



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 1in 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 - an action may be brought by administrators or liquidators of the company.

Section 6 of the Company Directors Disqualification Act 1986 - the Secretary of State (or the Official Receiver on the instructions of the Secretary of State where the company has been wound up by the Court.

Section 246ZB of the Insolvency Act 1986 - liquidators and/or administrators of the company

Section 127 of the Insolvency Act 1986 - liquidator of the company]

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 5 debts include:

1. The monitor's remuneration or expenses;
2. Goods or services supplied during the Moratorium;
3. Rent in respect of a period during the Moratorium;
4. Wages or salary arising under a contract of employment;
5. Redundancy payments;
6. Debts or other liabilities arising under a contract or other instrument involving "financial services", which includes 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?

[Yes, an administrator who wishes to continue the business operations of the company in administration may require suppliers of goods and services to continue supplying goods and services during the administration.

In this regard, the appointment of an administrator of a company in distress does not automatically terminate a company's executory contracts. Whilst terms in the contracts of supply have historically provided for automatic termination, also known as *ipso facto* clauses, have generally been effective, such clauses have increasingly been subject to statutory exceptions which have made them void or unenforceable.

Section 233 of the Insolvency Act 1986 (the "Act") applies to a supply of gas, electricity, water and communications services. "Communications" services includes the supply of goods and services such as point of sale terminals, computer hardware and software, information, advice and technical assistance, data storage and website hosting. Suppliers are not allowed to require payment of outstanding debts in order to secure a new or continued supply to the company in administration. However, section 233 of the Act allows

a supplier to impose a condition that the administrator must personally guarantee payment of charges in respect of the new supply that is provided to the company.

Furthermore, section 233A of the Act provides that a supplier of such services is generally not able to rely upon an “insolvency-related term” in a contract of supply which would otherwise entitle the supplier to terminate the supply, alter the terms of the supply or compel higher payments for continued supply.

Section 233B of the Act prevents suppliers from terminating supply upon the company’s insolvency, but also prevents suppliers from making it a condition of continued supply that pre-insolvency arrears are paid, from making other changes to the contract such as increasing prices. Under section 233B however, a supplier cannot insist on a personal guarantee (unlike the position under section 233). However, a supplier may still terminate a contract where the company or the insolvency office-holder consent or, on an application to the court, the court is satisfied that the continuation of the contract would cause the supplier hardship and grants permission for the termination.

Section 233B complements section 233 and 233A of the Act which prohibit termination by utility, communications and IT suppliers, by extending the restrictions on termination to other suppliers (save for specific exceptions, e.g. insurers, banks, electronic money institutions etc.)

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?

[In a liquidation scenario, certain classes of fall outside the pool of assets realisable by the liquidator, including debts that have been assigned to a receivables financier, assets subject to retention of title contracts.

The remaining assets are then paid in accordance of the following priority:

1. Expenses of the winding up (section 115 of the Act), including expenses and disbursements incurred by the liquidator in realising or getting in the assets of the company and carrying out the liquidation of the company, as well as the liquidator’s remuneration.
2. Preferential creditors - Once the expenses of the liquidation have been paid, preferential creditors are then paid next. These creditors include claims for unpaid wages of employees and tax liabilities. Preferential debts are classified into two classes, with ordinary preferential debts being paid before secondary preferential debts. Preferential debts, in their respective classes, rank equally amongst themselves and are paid *pro rata* if the company assets are insufficient to pay them all.
3. Floating charge holder - If there are more than one floating charge holders, priority between them will typically depend on which floating charge was first in time. Before making payment, the liquidator must also consider the application of s 176A of the Act, which applies if a floating charge was created on or after 15 September 2003 and after the company has gone into liquidation. If so, the liquidator has a duty to make a “prescribed part” of the company’s net property available for satisfaction of unsecured debts, unless the company’s net property (ie value of the company’s property after liquidation assets and preferential debts have been paid) is less than GBP 10,000.

4. Unsecured creditors - these are often ordinary trade creditors and are paid last in the statutory order.
5. Shareholders - Finally, assuming there are sufficient funds to pay all creditors, any surplus is distributed to the company's creditors according to the constitution, which typically provides for a *pro rata* distribution based on the shareholders' respective shareholding.

If the company had been subject to a Moratorium under Part A1 of the Insolvency Act 1986 during the 12-week period and was eventually wound up at the end of the Moratorium, the priority of debts would change in that unpaid pre-Moratorium or Moratorium debts which are not part of the payment holiday, such as debts owed to employees, or financial services debts can acquire "super priority status" and are now paid in priority to the liquidators' fees and expenses. However, if the pre-moratorium financial services debt is accelerated debt, which fell due by reason of the operation of, or exercise of rights under, an acceleration or early termination provision in the financial services contract, it will be prevented from acquiring such "super priority" status.

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;

[In relation to the floating charge granted in favour of Ambitus Bank plc ("AB"), the Liquidator may wish to apply to set aside the floating charge pursuant to (1) section 239; or (2) section 245 of the Insolvency Act 1986 (the "Act").

Avoidable preference - section 239

Alternatively, the Liquidator may consider seeking to unwind the floating charge on the basis that it was an avoidance preference granted to the AB. This would in turn depend on whether the Company was entirely dependent on AB's support for continued trading, such that if the debenture were not granted then AB would withdraw its support such that the Company would be forced into immediate liquidation. If this were the case, then the Company would not have been influenced by a desire to prefer the bank, but the continued trading by the Company.

Avoidance of floating charge - section 245

The issue in the present case is whether the floating charge that was granted by the Company to AB was done in circumstances where AB did not provide any fresh consideration to the Company.

In this regard, section 245 of the Act deals with the avoidance of floating charges, and applies where a company is in administration or liquidation which is targeted at preventing pre-existing unsecured creditors from obtaining the security of a floating charge shortly before a company enters insolvency. If the floating charge was created in favour of a person who is connected with the company, the relevant time period is two years prior to the onset of insolvency. If the person is not connected to the company, the relevant time is 12 months prior to the onset of insolvency. It must also be shown by the liquidator at the time the charge was created the company was either unable to pay its debts (within the meaning section 123 of the Act) or became unable to do so in consequence of the transaction.

In terms of the fresh consideration that must be provided by the floating chargee under s 245 of the Act for a charge to not be invalidated, such consideration may come in the form of (1) money paid or goods or services supplied to the company; or (2) a discharge or reduction of any debt of the company.

In the present case, as AB is not a connected person to the Company, the Liquidator would have to show that the Company granted the floating charge to AB within the period of 12 months' prior to the onset of insolvency, that the Company was unable to pay its debts at the time the floating charge was granted or became unable to do so in consequence of the transaction. On the facts, the Liquidator would likely be able to show this given that the floating charge was granted in June 2023, within the 12 month time period before the Company was wound up on 28 February 2024, and because the company was already suffering cash flow problems in January 2023, such that it was likely already cash flow insolvent in June 2023 when it granted the floating charge in favour of AB.

In relation to the requirement of fresh consideration, AB may seek to argue that it had provided fresh consideration to the Company for the floating charge by not demanding repayment of the Company's loans. However, this is unlikely to hold water given that such consideration would not be fresh consideration coming within the ambit of section 245 of the Act as AB did not provide any new money or goods or services to the Company, nor did AB discharge or reduce the Company's debt owed to it at the time the floating charge was granted to it.

Accordingly, the Liquidator is likely to have strong grounds to set aside the floating charge under section 245.]

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

[The liquidator may seek to unwind the transaction in relation to the sale of the laser cutting machines to Angela Bannister on the basis that this was a transaction at an undervalue pursuant to section 238 of the Act.

For a transaction to be unwound for being at an undervalue, the liquidator must show that the company:

1. Made a gift to another person; or
2. Entered into a transaction with another person on terms that provided for the company to receive no consideration; or
3. Entered into a transaction with another person for a consideration which, in money or money's worth, was, as at the date of the transaction, significantly less than the value, in money or money's worth of the consideration provided by the company.

The transaction must also have taken place within a period of 2 years prior to the commencement of the liquidation, and that the company was unable to pay its debts as they fell due within the meaning of section 123 of the Act or became unable to pay its debts in consequence of the transaction. Where the company transacts with a connected person, there is a presumption that the company was insolvent or became insolvent as a result of the transaction, unless the contrary is proved.

In the present case, the sale of the machines to Angela took place in January 2023, within the "relevant time" period of 2 years. Given that Angela was also a director of the Company at the material time, there would be a presumption that the Company was insolvent at the time the sale took place, or became insolvent as a result of the sale. It would likely be an uphill challenge for Angela to displace the presumption given that the Company was suffering cash flow problems in January 2023 when the sale took place, such that the Company would have likely been cash flow insolvent.

On the face of the price ascribed to the machines, the Liquidator is also likely to be able to show the price of the sale was at an undervalue, given that the machines were priced at a 60% discount of their original price which the Company had purchased it for just one year ago, and is therefore like to be found to be significantly less than the value in money or money's worth of the consideration provided by the Company. The Liquidator would however need to adduce expert valuation evidence in support of this position. Unless Angela can adduce expert valuation evidence showing that the value of the machines had drastically depreciated after one year of use, Liquidators will likely be able to unwind the sale and claw back the machines.

Angela is also likely to seek to argue that the transaction was entered into by the Company in good faith for the purposes of carrying on its business, given the liquidity issues faced by the company at the time, and that there were reasonable grounds for believing that the transaction would benefit the Company to enable it to meet its immediate cash flow needs, such that the Court should not make an order under section 238. However, assuming that the two laser cutting machines were the principal assets of the Company and primary means by which the Company would be able to generate revenue from its business operations, it is unlikely that Angela would succeed in this defence.]

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

[The Liquidator may wish to challenge the payments made to Aluminium Alumini Ltd (“AA”) on the basis that it constituted an avoidable preference pursuant to section 239 of the Act.

In this connection, section 239 is intended to prevent a company from placing one of its creditors in a better position than others shortly before it enters insolvency. In order for the Liquidator to unwind the transaction for being an avoidable preference, the Liquidator must show that:

1. The person whom it is alleged has been preferred was, at the time of the transaction, a creditor of the company (or surety or guarantor for any of the company’s debts or liabilities);
2. Something was done, or suffered to be done, by the company which had the effect of putting that person in a better position, in the event of the company going into insolvent liquidation, than the position they would have been in if that thing had not been done;
3. The company was influenced by a desire to prefer; and
4. The preference was given at a relevant time - if the preference was given to a connected person, for a period of two years before the onset of insolvency, and if the preference was given to any other person, ~~six~~ months before the onset of insolvency.

The Liquidator would likely find that it would be an uphill challenge to challenge the payments made to AA.

The first, second and fourth elements are not controversial, as AA was a creditor of the company at the material time by virtue of the outstanding sums owed to it. The Company had also arranged for upfront payment to satisfy the outstanding invoices owed to cover the existing liabilities, which placed AA in a better position than if no payment was made and AA was required to prove its debt in the Company’s liquidation as an unsecured creditor where recovery would likely be less than what it had in fact received. Assuming it could be established that a preference was given to AA, the payments which were made one month before the winding up order was made and would thereby fall within the relevant time period of six months before the onset of insolvency (since AA is not a connected person with the Company).

However, the Liquidator would likely face difficulties in showing that the Company was influenced by a desire to prefer AA’s interests over those of its other creditors, given that the Company appears to have been motivated by legitimate commercial considerations in arranging for the payments made to AA because of its belief that the continued supply of metal was essential to the Company’s operations. In this regard, the authorities have held that where the company was influenced solely by commercial considerations, specifically attempts to ensure that the company continued trading, there could be no desire to prefer. Consequently, the Liquidator would unlikely succeed in unwinding the payments made to AA.]

*** End of Assessment ***