



**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]: 41 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.**

**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

Commented [JL3]: c

**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.

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**QUESTION 2 (direct questions) [10 marks]**

Commented [JL5]: 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?

- (i) Where the company is being wound up, or is in administration – the official receiver, the liquidator, the administrator and (with the leave of the court) any victim of the transaction, such as a creditor.  
Where the victim is bound by a CVA, the supervisor of the CVA or any victim of the transaction (whether or not bound by the CVA)  
In any other case, a victim of the transaction.
- (ii) The Secretary of State or, if they so direct and the company in question is being wound up by the court in England and Wales, the official receiver.
- (iii) The administrator

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**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.

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

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

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**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?

Section 233 of the Insolvency Act 1986 (the "1986 Act") provides certain protections in relation to certain essential supply contracts where a company in administration seeks to continue to operate the business. It applies to supplies of gas, electricity, water, communications services and certain other technology such as point of sale terminals and website hosting (1986 Act, ss233(3), (3A)). Where s233 applies, the supplier may not make it a condition of providing that supply that the company pay any outstanding charges for supplies provided pre-administration (1986 Act, s233(2)(b)). However, the supplier may make the administrator personally liable for such supply (1986 Act, s233(2)(a)).

Similarly, the supplier may not rely on an "insolvency-related term" (for example, immediate termination upon insolvency) in the event that the company enters administration (1986 Act, s233A(1)(a)). However, the supplier has certain protections – they may seek the permission of the administrator to terminate the contract (s233A(4)(a)); they may seek leave of the court to terminate the contract (s233A(4)(b)); or they may terminate if any sum incurred after the date of administration remains unpaid for 28 days after it comes due (s233A(4)(c)). They may

also terminate the supply where, by written notice, the supplier makes it a condition that the administrator will be personally liable for the charges (s233A(5)(a)) and the administrator fails to give such a guarantee within 14 days (s233A(5)(b)).

In conclusion, the administrator has some power to prevent suppliers of certain goods and services from terminating their supplies or from attaching certain conditions to the provision thereof. However, this is not an absolute power and may result in the administrator becoming personally liable for the costs involved.

Commented [JL9]: 4  
Effect of new 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.

Secured creditors (other than those whose security is a floating charge) are not normally involved in the distribution of assets following a liquidation. They may simply enforce their security and, if there are sums remaining afterward, they rank as unsecured.

Where winding-up proceedings were brought within 12 weeks after the end of a moratorium, certain claims have an absolute priority (Insolvency Act 1986, s115 – all further section references are to the 1986 Act unless otherwise stated). These include any prescribed fees or expenses of the official receiver acting in any capacity in relation to the company (s174A(2)(a)) and “moratorium debts and priority pre-moratorium debts” (s174A(2)(b)). These are defined in s174A(3).

Unless s174A applies, as set out above, the expenses of the liquidation have priority over preferential creditors (s115, Rules 6.42, 7.108, Insolvency (England and Wales) Rules 2016). These include (but are not limited to) expenses properly incurred by the liquidator in preserving, realising or getting in any of the assets of the company; the cost of any security provided by the liquidator; any disbursements and the liquidator’s own remuneration.

Once the expenses of the liquidation are paid in full, the assets are then applied to the preferential creditors, as defined in ss386, 387, 175 and Schedule 6. These primarily include certain rights by employees in relation to salary and pensions (the full list is set out in Schedule 6). They also include monies advanced to pay wages or holiday remuneration – effectively allowing a lender whose money has been used to pay wages to take over the claim of that employee. They also include, where appropriate, sums which would be payable under the Financial Services Compensation Scheme, and PAYE deductions and other sums due to HMRC. These last two rank behind the general body of preferential creditors as “secondary preferential debts” (s386(1B)).

After these, payment is made to the floating charge holder (or, where there is more than one, the holders in order of priority, usually by time of creation). Where the floating charge was created on or after 15 September 2003, this is subject to the “prescribed part” (s176A). This is a set portion of the company’s net property – 50% of anything up to £10,000 plus 20% of anything in excess of that £10,000, up to a maximum of £800,000 (if the charge was created after April 6 2020; prior to that it was £600,000) (Insolvency Act 1986 (Prescribed Part) Order 2003). This is made available to the unsecured creditors and is only paid to the floating charge holder if all unsecured creditors are satisfied. If the floating charge holder has an outstanding unsecured balance due to it, it may not participate in the prescribed part (*Thorniley v Harris*).

The final portion of creditors to be paid is the unsecured creditors. As set out above, they are entitled to the prescribed part, along with any funds available after the floating charge holder has been paid in full.

If there are still sums remaining after all creditors have been paid, this surplus is distributed among the company's shareholders in accordance with the company's constitution.

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

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Prior to going into compulsory liquidation on 23<sup>rd</sup> 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 14<sup>th</sup> 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 granting of a floating charge is potentially struck at by s245 of the Insolvency Act 1986. This applies where the floating charge is granted at a "relevant time." It does not affect floating charges granted for new funding; where a floating charge secures both new and old debt, only the old is struck at and the charge will remain valid for the new funding.

The first question is, therefore, whether the floating charge was granted at a relevant time. The bank is not, on the present facts, a connected party in relation to the company (it is not, for example, a director of the company (s249)). The relevant time is therefore 12 months prior to the onset of insolvency. The charge was granted in February 2021. A winding up petition was presented on 14 October 2021. The order was granted on 23 December 2021. The floating charge was therefore granted within 12 months of the onset of insolvency.



The charge does not appear to have been issued in connection with any new funding, nor has the bank reduced the company's indebtedness to it in consideration for the charge. Instead, it was issued solely to prevent the bank calling in existing debts. The charge is therefore struck at by s245.

The sole remaining question is whether the company was either unable to pay its debts at the time of the transaction or became unable to do so as a result of the transaction (s245(4)). This cannot be answered conclusively on the available facts. The very fact that the company granted the charge in order to avoid the debt being called in suggests that it may have been unable to pay its debts. However, this would need to be established by the liquidator before the likely outcome of any action under s245 could be determined. In the event that such an action is successful, the floating charge would be invalid and the bank would rank as an unsecured creditor.

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#### Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

The sale of the coffee machines is potentially a transaction at an undervalue and struck at by s238 of the Insolvency Act 1986. This section allows a liquidator to attack a transaction which is made at a relevant time, and for an undervalue.

A transaction is made at the relevant time if it is made within two years prior to the onset of insolvency (s240(1)(a)), defined as the date of the commencement of the winding up (s240(3)(e)). The winding up order was granted on 23 December 2021. The transaction took place in July 2021. The transaction was therefore made at a relevant time. However, it is also a requirement that the company be unable to pay its debts at that time (or become so as a result of the transaction) (s240(2)). [This is a question of fact which cannot be definitively answered here. However, it is stated that the company continued to suffer cash flow problems. This may suggest that the company was unable to pay its debts. The liquidator would have to investigate this point, however.]

Commented [JL13]: What about the fact that it is to a connected party?

The second question is therefore whether it was made at an undervalue. A transaction is at an undervalue if:

- It is a gift;
- It is made on terms which provided for the company to receive no consideration; or
- The consideration received by the company was significantly less than the value, in money or money's worth, of the consideration provided by the company.

The first two do not apply as the company received consideration of £10,000. The question is therefore whether this was less than the value of the roasting machines. This is a question of fact which cannot be definitively answered here. However, the fact that the machines were purchased for £25,000 a year before suggests that they were worth more than £10,000. It would be unusual for machines to have depreciated that amount in a single year.

It is a defence to show that the transaction was entered into in good faith and for the purpose of carrying on the business, and there were reasonable grounds to believe that the transaction would benefit the company. It is difficult, on the facts, to establish whether this was the case.

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#### Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

Making payments to a creditor in the circumstances stated is potentially an unfair preference, struck at by s239 of the Insolvency Act 1986. In order to determine whether this transaction may be struck at, the liquidator must show:

- The preferred person was a creditor of the company at the time of the transaction (s239(4)(a));
- That something was done (or allowed to be done) which had the effect of putting the preferred person in a better position than they would have been in, in the event of the company going into insolvent liquidation (s239(4)(b));
- That the company was influenced by a desire to prefer that person (s239(5)); and
- That the preference was given at a relevant time (s239(2)).

Taking each of these points in turn, it is plain from the facts that Beans and Leaves Ltd was a creditor of the company at the time of the transaction. The first requirement is therefore met.

In making a payment for existing sums, and continuing to pay for goods, the company has made payments to a creditor which would otherwise rank as an unsecured creditor. The second requirement is therefore met.

The third requirement is more complex. There is a presumption that this is met if the preference is in favour of a connected person (s239(6)). "Connected," in this context, means a director or shadow director or an associate of those people or the company (s249). "Associate" is defined extensively in s435; without rehearsing that section here, it will suffice to state that Beans and Leaves Ltd does not, on the available facts, meet the definition. As such, the liquidator must prove that there was a desire to prefer them. There is authority that, where the transaction was influenced solely by the desire to ensure that the company continued trading, this does not constitute a desire to prefer. Beans and Leaves Ltd was an essential supplier of the business and the transactions were necessary to prevent them refusing further business. As such, it is doubtful (on the available facts) that the third requirement is met.

The "relevant time" for parties who are not connected to the debtor is six months. The transactions took place in the period a month before the winding up order was granted. This requirement is met, although (based on the point above) this is moot.

It should be noted that, separately, the transactions (particularly the continued payment of £3,000) may constitute wrongful trading under s214 of the 1986 Act. These payments appear to have been made after the presentation of the winding up petition. It is likely a reasonable person would have concluded there was no reasonable prospect of avoiding insolvent liquidation. Unless the directors could demonstrate that they took every step with a view to minimising the potential loss to the company's creditors, they would potentially be liable to make a contribution to the company's creditors.

**\* 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 and not s 239 applies.