



**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

- (c) its members, or any class of them.
- (d) The purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the said financial difficulties.
- (e) 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?

[Section 245 of the Insolvency Act (avoiding invalid floating charges):

- Actions under this section can be brought by the insolvency office-holders (administrators or liquidators) in their name; or alternatively, be pursued in the name of the company in the ordinary way

Section 6 of the Company Directors Disqualification Act 1986

- The liquidator and administrator can bring an action on behalf of a company to sue a director. Under section 246ZD of the Insolvency Act, office-holders have wide powers to assign causes of action to a third party funder who itself may then sue the defendant.

Section 246ZB (administration) of the Insolvency Act 1986 (Wrongful Trading)

- Administrators (claims can be brought in their name for the benefit of the company)
- Administrators can also assign the right to a third party, such as a creditor. It was confirmed in *Re Totalbrand Limited* that an office-holder was entitled to assign a claim including its proceeds without any requirement that the company should receive a payment from the proceeds (if ultimately successful). It was sufficient that the office-holder had received a payment in consideration for the assignment.

Section 127 of the Insolvency Act 1986 (Dispositions void, unless validated)

- Liquidators. \* In theory, it is not necessary for a liquidator to apply to court for a declaration that a transaction has been made void by the operation of section 127 of the IA 1986. A transaction within the scope of section 127 of the IA 1986 will be automatically void unless the court orders otherwise. However, where the liquidator's efforts to recover property that was the subject of a void transaction are being contested, they may need the court's assistance. In this context the liquidator will often seek an order for restoration of the property, coupled with a declaration that the transaction was void.

A transaction will not be void under section 127(1) of the Insolvency Act 1986 if the court makes an order validating the transaction. The term "validation order" refers to an order, made under section 127(1) of the Insolvency Act 1986, that validates a disposition of a company's property which would otherwise be void (or might become void) under that section.

The following parties may apply for a validation order:

- A company against which a winding-up petition has been presented.
- Any interested party to a transaction with a company against which a winding-up petition has been presented (*Re Argentum Reductions (UK) Ltd* [1975] 1 WLR 186).

**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 company does not have a payment holiday in relation to pre-Moratorium debts which the entity subject to the Moratorium must continue to pay as they fall due. The types of pre-moratorium debts not subject to a payment holiday are listed in section A18(3) of the Insolvency Act 1986:

- (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,
- (e) 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?

[In short, yes, they can. The appointment of an administrator does not automatically terminate a company's executory contract. As explained below, certain provisions of the Insolvency Act can effectively "lock-in" suppliers (with certain exceptions, depending on the type of services provided) into continuing to provide the company in administration with certain services.

***Essential Services Suppliers***

**Suppliers cannot terminate contracts of supply.** Terms in contracts of supply which provide for automatic termination now become subject to increasing statutory exceptions which largely make such automatic termination (ipso facto) clauses void. Section 233 of the Insolvency Act applies to the supply of certain essential services, such as gas, electricity, water and communication services. Communication services include the supply of goods and services such as point of sale terminals, computer hardware and software, information, advice, 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 Insolvency Act allows suppliers to require that the administrator must personally guarantee payment of charges in respect of the new supply. Section 233 A provides that 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. Section 233 B complements the provisions in sections 233 and 233A of the Insolvency Act by prohibiting termination by utility, communications and IT suppliers.

***Other suppliers***

Section 233 B of the Insolvency Act removes the restrictions on termination to all other suppliers (with a limited number of exceptions which include insurers, banks, electronic money institutions, clearing houses and recognised investment exchanges; securitisation companies; and overseas companies with corresponding functions. ]

### 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?

#### [A. The order of priority of payments

As a general note, a liquidator may only realise assets which belong to the company. If debts have been assigned or assets are subject to hire purchase or retention of title contracts, the liquidator will have no right to those assets. The priority of payment is as follows:

**1. Expenses of winding up, including the liquidator's remuneration (section of the Insolvency Act):**

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

#### *Rights/Obligations*

The liquidator cannot prioritise the payment of its own remuneration over the expenses listed under 1(a) – 1(3) of the list below.

**2. Preferential creditors**, as defined in sections 386, 387 and Schedule 6, which include limited claims of employees and some taxation liabilities and some taxation liabilities, among others. There are two classes of preferential debts: ordinary and secondary. 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. Schedule 6 of the Insolvency Act contains a list of preferential debts. The "**ordinary**" **preferential debts** include, in particular, the following categories:

- a) Any sum owed on account on an employee's contribution to an occupational pension scheme
- b) Remuneration owed by the company to a person who is or has been an employee of the debtor
- c) Claims for monies advanced to pay wages or holiday remuneration
- d) Levies on the production of coal and steel referred to in articles 49-to of the European Coal and Steel Community Treaty etc.

The examples of **secondary preferential debts** include, in particular, (i) amounts owed by the company to one or more eligible persons in respect of a deposit that was made through a non-UK branch of a credit institution authorised by the competent authority in the UK and would have been an eligible deposit if it had been made through a UK branch if that credit institution; (ii) PAYE income



tax deductions, national insurance deductions, VAT payment, Construction Industry Scheme deductions and student loan repayments etc.

### *Rights*

The payments to the employees of the company in liquidation has been given some priority. In most insolvencies the statutory protection afforded to employees under the Employment Rights Act 1996 provides a much more extensive protection to employees.

### **3. Floating charge holder and “the prescribed part”**

#### *Floating Charge*

If there is more than one floating charge holder, priority between them usually turns upon which floating charge was created first.

#### *Prescribed Part*

Before any payment can be made to a floating charge holder, the liquidator must first consider the application of section 176A of the Insolvency Act which applies to a company with a floating charge created on or after 15 September 2003 and the company has gone into liquidation. The liquidator is under duty to make a “prescribed part” of the company’s net property available for the satisfaction of unsecured debts and must distribute any of this prescribed part to a floating charge holder except insofar as it is in excess of the amount required to satisfy all the unsecured debts.

When the company’s net property, which is calculated after payment of liquidation expenses and preferential debts, does not exceed GBP 10,000, the prescribed part amounts to 50% of that property available for satisfying debts of floating charge holders.

When the property is less than the “prescribed minimum” of GBP 10,000 and the liquidator thinks that making a distribution to unsecured creditors would be disproportionate to the benefits, then the duty to make the distribution of the prescribed part does not apply. For net property surpassing GBP 10,000, the prescribed part is the sum of 50% of the first GBP10,000 in value, with an additional 20% of the excess in value above the GBP 10,000, subject to a maximum amount of the prescribed part of GBP 800,000.

### *Rights*

A floating charge holder (or any secured creditor), who may have an outstanding unsecured balance owing to it, is not permitted to participate in the distribution of the prescribed part. The holder of a qualifying floating charge may choose to enforce its charge by appointing an administrator which usually prevent a liquidator being appointed until the administration is completed. If such a charge holder consents to the appointment of a liquidator rather than an administrator, the floating charge holder will be paid out according to the charge holder’s priority.

### **4. Unsecured creditors**

They are paid last in the statutory order.

### **5. Shareholders**

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 holdings.

**B. The effect of the Moratorium on the order of priority of payments**

The Moratorium is a standalone procedure and is not linked to any other procedures. It is a debtor -in-possession procedure whereby the directors remain in control of the company, subject to a supervision by a monitor. The main goal is to rescue the company as a going concern. However, if the company is not rescued as a going concern but entered into liquidation within 12 weeks of the end of the Moratorium, the priority of debt in the subsequent liquidation changes as follows:

- Section 174 A of the Insolvency Act provides that certain unpaid pre-Moratorium or Moratorium debts (the debts which are not part of the payment holiday, for example, debts owed to employees or “financial services” debts) are paid in the subsequent litigation in priority to even the liquidator's fees and expenses. This section therefore gives certain unsecured debts a form of “super priority” in a subsequent liquidation. By way of illustration, unsecured (or secured) pre-Moratorium bank debt, falling within the definition of “financial services”, will acquire a “super priority” in the liquidation. However, there is an exception which prevents such liabilities from acquiring such “super priority” where the debt is accelerated debt, i.e. any pre-moratorium financial service debt which fell due by reason of the operation of, or exercise of rights under, an acceleration or early termination provision in the financial service contract. ]

**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 liquidator should consider if the floating charge in favour of Ambitus Bank plc (the Bank) can be avoided pursuant to section 245 of the Insolvency Act, which renders invalid floating charges given by a company at a relevant time, except to the extent, in substance, that “new consideration is provided for the charge. Section 245 does not prevent lenders who are providing fresh funding to the company from taking a floating charge for that new funding.

On the facts, there is nothing to suggest that the Bank will be providing fresh funding. Accordingly, the Bank could be regarded as a pre-existing unsecured creditor. There is also nothing to suggest that “fresh” consideration, such as money paid at the time as or after the creation of the charge, was provided for the charge.

The Bank is not connected with the Company, accordingly, the relevant time for the purposes of section 245 is any time within the period of 12 months prior to the onset of insolvency, but only if at the time of the creation of the charge the Company was unable to pay its debts (as specified in section 123 of the Insolvency Act) or became unable to do so in consequence of the transaction. It is not stated in the scenario whether the Company was either “cash flow” or “balanced sheet” insolvent at the time the Bank demanded the debenture. However, the Bank’s demands certainly indicate that it had concerns over the financial stability of the Company.

Giving that the debenture was granted in June 2023 and the winding up order was issued on 13 June 2024, which is less than 12 months prior to the onset of insolvency, provided that the Company satisfied the requirements of section 123 of the Insolvency Act at the time the debenture was granted, the liquidator has a strong case to avoid the charge by making an application to the court.

**Question 4.2 [maximum 6 marks]**

The sale of the laser cutting machines

[The liquidator could seek to unwind this transaction as transaction at undervalue pursuant to section 238 of the Insolvency Act. Under section 238, a liquidator may attack a transaction which was entered prior to the company entered into liquidation where the transaction was at an undervalue by demonstrating, in particular, that the company entered into a transaction (i) at the relevant time (ii) with another person for a consideration which, in money or money’s worth, was, at the date of that consideration, significantly less than the value, in money or money’s worth, of the consideration provided by the company. The relevant time for the purposes of this section is any time which is in the period of two years prior to the commencement of the liquidation. Based on the facts, the sale of the laser cutting machines seems to have occurred in January 2023, which is 1 year prior to the onset of insolvency.

Section 238 requires that at the time the transaction was entered into, either the company was unable to pay its debts as they fell due within the meaning of section 123 or become unable to pay its debts within the meaning of that section in consequence of the transaction. However, in the current scenario, the sale transaction was made with the director, who is a connected person to the Company.

In such cases the company is presumed to have been insolvent, or to have become insolvent as a result of the transaction, unless provided otherwise. On the facts, the liquidator has a good chance to unwind this transaction by making an application to the court. However, the direction may argue that the sale was entered by the Company in good faith and for the purpose of carrying out its business, and that at the time it did so there were reasonable grounds for believing that the sale of the laser cutting machines to the director would benefit the Company. ]

**Question 4.3 [maximum 4 marks]**

**The payments to Aluminium Alumini Ltd.**

[The liquidator could seek to argue that the payments to Aluminium Alumini Ltd (Alumini) is a preference transaction within the meaning of section 239 of the Insolvency Act. In order to succeed on an application under this section, the liquidator must demonstrate the following;

1. Alumini was a creditor of the Company at the time of the payment transactions
2. The payments made by the Company had the effect of placing Alumini in a better position that it would have been in if the preference had not been given
3. The Company, in making the payments, was influenced by a desire to prefer Alimini over other creditors
4. The preference was given at a relevant time.

The burden of proof in relation to the above matters will be rested on the liquidator. For a preference to be actionable, it must have occurred within the six months prior to the onset of insolvency if made in favour of a person not connected to the company. In this scenario the payments were made once month before the onset of insolvency. There is nothing to suggest that Alumini is in any way connected to the Company.

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It should be noted that the fact that pressure was applied by Alimini is not relevant for the purposes of determining the preference. Pressure should be considered relevant only to whether the is the requisite desire to prefer Alumini. The company must have been influenced by the desire to put the preferred party into a position which, in the event of the company going into insolvent liquidation, would be better than the position it would have been in if the preference had not been given.

Millet J in *Re MC Bacon Ltd* provides guidance as to the meaning of the relevant desire, noting a distinction between intention, which is an objective concept, and desire, which is a subjective one. Therefore, an intention to grant security to a creditor necessarily involves an intention to prefer that creditor in the event of insolvency.

In *MC Bacon*, it was found that the company was entirely dependent upon bank support for continued trading, if the bank withdrew its support, the company would be forced into immediate liquidation, the granting of the debenture was motivated not by a desire to prefer the bank, but by the desire to avoid the calling in of the overdraft and the continuation of trading by the company. Furthermore, in subsequent decisions, it has been held that where the company is influenced solely by the commercial considerations, specifically attempts to ensure that the company continues trading, there could be no desire to prefer. It is clear from the current scenario that the continued supply of metal was essential for the Company and it might be hard for the liquidator to argue that the Company was not influenced solely by commercial considerations.

**\* End of Assessment \***