



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.**
- 6.1 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 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 . . . :

- (a) within 10 weeks of the commencement of the administration.
- (b) within eight weeks of the commencement of the administration.**
- (c) within four 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.
- (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

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?

- (a) Malaysia.
- (b) Australia.
- (c) India.
- (d) 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?

- (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 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?

- (a) Five business days.
- (b) Twenty business days.
- (c) Ten days.
- (d) Three months.

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 if the director has been a director of the company during which period prior to the insolvent liquidation?

- (a) Six months.
- (b) Five years.
- (c) Two years.
- (d) 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?

The following persons may bring action under the described sections of the relevant laws:

- (i) Under Section 245 of the Insolvency Act 1986, an action may be brought by the **administrator, or a liquidator** of a company undergoing insolvency proceedings in relation to the avoidance of certain floating charges. Such actions are aimed at challenging any dealings in assets of the company at an undervalue within the relevant time.
- (ii) Section 6 of the Company Directors Disqualification Act 1986 deals with the duty of court to disqualify unfit directors upon the application of the **Secretary of State for Business, Energy and Industrial Strategy or the Official Receiver** acting upon the instructions of the Secretary of State if the company has been wound up by court.
- (iii) Since Section 246ZB of the Insolvency Act 1986 deals with wrongful trading in administration, action against directors of the company may be brought by the **administrator**. Additionally, the provisions of Section 246ZB (2) (b).¹ imply that the provisions may apply to liquidations thus a **liquidator** may bring action under this section.
- (iv) Section 127 of the Insolvency Act 1986 deals with avoidance of property dispositions in company winding up thus a **liquidator** may bring action against the directors to avoid the dispositions made during the period between the filing of a winding up petition and the winding up order.

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.

Section A18 of the Act.² provides for the exceptions to pre-moratorium debts for which a company has a payment holiday during a moratorium. This includes amounts payable in respect of—

- (i) the monitor's remuneration or expenses.
- (ii) goods or services supplied during the moratorium.
- (iii) rent in respect of a period during the moratorium.
- (iv) wages or salary arising under a contract of employment.
- (v) redundancy payments, or

¹ This subsection applies in relation to a person if— (b) at some time before the company entered administration, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid entering insolvent administration or going into insolvent **liquidation** (*emphasis mine*).

² <https://www.legislation.gov.uk/ukpga/2020/12/section/1#section-1-1> accessed on 27 February 2024

(vi) 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?

Yes, an administrator who wishes to continue the business of a company as a going concern can require suppliers of goods and services to continue supply during the administration subject to certain conditions being met. This is provided for under the Insolvency Act 1986 as amended by the Enterprise Act 2002 and the Corporate Insolvency and Governance Act 2020.

An administrator's appointment does not automatically terminate executory contracts and ipso facto clauses have been rendered void based on the provisions of Section 233A which prohibits suppliers from relying on insolvency related terms to terminate the contracts for supply or require a higher pay for continued supply and Section 233B which expressly prohibits termination of supply contracts once a company enters formal insolvency proceedings. The administrator should then rely on these provisions to require continued supply of goods.

The Act provides for certain essential supplies as stipulated in section 233 which include gas, electricity, water, and communication services. While the Act provides that such suppliers may not demand the payment of outstanding debts to continue supply, the Act allows the suppliers to require a personal guarantee from the administrator with respect to the new supply. Such payments are made as an expense of the administration thus rank before all other debts without affecting the ranking of the pre-administration debts owed to the suppliers.

However, a supplier may terminate the contract if the administrator consents to the same or consent of court is obtained. A supplier seeking what is normally referred to as a hardship exemption from court must satisfy the court that the continued supply is likely to cause the supplier undue hardship in their business.

Comparatively, the Insolvency Act of Kenya, 2015, which largely borrows from the UK Act, provides under Section 689 for the continued supply of essential services for companies in administration like the services in the UK. From practice, such utility service providers, particularly government owned agencies like the power supplier have continued to blatantly disregard the law and discontinue power supply unless payment of all prior debts is made, which forces administrator to make out such payments as essential payments.

There are exceptions of suppliers under the Act which the administrator may not require the suppliers to continue. This includes insurance services, banking services, electronic money services, recognised investment exchanges and clearing houses and securitisation companies.

In conclusion, the Insolvency Act 1986 empowers the administrator to require continued supply to be able to maintain the business as a going concern provided that an undertaking

to pay for supplies for the period of the administration is given by the administrator, with certain services in the financial services sector being exempt.

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?

In a liquidation, once a creditor has proven their debt by delivering a proof of debt to the liquidator, subject to availability of funds from the realisation of the company assets, payments are to be made by order of priority as discussed below.

The first payment is towards the expenses of winding up which include the liquidator's remuneration. This is provided for under Section 115 of the Act and rules 6.42 and 7.108 of the Rules. The expenses include, in order of priority:

- (i) Cost of preservation, realisation and getting in of the assets of the company and legal fees.
- (ii) Cost of security provided by the liquidator.
- (iii) Amounts payable towards the preparation of a statement of affairs.
- (iv) Necessary disbursements during liquidation including committee expenses.
- (v) Remuneration of any person employed by liquidator to offer services to the company.
- (vi) Remuneration of the liquidator.
- (vii) Corporation tax chargeable on gains accruing on realisation of the assets of the company.
- (viii) Any other expense properly chargeable by the liquidator in carrying out their functions.

Second in priority are the preferential creditors which comprises of limited claims of employees and some taxation liabilities which rank equally and abate in equal proportion if the company assets are insufficient to settle all of them. The preferential debts under Schedule 6 of the Act include but are not limited to:

- (i) Remuneration owed to an employee for four months prior to liquidation up to GBP 800.
- (ii) Claims for monies advanced to pay wages or remuneration during liquidation.
- (iii) Amounts owed by way of accrued holiday remuneration for any period of employment before liquidation.
- (iv) Amounts owed on account of an employee's contribution to an occupational pension scheme, deducted from earnings but not remitted for the period of four months prior to liquidation.
- (v) Amounts owed by the company on account of an employer's contribution to an occupational pension scheme in a period of 12 months prior to the relevant date.
- (vi) PAYE income tax deductions, national insurance deductions, VAT Payments, Construction Industry Scheme deductions and student loan repayments.

Third in priority is the floating charge holder. Where more than one floating charge exists then priority amongst them will be determined by the order in which the floating charges were created i.e., the charge that was created first will have priority. Payment of floating charge creditors should be considered alongside the provisions of section 176A which provides for a prescribed part to be set aside for unsecured creditors. The prescribed part

which is 50% of the company's net property applies where the net property of the company exceeds GBP 10,000. Where the net property does not exceed the figure, it is still 50% of the available net property. However, the duty to make a distribution of the prescribed part does not apply where the liquidator is satisfied that making a distribution to unsecured creditors would be disproportionate to the benefits.

Fourth in priority are unsecured creditors, who often in Kenya like in many jurisdictions received no dividend as realisations in liquidations are rarely enough to satisfy the first three priority classes of creditors.

Finally, where sufficient funds are available to pay creditors and interest on their debts, surplus is distributed amongst shareholders as per the constitution of the company.

Concerning the nature of rights enjoyed by each class of creditor or expense, Sections 175(2)(b) and 176A provide for certain rights. Secured creditors have security interest rights and will often have the right to be paid from the proceeds of the sale of their security subject to the waterfall. Secured creditors with floating charges benefit from proceeds from floating charge assets, after payment of the liquidation expenses and preferential creditors.

If the company is subject to a moratorium under part A1 during the 12 weeks prior to commencement of the liquidation, the priority of claims changes as certain debts gains super priority above the first priority debts i.e., expenses of winding up. This safeguard under Section 174A of the Act protects certain unpaid pre-moratorium and moratorium debts which are not part of the payment holiday to ensure they are paid first in a liquidation. Such debts include debts owed to employees or financial services debts. An exception however exists that excludes accelerated debts from gaining super priority. Accelerated debts are pre-moratorium financial services debt which fell due by reason of early termination provision in the financial services contract.

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 Alumi 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 relevant issues in relation to the floating charge in favour of Ambitus Bank plc, created 6 six months before the winding up petition, over the whole of the Company's undertaking would be to consider whether the creation of the floating charge is caught under Section 245 of the Act or a preference under Section 239 of the Act. Whichever case it may be, the liquidator may take action to invalidate the same under the relevant transaction avoidance provisions of the Act as discussed below.

Section 245 of the Act prevents pre-existing unsecured creditors from obtaining security of a floating charge shortly before a company enters a formal insolvency procedure such as a liquidation. The presumption that Ambitus Bank plc was a pre-existing unsecured creditor emanates from the fact that the creation of the floating charge was to prevent it from demanding repayment of the company's loans. For a floating charge to be invalidated under this section, the liquidator must prove the following:

- (i) That the floating charge was given at the relevant time, which is in 12 months prior to the onset of insolvency where the floating charge is in favour of a person not connected to the company such as an unsecured creditor i.e., Ambitus Bank plc. The onset of insolvency in the case of Blazer Laser, is the date of the creditors winding up petition i.e., 13 January 2024. The floating charge created in June 2023 is thus caught within the relevant time.
- (ii) That at the time of creation of the floating charge the company was unable to pay its debts as defined under Section 123. It is evident that Blazer Laser continued to suffer cash flow problems as early as January 2023 which would have eventually rendered it cashflow insolvent.
- (iii) That the company has subsequently entered liquidation, which is the case following the winding up order.

The exception to the above is where new consideration is issued. In the present case, however, there is no new consideration that Ambitus Bank plc issued to the Blazer Laser thus the floating charge is caught by section 245 and the Liquidator may bring action to invalidate the floating charge since the company is already in liquidation.

The invalidation of the floating charge does not invalidate the underlying debt. It however enables the liquidator to bring the assets of the company under his control and to be able to realise the assets for the benefit of all creditors as per the order of priority of payments under the Act.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

The sale of the laser cutting machines is caught under Section 238 which addresses transactions at an undervalue. The liquidator is enabled by the Act to bring action to attack

such transactions as a mechanism to ensure that all unsecured creditors are treated fairly and equally. For such action to succeed, the liquidator must prove the following:

- (i) The transaction was entered into at a relevant time i.e., the period of two years prior to commencement of liquidation. The sale of the two laser machines was approved and made in January 2023, one year before the winding up petition thus falls within the relevant time.
- (ii) The consideration for the transaction was at the date of the transaction significantly less than the value of the consideration provided by the company for the asset. The laser cutting machines were sold for GBP 40,000 while the same had been bought for GBP 100,000 a year before. The sale at 60% loss within a period of one year is evidently significantly less than what the company had paid for the machines. Even with consideration being made for depreciation and change in the macroeconomics, the difference would still be significantly less.
- (iii) That at the time of transaction the company was unable to pay its debts as defined under Section 123 or became unable to pay its debts as a result of the transaction. The transaction with a connected person creates a rebuttable presumption that the company was insolvent or became insolvent because of the transaction. The liquidator may then only be required to adduce evidence to prove that Angela was a director of the Blazer Laser.

While it is evident and important to note that the transaction was with a connected person, this is not a prerequisite of liability under the Act.

The protection under Section 238 is aimed at restoring the position of the company to what it would have been if the transaction had not been entered.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

While the Liquidator may bring action to void the payments made to Aluminium Alumini Limited (Alumini) under the provisions of Sections 127 and 239 of the Act. However, the evidentiary burden and exceptions to the application of the provisions may reduce the chances of success the liquidator's case as discussed below.

The payment to Alumini could be caught under Section 127 which allows the liquidator to retrieve assets disposed of during the period between the application for winding up and the issuance of the winding up order since the payment was made just a month before the winding up order. Section 127 includes both disposal of assets and payments of money as is the case with the payment made to Alumini. However, when placing reliance on this position, the liquidator should prepare for a scenario where Alumini seeks a validation order on grounds that the payment made to them was to enable the company to keep trading and for the wider benefit of the general body of unsecured creditors. If Alumini can satisfy the court that the payment was to allow the company to continue to trade, it may be validated.

Another provision that the liquidator may rely on to bring action under section 239 of the Act which prevents the company from placing one of its creditors in a better position shortly before entering insolvency proceedings. Alumini demanded payment of all sums owing to it and the company made payment of GBP 20,000 to cover existing liabilities, just a month before the winding up order was made. This in essence availed company assets in the form of cash to an unsecured creditor, giving them priority. Under Section 239, the liquidator must satisfy the court that:

- (i) That the person alleged to have been preferred was a creditor of the company at the time of the transaction. Alumini was owed monies by the company as evidenced by its demand for payment and subsequent payments made.
- (ii) That something was done which had the effect of putting that person in a better position in the event of the company going into insolvent liquidation. The payment made to Alumini as an unsecured creditor had the effect of settling its debt in full thus putting it in a better position in the liquidation as its exposure is wiped out.
- (iii) The company was influenced by the desire to prefer. The pressure by Alumini in demanding payment in full, requiring the company to do something may be considered relevant in determining requisite desire. Since the desire to prefer is presumed unless the contrary is shown, Alumini may oppose the liquidator's application to challenge this ground.
- (iv) The preference was given to at a relevant time. The fact that the preference was given just one month before the winding up order qualifies for the preference to have been given at the relevant time as the relevant time is 6 months prior to the onset of insolvency if in favour of a person not connected to the company.
- (v) That at the time the preference was given the company was unable to pay its debts. The insolvency status of Blazer Laser is not in dispute.

*** End of Assessment ***