



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 [JL1]: TOTAL 44 out of 50
Well done!

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

Commented [JL2]: 10 out of 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.

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

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 [JL3]: 10 out of 10

Question 2.1 [maximum 5 marks]

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?

1. Under section 423 of the Insolvency Act 1986 (the "Act"), if the company is being wound up or is in administration then the official receiver, the liquidator or the administrator can bring an action. Any victim of the fraudulent transaction, such as a creditor can also bring a claim but they require leave of the Court.
2. Where victim of such a transaction is bound by a CVA, they can bring an action themselves (as can any victim not bound by the CVA) or the supervisor of the CVA can. In any other circumstance the victim of the transaction can bring a claim.
3. Under section 6 of the Company Directors Disqualification Act 1986, the Secretary of State brings proceedings. Proceedings will either be brought in the name of the Secretary of State or the official receiver.
4. Under section 246ZB an administrator can bring an action.

Commented [JL4]: 5

Question 2.2 [maximum 5 marks]

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; and
5. any other decision making procedure which enables all creditors who are entitled to participate in the making of the decision to participate equally.

Commented [JL5]: 5

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

Commented [JL6]: 15 out of 15

Question 3.1 [maximum 6 marks]

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?

1. Automatic termination of a contract on the basis that a company goes into administration has become increasingly difficult to enforce. Section 233A of the Act prevents a supplier of essential services (gas, electricity, water and communications services) from relying on an insolvency-related term to terminate the supply of goods or services when a company enters administration.
2. As such, unless a contract expires due to a fixed term, or for other reasons unrelated to insolvency or the administration, the contract between any essential suppliers and the

company will most likely remain in effect. The administrator can therefore compel the continued supply of essential goods and services during the administration, unless the supplier obtains a court order permitting termination of the contract governing the supply. The administrator can also consent to termination.

3. Under section 233 of the Act essential suppliers are not allowed to require any debt owed be paid off before continuing the supply but can request a personal guarantee from the administrator for the services which will be provided during the period of administration. If supplies provided during administration are not paid within 28 days of falling due, the essential suppliers can also terminate
4. Section 233B of the Act (introduced by the Corporate Insolvency and Governance Act 2020) extended the restrictions under section 233 and 233A of the Act to any supplier. This allows the administrator, therefore, to compel the continuance of any goods and services (excluding financial services) unless termination is in accordance with a non-insolvency related term or unless the court permits termination upon the application of the supplier.

Commented [JL7]: 6

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.

1. Secured creditors with a fixed charge over assets are the first to be paid out in an insolvency, although in fact they sit outside of the insolvency proceedings and have a right to separate enforcement if they wish.
2. In the insolvency proceeding itself, subject to payment of the above, expenses of the winding up and the liquidator's remuneration are the highest-ranking payment in the waterfall, in accordance with section 115 of the Act. They are payable in the following order:
 - a. expenses properly incurred by the liquidator in preserving, realising or getting in any of the assets of the company (including conduct of legal proceedings);
 - b. the cost of any security provided by the liquidator;
 - c. any amounts payable to a person to assist in the preparation of a statement of affairs or accounts;
 - d. any necessary disbursements by the liquidator in the course of the winding up;
 - e. the remuneration of any person employed by the liquidator to perform services for the company;
 - f. the remuneration of the liquidator (subject to consent from either the creditors committee (or members committee if its solvent), the body of creditors or the sanction of the court);
 - g. the amount of any corporation tax on chargeable gains accruing on the realisation of any asset of the company; and
 - h. any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up.
3. Preferential creditors have the right to be paid after payment of the expenses. There are two classes of preferential creditor, ordinary and secondary. Preferential debts are largely made up of employee claims and taxation liabilities. Employee claims can be quite limited, however, for example, most of them are limited to the four months prior to liquidation and a maximum payment of up to GBP 800.

4. Ordinary preferential creditors will be paid first. If there is sufficient money then secondary preferential creditors will be paid out.
5. Floating charge holders are those which have security but it is not fixed over a specific asset. It floats, usual over all of (or a class of) the assets, often including stock in trade and any debts owed to the company until a crystallising event occurs. Up until such a crystallising event (e.g. a failure to meet a repayment) the Company is permitted to deal with the assets, over which the floating charge is held, freely without seeking permission from the charge holder. Floating debts are usually structured such that a company going into insolvency is a crystallising event.
6. However, in accordance with section 176A of the Act, from whatever is left after the payment of the liquidation expenses and preferential creditors (the “net property”), a liquidator must set aside a “prescribed part” from which the liquidator cannot pay out floating charge holders unless the prescribed part is in excess of the amount required to satisfy all the unsecured debts.
7. Where the company’s net property does not exceed GBP 10,000 the prescribed part is 50% of the net property. Where the company’s net property exceeds GBP 10,000 the prescribed part is 50% of the first GBP 10,000 in value plus 20% of the excess in value above the GBP 10,000 subject to a maximum amount of the prescribed part of GBP 800,000. Where the net property is less than GBP 10,000 the liquidator has a discretion and may conclude it is not worth paying out unsecured creditors.
8. The priority of the payment out of charge holders will usually be in order of time with the oldest charges being paid out first. However, different arrangements can be agreed as between the floating charge holders, particularly when a floating charge may, for example be held by a director who may agree a loan to the company and will permit the lender to take a priority charge.
9. Unsecured creditors are next in the waterfall. They are paid out on a pari-passu basis after payment of all of the above. If there is any left-over funds after that they are distributed among the shareholders according to the company’s constitution which will normally permit a distribution pro rata to the shareholders’ respective shareholding.
10. In an insolvent liquidation three to five creditors from the above will be elected to form the creditors’ committee. Secured creditors are excluded from this unless they file a proof of debt and submit their claim to the liquidation process. If the liquidation is solvent then it would be shareholders’ committee instead of a creditors’ committee.
11. All creditors have the right to vote in an insolvent liquidation aside from any secured creditors which have not filed a proof of debt.

Commented [JL8]: 9

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

Commented [JL9]: 9 out of 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;

1. The floating charge in favour of Stercus Bank plc (the "Bank") can likely be rendered invalid in reliance on section 245 of the Act. In accordance with section 245, where a floating charge is given within the 12 months prior to the onset of insolvency (this is assuming the bank is not a person connected with the company) it can be rendered invalid if it was not granted in favour of any new consideration (as is the case here – it is to secure existing loans to the Company) and at the time of the creation of the charge the Company was unable to pay its debts or became unable to do so in consequence of the transaction.
2. In accordance with section 123 of the Act a Company is unable to pay its debts if:
 - a. a creditor to whom the company is indebted in a sum exceeding £750 then due has served a written demand on the company requiring the company to pay the sum due and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
 - b. execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
 - c. it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.
3. A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

Commented [JL10]: 4
Reasonable answer.
245 applies only to floating charges – omitted
Limited application of the law to the facts.

Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

1. This is a transaction at an undervalue and can most likely be unwound in reliance on section 238 of the Act. The liquidator will have to prove firstly that the Company entered into a transaction with Ann Young ("Ms. Young") for consideration which, in money or money's worth, was, at the date of the transaction significantly less than the value, in money or money's worth, of the consideration provided by the Company.
2. As such it depends on the value of the coffee machines. If they were only worth GBP 10,000 then there is no basis to unwind the transaction. However, as Ms. Young paid 40% of the value paid by the Company in purchasing the machines only one year before, on the face of it, it appears likely that Ms. Young did not pay fair value for the coffee machines.
3. The transaction has taken place within a period of two years prior to the commencement of the liquidation as required by section 238 and as defined in section 240(3)(e). The Court will have to be satisfied, however, that at the time of the transaction the company was unable to pay its debts as they fell due or became unable to pay its debts in consequence of the transaction (as to which see section 123 of the Act for both). This sounds likely given the issues with the bank which arose prior to this transaction and that the transaction took place only five months prior to liquidation but the Court will have to be satisfied.
4. Fortunately for the Company, as Ms. Young is a Director of the Company, and therefore a connected person, the Company is presumed to have been insolvent at the time of the transaction, or to have become insolvent as a result of it, and the burden is therefore on Ms. Young to prove that was not the case.
5. Ms. Young would be unable to rely on the defences afforded by section 241.

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

1. It is unlikely that the payments to Beans and Leaves Ltd. ("B&L") can be avoided. This would appear to fall within the realms of the *Re MC Bacon Ltd.* case and what Millet LJ referred to as choosing between the lesser of two evils, without desiring either.
2. The section to be considered in this scenario is section 239 of the Act and the elements which the liquidators would have to prove to avoid the transaction are:
 - a. that B&L at the time of the transaction were a creditor of the Company. This is made out as the GBP 8,000 payment was to pay existing liabilities and the further GBP 3,000 was paid upon delivery with terms having being varied to agree that the debt arose at the time of each delivery.
 - b. that payment of the monies to B&L (and the variation in payment terms) by the Company had the effect of putting B&L in a better position in the event of the Company going into insolvent liquidation, than the position B&L would have otherwise been in. This appears to be made out. It is a compulsory liquidation and as such the Company is unable to pay all its debts. However, B&L as an unsecured creditor has entered into the liquidation without any debt owed by the Company

Commented [JL11]: 5
Although she might not succeed with a defence it would have been useful to explain what the defences are.
The structure of the answer could also be improved.
With application questions it is best to follow the following structure:
Identify the issues
State the law
Apply the law
When these steps are done in one go, some elements are often left out.

whereas, even if it had ceased trading with the Company, it would have been owed a debt of at least GBP 8,000.

- c. The preference was given at a relevant time. Assuming B&L is not a connected person to the Company this period is six months prior to the onset of the insolvency on 23 December 2021 (see section 240(3)(e)). This is also made out as it the monies were paid and terms altered one month prior to the commencement of the liquidation.
3. The above having all been made out, there are two relevant issues remaining. The first is whether, in the Company giving the preference to B&L, the Company was influenced by a desire to produce the effect of putting B&L in a better position than B&L would otherwise have been in entering into an insolvent liquidation. From the limited facts provided by the liquidators to date, this does not sound to be the case. B&L is one of the Company's key suppliers and had the Company not paid off the debt to B&L and varied to more favourable payment terms, B&L would have ceased supplies to the Company which the Company considered essential.
4. As such, although the result was to put B&L in a more favourable position that it would otherwise have been in, the intention of the Company was to secure continued, essential supplies. The Company, may, however, wish to look at actions against the Directors for wrongful trading.
5. The second relevant issue, which is a prerequisite to unwinding a transaction under 239 is that, at the time the preference was given, either the Company was unable to pay its debts as they fell due or became unable to pay its debts in consequence of the preference (as to which see section 123 of the Act as set out in answer 4.1 above). This is almost certainly met but is irrelevant in light of paragraphs 3 and 4, above.

*** End of Assessment ***

Commented [JL12]: 0
Refer to p 64 in the Guidance Text.
This scenario deals with a disposition after the commencement of the company's insolvency proceeding.
Therefore, s 127 and not s 239 applies.