



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: 33.5 OUT OF 50

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

Commented [DJ2]: 7 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. This statement is correct except it does not take into account Ireland's ability to avail of s426 as a former colonised country and current EU Member State.

Commented [DJ5]: a only

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 [DJ6]: 9.5 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?

- (i) S423 of the Insolvency Act 1986 concerns transactions defrauding creditors. Essentially any person who was the victim of the transaction (for example, a creditor) may bring an application to challenge the transaction. Usually however where a company is being wound up, the liquidator brings the challenge, or where the company is in administration, the administrator brings the application which is made for the benefit of all victims.
- (ii) Where the company is being wound up by the court, the official receiver may make the disqualification application to have a director disqualified. Separately, an 'office holder' is obliged to prepare a 'conduct report' dealing with the actions of the directors. The conduct report will aid the Secretary of State in deciding whether the directors should be disqualified. An office holder for this purpose is defined as the liquidator, administrator or administrative receiver (s7A of the Company Directors Disqualification Act 1986).
- (iii) S246ZB concerns wrongful trading by directors; where directors continue to trade while insolvent. A liquidator or administrator usually brings the application against the directors with a view making them personally liable for certain of the debts of the company.

Commented [JL7]: This section applies to administration – so only administrator is correct

Commented [DJ8]: 4.5

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.

- (i) Electronic voting;
- (ii) Virtual meeting;
- (iii) Correspondence;
- (iv) Physical meeting;
- (v) Any other decision making procedure that enables all creditors to participate equally.

Commented [DJ9]: 5

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

Commented [DJ10]: 7 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?

Yes, an administrator may continue to use suppliers to the company. It is the suppliers to the company that are prohibited from terminating contracts with the company or varying the terms of the contract. S233 of the Act applies to a supply of gas, electricity, water and communications services (for example the host of the company's website) to the company. Suppliers are not entitled to require payment of outstanding debts in return for continuing to

supply the company. Pursuant to s233A, suppliers cannot rely on an 'insolvency related term' which would otherwise entitle the supplier to vary or terminate the supply. S233B of the Act is perhaps the most wide ranging introduced in 2020 and prevents a supplier of goods and services from terminating a supply or 'doing any other thing' in relation to a contract where the company enters into a formal insolvency procedure.

Commented [JL11]: Personal guarantee

Commented [DJ12]: Your answer has the bare bones of the theory but is lacking some detail. Perhaps a structure that distinguished between the provisions of s233, 233A and 233B would have helped.
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.

Taking each in turn, the order of priority is as follows:

- (i) Secured creditors. Fixed charge holders are paid first and usually outside of the insolvency process. Fixed charges are generally taken as security in lending/finance transactions with a fixed charge provided by company over specific property/assets of the company.
- (ii) Liquidator costs and expenses including the liquidator's remuneration.
- (iii) Certain taxes due to the State and employee payments.
- (iv) Floating charge holders. Floating charges over non-specific assets typically crystallise on the happening of an insolvency event.
- (v) Unsecured creditors such as ordinary trade creditors.
- (vi) Shareholders. Lastly, in the event of a solvent liquidation, and subject to equity being available, shareholders are repaid.

Commented [JL13]: Preferential creditors?

Commented [JL14]: Prescribed part under s 176A?

Commented [DJ15]: This question asked you to explain not list.
4

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

Commented [DJ16]: 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 liquidator may take action pursuant to s245 of the Act to have the floating charge rendered invalid. According to the facts of the case as presented, the Company provided the floating charge to Stercus Bank in order to prevent it from demanding payment of the Company's loans. It appears that no fresh consideration was provided. In addition, the floating charge was created within 12 months of the liquidation. For the charge to be invalid, the Company must have been unable to pay its debts when it was created. The facts state that the Company had cash flow problems in July 2021 which were 'continuing'. The Bank was about to call in the loans. Together the facts suggest the Company was unable to its debts as they fell due. Where the floating charge is rendered invalid, the underlying debt will remain and the Bank will rank as an unsecured creditor in the liquidation.

Commented [DJ17]: 5

Question 4.2 [maximum 6 marks]

The sale of the coffee roasting machines; and

The sale of the coffee machines appears to have been made at an undervalue and to a connected person. The liquidator will investigate the transactions pursuant to s238 of the Act. The transaction involving the sale of the coffee machines happened within the relevant time period of 2 years prior to the commencement of the winding up. The prerequisite for liability under s238 is to show the Company was unable to pay its debts as they fell due. As the transaction here was with a director of the Company and as such a connected person, the Company is presumed insolvent unless the contrary is shown. The order to be made by the court upon the application of the liquidator is to restore the Company to the position it had been in prior to the transaction being made. The liquidator will be advised that the director may defend the application by showing that the transaction was made in good faith and for the purpose of carrying on the Company's business with the reasonable belief that it would benefit the Company.

Commented [JL18]: What could this look like?

Commented [DJ19]: 5

Question 4.3 [maximum 4 marks]

The payments to Beans and Leaves Ltd.

There appear to be two avenues for the liquidator to investigate and pursue – an application to court pursuant to section 239 of the Act to have the transactions made void – and an action against the director(s) for wrongful trading pursuant to s214 and s246ZB of the Act.

The payments may be viewed as preferring Beans and Leaves Ltd to other creditors and therefore as an unfair preference. The liquidator must prove that the Company was influenced

in deciding to make the payment by a 'desire' to put Beans and Leaves Ltd into a better position than in the event of insolvent liquidation the payments had not been made. The material time for the liquidator to consider is when the decision was made to grant the preference. The Company must have been unable to pay its debts as they fell due or become unable to its debts as they fell due as a consequence of the preference. The facts of the case disclose that the payment was viewed as 'essential' to the Company and sanctioned by the board as such. The pressure exerted by the supplier is relevant to determining the 'desire' to prefer. If the directors can show that the payment was driven solely by commercial considerations and to enable the Company to continue trading then that will amount to a defence.

The facts disclose that the payments were made in September 2021, a month before the winding up order was made. The Company had cashflow problems in July and it appears also earlier in the year in February. The liquidator may consider seeking orders from the court that the directors contribute to the Company's assets with such contribution being broadly in line with the increase in the Company's liabilities during the period the Company continued to trade. The burden of proof is on the liquidator to prove that the directors knew or ought to have known that there was no reasonable prospect of avoiding insolvent liquidation. Arguably it appears the directors should have moved to place the Company into liquidation in September or perhaps even earlier in 2021. In defence, the directors must show that what they did was to take every step to minimise loss to creditors. The directors will be judged by the general knowledge and skill reasonably expected of a person in their position and the general knowledge and skill that they possess.

Commented [DJ20]: 0
This question relates to a disposition made after the commencement of winding up proceedings. S 127 and not 239 applies.

*** End of Assessment ***