



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

Floating charges caught by section 245 of the Insolvency Act 1986 (the "Insolvency Act") are automatically rendered invalid in the event that a company goes into liquidation or administration. As such, an "action" under s.245 of the Insolvency Act does not depend on an application of a liquidator or administrator - s.245 is *ipso facto* the determination of a floating charge's invalidity. The only exceptions to an automatic rendering of a floating charge as invalid under s.245 of the Insolvency Act are the "new" consideration factors found in s.245(2)(a)-(c) of the Insolvency Act:

"(a) the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the company at the same time as, or after, the creation of the charge,

(b) the value of so much of that consideration as consists of the discharge or reduction, at the same time as, or after, the creation of the charge of any debt of the company, and

(c) the amount of such interest (if any) as is payable on the amount falling within paragraph (a) or (b) in pursuance of any agreement under which the money was so paid, the goods or services were so supplied or the debt was so discharged or reduced."

Section 6 of the Company Directors Disqualification Act 1986

Section 6 of the Company Directors Disqualification Act 1986 (the "CDDA") allows the Secretary of State to bring legal action against a director of a company, in circumstances where the Secretary considers that the court will be satisfied as to s.6(1)(a)-(b) of the CDDA.

Section 246ZB of the Insolvency Act

Traditionally, claims against directors for wrongful trading were only brought by liquidators. However, due to s.246ZB of the Insolvency Act (as introduced by the Small Business, Enterprise and Employment Act 2015), claims against directors for wrongful trading may now be commenced by administrators.

Section 127 of the Insolvency Act

Claims under s.127 of the Insolvency Act are ordinarily 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 following pre-moratorium debts must continue to be met by the company and do not benefit from the payment holiday under Part A1 of the Insolvency Act:

1. the monitor's remuneration or expenses;

2. goods and/or services supplied during the moratorium;
3. rent in respect of a period during the moratorium;
4. wages or salaries arising under a contract of employment; and
5. redundancy payments.

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?

In short, yes - an administrator of a company may require supplies of goods and services to continue during an administration. The appointment of an administrator to a company does not, in and of itself, terminate contracts of continuing obligations (i.e. executory contracts). In fact, executory contracts containing terms that seek to automatically terminate are regularly deemed void due to increasing statutory exceptions in modern-day times.

Despite the appointment of an administrator to a company, the need to obtain or retain particular supplies for the company's ongoing operation will persist. Section 233(3) of the Insolvency Act lists the following services as relevant supplies:

- (a) gas;
- (b) electricity;
- (c) water; and
- (d) communication services (which, includes point of sale terminals, computer hardware and software, information, advice, technical assistance, data storage, processing and website hosting).

However, it should be noted that a supplier of the above services may require the administrator to personally guarantee payment of charges in regards to any new supplies (s.233(2)(a) of the Insolvency Act).

Under s.233A of the Insolvency Act, a supplier is ordinarily unable to rely on an "insolvency-related term" of a contract concerning termination of said contract where a company merely enters administration. Further, the supplier will also be barred from altering any terms of the supply itself or insisting on more expensive payments for a continuation of supply.

In 2020, a new s.233B of the Insolvency Act was introduced. Section 233B expands on the above suppliers to include nearly all goods and services with very few exceptions. Further, s.233B does not allow for suppliers to require a personal guarantee from an administrator (unlike s.233). Be that as it may, s.233B does allow for an executory contract to be terminated with court permission in circumstances where the court is satisfied that the continuation of the contract would cause undue 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?

Priority of Payments

During the course of a liquidation, a priority of payments (and their relevant rights) ordinarily occurs in the following manner:

1. First and foremost, the expenses incurred to wind up the company, along with the liquidator's remuneration are paid in priority to all other payments.
2. Following payment of the above expenses and remuneration in full, preferential creditors (as defined in ss.386, 387 and Schedule 6: s.175) are paid. Such preferential creditors may be further broken down into the following subcategories of prioritisation:
 - a. Ordinary - ordinary preferential debts rank in priority to secondary preferential debts. However, in circumstances where the company's assets are insufficient to pay all preferential debts, the respective classes of preferential debts will rank equally. Ordinary preferential debts can include: certain pension payments owing to the company's employees, remuneration owed to the company's employees, holiday remuneration owed to the company's employees, levies concerning production of coal and steel, amounts ordered to be paid under the Reserve Forces (Safeguard of Employment) Act 1985, and certain deposits under the Financial Services Compensation Scheme to relevant persons.
 - b. Secondary - secondary preferential debts are defined under s.238 of the Insolvency Act and can include: amounts owed to relevant persons in respect of certain deposits under the Financial Services Compensation Scheme, amounts owed to relevant persons in respect of deposits through UK and non-UK credit institutions (subject to Crown preferences in respect to His Majesty's Revenue and Customs), certain tax/insurance/Construction Industry Scheme deductions, VAT payments, and student loan repayments.
3. Once all preferential debts have been paid, any holders of valid floating charges will be paid. In circumstances where more than one floating charge exists, priority will usually be given to whichever floating charge was created first. Despite the foregoing, and in circumstances where a floating charge was created on or after 15 September 2003, it should be noted that a liquidator is under a duty create a "prescribed part" of the company's property, which will be available for the payment of unsecured debts (s.176A). Such "prescribed part" may not be distributed to holders of a floating charge unless specific requirements are met or, certain conditions give rise to the extinguishment of the "prescribed part".
4. Subsequently, unsecured creditors are then paid. Often times, the expenses of the liquidation and further waterfall payments to preferential creditors renders any amount available to unsecured creditors insufficient or non-existent.
5. Lastly, and only in circumstances where sufficient funds (plus any interest) has been paid to all creditors of the company (whether secured or unsecured), any surplus

may be paid to the company's shareholders. Such payment is ordinarily distributed *pro rata* to the relevant shareholders' shareholding.

Changes in Priority of Payment where a Moratorium under Part A1 Occurred

In circumstances where a company enters into liquidation within 12 weeks from the end of a moratorium under Part A1 of the Insolvency Act, the usual priority of payments in the subsequent liquidation may be different had a moratorium not occurred.

Pursuant to s.174A of the Insolvency Act, debts that were not subject to the moratorium "payment holiday" are paid first in priority in a liquidation, even as to the expenses and fees of the liquidator. These pre-moratorium and moratorium debts falling outside of the "payment holiday" are capable of being reclassified as a super-priority payment in the liquidation. Further, both unsecured and secured pre-moratorium bank-debts are also capable of acquiring super-priority status in a subsequent liquidation under these circumstances. However, such bank-debts will not achieve a super-priority status in where such payment was brought about due to an acceleration event.

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;

Section 245 of the Insolvency Act will likely render the floating charge granted to Ambitus Bank plc (the "Bank") as invalid, such that no formal court action against the Bank by the liquidator is required.

Section 245 of the Insolvency Act only applies to floating charges. In circumstances where a company enters into liquidation (as is the case for Blazer Laser Limited (the "Company")), section 245 is meant to prevent unsecured creditors from obtaining a more ambitious form of security (i.e. the floating charge) shortly before a company enters into liquidation. While section 245 does not apply to the grant of a floating charge over new funding, this exception is not relevant in circumstances where the Bank did not grant the Company fresh funding for the floating charge.

Under section 245, the relevant floating charge must be created within a period of two years of a company commencing its liquidation. Applying the foregoing to the Company, the floating charge was granted to the Bank in or around June 2023. Given that the Company commenced its liquidation in early 2024, the floating charge falls within the relevant period for the purposes of section 245.

Finally, no 'new' consideration factors within section 245 apply to the facts of the floating charge granted to the Bank. As such, the floating charge to the Bank is likely to be rendered as invalid as the Company has entered into liquidation. Be that as it may, section 245 will not invalidate anything done pursuant to the Bank's floating charge prior to the Company's commencing of its liquidation. Although the Bank's floating charge will be invalidated, the Bank's underlying debt remains valid.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

It is likely that the liquidator will be able to attack the sale of the laser cutting machines under s.238 of the Insolvency Act (i.e. a transaction occurring at an undervalue).

Pursuant to s.238 of the Insolvency Act, and in order to attack transactions suspected to be at an undervalue, a liquidator must be able to evidence that the company:

1. made a gift to another person; or
2. entered into a transaction with another person on terms that provided for the company to receive zero consideration; or
3. entered into a transaction with another person for a consideration that, in monetary terms, was (on the day of the transaction), significantly lower than the value of the consideration given by the company.

In addition to the above, the transaction subject to attack must have occurred within the two-year period prior to the commencement of the liquidation of the company (the "Relevant Period").

While it is usually obvious where a gift or transaction with zero consideration has occurred, comparisons of consideration received versus consideration given by the company, in monetary terms, is likely to require valuation experts and evidence.

Further, a liability requirement under s.238 provides that the undervalued transaction must occur when the company was unable to pay its debts within the meaning of s.123 or

alternatively, where the company became unable to pay its debts as a result of the transaction. In circumstances where the transaction was with a "connected person" (i.e. someone connected to the company), it is presumed that the company was insolvent or became insolvent due to the transaction, unless otherwise proven.

Applying the above to the Company's liquidator will more than likely succeed in proving that the sale of the laser cutting machines (the "Transaction") occurred at an undervalue within s.238, due to the following:

1. the Transaction occurred in or around January 2023 and the Company commenced its liquidation on 13 January 2024. As such, the Transaction occurred within the Relevant Period;
2. the laser cutting machines were bought for GBP 100,000 in or around 2022. Although a valuation for the laser cutting machines in January 2023 will need to be obtained, it is extremely unlikely that such machines devalued by GBP 60,000 in the period of merely one year. In the circumstances, the consideration received by the Company in the Transaction is likely to be viewed as significantly lower than the consideration given by the Company; and
3. Ms Angela Bannister was a director of the Company and therefore qualifies as a "connected person". As a result, a court will presume that the Transaction occurred when the Company was unable to pay its debts as they fell due or became unable to pay its debts due to the Transaction. This presumption will prevail unless rebutted.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

The payments made to Aluminium Alumini Ltd ("AAL") appear as though they are capable of being avoided by the court on the application of the Company's liquidator under section 239 of the Insolvency Act.

Section 239 of the Insolvency Act is aimed at preventing a company from placing one creditor in a superior position to other creditors shortly before the commencement of insolvency proceedings. Such "preferences" to certain creditors in the form of full payment is prohibited where a creditor would likely have been unsecured (but for the preference) and only received cents on the dollar. Section 239 also allows for any security given to a creditor at a preference (or any other form of payment) to be attacked.

An application under section 239 may only be commenced upon a company being wound up. In order to be successful under s.239, a liquidator will have to prove that:

1. the creditor who received the alleged 'preference' was merely an unsecured creditor at the time of the transaction;
2. something was done by the company, which resulted in a creditor obtaining an unfair advantage to other creditors in the event of a company's insolvency;
3. the company was, in giving the alleged preference, influenced by a need to produce the situation in (2.) above in relation to the person preferred; and

4. the preference must be given within two years of insolvency proceedings (with respect to preferences given to connected persons) and six months of insolvency proceedings for unconnected persons.

Applying the above to the Company, almost all essential ingredients to a claim under s.239 are present:

1. AAL, at the time of demanding outstanding payment owing to it in the amount of GBP 20,000, was an unsecured creditor of the Company;
2. payment of GBP 20,000 (plus advance payment of GBP 8,000 for future supplies) by the Company to AAL resulted in AAL obtaining a better position than the Company's other creditors upon the Company entering into liquidation; and
3. the payment to AAL occurred within 6 months of the Company's liquidation.

Despite the above, the Company's liquidator will experience difficulties in establishing a desire to specifically preference AAL. The burden of proving such desire will remain on the Company's liquidator (given that AAL is unconnected to the Company). Recent case law has determined that a company influenced by commercial considerations, with the goal of keeping the company as a going concern, will not amount to a desire to preference. We have been told that the Company viewed the metal supplies from AAL as "*essential by the [C]ompany*." As a result, it is unlikely that the Company's payment to AAL would amount to a desire to preference AAL.

In circumstances where desire had been established, the liability requirement under s.239 would likely succeed as the Company would have been unlikely to be able to pay its debts one month before insolvency proceedings.

*** End of Assessment ***