



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. Liquidator, Administrator, A creditor/contributory of the Company
- ii. Secretary of State, Liquidator, creditor of the Company
- iii. Liquidator, Administrator
- iv. Liquidator, creditor of the Company

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.

- 1) Wages/Salary of employees etc under a contract of employment
- 2) Rental in respect of a period during the Moratorium
- 3) Expenses/incidentals incurred for supply of goods and services during the Moratorium
- 4) "Financial services" debts (consisting of lending, leasing or providing guarantees)
- 5) The monitor's remuneration and expenses incurred
- 6) Tax liabilities and redundancy payments (payment due to employees as a result of their dismissal during the moratorium)

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?

Upon entering administration, the Company's executory contractors and terms are not necessarily terminated automatically. Existing contractors with suppliers generally remain in effect despite administration. The administrator will be required to assess the type of goods and services required and which to retain. Under section 233 of the Insolvency Act 1986, administrators are allowed to apply to court for an order to require a supplier to continue supplying the goods and services during the administration of the company. However, burden of proof is on the administrator to indicate that the continued supply is necessary for the company's going concern and/or potential rescue.

In any event, should the supplier decide to continue supplying goods and services to the Company during the administration period, the act permits that the administrator be personally liable and personally guarantee the payment of the incurred expenses/due to the supplier in relation to the goods and services supplied during the administration period. However, the supplier is not permitted to include pre-administration debts as a requirement for providing post-administration supply. Section 233A also does not permit the supplier to rely upon an

ipso-facto clause (which would allow the supplier to terminate the supply), alter any conditions and terms of the supply and/or demand for higher payments in exchange for the continued supply.

Question 3.2 [maximum 9 marks]

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

In a liquidation, the order of priority of payments is generally determined by the Insolvency Act 1986 in the United Kingdom. The goal of having priority for payments is to ensure that certain classes of creditors receive payment before others. They can typically be classified as follows:-

- 1) **Secured Creditors**
Secured Creditors have security or collateral in the assets of the Company and are entitled to be paid from the proceeds of the sale of these assets before any other creditors. Secured Creditors would enjoy the “first-bite” of the proceeds from such sales and usually have a charge on specific assets of the company. Secured creditors can be further divided into secured creditors with a fixed charge (whereby they have security over a specific asset) and secured creditors with a floating charge (whereby they have a security over all the assets belonging to the company that crystallises into a fixed charge upon certain triggering events, usually administration/liquidation/any insolvency related matter)
- 2) **Costs and expenses of the Insolvency Proceeding**
Next, the costs and expenses incurred for the liquidation process will be paid. This includes liquidator’s remuneration and disbursements, legal costs incurred, and all other administrative fees that was incurred during the course of liquidation.
- 3) **Preferential Creditors**
Preferential Creditors are unsecured creditors but are prioritised due to their special status. Examples of preferential creditors are taxes due to the government, employee wages/salary/holiday pay/termination severance. Preferential creditors will be prioritised over unsecured creditors.
- 4) **Unsecured Creditors**
Unsecured creditors are creditors that have no security over any assets of the company. They are usually trade creditors or suppliers of the company and often recover a small percentage or zero of their total debt.
- 5) **Shareholders**
Lastly, in very rare circumstances where there are surplus funds after making distribution payments to all the above class of creditors, shareholders will receive the remaining funds that are left.

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 may affect the priority of payments. During a moratorium, the company is protected from legal actions by creditors, and the moratorium is intended to provide breathing space for the company to explore restructuring options.

The nature of the rights enjoyed by each class of creditor may be affected during a moratorium, and the restructuring plan developed during this period could impact the final distribution of funds in the liquidation:-

- Debts incurred during the moratorium will take priority over pre-moratorium unsecured debts (such as employee wages, rent or other expenses that are incurred)
- Secured debts created during the moratorium will also be granted priority over existing security interests
- Section 174A states that unpaid pre-moratorium or moratorium debts shall be paid in priority in a subsequent administration/liquidation. Therefore, the section allows for certain debts by unsecured creditors to be prioritised.

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;

The relevant issue pertaining the debenture created in favour of Ambitus Bank PLC was whether the debenture created was validly created in good faith and does not prejudice or is detrimental to the position of other creditors. It may be investigated under Section 245 of the Insolvency Act 1986.

Based on the facts given, the debenture was created under the pressure of the bank and to prevent the bank from demanding repayment of the loan. There may be grounds for the

debenture/floating charge to be invalidated should the bank fail to satisfy that “new” consideration was provided as set out in section 245 of the Insolvency Act 1986. An example of a scenario is that the floating charge created should allow the company to secure fresh funds to help with the cash flow and for the survivability of the company.

Notwithstanding the above, the liquidator’s should also investigate whether the floating charge was already crystallised at the time of creation. As the debenture was made in June 2023 and the winding-up order was in February 2024, the proximity of both events might raise questions about the company’s solvency at the time of creating the charge. It’s crystallisation would suggests that the Bank’s intention of creating the debenture had an intent to secure the bank’s position and recovery, and at the same time, prejudice and is preferential to the other unsecured creditors.

In the event the company goes into liquidation/administration, the validity of the floating charge may be challenged and set-aside. However, the underlying debt and amount owing to the bank remains valid.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

The issue at hand would be that the laser cutting machines might’ve been sold/disposed of at an undervalue as the sale was approved for GBP40,000 whereby it was bought at GBP100,000 only a year before. Taking into account the financial difficulties of the company and the timing of the sale, it further raises concerns on the fairness of the transaction. The sale was also completed within the period of two years prior to the commencement of the compulsory winding-up, which allows the liquidator/administrator to investigate the transaction. The relevant section in the Insolvency Act 1986 is Section 238 - transactions at undervalue.

It would also appear that the disposal was made to a director of the Company which is a related party. Pursuant to section 239, the court may order for the transaction to be reversed if the court is satisfied that the company has acted in a preferential manner. The company can be presumed to be insolvent should it involve any transaction with a related person (in this case, the director, Angela Bannister as the decision to transact may be influenced)

In addition, the liquidator/administrator can conduct an investigation on the sale and potentially take action to recover the machines. The liquidator can also examine whether the directors fulfilled their duty to promote the success of the company and acted in the best interests of creditor. An action taken under this section states that the burden of proof is with the liquidator/administrator to establish the connection to the claims.

In arriving to a conclusion, the liquidator should determine whether the basis of the disposal was just and well documented, the fair value of the disposal was supported by valuation reports and relevant market conditions and that the disposal was made bona fide. Under section 238, the liquidator or administrator is required to indicate that the transaction entered was for a consideration significantly less than the actual consideration of the transaction.

Should the Court be satisfied that the transactions were entered into by the company in good faith and for the benefit of carrying on its business with reasonable grounds, the court may not allow the liquidator’s claim/order in terms of section 238. Protection is also allowed for certain persons as per section 241 to not prejudice a party’s interest should the transaction be completed bona fide and in good faith and value.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

With regards to the payments by the company to Aluminium Alumini Ltd, the issue would be if the payments made were prioritized ahead of the other creditors and whether such payments was detrimental to the position of the unsecured creditors. Section 239 refers to preferences that the company has given priority over other creditors such that it has placed the creditor in a better position than others.

The Liquidator/Administrator should conduct an investigation on the payments to determine whether it was done bona fide for the benefit of the company to continue its operations or was it done in a preferential manner. In the event the liquidator's are able to show that the payments to Aluminium Alumini Ltd was preferential and prioritised ahead of other creditors, section 239 allows the court to set aside such payments and declare them void. This is especially the case should the company be insolvent at the time of the payments.

In addition, payments made was to secure future supplies and not for the immediate business purpose to help generate revenue and alleviate the financial difficulties faced by the company. As mentioned above, the liquidators may apply to court to recover the payments to the company.

*** End of Assessment ***