the charge holder's priority. Floating charge holders are paid following the payment of preferential creditors in a liquidation. In the scenario, it is important to understand if any further floating charges have been issued, as priority will be given to which floating charge was created first.

The liquidator must consider their duty to make a prescribed part, 50%, of the company's net property available to unsecured creditors. The liquidator must assess the net property of the Company, and if the net property of the Company does not exceed GBP10,000, then the duty to distribute the prescribed part does not apply. From the limited information provided above, it appears that the net assets may be less than GBP10,000 so the liquidator is not obliged to pay 50% of the net property to unsecured creditors.

Should Stercus Bank plc also be an unsecured creditor, they would not be entitled to the participation within the prescribed part of the distribution, should there be one. This law was stated in the *Thorniley v HMRC* [2008] case.

The above is directly in relation to Section 176A of the Act.

Commented [WPA13]: 0/5 the answer contains accurate law but misses the point of the question which is the charge will be invalid under s 245.

Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

The liquidator should consider and investigate the potential sale of the coffee roasting machines at an undervalue. As outlined within s238 of the Act, the liquidator may 'attack' a transaction which occurred prior to the appointment which was at undervalue. The liquidator must be able to demonstrate that Company acted on one of the following:

1. The Company made a gift to another person; or
2. The Company undertook the transaction in a manner which provided no consideration to the Company; or
3. The Company undertook the transaction which was for significantly less value than it should have been.

The transaction had to have occurred within 2 years of the commencement of the administration or liquidation to be classed as a 'relevant time'.

In the matter of the above scenario, the timeframe is less than 2 years, and on initial information received appears to be at a very significant discount to the purchase price. This would lead to further investigation to determine whether the transaction occurred at an undervalue.

Under s238 of the Act, it is imperative to prove that at the time of the transaction, the Company was unable to pay its debts as they fall due. The transaction in the scenario is to a connected party, the Director. This means that Company is automatically presumed to have been insolvent, unless the opposite is proven.

If there is no further evidence to disprove that the Company was solvent at the time of the transaction, the Court may restore the position to how it would have been, had the transaction either not been entered into, or entered into at a full market rate.

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

Section 239 of the Act talks to preferences which may be avoided upon the application of liquidator or administrator to the Court. The purpose of S239 is to prevent the Company placing one creditor in a better position than other creditors prior to a formal insolvency procedure. It does not appear that the Company sought to place Beans and Leaves Ltd in a better position through the payment, rather it appears that the transaction was entered into in order to continue the operation of the Company.

The Company would not have been able to enforce S233 of the Act as the Company was not in a formal proceeding at the time the transaction occurred.

Commented [WPA14]: 5/6 a better answer – more detailed application to the facts would have led to full marks

Commented [WPA15]: 0/4 unfortunately the issue is misidentified – s 127 is the only possible action due to the timing of the payments.

*** End of Assessment ***