



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) Applications are not brought as such under section 245 of the Insolvency Act 1986 which provides for the invalidity of floating charges granted within the relevant time other than for new consideration. However, such a transaction would be a preference and under section 239 such transactions may be avoided by the Court on the application of a liquidator or administrator. This conclusion is supported by the fact that in *Re Fairway Magazines* the liquidator was the named respondent to an application for a declaration that a floating charge was *not* invalidated by section 245, (ii) an application under section 6 of the Company Directors Disqualification Act 1986 for the disqualification of a director is made by the Secretary of State, or, where the company in question has been wound up by the Court, by the Official Receiver on the instructions of the Secretary of State. (iii) an application under section 246ZB of the Insolvency Act 1986 making a director liable for wrongful trading is brought by the liquidator, and (iv) an application under section 127 of the Insolvency Act to avoid a disposition made after commencement of the winding up is brought by the liquidator, but an affected person may seek a validation order declaring that the disposition is not 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.

- [i) the monitor's remuneration or expenses;
- ii) the cost of goods or services supplied during the Moratorium;
- iii) wages or salary payable under a contract of employment;
- iv) redundancy payments; or
- v) rent falling due during the Moratorium]

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?

[Yes. Under section 233A of the Insolvency Act 1986, a supplier to a company in administration of gas, electricity, water and communication services (such as point of sale terminals, computers, website hosting, etc.) cannot rely on any *ipso facto* clauses in their contracts with the company under which the fact of insolvency or administration would have been a basis for termination of the contract. Further, such suppliers cannot require satisfaction of arrears of payment as a precondition of continued supply. However, by section 233 of the Insolvency Act 1986, such suppliers can require that the administrator personally guarantee payment of charges for new supply.

Suppliers of other goods and services are similarly precluded for insisting on arrears of payment as a precondition of further supply and from relying on *ipso facto* clauses in their contracts of supply, by virtue of section 233B of the Insolvency Act 1986. However, they do not have the right to demand a personal guarantee as security for payment for new supply. In order to terminate the contract in administration, the supplier requires the consent of the company or administrator or (pursuant to an application) of the Court. The Court may grant such an application where it is satisfied that to oblige the supplier to continue to supply the company in administration would cause 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?

[The order of priority of payments is:

- i) Expenses of winding up;
- ii) Preferential creditors;
- iii) Floating charge holders;
- iv) Unsecured creditors; then
- v) Shareholders.

The expenses of winding up are also ranked in priority: first are expenses incurred by the liquidator in getting in the assets of the company, including litigation; then the cost of any security provided by the liquidator; then disbursements; then the remuneration of persons employed by the liquidator to provide services for the company and *then* the liquidator's remuneration; followed by corporate tax on chargeable gains accruing on realisation of any asset of the company; and last, any other expenses.

Preferential creditors include employees' claims such as accrued holiday or outstanding remuneration to the statutory limit of GBP800, and tax liabilities of the company. Preferential debts may be ordinary or secondary - ordinary preferential debts are paid first. Within each class (ordinary or secondary), preferential debts rank equally amongst themselves, and abate rateably if the company's assets net of the expenses of winding up are insufficient to discharge them in full.

The debts of floating charge owners are ranked according to the order of creation: the first created being paid first. Where the charge was created on or after September 15, 2003, the payment of debts of floating charge holders is subject to the provision of a "prescribed part" to satisfy unsecured creditors, and where the assets are insufficient to satisfy the floating charge holders, they are not permitted to share with the unsecured creditors in the prescribed part.

Next fall unsecured creditors; and finally (if any assets remain thereafter) the shareholders who share according to the terms of the company's constitution.

Where a company enters liquidation within 12 weeks of the end of a Moratorium, section 174A(2) of the Insolvency Act 1986 provides that any prescribed fees or expenses of the official receiver and moratorium debts and priority pre-moratorium debts rank prior to the expenses of winding up. Priority pre-moratorium expenses include debts owed to employees, the monitor's remuneration and debts in relation to financial services rendered to the company (other than accelerated debt).]

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;

[The liquidator should apply to Court for a declaration of the invalidity of the floating charge, under section 245 of the Insolvency Act 1986. The facts do not suggest that Ambitus Bank plc is a person connected to the Company.]

Floating charges in favour of unconnected persons may be invalid where granted less than 1 year before the onset of insolvency (that is the date of commencement of ending up - section 245(5)(d) of the Insolvency Act 1986) if at that time the company was unable to pay its debts, unless new consideration was conferred for the charge. New consideration would include money paid or goods or services supplied to the company at the time of or after creation of the charge, or the discharge or reduction of debts due from the company at the time of or after creation of the charge.

On the facts, the floating charge was created 7 months before the onset of insolvency, and no new consideration was conferred - the floating charge merely secures the existing debt. However, while the invalidity of the floating charge will preclude the bank from taking the priority status in the winding up of a floating charge holder, it does not invalidate the debts that the floating charge purported to secure.]

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

[The laser cutting machines have been sold to Angela, a director, at a value less than half what was paid for them a year before. Unless laser cutting machines depreciate very rapidly, this was a disposition at a significant undervalue. The transaction took place just one year before the commencement of liquidation, and so clearly within 2 years of that date. As such, there is the possibility that the liquidator can successfully attach this sale under section 238 of the Insolvency Act 1986 as a transaction at an undervalue. (Because the

transaction took place before the commencement of liquidation, section 127 cannot be employed.)

It must also be shown that at the time of the transaction, the Company was unable to pay its debts as they fell due or became unable to do so as a result of the transaction. The liquidator will be assisted in this regard by the fact that Angela is a connected person, so that the Company's insolvency or resulting insolvency is presumed unless the contrary is proved.

On the facts, the Company was "[continuing] ... to suffer cash flow problems" This is at least suggestive of the Company being insolvent at the relevant time.

However, it appears from the facts that the motive was not the preferment of Angela but the amelioration of the Company's cash flow problems. The decision to sell to Angela may have been made in good faith having regard to liquidity needs, and thus done for the purpose of carrying on the Company's business, to benefit the Company. If Angela is able to persuade the Court of this bona fides, the Court would not make an order under section 238].

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

[The liquidator may consider seeking to avoid the payments to Aluminium Alumini Ltd ("AAL") as being a preference, by making an application under section 239 of the Insolvency Act 1986. Such an application may be made where the party to the transaction was at the time a creditor of the company, the transaction put the party in a better position in the company's insolvency than they would have been in but for the transaction, the preference was given within 6 months of the onset of insolvency (where the party is not a connected person), and the company in effecting the transaction, was motivated by a desire to grant the party that advantage in the insolvency.

It is the last requirement which the liquidator, on the facts, will be unlikely to be able to satisfy. It has been held in decided cases that where the company's aim was to ensure that the company continued trading, the transaction will not be impugned as a preference. Here, the Company was responding to pressure by AAL as it needed the continuation of supply by AAL in order to continue trading. In the absence of other evidence of a different, preferential motive, the liquidator will therefore not be able to establish a preference.]

*** End of Assessment ***