



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?

Section 245 of the Insolvency Act 1986 permits a Liquidator or appointed Administrator to bring an action in order to void a floating charge granted shortly before a company enters into a formal insolvency procedure.

Section 6 of the Company Directors Disqualification Act 1986 allows the Secretary of State to bring legal proceedings against a director where they consider the court will be satisfied that the person concerned was a director of an insolvent company (or it was dissolved without becoming insolvent), and the directors' conduct makes them a 'person unfit to be concerned in the management of a company'.

Section 246ZB of the Insolvency Act 1986 permits a Liquidator or appointed Administrator to bring an action for wrongful trading.

Section 127 of the Insolvency Act 1986 states that any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members made after the commencement of the company's winding up, is void unless the Court orders otherwise. In order for the Court to order otherwise, an action would need to be pursued by 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.

A Moratorium under Part A1 of the Corporate Insolvency and Governance Act 2020 aims to rescue the company as a going concern. The Moratorium provides a stay on actions in relation to debts incurred prior to the Moratorium, except so far as they consist of amounts payable in respect of (amongst others):

- (a) goods or services supplied during the Moratorium;
- (b) rent in respect of a period during the Moratorium;
- (c) wages or salaries arising under a contract of employment;
- (d) redundancy payments; or
- (e) debts or other liabilities arising under a contract or other instrument involving "financial services" (i.e. including a contract consisting of lending, financial leasing or providing guarantees).

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 appointment of an administrator does not automatically terminate a company's executory contracts. Consequently, suppliers of goods and services should continue to supply those goods and services to the company during administration. Under section 233B of the Corporate Insolvency and Governance Act 2020, suppliers of goods and services are

prevented from terminating a supply upon a company's insolvency and cannot make repayment of pre-insolvency debts a condition of continued supply, and nor can they increase their prices. For general goods and services, suppliers cannot insist upon a personal guarantee from an administrator to continue the supply, although a supplier can make an application to the Court for termination of the contract, which the Court would grant if it is satisfied that the continuation of the contract would cause the supplier hardship. For supplies of gas, electricity, water and communication services (including point of sale terminals, computer hardware and software, information, advice and technical assistance, data storage and processing and website hosting) suppliers are permitted to stipulate, under section 233 of the Corporate Insolvency and Governance Act 2020, that the administrator must personally guarantee payment of charges in respect of a new supply. The administrator should therefore determine whether the goods and services in question are those that would fall under section 233 of the Corporate Insolvency and Governance Act 2020, or not.

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 statutory order of priority of payments in a liquidation provides for the following order of payments:

1. Expenses of winding up, including the remuneration of the office-holder (i.e. of a liquidator in a liquidation scenario). These expenses are given priority in the payment order by virtue of section 115 of the Insolvency Act 1986, over the company's preferential creditors, floating charge holders or unsecured creditors. Within this overarching category, the following order of priority applies:
 - a. expenses that are properly incurred by the liquidator in preserving, realising or collecting in any assets of the company (including via the use of 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;
 - 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 (subject to the rules on determination of that remuneration);
 - 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.

2. Preferential creditors. Once the expenses of the liquidation have been paid in full, the assets of the company are then used to pay preferential creditors (as defined in sections 386, 387 and Schedule 6: section 175 of the Insolvency Act 1986). There are two classes of preferential debts, ordinary and secondary. Ordinary preferential debts are paid before secondary preferential debts. Within their respective classes, preferential debts rank equally amongst themselves.
3. Floating charge holders. After preferential creditors have been paid, the next creditor to be paid will be any floating charge holder. If there is more than one floating charge holder, priority between each charge holder usually turns upon which floating charge was created first. Payment of floating charge holders is subject to section 176A of the Insolvency Act 1986, pertaining to floating charges created on or after 15 September 2003. Section 176A of the Insolvency Act 1986 codifies a liquidator's duty to make a 'prescribed part' of the company's net property available for satisfaction of unsecured debts, and therefore a liquidator must not distribute any of this prescribed part to a floating charge holder (except insofar as it is in excess of the amount required to satisfy all of the unsecured debt). A floating charge holder, who may have an outstanding unsecured balance owing to it, is not permitted to participate in the distribution of the prescribed part (see Thorniley v Harris [2008] EWHC 124 (Ch)).
4. Unsecured creditors. Creditors with no form of security are paid out last in the statutory order. Given the number of payments that take priority, there is often little or nothing left to pay to unsecured creditors.
5. Shareholders. If there are sufficient funds to pay all of a company's creditors (including unsecured creditors) and interest on their debts, any surplus is then distributed to company's shareholders according to the company's memorandum and Articles of Association, which normally mandate a pro-rata distribution according to shareholders' respective shareholdings.

If the company entered into liquidation within 12 weeks of the end of a Moratorium under Part A1 of the Insolvency Act 1986, the priority of debts change. Section 174A of the Corporate Insolvency and Governance Act 2020 provides that certain unpaid pre-moratorium debts, or moratorium debts which are not part of the moratorium's 'payment holiday' - including debts owed to employees or "financial services" debts - are paid in priority in any subsequent liquidation, including in priority to liquidators' fees and expenses. These debts are, by virtue of section 174A of the Corporate Insolvency and Governance Act 2020 given a form of "super priority". One exception to the "super priority" is unsecured (or secured) pre-Moratorium bank debt, falling within the definition of "financial services", where that debt is accelerated debt (i.e. any pre-moratorium financial services debt which fell due by reason of the operation of, or exercise of rights under, an acceleration of debt or early termination provision in the financial services contract); such debt is not given "super priority" in any subsequent liquidation, and would therefore fall to be paid in accordance with the standard priority of payment in a liquidation.

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 floating charge in favour of Ambitus Bank plc (the "Bank") would need to be considered by any Liquidator of Blazer Laser, appointed upon the winding up order following a creditor's petition, against section 245 of the Insolvency Act 1986. This provision is aimed at preventing pre-existing unsecured creditors obtaining the security of a floating charge shortly before a company enters a formal insolvency procedure. Although section 245 would not operate to prevent the Bank providing fresh funding to Blazer Laser in June 2023, and requesting a floating charge for that new funding, it would render invalid any floating charges given by a company within the "relevant time" except to the extent that 'new' consideration is provided for the charge. The categories of 'new' consideration fall to be analysed under section 245 of the Insolvency Act 1986, neither of which look to apply on these facts, with a new debenture being executed over the whole of Blazer Laser's company undertakings.

The "relevant time" for the purposes of section 245 is, on these facts, within the twelve months prior to the onset of insolvency (as there is nothing in the fact pattern to suggest that Blazer Laser and the Bank are connected persons, although to the extent they are the "relevant time" extends to 2 years prior to the onset of insolvency). As the floating charge was entered into in June 2023 and the company entered compulsory liquidation in February 2024, it falls within the "relevant time" for analysis.

If, at the time of the creation of the charge (i.e. June 2023) Blazer Laser was unable to pay its debts (within the meaning of section 123 of the Insolvency Act 1986) , or became unable to do so as a consequence of the transaction with the Bank, the floating charge will be considered a voidable transaction, and rendered invalid given Blazer Laser's entry into compulsory liquidation. However, although the floating charge is unvalidated, the underlying debt owed by Blazer Laser to the Bank under the company's loans remains valid. Subject to any further information (for example on any existing security over the company's loans) the Bank would rank as an unsecured creditor for any future distributions from the Liquidator.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

Given the value of the laser cutting machines in or around January 2022 (a year prior to the winding up order in January 2023) of circa GBP 100,000, and their sale to a director of the company for GBP 40,000 (in cash) a year later, at a time when - given the proximity to the creditor's winding up petition - the company either was insolvent, or was likely to become insolvent - the liquidator could bring a misfeasance action against (i) the former directors who approved the sale, and (ii) Angela Bannister as a former director in receipt of the proceeds of the sale. This misfeasance action against the former directors (as officers of the company) would be grounded in section 212 of the Insolvency Act 1986 as the former directors "*misapplied, retained or became accountable for money or property of the company, or [are] guilty of misfeasance or breach of any fiduciary or other duty*". In this scenario, the directors have breached their fiduciary duties (as codified under the Companies Act 2006) to act in the best interest of the company by selling company assets for significantly less than their true value.

If the Liquidator's claim against the directors for misfeasance is upheld by the Court, the Court could make an order for repayment of GBP 40,000 to the company, or a contribution to the company (in liquidation) by the guilty directors by way of compensation in respect of the misfeasance / breach of duty. Alternatively, if the Court is not satisfied by the Liquidator's claim and instead believes that the former directors acted honestly and reasonably and that, having regard to all the circumstances, ought fairly to be excused, it can grant relief to the former directors under section 1157 of the Companies Act 2006.

The Liquidator could also look to claw back the sale of the laser cutting machines as a transaction at an undervalue under section 238 of the Insolvency Act 1986 as a transaction with another person for a consideration which, in money, was at the date of the transaction, significantly less than the value in money of the consideration provided by the company. Given the sale was to a director (i.e. a connected person to the company), and was made within two years of the winding up of the company (i.e.. within the relevant time), the company is presumed to be insolvent at the time of the sale (unless Ms Bannister can demonstrate otherwise to the Court). Unless Ms Bannister satisfies 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, then the Court will make an order restoring the position to what it would have been if the transaction had not been entered into.

It is also possible that a Liquidator could consider taking disqualification actions against the former directors in light of this conduct. Under section 15A of the Company Directors Disqualification Act 1986, a director of an insolvent company who is disqualified may be ordered to then compensate any creditor (either specific creditors, or general company creditors) for the loss caused by the behaviour which led to the disqualification.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

It is possible that the payments to Aluminium Alumini Limited ("AAL") would be considered to be an unfair preference under section 239 of the Insolvency Act 1986. The payment of GBP 20,000 and the subsequent cash payments of GBP 8,000 could therefore be voided, on application to the Court, by the Liquidator.

The Liquidator would need to show that:

- (a) the person whom it is alleged to have been preferred was, at the time of the transaction, a creditor of the company; this is made out here as AAL was a key supplier of the company, with sums owed to it;
- (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 insolvent liquidation, than the position they would have been in if that thing had not been done (i.e. AAL has been preferred); this is made out here as AAL received an immediate payment of GBP 20,000 to cover existing liabilities and cash payments of up to GBP 8,000 upon delivery for a month prior to the company's winding up;
- (c) the company was, in giving the preference, influenced by a desire to prefer in relation to the person preferred; this would require some further analysis by the Court, and the liquidator would bear the burden of proof of demonstrating the requisite desire to prefer (given that AAL does not appear to be a connected person to the company; if the Liquidator becomes aware that AAL is, in fact, a connected person, there would then be a presumption that the company was influenced by a desire to prefer AAL). Given that the supply of metal was seen as "essential", it may be possible that a Court would determine that a desire to prefer had not been made out, but rather the GBP 20,000 payment and GBP 8,000 cash payments were influenced by the company's commercial considerations, and specifically attempts to ensure that it continued trading.
- (d) the preference was given at the relevant time; it does not appear, from the facts, that AAL is a connected person to the company. However, the relevant time for an unfair preference for an unconnected person is six months prior to the onset of insolvency. The preference was given a month prior to the winding up order, and therefore falls within the relevant time-frame.

*** End of Assessment ***