



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]: 31 out of 50

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

Commented [JL2]: 8 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.

Commented [JL3]: d

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 [JL4]: b

(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 [JL5]: 9 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?

- (i) Under section 423 of the Insolvency Act 1986 (a) The Official Receiver/ Liquidator/ administrator and (b) Any Victim of a FRAUDULENT Transaction done by the company can initiate an action for Avoidance of such defrauding transactions.
- (ii) The Official Receiver/ Liquidator/Administrator is the person who can take an action against the directors of an insolvent company under Section 6 of the "Company Directors Disqualification Act 1986" wherever he finds that the behaviour and actions of the directors where "unfit" for the stressed situation of the insolvent company
- (iii) Only the LIQUIDATOR of the company (not even the creditor or the contributory) can make an application before the courts against the directors of the company charging them of WRONGFUL TRADING

Commented [JL6]: 4
CDDA – Secretary of State

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.

As per section 264ZE(1) , when the decision cannot be arrived via the "deemed consent" procedure the creditors will use the "qualifying decision procedure" . The five (5) qualifying decision procedure which the creditors may use to take the decision in the matter of the insolvent company are :-

- a) Correspondence
- b) Electronic Voting
- c) Virtual Meeting
- d) Physical Meeting
- e) Any other decision making process as may be formulated by the creditors which enable all the eligible creditors to participate in the decision making process equally.

Commented [JL7]: 5

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

Commented [JL8]: 12 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?

An administrator will surely need continuous supplies of certain essential services and goods to keep the business of the company "as a going business/going concern" and for that Section 233, 233A and 233B of the Insolvency Act of 1986 contains the relevant provisions which govern and regulate the issue of supply of essential services and goods to the insolvent company , during its administration period.

Services and goods like Gas, Electricity, Water, Communication Services are essential services and must be continued to an insolvent company. As per the arrangement, the supplier cannot demand any outstanding payments (payments due on date of initiation of

Administration) as a precondition to continue the supplies during administration period, however section 233 allows a supplier to seek a Personal Guarantee of the administrator to ensure that the supplier is paid the dues of his supplies during the administration period.

However, Section 233A gives some flexibility to the suppliers by allowing them to alter the terms of supply during the administration period (like increasing the prices of the goods and services).

This uncertainty due to section 233A was taken care of by the provisions of Section 233A wherein the section clearly prohibits the suppliers to “do any other things” and also prohibits them to seek personal guarantee of the administrator to ensure the payment against their supplies during the administration period. The contract of supplies however can be terminated by the supplier only after a permission of the administrator or by seeking an order from the court (whereby the court is satisfied that a continuing supply by the vendor will be detrimental to the financial health of the vendor himself).

Commented [JL9]: 4
Effect of s 233B?

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.

The order of priority of payments by the liquidator in case of liquidation of a company are as under:-

- 1) **First Priority**- Expenses incurred during the liquidation are given “Super Priority” and are paid in “ Priority” ie before any amount could be paid to any Preferential Creditor/ Floating Charge Holder/ Unsecured Holder/ Shareholder.
During the liquidation process the expenses incurred by Liquidator comprise mainly of:-
 - a) Expenses incurred in preserving the company and its assets or realizing/controlling the assets of the company
 - b) Expenses incurred with respect to support staff of liquidator, the people engaged by liquidator to prepare accounts, appear before the court or to perform any services for the company whatsoever
 - c) Fees and Remuneration of the Liquidator/ Outstanding fees of the Administrator
 - d) Corporation tax as applicable
 - e) Any other expenses connected to the process of liquidation
- 2) **Second Priority**- Preferential Creditors are paid after the liquidation expenses have been paid for.

The preferential creditors are further divided into “Ordinary Preferential Debts” and “Secondary Preferential Debts”. The Ordinary Preferential Debts are paid in priority over the Secondary preferential debts

The Ordinary Preferential Debts include:-

- a) Limited claims of the employees of the company, balance salary, accrued holiday remuneration
- b) Amount owed by the company towards Pension
- c) Levies on production of coal and steel
- d) Amount of claims to be paid by the company under the Reserved Forces (Safeguard of Employment) Act 1985
- e) Amount owed by the company towards “eligible deposits”

The Secondary Preferential Debts include:-

- a) Crown dues like Income Tax Deductions, National Insurance Deductions , VAT Payments etc
- b) Amount owed by the company towards various types of Eligible Depositors

3) Third Priority-Floating Charge Holders

After payment of the expenses and preferential creditors the Floating Charge holders will be paid out of the property remaining after keeping aside a certain portion of the property of the company called 'Prescribed part' for the satisfaction of the Unsecured Creditors from the "Net Property" of the company. The "Net property" of the company is the total property of the company that remains after satisfaction of the expenses and the settlement of the preferential debt. If the value of the "prescribed part" is more than the value of the settlement of the unsecured creditors then the balance portion is added used towards satisfaction of the floating charge holders. The amount of "prescribed part" is calculated @ 50% of the value if the net property value less than UK Pounds 10,000 and additional 20% for value greater than UK Pounds 10,000.

Among the floating charge holders, the priority is given to the charge which is created first, ie settled in order of "seniority". Consideration of application of Section 176A of the Act shall also be kept in mind before settlement of the floating charge holders.

A floating charge holder who is also holder of an Unsecured debt shall not be allowed to participate in the distribution of the "prescribed part" reserved for unsecured creditors.

4) Fourth Priority- Unsecured Creditors.

As already discussed , the unsecured creditors shall be paid out of the "prescribed part" of the assets of the company. Normally by the time the first 3 class of creditors are paid off, there is very little left to distribute.

5) Fifth Priority- Shareholders of the Company. If anything remains after paying off all the above creditors (including interest on their debt) the same is paid to the shareholders of the company in a pro-rata basis of their respective shareholding in the company

Commented [JL10]: 8
Fixed Charge Holders?

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

Commented [JL11]: 2 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;

The relevant issue in creation of floating charge in favor of Stercus Bank Plc is that of "Preferential Transaction", wherein the company gives some preferential treatment to one of the creditors placing other creditors at a dis-advantageous position. The statutory provision applicable on the "preferential transactions" is Section 239 of the Insolvency Act 1986. Some of the provisions of Section 238 also apply to this issue.

The Company Corfee Zero Limited had issued the debentures (giving floating charge on whole of company's undertaking) to Stercus Bank Plc in Feb 2021. It is obvious that the company was undergoing financial stress at that time (as evident from the fact that the company was fearing that the bank may demand repayment of the loan) and the company must be on verge of a default in the bank repayments.

Had the company not issued the debenture the bank would have called back the entire loan there would have been an immediate compulsory liquidation of the company in February 2021 itself. Any company which would have been a running company would always take all actions possible to revive and thereby prevent itself going into liquidation. Therefore the management of the company issued the debentures to the bank under a logical business decision of preventing liquidation and giving itself a chance to survive and revive and not by any desire to put the bank in any preferential position.

The application of liquidation was finally filed on 14th October 2021, therefore the date of issue of debenture was more than 6 months before the date of filing of liquidation application (ie more than the look back period allowed for any preferential transaction with any non-related person as per the provisions on section 239 of the act. Therefore it can be safely concluded that the management of the company in the month of February 2021 had no apprehensions of the company being referred to liquidation (if they can issue the debenture). The intention of the management of the company was therefore not malafide and was not intended to give any preference to the creditor but to keep the company in a running condition.

Relying upon the judgement in the case of MC Bacon Ltd, it can be concluded that it is important to consider the the intention of the company and not whether there was a pressure tactics from the bank (which will always be there). In the instant case the banks were surely pressurizing the company to issue debenture but the company has not issued debentures with an aim to put banks in any preferential position but in order to save the company from immediate liquidation.

Therefore, the liquidator of the company will not take any action in relation to the issue of debentures and giving floating charge to the Stercus Bank PLC.

Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

The relevant issue in Sale of Coffee Roasting Machine is that of

- (a) "Transactions at Undervalue" wherein the company enter into a transaction with any person such that the value so received by the company is much lesser than the value of the transaction. The statutory provision applicable on "Transaction at Undervalue" is section 238 of the Insolvency Act 1986
- (b) "Transactions defrauding the Creditors" wherein the company which is under liquidation or winding up has at point of time during the look back period has entered into any Undervalue transaction. The statutory provision applicable on the "Transaction Defrauding the Creditors" is section 423 of the Insolvency Act 1986.

That it is true that in July 2021 the company was undergoing cash flow problems and therefore it is natural that the management of the company will take actions to improve the cash flow including selling off some non-core/ redundant assets. Since by July 2021 there was no application of liquidation filed against the company, so it can be assumed that the management has no inkling of the things to come and certainly the scenario of liquidation was neither in their knowledge nor in their mind. Therefore the act of sale of 5 coffee roasting machine @ 10000 (when the purchase price was 25000) cannot be considered as a "Misfeasance" and also cannot be considered as an act of "Wrong Doing" .

However , since the roasters were sold at a value much lesser than its purchase price to the Director of the company only, it can be presumed/assumed that the Roasters were sold at an Undervalue. The sale of the roasters to the directors would have NOT been assumed to be an Undervalue transaction only if an attempt would have been made by the company to sell the same in the open market and a market price would have been discovered and then the directors would have bought it at a price more than the market price.

Moreover , instead of buying the roasters , the directors should have infused the UK Pound 10000 as a contribution in the company and not in lieu of purchase of the roasters. Therefore not only the offence of undervalue transaction evident but the transaction borders on "Defrauding the Creditors". Moreover since the transaction has happened in a period of 2 years before the liquidation proceedings, the transaction is avoidable under the category of "defrauding the creditors". Now that the company is in liquidation the offence of Undervalue and Defrauding can be pursued.

Therefore, the liquidator of the company will take an action in relation to the issue of sale of coffee roaster and seek avoidance of the Under Value Transaction and seek relief under the section 423 of the act.

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

The relevant issue in payment to Beans and Leaves Ltd is that of :-

- a) "Misfeasance" wherein the directors of the company have failed to act in the best interest of the company and in cases where it was certain that the company is heading

Commented [JL12]: 1

It is conceivable why you would argue s 239 here, however, the transaction took place outside the time limit and there is no clear desire by the company to prefer. As such, the better option would have been to discuss s 245 and the avoidance of floating charges. See discussion on p68 of the Guidance Text about desire and debentures.

Commented [JL13]: Nothing in the facts to indicate that the intent was to place assets beyond the reach of creditors or to prejudice them.

Commented [JL14]: 1

The structure of the answer could 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.

for liquidation in the best interest of the creditors. The statutory provision applicable on the "Misfeasance" is Section 212 of the Insolvency Act 1986.

- b) "Wrong Trading" wherein once the directors of the company become aware that liquidation is imminent and still they do not act to minimize the losses to the creditors of the company. The statutory provision applicable on the "Wrong trading" is Section 214 , 246ZA, 246ZB of the Insolvency Act 1986.

That in the month of November when the email was received by the company wherein Beans & Leaves Ltd demanded settlement of their outstanding dues and payment of future supplies on cash only basis, the application for liquidation was already filed. Therefore at that point of time the board of the company was in total knowledge of the imminent liquidation of the company and at that point of time the primary duty of the board was to minimize the losses of the creditors.

The importance of coffee beans being an essential supply needed to keep the business running was not an important factor at that point of time because the liquidation application was already filed and it was only a matter of time before the operations were to close down. Therefore the focus of company management at the point of time should have been to preserve cash and assets of the company and therefore should not have parted away with UK Pounds 8000 to settled the old dues of Beans and Leaves Ltd.

Rather the action of company board should have been to preserve that cash. Its decision to buy further supplies in cash cannot be questioned and that was essential for survival of the company and that would have ensured survival for atleast a few weeks, whereas the action of settling old dues to the disadvantage and losses of the creditors is an action that can be questioned as "Malfeasance" and "Wrong Trading"

Therefore, the liquidator of the company will take an action in relation to the issue of payment to Beans & Leaves Ltd as an act of "Malfeasance" and "wrong trading".

*** End of Assessment ***

Commented [JL15]: 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 applies.