



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]: 39 out of 50

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

Commented [JL2]: 7 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.

Commented [JL3]: c

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

Commented [JL5]: 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.

QUESTION 2 (direct questions) [10 marks]

Commented [JL6]: 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?

Section 423 of the Insolvency Act 1986, relates to transactions entered into at an undervalue which intend to defrauding the creditors. The court will make order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction if the court is satisfied that the transactions were made to putting assets beyond the reach of a person who is making, or may at some time make a claim against the company and the transaction was made at undervalue. Under this section, the following parties have the right to bring any action against the transactions which are designed to defraud creditors: (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; (ii) where a victim is bound by a CVA, the supervisor of the CVA or any victim of the transaction (whether bound by the CVA or not); or (iii) in any other case, by a victim of the transaction.

Section 6 of the Company Directors Disqualification Act 1986 allows the court to disqualify unfit directors of insolvent companies if it is satisfied that the person has been or is a director of a company which has at any time become insolvent and that that person conduct in the company makes him unfit to be concerned in the management of a company. Section 16 of the Company Directors Disqualification Act 1986 allows the Secretary of State or the official receiver, or by the liquidator or any past or present member or creditor of any company [or overseas company] to make an application to the court for the making of a disqualification order against any person in relation to which that person has committed or is alleged to have committed an offence or other default under section 6 of the Company Directors Disqualification Act 1986.

Section 246ZB of Insolvency Act 1986 ensure the person who has been or is a director of insolvent companies liable for wrongful trading, the court, on the application of the administrator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.

Commented [JL7]: 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.

The decision of the creditors can be made either at creditors meeting, by decision procedure or by deemed consent procedure. Decision procedures means a qualifying decision procedures or creditors decision procedures.

The qualifying decision procedures explained under Section 246ZE(1) of the Act and the Insolvency Rules 2016 provides that a decision of the creditors may be considered using any qualifying decision procedure that the office-holder thinks fit, except that it may not be made by a creditors' meeting unless such a meeting is requested by the minimum number of creditors who represented by at least 10% in value of the creditors, 10% in number of the creditors or 10 creditors.

The deemed consent procedure permits a decision to be made by notifying creditors of the intended decision and if that decision is not effectively objected to, it is deemed to have been made.

The decision of creditors can be made by any one of the qualifying decision procedures listed in the Rules 15.3 if the deemed consent cannot be used (like for fixing the office holder's remuneration), or where it is effectively objected to by 10% value of the creditors or where the office-holder decides not to use it. The five qualifying decision procedures listed in the Insolvency Rules 2016 are a) correspondence; (b) electronic voting; (c) virtual meeting; (d) physical meeting; or (e) any other decision making procedure which enables all creditors who are entitled to participate in the making of the decision to participate equally. The decision can be passed by majority in value of creditors.

Commented [JL8]: 5

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

Commented [JL9]: 13 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 most of the time require to obtain or retain certain essential supplies of goods and services in order to salvage the assets and or business of the company. Section 233 of the Act allows the administer to request the suppliers to supply of gas, electricity, water and communications services by providing a personal guarantee for the payment of charges incurred during the administration period. This provision was introduced to stop suppliers of essential service providers from stop supplying to the administrator, unless all the outstanding charges incurred are paid. The suppliers are not permitted to require payment of outstanding debts in order to secure a new or continued supply to the company in administration.

The clause where allow one party to terminate the contract when the other party enter into formal insolvency procedures (liquidation/administration) are quite common in contracts of supply and its known as "ipso facto clauses". This effect somehow has been limited by section 233 A of the Insolvency Act 1986 and Section 233B which has now been added to the Insolvency Act 2020. Pursuant to section 233A of the Insolvency Act all the insolvency related terms in a contract for the supply of essential goods or services ceases to have effect when the company enters administration or voluntary arrangement. Whereas Section 233B of the Insolvency Act 2020 forbids the suppliers from enforcing the insolvency related clauses or do any other things in relation to the contract when the company enters formal insolvency procedure which includes prevents suppliers from terminating a supply upon the placed under insolvency procedures, prevent suppliers from making it a condition of continued supply that pre-insolvency arrears are paid and from making other changes to the contract such as increasing prices.

Commented [JL10]: 5
233B – extends provisions to all supplies

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 distribution of company's assets (except secured assets other than floating charge assets) are discussed in the sections 107, 115, 148, 175, 386 schedule 6 of the Insolvency Act 1986 and Rules 6.42, 7.108, 14.12(2). The order of priority payments often referred as "the waterfall payment". Listed below is the order of priority payments in liquidation:

1. Costs and expenses of winding up – section 115 of the Act, Rules 6.42 and 7.108
2. Preferential debts – section 386, 387 and Schedule 6, section 175 of the Act
3. Secured debts pursuant to floating charges – section 175 of the Act
4. Any preferential charge on goods distrained - section 176(2A)(3) of the Act
5. Unsecured creditors
6. Interest on debts from time of commencement of the liquidation (post-liquidation interest) - section 189 of the Act
7. Deferred and postponed creditors – section 74(2)(f) of the Act
8. Non-provable liabilities; and
9. Contributories

Costs and expenses of winding up:

- All the fees, costs, charges and expenses incurred in the course of winding up are to be regarded as expenses of the winding up
- The following are the expenses which are payable in the following order of priority:
 - o expenses that are properly incurred by the liquidator in preserving, realising or getting in any of the assets of the company (including the conduct of any legal proceedings);
 - o the cost of any security provided by the liquidator
 - o any amount payable to a person to assist in the preparation of a statement of affairs or accounts
 - o any necessary disbursements by the liquidator in the course of the winding up
 - o the remuneration of any person who has been employed by the liquidator to perform any services for the company
 - o the remuneration of the liquidator
 - o any deposited lodged on an application of for the appointment of a provisional liquidator
 - o costs in respect of petition for the winding up order
 - o the amount of any corporation tax on chargeable gains accruing on the realisation of any asset of the company
 - o any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up

Preferential debts

The preferential debts are paid in priority to all other debts including those secured by way of a floating charge and its paid after the costs and expenses of winding up have been paid in full. The date on which preferential debts are determined is known as the "relevant date" which is defined in section 387 of the Act. The relevant date in winding up will be generally be the winding up order or the date of the passing of the winding-up resolution. In broad term this section covers the following preferential debts:

- contribution to occupational pension scheme paid in period of four months prior to the commencement of the winding up for employee's contribution, and an employer's contribution for the period of 12 months before the relevant date
- Employees benefit remuneration for up to four months prior to the relevant date subject to maximum payment of £800
- Any amount of employees holiday pay accrued prior to the relevant date
- Any sum loaned and used for the specific purpose of paying employees remuneration
- Levies on coal and steel production

Secured debts pursuant to floating charges

The creditors with floating charge will be paid after payment of preferential creditors. If there are more than one floating charge the priority is given based on the date of creation of the charge. In relation to floating charge created after 15 September 2003, a certain part of the net proceeds known as "the net property" from the realisation of the property covered by the floating charges must be set aside for distribution to unsecured creditors. This known as "prescribed part". The prescribed sum are where the property's value does not exceed £10,000 in value, 50% of that, where the property's value exceeds £10,000 in value, 50% of the first £10,000 in value and 20% of that part exceeds £10,000 in value.

Unsecured creditors

This category contains creditors with no security and often received litter or nothing. These unsecured creditors will be paid after the expenses of winding up have been paid and distribution to preferential creditors and creditors subject to floating charge is settled.

Interest on debts from time of commencement of the liquidation (post-liquidation interest)

When there is a surplus remaining after the payment of all debts that have been proved, the first call on the surplus is for the payment of interest on those debts in relation to the period post commencement of the winding up.

Deferred and postponed creditors

The deferred and postponed creditors are paid out of the assets remaining after the unsecured creditors discharged in full. These debts comprise debts owing to the partner of the of the company, members of the company in his or her character as such.

Shareholders

The surplus assets after payment to all the above creditors will be distributed amongst the shareholders according to the company's constitution.

Commented [JL11]: 8
Fixed charge holders?

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

Commented [JL12]: 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;

Corfee Zero Limited ("the Company") has granted debenture to Stercus Bank plc in order to prevent it from demanding repayment of the Company's loans. The debenture contains floating charge covers whole of the company's undertaking. The floating charge was created shortly before the company enters into liquidation. The floating charge was also given for existing debts. Section 245 applies where a company is in administration or liquidation and the provision is aimed at preventing pre-existing unsecured creditors obtaining the security of a floating charge shortly before a company enters a formal insolvency procedure. If a floating charge is caught by section 245 then, save to the extent of any new consideration, it is rendered invalid. Section 245 also talks about the relevant time the floating charge is created and the person in whose favour the charge is created. If the floating charge is created in favour of connected person within 2 years prior to the onset of insolvency or 12 months before the onset of insolvency if it was created in favour of not connected person, the floating charge will be treated as invalid.

The liquidator of the Company can apply to the Court to make the floating charge as invalid as it fall within the section 245 of the Act where the floating charge was created in Feb 2021 in favour of not connected person within the period 12 months prior to the commencement of liquidation (liquidation was commenced on 23 December 2021). Although the floating charge is invalidated, the underlying debt remains valid.

However, the liquidator also has to be mindful of whether the value of so much of that consideration as consists of the discharge or reduction at the same time as the or after the creation of the charge of any debt of the company. If the consideration for the floating charge is done by way of reduction or discharge of the company's debt than the floating charge should be consider as valid floating charge.

Commented [JL13]: 4
Applies to floating charges only.

Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

In July 2021, 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. This was done as the Company continued to suffer cash flow problems

The liquidator may take action under section 238 of the Act where the transaction was done at an undervalue. Under this section the liquidator is able to show that the coffee machines was indeed sold at undervalue where the consideration received for the coffee machine far below the value.

The transaction was done is July 2021 whereas the company was wound up in December 2021. The liquidator can take action under this section when the transaction took place within the "relevant time" which is a period of 2 years prior to the commencement of the liquidation.

Further, also noted that the transaction was done with a connected person (the director of the company). Where the transaction is done with a connected person the company is presumed to have been insolvent or to have become insolvent as a result of the transaction, unless the contrary is proved.

The court by the application of the liquidator if concluded that the transaction is at an undervalue or preference, the court will make an order restoring the position to what it would have been if the transaction or the preference have not been taken place.

The liquidator also may consider take action under section 423 (transaction defrauding creditors) of the Act if he is able to satisfied the court the following 2 requirements:

- A. The transaction was entered with another person at undervalue
- B. company entered into the transaction for the purpose either of putting assets beyond the reach of a person who is making, or may at some time make, a claim against the company,

Under this section the liquidator can take action for transaction that had happened at any time period prior to the commencement of winding up.

Commented [JL14]: 5
Defence to 238?

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

The payment to Beans and Leaves Ltd was made by the Company as the company was held for ransom. The suppliers demanded immediate payment of all sums owing to it and further supplies would only be made on a cash on delivery basis. As Beans and Leaves Ltd is one of the key supplier, the Company have no choice but adhere to Beans and Leaves Ltd's request in order to continue the business. The issue here is whether a preference was given to Beans and Leaves Ltd. The preference treatment is described in section 239 of the Act, where a creditor is placed in a better position than other creditor shortly before the company goes into formal insolvency procedure. For example, when the Company in liquidation, Beans and Leaves Ltd will only be treated as unsecured creditors and will receive distribution pari-passu amongst its creditors. Hence may end up receive lesser amounts compare to if it has to be treated preferentially prior to winding up.

However, the liquidator is put on burden to prove the following in order to succeed application under section 239 of the Act.

1. the person whom it is alleged has been preferred was, at the time of the transaction, a creditor of the company - Beans and Leaves Ltd was a creditor of the company.
2. something was done, or suffered to be done, by the company which had the effect of putting that person in a better position, as oppose the creditor position in a winding up. – Beans and Leaves Ltd received the payment on outstanding where if the company in liquidation they would have to be treated pari-passu with other unsecured creditors.
3. the company was, in giving the preference, influenced by a desire to produce the effect referred to in (b) above in relation to the person preferred – as discussed in MC Bacon it is arguable here that the payment to Beans and Leaves Ltd the payment was motivated but not prefer to Beans and Leaves Ltd. As if no payment is made which will lead to stop in supply, and eventually the company may need to cease business. However, the argument points which may raise by the liquidator is whether the company sought for alternate supplier before committing to Beans and Leaves Ltd.
4. The preference was given at a relevant time – the relevant time referred to for not connected person is 2 years prior to the commencement of liquidation. This transaction between Beans and Leaves Ltd just a month before the winding up. So it is within the relevant time.

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.

*** End of Assessment ***