



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.

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Well done!

Commented [DJ2]: 8 out of 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.

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- (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.

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QUESTION 2 (direct questions) [10 marks]

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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?

1. The parties who may bring an action under section 423 of the Insolvency Act 1986 are as followed:
 - (a) the official receiver, the liquidator, or the administrator of the company in liquidation or administration process respectively and any victim (with the court's leave court) of the defrauding transaction involved;
 - (b) the supervisor of the company voluntary arrangement and any victim of the defrauding transaction involved;
 - (c) Any victim of the defrauding transaction in other circumstances.
2. The Secretary of State may bring an action against directors under section 6 of the Company Directors Disqualification Act 1986 to disqualify a director at least 2 years, up to 15 years.
3. As to section 246ZB of the Insolvency Act 1986, the liquidator is the only party empowered to bring an action to claim wrongful trading liability under this section.

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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.

According to rule 15.3 of the Insolvency (England and Wales) Rules 2016, in the context of an insolvent company, creditors can make decisions through the following five prescribed decision procedures are : (a) correspondence; (b) electronic voting;(c) virtual meeting;(d) physical meeting; (e) submission of ballot form by post, as any other decision making procedure which enables all creditors who are entitled to participate in the making of the decision to participate equally.

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

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Question 3.1 [maximum 6 marks]

Can an administrator who wishes to continue to operate the business of the company in administration require suppliers of goods and services to continue to supply those goods and services during the administration?

According to the UK law, the answer is yes. An administrator has the right to require suppliers of goods and services to continue to supply the goods and services during the administration. It should be noted first, under the UK law, the appointment of an administrator does not automatically terminate an executory contract, and the Ipsa Facto clauses which those suppliers may rely on, are subject to many statutory exceptions. As provided in section 233A and 233B of the Corporate Insolvency and Governance Act 2020, an "insolvency related term" in a contract of supply which enable the supplier to terminate or alter the supply or payment, is generally unenforceable. Moreover, clauses which enable suppliers to terminate or "do anything" in relation to the clauses are also prohibited.

Therefore, during the administration proceeding, if an administrator requires the suppliers to continue to supply, the suppliers are not allowed to stop supplying goods and services basing on insolvency related contract terms, and are not allowed to make or alter conditions in relation

to continuing to supply. For example, ask the debtor to pay the outstanding debt owed first as a prerequisite is not allowed.

It also should be noted, certain exceptions also apply to this situation under the UK law, according to section 233 of the Corporate Insolvency and Governance Act 2020, the suppliers are allowed to stipulate the administrator must guarantee the payment of supply personally. And supplier is empowered to apply to the court to terminate the supply. Upon such application, if the court is satisfied that the continuation of supply would cause hardship for the parties involved, the court will grant permission for the termination of supply.

Notably, for the application of section 233B as discussed above, certain type of suppliers are excluded from its applicable scope, including insurers, bankers, electronic money institutions, recognised investment exchanges and clearing house, securitisation companies, and oversea companies with corresponding functions.

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.

Under the Insolvency Act 1986, the secured debts with a fixed charge should be paid first and outside the liquidation. After the satisfaction of all the secured debts with a fixed charge in full, the order of priority in a liquidation are as followed.

1. the expenses of the winding up, which refer to all fees, costs, charges and other expenses incurred in the course of the winding up,¹ which are payable out of the company's assets in priority to all other claims. Further, according to rules 6.42 of the Insolvency (England and Wales) Rules 2016, the main expenses within this class are payable in the following order of priority:

- (a) expenses which are properly chargeable or incurred by the liquidator in preserving, realising or getting in any of the assets of the company or otherwise in the preparation, conduct or assignment of any legal proceedings, arbitration or other dispute resolution procedures, which the liquidator has power to bring in the liquidator's own name or bring or defend in the name of the company or in the preparation or conduct of any negotiations intended to lead or leading to a settlement or compromise of any legal action or dispute to which the proceedings or procedures relate;
- (b) the cost of any security provided by the liquidator or special manager under the Act or these Rules;
- (c) the remuneration of the special manager (if any);
- (d) any amount payable to a person employed or authorised, under Chapter 2 of this Part, to assist in the preparation of a statement of affairs or of accounts;
- (e) the costs of employing a shorthand writer on the application of the liquidator;
- (f) any necessary disbursements by the liquidator in the course of the administration of the winding up (including any expenses incurred by members of the liquidation committee or their representatives and allowed by the liquidator under rule 17.24, but not including any payment of corporation tax in circumstances referred to in sub-paragraph (i));
- (g) the remuneration or emoluments of any person who has been employed by the liquidator to perform any services for the company, as required or authorised by or under the Act or these Rules;
- (h) the remuneration of the liquidator, up to an amount not exceeding that which is payable under Schedule 11;
- (i) the amount of any corporation tax on chargeable gains accruing on the realisation of any asset of the company;
- (j) the balance, after payment of any sums due under sub-paragraph (h) above, of any remuneration due to the liquidator;

¹ The Insolvency (England and Wales) Rules 2016 r 6.42

Commented [DJ10]: Your answer could have been better structured with clearer distinctions being made between the provisions of s 233, 233A and 233B respectively.

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(k) any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up.

2. The preferential debts. According to section 175, 386 and 387 of the Insolvency Act 1986, the debtor's preferential debts should be paid in priority to all other unsecured debts and debts with a floating charge. The Schedule 6 of the Insolvency Act 1986 has listed 9 categories of preferential debts:

(a) debts due to Inland Revenue;(b) debts due to Inland Revenue;

(c) social security contributions;

(d) contributions to occupational pension scheme;

(e) remuneration, etc., of employees;

(f) levies on coal and steel production;

(g) debts owed to the Financial Services Compensation Scheme;

(h) deposits covered by Financial Services Compensation Scheme;

(i) other deposits as prescribed;(j) certain HMRC debts.

3. The secured debts with a floating charge. After all the preferential creditors have been paid, the creditors holding a floating charge should be paid next. It should be noted, where the floating charge was created on or after 15 September 2003 and debtor has entered liquidation, the section 176A of the Insolvency Act 1986 will apply. Moreover, unless all the unsecured debts can be satisfied, the "prescribed part" of the proceeds of assets is not available for floating charge holders, but available for satisfying the unsecured debts. The amount of the "prescribed part" should be calculated basing on the debtor's net property, and the distribution of which is not available for the floating charge holder with an outstanding balance.

4. The unsecured debts, i.e., the debts with no security and cannot be categorized into one of the preferential debts.

5. The shareholders. After all the creditors have been satisfied, if there still remain any surplus, the shareholders can have a distribution of the surplus according to the constitution of the company.

Moreover, the priority can be varied according to a subordination agreement which do not affect the priority of other creditors. It is also noteworthy that each class in the priority must be paid in full before the liquidator can move on to the [next](#).

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

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Prior to going into compulsory liquidation on 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 c 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;

The issue here of the floating charge created in favour of Stercus Bank plc is whether this transaction is voidable as a floating charge created for past value at a "relevant time" under section 245 of the Insolvency Act 1986.

According to section 245, a floating charge on the company's undertaking or property created at a "relevant time" prescribed by law is invalid except there is new 'consideration' given for creating the charge. In this case, the Stercus Bank plc is a pre-existing creditor of the company, and the granting of new debenture in order to prevent demanding repayment do not involve any money paid, goods or services supplied, hence it do not amount to a discharge or reduction. Therefore, the creation of the floating charge in question did not involve any 'new' consideration given. Moreover, as there is no fact indicating that the Stercus Bank plc is connected to the debtor company, the "relevant time" under the Insolvency Act 1986 is any time within the 12 months period prior to the onset of insolvency. In this case, the insolvency proceeding was commenced on 14th October 2021, and the floating charge was created on February 2021, the time of creation is within the period of 12 months.

Therefore, the floating charge in favour of Stercus Bank plc is within the scope of section 245, the liquidator can bring an action to avoid the floating charge in favour of Stercus Bank plc pursuant to section 245 of the Insolvency Act 1986.

Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

The issue here is whether the sale of the coffee roasting machines constitute a transaction at undervalue under section 238 of the Insolvency Act 1986.

As provided in the subsection 238(2) of the Insolvency Act 1986, where a debtor company entered into a transaction with any person at an undervalue at a relevant time, if the company was insolvent or became insolvent because of that transaction, the liquidator is empowered to apply to the court for an order to avoid such undervalue transaction. To establish an undervalue transaction, the following elements should be considered.

First, whether consideration in this transaction can be perceived as at an undervalue. In this case, as the sale of the coffee roasting machines is not a gift without consideration, the consideration issue should be considered under the subsection 238(4)(b) of the Insolvency Act 1986, which provided that a transaction for a consideration received that, in money or money's worth, is significantly less in than the value of the consideration provided by the debtor company, is an undervalue transaction which is voidable. In this case, the sale of the coffee roasting machines for "£10,000 in cash" may amount to an undervalue transaction, as the machines was bought for £25,000 just a year before. The market value of the machines should not be significantly impaired but it was only sold in this transaction at a price 60% less

Commented [DJ13]: Requirement of inability to pay debt missing.

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than the purchase price, which is not reasonable. Hence the consideration received by the debtor company in this transaction was significantly less than the value provided by the company. The transaction was entered at an undervalue.

Second, whether the transaction was entered at the 'relevant time'. As provided by section 240 of the Insolvency Act 1986, the "relevant time" for avoidance of undervalue transactions with connected person is two years. In this case, the debtor company commenced liquidation on 14th October 2021, and the transaction was entered in July 2021, which is within the two years period, hence the transaction was entered at the prescribed "relevant time".

Third, whether the debtor company was insolvent at the time of the transaction or it became insolvent because of that transaction. In this case, as the buyer in the transaction was the director of the company, in another word, a connected person of the company. Hence, according to section 240(2), it should be presumed that the company was insolvent at the relevant time or became insolvent, unless the contrary is proved. However in this case,, the company and Ann Young may argue on two points: (a) As mentioned above, they can prove that even though the company had cash flow problems, the company was not insolvent at the time and did not become insolvent because of the transaction. (b) they can prove that the transaction was entered by the company in good faith and for the purpose of carrying its business, and that at the time there were reasonable grounds for believing that the transaction would benefit the company.

Forth and the last, as some facts are missing in the scenario given, no conclusion can be made. However, after considering the three elements, if the court is satisfied that the transaction an undervalue transaction, the court may make an order to restore the pre-transaction position.

Moreover, since the transaction happened at the time when the company already suffered cash flow problem, the directors who approved the alleged sale may have committed wrongful trading under section 214 of the Insolvency Act 1986 if the directors knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation. And the directors may have committed fraudulent trading, if the transaction was entered with an intent to defraud creditors. If the court is satisfied that the directors are liable for wrongful trading or fraudulent trading, it may, on the application of the liquidator, declare the directors to be liable to make such contribution (if any) to the company's assets if the court thinks proper.

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

The issues here are whether the payments made to Beans and Leaves Ltd are voidable as a disposition according to section 127 of the Insolvency Act 1986, and whether it can be validated by court.

The first issue here is whether the payments were made after the commencement date of the winding up. Since the presentation of winding up petition was on 14th October 2021 and the order was issued on 23rd December 2021. Those payments to Beans and Leaves Ltd was made from one month before the issuance of the winding up order to the date of issuance of the winding up order. Those payments are all made during the "interim period". Since the winding up was made, these payments, as a type of property disposition, were all made after the commencement date of the winding up. Therefore, according to section 127(1), those dispositions are all void.

The second issue here is whether these payments should be validated by the court. The court has discretion to declare any disposition during the interim property not to be void. To reach a validation decision, one of the general considerations is that, the payment is for supplies which enable the company to continue trading. As in this case, the continuation of supply of the coffee beans was seen by the company as essential, and those payments were all made in the ordinary course of business, these payments are in line with this consideration.

Commented [DJ14]: Are there any defences? Specific remedies?
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Commented [JL15]: 4
Well done for correctly identifying s 127 as being applicable.

Third, to validate a contract, there is a need to prove that the payments were made for the benefit of the company but not only benefit the Beans and Leaves Ltd. Therefore, not all the payments in question can be validated. The payment of £8,000 to cover existing liabilities may hardly amount to for the benefit of the general body of unsecured creditors and be qualified to a validation order. But for the further payments on a daily delivery basis which allowed the company to continue to trade, as a general practice in UK, those payments should be validated by court,

*** End of Assessment ***