



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 [WA1]: 38/50 = 76% - a good effort which would have been even better with clearer and more detailed application of the law in certain places esp Q4

Commented [WA2]: 8/10

Commented [WA3]: d correct

- (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 [WA4]: b 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 [WA5]: 10/10

Question 2.1 [maximum 5 marks]

Commented [WA6]: 5/5

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) Section 423 of the Insolvency Act, 1986- Section 423 of the Insolvency Act, 1986 deals with the transactions defrauding creditors. An application for avoidance of transaction under section 423 can be filed by the official receiver or by the trustee of the bankrupt's estate or the liquidator or administrator of the body corporate or (with the leave of the court) by a victim of the transaction; or by the supervisor of the voluntary arrangement or by any person who (whether or not so bound) is such a victim (Section 424 of the Act)

(ii) Section 6 of the Company Directors Disqualification Act 1986- As per provisions of Section 7 of the Act, the Secretary of State can move an application under section 6 or by Official Receiver.

(iii) Section 246ZB of the Insolvency Act 1986- Where a company is in administration then the administrator may move application under section 246ZB of the Insolvency Act, 1986 for declaration of wrongful trading.

Question 2.2 [maximum 5 marks]

Commented [WA7]: 5/5

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

[Under the Insolvency Act 1986, Administrator has to formulate a statement setting out proposal for achieving objective of administration, which may, inter-alia, include details of administrator appointment, statement of affairs of the company, list of creditors, proposal for achieving the objective as also the method by which the administrator will seek a decision from the creditors, which is called 'decision procedure'.

Such decisions can either be made by way of deemed consent procedure or by following the decision procedure. Where deemed consent is objected to or where the administrator decides not to use this provision, then the Legislative Reform (Insolvency)(Miscellaneous Provisions) Order 2010 provides for following five decision procedures:

- (i) Correspondence.
- ii) Electronic voting
- iii) Virtual meeting
- iv) Physical meeting.
- v) Any other decision-making procedure which enables all creditors who are entitled to participate to participate equally in making the decision]

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

Commented [WA8]: 11/15

Question 3.1 [maximum 6 marks]

Commented [WA9]: 5/6 very clear answer but reference to actual statutory provisions would have led to full 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?

[Yes, under General Powers at 59 of Schedule B1 of the Insolvency Act, 1986 the administrator of a company has power to do anything necessary or expedient for the management of the affairs, business and property of the company. Administrator has to take custody and control of all the assets of the Company and to manage the affairs of the Company including business in accordance with the proposal approved by the Creditors.

Keeping in mind the challenges for keeping the Company as a going concern during the insolvency administration, (IA 1986) was introduced to ensure continuous supply of vital utilities, goods, electricity, and water etc. Since, such services are critical for running of operation of the Company, it was usually experienced that supplier of the Company would push the Company for payment if outstanding amounts before continuing supplies. But after IA 1986, it now illegal for suppliers of these utilities to stop the supply or demand payment in full of outstanding amounts before continuing supply post insolvency.

In case of Voluntary arrangement or in administration case, the contract of supply may be terminated with the approval of the Court, after administration or where the Company has entered a company voluntary arrangement. It may also be terminated with the consent of the administrator or supervisor.

Now under the Corporate Insolvency and Governance Act, 2020 it is illegal to terminate any contracts for the supply of all goods and services on the ground that the Company entered an insolvency proceeding.

The contract of supply may, however, be terminated with the consent of the officeholder or the company, in the case of the moratorium, or if the court is of the opinion that the supplier would suffer hardship by continuing with the supply of goods or services.

There is a temporary exemption for suppliers who are considered 'small entities.].

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.

[As per the provisions of Section 129 of the Insolvency Act, 1986, liquidation commences on passing of winding up order and it is deemed to have commenced from the date of petition. On passing of the order a moratorium comes into effect on disposition of the property. Liquidator takes over the control of the assets of the Company which is known as the 'estate of the company'. Liquidator realises this estate for distribution among the creditors (known as 'dividend') in the light of the admitted claim and order of priority. Usually, the order of priority is as follows:

- Secured creditors with a fixed charge
- Preferential creditors
- Secured creditors with a floating charge
- Unsecured creditors
- Shareholders

Under Chapter 14 of the Insolvency (England and Wales) Rules, 2016 read with Section 115 of the Act, the expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims. Further, Section 174A of the Act, also provides for priority of the moratorium debts and priority pre-moratorium debts, which may include (i) the monitor's remuneration or expenses, (ii) goods or services supplied during the moratorium, (iii) rent in respect of a period during the moratorium,

Commented [WA10]: 6/9 generally a good answer but more detail on different classes of preferential debts, maximum under s 176A and how fixed charges are dealt with would have been helpful

or (iv) wages or salary arising under a contract of employment, so far as relating to a period of employment before or during the moratorium. They are preferential creditors.

Under the Preferential creditor list, many outstanding tax due to the Crown are covered which are paid on pari-passu basis. Thereafter, employee related claims are given priority which may be due on account of an employee's contribution to pension scheme, remuneration payable to employee for a period of four months prior to commencement of the winding up subject to maximum of 800 pounds, sum accrued on account of holiday remuneration etc. Following additional debts have also been given preference debt recognition, i.e. specified amount owned by the Company in respect of an eligible deposit, specified amount owed by the Company to one or more eligible persons in respect of an eligible deposits and other claims on account of deposits of eligible person made through a non – EEA branch of credit institution authorised by the Competent Authority of EEA state.

After payment to Preferential creditors, floating charge holders are paid in next priority (subject to applicability of Section 176A of the Act). Such payments are made out of the 'net property' which is the amount of funds available with the Liquidator after liquidation expenses and preferential payment have been made. But, out of this sum too, the Liquidator is required to make a 'prescribed part' for meeting the claims of the unsecured creditors. The amount is calculated as per the prescribed formula i.e. where net property does not exceed £10,000, it is will be 50% of that property and where it exceed that sum of £10000, it will be 50% of the first £10,000 and then 20% of the amount in excess of £10,000.

Unsecured creditor are usually the last category of claimants to get dividend which is followed by shareholders, who usually do not get anything as in most of the case there is no amount left after the above mentioned priority claims are met.]

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

Commented [WA11]: 9/15

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:

Answer:

[Gist of Relevant Dates and Parties and Suspected actions relevant for examination of the issues in the Problem cited above:

Relevant Parties:

Debtor: Corfee Zero Limited ("the Company"). **Creditor:** Stercus Bank plc. **Director:** Ann Young. **Beans and Leaves Ltd.**, one of the Company's key suppliers]

Relevant Dates:

- (i) Issuance of debenture by the Company in favour of Stercus Bank plc in February 2021 with a floating charge over the whole of the Company's undertaking.
- (ii) Winding up petition issued on 14th October 2021.
- (iii) Compulsory liquidation on 23rd December 2021

Suspected Transactions-

- (iv) **Possible Preferential Transaction-** Date: February 2021- **Stercus Bank plc**
- (v) **Transaction for supply and past payments:** Sale of 5 coffee roasting machines for £10,000 in cash - Ann Young- A director of the Company. The machines had been bought for £25,000 a year before- Relevant Date: July 2021
- (vi) On account of threat from its supplier: the board authorised a payment of £8,000 to pay the existing liabilities and also agreed to further payments, on a cash on delivery basis, supplies which amounted to further payment of £3,000 up to the date of the winding up order ((month before the winding up order)

Question 4.1 [maximum 5 marks]

The floating charge in favour of Stercus Bank plc:

[Facts: As per the fact of the case, prior to compulsory liquidation order on 23rd December 2021, and under pressure from its creditor namely Stercus Bank plc, the Company, granted a debenture in favour of Stercus Bank plc in February 2021 with floating charge over the whole of the Company's undertaking.

The above transaction with Stercus Bank plc could face possible challenge on two counts, i.e. under section 239 of the Insolvency Act, 1986 as being a 'preferential transaction' and secondly under section 245 of the Act as 'avoidance of floating charge'.

Commented [WA12]: 5/5 a well explained and applied answer re s 245. The s 239 argument is peripheral as bot the timing and desire element are missing.

Section 239 of the Act deals with the transactions which can be avoided as preferential transactions by a liquidator or administrator. The section stipulates that where the company has, at a relevant time, given a preference to any person, the officeholder may apply to the court for an order under that section.

- (i) A Company is said to have given 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, and
 - (c) while giving such preference the Company was influenced by a desire to 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.

The 'relevant time' for the purpose of giving preference is defined under section 240 of the Act. For a connected person the relevant period is 2 years and for non-related person, it is the period of 6 months ending with the onset of insolvency.

For the purpose of the present case, since status of the Bank is not mentioned and as it was allowed a floating charge on the whole of the Company's undertaking, it is presumed that the Bank was a unsecured creditor prior to the transactions in question. In this case:

- (i) the transaction was by way of issuance of debenture in favour of Stercus Bank plc in the month of February 2021, and
- (ii) the insolvency petition was filed on 14th October 2021, and
- (iii) Compulsory liquidation order was issued on 23rd December 2021.

Thus, the order of compulsory liquidation though having been passed on 23rd December 2021 but the same would have effect from 14th October, 2021 the onset of the insolvency. But given that date and the transaction in question having been put into effect in the month of February 2021, the period of the transaction is beyond the 'relevant time' of six months considering the fact that the Bank is not a related party of the Company. Thus, challenge under section 239 would fail as it would not satisfy all the requirements of section 239 of the Act.

Floating Charge Avoidance:

As per Section 245 of the Act, a floating charge on the company's undertaking or property created at a relevant time is invalid. Subject to and to the extent of (a) the value of the consideration for the creation of the charge or (b) the value of so much of that consideration as consists of the discharge or reduction, at the same time as, or after, the creation of the charge, of any debt of the company.

The relevant period under sub section (3) of section 245 of the Act, is two years in case of relevant person and twelve months for non-related persons, from onset of insolvency.

Further, at that time the Company should be unable to pay its debts within the meaning of section 123 in Chapter VI of Part IV, or it should become unable to pay its debts within the meaning of that section in consequence of the transaction under which the charge is created.

Thus, floating charge created during the look back period can only be sustained if it is created for a new value.

As per the facts of the case, the floating charge was created by the Company on its entire undertaking in February 2021, that is well within the lookback period of 12 months from the date of onset of insolvency. Secondly, there is no new value provided by the Bank to the

Company as consideration for issuance of the transactions and creation of the floating charge. Further, the net effect of the transaction is putting the Bank in an advantageous position vis-à-vis other creditors, therefore, this transactions fails on account of the provisions of section 245 of the Act, therefore, the Liquidator should file application under this section 245 of the Act.]

Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines:

[As per the facts of the case, in the month of July 2021 the Company sold 5 coffee roasting machines to its director for £10,000 in cash. The machines had been bought for £25,000 a year before.

This particular transaction of sale of coffee roasting machines for £10,000 in cash has few missing facts such as (i) whether these 5 coffee roasting machines were the only machines available with the company or the company was having other machines and were able to keep up its operations without these machines, i.e. how critical were such assets for operation of the company. (ii) Secondly, how and for what purpose that cash of £10,000 was utilised. Since, the Company entered into liquidation, it is presumed that even with such cash of £10,000, the status of the Company did not change and it continued to suffer financial distraught and ended up in liquidation.

The Section 238 of the Insolvency Act, 1986 provide legal framework for setting aside of transactions which are undervalued and entered into within the relevant period. In this case, since the transaction was with a related party (director of the Company), the look back period is two years, thus the transaction does fall within the said period.

Now, the question arises whether this transaction was less than the value in money or money's worth and whether the Company, at the relevant time the transaction was entered into, was unable to pay its debt. The later point is taken care of as the transaction was entered into with a related party and in such a situation the insolvency of the company is presumed. We go by the value of £25,000.

In view of the facts as mentioned above, and also keeping in view the provisions of section 238 of the Act, the transaction will fail, and the Liquidator should file application under section 238 for quashing of the transaction.]

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

[Facts: As per the given facts of the case, there was a communication from Beans and Leaves Ltd whereby it 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.

Continued supply of coffee beans was essential by the Company, therefore, the company made the payment of £8,000 to the supplier to cover existing liabilities and also 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.

Now, this transaction purely relates to day-to-day operations of the Company. Additionally, such supply of raw material is essential for the company to keep up its operations.

Commented [WA13]: 4/6 a good answer but more detailed application of the law to the facts including any possible defence would have been helpful.

Commented [WA14]: 0/4 - although some interesting points are made, the law on the facts is covered by s 127 so the answer fails to identify the issue.

Onset of financial distress does not put any embargo on the Company and on its management to undertake transactions in good faith and in the ordinary course of its business. Secondly, at the same time, even the suppliers do not suffer any legal obligation to continue to supply without corresponding payment being made by the Company. The supplier company is also under obligation towards its shareholders to keep the business of the Company.

Thus, in our analysis, the transaction being in good faith and in the ordinary course of the business of the Company and to keep the company as a going concern for protection and preservation of the value of the company for the benefit of its creditors, the transaction will pass the test. Further, under the Insolvency (Protection of Essential Supplies) Order 2015 too, the Company is liable to make payment for current supply of the goods, further, the even the payment for the old dues not being post liquidation, it does not suffer any illegality thus, survive.]

*** End of Assessment ***