



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.

[Note: in both of these cases it must be an indictable offence *in connection with the promotion, formation, management, liquidation or striking off of a company, or with the receivership of a company's property* - not just any indictable office.]

Question 1.8

The filing by a company's directors of a Notice of Intention to Appoint an administrator produces a short-term moratorium on actions against the company which lasts for how long?

(a) Five business days.

(b) Twenty business days.

(c) Ten days.

(d) Three months.

Question 1.9

Which of the following statements is **incorrect**?

(a) An insolvency officeholder from an EU Member State will be automatically recognised by the courts in the UK whether the officeholder was appointed before or after Brexit.

(b) An insolvency officeholder from an EU Member State is automatically recognised by the courts in the UK if appointed before Brexit.

(c) An insolvency officeholder from an EU Member State appointed after Brexit may apply to a UK court for recognition under the Cross Border Insolvency Regulations.

(d) An insolvency officeholder from an EU Member State cannot apply to a UK court for recognition under section 426 of the Insolvency Act 1986.

Question 1.10

Under section 216 of the Insolvency Act 1986, a director of a company which has been wound up insolvent may not, unless an exception applies, be a director of a company that is known by a prohibited name if the director has been a director of the company during which period prior to the insolvent liquidation?

(a) Six months.

(b) Five years.

(c) Two years.

(d) Twelve months.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 5 marks]

Who may bring an action under: (i) section 245 of the Insolvency Act 1986, (ii) section 6 of the Company Directors Disqualification Act 1986, (iii) section 246ZB of the Insolvency Act 1986, and (iv) section 127 of the Insolvency Act 1986?

- (i) section 245 of the Insolvency Act 1986 - The liquidator of the company
- (ii) section 6 of the Company Directors Disqualification Act 1986 - Secretary of State (or Official Receiver on instructions of Secretary of State).
- (iii) section 246ZB of the Insolvency Act 1986 - The liquidator of the company
- (iv) section 127 of the Insolvency Act 1986 - The liquidator of the company will take steps to enforce section 127. The insolvent company or a party to the asset disposition may bring an application for validation under section 127.

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.

Debts that have fallen due before the moratorium, or that fall due during the moratorium, except in so far as they consist of amounts payable in respect of:

- (i) goods or services supplied during the moratorium,
- (ii) rent in respect of a period during the moratorium,
- (iii) wages or salary arising under a contract of employment,
- (iv) redundancy payments, or
- (v) debts or other liabilities arising under a contract or other instrument involving financial services.

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?

To a large extent, yes, as sections 233, 233 A and 233B of the Insolvency Act 1986 have the effect of (subject to certain exceptions) making automatic termination upon administration clauses in supplier contracts void unless the company or insolvency office-holder consents to the termination or, on application to the court, the court is satisfied that the continuation of the contract would cause the supplier hardship, and grants permission for termination (section 233B).

The statutory regime recognizes that an administrator will frequently need to obtain or retain certain essential supplies. Section 233 of the Act applies to a supply of gas, electricity, water and communications services. The definition of 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 processing

and website hosting. Suppliers are not permitted to require payment of outstanding debts in order to secure a new or continued supply to the company in administration. Section 233B complements s233 by broadening the restriction on termination to all other suppliers (with a limited number of exceptions, for example, insurers; banks; electronic money institutions; recognised investment exchanges and clearing houses; securitisation companies; and overseas companies with corresponding functions).

The effect of this statutory regime is that to a large extent 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.

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?

An insolvent company does not have sufficient assets to pay in full all the liabilities that it owes to its creditors. Accordingly, one of the primary functions of liquidation is to realise the assets of the insolvent company and to distribute the cash realisations made from those assets among the insolvent company's creditors. In broad terms the order of priority of payment to creditors can be stated as:

1. Expenses of the relevant insolvency process.
2. Payments to a category of creditors who are unsecured but whose claims are given a special statutory priority (known as preferential creditors).
3. Claims of creditors who hold security that, when it was created, was floating charge security.
4. Unsecured creditors.

The preferential creditor class at (2) includes debts owed in relation to pension schemes, wages and salaries of employees, holiday pay and others.

The class at (3) does not include holders of a valid fixed charge (created as a fixed charge) over a company's asset as such a creditor is entitled to the proceeds of the realisation of that asset in satisfaction of the liability due to it from the company *outside* of the liquidation. The class at (3) relates to charges created as floating charges which crystallise on insolvency to a fixed charge over the specific assets of a class.

Unsecured creditors (at (4) above) only receive a distribution after each category at (1) to (3) has been paid (in broad terms) in full. Ordinarily, money is distributed to each unsecured creditor in proportion to the debts due to each creditor (a *pari passu* distribution).

In terms of Part A1 of the Insolvency Act 1986, broadly speaking, the types of debts that must be paid as they fall due before or during a moratorium for the moratorium to continue will be given a "super-priority" status in formal insolvency proceedings that commence within 12 weeks of the end of a moratorium.

If a winding-up petition is presented or winding-up resolution is passed during a 12-week period after the end of a moratorium, prescribed Official Receiver fees and expenses, moratorium debts and priority pre-moratorium debts will have absolute priority over "all other claims" in the liquidation, including liquidation expenses, preferential debts and debt secured by a floating charge (although this will not affect the protection of fixed charge

security) (section 174A(2), *Insolvency Act 1986*). Prescribed Official Receiver fees and expenses take top priority, followed by moratorium debts and priority pre-moratorium debts.

The effect of this provision is that these "super-priority" debts are paid out ahead of classes (1) to (4) above. The statute sets out the priority of the super-priority debts vis-à-vis each other.

QUESTION 4 (fact-based application-type question) [15 marks in total]

Prior to going into compulsory liquidation on 28 February 2024, under pressure from its bank, Ambitus Bank plc, and in order to prevent it from demanding repayment of the company's loans, Blazer Laser Limited (the Company), granted a debenture in favour of Ambitus Bank plc in June 2023. The debenture contained a floating charge over the whole of the Company's undertaking.

The winding up order followed a creditor's winding up petition issued on 13 January 2024.

Sometime in January 2023, as the Company continued to suffer cash flow problems, the directors approved the sale of two laser cutting machines to Angela Bannister (a director) for GBP 40,000 in cash. The machines had been bought for GBP 100,000 a year before.

A month before the winding up order was made, Angela Bannister received an email from Aluminium Alumi Ltd, one of the Company's key suppliers. The supplier demanded immediate payment of all sums owing to it and informed the Company that further supplies would only be made on a cash on delivery basis. As the continued supply of metal was seen as essential by the Company, the board authorised a payment of GBP 20,000 to cover existing liabilities and agreed to further payments, on a cash on delivery basis, for further supplies which amounted to further payment of GBP 8,000 up to the date of the winding up order.

The liquidator has asked for advice whether any action may be taken in respect of the floating charge in favour of Ambitus Bank plc and the two subsequent transactions.

Using the facts above, answer the questions that follow.

Identify the relevant issues and statutory provisions and consider whether the liquidator may take any action in relation to:

Question 4.1 [maximum 5 marks]

The floating charge in favour of Ambitus Bank plc;

The chronology provides that the company was experiencing cash flow problems in January 2023 and six months later it entered into the debenture with Ambitus Bank and created the floating charge over its assets. The liquidator may seek to invalidate the floating charge by making an application under section 245 of the Act as the floating charge was created within the relevant time (12 months prior to onset of insolvency for unconnected persons). However the liquidator must prove that in June 2023 when the charge was created the company was unable to pay its debts (as per section 123 of the Act) or became unable to do so in consequence of the transaction. The existence of cash flow difficulties in January 2023 may assist in establishing the former (although it is unlikely the floating charge caused the latter). Section 245 does not prevent lenders who are providing fresh funding to the company from taking a floating charge for that new funding. However that is not the case

here as no fresh funding was provided but rather the bank agreed to forbear on its rights under the loan agreement.

This creation of the floating charge could also potentially constitute a voidable preference under section 239 of the Act as it places the bank in a better position than it would have been in the event of the company going insolvent. While it is undoubtedly the case that the Bank is 'better off' after the transaction, it is not clear that the company, in giving the preference, was influenced by a desire to give such preference to the Bank. On the facts provided, the Company may argue that the transaction was entered into by the company in good faith and for the purpose of carrying on its business, and that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.

In the decision of *MC Bacon* and subsequent rulings, it has been 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.

If the company can satisfy the Court to this effect, no order under section 239 will be made.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

The sale may constitute a sale at an undervalue which is a voidable transaction under section 238. In order to be attacked, the sale must have taken place at a "relevant time" which is in the period of two years prior to the commencement of the liquidation or administration. In this case the sale was in January 2023 and the commencement of liquidation was in January 2024 so the sale was within the relevant time.

Under section 238, the sale must also have been for a consideration which, in money or money's worth, was, at the date of the transaction, significantly less than the value, in money or money's worth, of the consideration provided by the company. As the machines were sold for 40% of the value of one year before, this is likely to meet the test under this section.

It is a prerequisite of liability under section 238 that, at the time the transaction was entered into, either the company was unable to pay its debts as they fell due within the meaning of section 123 or became unable to pay its debts within the meaning of that section in consequence of the transaction. In the case of a transaction with a connected person, however, the company is presumed to have been insolvent, or to have become insolvent as a result of the transaction, unless the contrary is proved. In this case, the transaction was with a connected person, being a director of the company and thus, the burden of proving the company was not insolvent at the time of the transaction is on the respondent to the liquidator's application.

As with section 239 discussed above, if the respondent to an application satisfies the court that the transaction was entered into by the company in good faith and for the purpose of carrying on its business, and that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company, then the court shall not make an order under section 238. However it is difficult to see how it is of benefit to the company to sell its assets at 40% of their value one year after purchase.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

Any disposition of the company's property (including cash) after the petition for winding up has been presented will be void under section 127 of the Act. As the payments to Aluminium Alumini were made after the date of the petition, they fall within the provisions of section 127.

A party may seek to validate the payments by way of a validation order from the court but such order will only be made where the circumstances indicate that the disposition will be or has been made for the benefit of the general body of unsecured creditors. While the justification for the payments was that the continued supply of metal was seen as essential by the company, as liquidation of the company had already commenced, the directors of the company owed their obligations to the creditors and not the members and the payments to Aluminium Alumini were not to the benefit of the creditors generally, and an application for a validation order would be unlikely to succeed.

For completeness, section 239 (dealing with preferences) does not apply to dispositions made after commencement of the winding up.

*** End of Assessment ***