



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) Liquidator or administrator; supervisor under voluntary arrangement; person who is entitled to present winding up petition
- (ii) Secretary of State
- (iii) HRMC; Secretary of State; liquidator/administrator/receiver
- (iv) Liquidator or administrator; supervisor under voluntary arrangement; person who is entitled to present winding up petition

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.

Monitor's remuneration or expenses
Debts owed to employees
Wages or salaries under employment contracts
Redundancy payments
Financial services debts or other liabilities
Payments for goods or services supplied during the Moratorium
Rent in respect of a period during the Moratorium

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. The appointment of an administrator does not automatically terminate a company's executory contracts, especially where there is no term in the contract of supply providing for such automatic termination (which clauses have increasingly become subject to statutory exceptions making such clauses void).

In relation to utilities such as gas, electricity, water, telco services, suppliers are not permitted to require payment of outstanding debts for a new/continued supply, although a supplier may stipulate that the administrator must personally guarantee payment of charges in respect of the new supply.

Section 233B of the 2020 Act prohibits clauses which allow the supplier of goods and services to terminate or "do any other thing" in relation to contracts if the company enters a formal insolvency

procedure. The section also prevents suppliers from making it a condition of continued supply that pre-insolvency arrears are paid and from making other changes to the contract such as increasing prices. A supplier also cannot insist on a personal guarantee from the administrator (cf. section 233). This section applies to all other suppliers with exceptions as regards insurers, banks, electronic money institutions, recognised investment exchanges, clearing houses, securitisation companies, overseas companies with corresponding functions.

However, a contract may still be terminated by a supplier where the company/administrator consents, or on application to the court (and where the court is satisfied that the continuation of the contract would cause the supplier hardship and thus grants permission).

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?

For priority of payments, usually holders of fixed-charges are paid first outside of formal insolvency out of assets subject to fixed charges. Next, expenses of the procedure including remuneration of the office-holder. Next, preferential creditors, which are usually only reasonably modest claims from employees owed debts by their employers, and some taxation debts owed to the Government. Next, unsecured creditors or those without the benefit of any security or title to assets. Finally, if there is any surplus after payment of the company's liabilities, this shall be returned to the company's members i.e. shareholders in accordance with their constitutional rights.

In the latter situation, if the company is not rescued as a going concern but enters administration/liquidation within the 12-week period of the end of the Moratorium, the priority of debts will change as follows: first, certain unpaid pre-Moratorium or Moratorium debts which are not part of the payment holiday, such as those to employees or financial services debts, are paid in priority even to the liquidator's fees and expenses. Pre-Moratorium bank debt falling within the definition of financial services will be likewise treated unless it is an accelerated debt.

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 Alumini 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 liquidator may wish to challenge the validity of the above floating charge. Section 245 of the Insolvency Act 1986 is relevant, as it applies only to floating charges, and where a company is in liquidation. The section is aimed at prevention pre-existed unsecured creditors from obtaining the security of a floating charge shortly before the company enter a formal insolvency procedure. It does not prevent lenders who are providing fresh funding to the company from taking a floating charge for that new funding, but renders invalid floating charges given by a company at a relevant time (being either 12 months or 2 years prior to the onset of insolvency depending on whether the person is un/connected with the company), except to the extent, in substance that 'new' consideration is provided for that charge.

Here, as the Bank is not connected with the company, the relevant period is 12 months from the commencement of liquidation, i.e. the charge is within such period. It appears to be the case that the company was, as of January suffering cash flow problems from January 2023, and by June 2023 already under pressure from the bank and facing demands from repayment of its loans, i.e. the requirement that at the time of the creation of the charge the company was unable to pay its debts within the meaning of s. 123 of the Act could have been met (e.g. if a creditor to whom the company owed more than GBP 750 had duly served a demand on the company at its registered office, or if it is proved to the satisfaction of the court that the company is either cash flow or balance sheet insolvent).

The floating charge would not be invalid if the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the company at the same time as, or after, the creation of the charge. If the consideration was not given at the same time as or before the charge, it may be invalid. Here, the fact that there does not appear to be any new consideration paid at the same time as the charge, the liquidator may wish to challenge the validity of the charge on such basis.

Assuming the floating charge is successfully proved to be within the scope of s. 245 of the Act, then save to the extent of any new consideration (which does not appear to be present on the facts per above discussion), it is rendered invalid. The invalidity will not however done under the authority of the charge prior to the commencement of the winding up on 13 January 2024. The underlying debt also remains valid.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

For these machines, the directors approved the sale of two laser cutting machines to a director for GBP 40,000 when the machines had been bought for GBP 100,000 a year before. Given the discrepancy in price over a relatively short period (i.e. when there would not have, presumably, such an extent of amortisation or depreciation), the liquidator may seek to argue that the sale to the director was a transaction at undervalue within s. 238 of the Insolvency Act 1986.

The liquidator will need to show that the company entered into the sale transaction to the director for a consideration (i.e. GBP 40,000) which was significantly less than the value of the consideration provided by the company (i.e. the machines).

As the sale transaction took place in January 2023, the sale transaction took place within the 'relevant time' period, which is 2 years prior to the commencement of liquidation. The liquidator will also have to show that at the time of the transaction, the company was unable to pay its debts within the meaning of s. 123 of the Act. As discussed above, since the company was from January 2023 already under pressure from the bank and facing demands from repayment of its loans, this appears to be the case. Further, given that the transaction is with a connected person (i.e. a director), the company is presumed to be insolvent. The liquidator's main evidential challenge will be one of valuation, i.e. showing that the machines were worth more than GBP 40,000 at the time of sale.

The director will likely seek in response to show that the transaction was entered into by the company in good faith and for the purpose of carrying on its business, and that at the time it did so there were good reasonable grounds for believing that the transaction would benefit the company. If shown, the court will not make the s. 238 order. However, the court retains an overriding power to restore the position to what it would have been had the transaction not been entered, if it concludes that there has been a transaction at undervalue.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumi Ltd.

The payments made to Aluminium Alumi Ltd. ("AAL") totalling GBP 28,000 may raise questions about preferential treatment of this creditor over others, especially considering the cash flow problems faced by the company at the material time.

If it can be shown that the payments were made with the intent to prefer one creditor over others, they may be susceptible to challenge as preferences under s. 239 of the Insolvency Act 1986. The purpose of this section is to prevent a company, shortly before formal insolvency procedure, from placing one of its creditors in a better position than others. The 5 elements to be proved by the liquidator are that:

- AAL was a creditor of the company at the material time (this is not controversial);
- Payments to AAL by the company had the effect of putting AAL in a better position, in the event of the company going into liquidation, than it would have been had the payments not been made (this is not controversial as AAL as an unsecured creditor prior to the payments might only have expected a dividend as an unsecured creditor);
- In making the payments, the company was influenced by a desire to produce the above effect, i.e. the desire to prefer, AAL (see discussion below);

- The preference was given at the relevant time (this is not controversial as the relevant period for unconnected persons is 6 months, but the payment was made only a month before the winding up order);
- The company was, at the time of the transaction, the company was unable to pay its debts within the meaning of s. 123 of the Act (see discussion above about why this is met).

As for the 3rd element above on the desire to prefer, the liquidator may face some difficulty proving this. AAL will likely assert that the payments to it as a key supplier were necessary for the company to continue to operate/trade, and, not made, the company would be forced into immediate liquidation, akin to the arguments in *Re MC Bacon Ltd*. As such, the liquidator will need to prove that the payments were motivated by a desire to prefer AAL instead of a mere desire to avoid the ensure AAL's continued supply of metal to the company so that its trading may continue. The court has also held that where a company is influenced by such commercial considerations such as attempts to ensure that the company continued trading, there could be no desire to prefer.

Further, the desire to prefer will not be presumed as AAL is not a connected person. The liquidator therefore bears the burden of proof of such intention.

*** End of Assessment ***