



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 is simply a declaratory provision as to the validity or otherwise of the relevant charge so the floating charge is automatically invalid if the relevant criteria are satisfied. In practice the insolvency holder (e.g. liquidator and administrator) will apply for court orders as to the validity of the charge.

(ii) The Secretary of State or the Official Receiver (on the instructions of the Secretary of State where the company in question has been wound up by the court) may bring an action under section 6 of the Company Directors Disqualification Act 1986.

(iii) An action under section 246ZB of the Insolvency Act 1986 may be brought by a liquidator and an administrator.

(iv) The liquidator may bring an action under section 127 of the Insolvency Act 1986 (and the recipient of the company asset would normally bring the application to seeking a validation order for dispositions that would otherwise fall under section 127).

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 following pre-Moratorium debts (i.e. excluding debts incurred during the Moratorium) do not form part of the payment holiday:

- (a) the monitor's remuneration or expenses;
- (b) goods or services supplied during the Moratorium;
- (c) rent in respect of a period during the Moratorium;
- (d) wages or salary arising under a contract of employment; and
- (e) debts or other liabilities arising under a contract involving "financial services" (which includes a contract consisting of lending, financial leasing or providing guarantees).

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?

The appointment of the administrator does not automatically terminate the company's contract with its suppliers.

Essential suppliers

Essential suppliers of gas, electricity, water, communications services are not permitted to demanding the company to pay outstanding charges incurred pre-administration as a continue to provide new or continued supply to the company in administration pursuant to section 233 of the Insolvency Act 1986 (the "Insolvency Act"). However, such suppliers are permitted to require the administrator to personally guarantee the payment of charges in respect of the new supply.

Such essential suppliers are also generally unable to rely upon any "insolvency-related term" in the supplier contract to terminate or alter the terms or compel higher payment for the continued supply to the company in administration pursuant to section 233A of the Insolvency Act.

All suppliers

Furthermore, section 233B also applies when a company enters administration - suppliers of all goods and non-financial services (other certain excluded suppliers) will be prevented from doing anything or allowing any other thing to happen in relation to the contract. Categories of suppliers excluded from the scope of section 223B includes insurers, banks, electronic money institutions, recognised investment exchanges and clearing house, securitisation companies and oversea companies with corresponding functions - therefore the administrator will not be able to prevent these suppliers from exercising any *ipso facto* clauses in the contract.

Suppliers who fall within section 233B therefore be prevented from terminating a supply or making it a condition of continued supply that pre-insolvency charges are paid or from increasing the price for the continued supply. In contrast with section 233, a supplier cannot insist on a personal guarantee from the administrator.

However, a supplier may apply to the court for permission to termination of the contract even if it falls under section 223B if the continuation of the contract would cause hardship to the supplier. It should also be noted that section 223B does not prevent suppliers from exercising any new termination rights that arises during the administration as a result of events which take place during that period, for example, if the company fails to pay the supplier for amounts which are incurred and become due after the commencement of the administration.

Question 3.2 [maximum 9 marks]

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

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

- **Expenses of winding up:** This category includes a number of categories of expenses which are payable in the following order of priority, (i) properly incurred by the liquidator in preserving, realising or getting in assets of the company, (ii) cost of security provided by the liquidator, (iii) amounts payable to a person to assist in the preparation of a statement of affairs or accounts, (iv) necessary disbursements by the liquidator in the course of the winding up, (v) remuneration of person employed by the liquidator to perform services for the company, (vi) remuneration of the liquidator, (vii) corporate tax on chargeable gains accruing on the realisation of any assets of the company and (ix) other proper expense of the liquidator.
- **Preferential debts:** This category largely comprises claims of employees (remuneration and contributions to pension schemes, subject to significant limits) and tax liabilities. The preferential debts can be further subdivided into two classes, (i) ordinary and (ii) secondary (which is paid after ordinary preferential debts). The preferential debts rank *pari passu* in their respective class.
- **Payment to floating charge holders:** After setting aside the "prescribed part" of the company's net property (which, if the company's net property exceeds £10,000, is 50% of the first £10,000 of net floating charge realisations plus 20% of anything after, subject to a maximum prescribed part of £800,000) for the satisfaction of the

unsecured debt, the liquidator will make distributions to the floating charge holders. The priority between floating charge holders normally depends on the time of creation of the floating charge.

- **Unsecured creditors:** Unsecured creditors will rank *pari passu* amongst themselves.
- **Shareholders:** If there are any remaining funds after the above distributions, the surplus will be distributed according to the company's constitution.

However, if the company had been subject to Moratorium in the 12-week period prior to the commencement of the liquidation, certain unpaid pre-Moratorium or Moratorium debts which are not part of the Moratorium payment holiday will be given "super priority" in the liquidation ahead of the liquidator's fees and expenses. This includes certain debts owed to employees who have been kept on by the administrator for at least 14 days and "financial services" debts. A key exception to note in relation to such "super priority" debt is that accelerated "financial services" debt (i.e. pre-Moratorium "financial services" debt which fell due as a result of an acceleration or early termination provision in the contract) will not acquire "super priority" in such circumstances.

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;

Avoidance of floating charge

Section 245 of the Insolvency Act renders a floating charge void if:

- it is created within one year before the company's insolvency and the company was unable to pay its debt or became unable to pay its debt as a consequence of the floating charge at the time the floating charge or created (or where the floating charge is created in favour of a connected person, created within two years before the company's insolvency (and there is no insolvency requirement where floating charges in favour of connected persons are concerned))
- no new consideration was provided at the time or after the charge was created.

There is nothing in the given facts which point to Ambitus Bank being a connected party. The floating charge was still granted within the look back period of 12 months prior to the onset of insolvency. Hence if the company was unable to pay its debts or became unable to do so as a consequence of granting the floating charge, the floating charge will be rendered invalid if no new consideration was given by Ambitus. (And if Ambitus is a connected party, the insolvency requirement will not be applicable).

The given facts do not seem to indicate that any new consideration has been provided by the Ambitus to the company in exchange of the floating charge - however, if Ambitus is able to show that it has provided refinancing / additional funding at or after creation of the floating charge or if it has discharged or reduced the debt of the company, then there will be new consideration which will make the floating charge valid (to the extent of the consideration).

If the criteria set out above are satisfied, the floating charge will be automatically invalid. In practice, the liquidator will likely apply to the court for a declaration as to the validity of the charge (or to take proceedings to prevent Ambitus from enforcing the floating charge).

It should also be noted that if Ambitus Bank plc has done anything under the authority of the floating charge prior to the creditor's winding up petition issued on 13 January 2024, the actions taken will not be invalidated even if the floating charge is avoided.

Unfair preference

If Ambitus Bank is a connected party, the liquidator may also apply to the court to avoid the floating charge transaction on the ground of preferences under section 239 of the Insolvency Act. The relevant time that the preference needs to be given for the purpose of section 239 is within 2 years prior to the onset for insolvency if the preference is given in favour of a connected person (and only 6 months if the preference is given to a non-connected person so the transaction will be outside relevant time period if Ambitus is not a connected person).

The liquidator will need to show that:

- Ambitus is a creditor of the company at the time of the transaction (which can be easily established based on the given facts)
- The granted of the floating charge had the effect of putting Ambitus in a better position in the event of the company going into insolvent liquidation than they would have been if the floating charge has not been granted (again, this can be easily established based on the factual pattern)
- The company was influenced by a desire to prefer Ambitus - this requirement may prove to be difficult to establish as desire is a subjective concept and (applying the principles in *Re Mc Bacon*) if it can be shown that the company was driven by the desire to avoid the bank's withdrawal of support rather than a desire to prefer the bank or influenced solely by commercial considerations, then this requirement will not be established.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

Transaction as undervalue

The liquidator may attack the transaction as a transaction undervalue under section 238 of the Insolvency Act.

The transaction takes place within the 2 year look back period prior to the commencement of the liquidation or administration.

As Angela is a director of the company, she is a connected person. Therefore the presumption that the company was insolvent at the time of the transaction applies (section 240 of the Insolvency Act) unless it can be shown otherwise.

The liquidator will need to show that the company entered into the transaction for a consideration which was significantly less than the value of consideration provided by the company. The relevant time of determining the value of the consideration was as at the time of the transaction. As the value of the machines dropped by 50% within one year (which seems likely to be more significant than the normal rate of depreciation of the machine), it seems likely, on prima facie, that the transaction was entered at undervalue.

Since the company was suffering cash flow problems at the time of the transaction, this would make it harder for the aforementioned presumption of insolvency to be rebutted. However, if the purchaser is able to 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 there were reasonable grounds at the time it did so for believing that the transaction would benefit the company, then the court will not grant an order under section 238 to restore the Company to what it would have been if the transaction was not entered (e.g. require the purchaser to return the machine to the liquidation estate).

For completeness, if the machines were further sold to a bona vide third party, interest in the property which was acquired in good faith and for value from a person other than the company would be protected under section 241. As such if the machine has been sold to such bona fide third party, the Court will not make an order against the current owner to return the machine to the liquidation estate, but the Court may order the director to pass on the sale proceeds from such sale to the third party.

Transaction designed to defraud creditors

Furthermore, the liquidator may try to attack the transaction under section 423 as a transaction designed to defraud creditors if (in addition to establishing that the transaction was undervalue) it can be shown that the company entered into the transaction for the purpose of putting assets beyond the reach of claimants against the company or prejudicing the interests of such person in relation to their claims.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

The liquidators may apply to the court to avoid the repayment of the GBP 20,000 existing liabilities pursuant to section 239 of the Insolvency Act.

Aluminium Alumini is a creditor of the company at the time of the payment. The full payment of the GBP 20,000 debt to Aluminium Alumini, which would be an unsecured

creditor in the liquidation, puts it in a better position than it would have been in had the payment not been made. (The further payment of GBP 8,000 for further supplies should not fall within the scope of the section 239 action as that is payment for future supply of goods rather than a payment of existing debts.)

The payment also occurred within the 6 months period prior to the onset of insolvency, so the transaction is within the relevant period even if Aluminium Alumni is not a connected person of the company. However, since the presumption of desire to prefer only applies where the preference is given to a person connected to the company, the burden of proof will be on the liquidators. The threshold for establishing a desire to prefer is high and given Aluminium Alumni is a key supplier of the company, it appears likely that the company may be able to argue that there was no desire to prefer as it was solely influenced the commercial consideration to ensure that the company could continue trading.

*** End of Assessment ***