



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 IA – floating charges – Administrator or Liquidator
- (ii) Section 6 of the CDDA – disqualification order against a person - the Insolvency Service acting on behalf of Secretary of State for Business and Trade or the Official receiver on the instructions of the Secretary of State where the company in question has been wound up by the court
- (iii) Section 246ZB of IA – wrongful trading - Administrator or Liquidator
- (iv) Section 127 of IA – void dispositions – Liquidator. The Court may validate the disposition.

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 monitor's remuneration and expenses, good and serviced supplier during the Moratorium, rent in respect of a period during the Moratorium, wages and salaries arising under a contract of employment, redundancy payments, financial services debt.

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, the administrator can require continuation of the supplies.

Historically supplier contracts used to contain clauses that would terminate the supplier contract in case of liquidation. Such contractual provisions are becoming void. The reason is that an objective of the administration is to keep the business of the liquidated entity alive and continuing its operations, including preserving employment and supplier and customer relationships. To be able to meet this objective, the administrator is likely to wish to continue the operations of the company in its pre liquidation form – retaining the same supplies from the same suppliers and selling the production (or services) to the same customers. As a going concern, then the business can be either brought out of administration into its original legal form or sold to a buyer that will operate the business.

Section 233 was initially covering the supplies of strategic character – Gas, electricity, water, and communication services (defined as including Web hosting, computer HW and SW, POS terminals, data storage and processing and similar). Suppliers are not allowed to condition their future supply on

payment of pre administration debt. And the supplier cannot terminate its supply due to the insolvency related term in their supply contract (233A).

The 2020 Act expanded the list of supplies to include any goods and services (section 233B). Similar to the section 233, the supplier cannot condition the continuation of the supply of goods and services on payment of the pre administration debt or cannot increase the price of the supply or otherwise change the contractual terms. The contract can, however, be terminated if agreed to by the administrator or permitted by the court – if the continuation of the contract causes hardship to the supplier. Supplies exempt under the section 233B include supplies of insurance, banks, electronic money services, recognised investment exchanges and clearing houses, securitisation companies and overseas entities with similar supplies.

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 - Only assets belonging to the company may be distributed by the liquidator – therefore assets effectively assigned to receivable financiers or subject to hire purchase agreement are excluded from the liquidation.

B - A floating charge holder may appoint an administrator and then the liquidator cannot be appointed until the administration is completed. However, the floating charge holder may agree to appoint a liquidator and then be paid out according to his priority.

C - Fixed charge holders – their claims are usually settled outside of formal insolvency procedures from the pledger assets recovery proceeds.

D - The following is the order of priorities under the liquidation:

1. Costs of the liquidation – with the following detailed list of preferences. According to Section 115 of the Act and rules 6.42 and 7.108 of the Rule. In the following priority:
 - Expenses properly incurred by the liquidator in preserving, realising or getting in any assets of the company, including the conduct of related legal proceedings;
 - Costs of security provided by the liquidator;
 - Payables to persons in respect of preparation of the statement of affairs or accounts;
 - Liquidators' disbursements in the course of the winding up (including expenses of the liquidation committee);
 - Remuneration of employees of the liquidator performing services for the company;
 - Liquidator's remuneration;
 - Corporation tax on chargeable gains on the realisation of any asset of the company;
 - Any other expenses chargeable by the liquidator in carrying out his functions.
2. Preferential creditors – limited claims of employees and their unpaid pension contributions. However, the statutory protection afforded to employees under the Employment Rights Act 1996 provides a greater protection than the Act. There are ordinary and secondary preferential debts.
 - a. Ordinary debt is comprised of for example: four months of pension contributions payable on behalf of the employee and 12 months payable on behalf of the employer,

4 months of salary to an employee capped at GBP 800, any holiday and sickness leave related payments, claims of moneys advanced to be used to pay such wages.

- b. Secondary debt consists of amounts owed in respect of eligible deposit in excess of the compensation payable under Financial services compensation scheme; similar deposit made via a non-UK branch of a credit institution; crown preference for certain debts owed to the taxation authority; PAYE employee tax deductions, National insurance deductions, VAT payments, Student loan repayments and Construction industry scheme deductions.
3. Floating charge holders – with priority among them assigned based on sequence of creation of the floating charges. The liquidator must preserve the prescribed part of the company’s net property for the unsecured creditors. A floating charge holder with unsecured claim cannot participate in the prescribed part distribution.
4. Unsecured creditors – paid dividends on a pro rata bases of what is left after paying the previous priority groups.
5. Members – if solvent liquidation, paid in line with company constitution.

E - If the company is not rescued during the Moratorium and enters liquidation within 12 weeks of the end of the Moratorium, the order of the priorities may change compared to the order of the priorities that existed prior to the Moratorium. Section 174A states that debts not subject to a payment holiday, pre Moratorium or Moratorium, which are unpaid and enter the liquidation, are ranked in priority above liquidator’s fees and expenses (bullet 1 above). Examples and debts owed to employees and financial services debts. Unsecured debts gain super priority under section 174A.

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 debenture in favour of Ambitus Bank with the floating charge was created in June 2023, which is less than 12 months prior to the liquidation (the floating charge is in favour of a person apparently not connected to Blazer Laser). It appears that no fresh funding was provided by Ambitus Bank.

Section 245 of the Act applies as the pre-existing unsecured creditor obtained a floating charge within 12-month period over the undertakings of a liquidated entity. It appears that Blazer Laser was already insolvent at the time of the debenture as in January 2023 the cutting machines were sold to the director due to cash flow difficulties.

As a consequence of applying Section 245, the floating charge will be invalid for the purposes of the liquidation and the related order of priorities – the underlying debt can be claimed by Ambitus Bank as unsecured.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

The sale of the cutting machines to Angela Bannister, a director and therefore a connected person, appears to be an undervalue transaction. The liquidator could apply section 238 of the Act and show that the consideration received by Blaze Laser for the cutting machines at the date of the transaction (January 2023) (GBP 40,000) was significantly less than the value of the cutting machines (GBP 100,000 a year before, i.e. in January 2022). The transaction did take place within the prescribed relevant time – 2 years before the commencement of the liquidation.

In this case, as Angela Bannister is a connected person, and therefore it is presumed that Blaze Laser was already unable to pay its debts or became unable to do so due to this transaction. It would have to be proven otherwise by the respondent (i.e. that Blaze Laser was solvent when the transaction took place, and also did not become insolvent due to this transaction) for the court to not make an order under section 238. The respondent can also convince the court that the transaction was made in good faith and benefited the company.

Should the order under section 238 be granted by the court, the transaction would have to be reversed and restored to the pre transaction state.

Also, the significance of the difference of the value exchanged between Blaze Laser and Angela Bannister is uncertain. It is unclear whether the cutting machines could have depreciated in value over the year of usage from GBP 100,000 to the transaction value of GBP 40,000 (including technological amortisation) and what the market value of the cutting machines was on the date of the transaction. The directors might have had market research done and provide it to the liquidator as a proof of the value not being significantly different. Another consideration is about what happened to the cutting machines after Angela Bannister purchased them – whether these remained in the premises of Blaze Laser and were continued being used in the production or were removed from the production process. If these were further used in the production process, Blaze Laser possibly paid a lease payment to

Angela Bannister – was that market level? The amounts would have to be considered in the quantification of the difference in the value of the transaction.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumi Ltd.

The payments to AA took place within one month prior to the winding up order, amounting to GBP 20,000 to cover existing liabilities and further GBP 8,000 to cover further supplies up to the date of the winding up order. The payments apparently took place sometime after 28 January 2024 (one month prior to the winding up order which took place on 28 February 2024) and therefore after the winding up petition was issued on 13 January 2024. According to section 127 of the Act dispositions of property made after the winding up petition are void, if subsequently the petition is granted. The payments to AA fall within the definition of disposition of property. While the directors, knowing a winding up petition was presented, tried to secure supplies of a key material for the production to continue, made a payment to one of the creditors, the effect of section 127 still applies with retrospective effect from the date of the winding up petition was presented, as the winding up order was subsequently granted.

So, the liquidator could apply section 127 and reclaim the payment made to AA.

Subsequently the court could issue a validation order. The applicant for the validation order to the court (possibly AA) has the burden of proof and will have to argue why the order should be made. Generally, the court can take into consideration a wide array of reasons. In our case it might be argued that the continuation of the production with the secured supplies by AA benefited all the creditor as more products were made, which could then be sold for additional income, and resources including labour (with fixed costs) could be utilised in the production.

Also, the applicability of section 239 of the Act could be considered. The transaction clearly falls within the 6-month period prior to the insolvency (no connected person appears to be involved) and the Blaser Laser was already insolvent (as the petition by a creditor was already issued). However, despite the pressure exercised by the creditor (which is not relevant for the consideration) there seems to be no indication that the transaction was motivated by a desire to improve the position of AA. As the burden of proof is on the liquidator, I would not recommend the liquidator to apply section 239 in this case.

*** End of Assessment ***