



**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?

- i) An avoidable floating charge under section 245 of the Insolvency Act 1986 is void without the office holder having to challenge the validity by bringing legal proceedings. However, should a dispute arise between the holder of charge and the office holder, legal proceedings may be necessary to determine such a dispute. In which instance, the office holder, being either the administrator or the liquidator, may represent the company.
- ii) Section 16(4) of the Company Directors Disqualification Act 1986 lists the various parties that may bring an application under section 6. These include, the Secretary of State, the official receiver, the Competition and Markets Authority, the liquidator, or any authority listed under section 9E.
- iii) The administrator of the company may bring an action under section 246ZB of the Insolvency Act 1984 for wrongful trading if certain criteria set out in the aforementioned section are met. However, the administrator being a “office holder” may in accordance with section 246ZB assign the right of action to a third party who may in turn sue the directors (and others).
- iv) The liquidator may institute action to recover assets disposed by the company subsequent to the deemed date of liquidation (i.e. after the winding-up petition was presented to court) to the date upon which the liquidator has taken control of the assets.

### 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.

According to A18 of Part A1 of the Insolvency Act 1986, the following pre- and post-Moratorium debts are excluded from the payment holiday;

- a) The monitor’s remuneration and expenses,
- b) Goods and services supplied during the moratorium,
- c) Rent in respect of the period during the moratorium,
- d) Wages or salary arising under a contract of employment,
- e) 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?

During administration proceedings, the administrator may in accordance with Section 233 of the Insolvency Act 1986 request a supplier of essential goods and services to continue to supply such goods or services, whilst the supplier of such goods and services is prohibited from ceasing supply. The supplier may also not demand payment of arrear charges to be settled in order to secure continued supply.

The administrator should carefully consider what is deemed as a supplier of essential goods or services for the purposes of application of this section. Sections 233(3) and 223(3A) broadens the initial scope of application of Section 223 and elaborates on which supplies

and goods are deemed to be essential suppliers. These include the provision of basic utilities, but also information technology related services without which a modern business cannot function.

However, these provisions relating to the supply of essential goods and services are not absolute as the act does make provision for their protection as well. In that; (i) the supplier may demand that the administrator personally guarantees payment of charges in respect of continuation of supply, and failure to provide such guarantees will entitle the supplier to terminate supply; (ii) if the supplier is able to prove to court that continuation of supply causes the supplier undue hardship, the supplier may successfully apply to court for permission to terminate supply; (iii) the supplier may terminate supply if the suppliers' post-administration account remains unpaid for a period of 28 days after payment is due.

### 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 essence, the order of priority that creditors are allocated in liquidation process is as follows:

1. Creditors with a fixed security or charge:  
By virtue of the nature of their security assigned over a specific tangible asset or retention of title in an asset these creditors would typically enforce their security outside liquidation process as the asset does not of the communal pot that other creditors may share in. Examples of this class include mortgage holders, rental deposits, invoice factoring, cession of book debts etc. In the event that the creditor of this class is settled in full, with interest, by the realization of the assets over which they hold security, the surplus would be transferred to the free residue available for the unsecured creditors.

The realization proceeds of assets that is not encumbered as set out above, would be distributed to creditors in the following order:

2. Administration costs: Section 115 and rules thereto list specific costs which should be paid in an order of priority prior to distribution to the creditors. These relate to *inter alia* reasonably incurred expenses of winding up, such as costs of preservation, security, disbursements, the liquidators' remuneration and capital gains tax
3. Preferential creditors: Certain creditors enjoy a preference afforded by Sections 386, 387 and Schedule 6 of the Insolvency Act 1986. Preference is then further allocated to ordinary preferential creditors and secondary preferential creditors under Schedule 6 of the Insolvency Act 1986.
4. Floating charge holders: Holders of a floating charge over the present and future undertaking of the company, which becomes crystalized upon winding up are further categorized as first or second floating charge holders depending which charge was created first. It should be noted that a so-called "top slice" of the realization proceeds is deducted to the benefit of the next class of creditor.

5. Unsecured creditors: These are usually the ordinary trade creditors and paid from the remainder of the proceeds, if any.
6. Shareholders: In the event that there are sufficient realization proceeds to settle all the creditors' debts with interested thereon, the surplus will be distributed to the shareholders *pro rata* in accordance with their shareholding.

If the company was in a Part A1 Moratorium within a 12-week period prior to liquidation, Section 174A provides for certain pre-moratorium and moratorium (secured and unsecured) creditors, such as employees, liabilities under adopted contracts and post-commencement financing, to enjoy a form of "super priority" over the preferential creditors in that their debts are considered within the class of administration costs referred to above.

#### **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 floating charge granted in favour of Ambitus Bank should be scrutinized in light of the provisions of Section 245 of the Insolvency Act 1986, which sets out the framework for avoidance of certain floating charges. A floating charge granted to a creditor over the undertaking of a company is automatically void without the need for the liquidator to apply to court if; (i) the charge was created in favour of an unconnected party within 12 months



prior to the onset of insolvency, or; (ii) if it was created in favour of a connected party within 2 years prior to the onset of insolvency, and at the time when the charge was created the company was unable to pay its debts or becomes unable to pay its debts due to the creation of the charge.

However, the floating charge may be validated in terms of Section 245(2) to the extent that “new money” or other fresh consideration is provided to the company in return for the creation of the floating charge. This may include additional funding, goods and services rendered or extinguishing of existing debt and not merely to secure preferential treatment of a pre-existing debt.

Considering that Ambitus Bank is not a connected person, and the floating charge was created within the 12 months prior to onset of insolvency, the charge might void if the liquidator can determine whether the company was unable to pay its debts at the time of creation of the charge. *In casu*, one can reasonably assume that the bank was demanding payment due to the company already being in arrears on its monthly instalments and therefore unable to pay its debts as it became due and payable. In which case the floating charge might be void as the sole objective of the creation of the floating charge merely to prevent Ambitus Bank from demanding payment of a debt that was already in existence and the creation of the charge did not reduce or discharge the debt to some extent.

However, the liquidator should be mindful of that if the bank extended further credit facility in return for the floating charge, by way of overdraft as example, the floating charge may be validated by following the reasoning in the decision of *Re Yeovil Glove Ltd 1965*.

#### **Question 4.2 [maximum 6 marks]**

The sale of the laser cutting machines; and

The sale of the assets to the director of Blaser Laser for 40,000.00 GBP which were bought for 100,000.00 GBP a year prior may be attacked as an undervalue transaction in terms of Section 238 of the Insolvency Act 1986.

Essentially, Section 238 provides for a mechanism to set aside a transaction that the company entered into with a person whereby the counter value provided to the company was in money’s worth significantly less than the value of the consideration provided by the company. There are a couple of qualifying criteria to be met if this mechanism is to be used in the instance that the transaction was concluded prior to onset of insolvency. Simply put; (i) the transaction should have occurred at a relevant time as defined in Section 340 (i.e. 2 years prior), and (ii) the company is at the time of the transaction unable to pay its debts, or (iii) the company is unable to pay its debts immediately after the transaction in question. However, if the transaction was concluded with a person connected to the company, Section 340(2) presumes that the two latter criteria are deemed to be fulfilled.

In this instance, the assets were sold undervalue to the director, being a connected person, within a period of 2 years prior to the onset of insolvency. Accordingly, the liquidator may apply in terms of Section 238(2), for the appropriate relief listed in Section 341(1).

The director in question might try to argue that the transaction was in good faith for purpose of carrying on business and that there were reasonable grounds to believe that the transaction would benefit the company, which in this case is probably a non-starter. However, the director might very well aver that the assets depreciated to such an extent that a purchase consideration of 40,000.00 GBP was at value, in which case an independent

valuation of the assets should be sought and compared with the book value of the assets as at the time when the transaction was entered into.

**Question 4.3 [maximum 4 marks]**

The payments to Aluminium Alumini Ltd.

The payments to Aluminium Alumini should be considered under Section 239 of the Insolvency Act 1986. Section 239 determines that transactions in favour unconnected creditors within 12 months prior to the onset of insolvency, or 2 years if connected, are liable to be set aside on the basis of the desire to afford a creditor a preference by being placed in a better position at the onset of insolvency than they would otherwise have enjoyed.

If the creditor is unconnected to the company in liquidation, the onus is fairly high in that the liquidator would have to prove that the preference was induced by the desire to prefer the creditor over others of the same class. However, if the creditor is connected to the company in liquidation, it is presumed that preference was given, and the onus is reversed on the receiver of the preference to prove the contrary.

*In casu*, the liquidator should firstly satisfy himself/herself that Aluminium Alumini is not “associated” with Blazer Laser as defined in Section 435(7) of the Act (i.e. sharing the same directors, shareholders or control), which would bring the payments liable for attack under Section 239(6), read with Section 249 of the Act.

Should the liquidator be satisfied that Aluminium Alumini is in fact an arm’s length creditor, he should consider the objective of the transaction in question to determine whether there are any grounds to believe that the preference was induced by a desire to prefer. Reflecting on the judgement in *Re MC Bacon Ltd* in this instance, the intention to prefer is clear whilst the desire to prefer is doubtful. Faced with the ultimatum of either settling the arrears and paying cash on delivery for future supply or being completely cut-off from supply of critical materials and ceasing trade immediately, the company chose the lesser of two evils. Accordingly, the liquidator would in all likelihood not be successful with an avoidable preference attack on the payments to Aluminium Alumini.

**\* End of Assessment \***