



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]: 9 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.

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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

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]

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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?

- i. An application may be made by the victim of the transaction or the Insolvency Practitioner. It may be made by an administrator or liquidator if the company is in administration or being wound up. The crux is that irrespective of the person making the application, the application is treated as being made on behalf of every victim of the transaction.
- ii. The Secretary of State or if the Secretary of State so directs in the case of a person who is or has been a director of a company which is being wound up by the court in England and Wales, by the official receiver.
- iii. The Administrator: on the application of the administrator, the court may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.

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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.

1. Correspondence
2. Electronic voting
3. Virtual meeting
4. Physical meeting
5. Any other decision-making procedure which enables all creditors who are who are entitled to participate in the making of 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?

Administration refers a temporal process of enabling the rehabilitation of a company that is financially distressed it begins when an administrator is appointed to perform duties necessary to achieve the objects, the administrator's role ends when the administration is successful and the company reverts to the directors of the company, however if the administration fails and the business is sold, the administrator distributes the proceeds to creditors according to the statutory order.

The administrator is an insolvency practitioner appointed to carry out the administration.

Section 233 of the Act prohibits suppliers from terminating a supply in a case when a company formally enters a formal insolvency procedure (the company enters administration, an

administrative receiver is appointed, or a voluntary arrangement has taken effect, or the company goes into liquidation, or a provisional liquidator is appointed).

Section 233 applies to the supply of gas, electricity, water and communication services. Communication services include the supply of goods and services such as point of sale terminals, computer hardware and software, information, advice and technical assistance, data storage and processing and website hosting. Section 233 of the Act permits a supplier to require that the administrator must personally guarantee payment of charges in respect of the supply.

In effect, suppliers of essential supplies cannot rely on any "insolvency-related term" in a contract of supply which otherwise would entitle the supplier to terminate the contract of supply, or alter the terms of the supply or demand higher payments for continued supply. Section 233B prohibits clauses which allow the supplier of goods or services to terminate or "do any other thing" in relation to the contract if the company enters into a formal insolvency procedure. The supplier may only terminate the supply by consent of the administrator or by an order of the court.

An administrator can therefore require suppliers of goods and services to continue to supply those goods and services during the administration.

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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.

Liquidation is the terminal procedure of winding up of a company, it is akin to performing the funeral rites of a company.

The rank of payment affects the following under the Insolvency Act 1986:

- Fixed Charge Holders
- Expenses (including the liquidators fees)
- Preferential creditors
- Floating charge holders
- Unsecured creditors
- Interest incurred on all unsecured debts post-liquidation
- Shareholders

Fixed Charge Holders

Fixed charge holders are paid first and will receive the money they are owed from the sale of the company assets that they hold a fixed charge over. Usually, those who hold a fixed security over the company's asset enforce their security outside any formal insolvency, in that case they are excluded from the statutory order under a formal insolvency proceedings.

Expenses (including remuneration of the liquidator or office holder)

After the payment of any liabilities to which section 174A applies, all 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. The expenses are payable in order of priority with the liquidator's remuneration as the last priority.

Preferential creditors with a charge

After all expenses to the insolvency procedure have been paid in full the next priority is to pay preferential creditors. These are typically employees with wage arrears and labour-related

claims. preferential debts are divided into two categories; ordinary preferential debts and secondary preferential debts. Ordinary preferential debts are paid before secondary preferential debts. Preferential debts, in their respective classes, rank equally amongst themselves and so must be paid in equal proportion in a situation where the company's assets are insufficient to pay them all.

Floating charge holders and the "Prescribed part"

After preferential creditors have been paid, the next priority is to pay secured creditors with a floating charge. If there are more than one floating charge priority between them usually turns upon which floating charge was created first. The liquidator must first consider the application of section 176A of the Act before making any payment to floating charge holders. Floating charge holders are supposed to be paid up to the amount realized from the assets covered by the floating charge. "However, part of the proceeds from realizing assets covered by any floating charge created on or after 15 September 2003 must be set aside and made available to satisfy unsecured debts (the Prescribed Part). The Prescribed Part is calculated as 50% of the first GBP10,000 of net floating charge realizations and 20% of the remainder, subject, to a cap of GBP600,000 where the first ranking floating charge was created before 6 April 2020 or a cap of GBP800,000 where the first ranking floating charge was created on or after 6 April 2020." The prescribed part should not be distributed to the floating charge holders, unless the unsecured creditors' claims have been paid and there is a surplus.

Unsecured Creditors

Unsecured creditors are the class of creditors that do not have any security interest in the company's assets. They are the last creditors to be paid in line with the statutory order. There is usually little or nothing remaining to pay unsecured creditors after paying the expenses and making distributions to preferential creditors and floating charge holders.

Interest incurred on all unsecured debts post-liquidation will be paid if there's any more funds left before Shareholders.

Shareholders

Any surplus will be distributed among the shareholders of the company according to its constitution. This distribution will be done pro rata the rights attached to their shares.

In conclusion, since those with fixed security will enforce their security outside the formal insolvency, **the statutory order will be reduced to expenses which will include the remuneration of the liquidator, preferential creditors, floating charge holders and unsecured creditors.**

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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 debenture in favour of Stercus Bank plc in February 2021. The debenture contained a floating charge over the whole of the Company's undertaking.

¹ James Roome, Tom Bannister, Emma Simmonds and Lauren Pfluger, Akin Gump LLP, "Restructuring and Insolvency in the UK: Overview" at <[https://uk.practicallaw.thomsonreuters.com/9-501-6812?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/9-501-6812?transitionType=Default&contextData=(sc.Default)&firstPage=true)>, accessed 9 June 2022

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 authorized 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 is whether or not the floating charge in favour of Stercus Bank Plc can be avoided by the liquidator.

The relevant statutory that applies here is section 245 of the Insolvency Act 1986

Section 245 (2) of Insolvency Act 1986 states that; a floating charge on the company's undertaking or property created at a relevant time is invalid except to the extent of the aggregate of:

- (a) the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the company at the same time as, or after, the creation of the charge,*
- (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, and*
- (c) the amount of such interest (if any) as is payable on the amount falling within paragraph (a) or*
- (b) in pursuance of any agreement under which the money was so paid, the goods or services were so supplied or the debt was so discharged or reduced.*

Where the person in whose favor the floating charge is created is connected with the company, the relevant time is any time within the period of two years prior to the onset of insolvency. Where the person in whose favor the floating charge is created is not connected with the company, the relevant time is any time within the period of 12 months prior to the onset of insolvency, but only if at the time of the creation of the charge the company was either unable

to pay its debts (within the meaning in section 123 of the Act) or became unable to do so in consequence of the transaction.

In effect the floating charge in favour of Stercus Bank Plc is invalid but the underlying debt remains valid.

The liquidator should communicate the status of the transaction to Stercus Bank Plc

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Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

The issue here is whether the liquidator can attack the transaction on the grounds that the transaction was at an undervalue.

The relevant legal principle here is Section 238 of the Insolvency Act 1986 since the company is already in liquidation.

Where the company has at a relevant time entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section. Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction. (Section 238 (2) & (3) of the Insolvency Act 1986)

In order for the transaction to be attacked, the transaction must have taken place at a relevant time which is in the period of two years prior to the commencement of the liquidation or administration.

Under section 238 the liquidator is required to prove that:

1. the company made a gift to that person or
2. otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or
3. the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.

The exception to a transaction undervalue is that that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.

From the facts, 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.

From the facts therefore, the liquidator may bring an application to the court against Ann Young for full payment of the full value of the coffee roasting machines because she bought them at undervalue.

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Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

Whether or not the payments to Beans and Leaves Ltd can be avoided by the liquidator.

The relevant statutory provision is Section 239 of the Insolvency Act 1986 since the company is already in Liquidation.

The purpose of section 239 of the Act is to prevent a company, shortly before entering a formal insolvency procedure, from putting one of its creditors in a better position than others. It prohibits such preferences such as a payment in full where the creditor could have expected only a dividend as an unsecured creditor.

For a preference to be actionable, it must have occurred within the two years prior to the onset of insolvency if the transaction occurred in favour of a connected person or if it occurred in favour of an unconnected person, then within the six months prior to the onset of insolvency. From the facts the liquidator can bring an action because the payments occurred a month before the winding up.

From the facts, 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.

From the facts therefore the Liquidator can bring an action against Leaves and Beans to restore the position to what it would have been if the company had not given that preference.

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This question pertains to a disposition after the commencement of winding up and therefore s 127 and not 239 applies.

*** End of Assessment ***