



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

If a floating charge is caught by s.245 of the Insolvency Act 1986 (the “Act”) then it will be automatically rendered invalid, except to the extent that it secures new consideration provided by the chargee to the chargor. The invalidity of the floating charge will arise in the event that the company enters liquidation or administration within the relevant time period (12 months or 2 years following the granting of the floating charge depending on whether the beneficiary of the charge is a connected person to the company or not). No court application is required by the administrator or liquidator as the floating charge will be automatically invalid provided that the conditions of s.245 of the Act are met and the administrator or liquidator can write to the beneficiary of the charge and state that they believe the floating charge to be invalid.

Section 6 of the Company Directors Disqualification Act 1986

An application to court for a disqualification order under s.6 of the Company Directors Disqualification Act (“CDDA”) will be made by the Secretary of State (or the Official Receiver on the instructions of the Secretary of State where the relevant company has been wound up by the court) pursuant to s.7(1) CDDA.

Section 246ZB of the Insolvency Act 1986 (Wrongful trading: administration)

An administrator is permitted to bring an action under s.246ZB of the Insolvency Act 1986 pursuant to s.246ZB(1) of that Act.

Section 127 of the Insolvency Act 1986 (Avoidance of property dispositions)

The company which is the subject of a winding up petition may apply for a validation order under s.127 of the Insolvency Act 1986. Case law.¹ has also confirmed that any interested party to a transaction with a company against which a winding up petition has been presented can also apply for a validation order.

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.

¹ Re Argentum Reductions (UK) Ltd [1975] 1 WLR 186

The Part A1 Moratorium creates a stay on enforcement of pre-Moratorium debts (i.e. those debts which fell due before the Moratorium and those debts that fall due during the Moratorium by reason of a pre-Moratorium obligation) save for debts that are payable in respect of:

- (i) wages or salary arising under a contract of employment;
- (ii) redundancy payments;
- (iii) rent in respect of a period during the Moratorium;
- (iv) goods or services supplied during the Moratorium; and
- (v) a contract or other instrument involving 'financial services' (which is defined as a contract consisting of lending, financial leasing or providing guarantees).

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?

The appointment of administrators to a company does not automatically terminate supply contracts to which the company is party. In addition, the supplier will generally not be able to rely on a provision in the supply contract that provides for the automatic termination of the contract on the insolvency of the company (i.e. an ipso factor clause).

Where the company is party to a contract for the supply of essential supplies such as gas, electricity, water and communication services, section 233 of the Insolvency Act 1986 (the "Act") prevents the supplier from requiring payment of outstanding debts as a condition to the continued supply of the essential service. However, the supplier is permitted to make it a condition that the administrator personally guarantees the payment of charges in respect of the continued supply.

Pursuant to s.233A of the Act, the supplier of the essential supplies set out in s.233 of the Act is only able to rely on an 'insolvency related term' to terminate the contract if certain conditions are met (i.e. the administrator consents to the termination or the court grants permission for the termination – s.233A(4) of the Act).

As a result of the Corporate Insolvency and Governance Act 2020 (CIGA) these protections have been expanded and s.233B of the Act prohibits clauses which allow suppliers of any goods or services to terminate the contract (or do any other thing) in relation to that contract where the company enters a formal insolvency procedure.

The effect of s.233B is to prevent suppliers from terminating supply upon the insolvency of the company and also to prevent suppliers from making it a condition that pre-insolvency arrears are paid or from making other amendments to the contracts. Unlike section 233 detailed above, under s.233B of the Act, the supplier cannot insist on a personal guarantee from the administrator in respect of the continued supply. The supply contract may still be terminated where the administrator consents to the termination or the court is satisfied that the continuation of the contract would cause the supplier hardship and grants permission for the termination – s.233B(5) of the Act.

In summary, the administrator can require the supplier to continue supplying goods and services during the administration. Depending on the type of supply, i.e. essential services, the supplier may

require a guarantee from the administrators in order to continue supplying the services. The supply contract may be terminated where the administrator consents or where the court grants permission.

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?

Creditors with fixed charge security will usually enforce their security outside of the formal liquidation process.

The priority of payments in liquidation is as follows: (i) Expenses, (ii) Preferential Creditors, (iii) Floating Charge Holders, (iv) Unsecured Creditors and (v) Shareholders. Creditors may agree to vary the order of priority between themselves pursuant to priority or subordination agreements.

Under section 115 of the Insolvency Act 1986 (the "Act") and rules 6.42 and 7.108 of the Insolvency (England and Wales) Rules 2016 (the "Rules"), certain expenses are given priority over the other classes of creditors in the liquidation. The remuneration of the liquidators ranks behind a number of other expenses including (i) expenses properly incurred by the liquidator in preserving, realising or getting in any of the assets of the company, (ii) the costs of security provided by the liquidator, (iii) necessary disbursements incurred by the liquidator in the course of the winding up and (iv) the remuneration of any person who has been employed by the liquidator to perform any services for the company.

Once all expenses have been paid in full, preferential creditors (comprising certain employee claims and tax liabilities) are paid from the assets of the company. There are two classes of preferential debts, ordinary and secondary, and ordinary preferential debts are paid ahead of secondary preferential debts.

Examples of ordinary preferential debts include: (i) sums owed by the company on account of the employer's contribution to an occupational pension scheme in the period of 12 months before the relevant date and (ii) sums owed by the company by way of accrued holiday pay in respect of any period of employment before the winding up.

Examples of secondary preferential debts include: (i) PAYE income tax deductions, (ii) VAT payments and (iii) national insurance deductions.

Once preferential creditors have been paid, floating charge creditors will be paid (where there is more than one floating charge creditor, their claims are ranked in the order of creation of the charges). The liquidator must consider the prescribed part under s.176A of the Act which applies to a company that has granted a floating charge on or after 15 September 2003 and requires the liquidator to make a prescribed part of the company's assets available for the satisfaction of unsecured debts. Where the company's net property does not exceed £10,000, the prescribed part is 50% of that property. Where the company's net property does exceed £10,000, the prescribed part is 50% of that property plus 20% of the excess above £10,000 subject to a maximum amount of the prescribed part of £800,000 (the cap is £600,000 where the floating charge was created prior to 6 April 2020).

Once the floating charge creditors have been paid, the assets will be distributed between the unsecured creditors of the company. However, it is often the case that once the expenses of the

liquidation have been paid and once distributions have been made to secured and preferential creditors, there is little or nothing left to pay a dividend to unsecured creditors.

In the event that there are sufficient funds to pay all creditors, together with interest, then any surplus will be distributed to the shareholders of the company in accordance with the constitution of the company. It is rare for a surplus to remain after all expenses and creditors have been paid.

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 floating charge contained in the debenture would be caught by s.245 of the Insolvency Act 1986 (the "Act") as it was granted by the Company to Ambitus Bank plc (the "Bank") in June 2023, within 12 months of the onset of insolvency in relation to the Company (in this case, the commencement of the winding up pursuant to the presentation of the winding up petition on 13 January 2024).

As the Bank did not provide any new consideration to the Company at the time the debenture was granted (i.e. the debenture secures existing consideration only) the floating charge will be invalid.

The fact that the floating charge is invalid does not invalidate anything done under the authority of the floating charge prior to the commencement of the winding up and it does not invalidate the underlying debt secured by the floating charge.

Given that the floating charge meets the criteria set out in s.245 of the Act, the floating charge is automatically invalid and no court application needs to be made by the liquidator to determine the invalidity of the charge. The liquidator can write to the Bank and state that the liquidator believes the floating charge to be invalid.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

The sale of the laser cutting machines could be caught by s.238 of the Act as a transaction at an undervalue as the company entered into a transaction for a consideration (£40,000) which was significantly less than the value of the consideration paid by the company (£100,000).

Although Angela Bannister (a director) is a connected person to the company pursuant to s.249 of the Act, the relevant period for a transaction at an undervalue is 2 years prior to the commencement of the liquidation or administration regardless of whether the transaction is with a connected or unconnected person.

The sale would fall in this relevant period as the sale was completed in January 2023, within 2 years of the onset of insolvency in relation to the Company (in this case, the commencement of the winding up pursuant to the winding up petition issued on 13 January 2024).

As the director is a connected person, the Company is presumed to have been insolvent or to have become insolvent as a result of the transaction unless the contrary is proved.

The liquidator can apply to court to set aside the transaction at an undervalue under s.238(1) of the Act.

The directors could seek to argue that the transaction was entered into by the Company in good faith and for the purpose of carrying on its business and that there were reasonable grounds for believing that the transaction would benefit the company (i.e. the sale of the laser cutting machines for £40,000 would assist with the ongoing cashflow problems of the Company). The directors could produce evidence that no other third parties were willing to pay more than £40,000 for the machines to support their defence.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

As there is no reference to security granted by the Company to Aluminium Alumini Ltd ("AA"), AA will be an unsecured creditor of the Company. The payments to could be caught by s.239 of the Act as a preference as the payments were made to a creditor which had the effect of putting AA in a better position than it otherwise would have been in the insolvency of the Company (i.e. AA has received payments ahead of other unsecured creditors in breach of the pari passu principle).

The payments were made 1 month prior to the winding up order which falls within the relevant time period of 6 months prior to the onset of insolvency (as AA is not a connected person to the Company – in which case the relevant period would be 2 years).

The liquidator can apply to court to set aside the preference under s.239(1) of the Act.

The liquidator would need to demonstrate that the Company was influenced by a desire to prefer AA. There is no presumption of this desire in this case as AA is not a connected person to the Company.

The directors could argue in defence of the liquidator's claim that as the company was influenced by commercial considerations alone and the desire to continue trading (rather than actively desiring to prefer AA) there can be no desire to prefer.

It would be rare for the liquidators to bring an action under s.239 of the Act in this case given that AA is not a connected person of the Company and there is therefore no automatic presumption of a desire to prefer and the liquidators would need to prove this desire.

*** End of Assessment ***