



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]: 40/50 80% a good effort which loses some marks at the end where the identification of issues is less convincing than earlier.

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.

(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

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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]: 5/5

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?

[The following person may bring action under the relevant sections and Acts:

- (i) Under section 423 of the Insolvency Act 1986,
the victim of the transaction;
where company is being wound up or is in administration, the official receiver, the liquidator and the administrator;
where victim is bound by CVA, the supervisor of the CVA.
- (ii) Under section 7 of the Company Directors Disqualification Act 1986,
the Secretary of State or
if the Secretary of State so directs in the case of company being or has been wound up by the court in England and Wales by the official receiver.
- (iii) Under section 246ZB of the Insolvency Act 1986,
where it appears to the administrator of a company under administration that the person who is or has been the director is to be liable to make such contribution shall apply to the court.]

Question 2.2 [maximum 5 marks]

Commented [WPA6]: 5/5

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

[Five qualifying decision procedures listed under rule 15.3 of the Insolvency (England and Wales) Rules 2016 by which a convener may seek a decision:

- (a) Correspondence;
- (b) Electronic voting;
- (c) Virtual meeting;
- (d) Physical meeting; or
- (e) Any other decision making procedure that entitles the creditors to participate equally in making decision.]

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

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Question 3.1 [maximum 6 marks]

Commented [WPA8]: 6/6

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 administrator may continue to operate the business as the Act disallows disruption of supply of goods or services under certain conditions. Under section 233 of the Insolvency Act 1986, from the effective date, the administrator shall, if made conditional by the supplier, personally guarantee payment of charges in respect of essential supplies of gas, electricity, water and communication services. Communication services has wider meaning that include

point of sale terminals, computer hardware and software, information, advice and technical assistance, data storage and processing, and website hosting. On entering into administration, the supplier contracts cannot automatically terminate supplies.

Section 233A of the Act provides further protection of essential supplies. The insolvency-related term in contract for supplies will cease to have effect if the company enters into administration. Supplier may terminate contract if the administrator consents to the termination or the court grants permission for it or the charges for supplies during administration remain unpaid within a period of 28 days from beginning with the day on which the payment became due or the supplier makes condition for the administrator to personally guarantee the payment of charges for supplies during administration and the he fails to do so.

The Corporate Insolvency and Governance Act 2020 added section 233B for furthering the protection of supplies of good and services. The section prohibits clauses in supply contracts that allow supplier of goods or services to terminate or "do any other thing" if the company enters a formal insolvency procedure. However the contract may still be terminated on the consent of the administrator or the court grants permission for termination where it is satisfied that the continuation of the contract would cause the supplier hardship. Further there are limited exceptions provided to insurers, banks, electronic money institutions, recognised investment exchanges and clearing houses, securitisation companies and overseas companies with corresponding functions.]

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.

[Under section 115 of the Insolvency Act 1986 read with rules 6.42 and 7.108 the Insolvency (England and Wales) Rules 2016 certain expenses are to be paid in priority over payments to preferential creditors, floating charge holders and to the unsecured creditors. If there are sufficient funds after distribution to the creditors, the same shall normally be distributed pro rata to the shareholders as per their respective shareholdings.

The order of priority is:

- 1) Expenses
 - a) expenses that are properly incurred by the liquidator in preserving, realising or getting in any assets of the company including conduct of legal proceedings;
 - b) the cost of security;
 - c) any amount payable to person assisting in preparation of statement of affairs or accounts;
 - d) disbursement made by liquidator in course of winding up including expenses of the liquidation committee;
 - e) remuneration of any person employed by liquidator providing services for the company;
 - f) liquidator remuneration;
 - g) corporation tax on chargeable gains in the course of realisation of assets of the company; and
 - h) any other expenses properly chargeable by the liquidator in the course of conducting the winding up of the company.
- 2) Payments to preferential creditors
 - a) Ordinary preferential debt
 - b) Secondary preferential debt
- 3) Payments to floating charge holders
- 4) Unsecured creditors
- 5) Shareholders

Commented [WPA9]: 8/9 very good but omits to deal with fixed charges

Preferential creditors are largely limited claims of employees, some taxation liabilities and some other liabilities.

Ordinary Preferential Debt:

Employee claims shall include contributions deducted towards occupational pension from earnings of the employees paid in the period of four months prior to the commencement; employer's contributions towards occupational pension in the period of twelve months prior to the relevant date; employee remuneration for period of four months prior to the commencement to a maximum of £800; accrued holiday remuneration for period prior to winding up. Taxation liabilities include levies on production of coal and steel. Other liabilities include monies advanced to pay wages or holiday remuneration; amounts ordered to be paid by the company under the Reserve Forces (Safeguard of Employment) Act 1985; amount owed in respect of an eligible deposit as does not exceed the compensation that would be payable in respect of the deposit under the Financial Services Compensation Scheme.

Secondary Preferential Debt:

Amount owed to one or more eligible persons in respect of an eligible deposit as exceeds the compensation that would be payable in respect of the deposit under the Financial Services Compensation Scheme; amount owed to one or more eligible persons in respect of a deposit made through a non-UK branch of a credit institution authorised by the competent authority of the UK and would have been an eligible deposit if it had been made through a UK branch of the credit institution; debt owed to taxation authority; PAYE income tax deduction; national insurance deduction; VAT payments; Construction industry scheme deductions and student loan repayments.

Floating charge holders are next in line to receive payment, however, the where there are more than one the priority is with the charge created first. Before making payment the liquidator shall make a "prescribed part" under section 176A of the Insolvency Act 1986 for the unsecured creditors. The prescribed part is the net property of the company after satisfaction of liquidation expenses and preferential debt. The prescribed part must not be distributed to the floating charge holders. Where net property does not exceed £10,000, the prescribed part is 50% of the net property. However, if the net property is less than the prescribed minimum i.e. £10,000 and the liquidator thinks that the cost of making a distribution to unsecured creditor would be disproportionate to the benefits, then liquidator shall not make such prescribed part. Where net property exceeds £10,000, the prescribed part is the sum of 50% of the first £10,000 in value plus 20% of the excess value subject to a maximum amount of £800,000. Floating charge holder having any unsecured debt is not allowed from participating in the prescribed part.

Unsecured creditors are paid out last in the pecking order of payments towards debt.

Shareholders are paid is there is surplus after making payment to creditors.]

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

Commented [WPA10]: 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]

Commented [WPA11]: 5/5

The floating charge in favour of Stercus Bank plc;

[Under section 245 of the Insolvency Act 1986 a floating charge on the company's undertaking or property created at a relevant time is invalid except to the extent of the aggregate of value of fresh money paid or good or services supplied to the Company or for value the Company is discharged from existing debt or for the interest payable on the debt or goods or services supplied. Such creation of charge is at the same time of providing new money or goods or services or after creation of charge.

Relevant time is two years prior from the onset of insolvency for connected person and 12 months prior from onset of insolvency for person not connected and the Company was unable to pay its debt.

The delay in creation of charge and in making payment or supply of goods or service or discharge of debt should be minimal. The directors should not gain benefit of releasing their personal guarantees.

Vulnerable floating charge may be invalidated however the underlying debt remains valid.

Considering the above to test for avoidance of floating charge we find that the date of granting the debenture thus creating the floating charge is within 12 months of the onset of the liquidation of the Company. Further no new money was received or existing debt was discharged by the grant of debenture, whereas the charge was created over all the assets of the Company. Still further the Company granted the debenture in order to prevent the bank from demanding repayment of loans thus signalling its inability to pay its debt. The period falls within the relevant time and at such time was unable to pay its debts within the meaning of section 123 of the Act.

Thus the floating charge was vulnerable and should be avoided.]

Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

[Section 127 of the Insolvency Act 1986 avoids disposition of property of the Company after commencement of winding up unless validated by court. The commencement date is the date of the presentation of the winding up petition. Disposition includes payment of money or sale or transfer of assets by way of gift, assignment, mortgage, charge, lease, loan or exchange.

Section 212 of the Insolvency Act 1986 applies if the officer of the Company has misapplied or retained or become accountable for, any money or other property of the Company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the Company.

Section 213 of the Insolvency Act 1986 where any business of the Company is carried out with intent to defraud the creditors or for any fraudulent purpose.

Section 214 of the Insolvency Act 1986 applies in relation to a person who is or has been a director of the Company and is guilty of wrongful trading and knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation. However, the director may step with a view to minimise the potential loss.

Under Section 238 of the Insolvency Act 1986 the liquidator may attack a transaction entered prior to the Company entering liquidation as at undervalue. Such transaction may be a gift to another person, or having received no consideration or for a significantly less than value in money or money's worth. The relevant time is a period of two years prior to the commencement of liquidation.

Section 239 of the Insolvency Act 1986 applies where the company has at a relevant time given a preference to any person. Preference will be where the person is one of the company's creditors or a surety or guarantor for any of the Company's debts or other liabilities and the preference has the effect of putting that person into a position which, in the event of the Company going into liquidation, will be better than the position he would have been in if that thing had not been done. Relevant time is two years prior from the onset of insolvency for connected person and 6 months prior from onset of insolvency for person not connected and the Company was unable to pay its debt.

Now testing the transaction against the above mentioned provisions we find that disposition of property is prior to the winding up petition filing date and there has been no misapplication or retention of the Company's property by Ann Young, Director. Both section 127 & 212 not apply. Section 214 may not apply as there is no wrongful transaction and moreover the director by buying the machines could have minimised potential losses. This brings us to Section 238 where the liquidator may attack undervalue transactions. However, the one may face problems of valuations and the transaction may have carried out in good faith and for the purpose of carrying on business in scenario of cash flow problems. Finally section 239 may not apply as Ann Young is not a creditor of the Company.

The liquidator may not attack this particular transaction.]

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

Commented [WPA12]: 2/6 – most of the answer is not relevant – only s 238 is really on the point and the treatment of that lacks detail.

Commented [WPA13]: 0/4 unfortunately the issue has not been identified correctly. Due to the timing, it cannot be s 239 but only s 127.

[Section 239 of the Insolvency Act 1986 applies where the company has at a relevant time given a preference to any person. Preference will be where the person is one of the company's creditors or a surety or guarantor for any of the Company's debts or other liabilities and the preference has the effect of putting that person into a position which, in the event of the Company going into liquidation, will be better than the position he would have been in if that thing had not been done. The Company in giving the preference was influenced by a desire to put that person in a better position. Relevant time is two years prior from the onset of insolvency for connected person and 6 months prior from onset of insolvency for person not connected and the Company was unable to pay its debt.

Now testing the transaction against the provisions of the section we find, that the transaction is within the relevant time i.e. one month before the winding up order was made. The transaction puts Bean and Leaves Ltd., creditor of the Company, in a better position than it would have been. The Company had cash flow problems being unable to pay its debt. Pressure from the creditor should not be considered relevant. However the desire to make payment to the creditor was not a desire to prefer the creditor but by desire to continue the operations of the Company as the coffee beans was seen as essential.

The liquidator may not attack this particular transaction on the matter of not being influenced by desire.]

*** End of Assessment ***