



**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.

Commented [DJ3]: c

#### 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?

The parties allowed to bring action under **Section 423 Insolvency Act (1986)**, ie right to attack transactions defrauding creditors, depend on the circumstances. The conditions are provided in **Section 424 Insolvency Act (1986)**. If a company is in the process of winding up or in administration, the parties allowed are the official receiver, liquidator, administrator, and any victim of the transaction with leave of the court (eg a creditor). In the case of a company voluntary arrangement ("CVA"), the parties allowed are the supervisor (if the victim is bound by the CVA) or any victim of the transaction (regardless of whether it is a victim). In any other case, the victim of the transaction may always bring an action under this section.

The parties allowed to bring action under **Section 6 of the Company Directors Disqualification Act (1986)**, ie director disqualification, are listed **Section 7(1)** of that Act. If the Secretary of State, based on the "unfitness" report of the liquidator or administrator, is of the opinion that a disqualification order should be made for the sake of public interest, the Secretary of State may apply to court or – if the company is being or has been wound up – the official receiver.

The parties allowed to bring action under **Section 246ZB(1) Insolvency Act (1986)**, ie fraudulent trading, are the administrator or the liquidator. They may bring a civil application for fraudulent trading for the benefit of all creditors – and not only the victims.

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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 **qualifying decision procedures** are used when the **deemed consent procedure** cannot be used, is objected to, or where the office-holder does not (want to) use it.

The procedures are listed in **Rule 15.3 of the Insolvency Rules 2016 SI 2016/1024** and are as follows: (1) correspondence, (2) electronic voting (see Rule 15.4), (3) virtual meeting (see Rule 15.5), (4) physical meeting (15.6), and (5) any other procedure which gives all creditors who are entitled to participate the opportunity to equally take part in the decision making procedure.

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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?

During an administration, the company's executory contracts are not automatically terminated. Even contracts having *ipso facto* clauses do not lead to their automatic termination once the company has entered a formal insolvency proceeding, as these clauses are often times subject to statutory exceptions. As such, these clauses are void.

Part VI of the Insolvency Act (1986) deals with management powers and duties of the administrator. **Section 233(3) and (3A) Insolvency Act** provide a list of the types of

(essential) supplies of which the suppliers are prohibited from requiring payment of outstanding debts so that they can continue to supply to the company in administration. The same applies to new suppliers.

Looking into [section 233](#) of the Act, the supplies are: gas, electricity, water, communication services, and supply of goods or services listed in [section 233\(3A\)](#) which are point of sale terminals, computer hardware and software, information, advice and technical assistance in connection with the use of information technology, data storage and processing, website hosting.

As such, the administrator may require the suppliers to secure the continuation or the commencement of supply to the company in administration. In return, the administrator has to personally guarantee the payment of charges.

An exception under [section 233B\(5\)](#) of the Act is that the contract may nonetheless be terminated by the supplier if the company or the administrator consents to it, or if the court grants permission upon application because it is satisfied that the continuation would cause the supplier [hardship](#).

### 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.

To begin with, the liquidator may only realise assets belonging to the insolvent company. As such, assets that are subject to eg **hire purchase or retention of title** contracts are not part of the insolvent estate. The same applies to debts which have been assigned to a **receivable financier**.

One should also note that holders of **fixed charges** are paid outside of any formal insolvency. These are secured creditors whose security attaches to a particular (class of) asset(s) and the debtor needs the consent of the creditor prior to dealing with the asset. Examples include mortgages and charge on assets.

Generally speaking, and if no **subordination agreement** between creditors are agreed (which varies their priority based on mutual consent), the order of priority of payments in a insolvency liquidation procedure is as follows.

Firstly, the **expenses of the procedure**, which includes the remuneration of the liquidator, are paid. All fees, costs, charges and other expenses incurred in the course of the winding up are therefore payable out of the company's assets in priority to all other claims, see Section [115](#) Insolvency Act (1986). Rules [6.42\(4\)](#) and [7.108\(4\)](#) of the Insolvency Rules (2016) provide the following order of payment: (1) expenses incurred by the liquidator in preserving, realising or getting in any of the company's assets; (2) the cost of any security provided by the liquidator; (3) the remuneration of the special manager (if any); (4) any amount payable to a person employed or authorised to assist in the preparation of a statement of affairs or of accounts; (5) any necessary disbursements by the liquidator; (6) the remuneration of any person who has been employed by the liquidator to perform any services for the company; (h) the remuneration of the liquidator; (8) the amount of any corporation tax on chargeable gains accruing on the realisation of any asset of the company (irrespective of the person by whom the realisation is effected); (9) any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up.

**Preferential creditors** are next in line. These are codified in sections [386-387](#) and [Schedule 6](#) "the categories of preferential debts" of the Insolvency Act (1986) and largely include employees' remuneration or taxation debts owed to the Government (ie the Crown). The employees also enjoy significant protection under the Employment Rights Act (1996). Outstanding tax provisions are largely dealt with in the Finance Act (2020). The preferential debts can be split into "**ordinary**" (paragraphs 8-15 Schedule 6) and "**secondary**" (eg paragraphs 15BA-15BB Schedule 6) preferential debts. Ordinary preferential debts include, *inter alia*: (1) employees' contributions to an occupational pension scheme; (2) accrued holiday

**Commented [DJ8]:** Some elements missing. The answer could have been structured in a way to better elaborate on the differences in the provisions of 233,233A and 233B.  
Good attempt  
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remuneration; (3) levies on the production of coal and steel etc... Secondary preferential debts include PAYE income tax deductions, student loan repayments, VAT payments etc...

Holders of **floating charges** are next to receive their payment. These are secured creditors whose security "floats" above a class of assets which can be dealt with by the debtor in the normal course of business without the need for the creditor's consent. They are floating because they are created over ascertained and definite property, which has a shifting nature in value and quantity. Examples include receivables and stock. The priority within this category is based on the date of creation. The charge that was created first, will be repaid first. It is important to note that the liquidator is obliged to allocate a "**prescribed part**" of the company's net property to unsecured creditors, before satisfying the claims of the floating charge holders. The calculations and allocation depend on the sum of the net property. If the sum is below a certain threshold (ie BP 10.000), the liquidator may make an exception if s/he considers a distribution to the unsecured creditors to be disproportionate to the benefits.

Lastly, **unsecured creditors** ie creditors without any form of security or title to assets are paid out last. Examples could include ordinary trade suppliers and taxation liabilities that are excluded from the preferential category.

If any **surplus** remains, it will be returned to the members and shareholders according to their rights under the company's Articles of Association (which normally distributes the sum on a *pro rata* basis).

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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;

Stercus Bank plc received a debenture which includes a floating charge on the whole of the undertaking of the Corfee Zero Limited company. This debenture was given on February 2021. The company enters into a compulsory liquidation procedure in December 2021 by the court's winding up order. However, according to **section 129(2)** of the Insolvency Act (1986), the liquidation is deemed to have commenced **at the date of the petition** (and not the date of the winding up order). As such, the liquidation commenced on the day the creditors' winding up petition was filed, ie on **2021, October 14<sup>th</sup>**.

The question is whether the liquidator may take any action against the floating charge given to the bank. **Section 245** of the Insolvency Act (1986) is the relevant provision as it aims to prevent the adjustment of prior transactions, more specifically, it **prevents pre-existing unsecured creditors from obtaining a security – in the form of a floating charge** – prior to the commencement of a formal insolvency procedure.

Important factors are the **connectivity** of the floating charge holder and the company, as well as the **time** of the creation of the security. It can be derived from the facts above that the bank is not connected with the company.

Therefore, **section 245(4)** applies, which states that where a company creates a floating charge maximum **12 months prior** to the onset of insolvency it may be invalid on the condition that at that time, the company was **unable to pay its debts** within the meaning of section 123 Insolvency Act or becomes unable to pay its debts in consequence of the transaction under which the charge is created.

Applying this to the our case, the company created the floating charge under pressure from the Stercus Bank plc and in order to prevent the Bank from demanding repayment of the company's loans. This shows the financial difficulties of the company which was unable to pay its debts as they fell due within the meaning of section 123. Moreover, the charge was created in February, just **eight (8) months** prior to the commencement of the liquidation procedure.

No exceptions listed under section 245(2) of the Act applies *in casu* as the Bank did not give ("new") consideration in return for the charge.

Therefore, the liquidator **may take action** against the charge. As soon as a floating charge is caught by this provision, it is rendered invalid (whilst the underlying debt remains **valid**).

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**Question 4.2 [maximum 6 marks]**

The sale of the coffee roasting machines; and

The company sold five (5) coffee roasting machines to a director, Ann Young, for BP10.000 in July 2021 which were bought for BP25.000 the year before. The question is whether the liquidator may take action against this transaction.

The relevant provision is **section 238** of the Insolvency Act (1986) which concerns **transactions at an undervalue**. Under paragraph 2 of that section it stipulates that where a company has **at a relevant time** entered into a transaction with **any person at an undervalue**, the liquidator may apply to the court to attack said transaction. Paragraph (4)(b) of that section explains that the company enters into a transaction with the person for a consideration the value of which is **significantly less than the value** of the consideration provided by the company.

The relevant time is defined in **section 240** of the Act, which states under paragraph (1)(a) that in the case of a transaction at an undervalue or of a preference which is given to a **person who is connected** with the company (otherwise than by reason only of being its employee), the relevant time period is **two (2) years ending with the onset of insolvency**. Section 240(2) also adds the condition that at that time, the company was unable to pay its debts within the meaning of section 123 of the Act or becomes unable to pay its debts as a consequence of the transaction.

Ann Young is, without a doubt, connected with the company as she is the director. During that time, the company was still suffering from cash flow problems and was unable to pay its debts. Moreover, the transaction took place just four (4) months prior to the commencement of the proceeding. As such, the latter three criteria are satisfied.

However, the main problem lays with the **assessment of the value** of the coffee roasting machines at that time. Could there have been such a depreciation (from BP25.000 to 10.000) in just one year? Or should this transaction be categorized as a "transaction at undervalue"? In any case, the court will have to make an assessment also based on precedent (see eg [Philips v Brewin Dolphin Bell Lawrie Ltd \[2001\] UKHL 2](#)).

Also, under section 238(5) of the Insolvency Act, the court will have to consider whether the transaction was entered into in **good faith** and for the purposes of carrying on the business and that there were **reasonable grounds** for believing that the transaction would benefit the company. If the court is satisfied that these cumulative criteria have been met, it may not make an order.

*In casu*, one might argue that the company entered into this transaction for the sake of having more liquidity at its disposal. Selling the machines (perhaps at an undervalue) would perhaps have helped solve the cash flow problem, at least for the short term. On the other hand, one might argue that the company foresaw its downfall and the director bought the coffee roasting machines (which are arguably essential to the business) with an attractive discount before it was included in the insolvent estate.

Regardless of the outcome, there are sufficient grounds for the liquidator to apply to court for an order to attack the transaction. In my opinion, this is a transaction at an undervalue and the exception would not apply in this **case**.

Commented [DJ12]: Remedies?  
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#### Question 4.3 [maximum 4 marks]

##### The payments to Beans and Leaves Ltd.

A month prior to the winding up order, Beans and Leaves demanded immediate payment of all outstanding debts and created new terms and conditions for the future supply of coffee beans, ie supplies are only made on a cash on delivery basis. The company needed the continued supply of the coffee beans as they were essential. Therefore the company paid a total of BP 11.000 (BP 8.000 outstanding and 3.000 further payment) up to the date of the winding up order. The question is whether the liquidator may attack these payments.

The relevant provision is **section 127(1)** of the Insolvency Act. This provision aims to avoid any **disposition of property** of the company made after the commencement of the winding up, which is the date of the presentation of the petition. Any disposition made during the interim period between the petition and the winding up order may be affected by section 127. The interpretation regarding disposition of property is wide and can affect any payment of money, sale or transfer of assets, and any form transferral eg sale, gift, assignment, lease, mortgage, etc...

Applying to our case, a month before the winding up order, ie November 2021, the payments to Beans and Leaves Ltd were made. As such, this disposition by way of payment of money is conducted during the interim period between the petition and the order and is open to attack under section 127 of the Insolvency Act.

However the impact of this section is also not fully encompassing. The court may via its wide discretionary power declare that certain dispositions are not void by way of a **validation order**. When applying for the validation order, the company carries the burden of proof. This order will be given only in the circumstances in which the disposition is, will be, or has been made for the **benefit of the general body of unsecured creditors**. The transaction should have been made **honestly, in the ordinary course of business, and for the benefit of the company** (to pay wages or suppliers), in order to fulfil a **profitable**(-appearing) contract, for it to have a higher chance of receiving a validation order, unless the disposition benefits only one creditor to the detriment of others.

Moreover, payments that are made to **ensure continued supplies** and enabling the company to continue trading – which was in the best interest of the creditors – are likely to receive such orders.

Furthermore, when considering the goods that have been paid based **cash on delivery terms**, the court will assess the benefit to the company and whether the payment will enable further supplies to be delivered and enable business continuation.

*In casu*, the continued supply of coffee beans was seen as essential by the company, the payments of the outstanding debts and the agreement to the new (cash on delivery) terms have been made to ensure continued supplies and business continuation for the benefit of the creditors. Therefore, the chances for the company receiving a validation order is high.

In short, the liquidator **may attack** the payments made to Beans and Leaves Ltd, as the fall under the scope of section 127 of the Insolvency Act. However, the company may always attempt to apply for the **validation order** as it seems to have sufficient grounds for convincing the court that it should receive such an **order**.

**\* End of Assessment \***

**Commented [DJ13]: 3**  
A good answer. Reference to the commencement date would have ensured full marks