



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?

An action under section 245 of the Insolvency Act 1986 may be brought by a liquidator or administrator.

An action under section 6 of the Company Directors Disqualification Act 1986 may be brought by a liquidator or administrator.

An action brought under section 246ZB of the Insolvency Act 1986 may be brought by an assignee of the liquidator who purchases the liquidator's causes of action.

An action brought under section 127 of the Insolvency Act 1986 may be brought by a liquidator or administrator.

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 following debts are not subject to the payment holiday under the Moratorium:

1. Remuneration and expenses of the Monitor;
2. Goods and services supplied during the Moratorium;
3. Rent for any period during the Moratorium;
4. Employee wages and salaries under applicable employment contracts;
5. Redundancy payments; and
6. "Financial services" contract debts or liabilities.

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?

An administrator's rights are limited to enforcing the counterparty's contractual obligations under the terms of executory supply contracts. Suppliers may no longer rely on automatic termination of executory contracts when a company enters administration or liquidation. Now, such automatic termination clauses, also known as *ipso facto* clauses, are unenforceable, and the supplier must abide by the contract terms unless otherwise ordered by the court.

Section 233 of the Insolvency Act 1986 applies to contracts for the supply of gas, electricity, water and communications services. Under Section 233, the supply contract is not terminated when a company enters administration, and the supplier is prohibited from requiring payment of pre-administration debts as a condition of performing under the supply contract. However, suppliers for these specific types of supply contracts may require a personal guaranty from the administrator for payment of supplies during administration.

Section 233B of the Insolvency Act 1986 expands application of certain protection for the company to all other suppliers, with limited exceptions for certain financial institutions. A supplier is prohibited from compelling higher prices or payment of pre-administration debt in order to continue supplying goods and/or services to the company. In addition, Section 233B prohibits a supplier from requiring a personal guarantee from the administrator. However, a supplier may apply to the court for relief from the supply contract where it can demonstrate that continuing the contract with the company would cause hardship to the supplier.

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 for distribution in a liquidation is as follows. Each class or subclass must be paid in full before any distribution is made to the next in line class or subclass.

1. Class of Liquidation Expenses. The highest priority goes to the expenses of liquidation, which are paid in the following priority: (a) liquidator's expenses in preserving, realizing, or getting in assets of the estate, (b) costs of security provided by the liquidator, (c) costs of preparing the statement of affairs or accounts, (d) necessary disbursements, (e) remuneration of persons employed by the liquidator, (f) the liquidator's remuneration, (g) corporate tax on chargeable gains, and (h) other expenses of liquidation.
2. Class of Preferential Claims. Two subclasses: (a) ordinary preferential debts, which include limited employee claims and taxation liabilities, and (b) secondary preferential debt, which include amounts owed by the company to eligible persons regarding certain deposits.
3. Class of Floating Charge Claims. If the holder of a floating charge consents to liquidation, the assets subject to the floating charge will be realized. If there are more than one floating charge holder, the first floating charge holder to perfect its security interest will have priority over later perfected charges. Section 176A of the Insolvency Act 1986 requires a holdback (the prescribed part) of at least 50% of the net proceeds (that is, the any amount remaining after Liquidation Expenses and Preferential Claims are paid in full) to be paid to the next class of Unsecured Claims. In the event that the net proceeds exceed GBP 10,000, that holdback or prescribed part will also include 20% of the excess in value above GBP 10,000, subject to a maximum holdback of GBP 800,000. In addition, in the event that there are sufficient proceeds to pay all Unsecured Claims in full, any remaining holdback will be applied to Floating Charge Claims.
4. Class of Unsecured Claims. All unsecured claims are paid pro rata from the prescribed part and excess net proceeds.

5. Shareholder. Any surplus after paying all of the above claims in full with interest will be disbursed to any shareholders according to the company's constitutional documents.

The priority of debt payment changes if the company was subject to a Moratorium during the 12 weeks before entering liquidation. Certain unpaid pre-Moratorium debts or Moratorium debts not subject to the payment holiday, such as certain employee claims and "financial services" debts, achieve super priority status and are paid in priority with the class of Liquidation 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 Alumini Ltd, one of the Company's key suppliers. The supplier demanded immediate payment of all sums owing to it and informed the Company that further supplies would only be made on a cash on delivery basis. As the continued supply of metal was seen as essential by the Company, the board authorised a payment of GBP 20,000 to cover existing liabilities and agreed to further payments, on a cash on delivery basis, for further supplies which amounted to further payment of GBP 8,000 up to the date of the winding up order.

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

Using the facts above, answer the questions that follow.

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

Question 4.1 [maximum 5 marks]

The floating charge in favour of Ambitus Bank plc;

The granting of the debenture to Ambitus Bank plc appears to be an avoidable preference. In June 2023 the Bank held an unsecured claim and pressured the company to elevate the priority of its claim to a secured claim by the granting of a debenture containing a floating charge over the whole of the company's undertaking. The company granted the debenture to prevent the Bank from demanding repayment of the company's loan, not in exchange for new value from the Bank to the company. If the Bank's demand is related to the company's inability to pay its debts as they come due, then the debenture was granted with in six months prior to the onset of insolvency. The debenture clearly put the Bank in a position that was better than the unsecured position it was in before the preference had been given.

The issue is whether the company was influenced by a desire to prefer the Bank to its other creditors. This hypothetical is similar to the case *Re MC Bacon Ltd.* where the court held that the granting of a debenture such as the one in the present case to the bank (on which the company was entirely dependent) was not a preference because the company's desire was not to prefer the bank over other creditors but rather to avoid the calling of its overdue payments and continuation of the company as a going concern.

Although the granting of the debenture may not be an avoidable preference, the floating charge is avoidable under Section 245 of the Insolvency Act 1986. The granting of the debenture was within 12 months prior to onset of insolvency, and the company appears to have been overdue in its loan repayments to the Bank. The floating charge will be rendered invalid, but the underlying unsecured debt will remain.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

The first thing to determine is whether the sale of the laser cutting machines was completed. The facts state only that the company's board approved the sale to director Angela Bannister. Assuming that the sale closed, the next relevant factor is whether the sale closed before or after 13 January 2024, that date on which the creditor's winding up petition was issued. Upon issuance of the winding up order, the commencement of liquidation relates back to the date of the petition, not the date of the winding up order. If the transaction for the sale of the machines occurred on or after 13 January 2024, the transaction is void unless the court orders otherwise.

The next thing to consider is whether the sale of the machines was undervalue. A year earlier the value of the machines was GBP 100,000 but director Bannister is paying only GBP 40,000 in cash. While the company desperately needed cash, the discrepancy in value may subject this transaction to avoidance. The transaction occurred well within the two-year reachback period before the commencement of liquidation, and the company was cash flow insolvent at the time of the transaction. In addition, because the sale is to a connected person, the company is presumed to be insolvent and director Bannister has the burden to prove to the contrary.

Director Bannister may have a good faith defense if she can prove that the liquidation value of the machines is GBP 40,000 or less and that the cash was necessary to the company to continue its operation. Director Bannister's defense would also be helped if she had obtained an independent Evaluator's Report certifying that the current value of the machines is GBP 40,000 or less.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumi Ltd.

The GBP 20,000 paid to the supplier to cover existing liabilities is likely a preference. The payment satisfied 100% of the company's outstanding debt to the supplier, while other general unsecured creditors of the company will likely receive a dividend, if any, of less than 100%. It may be difficult to find that the company actually desired to prefer the supplier. It is more likely that the company desired not to lose the continued supply of essential metal, which fact will defeat the preference claim.

It should be noted that the payment to the supplier occurred a month before the winding up order was made. But the company entered liquidation more than a month earlier, on 13 January 2024,

when the petition was issued. As a result, the disposition (payment of GBP 20,000) is void unless the court validates it. Here, the supplier may request that the court validate the disposition (payment of GBP 200,000) because the company was trading at the time the payment was made, which payment was also made in the ordinary course of the company's business and preserved the business for the benefit of all general unsecured creditors.

The supplier's demand for cash on delivery of supplies is reasonable because the metal supplies are essential to the company and the company is receiving equivalent value in exchange for the cash payment.

*** End of Assessment ***