



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 of the Insolvency Act is the floating lien avoidance statute. It applies only to floating liens and when the company is in administration or liquidation. As such, it may be brought by either a liquidator or administrator.
- (ii) Section 6 of the Company Directors Disqualification Act 1986 addresses disqualification of a director. The application to the Court is made either by the Secretary of State or by the Official Receiver on instruction from the Secretary of State when the pertinent company has already been wound up by the Court.
- (iii) Section 246ZB of the Insolvency Act 1986 involves wrongful trading which is an available remedy to a liquidator in order to hold a director liable for debts to the company.
- (iv) Section 127 of the Insolvency Act 1986 allows for avoidance of a transfer made after commencement of a compulsory winding up. This action is brought by the liquidator to retrieve assets disposed of by the Company after the petition and before the winding up order.

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.

Part A1 of the 2020 Act is the Moratorium which is applied for by the directors of a company. Debts which are not stayed by the Moratorium include the following:

- 1) The monitor's remuneration or expenses
- 2) Wages or salary arising under a contract of employment
- 3) Rent incurred during the Moratorium
- 4) Good or services supplied during the Moratorium; and
- 5) 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?

A provision in a contract that effectuates automatic termination upon insolvency, known as an ipso facto clause, was historically permitted. However, many statutes have been promulgated to restrict the effect of ipso facto clauses to such a degree that most often they are now void. This is because an administrator who wishes to operate a business will often need certain contracts to continue in

order to effectively operate. Consequently, pursuant to 233A of the Insolvency Act 1986, suppliers are not permitted to required payment of pre-administration debts in order to continue supply and cannot rely on an ipso facto clause to terminate the contract. Also, pursuant to Section 233B of the 2020 Act, the supplier may not “do any other thing” in relation to the contract as a condition of continuing. For instance, the supplier cannot raise the prices. Under the Act, the supplier could require that an administrator personally guarantee payment of any charges incurred during the administration. However, this is no longer true under the 2020 Act.

Question 3.2 [maximum 9 marks]

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

Under Section 115 of the Act, there are several categories of expenses that are paid at the highest level of priority in a liquidation; generally these are fees/expenses incurred during the liquidation. These categories of expenses also have a hierarchy of payment within this highest level; they are paid in the following priority order:

- 1) Expenses properly incurred by liquidator in collecting, preserving or administering the assets;
- 2) Any security costs by the liquidator;
- 3) Fees/expenses incurred in preparing statement of affairs or accounts;
- 4) Any necessary disbursements by the liquidator during the winding up;
- 5) Fees/expenses of anyone employed by liquidator to provide services in the case;
- 6) Fees/expenses of liquidator;
- 7) Chargeable gains tax on any sales of assets;
- 8) A catchall aimed to include any other expenses properly chargeable as part of the windup

Each of the above categories must be paid in full prior to the next listed category receiving anything and, if the monies are not sufficient, each creditor within the same category will share on a pro rata basis.

Once all of the above liquidation expenses are paid, the next category of payment is known as the “preferential creditors”; which are primarily composes of a monetarily limited wage claim for employees and some tax liabilities. Preferential debts are listed in Schedule 6 of the Act and are divided into two types: ordinary and secondary. Ordinary debts are paid first and all debts within that type share on a pro rata basis. Then, if the ordinary preferential debts are paid in full, the secondary preferential debts will share, also on a pro rata basis, unless/until they are paid in full.

The following debts are ordinary preferential debts:

- 1) Any amounts owed for employee’s contribution to pension scheme, incurred within 4 months prior to commencement;
- 2) Any amounts owed for the employer’s contribution to pension scheme, incurred within 12 months;
- 3) Wages owed and incurred within 4 months, up to maximum of GBP 800
- 4) Accrued holiday remuneration for any period
- 5) Reimbursement claims for lenders for wages paid by them, to the same extent as listed above
- 6) A few other special interest charges (levies on production of coal, claims under Reserve Forces, certain limited financial institution deposits)

The secondary preferential debts are comprised of additional financial institution deposits (those over the limit of the ordinary preferential debts and from banks outside of the UK) and various tax deductions, VAT payments and student loan repayments.

If there are still funds left in the estate after payment of the liquidation expenses claims, the ordinary preferential debts and the secondary preferential debts, the next category of payment is to the floating charge holder. If there is more than one floating charge holder, the one that was created first gets the priority of payment. Also, before any payment can be made to a floating charge holder, the liquidator needs to apply Section 176A of the Act if the floating charge was created on or after 9/15/03. Section 176A requires that a percentage of the “net property” (the amount remaining after payment of the liquidation and preferential debts) be provided to unsecured creditors, either 50% if the net property is less than or equal to 10,000 GBP (unless the liquidator deems this disproportionate) or the sum of 50% of the first 10,000 GBP plus 20% of excess above 10,000 GBP (up to GBP 800,000). Also, the floating lien creditor cannot share in the “carved out” distribution to unsecured creditors.

Next, unsecured creditors are paid, if there is anything left. And finally, any surplus is distributed to the shareholders in proportion to their shares held.

If a Company has been subject to a Moratorium under Part 1A of the Insolvency Act 1986 during the 12 week period prior to commencement of the liquidation, the priority scheme mentioned above may vary significantly. This is because certain unpaid pre-Moratorium debts that are not subject to the “payment holiday” are afforded a “super priority” in a subsequent liquidation. So, for instance, unpaid debts to employees are paid in the subsequent liquidation at a higher level of priority than even the liquidator’s fees and expenses. Similarly, unsecured or secured pre-moratorium bank debt, which falls within the “financial services” exception to the payment holiday, will also normally acquire a super priority (unless the debt came due as a result of an acceleration or early termination provision).

QUESTION 4 (fact-based application-type question) [15 marks in total]

Prior to going into compulsory liquidation on 28 February 2024, under pressure from its bank, Ambitus Bank plc, and in order to prevent it from demanding repayment of the company’s loans, Blazer Laser Limited (the Company), granted a debenture in favour of Ambitus Bank plc in June 2023. The debenture contained a floating charge over the whole of the Company’s undertaking.

The winding up order followed a creditor’s winding up petition issued on 13 January 2024.

Sometime in January 2023, as the Company continued to suffer cash flow problems, the directors approved the sale of two laser cutting machines to Angela Bannister (a director) for GBP 40,000 in cash. The machines had been bought for GBP 100,000 a year before.

A month before the winding up order was made, Angela Bannister received an email from Aluminium Alumini Ltd, one of the Company’s key suppliers. The supplier demanded immediate payment of all sums owing to it and informed the Company that further supplies would only be made on a cash on delivery basis. As the continued supply of metal was seen as essential by the Company, the board authorised a payment of GBP 20,000 to cover existing liabilities and agreed to further payments, on a cash on delivery basis, for further supplies which amounted to further payment of GBP 8,000 up to the date of the winding up order.

The liquidator has asked for advice whether any action may be taken in respect of the floating charge in favour of Ambitus Bank plc and the two subsequent transactions.

Using the facts above, answer the questions that follow.

Identify the relevant issues and statutory provisions and consider whether the liquidator may take any action in relation to:

Question 4.1 [maximum 5 marks]

The floating charge in favour of Ambitus Bank plc;

Section 245 of the Act applies to Ambitus Bank's floating charge. Section 245 invalidates some floating charges if they were granted for no new consideration. In other words, a bank cannot retain a floating lien which was granted without providing any new money. The application of section 245 requires that the new loan took place within a certain period of time prior to the "onset of insolvency" and that, at that time the company was either unable to pay its debts or became unable to pay as a result of the transaction.

In our facts, it does not appear that Ambitus Bank is connected with the company. Therefore, the applicable reach back period is within 12 months prior to the "onset of insolvency". Under section 129 of the Act, the liquidation is deemed to have commenced as of the date of the petition, not the wind up order. In our facts then, the onset of insolvency should be the date of the petition, January 13, 2024. Since the debenture was provided on June 2023, this would meet the 12 month requirement and therefore the lien should be avoided.

The Bank could try to argue that the company wasn't insolvent as of June 2023 under either the balance sheet or cash flow definitions of insolvency (See Section 123 of the Act). Essentially, the granting of the floating charge would be invalid if the Debtor either could not pay his debts as they came due at the time the lien was provided or was rendered unable to pay his debts as a consequence of the transaction. This argument should also fail because our facts indicate that the Debtor began having cash flow issues at least by January 2023 prior to the granting of the floating charge.

The result should be that the lien is invalidated as of the date of the petition. However, any benefit that the Bank obtained prior to the filing of the wind up petition would not be subject to avoidance and the underlying debt of the Bank remains valid (as an unsecured claim).

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

The liquidator may also be able to avoid the sale of the laser cutting machines to Angela Bannister but this is not definite. Section 238 of the Act governs transactions sold at an undervalue. The requirements of Section 238 are that the company (1) made a gift to a person; (2) entered into a transaction with a person that provided no money to the company; or (3) entered into a transaction with another person for consideration that was significantly less than the value "in money or money's worth". The required time period for the transaction is within 2 years prior to the commencement of the liquidation, which is well met here. There is also a requirement of Section 238 that the company was unable or becomes unable to pay its debts within the meaning of Section

123. However, this definition of insolvency is presumed if the transfer was to a “connected person”. Since Angela Bannister is a director, this requirement would be presumed satisfied.

The likely uncertainty in our fact pattern would be whether the price of 40K GBP was adequate for machines bought for 100K GBP one year before. This may require an evidentiary hearing as to valuation/depreciation for this type of asset. Also, Ms. Bannister could argue that the transaction was entered into in good faith and for the purpose of allowing the business to carry on operations. If the Court believes Ms. Bannister that she reasonably believed the transaction would benefit the company (because the company was in desperate need of cash for instance), then the Court may well decline to avoid the transaction. However, the fact that it was a director that benefitted from the lower price would weigh in favour of avoidance. Also, under section 212, a liquidator can bring a general “misfeasance” type claim against Ms. Bannister based on perhaps a breach of fiduciary duty to the company.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumi Ltd.

The payments made to Aluminum Alumi should be recoverable. First, pursuant to 233B of the Insolvency Act 1986, suppliers are not permitted to require payment of pre-liquidation debts in order to continue supplying the Debtor and that same section prohibits the supplier from “doing any other thing” in relation to that contract. As such, the supplier may not be permitted to change the payments terms to COD.

The timing of the payments here, though, are somewhat problematic. The demand by the supplier came one month before the windup order, or approximately Jan 28, 2024. This predates the wind up order but is after the filing of the windup petition. However, under section 129 of the Act, the filing of the windup petition is deemed to be the commencement of the proceeding, so this should still invalidate the overpayments to Aluminum Alumi.

Moreover, section 127 of the Act specifically avoids any transfers of company property made after commencement of the winding up but before the wind up order, unless the court orders otherwise. Transfer of property in section 127 of the Act includes payment of money as well as assets being sold or transferred. As such, the funds obtained by Aluminum should be recoverable under section 127. The Court does have discretion but generally this would be used to justify ordinary course transactions, not transactions entered into only because of the onset of insolvency. Using section 127, the creditor might well be able to continue the COD payment requirement, but would likely have to return the \$20K GBP.

Alternatively, if the demands of the creditors are determined to be prior to liquidation (ie Section 129 does not apply), then at least the \$20K GBP paid for pre-insolvency debt would be recoverable as a preference. Section 239 governs preferences and prohibits a payment within a pertinent period that enables the creditor to receive more than other similarly situated creditors of the same priority class. The pertinent period for an unconnected creditor is 6 months prior to the onset of insolvency. Again, given that Section 129 would appear to deem the filing of the windup petition as the commencement date, Section 239 would not apply.

*** End of Assessment ***