



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.

Commented [JL3]: 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 [JL4]: 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 [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?

Parties or individuals who have been prejudiced by transactions which are made at an undervalue may apply to Court for an order to avoid the transaction and the application can be made at any time, not just in the period leading up to insolvency. Where the Company is being wound up or in administration, the official receiver, the liquidator, the administrator and any parties who have been prejudiced by the transactions made at an undervalue including creditors, with leave of court can make an application to Court under Section 423 of the Insolvency Act 1986. Where parties are bound under a Creditors Voluntary Arrangement ("CVA"), the supervisor of the CVA or creditors of the CVA whether bound by the CVA or not can make an application to Court under Section 423 of the Insolvency Act 1986. In any other cases, any victim of the transactions which are made at an undervalue can apply to Court under Section 423 of the Insolvency Act 1986.

The Secretary of State may make an application to Court to have the Court disqualify an individual from acting as a director of a company under Section 6 of the Company Directors Disqualification Act 1986 or directs the Official Receiver to make the application to Court in the case where the company is being or has been wound up.

Under Section 246ZB of the Insolvency Act 1986, the administrator can apply to Court for a declaration that a person who is or has been a director to the company to be liable to make a contribution to the company's asset.

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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.

The five (5) qualifying decision procedures are:

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

Commented [JL7]: 5

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

Commented [JL8]: 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?

When a company enters administration and where the administrator decides to continue to operate the business of the company, the administrator may request the suppliers of goods

and services to continue with supply during the administration period. Section 233(2) of the Insolvency Act 1986 ("the Act") indicates that upon request by the administrator, the supplier of essential goods and services covered under this section shall continue supply by not making it a condition of giving a supply that any outstanding charges incurred prior to the date of the administration are paid. The supplier can however stipulate that the administrator to personally guarantee payment of charges in respect of the supply. The type of supplies which are applicable and covered under Section 233 of the Act includes supply of gas, electricity, water and communications services. Section 233(3A) of the Act also expands the definition of supply of facilitating anything to be done by electronic means to include point of sale terminals, computer hardware and software, information, advice, and technical assistance, data storage and processing and web hosting.

Section 233A of the Act further restrict the supplier of essential goods and services from terminating the contract of supplies by invoking the "insolvency related term" unless consent is obtained from administrator on the termination, approval is granted by Court for the termination and/or the administrator does not provide his personal guarantee on the payment of the charges upon request by the supplier.

Section 233B further expand the protection for the insolvent company by prohibiting the supplier of goods and services from terminating the contract of supply in the event the company becomes subject to relevant insolvency procedure.

Commented [JL9]: 5
A little more on the effect of 233B would have ensured full marks.

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.

A liquidator shall make payments in accordance to the following priority out of the assets belonging to the Company:

Expenses of Winding-Up:

Fees, Costs, Charges and other expenses incurred in the course of the winding-up are to be treated as expenses of winding-up. These expenses shall take priority over the Company's preferential creditors, any holders of floating charges and company's unsecured creditors (after payment of any liabilities to which section 174A applies, in accordance to Section 115 of the Act). Pursuant to rules 6.42 and 7.108 of the Insolvency Rules 2016, payment of the Expenses of Winding-up shall be paid according to the following order of priority:

1. Expenses properly incurred by the liquidator in preserving, realising or getting in any of the assets of the company;
2. Cost of any security provided by the liquidator;
3. Any amount payable to a person assisting in the preparation of a statement of affairs or accounts;
4. Any necessary disbursements by the liquidator in the course of the winding-up;
5. Remuneration of any person employed by the liquidator to perform any services for the company;
6. Remuneration of the liquidator;
7. Amount of any corporation tax on chargeable gains accruing on the realisation of any assets of the company;
8. Any other expenses properly chargeable by the liquidator carrying out the liquidator's function in the winding-up.

Preferential Creditors

Upon payment of expenses of winding-up in full, assets of the company shall then be used to pay preferential creditors of the company. Preferential creditors consist of two (2) classes, ordinary and secondary in which ordinary preferential creditors are paid ahead of the secondary preferential creditors. The preferential debts shall rank equally amongst themselves in their respective classes. In circumstances where the company's assets are insufficient to pay the preferential debt, the preferential creditors shall be paid in equal proportion in accordance to their claims. Debts categorised as preferential claims are listed in accordance to Schedule 6 of the Insolvency Act 1986.

Floating Charge Holder

Upon payment of preferential creditors of the company, assets of the company shall then be used to pay the floating charge holder of the company. Payment to floating charge holder is however subject to application of section 176A of the Insolvency Act 1986. For a company which is subject to a floating charge created on or after 15 September 2003, the liquidator shall make a prescribed part of the company's net property (calculated after payment of expenses of winding-up and payment of preferential debt) available for the satisfaction of other unsecured creditors. The liquidator is dutiful to prescribe 50% of the net property value of the first 10,000.00 Pound plus 20% of the excess in value above 10,000.00 Pound, subject to maximum amount of 800,000.00 Pound. Where the net property is less than the minimum of 10,000 Pound and the liquidator thinks that making a distribution to unsecured creditors would be disproportionate to the benefits, the liquidator's duty to make a prescribed part under Section 176A of the Act shall not apply. The liquidator shall not distribute the prescribed part to the floating charge holder unless the prescribed part amount exceeds the amount required to satisfy the company's unsecured debt. The floating charge holder who still have an outstanding unsecured balance owing is not permitted to participate in the distribution of the prescribed part pursuant to the case law of *Thorniley v Harris* [2008] EWHC 124(Ch).

Unsecured Creditors

Upon payment of expenses of winding up, and distribution to preferential creditors and floating charge holders, balance assets of the company shall then be distributed as dividend to the unsecured creditors on a equal proportion in accordance to their claim.

Shareholders

In the event of surplus funds after payment of all the creditors of the company, distribution of the surplus funds shall be distributed amongst the shareholders in accordance to the constitution of the company.

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

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.

Commented [JL10]: 8
Fixed charge holders?

Commented [JL11]: 10 out of 15

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 issues to be considered in this case are the validity of the newly created floating charge. In considering whether the charge is rendered invalid and caught under Section 245 of the Insolvency Act 1986, the following will need to be established:

- a) In accordance to Section 245(2) of the Act, whether the creation of the floating charge is created for (i) consideration which consist of money paid, or goods or services supplied to the company at the same time as or after the creation of charge; or (2) for a consideration consist of discharge or reduction of any debt of the company at the same time or after creation of the charge. If the answer to the above is in the affirmative, the floating charge created will be rendered valid and within the exemption given in Section 245 of the Act. However, if the consideration given is with the objective to release the director's personal liability under guarantees rather than for proper commercial considerations, the floating charge created will be caught under Section 245 as suggested in the case of Fairway Magazines [1992] B.C.C. 924.
- b) In accordance to Section 245(3) whether the floating charge is created in favour of a person who is connected with the company within the period of two (2) years ending with the onset of insolvency.

In this case, the liquidator will need to determine whether the consideration for the creation of floating charge given to Stercus Bank is for fresh loan or for the reduction of its debt to the Bank. Should the findings meets the exemption requirement stipulated under Section 245 of the Act, the Liquidator may not be able to avoid the floating charge created in favour of Stercus Bank Plc.

Commented [JL12]: 4
Only applies to floating charges.

Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

The liquidator may be able to take action against the board of directors of the company once the following is able to be established:

- i. That by entering into the transaction with one of the director, preference was given to the said director pursuant to Section 239 of the Insolvency Act 1986.
- ii. That the transaction entered into with the director meets the requirement under Section 238(4) in that:
 - a) The company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration; or
 - b) The company enters into a transaction with that person for a consideration in value of which in money or money's worth is significantly less than the value in money or money's worth of the consideration provided by the company.
- iii. That the transaction entered into by the company is made for the purpose of putting the assets beyond the reach of the company's creditors or prejudicing the interest of the company's creditors pursuant to Section 423(3) of the Insolvency Act 1986.
- iv. That the transaction entered into by the company is not done in good faith and is not for the purpose of carrying on its business and that there were no reasonable grounds to believe that the transaction would benefit the company at the time the transaction was entered into as the court shall not make an order in respect of a transaction at an undervalue if it is satisfied with the requirement under Section 238(5) of the Insolvency Act 1986.

Upon establishing the above, the liquidator may consider making an application to Court for an order under Section 238 or Section 423 of the Insolvency Act 1986 to void the transaction and restore the position to what it would have been if the transaction had not been entered into.

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

The liquidator will need to establish the following:

- i. That by paying the amount outstanding to Beans and Leaves Ltd when the director is aware that a petition to wind-up the company was made, the director is influenced by a desire to put Beans and Leaves Ltd in a better position in the event of the company going into insolvent liquidation pursuant to Section 239(4) of the Insolvency Act 1986. The burden of proof will rest with the liquidator to disprove that the payment made to Beans and Leaves Ltd was made solely by commercial consideration, where the director attempts to obtain continued supply from its key supplier to ensure continuation of trading by the company;
- ii. Whether the purchase transaction entered into by the company with Beans and Leaves Ltd for further supplies was done in the ordinary course of business and is done in bona fide. In the event that the Liquidator applies to Court to avoid the disposition of the property of the company after the commencement date of the winding up under Section 127 of the Insolvency Act 1986, the Court will be able to validate the transaction if it is satisfied that the payment of cash in delivery made to Beans and Leaves Ltd for supplies was made to enable further supplies to be received by the company and enabling the business of the company to continue.

Commented [JL13]: There is nothing in the facts to indicate this purpose.

Commented [JL14]: Some requirements of the s 238 action are missing – inability to pay debts and relevant time.
4

Commented [JL15]: 2
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.

In this particular case, the liquidator may not be able to take any action to void the transaction and restore the position of the company to what it would have been if the transaction had not been entered into, unless the liquidator is able to establish that the transaction was not made in the ordinary course of business and in good faith and that the company has a desire to prefer Beans and Leaves Ltd over the other creditors.

*** End of Assessment ***