



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) The administrator or liquidator.
- (ii) The Secretary of State, or the Official Receiver on the instructions of the Secretary of State.
- (iii) The administrator.
- (iv) The liquidator.

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.

These are to be found in s A18(3) of the Insolvency Act 1986.

- (1) The monitor's remuneration or expenses.
- (2) Goods or services supplied during the moratorium.
- (3) Rent in respect of a period during the moratorium.
- (4) Wages or salary arising under a contract of employment.
- (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?

The administrator can utilise the protections under ss 233, 233A and 233B of the Insolvency Act 1986 to require suppliers of certain goods and services to continue their supply during the administration.

Under s 233, suppliers of gas, electricity, water and communications services are not permitted to make the giving of supply to the company in administration conditional upon the payment of outstanding charges. The supplier may however make the giving of such supply conditional upon the administrator personally guaranteeing the payment of charges in respect of the supply.

Under s 233A, such suppliers also cannot rely on an insolvency-related term in the contract which would otherwise terminate (or entitle them to terminate) the contract or supply upon the company entering into administration.

Under s 233B, suppliers of goods and services in general (with some limited exceptions listed in Schedule 4ZZA to the Act) are prevented under s 233B(3) from terminating the supply upon the company entering administration, and are further prevented under s 233B(7) from making the supply conditional upon the payment of outstanding charges. The exception is where the administrator or company consents to the termination, or the court is satisfied that the continuation of the contract would cause the supplier hardship and grants permission for the termination of the contract.

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?

Firstly, in a liquidation, only assets belonging to the company may be realised and distributed. Therefore, the liquidator has no right to assets subject to security such as a fixed charge (which cannot be dealt with without the consent of the chargee), as well as assets subject to hire purchase or retention of title.

Of the assets which may be distributed, the first in priority will be the expenses of winding up as stipulated in s 115 of the Insolvency Act 1986 and rules 6.42 and 7.108 of the Insolvency Rules. These expenses are payable in the following priority:

- (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 any legal proceedings);
- (b) the cost 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 (including, for example, any expenses incurred by members of the liquidation committee);
- (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 asset of the company; and
- (h) any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up.

Following the payment of the expenses of winding up in full, the next in priority will be the preferential creditors as set out in Schedule 6 of the Insolvency Act 1986. These preferential debts are further divided into ordinary preferential debts and secondary preferential debts, which are only paid after the ordinary preferential debts (which rank equally between themselves). Preferential debts consist primarily of limited claims of employees and certain tax liabilities.

After the preferential creditors have been paid, the next in priority will be any floating charge holders. Floating charge holders possess a security which is said to float above a class of assets (typically the undertaking of the company) until such time as it crystallises to become a fixed charge (usually upon the insolvency of the company). However, under s 176A of the Insolvency Act 1986, the liquidator must set aside a "prescribed part" of the company's net property available for the satisfaction of unsecured debts - this is not to be distributed to the floating charge holder unless it exceeds the amount required to satisfy all unsecured creditors.

The next in priority will be unsecured creditors (ie creditors who have no security or title to assets). Finally, any remainder will be distributed to the shareholders in the proportion of their respective shareholdings.

If the company had been subject to a moratorium under Part A1 during the 12-week period prior to commencement of liquidation, s 174A of the Act provides super priority to certain unpaid pre-moratorium and moratorium debts which are not part of the payment holiday,

such as debts owed to employees or “financial services” debts. These are paid in priority to the liquidator’s fees and expenses.

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 Alumi 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 may avoid the floating charge under s 245 of the Insolvency Act 1986. Section 245 renders invalid floating charges given by the company within 12 months from the onset of insolvency where the person in whose favour the floating charge is created is not connected with the company (as is the case with Ambitus Bank plc) provided that at the time of the creation of the charge the company was either unable to pay its debts (within the meaning in section 123 of the Act) or became unable to do so in consequence of the transaction.

In this case, the floating charge was granted to Ambitus Bank plc in June 2023, which is less than 12 months from the company going into liquidation on 28 February 2024. It is likely that the company was unable to pay its debts within the meaning of s 123 as of June 2023, given that it had been suffering cash flow problems and a creditors’ winding up petition brought in January 2023 ultimately succeeded.

Therefore, under s 245, the floating charge is invalid except to the extent that new consideration was provided for the charge. Such new consideration may be in the form of money paid or goods or services supplied to the company, or the discharge or reduction of any debt of the company. In this case, no new consideration was provided to the company

since it was granted in exchange for Ambitus Bank plc not demanding repayment of the company's loans.

The liquidator can therefore have the floating charge declared invalid under s 245.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

The liquidator may attack the sale as a transaction at an undervalue under s 238 of the Insolvency Act 1986. Under s 238, the liquidator must show the following:

- (a) The company made a gift to another person; entered into a transaction with another person on terms providing for the company to receive no consideration; or entered into a transaction with another person for a consideration which, in money or money's worth, was, at the date of the transaction, significantly less than the value, in money or money's worth, of the consideration provided by the company.
- (b) The transaction must have taken place within two years prior to the commencement of the liquidation.
- (c) At the time the transaction was entered into, the company was unable to pay its debts as they fell due within the meaning of section 123 or became unable to pay its debts within the meaning of that section in consequence of the transaction. For a transaction with a connected person, the company is presumed to have been insolvent, or to have become insolvent as a result of the transaction, unless the contrary is proved.

In this case, the sale of the laser cutting machines was at GBP 40,000 in cash, which was significantly less than the price they were purchased at just a year before. Therefore, it is quite likely that this is a transaction at an undervalue. The sale took place in January 2023, which is around the same time the winding up petition was brought. Therefore, the time requirement is fulfilled. Further, the sale was to a director of the company, ie a connected person, so the liquidator can rely on the presumption of insolvency.

Therefore, the liquidator may apply for an order restoring the position to what it would have been if the preference had not been given, or the transaction not entered. It then falls on Angela to satisfy the court that the transaction was entered into by the company in good faith and for the purpose of carrying on its business, and that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company. In her defence, Angela might be able to argue that the sale was reasonable to solve the company's cash flow problems.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

The liquidator may avoid a payment as an unfair preference under s 239 of the Insolvency Act 1986. The liquidator must show that:

- (a) the person whom it is alleged has been preferred was, at the time of the transaction, a creditor of the company (or a surety or guarantor for any of the company's debts or liabilities);
- (b) something was done, or suffered to be done, by the company which had the effect of putting that person in a better position, in the event of the company going into insolvent liquidation, than the position they would have been in if that thing had not been done (that is, that the person has been preferred);

- (c) the company was, in giving the preference, influenced by a desire to produce the effect referred to in (b) above (the desire to prefer) in relation to the person preferred; and
- (d) the preference was given at a relevant time.

For a preference in favour of a person not connected to the company, it is only actionable if it is entered into within the six months prior to the onset of insolvency.

It is also a prerequisite that, at the time the preference was given, either the company was unable to pay its debts as they fell due within the meaning of section 123 of the Act or became unable to pay its debts within the meaning of that section in consequence of the preference.

It is clear that the timing requirement will be satisfied for all the payments concerned because they occurred only within the month before the winding up order was made. It is also clear that Aluminium Alumini Ltd was a creditor of the company.

In terms of the requirement that the payments must have put the creditor in a better position in the event of the company going into insolvent liquidation, the GBP 20,000 payment for outstanding liability and the GBP 8,000 payment for cash on delivery basis should be analysed separately. The former payment will likely satisfy this requirement since it was a payment of outstanding debt. The latter however is simply payment for goods received during the last month before insolvency. It is unlikely that this payment will be regarded as having put Aluminium Alumini Ltd in a better position. Therefore, the GBP 8,000 payment likely cannot be avoided.

In terms of the GBP 20,000 payment, the liquidator must go on to show that the company was influenced by a desire to put Aluminium Alumini Ltd in a better position in the event of insolvency. It has been held in decisions that where the company was influenced solely by commercial considerations, specifically attempts to ensure that the company continued trading, there could be no desire to prefer.

In this case, since the company made the payments to Aluminium Alumini Ltd so as to obtain continued supply of metal (which was regarded as essential), it is likely that the company will be regarded as having been influenced solely by commercial considerations. Therefore, there is not likely to be a desire to prefer. Thus, the GBP 20,000 payment also cannot be avoided.

*** End of Assessment ***