



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?

- (i) Section 245 of the Insolvency Act 1986

Section 245 relating to floating charge avoidance automatically applies when the conditions are satisfied i.e. no application is required. Once it applies, a Liquidator or Administrator can bring action to avoid the new floating charge security.

- (ii) Section 6 of the Company Directors Disqualification Act 1986

Under Section 6, anyone can report a company director as being 'unfit' however where the company is insolvent this tends to be the Liquidators. Once the Court is satisfied that the director is unfit it will order that the Director is disqualified for a specific period.

- (iii) Section 246ZB of the Insolvency Act 1986

Under Section 246ZB, the administrator will make an application to the court and the court may declare that that a director is to be liable to make contribution to the company's assets. The Administrator can then enforce this action against the director.

- (iv) Section 127 of the Insolvency Act 1986

Any disposition of property made after the commencement of compulsory winding up shall be void, unless proven otherwise. Under section 127, a Liquidator can bring action and retrieve disposed assets to, in effect, reverse the transaction. However, other parties (incl. the Liquidator) can apply to the court for a validation order where dispositions shall not be void.

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.

- Amounts payable in respect of goods and services supplied during the moratorium;
- Wages and salaries arising under contracts of employment;
- Redundancy payments;
- Rent payable in respect of a period during the Moratorium; and
- Monitor's remuneration and expenses.

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?

Once appointed, an Administrator has any powers necessary for the management of the company's affairs, business and property.

Section 233 of the Insolvency Act applies to the supply of gas, electricity, water and communications. The suppliers of such goods and services are not permitted to require payment of outstanding debts in order to continue to supply these services throughout the administration. However, in order to continue the provision of such services, the service provider is able to request a personal guarantee from the administrator in respect of the costs associated with the supply throughout the administration. The service provider of such services is also able to alter the terms of the contract or demand higher payments for the supply throughout the administration (section 233A of the Insolvency Act).

Section 233B of the Insolvency Act applies to suppliers not covered under section 233A and prevents them from terminating the contract with the company once it enters administration. This section of the Insolvency Act also prohibits these suppliers from demanding payment of outstanding debts in order to continue to supply goods and services to the company in administration and they are unable to demand personal guarantee from the administrator.

Where the court is satisfied that continuation of a contract would cause the suppliers financial detriment then it may allow the termination of the contract by the supplier.

Overall, as the rights of suppliers to terminate contracts is limited, the administrator can require suppliers of goods and services to continue to supply throughout the administration.

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?

A liquidator's duty is to realise the assets of the company and distribute proceeds to creditors in accordance with the "distribution waterfall" and priority of creditors.

Once assets have been realised, the expenses incurred in the winding up of the company will be paid first (section 115 of the Insolvency Act). There is also a priority of payment within the expenses that have been incurred as a result of the winding up, this priority is as follows:

1. Expenses incurred by the liquidator in relation to the company's assets;
2. Any costs associated with security that is provided by the liquidator;
3. Amounts payable to individuals who assisted with the preparation of the Statement of Affairs;
4. Liquidators' disbursements;
5. Amounts payable to individuals employed by the liquidator to perform services for the company;
6. Liquidators' remuneration;
7. Corporation tax on chargeable gains; and
8. Any other expenses incurred by the liquidator.

The next class of creditors which will receive payment from the realised assets is preferential creditors. This mainly includes employees and tax authorities however a higher level of protections has historically been provided to employees as they receive statutory

protection under the Employment Rights Act. The preferential debts of a company are divided into ordinary and secondary whereby ordinary preferential debts are paid first. The debts within these two categories rank equally for payment. Schedule 6 of the Insolvency Act lists out some examples of preferential debts:

1. Employee contributions made within 4 months of the commencement of the liquidation to an occupational pension scheme;
2. Employer's contributions made within 12 months of the commencement of the liquidation to an occupational pension scheme;
3. Employee remuneration for the 4 month period prior to liquidation;
4. Amounts owed to employees for accrued holiday;
5. Levies on the production of coal and steel;
6. Amounts payable under the Reserve Forces Act;
7. Amounts covered by the Financial Services Compensation Scheme (up to the maximum amount of £85,000); and
8. PAYE Income Tax, NI deductions, VAT, CIS deductions and student loan repayments.

Floating charge holders will receive payment out of the assets next. If there is more than one floating charge holder then the priority of payment will be based upon the creation date i.e. the earliest floating charge will be paid first.

The liquidator is also required to make part of the company's assets available to unsecured debts and this proportion of the assets must not be distributed to floating charge holders. This set-aside proportion of the assets is known as the "prescribed part". The "prescribed part" is equal to 50% of the first 50% of net property plus 20% of the excess net property and is subject to a maximum of £800,000.

Unsecured creditors, usually consisting of trade creditors, would be paid next. These unsecured creditors rank equally and will be paid in proportion of their debts if the funds remaining are not sufficient to cover the entire unsecured creditor pool.

Finally, although unlikely in an insolvency, if there are funds remaining after payable of all expenses and creditors then a payment will be made to shareholders on a pro-rata basis in respect of their shareholdings.

If the company enters liquidation at the end of a 12-week Moratorium then the priority of debts will differ. Section 174A of the Insolvency Act stipulates that some pre-Moratorium debts e.g. amounts owed to employees will be paid following liquidator and therefore receive "super priority". These "super priority" debts will rank higher in priority to all others debts.

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 Liquidator of the Company should refer to Section 245 of the Insolvency Act in respect of the floating charge that was created in favour of Ambitus Bank plc (the Bank).

This section is aimed at preventing pre-existing unsecured creditors from obtaining floating charge security shortly before a company enters an insolvency procedure. The Bank was a pre-existing unsecured creditor as the Company already had existing loans which the Bank was demanding payment of.

The creation of the new floating charge must have taken place within the relevant time prior to insolvency and the insolvency entity must have been unable to pay its debts at that time for Section 245 to apply. As the Bank is an unconnected party to the Company, the relevant time is 12 months prior to insolvency. The creation of the new floating charge security took place in June 2023 which was eight (8) months prior to insolvency. The Company was also unable to pay its current loans with the Bank and therefore Section 245 would apply.

No "new" consideration was given by the Bank for the creation of the floating charge as the debenture related to the existing loans that were in place.

Therefore, the Liquidator is able to deem the floating charge in favour of the Bank as invalid however the debt owed to the Bank still remains valid but would be considered as an unsecured creditor when distributing the assets.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

The sale of the laser cutting machines to Angela Bannister (the Director) appear to have been at undervalue and therefore Section 238 of the Insolvency Act would need to be considered by the Liquidator. Section 238 permits the Liquidator to attack certain transactions which took place shortly before a company enters insolvency.

The Liquidator must show the Court that the Company:

- (i) Made a gift to another person; or
- (ii) Entered into a transaction on terms that meant the company did not receive any consideration; or
- (iii) Entered into a transaction where the consideration received by the company was less than the value.

The laser cutting machines were purchased for £100,000 and then sold to the Director for £40,000 a year later. This suggests that the consideration received for the laser cutting machines was less than the value of the asset and the Liquidator must show this.

The transaction must also have taken place within two years prior to insolvency. The sale to the Director took place one year before the liquidation commenced.

The sale of the laser cutting machines was made to a connected party (director). Therefore, it is a prerequisite that the Company was insolvent at the time of sale. It must be proved that the Company was not insolvent for Section 238 to not apply.

If the Court is satisfied that the transaction is at an undervalue or preference was provided then it will make an order to restore the position to what it would have been had the transaction not been entered into or no preference was given.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumi Ltd.

The Liquidator should consider Section 239 of the Insolvency Act in relation to payment to Aluminium Alumi Ltd (the Supplier). It appears that preference has been given to the Supplier as they were paid shortly before the commencement of the liquidation whereas in the liquidation they would have received a distribution which may not have been equal to full payment of their debt.

The Liquidators may make an application to the Court to avoid the transaction which provided preference and the burden of proof lies with the Liquidator. They must prove that:

- (i) The Supplier was a creditor at the time of the transaction;
- (ii) The position of the Supplier was improved in comparison to if the Supplier had been paid in the liquidation;
- (iii) There was a desire by the Company to improve the position; and
- (iv) The preference was given at a relevant time.

The Supplier was a creditor at the time of the transaction as there was an outstanding debt of £20,000 which was paid by the Company. The Liquidator must prove that the Supplier would have received less in the insolvency procedure based on the value of the realisable assets and after payment to any other creditors which rank higher than the Supplier. The Liquidator must also prove that there was a desire from the Company to improve the position of the Supplier which there appears to be as the Company required the ongoing supply to continue to trade.

For preference to be claimed by the Liquidator, the transaction must have taken place within six months before the commencement of the liquidation. The payment to the Supplier was made one month prior to the commencement of the liquidation.

*** End of Assessment ***

