



**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) In terms of **Section 245 of the Insolvency Act 1986** a liquidator in a liquidator and an administrator in an administration can apply to court for an order whereby pre-existing unsecured creditors wants to obtain society of a floating charge just before a company commences formal insolvency proceedings.
- (ii) **Section 6 of the Company Directors Disqualification Act 1986** deals with a disqualification order based on directors being found unfit for trading the company under insolvent circumstances, which could prejudice the Crown. The court makes an order for a disqualification on an application brought by the Secretary of State (or the Official Receiver on the instructions of the Secretary of State if the company is already wound-up).
- (iii) The relief, outlined in **Section 246ZB of the Insolvency Act 1986** whereby a director acting wrongfully and/or fraudulently is held liable for the debt of the company, is available for a liquidator in a liquidator and to an administrator in an insolvent administrator. Application must be made to the court which has a discretion to determine if the director's liability for the debts of the company.
- (iv) **Section 127 of the Insolvency Act 1986** deals with the "disposition of property" and so to ensure the creditors of an insolvent estate is not prejudiced by any transaction whereby property is disposed after the commencement date of liquidation , the liquidator will initiate legal action to have transactions set aside to the benefit of the creditors of the insolvent estate. There are instances where any third party can apply to court for a validation order based on the fact that the transaction in question was bona fide and indeed stand to benefit all the general body of unsecured creditors.

**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 creditors of a company that is under the Moratorium can still enforce their rights pertaining to debts incurred during the Moratorium but they are constrained to enforcement or payment of pre-Moratorium debts as the company enjoys a "payment holiday" during the Moratorium imposes. In particular there are debts exempted from this stay on legal action (enforcement) despite the fact that it maybe be a pre-Moratorium debt falling due before the Moratorium and/or falling due during the Moratorium period. These inter alia include:

- (1) Remuneration and/or expenses of the monitor;
- (2) Goods and services supplied to the company during the Moratorium;
- (3) Rental payments relating to a period during the Moratorium;
- (4) Wages or salaries in terms of an employment contract;

(5) Payment in terms of laying off employees (retrenchments).

**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?

Once appointed an administrator has three statutory objectives to consider. The first objective is to rescue the company. This can only be achieved by trading the company as a going concern which means the core of the business of the company must be restored to solvency ensuring creditors are paid in full as the administrator protects the interests of all creditors.

The mere appointment of an administrator doesn't entail an automatic cancellation of executory contract of the company. In an attempt to rescue the business of the company, the administrator can require essential services from critical suppliers and service providers to continue. In terms of section 233 of the Insolvency Act these include the supply of gas, electricity, water and communications services which refers to sale terminals, computer hardware and software, information, advice, technical assistance, data storage, processing and website hosting. These critical suppliers will be required to continue the supply of these services without seeking payment of outstanding debt during the administration of the company. There is however provision made that the supplier could request the administrator to provide a personal guarantee for payment of expenses relating to new goods and services supplied.

Furthermore, section 233A a supplier which is ordinarily bound to the services contract and can't rely on the administration as an "insolvency-related term" to be able to cancel the supply agreement, can now amend the terms of the supply or service agreement, charging increased rates / payment for the continued supply during the administration period of the company. providing the service as the

**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?

Order of priority of payment in liquidation (ranking of creditors' claims)

1. Secured creditors

These are holders of fixed charges and they get paid from the proceeds of sale of the assets over which the fixed charge is registered.

2. Expenses of the winding-up, including the remuneration of the liquidator

Section 115 of the Insolvency Act 1986 and rules 6.42 and 7.108 of the Rules affords priority of some expenses over the company's preferential creditors, floating charge holders and unsecured creditors. These expenses are paid in their own order of priority –

- (i) Expenses in relation to the preservation and realisation of the assets, which includes the costs of any legal action that had to be instituted;
- (ii) The cost of security that the liquidator had to provide;
- (iii) Costs in relation to preparing the statement of affairs or financial accounts;
- (iv) Necessary disbursement by the liquidator to members of liquidation committee;
- (v) Remuneration for any service provider / consultant employed by the liquidator for purposes of servicing the company;
- (vi) Remuneration of the liquidator in line with the applicable rules;
- (vii) Payment of corporation tax on chargeable gains accruing on the realisation of the company's assets; and
- (viii) Any other expense which liquidator charged in order to perform his duties in the winding up of the company.

### 3. Preferential creditors under Schedule 6 of the Insolvency Act 1986

After payment of all the expenses in the liquidation, the assets of the company are realised and used to settle preferential claims. As a rule, claims of employee for remuneration and pension fund contribution enjoy some priority in this category:

- (i) Outstanding amount to an employee's pensions scheme, being contributions deducted from the employee's salary for a period of 4 months pre the liquidation;
- (ii) Outstanding amount to an employee's pensions scheme, being contributions deducted from the employee's salary for a period of 12 months pre the liquidation;
- (iii) Remuneration claims from employees subject to a maximum amount of GBP 800;
- (iv) Amounts owed for accrued holiday remuneration for any period of employment;
- (v) Claims for advances made for holiday remuneration;
- (vi) Levies on steel and coal production;
- (vii) Amount required to pay Reserves Forces Act 1985 (safeguard of employment);
- (viii) Any amount owed for eligible deposit, which is less than the Financial Services Compensation Scheme;
- (ix) Any amount owed to one or more person relating to an eligible deposit, which is less than the Financial Services Compensation Scheme;
- (x) Amount owed by the company re a deposit though a non-UL branch and which would qualify as an eligible deposit; and
- (xi) PAYE income tax deductions, national insurance, VAT payments, Construction Industry Scheme and student loan repayments.

### 4. Floating charges

If there are more than one floating charge holder, payment is prioritised based on the date (when) the floating charge was created, with first in time being first in line. There is a "prescribed part" of the company's net property available that must be paid to unsecured debtors. The amount is calculated once liquidation expenses and preferential debts have been settled.

### 5. Unsecured creditors

Creditors without any security or title to assets. This pertains to ordinary trade supplier creditors and they are paid out last and more highly unlikely that there will be anything left for unsecured creditors to receive any dividends.

### 6. Shareholder

In the less probable scenario where all creditors received their capital and interest and there is a remaining surplus, the shareholders will share the surplus pro rata and in line with the company's constitution.



Interestingly the order of priority where a company is not rescued under the Moratorium and is then liquidated, looks slightly different. In terms of section 174A unpaid pre-Moratorium debts (which wasn't part of the payment holiday, for example debts owed to employees, are paid in the subsequent liquidation and enjoys a priority over the fees and expenses of the liquidator. This is referred to as a "super priority" in the liquidation waterfall of payments. Furthermore, unsecured pre-Moratorium debt, exempted from the payment holiday will also acquire a "super priority" to the extent that it wasn't accelerated during the Moratorium.

**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;

In terms of section 239 of the Insolvency Act a preference to a creditor with a view or a desire to prefer that creditor over another creditor is one of the transaction avoidance sections in the legislation. In this instance a creditor, Ambitus Bank plc was looking to demand repayment of the debts owed to it. It however bargained with the company, Blazer Laser to afford Ambitus Bank plc a floating charge for existing debt. In return the bank would not demand repayment and take enforcement action.

The liquidator will only have locus standi to bring such an application under section 239 once the liquidation has commenced. The burden of proof lies with the liquidator to prove elements of –

- (i) The relevance of the time that the preference occurred – June 2023) seven month before formal insolvency proceedings commenced;

- (ii) The preference would have the effect of bettering the position of Ambitus Bank plc – they would now enjoy a preferred claim under their floating charge versus an unsecured claim.
- (iii) Ambitus Bank plc was a creditor which haven't been paid as Blazer Laser was not able to pay its debts as they fell due.
- (iv) The company had the desire to confer a preference to Ambitus Bank plc in an attempt to avoid the bank demanding payment of existing debt obligations to the bank. In a leading case *Re MC Bacon Ltd*<sup>1</sup> the court found "an intention to grant security to a creditor involves an intention to prefer that creditor in an insolvency event. The liquidator in *MC Bacon* opposed the court's view and stated that the granting of security for existing debts was inferring a preference on the bank. Millet J found that in an instance where the company is reliant on the bank in order to keep its doors open, the granting of the security (debenture) was premised on a desire to avoid the calling of the debt and not on a desire to necessarily prefer the bank.

Based on subsequent decisions the position is that where the company based the decision to "prefer" solely on commercial considerations, primary to ensure that the company continue to trade, there is no desire to prefer. On this basis the liquidator should not attack the debenture given at the time unless a desire to prefer can be demonstrated.

#### **Question 4.2 [maximum 6 marks]**

The sale of the laser cutting machines; and

Section 127 of the Insolvency Act 1986 specifically prevents the sale of assets / property after the date that the liquidation has commenced, where the commencement date is the date of presentation of the petition to wind up. The court has an absolute discretion in applications where the liquidator takes the necessary action under section 127 to recover assets of the company. In this instance, where the company sold two of its laser cutting machines which are critical to its business operations, to (a) a director and (b) at a very steep discounted price. From this is obvious that the transaction was not arms' length and that the company was prejudiced as to the value of the asset and the price it was sold for in the doubtful transaction. In my view the director (connected person) who benefited from this transaction will not be successful with a validation order as the transaction was not in the ordinary course and only the director benefited from the transaction to the detriment of the body of unsecured creditors.

Whereas the transaction happened with 2 years before the winding-up commenced, the liquidator can under section 238 of the Insolvency Act 1986 attack the transaction as the two laser cutting machines valued at GBP100,000 was sold for GBP40,000 to a related or connected party, a director of the company. Only if the respondent can convince the court that the transaction was bona fide and for the purpose of carrying on business in the ordinary course, with a view to benefit the company, the court may not set aside the transaction and grant an order under section 238. In my view that is highly unlikely, I believe the liquidator will be successful in setting aside the transaction where the machines were sold.

#### **Question 4.3 [maximum 4 marks]**

The payments to Aluminium Alumini Ltd.

Another transaction avoidance provision is section 239 of the Insolvency act 1986 preventing the company to prefer one creditor over another by make payment when formal insolvency proceedings seem eminent. In this instance the insolvent company Blazer Laser agreed repayment terms with

---

<sup>1</sup> [1990] BCC 78

Aluminium Alumini one of its creditors a mere month before the petition for the winding-up of Blazer Laser was presented. Not only did Aluminium Alumini demand payment for existing liabilities in the amount of GBP20,000 they also contracted to be paid in cash for any further goods supplied. In a liquidator Aluminium Alumini would have been an unsecured creditor (trade creditor) and would have the prospect of a dividend. They now elevated their position to enjoy full payment.

The liquidator will only have locus standi to bring such an application under section 239 once the liquidation has commenced. The burden of proof lies with the liquidator to prove –

- (i) The relevance of the time that the preference occurred – one month before formal insolvency proceedings commenced;
- (ii) The company had the desire to prefer Aluminium Alumini as applied pressure on the debtor to agree to this preference as they demanded immediate repayment and as the board considered them a key supplier they capitulated ;
- (iii) The payment or action to prefer Aluminium had the effect of bettering their position – they would have been unsecured creditor hoping for a decent dividend; and
- (iv) That Aluminium Alumini is indeed a creditor of Blazer Laser

In my view the liquidator will be successful with the application under section 239 for preference to Aluminium Alumini for the amount paid for the existing debt. Insofar as the cash on delivery terms for the critical goods supplied, one can argue that since metal was part of the core business and was seen to be in the interest of the company to facilitate and possibly improve its output (performance) and revenue, it is possible to condone the cash on delivery arrangement as a critical expense. However, the GBP8,000 that Aluminium Alumini received in cash for goods delivered indeed bettered their position as they only would have an unsecured, trade creditors claim in a liquidation.

**\* End of Assessment \***