



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

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

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.

Commented [WPA1]: 31/50 = 62% - some good answers but loses marks on identification of issues in Q4.

Commented [WPA2]: 9/10

(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 [WPA3]: B is correct

- (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 [WPA4]: 9/10

Question 2.1 [maximum 5 marks]

Commented [WPA5]: 4/5

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) pursuant to section 423 of the Insolvency Act 1986, relief may be sought – in respect of transactions which are allegedly designed to defraud creditors – by:
- the Official Receiver, the liquidator, the administrator and (with leave of the court) any victim of the transaction (e.g. a creditor) in cases where the company is being wound up or is in administration;
 - where a victim is bound by a Company Voluntary Arrangement (CVA), the supervisor of the CVA; or
 - a victim of the transaction in any other case;
- (ii) pursuant to section 6 of the Company Directors Disqualification Act 1986 (the “CDDA”) a disqualification order may be sought by:
- the Secretary of State (CDDA s 7(1)(a)); or
 - by the Official Receiver on the direction of the Secretary of State in the case of a person who is or has been a director of a company which is being wound up by a court in England and Wales (CDDA s 7(1)(b));
- (iii) pursuant to section 246ZB(1) of the Insolvency Act 1986, relief may be sought during administration in respect of wrongful trading by the administrator.

Commented [WPA6]: Or a victim if bound by the CVA

Question 2.2 [maximum 5 marks]

Commented [WPA7]: 5/5

List the **five (5)** qualifying decision procedures by which creditors may make decisions in the context of an insolvent company.

Rule 15.3 of the Insolvency Rules 2016 sets out the five qualifying decision procedures by which creditors may make decisions in respect of an insolvent company:

- (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.

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

Commented [WPA8]: 10/15

Question 3.1 [maximum 6 marks]

Commented [WPA9]: 4/6 – good as far as it goes but no reference to s 233B which extends similar provisions to other types of supply

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?

Pursuant to section 233(2) to (3A) of the Insolvency Act 1986, an administrator may request that contractual suppliers of gas, electricity, water, communication services, and goods or services where the supply is for the purpose of enabling or facilitating anything to be done by electronic means (i.e. point of sale terminals; computer hardware and software; information, advice and technical assistance in connection with the use of information technology; data storage and processing; and website hosting) continue supply during the administration.

Pursuant to section 233(2), whilst a supplier may make it a condition of continuing supply that the administrator guarantee the payment of any charges in respect of the continued supply, the supplier may not make it a condition of continuing supply that any outstanding pre-administration charges for supply be paid.

Further, pursuant to section 233A, during an administration a supplier of essential services may not rely on any provision in the supply contract which purports to allow the supplier, if the company becomes insolvent, to cease supply or alter the terms of supply (e.g. higher rates or faster payment terms).

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.

In a liquidation, distribution payments are prioritised as follows (in descending order):

- (1) expenses of winding up, pursuant to section 115 of the Insolvency Act 1986 and Rules 6.42 and 7.108 of the Insolvency Rules 2016, in the following order:
 - a. the liquidator's expenses in preserving, collecting and realising assets of the company (including the costs of the conduct of legal proceedings);
 - b. the liquidator's expenses for any security furnished;
 - c. fees incurred to assist in the preparation of the Statement of Affairs and any accounts;
 - d. the liquidator's disbursements (e.g. liquidation committee members' expenses);
 - e. the remuneration of anyone employed by the liquidator to provide services to the company;
 - f. the liquidator's remuneration;
 - g. tax owing for any taxable gains on the realisation of the company's assets; and
 - h. any other expenses properly incurred by the liquidator;
- (2) preferential creditors, whose priority cannot be altered by the administrator and who take priority before any payment may be made to holders of floating charges or unsecured creditors, divided into ordinary preferential debt and secondary preferential debt, including:
 - a. sums owing in respect of occupational pension scheme (both the employer's contributions for a period of 12 months prior to the commencement of the winding up and any employee contributions deducted but not paid for a period of 4 months prior to such commencement) (ordinary preferential debt);
 - b. employee remuneration owed for up to four months prior to commencement and capped at £800, all accrued holiday remuneration (ordinary preferential debt);
 - c. loan funds used to pay employee remuneration and holiday remuneration (ordinary preferential debt);
 - d. treaty levies owing pursuant to the European Coal and Steel Community Treaty (ordinary preferential debt);
 - e. statutory payments pursuant to the Reserve Forces (Safeguard of Employment) Act 1985 (ordinary preferential debt);
 - f. in respect of financial institutions which have become insolvent, payments made to depositors by the Financial Services Compensation Scheme (ordinary and secondary preferential debt); and
 - g. certain debts owing to Her Majesty's Revenue and Customs such as income tax deductions, national insurance deductions, VAT payments etc (i.e. the Crown preference, a secondary preferential debt);
- (3) floating charge holders, with priority between them usually determined based on which charge was created first and any floating charge created on or after

Commented [WPA10]: 6/9 – some useful detail but no mention of fixed charges and lacking detail on s 176A

15 September 2003 subject to a “prescribed part” of the company’s net property for unsecured creditors pursuant to section 176A of the Insolvency Act 1986; and (4) unsecured creditors.

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

Commented [WPA11]: 3/15

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]

Commented [WPA12]: 1/5 – s 239 also fails as the time limit for a non-connected person is 6 months. The question required consideration of s 245.

The floating charge in favour of Stercus Bank plc;

The issue in respect of Stercus Bank plc is whether the debenture granted by the Company to the Bank containing a floating charge over the whole of the Company’s undertaking was a preference.

Pursuant to section 239(4) of the Insolvency Act 1986:

a company gives a preference to a person if—

(a) that person is one of the company’s creditors or a surety or guarantor for any of the company’s debts or other liabilities, and

(b) the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.

For the preference to be actionable, it must have occurred within two years prior to the onset of insolvency, which clearly occurred here as the debenture was granted in February 2021 and the winding up order was made in December 2021.

However, the debenture is unlikely to be found to be a preference if, as it appears, the Company was entirely dependent on the Bank for support to continue trading: per Millett J in *MC Bacon Ltd* [1990] BCC 78.

Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

Section 212 of the Insolvency Act 1986 creates a simplified procedure to pursue officers and directors for misfeasance, including actions where they are alleged to have “misapplied, retained or become accountable for money or property of the company” and therefore includes fiduciaries duties to act in the best interest of the company and not to act where the director has a conflict of interest and duty.

Likely the sale of the five coffee roasting machines for £10,000 in July 2021, when the Company had already in February 2021 been compelled to grant the Bank a debenture containing a floating charge over the whole of the Company’s undertaking, and the roasting machines had been bought for £25,000 only a year before, raises serious questions about not only the malfeasance of the director who purchase the machines, Ann Young, who appears to have not only breached her fiduciary duties with the sale but also been in a conflict of interest in doing so, but also of the malfeasance by breach of fiduciary duties of the other directors who approved this sale.

Section 212 proceedings may be brought by the liquidator, the Official Receiver and any creditor, and we would recommend that the liquidator do so against both Ms Young and the other directors.

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

[Type your answer here]

*** End of Assessment ***

Commented [WPA13]: 2/6 although a breach of duty action may be brought on these facts, more detail on the actual breach and or conflict rules is needed. The more obvious action would be under s 238 IA.

Commented [WPA14]: 0/4 – required consideration of s 127