



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?

- Section 245 of the Insolvency Act 1986 applies to floating charge avoidance in the sense that it is aimed at preventing pre-existing unsecured lenders from obtaining a floating charge right before the company enters formal insolvency procedure. Under section 245 of the Insolvency Act 1986, an action can be brought by the liquidator or administrator. As well, fresh money capital providers that require such floating charge to rescue business can avail an action to justify the validity of the floating charge
- Section 6 of the CDDA deals with evidence of unfit behaviours by the directors while the company was insolvent. Under section 6 of the Company Directors Disqualification Act 1986, the Secretary of State or any person authorized by the Secretary of State, such as the Official Receiver on the instructions of the Secretary State, can bring an action
- Section 246ZB of the Insolvency Act 1986 make directors liable for wrongful trading and, in some circumstances, liable for some of the debts and liabilities of the company. Under section 246ZB, only the liquidator can apply to the court. Additionally, as section 246ZB has been introduced to the Small Business, Enterprise, and Employment Act 2015, meaning that wrongful trading is introduced to administration, the administrator can arguably as well bring an action
- Section 127 of the Insolvency Act 1986 deals with the disposition of assets of the company after the commencement of the winding up. Typically, the liquidator will take actions to enforce section 127 to retake assets disposed of between the petition date and the winding up order. However, other stakeholders can bring actions, in the form of applications for sanction or validation orders, to prove that (possible) dispositions are valid according to rules defined by this section

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.

Under Part A1 of the Insolvency Act 1986, there is a stay on enforcement of pre-Moratorium debts, except for the following items, not least, which remain payable/outstanding:

- Wages and salary arising under contracts of employment
- Rent during the Moratorium period
- Payments for goods and services supplied during the Moratorium period
- Obligations under financial services contracts such as contracts of lending, financial leasing or guarantee provisions
- Redundancy payments arising from employment contracts

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, under sections 233, 233A, and 233B of the Act, the administrator can avail of the provisions of these sections to prevent suppliers from terminating critical supply upon the company entering insolvency, by claiming *ipso facto* clauses, as well as using coercive measures such as price increases, conditional supply upon settlement of outstanding dues, and/or requesting a personal guarantee from the administrator. The administrator has the authority to bind the suppliers to continue supplying the insolvent business with goods and services required for the on-going activity of the asset while the administrator manages the restructuring process and explore restructuring options. This power is aimed at ensuring that the company's business continues as a going-concern during the administration process and ultimately at augmenting the prospects of the business achieving improved outcomes for creditors through adequate rehabilitation/reorganisation plans. In return of this power, the administrator is required to provide adequate payment protections for the goods and services rendered by the suppliers when required.

Question 3.2 [maximum 9 marks]

Explain the order of priority of payments in a liquidation and explain the nature of the rights enjoyed by each class of creditor or expense. How would this priority change if the company had been subject to a Moratorium under Part A1 of the Insolvency Act 1986 during the 12-week period prior to the commencement of the liquidation?

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

- 1- Fixed charge creditors: they enjoy first claim on the secured assets and will be paid first
- 2- Administrative expenses: the fees related to the insolvency process, including legal costs, the fees of the insolvency practitioners, and other administrative expenses are paid next
- 3- Preferential creditors: debt with preferential status such as wages, contributions to employee benefit schemes, unpaid holidays (with limits) and tax to the Government. These claimholders benefit from a statutory priority
- 4- Floating charge creditors: they rank above unsecured creditors and below fixed charge creditors but are subject to section 176A of the Act with regards to deductions to ensure the rights of unsecured creditors to a fair share of the remaining assets
- 5- Unsecured creditors: This includes, not least, trade creditors and suppliers, which shall proportionately share the remaining assets available
- 6- Shareholders: they represent residual value, if any, and can claim any residual value left after all the creditors aforementioned are paid

According to section 174A, if a company has been subject to a Moratorium under Part A1 of the Insolvency Act 1986 during the 12-week period prior to the commencement of the liquidation, the order of priority would change through the granting of "super priority" status to certain unpaid pre-Moratorium or Moratorium debts, such as directors' compensation, financial debt, or unsecured debt that is pre-Moratorium and unpaid. Such super priority claim will be ahead of administrative expenses and other fixed charged creditors. Last but not least, during the Moratorium period, critical vendors will rank highest in the cash waterfall, as well as new money providers, ahead of other creditors, as the objective of the administrator is the rescue of the business and such payouts are the most critical and new money providers would need to be secured to fund the insolvent business during its restructuring process.

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;

Given the facts and circumstances leading up to the compulsory liquidation of Ambitus Bank plc, the liquidator may consider taking action in relation to the floating charge over the whole of the company's assets or undertaking, in this case inventory and receivables. In a liquidation scenario, floating charges rank below fixed charge creditors and above unsecured creditors. However, this floating charge can be challenged if it is harmful to the estate and the general interest of creditors.

Indeed, according to section 245, if within 12 months prior to the start of the insolvency procedure, the company grants a floating charge to a lender, such floating charge can become invalid. Indeed, in this case Blazer Laser granted Ambitus a floating charge in June 2023, 7 months before the winding up petition by the creditors, and such floating charge was not provided in exchange of new money. Additionally, based on the facts of the case, the company was unable to pay its debt at the time of the granting of the floating charge. Indeed, it started witnessing cash flow issues in January 2023 and probably continued until June 2023 when the floating charge was requested by Ambitus Bank. Arguably, it could be said that the company was unable to save itself from the winding up order because it has already granted this floating charge and therefore it could be argued that this security could have been provided to another lender (by raising rescue financing for instance) to solve the cash flow issues earlier as they aggravated.

In either case, the liquidator can claim the statutory provisions of section 245 to render the floating charge invalid and place the creditors on more level-playing field (i.e. fairer) in the distribution of assets in the liquidation proceeding.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

The liquidator could probe the nature and circumstances surrounding the sale of the laser cutting machines to decide as to whether it qualifies as a transaction at an undervalue according to section 238 of the Act. More specifically, the transaction could be at an undervalue as the laser cutting machines were bought one year before for GBP 100,000 and then sold to Angela Bannister for 40% of its value at GBP 40,000 in cash right before the creditor liquidation petition. Section 238 of the Insolvency Act 1986 addresses this type of transactions, that happen up to two years prior to the commencement of the liquidation (petition) or administration, and allow the liquidator to challenge these transactions if they are carried at values less than the value of the consideration paid by the company. In this respect, the liquidator needs to assess the fair market value of this transaction at that point in time and appraise the given circumstances around the transaction (Section 238) and motivation for the decision taken, whether to save the company or favor the director, Angela (issue of preference to a connected person under section 239). As well, the liquidator would assess if the company would have fared better if the transaction had not happened. If the investigation leads to the conclusion that this transaction is at undervalue, and therefore is unfair and carries prejudice to other creditors, then the liquidator has the power to set aside the transaction and include the asset in the pool of assets for the benefit of all creditors, by cancelling the transaction or restoring the asset that was sold.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

The liquidator should assess the circumstances and timing of the payments to Aluminium Alumini to understand the commercial background of the transaction and its impact on other creditors. As such, the key consideration for the liquidator is the fairness and preference of the transaction to determine whether it falls within the categories of preferences in accordance with section 239 of the Act. The situation of Aluminium Alumini satisfies most of the statutory provisions of section 239 in respect to:

- Aluminium Alumini is a creditor of the company and provider of critical supply (metal) to the going concern of the business
- Aluminium Alumini has received a significant payment of GBP 20,000 and cash payment of GBP 8,000 which put Aluminium Alumini in a better position than if Blazer Laser were declared insolvent at that time and accordingly Aluminium Alumini would not have prevailed of these terms, given the fact that Aluminium Alumini is essentially an unsecured creditor
- The preference was given in the relevant time of 2 years prior to the petition
- It could be argued that the debtor has become insolvent as a consequence of this preference, given the size of the cash payments when the debtor was factually suffering cash flow problems and teetering on the brink of insolvency

Armed with these provisions, the liquidator can apply to the court to challenge this preferential transaction that happened in a period of financial stress or distress, that starved the business of critical cash that could have been saved to salvage the business. In particular the cash payment of GBP 20,000 and cash on delivery (while normal supplier payment terms could apply) has been detrimental to the cash flow situation of Blazer Laser.

*** End of Assessment ***