



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?

[Type answer here]

Question 2.2 [maximum 5 marks] DONE

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.

As indicated in the module notes, the stay on enforcement of debts prior to the Moratorium, the exceptions being amounts payable related to:

- 1) The remuneration and/ or expenses of the monitor
- 2) Services and/ or goods that are provided during the moratorium
- 3) Rent that relates to the Moratorium period
- 4) Salary and/ or wages related to employment contracts
- 5) Payments related to redundancies
- 6) Debts and/ or any other liabilities from a contract or other type of instrument related to “financial services”, which includes a contract for financial leasing, lending or the provision or guarantees. (Idem p 38 module notes)

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?

Let me firstly state that the module notes **do not** seem clear to me in the case where there is no existing contract in place for the supply, or a contract was to expire according to a termination date (that is not a “insolvency related term”).

On this issue, the module notes state:

“Insolvency clauses” have increasingly become void. S. 233 of the Act applies to suppliers of essential services/ supplies, such as electricity, water, gas and communication services which includes items such as computer software and hardware, information, point of sale terminals, advice and technical assistance, website hosting and data processing and storage. These suppliers cannot make the continued supply subject to outstanding debts being paid, though they can require the administrator to personally guarantee the new charges. S. 233A provides that such suppliers cannot rely on insolvency clauses to terminate or change terms including higher rates. (Idem p. 20 module notes)

The 2020 Act expands protections with S 233B prohibiting clauses that allow any supplier of services or goods to terminate or make any change, including requiring payment of pre-insolvency debts or increasing prices, for companies that enter formal insolvency procedures, and cannot require a guarantee like S. 233. Termination can be permitted on application to the court granting such, say due to undue hardship to the supplier. So S 233B similarly prohibits termination by providers of communications, utilities or IT, and expands the restriction to terminate on any other suppliers, with limited exceptions including banks and electronic money institutions, recognized clearing houses and money exchanges, insurers, securitisation companies, and including foreign companies. (Idem p 21 module notes)

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, per S 115 of the Act & Rules 6.42/7.108, certain expenses have priority over preferred creditors, floating charge holders and unsecured creditors. The main expenses given this priority to be paid are payable in the following order:

- a) Expenses properly incurred by the liquidator related to the company's assets, including related legal proceedings
- b) Expense of security the liquidator may provide
- c) Expenses to anyone assisting to prepare accounts or statement of affairs
- d) Payments by the Liquidator during the winding up, including liquidation committee
- e) Amounts payable to any person the liquidator employs to perform services to the company
- f) Liquidator's remuneration (subject to same rules as administrators, including fee estimates for time and cost based fees)
- g) Corporation tax on "chargeable gains" related to realising the companies assets (presumably post liquidation)
- h) All other expenses "properly chargeable by the liquidator" to carry out their functions of the winding up (Idem pages 51 & 52 of module notes)

After payment of the liquidation expenses, preferential are then paid before floating charge holders or unsecured creditors. These are noted to be largely some tax liabilities and some limited employee claims. It is noted the Employment Rights Act 1996 provides greater protection to employees, the details of which are not explained in the module notes. (Idem p 52 Module notes).

There are a ordinary and secondary class of preferred creditors, ordinary being paid first, and which rank equally among themselves in their respective classes. The preferred rank as follows per Sch 6 of the Act:

- 1) Employee's contributions to pension schemes, having been deducted from earnings, in the prior 4 months
- 2) Employer's contributions to pension schemes in the prior 12 months
- 3) Unpaid remuneration to existing and former employees 4 months prior, maximum GBP 800
- 4) Unpaid employee's holiday pay for any time prior
- 5) Claims for paid wages or holiday pay, generally for lenders
- 6) Certain taxes on production of steel and coal (rare)
- 7) Claims having been ordered paid per the Reserve Forces Act 1985 (rare)

More recently the following have been added, being payments of certain deposits by financial institutions:

- 8) Any additional payment made that would have been made for an eligible deposit under the Financial Services Compensation Scheme.
- 9) Any amount that exceeds the entitlement under #8 above
- 10) Amounts owed for deposits to eligible persons
 - Made via a non-UK branch "bank", properly authorized by UK authority
 - Eligible deposits that would have been made by a UK branch of the "bank"
 - certain taxation amounts owed to the Crown

11) National Insurance deductions, PAYE income tax deductions, payments for VAT, Student loan and construction industry scheme deductions.
Items 9-11 above are “secondary” preferred creditors. (idem pages 53 & 54, module notes)

Next are floating charge holders, usually in the order created first, subject to any excess of amounts owed to unsecured creditors, at 50% if the “net property” is less than GBP 10K (unless not cost effective to administer, or if above 10K, 50% of 10K and 20% of the excess to a max of 800K for the unsecured creditors, subject to any secured creditors including floating charge holders not being able to share in this calculated about for unsecured creditors. (IBID)

Finally, creditors with no security are paid last, with any excess going to shareholders. The above is subject to subordination agreements. (IBID)

The module notes note, while peculiar, if the company is attempting rescue with a moratorium under Part A1, if it enters liquidation within 12 weeks after the moratorium ended, the priorities may change. Per S 174A, certain Moratorium or pre-Moratorium debts (which were not part of the payment holiday), including debts to employees or financial services organization, are to be paid in the liquidation must be paid before the liquidators fees/ expenses, providing these particular unsecured debts a “super-priority”. Examples are directors fees prior the moratorium, and pre-moratorium bank debt, whether secured or not, except when the debt is accelerated due to termination under the contract. (IDEM p 39 module notes)

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;

As it appears the floating charge was given in order to enable the company to continue in business (unless it was trading while insolvent which creates potential director's liabilities), the security would not seem to be recoverable as a fraudulent preference, as the purpose of the security was not to prefer one creditor (the bank) over another, but to continue in business for the benefit of the company and all interested parties including all creditors.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

The main issue seems to be whether the sale was at an undervalue, which may require a qualified valuation of the assets, including considering the urgency in which the proceeds were required (as values are generally lower if it's a "fire-sale" situation). It would also be necessary to consider the urgency and importance of receiving the proceeds of sale. Since a defense is that the transaction was in the best interest of the company, it would also be considered how important the sold machinery was to the operation of the business. If they were critical, this would negate an argument it was in the best interest of the company and other stakeholders.

Being a related party, the onus appears to be on the Director to prove the sale price was not at an under value.

If it is determined that the sale was at an undervalue given the circumstances (need and urgency to get funds to continue operating), the liquidator would have a basis to recover the sale proceeds or "unwind" the transaction.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumi Ltd.

Given the facts presented, that they were a key supplier, so presumably critical to the continued operation of the business (which implies there were no alternative suppliers that could have benefited the company more), then the payment of arrears, and ongoing payments COD to continue supply so the company could continue operations, on the face it, it does not appear this was a fraudulent preference and so it seems the liquidator is unlikely to be able to recover any payments made to the supplier.

However, an issue/ exception is that if this was considered an "Executory contract", the supplier may not have been able to terminate the contract, or otherwise demand payment of pre-liquidation debts, and so may have had to continue supply (per S 233/A & or B of the Act), in which case the payment of pre-liquidation debts were not appropriate, and the Liquidator may be able to recover payment of at least the pre-liquidation payments from the

supplier, and possibly other amounts paid because the supplier altered the terms of the contract. (IDEM p 20/21 module notes)

*** End of Assessment ***