



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]: 41/50 = 82% a generally very strong performance. Well Done!

Commented [WPA2]: 9/10

(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

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.

QUESTION 2 (direct questions) [10 marks]

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Question 2.1 [maximum 5 marks]

Commented [WPA5]: 4/5 qii is incorrect – it is the Sec of State or OR who may bring an action

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?

- (i) Under section 423 of the Insolvency Act 1986 the following parties may bring action:
 - The official receiver, the liquidator, the administrator any victim of the transaction such as a creditor (with leave of the court) where the company is being wound up or is in administration.
 - The supervisor of the CVA or any victim of the transaction (whether bound by the CVA or not where a victim is bound by a CVA.
 - A victim of the transaction, in any other case.
- (ii) Under section 6 of the Company Directors Disqualification Act 1986 (“CDDA”) the court may bring action. The CDDA includes provisions granting the court powers to impose a disqualification order. The Secretary of State also has the powers to impose a disqualification order.
- (iii) Under section 246ZB of the Insolvency Act 1986 the administrator may bring action upon application to the court.

Question 2.2 [maximum 5 marks]

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

- a. Correspondence
- b. Electronic Voting
- c. Virtual Meeting
- d. Physical Meeting
- e. Any other decision-making procedure which enables all creditors who are entitled to participate in the making of the decision to participate equally.

The method used is selected by the party seeking the decision and the decision date set must not be less than 14 days after the date of delivery of the notice.

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

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Question 3.1 [maximum 6 marks]

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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?

Under Section 233A (1) of the Insolvency Act 1986 (the “Act”), an insolvency-related term of a contract for supply of essential goods or services to a company ceases to have effect if the company enters administration, in most cases. The supplier can only terminate the contract if the administrator consents to termination, the court grants permission to terminate (if it

satisfied that continuation of the contract would cause supplier hardship) or if charges with respect to supply after the company entered termination are not paid within 28 days from when payment is due.

An administrator can therefore require the suppliers to continue to supply essential goods and services during the administration and it should be noted that:

- Section 233 of the Act applies only to the supply of gas, electricity, water, communication services and goods or services (being point of sale terminals, computer hardware as well as others as set out in Section 233 (3A)).
- Under this Section 233 (2) of the Act, if the administrator makes the request, once the company has gone into administration, the supplier of the goods or services referred to in Section 233 (3), can make it a condition, of supplying the goods or service, that the administrator must personally guarantee the payment of any charges in respect of supply of the same. Section 233 (2b) provides that the supplier cannot make it a condition, of supplying the goods or service, that any outstanding charges due from the company before the date of administration be paid before they supply the goods or service to the company now in administration.
- Section 233B of the Act prevents suppliers from altering the terms of the contract such as increasing prices or additional terms as a condition of continuing to supply the goods or services.

Question 3.2 [maximum 9 marks]

Commented [WPA9]: 9/9

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.

Pursuant to section 115 of the Insolvency Act 1986 (the "Act"), "All expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims."

Fixed charge holders are typically paid first outside of formal insolvency procedure. In the instance that they are not paid outside the proceedings then they will be paid first out of the sales proceeds of the company's asset they are holding a fixed charged over.

The order of priority of other payments in the liquidation are as follows:

1. Expenses of procedure – Pursuant to section 6.42 of The Insolvency (England and Wales) Rules 2016 (the "Rules"), there is an order of priority for expenses of the winding up payable.

The first priority category of expenses are expenses properly incurred by the liquidator in preserving, realising or getting in any of the assets of the company are also included in this class of expenses. This is followed by any cost of security provided by the liquidator, among others including any necessary disbursements by the liquidator during the winding up.

The expenses of the procedure also include the remuneration of the liquidator, however there are a number of categories of expenses payable ahead of the remuneration due to the liquidator.

2. Preferential creditors – Pursuant to section 386 of the Act, preferential debts fall into 2 classes, 'ordinary' and 'secondary', ordinary preferential debts are paid first. Ordinary preferential debts rank equally among the class, same with secondary preferential debts.

Schedule 6 (the "Schedule") of the Act lists the different categories of preferential debt. Categories 8 to 15B of the Schedule are considered ordinary preferential debts and include: unpaid contributions to occupational pension schemes and rights of employees i.e., wages and salary including accrued holiday pay. Categories 15BA, 15BB or 15D of the Schedule are considered secondary preferential debts and include some taxation debts owed to the Government i.e., income tax deductions under PAYE regulations.

Timing of the debt is also taken into consideration.

3. Floating charges – Pursuant to Section 176A (2), where there are assets available for distribution after expenses of the liquidation and preferential creditors have been paid, the liquidator "shall make a prescribed part of the company's net property available for the satisfaction of unsecured debts and shall not distribute that part to the proprietor of a floating charge except in so far as it exceeds the amount required for the satisfaction of unsecured debts".

Per The Insolvency Act 1986 (Prescribed Part) (Amendment) Order 2020, the prescribed part is calculated as a percentage of the value of the company's property which is subject to a floating charge, being 50% of the first £10,000 of the company's net property and 20% of the net property thereafter, subject to a maximum of £800,000.

There are instances where the prescribed part can be disapplied, for example where the company's net property is less than £10,000 or if the liquidator determines the cost of making the distribution outweighs the benefit.

If there is more than one floating charge holder, the floating charges are ranked in priority by their date of creation.

4. Unsecured creditors – This class of creditors consist of creditors (most commonly trade creditors) who have no security over the assets of the company. The *pari passu* principle means that all unsecured creditors are ranked equally, and available assets are distributed in proportion to the debts due to each unsecured creditor.

Once the priority payments/creditor claims have been settled, any surplus will be returned to members.

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

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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]

Commented [WPA11]: 5/5

The floating charge in favour of Stercus Bank plc;

Pursuant to Section 245 (2) of the Act a floating charge on the company's undertaking or property created at a relevant time is invalid, with exceptions set out in the Act. Pursuant to Section 245 (3) of the Act the time at which a floating charge is created by a company is a relevant time where the charge is created:

- Within 2 years ending with the onset of insolvency, where the floating charge is in favour of a person connected with the company
- Within 12 months ending with the onset of insolvency, where the floating charge is in favour of any other period

(Where a company has gone into liquidation the onset of insolvency is considered to be the date of the commencement of the winding up).

Under Section 245 (4) where the floating charge is made in favour of a person who is not connected with the company, the time is not a relevant time unless the company is unable to pay its debts or becomes unable to pay its debts in consequence of the transaction under which the charge is created.

The debenture granted in favour of Stercus Bank plc (the "Bank") included a floating charge over the whole of the Company's undertaking. The debenture was granted in February 2021, within the 12 months preceding the date the winding up petition was presented and the date of the winding up order. If the Bank is deemed a connected person or not, the floating charge was granted within the relevant time to be considered invalid.

In addition, the floating charge in favour of the Bank was granted in order to prevent the Bank from demanding repayment of the Company's loans. The liquidator could consider that the Company would not have been in a position to repay these debts if the debenture had not been granted to the Bank.

Even if the floating charge is deemed invalid, the debt remains valid and is payable (once expenses of the liquidation and preferential debts have been settled).

Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

The sale of the coffee roasting machines to a director of the Company, Ann Young, occurred 4 months before the winding up petition was presented and 6 months before the winding up order was made. The machines were sold at a discount of £15,000 (not accounting for depreciation).

Given the seemingly discounted sale price given, the liquidator should consider if this was a transaction at an undervalue and if they can apply to the court for an order under Section 238 of the Act.

Pursuant to Section 238 of the Act, 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, in money or money's worth, of the consideration provided by the company". The transaction would need to have occurred within the relevant time, being in the case of a transaction at an undervalue or of a preference which is given to a person who is connected with the company (otherwise than by reason only of being its employee), at a time in the period of 2 years ending with the onset of insolvency (the date of the commencement of the winding up)¹.

Pursuant to Section 249 of the Act, a person is considered connected with a company if they are a director (or shadow director), an associate of a director (or shadow director) or an associate of the company.

Ann Young, as a director, and would be considered a connected person of the Company and the transaction occurred within the relevant time.

It is possible that the court will not make an order under Section 238 of the Act, as the transaction occurred at a time when the Company was suffering from cash flow problems and under Section 238 (5) if the court is satisfied that the Company entered into the transaction in good faith and for the purpose of carrying out the business and if at the time there were reasonable grounds for believing that the transaction would benefit the Company then the court shall not make the order. If the liquidator can provide evidence to the contrary i.e., that the Company was solvent at the time of the transaction then the likelihood of an order being made is greater.

In the instance that the order is made, the position is restored to what it would have been had the company not entered into the transaction.

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

The payments to Beans and Leaves Ltd. were made in the period after the winding up petition was presented but before the winding up order was made. The liquidator should consider if these were preference payments and if they should apply to the court for an order to restore

¹ Section 240 1(a) and 3(e) of the Act.

Commented [WPA12]: 5/6 good but needed to consider the need to show insolvency and the effect of the presumption against a connected party.

Commented [WPA13]: 0/4 unfortunately the issue is misidentified – it cannot be s 239 as the winding up has already commenced – it can only be s 127

the position to what it would have been had the Company not given that preference under Section 239 of the Act.

Under Section 239 of the Act, it is considered that a company has given preference to a person:

- where the person is one of the company's creditors at the time of the transactions;
- if the person would be in a better position had the transaction not taken place; and
- if there was a 'desire' to make the creditor better off.

Beans and Leaves Ltd were a creditor of the Company at the time of the transactions taking place. Beans and Leaves Ltd have also been paid the full balance of their amounts due, had they not been paid before the start of the liquidation they potentially would have only received a proportion of their amounts due under the *pari passu* principle. Assuming that Beans and Leaves Ltd was not a connected company then it is not clear if there was 'desire' to make Beans and Leaves Ltd 'better off' or if this was purely a commercial decision rather than a preference given that the supply of the coffee beans is essential to the continuation of the business.

In addition, the preference would need to have been given at the relevant time, as outlined in the response to Question 4.2 above in the case of a connected person or if not given to a connected person, a time in the period of 6 months ending with the onset of insolvency. The payments to Beans and Leaves Ltd were made within 6 months of the onset of insolvency.

The liquidator would also need to consider if the Company was unable to pay its debts as they fell due at the time of the preference. In reference to this, we do know that the Company was suffering cash flow issues.

*** End of Assessment ***