



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]: 23/50 = 46% Unfortunately there are too many issues misidentified or dealt with in insufficient detail.

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.**

Commented [WPA3]: D is correct

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.

Commented [WPA4]: 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]

Commented [WPA5]: 5/10

Question 2.1 [maximum 5 marks]

Commented [WPA6]: 0/5 each sub question required a different answer

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?

A Liquidator or administrator.

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 meeting.
- Physical meeting.
- Any other decision-making procedure which enables all creditors entitled to participate in the making of the decision to participate equally.

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

Commented [WPA8]: 8/15

Question 3.1 [maximum 6 marks]

Commented [WPA9]: 3/6 more detail needed to include s 233A and 233B

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?

Yes, subject to the provisions of Section 233(2) of the Insolvency Act, 1986. Pursuant to this Section, if a request is made by or with the concurrence of the administrator, after the effective date, of any of the supplies mentioned therein, the supplier may make it a condition of the giving of the supply that the office-holder personally guarantees the payment of any charges in respect of the supply, but shall not make it a condition of the giving of the supply, or do anything which has the effect of making it a condition of the giving of the supply, that any outstanding charges in respect of a supply given to the company before the effective date are paid.

The supplies referred to above are mentioned in Section 233(3) and 233(3A).

Question 3.2 [maximum 9 marks]

Commented [WPA10]: 5/9 broadly correct but lacking detail and out of date in respect of Sch 6.

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 is the order by which the assets of the debtor are applied when the time comes. The Insolvency Act, 1986 and the Insolvency (England and Wales) Rules, 2016 provide for the manner in which the assets of the debtor will be applied as follows:

- First to be paid will be the expenses incurred in the winding up, including the remuneration of the liquidator (Section 115);

b) Next to be paid will be claims by preferential creditors who are described in 9 categories under Schedule 6 to the Act. These are summarised below:

Category 1: Debts due to inland revenue.

Category 2: Debts due to customs and excise.

Category 3: Social Security Contributions.

Category 4: Contributions to occupational pension schemes.

Category 5: Remuneration, etc, of employees.

Category 6: Levies on coal and steel production.

Category 7: Deposits covered by Financial Services Compensation Schemes.

Category 8: Other deposits.

Category 9: Certain HMRC debts.

c) After the payments of these claims, next shall be the claims by any floating charge holder (Section 176ZA) subject to the claims by the preferential creditors. The settlement of the secured creditors is made subject to the extent to which the assets satisfy the claims by the preferential creditors. It is worth noting that the rights and interests of the secured creditors cannot be affected by the terms of any CVA.

d) Next to be paid will be the unsecured creditors. These

e) Lastly, whatever is left after the distributions are made will be returned to the shareholders.

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

Commented [WPA11]: 2/15

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 here is that Stercus Bank plc would have, in any case, been an unsecured creditor of the debtor and as such, been subject to the *pari passu* treatment of its claim together with other unsecured creditors. However, in creating in its favour a secured charge within the relevant period, Stercus Bank plc can be said to have gained an unfair advantage over the other unsecured creditors by obtaining more than it would have ordinarily obtained if it were to claim as an unsecured creditor.

The Liquidator may proceed under Section 245 of the Insolvency Act 1986 which provides for invalid floating charges. It provides for the avoidance of transactions creating floating charges over the debtor's assets shortly after the commencement of liquidation proceedings.

In this instance, given that the winding up order was given on 14th October 2021 and this transaction was concluded in February 2021, this transaction falls within the one – year relevant period under Section 245(3)(b) of the Act.

Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

This transaction would also be subject to the avoidance provisions in the Act given that Ann is a director of the company and therefore a person associated with the company within the meaning of Section 249 of the Insolvency Act.

Such a transaction would also be set aside upon application by the Liquidator on the grounds that it would be considered as a transaction, unless otherwise proved, that had the effect of putting her into a position which, in the event of the company going into insolvent liquidation, was better than the position she would have been in if that thing had not been done.

This stems from the combined interpretation of Sections 239(6), (5) and then (4) of the Insolvency Act, 1986.

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

This transaction, too, may be set aside on account of being a preference of a creditor. The fact that the company passed a resolution a month before the winding up order made shows that at that time, the company was presumed unable to pay its debts. Therefore, under Section 239(4) of the Act, it provides that for the purposes of this section and section 241, a company gives a preference to a person if: -

- a) that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities, and

Commented [WPA12]: 2/5 lacks important detail

Commented [WPA13]: 0/6 it is not clear how s 239 might apply here. It is more likely to fall into s 238 or s 423.

Commented [WPA14]: 0/4 – s 239 cannot apply to actions once a winding up has commenced – the question required consideration of s 127

- b) the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he/she would have been in if that thing had not been done.

Under Section 239(5), it is worth noting that the court shall not make an order under this section in respect of a preference given to any person unless the company which gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (4)(b), that is, the effect of putting the creditor in a much better position than it would have otherwise been in a case of liquidation. In *Re M. C. Bacon Ltd*, [1990] BCLC 324., Millett J, while highlighting on the issue of desire to influence, stated that it was not necessary to adduce direct evidence of the desire – which could be inferred from the circumstances of the case – but the desire must have influenced the decision or the transaction being attacked by the liquidator.

In this case, it would be inferred from the company's categorization of the coffee beans as essential to the business and the threat of their supply being cut off that there was indeed a desire to ensure that the supply of coffee beans continued, which desire influenced the company's decision to grant the suppliers a priority over the other creditors.

*** End of Assessment ***