



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) Section 245 targets transactions that are entered into by the company with parties connected to the company (such as directors or shareholders). The insolvency practitioner can apply to the courts to have these transactions set aside.

(ii) The Secretary of State can make an application to the courts to have a director disqualified under Section 6 of the Company Directors Disqualification Act 1986. Section 6 is the most commonly used grounds to have a director declared disqualified;

(iii) The Small Business, Enterprise and Employment act of 2015 introduced wrongful trading and fraudulent trading to administration (S 246ZB and S 246ZA) in order to hold directors accountable should they trade under insolvent circumstances. Only the liquidator can apply to the courts.

(iv) Section 127 deals with the disposition of assets in order to ensure a debtor does not enter into agreements to the detriment of creditors. Any person can apply to the courts for a validation order and the burden of proof is on them to make a case for the order to be granted.

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.

[The moratorium on paying debts due ('payment holiday') automatically kicks in on filing of the relevant documentation. There is an automatic 20 business day moratorium that is activated. This can be extended through various means. The exceptions to this are debts that incur after the filing (and during the moratorium period) and include:

- Wages and salaries of employees who provide services after the filing date
- Rents due for the use of premises
- Goods or services provided to the company during the moratorium
- Redundancy payments
- Debts arising from funding activities e.g. loans and financial leases]

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?

[Changes to the laws in the UK have been made in order to assist struggling business get re-organised rather than automatically be liquidated. To this end the appointment of an administrator does not automatically terminate a company's executory contracts. These contracts have now become subject to statutory exceptions which largely make automatic termination clauses void.

Section 233B prohibits suppliers from terminating contracts on the basis that a company has entered insolvency proceedings. The section also prevents companies from stopping supply on the basis that pre-insolvency debts are not paid or from amending the contract in any from (such as increasing prices). S233 permits that a supplier can ask for to personally guarantee payment against new supply where S233B prevents suppliers from insisting on personal guarantees from the administrator.

There are exceptions to S233B. These include where the supplier satisfies the courts that the continuation of the contract would cause the supplier hardship. The act also specifies certain activities where contracts are prohibited from being cancelling, namely essential services such as utilities, communication and IT services.]

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 the liquidation there is a waterfall of payments that are made in a specific order of priority, these being:

1. Expenses incurred by the liquidator in realising the assets of the company. These include administrator expenses, cost of security, application order costs, statement of affairs costs, remuneration of persons employed by the administrator and the administrators remuneration.
2. Once the liquidators' costs are paid preferential creditors are paid (as defined in S386, 387 and Schedule 6: section 175). This includes certain employee claims and specified tax liabilities. ranking above floating charge creditors. There are 2 classes of preferential debts being ordinary and secondary. Only once the ordinary preferential debts are paid will the secondary preferential debts be paid.
3. Floating charge holders rank next in line. There could be more than 1 floating charge holder and priority is generally given to the first holder. A portion of the assets subject to a floating charge is set aside to be distributed among unsecured creditors. This is known as the 'prescribed part,' and its maximum value is subject to statutory limits.
4. Unsecured creditors (those with no security) rank last of the creditors. This broad category includes trade creditors, certain HMRC debts not classified as preferential, and other debts not secured by a charge. They share pro-rata in the company's remaining assets after the above claims are satisfied.
5. Once all creditors are paid (including the interest on outstanding debts) the remaining funds are distributed to shareholders.

If a company has been subject to a moratorium in the 12 weeks from to the commencement of the liquidation the priority doesn't necessarily change, however the financial situation does change as do the options available.

'Super Priority' is a term used to rank expenses that owed after the adoption and include parties who have contracted with the company in administration including employees and lenders of additional finance. These 'super priority' expenses are listed under para 99 of Schedule B1 of the Act. These rank even ahead of the liquidator's fees and expenses.]

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;

[A fixed charge is defined as a charge that attaches to a particular asset or class of assets while a floating charge floats or hovers above a class of assets. Floating charges are often expressed over the undertakings of the company which is interpreted to include all assets of the business (being property, stock and debtors) both present and future including the right to carry on business.

Blaze Laser issued a debenture to Ambitus Bank. A debenture is typically a mixture of a fixed charge (over some asset class) and a floating charge over the balance of the assets. No specific assets are mentioned in the Blaze Laser debenture. The floating charge holder normally gives the creditor the right to appoint an administrator who will look after their interests and take control of the assets of the debtor. This enforcement of this security has been hugely diminished and for all practical purposes abolished.

An out-of-court appointment of an administrator is normally made. The holder of the floating charge must file a statutory declaration of the appointment and that the floating charge is enforceable. After filing all the necessary documentation has been filed the appointment is made.

The floating charge was issued in June 2023 which is at least six months prior to the winding up petition of the creditors on 13 January 2024. As the floating charge is with an unconnected party it falls within the 12 months preceding the onset of insolvency. S245 prevents pre-existing unsecured creditors taking a floating charge shortly before the company goes into administration.

The key points to consider are whether the Bank was a pre-existing creditor and whether there was a new loan. The information at hand indicates that the Bank had an existing loan and as such the Bank was a pre-existing creditor. What is not clear is whether the Bank provided additional funding or whether they merely got a floating charge over the assets of Blaze Laser.

Should it be found that no new facility was provided, the floating charge would be rendered invalid. The definition of new is clearly defined and has been tested in *Fairway Magazines* and *Re Shoe Lace Ltd*. While the Floating Charge may be invalidated, the underlying debt does remain.]

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

[Section 423 of the act deals with transactions defrauding creditors. Where a company is being wound up and a creditor is victim of a fraudulent transaction they can attack that transaction and have it set aside.

There are 2 requirements to satisfy S423. The first being that the company entered into the transaction with another person at an undervalue (that being either no consideration or at a significantly less consideration than it's worth). The second consideration, in addition to the first, is that the transaction **was** entered into to put the assets beyond the reach of the creditors or prejudicing the interests of the creditor in relation to a claim they might make against the company.

The act does not stipulate a time period, nor that the company is insolvent or subject to insolvency proceedings. An application may be made by any person who is a victim of the transaction and the application is treated as being made on behalf of every victim or potential victim.

In the case of Blazer Laser, the company is subject to insolvency proceedings and as such the insolvency practitioner generally launches the application. In this case it would be argued that the machine has significantly more value than the GBP 40,000 paid for a 1 year old machine costing GBP 100,000. The specific facts relating to the machine would need to be argued (depreciation of the machine, market conditions that drive second hand machine prices, usage over the year, condition of maintenance etc.) in order to prove fraud.

Gifts made to connected parties for 'rainy days' are often also attacked. These could have occurred many years prior to the company becoming financially constrained.]

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

[Section 239's underlying purpose is to prevent a company, shortly before entering formal insolvency proceedings, from placing one creditor in a better position than others. It prevents the full payment of a creditor's debt where the creditor would under normal trading have benefited from a distribution only. An application under S239 can only be made if the company has gone into liquidation or administration and the applicant must show:

1. That the person alleged to be preferred was a creditor
2. Something was done that which has the effect of putting that person in a better position
3. The company was influenced by the desire to produce the effect of putting the person in a better position
4. Preference was given at a relevant time

In the case of Aluminium Alumini ("AA") this appears to be the case. The payments were made in an effort to put AA in a better position.

The relevant time refers to the period in which the transaction takes place. It goes as far back as 2 years **prior** to insolvency (if it is in favour of a connected person) and six months if in favour of a non-connected person.

The more difficult test is that of the desire (and not the intention) to put the creditor in a better position. It has been held in the latest decisions that a company influenced solely by

commercial decisions, specifically to in attempts to keep the company trading, there could be no desire to prefer.

As Angela Bannister was a director and not defined as a connected person it's difficult to show that she had the desire to give the creditor any preference over other creditors and as a result S239 would be difficult to uphold and the payments would stand as valid.]

*** End of Assessment ***