



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?

The liquidator or the administration.

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 monitor's remuneration or expenses, the goods or services supplied during the Moratorium, the rent in respect of a period during the Moratorium, wages or salary arising under a contract of employment and redundancy payments.

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 6 marks]

Can an administrator who wishes to continue to operate the business of the company in administration require suppliers of goods and services to continue to supply those goods and services during the administration?

Yes, the administrator can require suppliers of good and services which are essential for the continuity of the company to continue to supply those goods and services during administration.

In fact, administrators must act with one or more of three statutory objectives in mind. The first objective is to consider rescuing the company, which involves rescuing the business as an ongoing concern with the retention of all or a material part of the business of the company together with a restoration to solvency with all the creditors being paid in full. Unlike an administrative receiver who owes a primary duty to the appointing secured creditor, an administrator must have regard to the interest of all of the company's creditors and can only limit their ambition to seeking to realise assets to repay a secured creditor if they think it is not reasonably practicable to achieve anything else.

With the aim of rescuing the company, the administrator can apply the provisions relating to the executory contracts. In this respect, the appointment of an administrator does not automatically terminate a company's executory contracts. Terms in contracts of supply which provide for automatic termination have historically been generally effective but have now become subject to increasing statutory exceptions which largely make such automatic termination clauses void.

An administrator will frequently need to obtain or retain essential supplies. Section 233 of the Act applies to supply of gas, electricity, water and communications services. The definition of communications services includes the supply of goods and services such as point of sale terminals, computer hardware and software, information, advice, and technical assistance, data storage and processing and website hosting. Suppliers are not permitted to require payment of outstanding debts in order to secure a new or continued supply to the company in administration. However, section 233 of the Act permits a supplier to stipulate that the administrator must personally guarantee payment of charges in respect of the new supply.

In addition, under section 233A 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.

The 2020 Act has now expanded these protections for an insolvent company by adding section 233B to the Act, which prohibits clauses which allow the supplier of any goods or services to terminate or “do any other thing” in relation to that contract if the company enters a formal insolvency procedure.

A provision of a contract for the supply of goods or services to the company is of no effect when the company enters an insolvency procedure, if, under that provision the contract would terminate, or the supplier would be entitled to terminate the contract or to “do any other thing” upon the company entering an insolvency procedure. Section 233B therefore prevents suppliers from terminating a supply upon the company’s insolvency but also prevent 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. Under Section 233B, a supplier cannot insist in a personal guarantee from the administrator.

Under Section 233B, a contract may still be terminated by a supplier where the company or insolvency office-holder 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 termination.

Section 233B complements the existing ss 233 and 233A of the Act which, in similar terms, prohibit termination by utility, communications and IT suppliers. Section 233B opens the restriction on termination to all other suppliers.

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?

Under section 115 of the Act, a number of expenses are given priority over the company’s preferential creditors, any holder of floating charges and the company’s unsecured creditors. The following are the main expenses which are payable in priority to those creditors and are payable in the following order of priority: (i) 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), (ii) the cost of any security provided by the liquidator; (iii) any amount payable to a person to assist in the preparation of a statement of affairs or accounts; (iv) any necessary disbursements by the liquidator in the course of the winding up; (v) the remuneration of any person who has been employed by the liquidator to perform any services for the company; (vi) the remuneration of the liquidator; (vii) the amount of any corporation tax on chargeable gains accruing on the realisation of any asset of the company; and (viii) any other expenses properly chargeable by the liquidator in carrying out the liquidator’s functions in the winding up.

Once the expenses of the liquidation have been paid in full, the assets of the company are then used to pay preferential creditors. The category of preferential creditor largely comprises limited claims of employees and some taxation liabilities but there are some other types of liability. It has always been a characteristic of the statutory preferential debts regime that employees’ remuneration has been given some priority. There are two

classes of preferential debts, ordinary and secondary. Ordinary preferential debts are paid before secondary 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. Ordinary preferential debts are listed under Schedule 6 of the Act. However, points 9, 10 and 11 of the Schedule 6 of the Act are defined as secondary preferential debts under section 386 of the Act and are paid after the "ordinary" preferential debts.

After preferential creditors have been paid, the next creditor to be paid will be any floating charge holder. There may be more than one floating charge holder and if that is the case, priority between them usually turns upon which floating charge was created first. Before any payment can be made to any floating charge holder, the liquidator must first consider the application of section 176A of the Act. Section 176A applies to a company with a floating charge created on or after 15 September 2003 and the company has gone into liquidation (or administration).

Creditors with no security, often ordinary trade creditors, are paid out last in the statutory order.

If there are sufficient funds to pay all the creditors, any surplus is distributed amongst the shareholders according to the company's constitution, which will normally permit a distribution *pro rata* the shareholders' respective shareholding.

With respect to the Moratorium introduced by way of the new Part A1 to the 2020 Act, is important to state that such Moratorium is a standalone procedure and is not linked to any other procedure. The Moratorium is a debtor-in-possession procedure whereby the directors remain in control of the company, subject to the supervision of a monitor. Therefore, 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, then priority of debts in the subsequent administration or liquidation may be different to the priority of debts which existed prior to the Moratorium. In this regard, Section 174A provides that certain unpaid pre-Moratorium or Moratorium debts, 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. Section 174A therefore affords certain unsecured debts a form of "super priority" in subsequent liquidation. For example, if a director has not been paid for months prior to a Moratorium, if the Moratorium leads to an unsuccessful rescue attempt and the company enters liquidation, the pre-Moratorium unsecured debts of the director will acquire "super priority" in the liquidation.

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;

Section 245 of the Act applies only to floating charges, not any other type of security. It applies where a company is in administration or liquidation and the provision is aimed at preventing pre-existing unsecured creditors obtaining the security of a floating charge shortly before a company enters a formal insolvency procedure. Where the person in whose favor the floating charge is created is not connected with the company, the relevant time is any time within the period of 12 months prior to the onset of insolvency.

The floating charge in favor of Ambitus Bank plc seems to fall within this provisions as it cannot benefit from the exceptions set forth in section 245 of the Act.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

This transaction could be analysed under the provisions related to transactions at undervalue. As part of the underlying policy of the Act to treat all unsecured creditors fairly and equally, the Acts permits certain transactions which were entered into shortly before the company entered formal insolvency to be open to attack. Under section 238 of the Act, a liquidator (or administrator) may attack a transaction which was entered prior to the company entering liquidation or administration where the transaction was at an undervalue. Therefore, under section 238, it could be considered that the company entered into a transaction with another person for a consideration which, in money, was, at the date of the transaction, significantly less than the value of the consideration provided by the company. In order to be attacked, the transaction must have taken place at a "relevant time" which is the period of two years prior to the commencement of the liquidation or administration.

The facts of the case seems to fit in this provision, as the transaction was made at a "relevant time" (one year before the commencement of insolvency proceedings) and Angela Bannister (a director) only paid GBP 40,000 in cash for machines that had been bought for GBP 100,000 a year before. Even though at the time of the transaction the machines might have worth less than the original purchase price (GBP 100,000), it probably worth much

more than only GBP 40,000. Moreover, as the transaction was entered into with a connected person, then company is presumed to have been insolvent.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alimini Ltd.

Section 239 relates to preferences which may be avoided by the court on the application of a liquidator or an administrator. The underlying purpose of this section is to prevent a company, shortly before entering a formal insolvency procedure, from placing one of its creditors in a better position than others. It prevents such preferences such as payment in full where the creditor could have expected only a dividend as an unsecured creditor, and it also opens up to attack a security given to a creditor who previously only had priority as an unsecured creditor. In order to succeed on an application under section 239 must show that: (a) the person whom it is alleged has been preferred was, at the time of the transaction, a creditor of the company; (b) something was done by the company which had the effect of putting that person in a better position, in the event of the company going into insolvent liquidation, than the position they would have been in if that thing had not been done; (c) the company was influenced by the desire to produce the effect referred to in (b); and (D) the preference was given at a relevant time.

In this case the payments to Aluminium Alimini Ltd. would apparently meet all the requirements addressed before, and could be attacked under provisions 238 and 239 as the unsecured creditor was paid before due and treated with priority.

*** End of Assessment ***