



**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?

The Liquidator of a company has standing to bring an action under Section 245 of the Insolvency Act of 1986, Section 246ZB of the Insolvency Act of 1986 and Section 127 of the Insolvency Act of 1986. In the case of Section 6 of the Company Directors Disqualification Act of 1986, such action can be made by the Secretary of State or the Official Receiver on instructions of the Secretary of State when the company is wound up by order of the court.

**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 “payment holiday” includes those debts that were incurred prior to the Moratorium except when they consist of amounts payable under any of the following:

1. The monitor’s remuneration and expenses;
2. Goods or services provided during the Moratorium;
3. Rent in respect of a period during the Moratorium;
4. Wages or salaries arising under a contract of employment;
5. Redundancy payments or debts arising under a contract or other instrument 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?

An administrator has the ability to obtain certain goods and supplies while continuing to operate the business. Pursuant to Section 233 of the Act the administrator can maintain the supply of gas, electricity, water and communication services. Suppliers under this section can request a personal guarantee from the administrator for the supply of new services.

Section 233B of the Act allows the administrator to continue with those contracts for other suppliers not included in Section 233. Nevertheless, suppliers under Section 233B may terminate the contract with consent of the administrator or when they apply for leave to the court due to undue hardship. There are also exceptions under Section 233B limited to contracts for insurers, banks, electronic money institutions, recognized investment exchanges, securitisation companies, clearing houses, and overseas companies with corresponding functions.

**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 priority in payments in a liquidation proceeding is as follows:

1. Expenses related to the liquidation or winding up of the company have first priority in payment pursuant to Section 115 of the Act. These expenses also have a priority scheme within this class which is as follows:
  - a. Expenses incurred by the liquidator for the realization, preservation or getting of assets of the company;
  - b. Costs of any security provided by the liquidator;
  - c. Payment to persons who prepared or assisted to prepare the statement of affairs or accounts of the company;
  - d. Necessary disbursements made by the liquidator for the winding up of the company;
  - e. Payment to those employed by the liquidator to perform services to the company;
  - f. Payment of the liquidator's fees;
  - g. Company's tax gains due for the realization of the assets of the company sold as part of the liquidation;
  - h. Any other expenses properly charged by the liquidator in carrying out his/her functions in the winding up proceedings.
2. Payment of priority or preferential creditors defined under Sections 386, 387 and Schedule 6 of the Act. This class includes limited claims of employees and some taxation liabilities, among others. Recently, certain claims related to deposits in financial institutions subject to the Financial Services Corporation Scheme as well as outstanding taxes owed to the Crown were also included as preferential claims. For the specific detail of the claims included under this class please refer to Schedule 6 of the Act, which provides the list of 11 categories of preferential creditors. These are divided into two categories, ordinary and secondary. Those debts included under items 9, 10 and 11 of Schedule 6 are defined as secondary preferential debts because they are paid after the ordinary preferential debts listed under items 1-8 of Schedule 6. They are secondary as per Section 386 of the Act. The ordinary debts under items 1-8 are paid first under the Class payment scheme. Finally, preferential debts in their respective subclasses rank equally amongst themselves and they abate in equal proportion if the company's assets are insufficient to pay all of them in full.
3. After payment is made to preferential creditors, payment is made to floating charge holders. Priority depends on the date of the creation of the floating charge. The liquidator must first determine whether the floating charge was created on or after 15 September 2003 and if the company has gone to liquidation or administration. (See Section 176A of the Act). If this is the case, then the liquidator must make a prescribed part of the company's net property (funds available after payment of liquidation expenses and preferential claims) to provide for the payment of unsecured creditors. Unless there is a surplus, the liquidator cannot use the prescribed part to pay the floating charge holder. It must be underscored that secured creditors that have an unsecured portion of their claim cannot participate in the distribution of the prescribed part.

4. After the three categories listed above are paid, the liquidator pays unsecured creditors.
5. If all the classes listed above are paid in full, with interest and there is still a surplus, then the liquidator proceeds to pay the company's shareholders according to the company's constitution.

However, this priority of payments scheme is different if the company has been subject to a Moratorium under Part A1 of the Act during the 12 months period prior to the commencement of the liquidation. If this is the case, Section 174A of the Act provides that certain unpaid pre-moratorium debts which were not part of the payment holiday (i.e. debts to employees or financial services) are paid in priority to the liquidator's fees and expenses. Therefore, they have a "super priority" status in the event of a liquidation that follows a moratorium. Nevertheless, those bank debts that related to an accelerated debt are not entitled to this super priority status.

**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;

If the liquidator wishes to invalidate and avoid the floating charge granted by the company to Ambitus Bank plc ("Ambitus") we would need to consider if the requirements of Section 245 of the Act for



avoidance of the floating charge are met and also if Ambitus has a valid defence against such avoidance action. The liquidator would need to submit to the Court evidence proving all of the required elements.

Pursuant to Section 245 of the Act the following criteria need to be met in order to avoid or invalidate a floating charge granted by a company:

1. The floating charge has to be granted by the company to a creditor in a term of 12 months ending with the onset of the insolvency proceeding (the date in which the winding up commences).
2. No new value or new funds were provided by the creditor to the company on account of this floating charge.
3. The floating charge was provided by the company on account of a prior or antecedent debt owed to the creditor.
4. The floating charge was granted while the company was insolvent as defined under Section 123 of the Act, meaning that it was unable to pay its debts or it became unable to pay its debts because of the transaction.

If all of the above criteria are met, then the floating charge can be invalidated. Nevertheless, it must be underscored that the underlying debt remains valid, but as an unsecured debt.

In this case the liquidator can present evidence to invalidate the floating charge granted to Ambicus because:

1. The debenture with the floating charge was granted by the company to Ambitus as security for the preexisting loans that the company had and in order to avoid a demand for repayment of such loans.
2. Ambitus did not provide any new value or new funds to the company on account of the debenture and the floating charge.
3. The floating charge was granted on June 2023, that is within the 12 month period for avoidance of a floating charge granted to a creditor. The winding up order was entered following the creditor's winding up petition on 13 January 2024.
4. The floating charge was granted while the company was unable to pay its debt or became unable to pay its debt on account of the floating charge. According to the facts the company was having cash flow problems at least since January 2023, one year before the wind up order was entered and the company was not paying its debts to other creditors. Moreover, the floating charge was over the company's whole undertaking.

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

The sale of the laser cutting machines; and

In order to determine if the liquidator can invalidate the sale of the laser cutting machines to Angela Bannister we would need to consider if such transaction was a transaction at undervalue pursuant to Section 238 of the Act and if Angela Bannister has any valid defence to this action from the liquidator. The liquidator would need to submit to the Court evidence proving all of the required elements. Section 238 provides that in order to avoid a transaction at undervalue the following elements need to be met:

1. Since Angela Bannister is a director of the company, the transaction at undervalue had to be made 2 years prior to the commencement of the liquidation or winding up of the company.

2. Either no consideration was given, the transaction was a gift or the consideration provided to the company for the transaction was significantly less in value than the consideration given by the company to the person/entity.
3. The transaction was entered while the company was unable to pay its debts or became unable to pay its debts as a consequence of the transaction, as defined in Section 123 of the Act.
4. It is presumed that the company was unable to pay its debts if the transaction was entered with a related party to the company, unless proven contrary.

We would also need to consider if the following elements to the defence are present:

1. If the transaction was entered in good faith.
2. If the transaction was entered for the purpose of carrying on the business of the company
3. If there were reasonable grounds to believe that the transaction would benefit the company.

When we look at the specific facts of this case, we can conclude that the following elements for the avoidance of the transaction at undervalue are present:

1. The transaction was made on January 2023, that is one year prior to the winding up order.
2. Angela provided the company GBP 40,000 in cash for the equipment which just one year before was purchased at 100,000. That is, she paid less than half of the purchase price of the equipment. The liquidator can argue that such payment was undervalued and would need to prove that the value of the equipment at the time of the sale was higher than the GBP 40,000 paid.
3. The transaction was entered with Angela, who is a director of the company. Therefore, there is a presumption of insolvency. Moreover, it was entered at the time the company was undergoing cash flow problems, therefore it can be also argued and the liquidator would need to prove, that the company was unable to pay its debts as they became due at the time (cash flow insolvency).

Notwithstanding the above listed elements and facts, Angela Bannet can raise the defence against the avoidance of the sale of the equipment. She can allege that the transaction was entered in good faith, to assist the company at the time and provide cash so that the company could continue its business and there was a reasonable belief that this transaction would benefit the company. The liquidator would need to prove these defence elements to be contrary or false. From the facts provided there is no evidence that good faith was lacking in the transaction and that the company did not benefit from the same because of the cash influx of the GBP 40,000 at the time. Angela could argue that these funds allowed the company to survive one more year prior to its winding up in 2024. The Court would have to consider all factors when deciding if the transfer was undervalued and subject to avoidance.

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

The payments to Aluminium Alumini Ltd.

In order to avoid the payments made to Aluminium Alumini Ltd. ("AAL") the liquidator needs to evaluate if the elements for the avoidance of a preferential transfer under Section 239 of the Act are met and submit to the Court evidence proving all of the required elements. Also, the liquidator must consider any defence that AAL may be entitled to claim and evaluate if there is evidence to rebut such defence. In this specific case there are two types of transfers made by the company to AAL and they both need to be evaluated separately.

Section 239 of the Act establishes the following elements for the avoidance of a preferential transfer to an unsecured creditor:

1. The person to whom the transfer was made was a creditor of the company at the time such preferential transfer was done.
2. The transfer was done in order to put the creditor in a better position in the event the company enters liquidation and such transfer had not been made. The transfer must benefit the creditor to the detriment of other unsecured creditors.
3. The company, in giving the transfer, was influenced by the desire to prefer the creditor over other creditors in the event of liquidation.
4. The transfer was made 6 months before the onset of the insolvency proceedings.
5. At the time the transfer was made the company was unable to pay its debts as they became due or became unable to pay its debts due to the transfer made as defined by Section 123 of the Act.

In this case two types of transfers were made: the GBP 20,000 transfer to satisfy in full the existing debt with AAL, the company's key supplier and the GBP 8,000 payment for cash sales of goods delivered. Regarding the GBP 20,000 payment to AAL the following facts are relevant and if proven by the liquidator they can persuade the Court to enter and order to restore the position of the company as if such transfer had not been made.

1. AAL was a creditor of the company at the time the transfer was made.
2. AAL requested the payment of the entire amount of the existing debt (GBP 20,000) to which the company's directors agreed.
3. The company authorized the payment of the entire existing debt to AAL and bettered AAL over all other unsecured creditors because the debt was eliminated.
4. The demand for payment and subsequent payment were made one month before the winding up order was made.
5. At that time the company was unable to pay its debts as they became due. The transfer was made one month prior to the winding up order. At that time the company was already unable to pay its debts and such situation led to the petition by a creditor for such winding up on 13 January 2024.
6. By paying the entire unsecured debt of AAL, the company's directors had the desire and intent to place AAL in a better position than all other unsecured creditors on the eve of its inevitable winding up and liquidation. See *Manolete Partners Plc v Coleman* [2022] EWHC 2644 (Ch) which provides that "it is necessary to prove (subject to statutory presumption) a desire not just to confer benefit on the recipient but to improve their position in an insolvent liquidation." In this, case the payment of the GBP 20,000 excluded AAL from distribution in the insolvency proceedings, since it was no longer a creditor of the company. The company's directors were clearly influenced by such desire to better AAL since it agreed to make the payment basically on the eve of the winding up order. They knew that insolvency proceedings were "in the horizon".

On the other hand, AAL can claim as a defence that the GBP 20,000 payment was not preferential because the company's directors were following their best commercial considerations, since AAL was the main supplier and the directors did not want the company to lose this essential good to maintain operations. The court would be faced with balancing the evidence of this subjective component of the avoidance action. If proven this element in favour of the liquidator, the transfer can be avoided since the other elements are undisputed by the facts.

With respect to the GBP 8,000 payment made to AAL, the same were done on a cash on delivery basis. Therefore, there was a contemporaneous exchange of goods with each payment made and the company received consideration equal to the amount of the payment. AAL can claim that such payments were made due to commercial considerations and that thus, the company did not have the required desire and intent of the betterment of AAL over other unsecured creditors in a liquidation proceeding.

**\* End of Assessment \***