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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 of the Insolvency Act 1986: a floating charge on the company’s undertaking or property created at a relevant time shall be invalid unless certain exceptions apply. The relevant time will be either 1 year, or 2 years, from the date of the onset of insolvency, depending on the circumstances. No one is required to bring the action and the floating charge will be invalid *ipso facto*.

Section 6 of the Company Directors Disqualification Act 1986: an application may be made by the Secretary of State, the official receiver, the liquidator over the company, any past or present member of the company, any past or present creditor of the company.

Section 246ZB of the Insolvency Act 1986: An administrator. In more detail, on the application of the administrator, the court can require certain contributions to be made to the company's assets by persons who were engaged in wrongful trading.

Section 127 of the Insolvency Act 1986: any disposition of the company’s property (including shareholdings in other companies) or alteration in the status of the company’s register of members made after the commencement of the winding up is void, unless the court otherwise orders. No one is required to bring the action.

**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.

The following debts will not form part of the payment holiday when a company is subject to a moratorium:

* the monitor’s remuneration or expenses;
* goods or services supplied during the moratorium;
* rent in respect of a period during the moratorium;
* wages or salary arising under a contract of employment; and
* redundancy payments.

**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?

It depends.

Historically, contracts have been able to provide that as a result of the appointment of liquidators or administrators or some other relevant event of insolvency a contract could then be repudiated, or even deemed void.

However, in recent times, legislation has been introduced to place limits on such provisions, and otherwise mandates continued supply following such an insolvency event.

For example:

* Section 233 provides that an administrator may require that the supply of gas, electricity, water, or communication services be maintained following the appointment of an administrator. However, in order to protect the supplier, the supplier may make it a condition of the giving of the supply that the office-holder personally guarantees the payment of any charges in respect of the supply (which will naturally protect the supplier from the risk of non-payment in the context where resources such as these have low profit margins and as such it would not be equitable to cause them to continue supply in circumstances where they are not getting paid).
* Section 233A: in addition to the above, a supplier of services is generally unable to rely upon an insolvency related or 'triggered' term in a contract of supply which would otherwise entitle the supplier to alter the terms of supply, or compel higher prices for the supply. Again, this term increases the likelihood that the administrator will be able to maintain the undertaking as a going concern following a company going into 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?

The order of priority of payments in a liquidation will be as follows:

* *Fixed charges*. Usually the holders of fixed charges will be paid first. This usually occurs outside of any formal insolvency process from the sale proceeds of assets that were the subject of the charge.
* *Expense of the procedure*. Then, the administrators fees (or other office holder), legal fees, and other expenses of the procedure will be paid.
* *Preferential creditors*. Then, special classes of preferential creditors will be paid. In practice, this usually includes money owed to employees by insolvency employers, and some taxes owed to the Government.
* *Floating charges*. Then, the holders of floating charges will be paid from the assets that the floating charge relate to, commonly all of the assets of the undertaking.
* *Unsecured creditors*. Then, only after the above classes of creditors and security holders have been satisfied will unsecured creditors be paid, and these creditors will be paid on a *pari passu* basis if they cannot be satisfied in full.
* *Members*. Then, only if there is a surplus following payment of the above classes of rights holders will members be paid out in accordance their rights under the company's constitution and articles of association, most likely on a *pari passu* basis. However, if there are any PPMs or shareholders agreements in place, members may also seek declarations from the Court or otherwise cause payments to be made in accordance with those agreements.

This priority structure would change if the company was the subject to a moratorium. First, as a general rule, creditors would not be able to enforce their rights as noted above once a moratorium is in place. However, there are limited exceptions to this, as outlined in detail above in Question 3.1. That is, the creditors mentioned in section 3.1 above would continue to be paid during the course of the 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;

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 Company went into compulsory liquidation on 28 February 2024.

As such, the floating charge was entered into less than one year before the Company went into liquidation.

Pursuant to section 245 (2) and (3)(b) a floating charge on the company’s undertaking or property created within 12 months of the onset of insolvency of the Company shall be invalid unless certain exceptions apply, which do not appear to apply in this case.

As such, it appears that this floating charge shall be *ipso facto* deemed invalid.

**Question 4.2 [maximum 6 marks]**

The sale of the laser cutting machines; and

In the course of January 2023 the directors of the Company approved the sale of two laser cutting machines to Angela Bannister for GBP 40,000 in cash. Angela is also a director of the Company. The machines had been bought for GBP 100,000 a year before.

Pursuant to section 127(1) of the Insolvency Act 1986 any disposition of the company’s property made after the commencement of the winding up is, unless the court otherwise orders, void *ipso facto*.

However, as this disposition was made before the winding up order was made, another statutory basis will need to be found in order to void this transfer.

One potential basis that could be used in order to receive compensation or a contribution to the insolvency estate is section 246ZB of the Insolvency Act 1986.

In order to require a contribution by Angela (or potentially the other directors too), the administrator could apply to Court and seek to show the following:

* the relevant persons were directors of the Company prior to the insolvency in January 2023;
* the Company has now entered insolvent administration;
* Angela and the other director knew in January 2023 (or ought to have concluded) that there was no reasonable prospect that the Company would avoid entering insolvent administration, or going into insolvent liquidation; and
* the directors did not take every step with a view to minimising the potential loss to the company's creditors in January 2023.

For the purposes of the above, the facts which a director of a company ought to know or ascertain, the conclusions which the director ought to reach and the steps which the director ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both—

* the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company; and
* the general knowledge, skill and experience that that director has.

Considering the above in the round, if the administrator can show that the directors thought that there was no reasonable prospect that the Company would avoid entering insolvent administration and sold the laser cutting machines at a discount in any event then they would be required to make a contribution for that value.

**Question 4.3 [maximum 4 marks]**

The payments to Aluminium Alumini Ltd.

One month before the winding up order was made Aluminium Alumini Ltd demanded:

* immediate payment of all sums owing to it (GBP 20,000); and
* informed the Company that further supplies would only be made on a cash on delivery basis (GBP 8,000).

Under section 233B(7) of the Insolvency Act 1986 a supplier shall not make it a condition of any supply of goods and services after the time when the company becomes subject to the relevant insolvency procedure, or do anything which has the effect of making it a condition of such a supply, that any outstanding charges in respect of a supply made to the company before that time are paid.

Furthermore, the directors of the Company appear to have consented to the altered arrangements, and thus there appears to be little that the Company can do to reverse these payments.

**\* End of Assessment \***