



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 [DJ1]: TOTAL: 36 OUT OF 50

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

Commented [DJ2]: 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.

Commented [DJ3]: d

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.**
- (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 [DJ4]: 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 [DJ5]: 8 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?

The following people are eligible to bring an action for section 423 of the Insolvency Act 1986 ("the Act"),

- 1) In case the Company is wound up or in administration, the official receiver, liquidator, administrator, victim of the defrauded transactions. In case the victim of fraud is under CVA, the supervisor or victim, no matter bound by CVA or not, of the CVA will be eligible to bring an action.
- 2) For section 6 of the CDDA and section 246ZB of the Act, the power to bring an action against the directors was rest in the liquidator/administrator. Under section 246ZD of the Act, in some situations, i.e., the liquidator lacks the funding for bringing the litigation, the liquidator may assign the right to sue to third party which is willing to provide the funding for litigation. It can be creditors or victims of the unlawful act.

Commented [DJ6]: 3
Your answers to parts ii) and iii) are incorrect
ii) - Secretary of State
iii) - Administrator

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 qualifying decision procedures are listed in Insolvency Rules 2016, they are 1) correspondence, 2) electronic voting, 3) virtual meeting, 4) physical meeting and 5) any other decision-making procedure enabling eligible creditors to participate in making decision.

Commented [DJ7]: 5

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

Commented [DJ8]: 10 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?

According to paragraph 59 of Schedule B1 of the Act, the administrator was empowered to do things that is essential for managing affairs, business and property of the company. Administrator will take up the role of director and act as a company's agent.

If the contract is an executory contract, the commencement of administration will not render those contracts ineffective, as such, the suppliers are obligated to continuing its supply. Some essential services, such as, utilities, IT supplies and communication services cannot be terminated under section 233 and s233A of the Act. Section 233B extended such restriction to end the contracts to all suppliers with a few exceptions.

It should be noted that even if the balances due to these suppliers are not settled, i.e., insolvent company failing to fulfil the contract, the suppliers are still required to supply such services. A clause for terminating the contract automatically event the company become insolvent is also invalid.

Some exceptions were added after the introduction of the Corporate Insolvency and Governance Act 2020. In these situations, the suppliers can terminate the contract,

- 1) With the permission of the administrator, and
- 2) With the permission to the Court, if the suppliers can proof that the continuance of supply will cause hardship to them.

As the concept of hardship is not defined, the supplier has to prove to the satisfactory of the court.

Commented [DJ9]: Your answer could have been better structured with clearer distinctions being made between the provisions of s 233, 233A and 233B respectively.
3

Question 3.2 [maximum 9 marks]

Explain the order of priority of payments in a liquidation and explain the nature of the rights enjoyed by each class of creditor or expense.

The priority of payments is set out under section 115 of the Act (and rules 6.42 and 7.108 of the Insolvency Rules 2016). The priority is generally as expenses incurred in in liquidations, liquidator's costs (i.e., remuneration of liquidator), preferential claims, floating charges, unsecured debts and shareholders.

In accordance to section 115 the Act, expenses related to winding up procedures are first to be settled and liquidator remuneration come after. The priority of expenses is set out as follows,

- 1) Expenses incurred by the liquidator in preserving, realising or getting the assets,
- 2) The cost of any security provided by the liquidator,
- 3) Amount payable for preparing statement of affairs or accounts,
- 4) Necessary disbursement by the liquidator in the course of the winding up,
- 5) Services charged for person employed by the liquidators,
- 6) The remuneration of liquidators,
- 7) Tax on profits for realizing the profits, and
- 8) Other expenses incurred necessarily for liquidator discharging his duties.

Preferential claims are claims from preferential creditors which are defined in sections 386, 387 and Schedule 6: section 175, i.e., outstanding salary, holiday remuneration and pension, from employees and government tax claims. The nature of preferential claims is largely statutory one and with limits. Preferential claims can be divided into 2 classes, namely, ordinary and secondary which ordinary preferential debts are paid before secondary preferential debts. Preferential claims are ranked equally within their classes and in proportion if they cannot be fully settled.

Employee's preferential claims are limited claim. Below are some of the ordinary preferential debts listed in Schedule 6 of the Act,

- 1) Outstanding employee's contribution to pension scheme 4 months before the start of winding up procedures,
- 2) Outstanding employee's contribution to pension scheme 12 months before the relevant date,
- 3) Outstanding salary four months before the appointment of liquidator and up to a maximum limit of £800,
- 4) Outstanding holiday remuneration for any period of employment before winding up,
- 5) Claims for monies advanced to pay wages,

After the introduction of the Finance Act 2020, some of the tax liabilities will be treated as secondary preferential debts. As listed in section 386 of the Act, it included taxations debts where the company was acting as tax collector for the Government, some examples are PAYE income tax, VAT, students loan repayments. Meanwhile, certain debts owned to HMRC became preferential under Crown preference.

Floating charge holders rank after the preferential claims. The order of payment among floating charge holders depends on when the float is created. Their right to receive the payment may be limited by section 176A of the Act and the "prescribed part".

The liquidator should set aside a "prescribed part" for making payment to unsecured debts if unsecured claims cannot be fully satisfied. The amount of "prescribed part" can be calculated as followings,

For company's net assets (after deduction of liquidation expenses and preferential debts) does not exceed £10,000, the prescribed part is 50% of the net assets. The liquidator may exercise his discretion for not forming a prescribed part if he believes that unsecured creditors would be disproportionate to the benefits. For cases

exceeding £10,000, it will be 50% for the first £10,000 and 20% of the £10,000 with the maximum of £800,000.

In *Thorniley v Harris* [2008], it should be noted a floating charge holder with unsecured claims are not allowed to take part in distribution of prescribed part.

Unsecured claims ranked the lowest among all of the claims above. Shareholders will be entitled to distribution in case all of the creditors' claims are settled.

It should be noted that fixed charge holder is also one of the creditor classes not affected by the liquidation process. They are paid first outside of the liquidation which are normally conducted by a receiver.

Commented [DJ10]: 7
Fixed charge holders?

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

Commented [DJ11]: 10 out of 15

Prior to going into compulsory liquidation on 23rd December 2021, under pressure from its bank, Stercus Bank plc, and in order to prevent it from demanding repayment of the company's loans, Corfee Zero Limited ("the Company"), granted a debenture in favour of Stercus Bank plc in February 2021. The debenture contained a floating charge over the whole of the Company's undertaking.

The winding up order followed a creditor's winding up petition issued on 14th October 2021.

In July 2021, as the Company continued to suffer cash flow problems, the directors approved the sale of 5 coffee roasting machines to Ann Young (a director) for £10,000 in cash. The machines had been bought for £25,000 a year before.

A month before the winding up order was made, Ann Young received an email from Beans and Leaves Ltd, one of the Company's key suppliers. The supplier demanded immediate payment of all sums owing to it and informed the Company that further supplies would only be made on a cash on delivery basis. As the continued supply of coffee beans was seen as essential by the Company, the board authorised a payment of £8,000 to cover existing liabilities and agreed to further payments, on a cash on delivery basis, for further supplies which amounted to further payment of £3,000 up to the date of the winding up order.

The liquidator has asked for advice whether any action may be taken in respect of the floating charge in favour of Stercus Bank plc and the two subsequent transactions.

Using the facts above, answer the questions that follow.

Identify the relevant issues and statutory provisions and consider whether the liquidator may take any action in relation to:

Question 4.1 [maximum 5 marks]

The floating charge in favour of Stercus Bank plc;

The issue facing in the floating charges is floating charge avoidance under section 245. The section prevent company creating a floating charge to a pre-existing unsecured creditor shortly before liquidation. The floating charge will be void if the creation of the floating charge did not lead to a fresh fund to the company at the relevant time.

As the Stercus Bank is not a related party to the Company. The arrangement for creating floating charge is made with 12 months before the compulsory liquidation which fall into the timeframe of the relevant time as stated in section 245.

Meanwhile, Stercus Bank plc is a pre-existing unsecured creditor. The floating charge did not provide any fresh money to the Company, it merely serves as a protection of Stercus Bank plc and give the bank a higher ranking than other unsecured creditor in case the company went into liquidation.

Lastly, the charge is over the entire company's undertaking. However, neither the consideration consisted of money paid, or goods or services supplies, nor consisted of discharge/reduction of the debt of the Company at the same time, which are 2 exempted situations set out in section 245. The floating charges are likely to be void under section 245.

Although the charge is void, it should be noted that the underlying debt of Stercus Bank plc remains valid.

Commented [DJ12]: 5

Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

The sale of the coffee roasting machines may be attacked under section 238 of the Act as an undervalued transactions if the administrator can prove that the proceeds for the coffee roasting machines, £10,000, is significantly less than the fair value.

The transaction falls into the relevant time which is 2 years before the commencement of liquidation. As the coffee roasting machines are disposed to the director of the Company who is a connected person, the Company is presumed to be insolvent or become insolvent as a result of the transactions unless the presumption is rebutted.

To work out whether the transaction is undervalued or not, external valuer may be employed to calculate the fair value and the depreciation of coffee roasting machines. On the other hands, it can make reference to second hand market to estimate the value of these machines. It may also need to check whether the machines have any defects for selling at such a low consideration.

The Company may also defend the transaction on the grounds that the transaction would benefit the Company at the transaction was made, i.e., preventing the Company from immediate default.

In case, the court conclude that the transaction is an undervalued, it can make order restoring the position as if the transaction has not been made before.

Commented [JL13]: What could this order look like?

Besides section 238, the director may also be attacked by under “misfeasance” under section 212 as selling these machines may result in the Company cannot operate its business which worsened the financial position of the Company. The director maybe accused of breach of fiduciary skills and negligence for misapplied the Company’s assets.

Lastly, the transactions may also be challenged by section 423 for defrauding creditors as the director appears to remove assets, which are available to creditors in liquidation, to his own pocket at a consideration less than its fair value. Creditor were out of reach for the machines now in case of liquidation. Unlike section 238, there are no time limits related to the transaction must have been entered.

Commented [DJ14]: 5

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

The payments made by the Company to unsecured creditor, Beans and Leaves Ltd, may be caught under section 239 of the Act. The Company has placed Beans and Leaves Ltd in a better position than others, i.e., pay the creditor in cash basis and made a payment of £8,000 and further payment £3,000 exclusively to Beans and Leaves Ltd. Beans and Leaves Ltd has a priority over other secured creditors.

As Beans and Leaves Ltd is not a connected-party to the Company. The relevant time for the payment is 6 months before the commencement of liquidation, the payment was made 1 month before the liquidation. It falls within the relevant time.

Bean and Leaves Ltd, being a supplier of the Company, is a creditor of the Company.

The administrator may need to prove the Company has a “desire to prefer” as the Beans and Leaves is not a connected person to the Company. It should be noted that the Company influenced solely by commercial considerations will not be viewed as “desire to prefer”.

In this case, Beans and Leaves Ltd is a key supplier to the Company and there is no alternate supplier available. Without its supply, the Company may have difficult in operating the Company. Under such circumstances, the Company has no choice but to give agreed to the terms proposed by Beans and Leaves Ltd may not be viewed as giving preference to it. Consequently, it is unlikely the transaction will be caught by section 239.

Commented [DJ15]: 0
Refer to p 64 in the Guidance Text.
This scenario deals with a disposition after the commencement of the company’s insolvency proceeding.
Therefore, s 127 and not s 239 applies.

*** End of Assessment ***