



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?

Answer: (i) The operation of section 245 is automatic, i.e. a liquidator or administrator need not make an application under the section to invalidate the taking of a floating charge by unsecured creditors during the relevant time.¹ A floating charge can be avoided if 3 conditions are satisfied - (a) The floating charge was given to a connected person 2 years prior to the onset of insolvency; (b) if they are not a connected person but at the time of giving the charge the company was unable to pay its debt, the relevant time is 12 months; (c) if no new consideration has been provided.

(ii) Section 6 of CDDA deals with the duty of the court to disqualify unfit directors of insolvent companies. Section 7 of the CDDA discusses the reporting provisions wherein clause 1 states that the application is to be made by the Secretary of State if they believe that an ordeal so expedient in the public interest is necessary. It can also be made by the Official Receiver if so directed by the Secretary of State.

(iii) Under Section 246ZB, the administrator can bring an action against a person who has been a director of a company undergoing administration or knew prior to the start of administration that the company would go into administration for wrongful trading.

(iv) Under section 127 of the Insolvency Act, 1986, the liquidator has the power to bring an action to retrieve or recover any assets of the company that may have been disposed of between the time period of making the petition and the winding up order. The main purpose is to make all of the debtors' property available to the creditors (anti-deprivation rule).

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.

Answer: CIGA 2020, under Part A1, introduces a new concept of a standing moratorium, within which it introduces a payment holiday for certain pre-moratorium debts. The logic behind it is to prevent the debtor from paying off most of its pre-moratorium debts. Pre-moratorium debts, as the name suggests, are liabilities imposed prior to the imposition of the moratorium. A monitor (insolvency practitioner) is appointed to supervise it.

Section A18 (3) enlists the debts that do not form part of the payment holiday -

- (a) Monitor's remuneration and expenses.
- (b) Goods and services supplied during the moratorium.
- (c) Rent in respect of a period during the moratorium.
- (d) Wages and salary arising under a contract of employment.
- (e) Redundancy Payment (sum of money given to an employee when the job is made redundant; also called Severance Payment.)
- (f) Debts & other liabilities arising under contracts or other instruments involving financial services.

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

¹ Parry, Rebecca, 'Avoidance of Floating Charges (Insolvency Act 1986, Section 245: Corporate Insolvency Only)', in Hamish Anderson, and William Trower (eds), *Transaction Avoidance in Insolvencies* (New York, 2018; online edn, Oxford Academic), <https://doi.org/10.1093/oso/9780198793403.003.0021>, accessed 28 Feb. 2024.

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?

Answer: The answer to the question is yes. The relevant provisions that deal with this are Sections 233, 233A & 233B, Insolvency Act, 1986.

Section 233 applies to the supply of essential goods and services to the company in administration, as it is vital to maintain this supply to continue operations. These services include the supply of gas, electricity, water, and communication services (including goods and services like supply of sale terminals, computer hardware and software, technical assistance, data storage, etc.). The supplier is prohibited from demanding any payment for the outstanding debt as a condition for supply once the company is in administration. However, they are permitted to ask the administrator to provide a personal guarantee for payment for the new supplies.

Section 233A prohibits the termination of any contract by utility, communication, and IT supplies on the basis of an *insolvency-related term* in their contract. This allows companies in administration to trade through and be rescued - whether in administration or CVA. However, suppliers are allowed to terminate the contract under sub-section 4 where the office holder consents to the termination of the contract, or the court allows it on the grounds of hardship or where the administrator has failed to provide a personal guarantee within 14 days of the request by supplier, or any charges in respect of the supply that are incurred after the company entered administration or the voluntary arrangement took effect are not paid within the period of 28 days beginning with the day on which payment is due.

Further, section 233B opens up to all other supplies in addition to the essential services. The section prohibits any clauses which allow the supplier of any good and services to terminate or *do any other thing* in reference to a contract once the company enters a formal insolvency procedure. This section just doesn't apply to prevent suppliers from terminating a contract on the insolvency of a company but also prevents them from imposing any condition that mandates the payment of previous arrears before the new supply is provided. They are also not allowed to charge more money than under the contract for the new supply.

These three sections apply in administration and under CVA, but section 233B also applies where the company is in a moratorium or restructuring plan, or liquidation.

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?

Answer: The order of priority of payments in a liquidation is as follows:

- i. **Fees & expenses related to costs of winding up** - This includes expenses for winding up, expenses incurred for preserving and realizing assets of the company, costs of security provided, costs incurred in carrying the business, remuneration of any person employed by liquidator, etc.
- ii. **Liquidator's own remuneration.**

- iii. **Secured creditors with fixed charge (after costs of realization)** - Essentially, creditors that hold a fixed charge over assets. They are paid in full due to the nature of security.
- iv. **Preferential creditors** - any creditor identified as a preferential creditor under the definition of sections 386 & 387 and schedule 6 - this largely includes limited claims of employees, tax liabilities, employers' pension schemes, amounts owed by the company by way of accrued holiday remuneration, production of coal and steel, the amount owed in respect of eligible deposit which does not exceed compensation payable under Financial Services Compensation Scheme, etc. *Ordinary preferential debts* are paid before *secondary preferential debt*. Secondary preferential debts are amounts owed in respect of eligible deposit which exceeds compensation payable under the Financial Services Compensation Scheme or in respect of any deposit made to the non-UK branch of credit institution or PAYE income tax deductions.
- v. **Floating charge Holders and the prescribed part** - the next in line is a floating charge holder. If there is more than one floating charge holder. Priority will be attributed to the charge that was created first. The 'prescribed part' refers to an amount set aside from the sale of floating charge assets net of costs of the liquidation and applies to charges taken out after 15th September 2003. This sum is used to provide unsecured creditors with a greater chance of recovering some of their debt. Fifty per cent of the first £10,000 realised from the sale of floating charge assets is set aside in this way, and then 20% of any further realisations up to £600,000.²
- vi. **Unsecured Creditors (Pari passu distribution)** - creditors with no security - trade creditors, suppliers, customers, contractors, etc.
- vii. **Shareholders** - If there is any money left after distributing funds amongst the former creditors, it will be distributed to the shareholders.

Yes, the order of priority will change. Section 174A provides that certain unsecured debts are allocated a super-priority status - unpaid moratorium debts and priority pre-moratorium debts. These debts are paid before payments of liquidator's fees & expenses. These debts may include -

- (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, or
- (iv) wages or salary arising under a contract of employment, so far as relating to a period of employment before or during the moratorium. (Section 174A(3))

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.

² <https://www.begbies-traynorgroup.com/articles/insolvency/who-gets-paid-first-when-a-company-goes-into-liquidation>

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;

Answer: **Section 245 of the Insolvency Act, 1986** - Under this section of the Act, a floating charge, which is not given for a new value prior to insolvency, can be set aside. According to Goode, 'the purpose of this provision...was to prevent the conferment of an unfair advantage on an existing creditor at a time when liquidation was imminent. But they have always been confined to floating charges, no doubt reflecting a view that the all-embracing nature of the floating charge had such a potentially deleterious effect on other creditors that it should be subject to a special rule.'³

Gullifer & Payne point out that the argument advanced in favour of this provision is that 'a lender that takes charge when the borrower is in financial difficulties improves its position significantly vis-à-vis all other creditors. This improvement in position can only be justified if, and to the extent that, the lender provides the borrower with the new value.'⁴

When the person in whose favour the floating charge is created is not connected to with company, the relevant time is 12 months prior to onset of insolvency. If the person is connected, the relevant time is 2 years prior to insolvency. The facts of this case fall within the relevant period and thus the liquidator may set it aside.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

Answer: **Section 238 of Insolvency Act 1986** - a liquidator may investigate any transfer of property/assets of the company made within 2 years prior to the start of insolvency. The liquidator must prove that the company or its officers entered into a transaction for a consideration of money or money's worth where the consideration received was significantly less. This is called a transaction at an undervalue. This is for the liquidator to prove that

³ Kristin Van Zwieten (ed), *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2019) 693

⁴ Louise Gullifer & Jennifer Payne, *Corporate Finance Law, Principles and Policy* (2nd edn, Hart Publishing 2015) 287;

the transaction was done at an undervalue. If the court is satisfied that the action was in good faith, the court will not make an order to this effect.

In the present case, the facts established that there was a cash flow issue. Thus, in January 2023, the two directors of the company sold 2 laser machines to another director for 40000 GBP while the original price was 100,000 GBP. The general rule underlying this provision is the presumption of insolvency in case where such transaction is made are with a connected person.

The relevant time for this is 2 years prior to start of insolvency.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

Answer: The decision to make payments to a key supplier in the month leading up to the winding-up order raises issues that the transaction was actually a preference allotted to an unsecured creditor.

The payments made to Aluminium Alumini Ltd to cover existing liabilities and for further supplies may be considered as preferences under Section 239 of the Insolvency Act 1986.

Section 239 of the Act is an exercise in anti-deprivation rule and pari passu principle. They seek to prevent a situation where one creditor is put in a better position than the others. It must be proved that the person, to whom the preference is given is a creditor of the company, and that such preference puts him in a better position. Although pressure from a creditor is not relevant to the decision of attributing a preference, it only matters when there is a requisite desire. Since this happened 2 months ago, at the brink of winding up order, the transaction is preferential in nature.

*** End of Assessment ***