



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?

For Section 245 of the Insolvency Act 1986 on “Avoidance of certain floating charges”, an action may be brought by a liquidator or an administrator.

For Section 6 of the Company Directors Disqualification Act 1986, an action may be brought by a liquidator, administrator or administrator receiver.

For Section 246ZB of the Insolvency Act 1986 on “Wrongful trading: Administration”, an action may be brought by an administrator.

For Section 127 of the Insolvency Act 1986 on “Avoidance of property disposition”, an action may be brought by a 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.

The debts that do not form part of the payment holiday under Part A1 of the Insolvency Act 1986 when a company is subject to a Moratorium are set out in Section 174A of the Insolvency Act 1986 and they include pre-moratorium debts in respect of the following:

- a. Monitor’s remuneration or expenses;
- b. Good or services supplied during the moratorium;
- c. Rent in respect of a period during the moratorium;
- d. Wages or salary arising under a contract of employment;
- e. Redundancy payments; and
- f. Debts or other liabilities arising under a contract involving financial services.

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?

1. Yes, an administrator may require suppliers of certain goods and services to continue to supply those goods and services during the administration. This is set out in **Section 233 of the Insolvency Act 1986**, and they include only specific goods and services such as gas,

electricity, water and communications services (**Section 233(3) of the Insolvency Act 1986**).

2. In such situation, a supplier may not be allowed to demand for payment of outstanding debts in order to continue the supply of goods or services. However, they may “*make it a condition of the giving of the supply that the [administrator] personally guarantees the payment of any charges in respect of the supply.*” (**Section 233(2)(a) of the Insolvency Act 1986**).
3. Additionally, pursuant to **section 233A of the Insolvency Act 1986**, a supplier of those specific goods and services may not rely upon an “insolvency-related term” in their contract of supply to terminate the said contract. This enables the administrator to ensure that any contract of supply of those specific goods and services would not be terminated.
4. With the introduction of **section 233B of the Insolvency Act 1986** (that was introduced by the **Corporate Insolvency and Governance Act 2020**), further protections are accorded to companies under any insolvency procedure (including administration) in relation to the supply of goods and services. **Under s. 233B of the Insolvency Act 1986**, a supplier is prevented from terminating a supply upon the company’s insolvency but also prevent suppliers from making it a condition of continued supply that pre-insolvency arrears are paid and from making other changes to the contract such as increasing prices. A supplier also cannot insist on a personal guarantee from the administrator.
5. A supplier may only terminate the contract of supply if the administrator consents or on an application to court by the supplier, the court is satisfied that the continuation of the contract would cause the supplier hardship.

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?

1. **The** order of priority of payments is set out in **Section 115 of the Insolvency Act 1986**. Under this section, the following expenses are given top priority over the company’s preferential creditors, any holders of floating charges and unsecured creditors. These expenses include but not limited to the following:
 - a. Expenses incurred by the liquidator to preserve or realise assets of the company;
 - b. Cost of any security provided by the liquidator
 - c. Remuneration of the liquidator
2. Next in the order of priority is payment of debts to preferential creditors. The types of payments are set out in **Schedule 6 of the Insolvency Act 1986** and they include but not limited to the following:
 - a. **Deb**ts due to the Inland Revenue
 - b. Debts due to customs and excise
 - c. Debts on account of social security contributions

- d. Debts on account of contributions to occupational pension schemes;
 - e. Remunerations to employees
 - f. Levies on coal and steel production
 - g. Debts owed to the Financial Services Compensation Scheme
3. After preferential creditors have been paid, the next category of creditors to be paid would be any holder of floating charges. In the event of more than one floating charge holder, priority would be given to the one that was created earlier.
 4. However, before any payment can be made to holders of floating charge, the liquidator must consider the application of **Section 176A of the Insolvency Act 1986** where the liquidator is under a duty to make a “prescribed part” of the company’s net property available for the satisfaction of unsecured debts and must not distribute any of this prescribed part to a floating charge holder unless it is in excess of the amount required to satisfy all the unsecured debts.
 5. Next in the order of priority of payment is unsecured creditors.
 6. In the event there are surplus of monies after payments to all creditors, the surplus may be distributed among the shareholders of the company in accordance with the company’s constitution.
 7. However, the order of priority set out above will 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. This is set out in **Section 174A of the Insolvency Act 1986** whereby certain unpaid pre-Moratorium or Moratorium debts are paid in priority. In other words, these categories of debt are afforded a form of “super priority” in subsequent 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 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;

1. As the floating charge was created in favour of Ambitus Bank plc ("Bank") just months before the compulsory liquidation of the Company, the liquidator may look to **Section 245 of the Insolvency Act 1986** concerning "Avoidance of certain floating charges".
2. Unless there are contrary evidence which shows otherwise, the Bank may not be a person connected with the Company. In such situation, the relevant time to determine whether the floating charge created in favour of the Bank is caught under **section 245 of the Insolvency Act 1986** is 12 months prior to the date of commencement of insolvency proceedings.
3. Since the creditor's winding up petition was issued on 13 January 2024 and the floating charge in favour of the Bank was created just 6 months prior in June 2023, the Bank's floating charge will be caught under **section 245 of the Insolvency Act 1986**, and the floating charge is invalid.
4. The only exception is if in consideration of the creation of the floating charge, the Bank had provided to the Company at the same time as or after the creation of the charge, "*the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied*" (**Section 245(2) of the Insolvency Act 1986**).

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

1. Since the laser cutting machines ("Machines") were sold to the Company's director at GBP60,000 below its value a year ago, it is arguable that the Machines were sold at an undervalue. In such situation, the liquidator may look to **Section 238 of the Insolvency Act 1986** concerning "Transactions at an undervalue".
2. The liquidator would first need to determine the "relevant time" as defined under **section 240 of the Insolvency Act 1986** to determine whether the transaction was made at an undervalue. As Angela Bannister is a director of the Company, she is arguably "*a person connected with the company (otherwise than by reason only of being its employee)*". To that end, the relevant period is 2 years prior to the commencement of the winding up proceedings.
3. Since the transaction was made in January 2024 and assuming it was made after the presentation of the winding up petition on 13 January 2024, the sale of the Machines to Angela Bannister is caught under section 238 of the Insolvency Act 1986.

4. Based on **Section 238(4)(b) of the Insolvency Act 1986**, it is arguable that the Machines were sold to the director *“for a consideration the value of which, in money or money’s worth, is significantly less than the value... of the consideration provided by the company.”* This is particularly when the difference in price between the time when the Company purchase the Machines 1 year ago and the time when the Company sold the Machines to the director is significant.
5. Accordingly, the liquidator may consider applying to court for an order to invalidate the sale of the Machines and to restore the Company to *“the position to what it would have been if the company had not entered into that transaction.”*
6. A court order to invalidate the sale of the Machines will be made by court unless 2 conditions can be proven under **section 238(5) of the Insolvency Act 1986**:
 - a. First, that the Company who entered into the transaction did so in good faith and for the purpose of carrying on its business; and
 - b. Second, that at the time of the transaction, there were reasonable grounds for believing that the transaction would benefit the company.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

1. Since the payment was made to Aluminium Alumini Ltd (“Aluminium”) a month before the winding up order was made, the liquidator may look to **Section 239 of the Insolvency Act 1986** concerning “Preferences”.
2. Under **Section 239 of the Insolvency Act 1986**, the liquidator may apply for a court order to restore *“the position [of the Company] to what it would have been if the company had not given the preference”* where the Company had during a relevant time given a preference to a 3rd party.
3. The relevant time is dependent on whether the 3rd party receiving the preference is a person connected to the Company (**Section 240(1) of the Insolvency Act 1986**). Assuming Aluminium is not a person connected to the Company, the relevant time to determine whether there was a preferential payment made is 6 months prior to the commencement of the winding up proceedings.
4. In order to succeed in such application under **Section 239 of the Insolvency Act 1986**, the liquidator must be able to show the following pursuant to **Section 239(4) and (5) of the Insolvency Act 1986**:
 - a. That Aluminium is one of the Company’s creditors;
 - b. That the Company did anything which has the effect of putting Aluminium into a position which, in the event of the Company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done; and

- c. The Company which gave the preference was influenced in deciding to give the preference by a desire to prefer the creditor.
5. The first two requirements are relatively easy to establish as Aluminium is a creditor arising from unpaid supply of goods, and that the total payment of GBP 28,000 has the effect of putting Aluminium into a position which is better than its position it would have been in if no payments were made.
6. In so far as the “desire” to prefer Aluminium, the liquidator must show that the Company had desired to improve the creditor’s position in the event of an insolvent liquidation, and not just that the Company had desired to make such payment. As Millett J stated in ***M C Bacon Ltd [1990] BCLC 78***,

“It is not, however, sufficient to establish a desire to make the payment or grant the security which it is sought to avoid. There must have been a desire to produce the effect mentioned in the subsection, that is to say, to improve the creditor’s position in the event of an insolvent liquidation. A man is not to be taken as desiring all the necessary consequences of his actions. Some consequences may be of advantage to him and be desired by him; others may not affect him and be matters of indifference to him; while still others may be positively disadvantageous to him and not be desired by him, but be regarded by him as the unavoidable price of obtaining the desired advantages. It will still be possible to provide assistance to a company in financial difficulties provided that the company is actuated only by proper commercial considerations. Under the new regime a transaction will not be set aside as a voidable preference until the company positively wished to improve the creditor’s position in the event of its own insolvent liquidation’.

7. Since the continued supply of metal from Aluminium is essential to the Company, it is arguable that the Company was influenced by commercial considerations and that there was no desire to put Aluminium in a better position.

*** End of Assessment ***