



**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.

#### 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.**

**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?

- The following parties may bring action under section 423 of the Insolvency Act 1986 to attack transactions defrauding the creditors;
  - Where the company is in administration or being wound up; the administrator, the official receiver, the liquidator, or the victim of such transaction (with a leave from the court);
  - Where there is a binding Company Voluntary Arrangement (CVA) in place; the supervisor of the CVA or the victim of the transaction (whether bound by the CVA or not); or
  - Victims of the transaction in any other case.
- Section 6 of the Company Directors Disqualification Act 1986 is the most common ground to seek disqualification of directors of insolvent companies, and can be brought by the Secretary of State, based upon reports made by the relevant insolvency office holders (such as official receiver, administrator, or liquidator) regarding the unfitness of the director(s) to be disqualified.
- Section 246ZB of the Insolvency Act 1986 extended the legal action that can be brought against directors of insolvent companies based on wrongful trading (applicable to directors of companies in liquidation, under section 214 of the Act), to directors of companies in insolvent administration, and legal actions under this section 246ZB can only be brought by the administrators of such companies.

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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.

The five qualifying decision procedures consist of;

- (a) Correspondence;
- (b) Electronic voting;
- (c) Virtual meeting;
- (d) Physical meeting (subject to written request from such prescribed threshold of creditors, in numbers or values); and
- (e) Any other decision procedure that can ensure that all creditors that are entitled to vote or participate in the decision making, are able to do so 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?

Yes, under sections 233, 233A and 233B of the Insolvency Act, the administrator may opt to continue the supply contracts that are in place, and therefore require the supplies be continued during the administration (with certain limited number of exceptions for supply contracts related to financial services such as contracts with insurers, banks, investment exchanges, clearing houses). The suppliers are not permitted to terminate the supply, or to rely on provision in the executory contract for an automatic termination upon insolvency (the *ipso-facto* clauses). The suppliers are also prohibited from requiring payment of unpaid arrears before continuing the supply, or from making other modification to the contract such as higher prices for continuing the supply.

However, section 233A of the Insolvency Act permits a supplier to require that the administrator personally guarantee the payment of charges in respect of the continued supply, and section 233B of the Insolvency Act further allows the supply be terminated with the consent of the administrator or with permission from the court (if the court is satisfied that the continuation of the supply would result in disproportionate hardship on the supplier).

### 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.

Holders of fixed charge and security will usually be able to enforce and realise their collateral outside the insolvency or liquidation process. The following statutory order of priority would then apply to the realisation of assets belonging to the company in liquidation;

#### ▪ Liquidation Expenses

Liquidation expenses are given priority ahead of the other classes of creditors, and these prioritised expenses have the following order of seniority / priority;

- (1) Expenses incurred by the liquidator to preserve, realise or get the company's assets (including the relevant legal costs);
- (2) Costs of any security provided by the liquidator;
- (3) Expenses related to preparation of the company's statement of affairs;
- (4) Disbursements incurred by the liquidator in the course of winding up;
- (5) Remunerations of any person employed by the liquidator to cater services to the company;
- (6) Remuneration of the liquidator;
- (7) Corporation tax on chargeable gains from realisation of the company's assets;
- (8) Any other expenses in carrying out the liquidator's functions in the winding up of the company.

#### ▪ Preferential Debts

Once expenses of the liquidation are paid in full, the realisation of the company's assets are then applied to pay the company's preferential debts, which consist of Ordinary Preferential Debts and Secondary Preferential Debts. The Ordinary Preferential Debts shall be paid ahead of the Secondary Preferential Debts, and each debt in the respective class would rank equally so if the remaining assets are insufficient to pay all these debts in full, each preferential debt from the same class would share the distribution of assets in equal proportion.

The Ordinary Preferential Debts consist of;

- (1) Amounts owed for employee's contribution to occupational pension scheme, up to four months before the commencement of the winding up;
- (2) Amounts owed for the employer's contribution to occupational pension scheme, up to twelve months before the commencement of the winding up;

**Commented [DJ8]:** Your answer could have been structured better with clearer distinctions being made between the provisions of s 233, 233A and 233B respectively.  
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- (3) Unpaid employees' remuneration up to four months before the commencement of the winding up, and up to a maximum amount of £800;
- (4) Unpaid holiday remuneration in respect of any period before the winding up;
- (5) Monies advanced to pay wages or holiday remuneration;
- (6) Levies on production of coal and steel relevant articles in the European Coal and Steel Community Treaty;
- (7) Claims on which the company has been ordered to pay pursuant to the Reserve Forces (Safeguard of Employment) Act 1985;
- (8) Amounts owed by the company on eligible deposits not in excess of compensation accorded by the Financial Services Compensation Scheme to the depositors.

The Secondary Preferential Debts consist of;

- (9) The amounts owed by the company on eligible deposits beyond the compensation accorded by the Financial Services Compensation Scheme to the depositors;
- (10) Amounts owed by the company on deposits made through a non-UK branch of credit institution authorised by the authority in the UK, which would have been eligible deposits if they were made through the UK branch of that credit institution;
- (11) Certain prescribed debts to the taxation authority (such as PAYE income tax deductions, national insurance deductions, VAT payments, Construction Industry Scheme deductions, and student loan repayments).

▪ Floating Charge Holders

After preferential debts are paid, the next in line would be the creditors holding floating charge on the company's assets. The order of priority between or among multiple holders of floating charge would be determined by the time the charges were created (older charge would rank ahead of the newer charge).

For floating charges that were created on or after 15 September 2003 however, the liquidator is under duty to retain a 'prescribed part' for the benefit of unsecured creditors, before making distribution to the floating charge holders (unless for such prescribed part amount in excess of the unsecured debt), as mandated by section 176A of the Insolvency Act of 1986. Where the value of the company's remaining assets (after paying the liquidation expenses and preferential debts) which would become available to the floating charge holders (the 'net asset') does not exceed £10,000, the prescribed part is 50% of the net asset. The prescribed part requirement however would not apply if the company's net asset is less than £10,000 and the liquidator thinks that making distribution to unsecured creditors would be disproportionate to the benefits. For cases where the company's net asset is higher than £10,000, the prescribed part is the sum of (i) 50% of the first £10,000, and (ii) 20% of value in excess of £10,000, subject to maximum prescribed part of £80,000

▪ Unsecured Creditors

Those creditors not having the benefit of any security or title to assets would fall into the general unsecured creditors pool. This class of creditors would normally consist of ordinary trade suppliers and non-preferential tax claims, and these creditors would benefit from the prescribed part retained as per section 176A of the Insolvency Act and any remaining realised assets after the liquidation expenses, preferential debts, and floating charge holders have been paid.

▪ Members (Shareholders)

In the event there is still any surplus assets after all the unsecured creditors are paid in full, the surplus assets will then be distributed to the company's members or shareholders according to the company's constitution.

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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 23<sup>rd</sup> 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 14<sup>th</sup> 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;

Under section 245 of the Insolvency Act 1986, a floating charge created for the benefit of an otherwise unsecured creditor, during the prescribed 'relevant time' shortly before the onset of insolvency, without providing any fresh or new consideration for it, shall be invalid. Stercus Bank did not provide any new consideration for the grant of the debenture which contained the floating charge, and as such the floating charge is vulnerable for invalidation under this section 245.

The 'relevant time' applicable for Stercus Bank's floating charge, given that the bank is not a connected person, is the 12 months period ending with the onset of the insolvency, if at the time of the creation of the charge the Company was unable to pay its debts within the meaning of section 123 of the Insolvency Act, or became unable to pay its debts because of the transaction. The onset of the Company's insolvency is the date of the commencement of the winding up, which was 14 October 2021. The floating charge was granted (in February 2021) within the prescribed 12 months period preceding the onset of insolvency, and at that time the

Company was unable to pay its debt (which led the Company to provide the debenture and the floating charge), and therefore Stercus Bank's floating charge shall be invalid.

The operation of section 245 of the Insolvency Act is however automatic and does not require any application by the liquidator. On the other hand, while the floating charge is invalidated by this section 245, the underlying debt (to Stercus Bank) remains valid.

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#### Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

Given that the sale of the coffee roasting machines was done at a value (£10,000) that is seemingly below what the machines were worth (as the machines were bought at £25,000 one year prior), the sale of these machines may be subjected to attack under section 238 of the Insolvency Act, concerning transactions at an undervalue.

The liquidator may take action to unwind the transaction and restore the position of the Company. The prerequisite for this section 238 is that the undervalue transaction was done within the 'relevant time'. Section 240 of the Insolvency Act stipulates that the 'relevant time' is the 2-years period ending with the onset of insolvency (commencement of the winding up) and when the transaction was carried out, the Company was unable to pay its debts within the meaning of section 123 of the Insolvency Act, or became unable to pay its debts because of the transaction. However, given that the undervalue transaction was with a connected person (Ann Young, a director), section 240 of the Insolvency Act stipulates that the requirement concerning the Company's inability to pay its debt (or becoming unable to do so because of the transaction) is presumed to be satisfied, unless the contrary is shown. As such, the Company's transaction with Ann Young satisfies the qualifications of an undervalue transaction under section 238 of the Insolvency Act.

Commented [JL12]: Are there any defences?

If the liquidator's application is successful, the court can override the sale of the machines to Ann Young, and reinstate the position of the Company to what it would have been if the sale was not made.

Commented [JL13]: What could that look like?

Additionally, the liquidator may also look into whether there was any breach of duty on the part of the Company's directors, in approving and transacting the sale of these machines to Ann Young (who is also a director). If so, the liquidator may bring action against Ann Young and/or the other directors (who approved the transaction), for misfeasance under section 212 of the Insolvency Act, for having breached any fiduciary or other duty, including the duty to act in the best interests of the Company and the duty to not act where there is any conflict of interests. If the action based on this section 212 is successful, the court may sanction and compel the directors to repay the moneys, or restore the asset (the machines), or compensate the Company's assets.

Lastly, the liquidator may look into whether the transaction with Ann Young would qualify as a transaction that deprived the creditors of the Company of the assets concerned (the roasting machines), as the machines would otherwise be part of the insolvent estate had they not been sold, which thus violated the anti-deprivation rule.

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#### Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

The Corporate Insolvency and Governance Act 2020 has expanded the protection for insolvent companies against termination or modification of supplies, by inserting section 233B

to the Insolvency Act 1986. The Company's liquidation is within the prescribed meaning of a 'relevant insolvency procedure' under section 233B, and as such, Beans and Leaves Ltd, as the Company's supplier, is not permitted to unilaterally terminate the supply, or to rely on automatic termination or modification provision in the executory contracts. Beans and Leaves Ltd is also prohibited, under section 233B, from making it a condition of continued supply that the outstanding amount that the Company owed (£8,000) is first paid, or from changing the payment terms for the supply. The liquidator may therefore take action to set aside these payment requests and modification of payment terms, if the liquidator thinks that continuing supplies temporarily is beneficial to the winding up of the Company.

Additionally, under **section 127** of the Insolvency Act, any disposition of property after the commencement of the winding up, unless validated by the court, is void. The disposition of property under section 127 is widely construed and would include payments of money as well as sale of assets. As such the liquidator may take action against the amounts demanded by Beans and Leaves Ltd, if they had been paid by the Company, given that the payment would have happened after the winding up commenced, as the winding up is deemed to commence at the time of the presentation of the petition for winding up (section 129 of the Insolvency Act).

Lastly, the liquidator may also look into whether the directors of the Company had engaged in 'wrongful trading', where they continued trading (continued supplies) when they ought to have known that there was no reasonable prospect for the Company to avoid liquidation. The provisions on wrongful trading as stipulated in section 214 of the Insolvency Act requires that directors shall, once they became aware of the prospect of insolvent liquidation, take every step to minimise potential losses to the creditors. The burden of proof is on the liquidator, to demonstrate that the directors knew or ought to have concluded that there was no reasonable prospect that the Company would avoid insolvent liquidation. In the case of wrongful trading, the liquidator may submit an application to the court, to declare the directors liable and to order the directors to compensate the Company for certain portion of the Company's liabilities that were caused by such wrongful trading.

**Commented [JL15]:** This is what you should have focused on.

**Commented [DJ16]:** Question pertained to s 127 which you discussed but it is rather light touch.  
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**\* End of Assessment \***