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**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: 202223-336.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**.

6.1If 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 2024**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. 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 2024** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. If you elect to submit by 1 March 2024, you **may not** submit the assessment again by 31 July 2024 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of **9 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 . . .:

1. within 10 weeks of the commencement of the administration.
2. within eight weeks of the commencement of the administration.
3. within four weeks of the commencement of the administration.
4. 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?

1. 40 business days.
2. One year and 20 business days.
3. One year and 40 business days.
4. 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?

1. 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.
2. 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.
3. The purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the said financial difficulties.
4. 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?

1. The administrator.
2. Any secured creditor with the benefit of a qualifying floating charge.
3. The purchaser.
4. The company’s auditor.

**Question 1.5**

Which one of the following **is not** a debtor-in-possession procedure?

1. Administration.
2. Restructuring Plan.
3. Scheme of Arrangement.
4. Company Voluntary Arrangement.

**Question 1.6**

Section 426 of the Insolvency Act 1986 contains provisions for UK courts to provide assistance to overseas courts from certain listed jurisdictions. Which of the following is not a listed jurisdiction under section 426?

1. Malaysia.
2. Australia.
3. India.
4. Hong Kong.

**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?

1. Wrongful trading.
2. Breach of fiduciary duty.
3. Being found guilty of an indictable offence in Great Britain.
4. Being found guilty of an indictable offence overseas.

**Question 1.8**

The filing by a company’s directors of a Notice of Intention to Appoint an administrator produces a short-term moratorium on actions against the company which lasts for how long?

1. Five business days.
2. Twenty business days.
3. Ten days.
4. Three months.

**Question 1.9**

Which of the following statements is **incorrect**?

1. 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.
2. An insolvency officeholder from an EU Member State is automatically recognised by the courts in the UK if appointed before Brexit.
3. 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.
4. 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 if the director has been a director of the company during which period prior to the insolvent liquidation?

1. Six months.
2. Five years.
3. Two years.
4. Twelve months.

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 5 marks]**

Who may bring an action under: (i) section 245 of the Insolvency Act 1986, (ii) section 6 of the Company Directors Disqualification Act 1986, (iii) section 246ZB of the Insolvency Act 1986, and (iv) section 127 of the Insolvency Act 1986?

Section 245 applies to administration and liquidation and establishes a rule under which the floating charge established 2 years (in case of connected persons) or 12 months (in other cases) before the commencement of administration/liquidation is invalid. There is exception to these rules, if the floating charge is executed with the creation of the new consideration to the debtor. The invalidity of such floating charge is automatic, therefore there is no need for the action by the office holder. However, if there is a dispute between the creditor in which favour the floating charge was created and the office holder (administrator or liquidator), office holder may bring an action to determine that a floating charge in invalid, or the creditor the holder of the floating charge.

The company director can be disqualified on demand of the office holder – administrator, liquidator, on demand of creditors and other persons. Basically, anyone can report that director should be disqualified, i.e. that the director is unfit.

Section 246ZB of the Insolvency Act 1986 relates to the wrongful trading of directors of the insolvent debtor. This section relates solely to the administration commenced against the insolvent debtor. It is the administrator who can bring such an action against the former director.

Section 127 of the Insolvency Act relates to the voidance of disposition of property which is made after the commencement of the winding up by the court. The liquidator brings such voidance actions.

**Question 2.2 [maximum 5 marks]**

List any **five (5)** of the debts which do not form part of the payment holiday under Part A1 of the Insolvency Act 1986 when a company is subject to a Moratorium.

Part A1 of the Insolvency Act 1986 regulates the Moratorium of eligible companies in certain circumstances. The Moratorium does not include the following A18 (3):

(a) the monitor’s remuneration or expenses,

(b) goods or services supplied during the moratorium,

(c) rent in respect of a period during the moratorium,

(d) wages or salary arising under a contract of employment,

(e) redundancy payments, or

(f) debts or other liabilities arising under a contract or other instrument involving financial services.

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

**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?

Section 233 of Insolvency act prescribes that the administrator can demand supply of utility goods, such as water, electricity, communications, gas. Section 233B forbids the supplier to terminate or “do any other thing” regarding the contract if the company enters insolvency proceedings.

The supplier can condition of provision of supplies that the administrator personally guarantees the payment for supplies but is not entitled to demand the payment of outstanding charges for the supplies provided before the commencement of administration.

**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. How would this priority change if the company had been subject to a Moratorium under Part A1 of the Insolvency Act 1986 during the 12-week period prior to the commencement of the liquidation?

Priority is provided to the expenses of the liquidation, i.e. the following: expenses of the liquidator in preserving, realising or getting the assets of the company, the cost of security provided by the liquidator, payments to persons which assisted in the preparation of the statement of affairs, disbursements by the liquidator during the winding up, employees which provided services to the company and have been engaged by the liquidator, remuneration of the liquidator, other expenses by the liquidator for exercising its powers during winding up.

Next priorities are given to preferential creditors – ordinary and secondary. First the ordinary preferential creditors are paid before the secondary collect their amounts. The creditors inside these classes receive pro rata amounts if the estate is not sufficient to cover all debts.

Preferential claims are the following (ordinary): employee contribution to occupational pension scheme 4 months prior to commencement of the winding up, employer’s contribution to occupational pension scheme 12 months prior to commencement of liquidation, remuneration to the employees for their wages 4 months prior to commencement of liquidation and up to the maximum of 800 GBP, accrued holiday remuneration or sick leave amounts to employees, coal and steel production, amount owned to Reserve Forces. Secondary preferential claims are deposits under the Financial Services Compensation Scheme, deposits which was made through non-UK branch of a credit institution, deposits which should have been made through a UK branch of the credit institution, income tax deductions, insurance deductions, VAT, construction industry scheme deductions and student loan payments.

Next priority is given to the floating charge holders and after them unsecured creditors. In the final, payments are made to shareholders if there are sufficient assets.

If Moratorium was introduced (Part A1) the priority may be different. Section 174A prescribes that debts which are not paid before Moratorium or Moratorium debts – employees or financial services debts are paid prior to liquidator fees and expenses. Super priority may also be given to director’s claims if it has not been paid prior to Moratorium.

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

Prior to going into compulsory liquidation on 28 February 2024, under pressure from its bank, Ambitus Bank plc, and in order to prevent it from demanding repayment of the company’s loans, Blazer Laser Limited (the Company), granted a debenture in favour of Ambitus Bank plc in June 2023. 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 13 January 2024.

Sometime in January 2023, as the Company continued to suffer cash flow problems, the directors approved the sale of two laser cutting machines to Angela Bannister (a director) for GBP 40,000 in cash. The machines had been bought for GBP 100,000 a year before.

A month before the winding up order was made, Angela Bannister received an email from Aluminium Alumini 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 metal was seen as essential by the Company, the board authorised a payment of GBP 20,000 to cover existing liabilities and agreed to further payments, on a cash on delivery basis, for further supplies which amounted to further payment of GBP 8,000 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 Ambitus 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 Ambitus Bank plc;

The avoidance of the floating charge is regulated by Article 245 of the Insolvency Act. The preconditions are that there was no fresh funding (or no new consideration) by the creditor and therefore the creditor is put into better position by establishing a floating charge.

The time limit for not connected creditors is 12 months before the commencement of compulsory liquidation (28 February 2024). Therefore, establishing the floating charge in June 2023 falls into this period.

Additional preconditions are that the company was unable to pay its debts (as defined in Art. 123 of Insolvency act) or became unable to pay its debts because of that transaction, i.e. provision of debenture with the floating charge. This point can be disputed in the case, as we do not have more data on the facts of the case and therefore, this issue should be carefully considered by the liquidator.

**Question 4.2 [maximum 6 marks]**

The sale of the laser cutting machines; and

This might be the case of the transaction of the undervalue (Art. 238 (4 (b)) of the Insolvency Act). As indicated, machines had a value of 100.000 GBP a year before the transaction with the director was executed. If the appreciation of machines does not indicate otherwise (in my opinion hardly the case as it would mean the machine has lost 60% of the value within a period of 1 year).

Director is a connected person, therefore the time limit for the avoidance of this transaction is 2 years prior to the winding up. Hence, this transaction is avoidable. In addition, when the transaction was performed with the connected person, it is presumed that the company was insolvent, subject to the proof of the contrary.

**Question 4.3 [maximum 4 marks]**

The payments to Aluminium Alumini Ltd.

Article 239 of the Insolvency Act is applicable for this case. Preconditions for the avoidance of the preference is that a) the existing creditor is preferred, which is true in the present case, 2) the creditor is in better position than it would be in insolvency (liquidation), which is here true as this creditor would receive less on the principle of pro rata for unsecured creditors, 3) there was a desire to provide preference to this creditor (this is unlikely to be fulfilled) and 4) relevant time – 6 months prior to commencement of the liquidation, which if here fulfilled, as Aluminium Alumini received monies in the period less of the month prior to liquidation.

The most difficult part here is the desire to provide preference to the creditor. The relevant case is Re MC Bacon Ltd (1990 BCC 78) and the subsequent decisions following this case, if the creditor was preferred not by desire to be put in better position in insolvency proceedings, but for commercial reasons, i.e. to continue to trade, then the transaction cannot be deemed as having the desire to prefer in insolvency. Therefore, with the given facts of the case, my opinion is that this condition most likely would not be fulfilled.

**\* End of Assessment \***