



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?

There is no action under section 245 of the Insolvency Act 1986. It renders invalid floating charges given by a company at a relevant time.

An action under section 6 of the Company Directors Disqualification Act 1986 is made by the Secretary of State, or the Official Receiver on the instructions of Secretary of State where the company in question has been wound up by the court.

An action under section 246ZB of the Insolvency Act 1986 can only be made by the liquidator, and not a creditor or a contributory.

An action under section 127 of the Insolvency Act 1986 may be made by anyone applying for a validation order.

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.

Debts incurred during the Moratorium.

Pre-Moratorium debts (being debts falling due before the Moratorium and which fall due during the Moratorium by reason of a pre-Moratorium obligation) insofar as they consist of amounts payable in respect of:

- (a) the monitor's remuneration or expenses;
- (b) rent in respect of a period during the Moratorium;
- (c) wages or salary arising under a contract of employment;
- (d) redundancy payments; or
- (e) debts or other liabilities arising under a contract or other instrument involving "financial services".

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.

Insofar as the supply of gas, electricity, water and communication services is concerned, section 233 of the Insolvency Act 1986 ("the Act") applies and prevents suppliers of such services from requiring payment of outstanding debts in order to secure a new or continued supply to the company in administration. However, suppliers of such services are permitted to stipulate that the administrator must personally guarantee payment of charges in respect of the new supply. Further, under section 233A of the Act, a supplier of such services is generally unable to rely upon an "insolvency-related term" in a contract of supply which would otherwise entitle the supplier to terminate the supply, alter the terms of the supply or compel higher payments for continued supply.

With respect to other suppliers of goods and services to the company in administration (subject to a limited number of exceptions, such as insurers, banks, electronic money institutions, recognised investment exchanges and clearing houses, securitisation companies and overseas companies with corresponding functions), section 233B of the Act prohibits clauses which allow the supplier to terminate or “do any other thing” in relation to the contract between the supplier and the company if the company enters administration (including making it a condition of continued supply that pre-insolvency arrears are paid and making other changes to the contract such as increasing prices). Such a supplier also cannot insist on a personal guarantee from the administrator. The contract may still be terminated by a supplier where the company or insolvency officeholder consents or, on application to the court, the court is satisfied that the continuation of the contract would cause the supplier hardship, and grants permission for the termination.

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?

First, there are a number of expenses given priority over the company’s preferential creditors, any holders of floating charges and the company’s unsecured creditors (section 115 of the Insolvency Act 1986 (“the Act”) and rules 6.42 and 7.108 of the Insolvency Rules 2016 SI 2016/1024 (“the Rules”). The main expenses which are payable in priority in those creditors, and which are payable in the following order of priority, are:

- (a) expenses that are properly incurred by the liquidator in preserving, realising or getting in any of the assets of the company (including the conduct of any legal proceedings);
- (b) the cost of any security provided by the liquidator;
- (c) any amount payable to a person to assist in the preparation of a statement of affairs or accounts;
- (d) any necessary disbursements by the liquidator in the course of the winding up;
- (e) the remuneration of any person who has been employed by the liquidator to perform any services for the company;
- (f) the remuneration of the liquidator;
- (g) the amount of any corporation tax on any chargeable gains accruing on the realisation of any asset of the company; and
- (h) any other expenses properly chargeable by the liquidator in carrying out the liquidator’s functions in the winding up.

After the expenses of the liquidation have been paid in full, the assets of the company are then used to pay preferential creditors (before any payment may be made to holders of floating charges or to unsecured creditors). There are two classes of preferential debts, ordinary and secondary. Ordinary preferential debts are paid before security preferential debts. Preferential debts, in their respective classes, rank equally amongst themselves and so abate in equal proportion if the company’s assets are insufficient to pay them all. The listing of preferential debts, both ordinary and secondary, is contained in Schedule 6 of the Act. Preferential creditors are defined in sections 386 and 387 of the Act.

After preferential creditors have been paid, the next creditor to be paid is any floating charge holder. If there is more than one floating charge holder priority between them

usually turns upon which floating charge was created first. However, before any payment can be made to any floating charge holder, the liquidator must first consider the application of section 176A of the Act, which applies to a company in liquidation with a floating charge created on or after 15 September 2003. Under this section, the liquidator has a duty to make a “prescribed part” of the company’s net property available for the satisfaction of unsecured debts and must not distribute any of this prescribed to a floating charge holder except to the extent it is in excess of the amount required to satisfy all the unsecured debts. Finally, creditors with no security, such as ordinary trade creditors, are paid out last in the statutory order.

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, section 174A provides that certain unpaid pre-Moratorium or Moratorium debts (the debts which are not part of the payment holiday), such as debts owed to employees or “financial services” debts, are paid in the subsequent liquidation in priority to even the liquidator’s fees and expenses - in other words, it affords certain unsecured debts a form of “super priority” in a subsequent liquidation.

In the (unlikely) scenario that there are sufficient funds to pay all the creditors, and interest on their debts, then any surplus is distributed amongst the shareholders according to the company’s constitution.

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 first issue is whether section 245 of the Insolvency Act 1986 (“the Act”) renders the floating charge invalid (if it does, only the floating charge is rendered invalid, not the underlying debt).

Here, Ambitus Bank plc did not provide fresh or new funding. It was an unsecured creditor that obtained the security of a floating charge shortly before the company entered liquidation and for which Ambitus Bank plc did provide any new consideration.

Ambitus Bank plc is not connected to the company and the floating charge was created within the period of 12 months prior to the onset of insolvency (being the date of the petition), however, in order for section 245 of the Act to apply, the liquidator will need to demonstrate that, at the time of the creation of the charge, the company was either unable to pay its debts (within the meaning of section 123 of the Act) or became unable to do so in consequence of the transaction.

The creation of the floating charge could not be attacked by the liquidator as a preference under section 239 of the Act. Although the creation of the floating charge can be a preference, as security has been given to a creditor who previously only had priority as an unsecured creditor, in order to succeed on an application under section 239, the liquidator would need to show that:

- a) at the time the floating charge was created, Ambitus Bank plc was a creditor of the company (this does not seem controversial);
- b) the creation of the floating charge had the effect of putting Ambitus Bank plc in a better position, in the event of the company going into liquidation, than the position it would have been if the floating charge had not been created (again, this does not seem controversial);
- c) the company was, in giving the preference, influenced by a desire to prefer Ambitus Bank plc (here, the company did not want Ambitus Bank plc to demand repayment of its loans and, having regard to the decision of Millett J in *Re Mc Bacon Ltd* [1990] BCC 78, it is likely a court would find that the company, in granting the debenture, was motivated, not by a desire to prefer the bank, but by the desire to avoid the calling in of the loans and the continuation of the trading of the company); and
- d) the preference was given at a relevant time (here, Ambitus Bank plc is not connected to the company and so the debenture would need to have been granted within the six months prior to the onset of insolvency, which it was not).

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

The first issue is whether such a transaction was a transaction at an undervalue under section 238 of the Act. If the court concludes that there has been a transaction at an undervalue it will make an order restoring the position to what it would have been if the transaction has not been entered into.

The laser cutting machines were not gifted and the company did receive consideration for them, which means the liquidator will need to demonstrate that the consideration received by the company was, at the date of the transaction, significantly less than the value, in money or money’s worth, less than the value of the laser cutting machines. That seems a realistic possibility given the machines were sold to the director for GBP 40,000 and had been purchased by the company for GBP 100,000 only a year before.

It is a prerequisite of liability under section 238 that, at the time the transaction was entered into, either the company was unable to pay its debts as they fell due within the meaning of section 123 or became unable to pay its debts within the meaning of that section in consequence of the transaction. Because the sale of the laser cutting machines was to a director, this was a transaction with a connected person, which means the company is presumed to have been insolvent, or to have become insolvent, as a result of the transaction, unless the contrary is proved.

If the director can satisfy the court 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 reasonable grounds for believing that the transaction would benefit the company, then the court will not make an order under section 238.

The transaction could also potentially be attacked by the liquidator under section 423 of the Act as a transaction to defraud creditors. As with any application under section 238 of the Act, the liquidator will need to demonstrate that the consideration received by the company was, at the date of the transaction, significantly less than the value, in money or money's worth, less than the value of the laser cutting machines. The liquidator will also need to show that the company entered into the transaction for the purpose either of putting assets beyond the reach of a person who is making, or may at some time make, a claim against the company, or of otherwise prejudicing the interests of such a person in relation to the claim which they are making or may make. There is no time limit in respect of when the transaction must have been entered into.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

The creditor's winding up petition issued on 13 January 2024, which is taken to be the commencement date of the winding up.

The payments of GBP 20,000 and GBP 8,000 to Aluminium Alumini Ltd were made on or after 28 January 2024.

Accordingly, those payments are a disposition of property of the company within the meaning of section 127 of the Act, and therefore avoided unless the court otherwise orders.

The court has a wide discretionary power to declare that the dispositions were not void (which is called a validation order). Aluminium Alumini Ltd will bear the onus of proving that such an order should be made and a validation order will only be made where the circumstances indicate that the disposition has been made for the benefit of the general body of unsecured creditors.

The question says that the continued supply of metal was seen as essential by the Company, which may mean that Aluminium Alumini Ltd can obtain a validation order if it can demonstrate that the payments to it allowed the company to continue to trade or to fulfil contracts that appeared to be profitable.

The payments to Aluminium Alumini Ltd cannot be attacked by the liquidator as a preference under section 239 of the Act. In order to succeed on an application under section 239, the liquidator would need to show that:

- a) at the time the payments were made, Aluminium Alumini Ltd was a creditor of the company (this does not seem controversial);
- b) the making of the payments had the effect of putting Aluminium Alumini Ltd in a better position, in the event of the company going into liquidation, than the position it would have been if the payments had not been made (again, this does not seem controversial);
- c) the company was, in giving the preference, influenced by a desire to prefer Aluminium Alumini Ltd (as set out above, the continued supply of metal was seen as essential by the Company and so the court would likely find that the company, in making the payments, was motivated, not by a desire to prefer Aluminium Alumini Ltd, but by the desire to ensure that the company continued trading); and
- d) the preference was given at a relevant time (here, Aluminium Alumini Ltd is not connected to the company and so the payments needed to be made within the six months prior to the onset of insolvency, being the date of the petition, which they were not - they were made after the date of the petition).

*** End of Assessment ***