



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
A liquidator may bring an action under section 245 of the Insolvency Act 1986.
- (ii) Section 6 of the Company Directors Disqualification Act 1986
An application under section 6 of the Company Directors Disqualification Act 1986 will be made by the Secretary of State or the Official Receiver on the instructions of the Secretary of State where the company has already been wound up by the Court.
- (iii) Section 246ZB of the Insolvency Act 1986
An administrator may bring an application against directors for wrongful trading under Section 246ZB of the Insolvency Act 1986.
- (iv) Section 127 of the Insolvency Act 1986
A liquidator may bring an action under Section 127 of the Insolvency Act 1986 in order to retrieve company assets disposed of during the period between the petition and the winding up order.

Question 2.2 [maximum 5 marks]

List any **five (5)** of the debts which do not form part of the payment holiday under Part A1 of the Insolvency Act 1986 when a company is subject to a Moratorium.

The following five debts do not form part of the payment holiday under Part A1 of the Insolvency Act 1986 when a company is subject to a Moratorium:

1. Goods or services supplied during the Moratorium;
2. Rent in respect of a period during the Moratorium;
3. Wages or salary arising under a contract of employment;
4. Redundancy payments; or
5. The monitor's remuneration or expenses.

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 6 marks]

Can an administrator who wishes to continue to operate the business of the company in administration require suppliers of goods and services to continue to supply those goods and services during the administration?

The short answer to this question is yes, if an administrator wishes to continue to operate the business of the company in administration, he or she can require suppliers of certain goods and services to continue to supply those goods and services during the administration. However, this does not apply to all suppliers of goods and services. Furthermore, to those suppliers of goods and services to which it does apply, this does not apply where the company or administrator consents to the termination of the contract for the supply of goods and services or where, on application to the court, the court is satisfied that undue hardship would result in the continuation of the contract.

Historically, terms of contracts which provide for the automatic termination of the contract upon the occurrence of an insolvency event have been effective and recognised by the

courts. However, there have been recent legislative changes in this area over the last number of years in England and Wales which has been such terms be subject to avoidance. The rationale behind these legislative changes is that an administrator will very often have to make use of certain goods and services in order to keep the company operational. Section 233(3) of the Insolvency Act sets out an exhaustive list of goods and services which an administrator can request the continuation of during the administration. Under section 233(2) of the Insolvency Act 1986, it is open to the suppliers of these goods and services to require the administrator to personally guarantee the payment of charges in respect of the new supply required. However, the suppliers of these goods and services are not permitted to require the payment of any outstanding debts in order to guarantee continued supply to the company in administration.

Section 233B was introduced into the Insolvency Act 1986 by section 14 of the Corporate Insolvency and Governance Act 2020. Section 233B now prohibits clauses of contracts for the supply of goods and services which allow the supplier to terminate or "do any other thing" in relation to the contract if the contract enters into an insolvency procedure. Therefore, suppliers of goods and services are thereby prevented from terminating a contract for the supply of goods and services upon the company receiving the services entering into an insolvency procedure.

Section 233B exists alongside the already-existing section 233 and 233A. Section 233B extends the restriction on termination of contracts for the supply of goods and services to all other suppliers beyond the previous exhaustive list as set out above. There are a small number of exceptions to this under section 233B, for example contracts with banks and insurance companies.

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?

Section 115 of the Insolvency Act 1986 sets out order of priority of payments in a liquidation which are payable before any of the company's preferential creditors, any holders of floating charges and the company's unsecured creditors. They are as follows and are payable in the following order:

1. Expenses properly incurred by the liquidator during the course of preserving, realising or getting in any of the assets of the company (this includes assets realised as a result of any litigation);
2. The cost of any security that may have been provided by the liquidator;
3. Any monies payable for assistance with the preparation of a statement of affairs or company accounts;
4. Any necessary disbursements by the liquidator during the winding up of the company;
5. The wages or salary due to any person who may have been employed by the liquidator for the performance of any services for the company in liquidation;
6. The fees due to the liquidator (which fees are subject to a fees estimate regime where a "time/cost" basis for the liquidator's remuneration is applicable);
7. Any corporation tax payable on chargeable gains having accrued on the realisation of any asset of the company;
8. Any other types of expenses which are properly chargeable by the liquidator during the course of his or her duties in the liquidation.

It is only after the foregoing expenses have been paid in full that distributions can be made to the company's preferential creditors. There are two classes of preferential creditors; ordinary and secondary. Ordinary preferential creditors are paid in priority to secondary preferential creditors. In each respective class of ordinary and secondary preferential debts, the types of debts rank equally and so within each class of preferential debt, the debts are abated proportionately if there are insufficient funds to satisfy all of the debts entirely. Schedule 6 of the Insolvency Act 1986 sets out the preferential creditors, with the classes of creditors at points 1 - 8 being ordinary preferential creditors, and the classes of creditors following them at points 9 - 11 being the secondary preferential creditors (as so defined in section 386 of the Insolvency Act), which are as follows:

1. Monies owed on account on an employee's contribution to their occupational pension scheme (i.e., contributions deducted from earnings of the employee) paid in the four months prior to the commencement of the winding up of the company;
2. Any monies owed by the company on account of an employer's contribution to their occupational pension scheme in the twelve months prior to the commencement of the winding up of the company;
3. Wages or salary owed by the company to a current or former employee of the company which is payable in any part of the period of four months prior to the commencement of the liquidation up to a maximum amount of £800 (bizarrely, a figure that has not changed since 1976);
4. Monies owed by the company in respect of accrued holiday pay for any period of employment before the company's winding up;
5. Third parties who may have advanced monies for the purpose of paying wages or holiday pay will be, in a sense, able to "step in the shoes" of the employee as the third party (such as a lender) and have these monies rank as preferential;
6. Levies on the production of coal and steel as set out in article 49 and article 50 of the European Coal and Steel Community Treaty (these claims are now extremely rare);
7. Monies ordered to be paid by the company under the Reserve Forces (Safeguard of Employment) Act 1985;
8. Monies owed by the debtor company in relation to an eligible deposit (but not to the extent that it would exceed the compensation payable in relation to the deposit under the Financial Services Compensation Scheme to the person to whom the debt is owed). These debts relate to debts owed to those who held deposits with banks who subsequently become insolvent;
[note that the following three types of preferential debts rank below those listed at 1-8 above]
9. So much of the amount that may be owed by the debtor company to eligible persons in respect of an eligible deposit, to the extent that it exceed any compensation payable in respect of the deposit under the Financial Services Compensation Scheme to that person;
10. Monies owed by the debtor company to eligible persons in respect of a deposit that (a) was made via a non-UK branch of a bank authorised by the relevant authority of the UK, and (b) would have been an eligible deposit if it had been made through a UK branch of that bank;
11. PAYE income tax deductions, national insurance deductions, VAT payments, deductions under the Construction Industry Scheme and student loan repayments.

After the expenses explained above and the foregoing preferential creditors have been paid, the next class of creditor on the list is a creditor who holds any floating charge over assets of the company. It may be the case that there is more than one creditor who holds a floating charge over an asset of the company. If that is the case, generally speaking, priority between them is in accordance with whosever floating charge was first created. The

liquidator should be careful to consider Section 176A of the Insolvency Act 1986 before making any payments to creditors who hold a floating charge over assets of the company.

Last on the list of creditors to be paid are unsecured creditors, i.e., those with no security. These are typically trade creditors.

Rarely, it might be the case that there are sufficient funds in the liquidation to pay all of the creditors (as well as interest on their debts). If this is the case and there is any surplus, shareholders will then receive the distributions pro rata between them.

Following a moratorium, if a company is not rescued as a going concern but goes into either administration or liquidation within 12 weeks of the moratorium, the priority of payment of debts may be different to the priority of payment of debts that would have applied prior to the Moratorium.

There are certain debts which enjoy a form of "super-priority" after in a liquidation or administration subsequent to a Moratorium. Under section 174A of the Insolvency Act 1986, certain debts (pre-Moratorium debts that are unpaid or debts which are not part of the payment holiday during the Moratorium period) are paid in priority to even the liquidator's fees and expenses in the subsequent liquidation or administration. Examples of these so-called "super-priority" debts in a subsequent liquidation or administration following a Moratorium would be debts owed to employees or "financial services" debts.

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 liquidator should consider taking action pursuant to section 245 of the Insolvency Act 1986 in relation to the floating charge in favour of Ambitus Bank plc.

Section 245 is aimed at preventing existing unsecured creditors from obtaining new security of a floating charge shortly before a company enters into liquidation or another insolvency procedure. It specifically applies to creditors who get the benefit of a floating charge without providing fresh consideration in exchange. The relevant time period for the creation of the floating charge is any time within the previous twelve months to the commencement of the winding up (unless the party taking the floating charge is a connected party, which is not the case here), as long as, at the time of the creation of the floating charge, the company was unable to pay its debts (in accordance with the meaning set out in section 123 of the Insolvency Act 1986) or became unable to pay its debts as a result of the transaction. The consequence of applying section 245 to a floating charge is that the floating charge is rendered invalid. However, although the floating charge can be invalidated, the underlying debt remains valid.

From the facts we are given, it does not appear that Ambitus Bank plc provided the company with fresh consideration in exchange for the floating charge over the whole of the Company's undertaking. In fact, we are explicitly told that the floating charge was granted to Ambitus Bank plc in order to prevent Ambitus from demanding repayment of the loans owed by Blazer Laser Limited. The floating charge was created pursuant to the debenture in June 2023 and the company went into liquidation less than one year after that, so section 245 applies here.

As a consequence, the liquidator of Blazer Laser Limited will be able to engage section 245 here and invalidate the floating charge, but the underlying debt will remain valid.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

The liquidator should consider taking an action or actions here pursuant to sections 212, 423 and 238 of the Insolvency Act 1986 in relation to the sale of the laser cutting machines to Angela Bannister (a director of the company).

When a company goes into liquidation, it is very common for a liquidator to examine the transactions preceding the liquidation (especially transactions with the company's directors) which might be open to attack. A liquidator might have a number of options in this regard.

Section 212 of the Insolvency Act 1986 creates a simplified procedure for causes of action which could have been enforced by the company prior to liquidation. The Court may consider whether there has been any misfeasance or breach of duty in relation to the company. Under section 212, the Court may order the restoration, repayment or accounting of money or property or the contribution of such monies to the company by way of compensation in respect of the misfeasance or breach of duty. Misfeasance would include actions where the alleged wrongdoer has "*misapplied, retained or become accountable for money or property of the company, or [is] guilty of misfeasance or breach of any fiduciary or other duty*".

Under section 238 of the Insolvency Act 1986, the liquidator can attack a transaction entered into prior to the company going into liquidation where the transaction was at an undervalue.

In order to do so, the liquidator must be able to show that either (1) the company made a gift to another person or otherwise entered into a transaction with another person on terms under which the company received no consideration, or (2) the company entered into a transaction with another person for a consideration which was significantly below the consideration provided by the company (in the previous transaction).

Under section 238, in order for the transaction to be open to attack, it must be within two years of the commencement of the company's liquidation (the date of the resolution of the creditors). If the transaction was with a "connected person", it is presumed that the company was insolvent at the time of the transaction or that the company became insolvent as a result of the transaction, unless the contrary is proven.

If the Court concludes that there has been a transaction at an undervalue, it has the power to make an order restoring the company's position to what it would have been if the transaction had not been entered into.

Section 423 of the Insolvency Act 1986, the liquidator has the right to attack transactions which have the effect of and/or are designed for the purpose of defrauding creditors. There are two requirements for an attack on a transaction under section 423:

1. The company must have entered the transaction with another person at an undervalue (this is defined in the same way as under section 238 as set out above); and
2. The company must have entered into the transaction either to put assets beyond the reach of a person who is making a claim against the company or otherwise prejudicing the interests of such a person in relation to the claim being made.

Applications to attack a transaction under section 423 of the Insolvency Act have no time limit.

On the facts that we are given, the liquidator of Blazer Laser Limited should have a strong case to make for attacks on the transaction with Angela Bannister, a director of Blazer Laser Limited, for the sale of two laser cutting machines for £40,000. We are told that the company bought the two laser cutting machines for £100,000 one year beforehand. While it is possible that they may have reduced in value over the course of a year, it would seem unlikely that they would reduce in value by over 50%. Further, as a director of Blazer Laser Limited, Angela Bannister is a connected party to the company in this transaction.

Therefore, the liquidator should consider taking an action against Ms Bannister under sections 212 and 238 of the Insolvency Act for the transaction having taken place at an undervalue. The court may order the restoration, repayment or accounting of money or property or the contribution of such monies to the company by way of compensation in respect of the misfeasance under section 212, and/or an make an order restoring the position of Blazer Laser Limited to what it was before the transaction with the director. As the transaction took place with a connected party, Ms Bannister as a director of Blazer Laser, it will be presumed that the company was insolvent at the time of the transaction unless Ms Bannister presents evidence to the contrary. In terms of an application under section 423, this is not as clear cut as we do not have enough information on the facts that we are given that would suggest that the second element of the test for section 423 is satisfied. However, the liquidator should nonetheless consider it.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

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.

In relation to the payments made to Aluminium Alumini Ltd and authorised by the board of Blazer Laser Limited, the liquidator should consider taking an action in relation to sections 233 and 239 of the Insolvency Act 1986.

Section 233 of the Insolvency Act 1986 applies to the supply of gas, electricity, water and communications services. Suppliers of these services are prohibited from requiring payment of outstanding debts in order to secure new or continued supply of the services to the company in administration.

Section 239 of the Insolvency Act 1986 relates to preferences which may be avoided by the court on the application of the liquidator. The purpose of this provision is to prevent a company from preferring one creditor over another in the time immediately preceding the liquidation. It prevents these preferences in circumstances where the preferred creditor should have only expected a dividend as an unsecured creditor but has instead been paid in full ahead of other creditors who would be paid first in line with the order of payment preferences in a liquidation.

On the facts we are given, we know that the board authorised the payment of £20,000 to Aluminium Alumini Ltd to cover existing liabilities. This transaction will be caught by both sections 233 and 239 of the Insolvency Act as it has had the effect of preferred this creditor over other creditors who may be entitled to be paid first, and Aluminium Alumini Limited are prohibited from requiring payment for an existing debt under section 233.

We know that the board of Blazer Laser Limited authorised a further payment of £8,000 "up to the date of the winding up order". We also know that the winding up order was made on 28 February 2024 and that the creditors passed a resolution for the winding up of the company on 13 January 2024. Under the Act, the date of the commencement of the liquidation is the date of the passing of the resolution. We are also told on the facts that Ms Bannister received this email from Aluminium Alumini Ltd "a month before the winding up order was made", i.e., 28 January 2024. Therefore, the board authorised this payment after the commencement of the winding up of Blazer Laser Limited. However, this transaction may be considered to be reasonable as the supply of metal is seen as essential by the company.

*** End of Assessment ***