



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 the Insolvency Act 1986** - liquidator(s) / administrator(s) of the company.
- (ii) **Section 6 of the Company Directors Disqualification Act 1986** - The Official Receiver may take action under this section, on the instruction of the Secretary of State for Business, Energy and Industrial Strategy.
- (iii) **Section 246ZB of the Insolvency Act 1986** - liquidator(s) / administrator(s) of the company.
- (iv) **Section 127 of the Insolvency Act 1986** - liquidator(s) 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.

These 5 types of debt do not form part of the payment holiday under Part A1 of the UK Insolvency Act 1986 (“UKIA”) when a company is subject to a Moratorium:

- debts in relation to goods or services supplied during the Moratorium;
- debts for rent in respect of a period during the Moratorium;
- debts in respect of redundancy payments;
- debts for wages or salary arising under a contract of employment; and
- debts or other liabilities arising under a contract or other instrument involving “financial services” which term is defined as including 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 - the administrator who wishes to continue to operate the business of the company in administration can require suppliers of goods and services to continue to supply those goods and services during the administration. This is because the appointment of an administrator does not automatically terminate a company’s executory contracts.

Even if the contracts between the company and their suppliers have terms which provide for automatic termination when an insolvency-related event occurs (i.e. *ipso facto* clauses), the administrator might still be able to require the suppliers of goods and services to continue to supply those goods and services during the administration. This is because such *ipso facto* clauses are increasingly subject to statutory exceptions which largely render them void.

Furthermore, under section 233 of the UKIA which applies to the supply of gas, electricity, water and communication services, suppliers are not allowed to require payment of outstanding debts in order to secure a new or continued supply to the company in administration. Section 233A of the UKIA also provides that a supplier of such services is generally unable 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.

Question 3.2 [maximum 9 marks]

Explain the order of priority of payments in a liquidation and explain the nature of the rights enjoyed by each class of creditor or expense. How would this priority change if the company had been subject to a Moratorium under Part A1 of the Insolvency Act 1986 during the 12-week period prior to the commencement of the liquidation?

The order of priority of payments in a liquidation from highest to lowest, and the nature of the rights enjoyed by each class of creditor or expense are as follows:

1. **Expense of the winding up** - Some expenses are given priority pursuant to section 115 of the UKIA read with rules 6.42 and 7.108 of the Insolvency Rules 2016 SI 2016/1024. These include, but are not limited to, expenses incurred by the liquidator in preserving, realising or getting in any assets of the company, the costs of any security provided by the liquidator, and any amount payable to a person to assist in the preparation of a statement of affairs or accounts.
2. **Preferential creditors** - this category largely comprises limited claims of employees and some taxation liabilities. They include employees’ remuneration and contributions to their pension schemes, as well as outstanding tax to the government. Schedule 6 of the UKIA lists other types of debts which are treated as preferential.
3. **Floating charge holder** - this category essentially comprises creditors who have been granted a floating charge over the assets of the company. There may be more than one floating charge holder, in which case priority between them usually turns upon which floating charge was created first.

Before making payment to a floating charge holder, the liquidator must first consider the application of section 176A of the UKIA. This section applies to a company with a floating charge created on or after 15 September 2003 and who has gone into liquidation or administration. Under s 176A of the UKIA, the liquidator or administrator is under a duty to make a “prescribed part” of the company’s net property available for the satisfaction of unsecured debts and must not distribute any of this prescribed part to a floating charge holder except insofar as it is in excess of the amount required to satisfy all the unsecured debt.

4. **Unsecured creditors** - this category refers to creditors who have no security.
5. **Shareholders** - if there are sufficient funds to pay all the creditors and interest on their debts, any surplus of the company will be distributed amongst the shareholders according to the company’s constitution, which will normally permit a distribution *pro rata* the shareholders’ respective shareholdings.

If the company had been subject to a Moratorium under Part A1 of the Insolvency Act 1986 during the 12-week period prior to the commencement of the liquidation - the priority of

debts would change. According to section 174A of the UKIA, certain unpaid pre-Moratorium or Moratorium debts - such as debts owed to employees or “financial services” debts - are paid in the subsequent liquidation in priority to even the liquidator’s fees and expenses. Section 174A of the UKIA essentially affords certain unsecured debts a form of “*super priority*” in a subsequent liquidation.

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 liquidator might be able to invalidate the floating charge in favour of Ambitus Bank plc pursuant to section 245 of the UKIA.

Section 245 of the UKIA only applies to floating charges, and its purpose is to prevent pre-existing unsecured creditors obtaining the security of a floating charge shortly before a company enters a formal insolvency procedure. Section 245 of the UKIA can render invalid floating charges given by the company unless “*new*” consideration is provided for the floating charge.

In order to invalidate the floating charge, the liquidator must show that Blazer Laser had provided the floating charge to Ambitus Bank within the period of 12 months prior to the onset of insolvency when Blazer Laser was either unable to pay its debts or became unable to do so in consequence of the transaction. The liquidator should be able to show this because the winding up petition was issued on 13 January 2024 and Blazer Laser went into

compulsory liquidation on 28 February 2024, which are all within 12 months of June 2023 when the floating charge was given. Also, given that Blazer Laser was pressured into giving the floating charge in June 2023, it was likely unable to pay its debts already at the time that it gave the floating charge to Ambitus Bank.

Ambitus Bank plc might try to argue that it gave “new” consideration in the form of not demanding and enforcing the loans given to Blazer Laser. However, this is unlikely to satisfy the 2 main categories of “new” consideration for the purposes of section 245 of the UKIA, which require such consideration to either (i) consist of money paid or goods and services supplied to the company at the same time or after the creation of the floating charge, or (ii) consist of a discharge or reduction of any debt of the company at the same time as or after the creation of the floating charge. Therefore, the liquidator might be able to successfully invalidate the floating charge in favour of Ambitus Bank plc.

The liquidator should note, however, that while he might be able to invalidate the floating charge, the underlying debt owed to Ambitus Bank will still be valid.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

The liquidator might be able to reverse the sale of the laser cutting machines to Angela Bannister under section 238 of the UKIA.

To succeed under section 238 of the UKIA, the liquidator must show that Blazer Laser:

1. made a gift to another person, entered into a transaction with another person on terms that provided for the company to receive no consideration, or entered into a transaction with another person 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 Blazer Laser;
2. the transaction was made in the period of 2 years prior to the commencement of the liquidation or administration;
3. at the time that the transaction was entered into, Blazer Laser was unable to pay its debts as they fell due, or became unable to pay its debts in consequence of the transaction. In this regard, if the transaction was made with a connected person, Blazer Laser will be presumed to have been insolvent, or to have become insolvent, as a result of the transaction unless the contrary is proved; and
4. the transaction was not entered into by Blazer Laser in good faith and for the purpose of carrying on its business, and at the time the transaction was made there were no reasonable grounds for believing that the transaction would benefit the company.

Regarding element 1, the liquidator should be able to show that the sale of the laser cutting machines to Angela Bannister was done at an undervalue. This is because the Blazer Laser purchased the machines at GBP 100,000 the year before, but had sold it at less than half the purchase price 1 year later in January 2023. The liquidator should adduce a valuation report from an expert to serve as evidence that the laser cutting machines were sold at an undervalue.

As for element 2, as the liquidation was commenced on 13 January 2024, the sale of the laser cutting machines in January 2023 was clearly done in the period of 2 years prior to the commencement of the liquidation or administration.

With regard to element 3, as the sale of the laser cutting machines was done to a connected person (i.e. a director of Blazer Laser), Blazer Laser will be presumed to have been insolvent, or to have become insolvent, as a result of the sale of the laser cutting machines. This presumption is unlikely to be rebuttable because Blazer Laser has already had difficulties repaying its loans to Ambitus Bank in June 2023, and also suffered cash flow problems in January 2023.

In respect of element 4, Blazer Laser might argue that it sold the laser cutting machines in good faith to solve its cash flow problems. However, the liquidator might be able to prove otherwise by showing that the laser cutting machines could have been sold to other third parties at a higher price, especially since the laser cutting machines are relatively new (1 year-old).

If the liquidator succeeds in establishing that the transaction falls under section 238 of the UKIA, the Court can make an order restoring the position to what it would have been if the preference had not been given, or the transaction not entered. In this case, the Court might be able to compel Angela Bannister to return the laser cutting machines to Blazer Laser, and for Blazer Laser to return Angela Bannister the GBP 40,000.

However, the liquidator should be aware that under section 241 UKIA, protection is afforded to persons who acquired the property from a person other than Blazer Laser, and which was acquired in good faith and for value. Therefore, if Angela Bannister had sold the laser cutting machines to another party who purchased them in good faith and for value, the liquidator might not be able to reverse the sale and claim back the laser cutting machines from that party.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

The liquidator will unlikely be able to take any action in respect of the payments to Aluminium Alumini Ltd (“AAL”) under section 239 of the UKIA.

To succeed under section 239 of the UKIA, the liquidator must show that Blazer Laser:

1. has gone into liquidation or administration;
2. the person whom it is alleged has been preferred was, at the time of the transaction, a creditor of the company (or a surety or guarantor for any of the company’s debts or liabilities);
3. 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 bene in if that thing had not been done (i.e. that the person has been preferred);
4. the company was, in giving the preference, influenced by a desire to produce the effect referred to in (3) above in relation to the person preferred;

5. the preference was given at a relevant time, i.e. 2 years prior to the onset of insolvency (if in favour of a connected person), or 6 months prior to the onset of insolvency (if in favour of a person unconnected to the company); and
6. at the time the preference was given, either the company was unable to pay its debts as they fell due, or became unable to pay its debts in consequence of the preference.

Elements 1, 2, 3 should be satisfied because Blazer Laser is currently in liquidation, AAL was a creditor of Blazer Laser at the time the preference was given, AAL was preferred by Blazer Laser when it authorised payments to AAL despite being unable to pay its debts to other creditors.

Elements 5 and 6 should also be satisfied because the payments to AAL were made a month before Blazer Laser was wound up, and Blazer Laser was clearly unable to pay its debts at the time that the preference was given, especially since it already had difficulties repaying its loans to Ambitus Bank in June 2023, and also suffered cash flow problems in January 2023.

However, the liquidator will unlikely be able to succeed in reversing the payments to AAL under section 239 of the UKIA because of Element 4 which requires the liquidator to show that Blazer Laser had, in giving the preference, been influenced by a desire to prefer AAL. To this end:

- it is important to differentiate the concept of “*desire*” as required under section 239 of the UKIA from the concept of “*intention*”. Although an intention to make payment to AAL necessarily involves an intention to prefer AAL over other creditors in the event of insolvency, that does not necessarily mean that Blazer Laser desired to prefer AAL over other creditors;
- for example, in *Re MC Bacon Ltd* [1990] BCC 78, the company was entirely dependent upon bank support for continued trading, such that if the debenture were not granted the bank would withdraw its support and cause the company to be forced into immediate liquidation. Millett J held that even though the company granted a debenture to the bank and preferred the bank to its other creditors, this was not motivated by a desire to prefer the bank but a desire to avoid the calling in of the overdraft and to continue trading; and
- the current case can be analogised to *Re MC Bacon Ltd* [1990] BCC 78. Similar to the company in *Re MC Bacon Ltd* [1990] BCC 78, Blazer Laser likely preferred AAL not because it desired to do so, but because it had to do so in order to ensure the continued supply of metal which was essential for Blazer Laser to continue trading.

*** End of Assessment ***