



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?

An action for a declaratory order under section 245 of the Insolvency Act 1986 (i.e. that a floating charge is invalid) can be brought by the insolvency officeholder (including the liquidator in a liquidation, or the administrator in an administration).

An action under section 6 of the Company Directors Disqualification Act 1986 can be brought by 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.

An action under section 246ZB of the Insolvency Act 1986 (i.e. wrongful trading) can be brought by the insolvency officeholder (including the liquidator in a liquidation, or the administrator in an administration).

For actions under section 127 of the Insolvency Act 1986 (i.e. disposition void unless validated) – if seeking to a declaratory order under section 127 to retrieve company assets disposed of during the relevant period, such application would normally be brought by the insolvency officeholder (including the liquidator in a liquidation, or the administrator in an administration); if seeking a validation order from the court that the disposition is not void, the recipient of the company assets would normally bring the application.

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.

It should be noted that a Moratorium does not prevent enforcement of creditor actions in relation to the debts incurred during the Moratorium, rather it imposes restrictions on enforcement or payment of pre-Moratorium debts.

The following types of pre-Moratorium debts do not form part of the payment holiday under Part A1 of the Insolvency Act 1986 when a company is subject to a Moratorium:

1. the monitor's remuneration or expenses;
2. rent in respect of a period during the Moratorium;
3. wages or salary arising under a contract of employment;
4. redundancy payments; and
5. debts or other liabilities arising under a contract or other instrument involving "financial services", which includes 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?

It should be noted that the appointment of an administrator does not automatically terminate a company's executory contracts, such as ongoing contracts of supply of goods and services. However, such contracts of supply of goods and services may contain *ipso facto* clauses providing for automatic termination when the company enters into an insolvency process (such

as administration). The administrator have various statutory powers and protections against this, to require suppliers of goods and services to continue supplying goods and services to the company during the administration.

For suppliers of gas, electricity, water and communication services

Section 233 of the Insolvency Act 1986 provides that suppliers of gas, electricity, water and communication services (including point of sale terminals, computer hardware and software, information, advice and technical assistance, data storage and processing and website hosting) are not permitted to require payment of outstanding debts to secure new or continued supply to the company in administration, though such suppliers can require the administrator to personally guarantee payment of charges in respect of the new supply.

Section 233A of the Insolvency Act 1986 provides that a supplier of services mentioned in section 233 is generally unable to rely on ipso facto clauses entitling the supplier to terminate the supply or alter the terms of supply or compel higher payments for continued supply.

For suppliers of other goods and services

Section 233B of the Insolvency Act 1986 generally prohibits clauses which allow the supplier of any goods or services to terminate or do any other thing in relation to the supply contract if the company enters a formal insolvency procedure (e.g. administration). This empowers the administrator to prevent the suppliers from making it a condition of continued supply that pre-insolvency arrears be paid, or make other changes to the contract such as increasing prices, nor can the supplier insist on the administrator providing a personal guarantee for payment of charges in respect of the new supply.

However, the supplier may (a) terminate the contract if the company or the insolvency officeholder consents, or (b) make an application to the court that continuation of the contract would cause the supplier hardship, and if the court is so satisfied, it may grant permission for termination of the supply contract.

For suppliers of certain exempted functions

There are certain suppliers who are not limited by the restrictions set out in sections 223, 223A or 223B of the Insolvency Act 1986, including insurers, banks, electronic money institutions, recognised investment exchanges and clearing houses, securitisation companies, overseas companies with corresponding functions. The administrator will have limited powers to stop these suppliers from terminating their contracts if the supply contract so provides.

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?

It should be noted that the assets distributed to creditors according to the statutory priority of payments rules do not include – (i) those assets which the company does not have title, for example debts effectively assigned to a receivables financier, or assets subject to hire purchase or retention of title contracts; and (ii) those assets which are under some “fixed” security in favour of a creditor (e.g. a mortgage of fixed charge over the assets).

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

1. Expenses of the liquidation (section 115 of the Insolvency Act 1986) – this includes the following (in order of priority):
 - a. expenses properly incurred by the liquidator in preserving, realising or getting in any assets of the company;
 - b. cost of any security provided by the liquidator;
 - c. amount payable to a person assisting with preparation of statement of affairs or accounts;
 - d. necessary disbursements by the liquidator in the course of the winding up;
 - e. remuneration of any person who has been employed by the liquidator to perform any services for the company;
 - f. remuneration of the liquidator;
 - g. any corporation tax on chargeable gains accruing on realisation of any assets of the company; and
 - h. other expenses properly chargeable by the liquidator in carrying out its functions in the winding up.

2. Preferential creditors (sections 175 of the Insolvency Act 1986). There are two classes of preferential debts – ordinary preferential debts are paid before secondary preferential debts, but preferential debts in their respective classes rank equally amongst themselves.
 - a. Ordinary preferential debts
 - i. sums owed on account on an employee's contribution to an occupational pension scheme for certain periods of time;
 - ii. remuneration owed to an employee and payable in respect of four months prior to commencement of the winding up, up to maximum of GBP800 per employee;
 - iii. amounts owed by way of accrued holiday remuneration in respect of any period of employment before winding up;
 - iv. claims for monies advanced to pay wages or holiday remuneration;
 - v. levies on production of coal and steel referred to in the European Coal and Steel Community Treaty;
 - vi. claims for amounts ordered to be paid by the company under the Reserve Forces (Safeguard of Employment) Act 1985; and
 - vii. (*in the case of insolvent financial institutions that held deposits*) eligible deposit that does not exceed the compensation payable in respect of the deposit under the Financial Services Compensation Scheme.

 - b. Secondary preferential debts
 - i. (*in the case of insolvent financial institutions that held deposits*) amount owed to eligible persons for the amount in respect of an eligible deposit exceeding any compensation payable in respect of the deposit under the Financial Services Compensation Scheme;
 - ii. (*in the case of insolvent financial institutions that held deposits*) amount owed to eligible persons in respect of a deposit made through a non-UK branch of a credit institution authorised by the competent authority of the UK, and would have been an eligible deposit if it had been made through a UK branch of that credit institution; and
 - iii. PAYE income tax deductions, national insurance deductions, VAT payments, Construction Industry Scheme deductions and student loan repayments.

3. Floating charge holders. If there are more than one floating charge holder, then priority between them usually turns upon which floating charge was created first in time. The

liquidator must set aside a “prescribed part” of the company’s net property available for satisfaction of unsecured debts, and must not distribute this to a floating charge holder. If a floating charge holder has an outstanding unsecured balance owing to it, it cannot participate in the distribution of the prescribed part.

- a. If the insolvent company’s net property does not exceed GBP 10,000 – the prescribed part is 50% of the property.
 - b. If the insolvent company’s net property exceeds GBP 10,000 – the prescribed part is the sum of 50% of the first GBP 10,000 and 20% of the excess value above GBP 10,000, subject to a maximum amount of GBP 800,000.
4. Unsecured creditors.
 5. Shareholders, to the extent there are sufficient funds to pay all the creditors. The surplus is distributed amongst the shareholders according to the company’s constitution.

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 of the Insolvency Act 1986 provides that certain unpaid pre-Moratorium or Moratorium debts are afforded “super priority” status, and such debts are paid in higher priority to expenses of the liquidation, which would have ranked highest under the general statutory priority payment rules.

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;

Avoidance of floating charge

Under section 245 of Insolvency Act 1986, the floating charges created in favour of pre-existing unsecured creditors shortly before the company enters a formal insolvency procedure may be rendered invalid. Ambitus Bank plc is an existing creditor/lender of the company, therefore *prima facie* section 245 could be relevant for the liquidator to seek a declaratory order for invalidating the floating charge granted in favour of Ambitus Bank plc.

Ambitus Bank plc, as an independent financier, is unlikely a person connected with the company, therefore the relevant time to consider whether a floating charge can be avoided is likely 12 months prior to onset of insolvency (i.e. 12 months prior to 13 January 2024, starting from 13 January 2023). Since the floating charge was granted in June 2023, it is caught within the relevant time period.

It should be ascertained whether any new consideration was provided by the company for the floating charge. For example, did Ambitus Bank plc grant new money to the company at the same time as or after creation of the floating charge, and/or discharged or reduced the debt owed to Ambitus Bank plc at the same time or after creation of the floating charge? From the facts, it is unclear if any new consideration was provided for the floating charge in question.

Unfair preference

Under section 239 of the Insolvency Act 1986, a transaction entered into by the company (including the grant of security to a creditor) shortly before entering a formal insolvency process placing one of its creditors in a better position than others, could be avoided for unfair preference.

If a preference was given in favour of a person not connected to the company, the relevant period where a preference transaction will be captured is 6 months prior to onset of insolvency (i.e. 6 months prior to 13 January 2024, starting from 13 July 2023). Since the floating charge was granted to Ambitus Bank plc in June 2023, it is unlikely that such grant of security could be avoided for unfair preference.

In any event, to establish an unfair preference, a desire to prefer must be established. In this case, Ambitus Bank plc placed pressure on the company to grant the security, and the company acceded to such pressure to prevent the bank from demanding for repayment of the company's loan – considering the reasoning in *Re MC Bacon Ltd* [1990] BCC 78, it may be difficult to establish a desire by the company to prefer the bank when the company was likely influenced solely by commercial considerations in granting the floating charge in favour of Ambitus Bank plc.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

Transaction at an undervalue

Under section 238 of the Insolvency Act 1986, transactions entered shortly before the company entered formal insolvency proceedings at an undervalue could be avoided.

In order to challenge the transaction, it must have taken place 2 years prior to commencement of the liquidation (i.e. 2 years prior to 13 January 2024, starting from 13 January 2022). Since the disposal of the two laser cutting machines took place in January 2023, the transaction falls within the relevant period.

The liquidator must show that the company entered into the transaction for disposal of the two laser machines for a consideration which, in money or money's worth, was at the date of the transaction, significantly less than the value in money or money's worth of the consideration provided by the company. It is difficult to tell from the facts whether the two laser cutting machines were disposed at below market value – while the machines originally cost GBP 100,000, such value was a year before the transaction took place, and the value of the machines as of January 2023 may need to account for depreciation and fair wear and tear after one year of use. Nonetheless, given that Angela Bannister paid less than half the original price of the machines (GBP 40,000, only 40% of the original price), *prima facie* there seems to be an argument that the machines have been disposed of below market value.

The liquidator must also show that the company was unable to pay its debt as they fell due when the transaction was entered into, or became unable to pay its debt as a result of the transaction. In this case, since Angela Bannister as a director of the company is a “connected person”, the company is presumed to have been insolvent or have become insolvent as a result of the transaction, unless the contrary is proved.

Angela Bannister can attempt to raise a defence that the transaction was entered into by the company in good faith and for purposes of carrying on its business, and there were reasonable grounds at the time of the transaction for believing the transaction would benefit the company. Since the company had cash flow problems, the sale of the machines to the director could improve the company's cash position, and potentially benefited the company. However, it is uncertain what Angela's intentions are for purchasing the machines, hence there is a counterargument that the transaction was not entered in good faith, and potentially for other reasons (e.g. for the director to purchase the machines at a low price for her own personal benefit).

Assuming Angela still holds the machines, the court could make an order to reverse the transaction. However, if the machines had since been sold to a third party buyer who acquired them in good faith and for value, then the court may grant alternative relief, e.g. compensation order made against Angela to make good the loss suffered by the company as a result of the transaction.

Transactions defrauding creditors

Under section 423 of the Insolvency Act 1986, where a transaction was entered into to defraud creditors, the liquidator can challenge the transaction and seek to have it avoided or obtain appropriate relief against the person benefitting from the transaction.

To succeed on this action, it must be shown that (i) the company entered into a transaction with another person at an undervalue (including receiving significantly less consideration than it has provided), and (ii) the company entered into the transaction for purposes of putting the assets beyond reach of creditors or otherwise prejudicing interests of creditors in relation to a claim they may make against the company. There are no time limits in respect of which the transaction must have been entered.

As discussed above, there is a *prima facie* argument that the machines have been disposed of at an undervalue. However, the liquidators also need to show the transaction was entered into for purposes of putting assets beyond control of the creditors – Angela could offer different

explanations for this, for example that the transaction was intended by Angela to inject cash into the company with a view to alleviate its immediate cash flow problems.

Assuming the challenge is successful, the relief available is similar to transaction at an undervalue – the court could make an order to reverse the transaction, or make a compensation order against Angela if the assets have since been sold to a *bona fide* purchaser for value.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

The winding up order was made on 28 February 2024, and the winding up petition was issued on 13 January 2024. The commencement of winding up of the company will relate back to the date of the winding up petition, i.e. 13 January 2024.

Under section 127 of the Insolvency Act 1986, any disposition of property of the company (including any payment of money) made after commencement of winding up is avoid, unless the court otherwise orders. Since the payment of GBP 20,000 and further payment of GBP 8,000 for further supplies to Aluminium Alumini Ltd (the “**Payments**”) appear to have been made on a month before the winding up order was made (i.e. on or around 28 January 2024), the Payments are *prima facie* unlawful dispositions of the company’s assets, and the liquidator can attempt to claw back such payments from Aluminium Alumini Ltd.

Aluminium Alumini Ltd may apply to the court for a validation order to declare such Payments shall not be void, and has the burden of showing that the order should be made – it will need to establish that the Payments were made *bona fide* in the ordinary course of business of the company without prejudicing the interests of parties interested in the assets of the company, such that the Payments were made for the benefit of the general body of the unsecured creditors. In this case:

- the effect of the Payments seems to have been to give a preference to Aluminium Alumini Ltd over other creditors, and departs from the *pari passu* principle;
- however, in cases where the court considers that continuance of trading was in the best interests of creditors, payments necessary to ensure continued supplies to enable the company to continue trading, and goods paid for on terms of cash on delivery to enable further supplies to be received by the company, could be validated by the court;
- Aluminium Alumini Ltd as one of the company’s key suppliers is critical to enabling the company to continue trading, and as mentioned in the facts continued supply of metal was seen as essential by the company. However, the court could take a view that continuance of trading a month before the winding up order was made is not in the best interests of the creditor, and that the company should have been put into liquidation as soon as possible; and
- it may be difficult for Aluminium Alumini Ltd to argue that it was unaware that a winding-up petition had been presented against the company, since some time had passed between the petition having been presented on 13 January 2024, and Aluminium Alumini Ltd obtaining the payments on 28 January 2024.

Summarising the above, the court could validate the Payments on the basis that continued supply of metal by Aluminium Alumini Ltd would enable to the company to continue trading which was in the best interests of the creditors. On the other hand, if the court does not agree

that continued trading was in the best interests of the creditors, and considering that the Payments appeared to benefit only one creditor (Aluminium Alumini Ltd) to the detriment of other unsecured creditors, the court could refuse to validate the Payments.

*** End of Assessment ***