



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) A liquidator or administrator may bring an action under section 245 of the Insolvency Act 1986.
- (ii) The Secretary of State or the Official Receiver being instructed by the Secretary of State may bring an action under section 6 of the Company Directors Disqualification Act 1986.
- (iii) The liquidator or administrator may bring an action under section 246ZB of the Insolvency Act 1986.
- (iv) The liquidator may bring an action under section 127 of the Insolvency Act 1986.

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 payment holiday under Part A1 of the Insolvency Act 1986 (the Act) applies only to debts prior to the moratorium i.e. debts which became due at that time or obligations which were formed at that time but become due during the moratorium period. However, pursuant to Section A18 of the Act, the moratorium does not apply to these debts:

- (i) wages or salary arising under a contract of employment;
- (ii) redundancy payments;
- (iii) debts or other liabilities arising under a contract or other instrument involving financial services;
- (iv) the monitor's remuneration or expenses; and
- (v) rent in respect of a period 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?

Yes, an administrator who wishes to continue to operate the business of a company in administration can require suppliers of goods and services to continue to supply those goods and services during the administration. The operation of a business necessitates the acquisition and use of goods and services such as water, electricity, a phone, POS terminals, computers etc. to produce/deliver the finished product (whatever it may be) for its consumers – this does not change because a company is in administration. The administrator in carrying on the operation of the business of the company may require the said goods and services and Sections 233, 23A and 233B of Insolvency Act 1986 (the Act) contemplate a situation such as this.

By virtue of Section 233 of the Insolvency Act 1986 (the Act), the administrator is offered certain protection if he requires the continued supply of goods and services in that the section provides that suppliers cannot require that payment be made for any outstanding charges in respect of a supply given to the company prior to the administration, in exchange for the resumption of the supply. It does, however, allow the supplier to request that the administrator personally guarantees the charges for the supply in the current period. This section applies to gas, water, electricity, and communication services.

Section 233A offers further protection for essential supplies. Subsection 1 provides for an “insolvency-related term” of a contract for the provision of essential supplies to a company is void if that company enters administration or an approved voluntary arrangement under Part 1 takes effect. Such term is one that under normal circumstances would allow the supplier to terminate the contract and the supply due to the company entering one of the said insolvency procedures.

Similarly, Section 233B of the Act goes even further by offering protection with respect to the general supply of good and services; same is not limited to the essential supplies. The section prohibits clauses in contracts for the supply of goods and services that allow suppliers to terminate a contract or supply or do any other thing because the company becomes subject to an insolvency procedure such as administration. However, subsection (5) makes it clear that the contract may still be terminated if the office-holder, in this case being the administrator, or the company consents to the termination or if the court is satisfied that the supplier would suffer hardship as a result of the continuation of the contract and permits the termination of same.

Question 3.2 [maximum 9 marks]

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

The order of priority in a liquidation is as follows:

- (i) **all** expenses properly incurred during the winding up of the company which is inclusive of the liquidator’s remuneration: Section 115 of the Insolvency Act 1986 (the Act) indicates that after liabilities are paid in instances where Section 174 of the Act is applicable, all expenses incurred during the winding up of the company are to be paid in priority to all other claims, using the company’s assets.
- (ii) Preferential creditors (as per Sections 386, 387 and Schedule 6: Section 175 of the Act) – After the expenses have been settled in full, the company’s assets will then be used to pay the preferential creditors pursuant to Section 175 of the Act. Section 386 of the Act makes reference to two types of preferential debts: ordinary

and secondary. Subsection 1 of Section 175 indicates the ordinary preferential debts are to be paid before secondary preferential debts and shall be paid in full unless the assets are insufficient to meet them. Nevertheless, these debts rank equally among themselves within their classes. Schedule 6 outlines 9 categories of preferential debts which include *inter alia* debts due to Inland Revenue, debts due to customs and Excise and the remuneration, etc. of employees.

- (iii) Floating Charge Holder – The floating charge holder would be next in line for payments however the applicability of Section 176A of the Act must be considered. The section particularly subsection (2) requires the liquidator to make a prescribed part of the company's net property available for the payment of unsecured debts and prohibits the distribution of the said part to a floating charge holder except where there is excess when consideration is given to the amount required for the satisfaction of the unsecured debts. Subsection 6 indicates that the company's net property is the amount of the company's property that would be available to satisfy the claims of debenture holders or floating charge holders, but for Section 176A of the Act. Subsections 3, 4 and 5 outline the instances in which the section would not apply such as where the liquidator believes the cost to make the distribution to the unsecured creditors is disproportionate to the benefits to be gained or if the Court orders that subsection 2 should not apply. In identifying the part, subsection 7 provides that an order under subsection (2) may provide for the calculation of the "part" as a percentage of the company's net property or as a total of different percentages of different parts of the company's net property.
- (iv) Unsecured Creditors – The unsecured creditors are usually paid last and frequently, receive nothing after the expenses are paid and preferential and secured creditors are satisfied.

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 Act would be applicable. Subsection 2 of the provision provides for the payment of fees or expenses of the official receiver and certain moratorium and priority pre-moratorium debts in preference to all other claims, in the liquidation. Subsection 2 (b) outlines what is considered a priority pre-moratorium debt. This therefore means that the said debts would rank above all the expenses properly incurred during the winding up of the company which is inclusive of the liquidator's remuneration.

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 239 of the Insolvency Act 1986 (the Act) where a company has at a relevant time given a preference to any person, the liquidator may apply to the court for an order under this section. In order to bring a successful application under Section 239, the liquidator must show that the preferred person is one of the company's creditors and the company does anything or instructs that anything be done to put that person in a better position if that thing hadn't been done; that company in preference was influenced by a desire to do so to put the creditor in a better position than he would have been had the thing not occurred; and that the preference was given at a relevant time. Due consideration should also be given to the pre-requisite for liability under the Act which is whether the company at the time of the transaction was unable to pay its debts as they fell due (as per Section 123 of the Act) or the company became unable to pay its debts as a result of the transaction. The burden of proof will lie with the liquidator unless the person who received preference is a connected person.

On the face of it, the facts suggest that these requirements would not be proven. It is true that Ambitus Bank plc was a creditor of the company who was put in a better position by the company when a debenture was issued in their favour. In terms of the pre-requisite, it appears that at the relevant time the company could be deemed unable to pay its debts taking into account its actions to avoid the bank demanding repayment of its loans. This would have to be proved to the satisfaction of the Court. However, based on the definition of "relevant time" under Section 240 of the Act this act would not meet this requirement as in this case, where the preferred person was not a connected person, the act of preference would have had to occur within a 6-month period ending with the onset of insolvency. Furthermore, the facts indicate that the debenture was issued to prevent the bank from demanding repayment of the company's loans which could be argued as proof that the Company had no desire to the company to put the bank in a better position which is essential to the success of the application.

The liquidator may also bring an action under Section 245 of the Act after giving consideration to whether the floating charge was created at a relevant time and whether the company at the time of the transaction was unable to pay its debts as they fell due (as per Section 123 of the Act) or the company became unable to pay its debts as a result of the transaction.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

The liquidator may take action under Section 238 of the Insolvency Act 1986 (the Act) provides that a liquidator, where a company at a relevant time has entered into a transaction at an undervalue, may apply to the court for a remedy under the section. To make a successful application under this section, the liquidator must show that in the present case, the Company entered into a transaction for consideration which the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the Company.

Furthermore, the liquidator must also confirm that the transaction took place at "a relevant time" which pursuant to Section 240 of the Act is in the period of 2 years ending with the onset of insolvency being the date of the commencement of the winding up. The transaction took place in January 2023, over a year before the winding up meaning that the transaction took place at "a relevant time" as per the Act.

Notwithstanding the above requirements, consideration must also be given to whether the company at the time of the transaction was unable to pay its debts as they fell due (as per Section 123 of the Act) or the company became unable to pay its debts as a result of the transaction.

In the present case, the laser cutting machines were sold to Ms. Bannister for less than what they were worth a year before the company went into liquidation and as such, the liquidator should be able to prove the transaction was undervalue. However, to prove that the amount paid was "significantly less" than the value at the time it is likely that a valuation will have to be done by the liquidator. Furthermore, the time of the transaction being more than a year before the commencement of the liquidation means that it happened at a "relevant time" as per the legislation and the report of "cash flow problems" suggests cash flow insolvency which means the requirement pursuant to Section 123 has also been met.

Accordingly, on the face of it, the liquidator may take action against this issue pursuant to Section 238 of the Act. Furthermore, the liquidator may also seek to bring a general misfeasance action against the directors in this regard. He must however also consider whether the Company would be able to prove that the transaction was entered into in good faith and in order to carry on its business and whether at the time there were reasonable grounds for believing that the transaction would benefit the company – the Court will not make the order under Section 238 if it is satisfied of this.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumi Ltd.

Under Section 127 of the Act any disposition of the company's property, etc. made after the commencement of the winding up by the Court is avoided, unless the Court makes an order to the contrary. The term "disposition of property" includes and affects payment of money as well as the sale, lease and loan of other property. Notwithstanding same, the Court can make an order declaring that the dispositions are not void – a validation order. Such order will only be made where it is showed that the disposition was done for the benefit of the unsecured creditors. In making its decision, it is likely that the court will sanction payments made to secure continued supply of goods and services to allow the company to continue to trade which it believes was in the best interest of its creditors and where supplies are paid for as per cash on delivery, consideration will be given to whether this was done to secure further supplies to continue the trading of the Company. In the present case, the avoidance of these payments would be automatic unless the Court orders otherwise and in this case the application under this Section would be to validate the disposition of the assets of the company. It is unlikely that

this application would be made by the liquidator but rather the Company or its directors who would benefit from such an order. Based on the foregoing, the liquidator may not take action under this section of the Act.

*** End of Assessment ***