



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?

An action may be brought:

- i. under section 245 of the Insolvency Act 1986 by an administrator or liquidator;
- ii. under section 6 of the Company Directors Disqualification Act 1986 by the Secretary of State (or the Official Receiver on the instructions of the Secretary of State in the applicable circumstances);
- iii. under section 246ZB of the Insolvency Act 1986 by an administrator or liquidator;
- iv. under section 127 of the Insolvency Act 1986 for a validation order by the relevant company or any interested party.

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.

- Salary payments arising under a contract of employment;
- Redundancy payments;
- For goods and/or services supplied during the Moratorium;
- Rent in respect of a period during the Moratorium; or
- Debts/other liabilities arising out of a contract for 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?

Section 233 of The Insolvency Act 1986 gives protection with respect to essential supplies (e.g. IT, gas, electricity and water). This is not a means to compel supply of goods, but does prevent the supplier demanding pre-administration debts be paid as a condition to continuing supply in return for the insolvency office holder to personally guarantee payment of the post-insolvency supply.

Section 233A takes the section 233 protection a little further in respect of the specified essential supplies and prevents a supplier from terminating the supply contract because of entering administration (so called ipso facto clauses). Therefore, absent any other breaches of contract that may amount to a termination right the supply for the essential goods should continue.

A company's entry into administration does not automatically terminate other (non-essential) contracts either. Historically, many contracts would provide for automatic termination of the contract when one of the parties enters into administration (or other insolvency proceedings) such that suppliers did not need to keep supplying when there was a heightened risk of non-payment (or the other party is in arrears). Section 233B expanded the restriction on ipso facto clauses to the supply of any goods. Therefore, a counterparty cannot terminate the contract or do any other thing as a consequence of the company entering into administration. This means supplier must keep supplying under the contract and cannot demand the payment of any pre-administration debts as a condition for

continuing supply. In this circumstance, the supplier also cannot request a person guarantee from the office holders (as under Section 233).

The administrators can therefore insist on the continued supply of goods and services, however the supplier could apply to the court to terminate the contract if the continued supply would cause them hardship.

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 liquidation, the priority of payments is:

1. Fixed charges. Realisations from assets over which a creditor has a fixed charge must be distributed to the holder of the fixed charge. If there are multiple charge holders then the priority is set based on the order the charges taken. Fixed charge holders cannot over recover, so if the realisation provides an excess of funds the excess will go into the waterfall set out below.
2. Expenses in the liquidation including expenses of winding up and the remuneration of the liquidators. These payments are made in priority of even the preferential creditors.
3. Preferential creditors which include employee salaries and some tax liabilities. Within preferential creditors there are two classes of preferential creditors: ordinary and secondary preferential debts. Ordinary preferential creditors have rights to payment before the secondary preferential creditors.
4. Prescribed part. Before the liquidator makes a distribution to a floating charge holder a prescribed part must be carved out for the benefit of unsecured creditors. The quantum of the prescribed part is calculated as a percentage of the company's assets which is subject to a floating charge (depending on the value). Only in exceptional circumstances is the prescribed part disapplied by a court, but it may do so if the cost of doing so would be disproportionate to the benefit to the creditors. Secured creditors (including floating charge holders) cannot participate in the prescribed part.
5. Floating charge holders. If there is more than one floating charge holder then the priority among that class of creditors is decided on the order of creation of the charge.
6. Unsecured creditors. These creditors are paid out last and are treated equally (pari passu) with each other. Secured creditors who were not fully repaid from their security may also join in the distribution to unsecured creditors (on a pari passu basis) but do not participate in the prescribed part.
7. Shareholders. If all creditors are repaid in full then remaining funds belong to the shareholders.

If the company had been subject to a Part A1 moratorium and enters liquidation within 12 weeks of the end of the Moratorium then there are a number of changes to the order of priority. This is set out in Section 174A and provides for certain debts to be paid in priority of even the expenses of the liquidation (but not fixed charges). The relevant debts that will be elevated in priority are Moratorium debts and pre-Moratorium debts. Moratorium debts are those debts that became due during or after the Moratorium in connection with an obligation delivered/incurred during it. Pre-Moratorium debts that receive priority status include payment for goods or services supplied during the Moratorium, salaries and

redundancy payments that fell due before or during the moratorium. The priority of payment between these claims is also governed by an order of priority set out in Section 174A, with the debts due for goods and services supplied during the Moratorium taking priority.

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 Alimini 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 floating charge was granted to Ambitus Bank plc for no consideration in respect of existing liabilities. Section 245 aims to prevent pre-existing unsecured creditors obtaining a floating charge shortly before formal insolvency proceedings are commenced and renders certain floating charges invalid.

Ambitus Bank plc, as far as we are aware, is not a connected party to the company and therefore the relevant lookback period is 12 months prior to the onset of insolvency. The onset of insolvency is usually taken as being the date on which formal insolvency proceedings were commenced and therefore the date on which the lookback period starts is 13 January 2024 (the date on which the winding up petition was presented to court). The floating charge was granted in June 2023 and therefore it falls in the relevant period.

In addition to being within the relevant lookback period, the company must have been unable to pay its debts at the time it granted the charge (Section 245(4)). This is tested

with respect to the tests set out in Section 123. On the presented facts, it appears highly likely that the company was either balance sheet or cashflow insolvent at the time of granting the floating charge, particularly given the lengths taken to avoid the bank calling the debts in and the need to sell assets to meet other payments.

Although the floating charge is likely invalid, the debt owed to Ambitus Bank plc remains valid.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

In a liquidation, the liquidator can apply to the court set aside a transaction (Section 238). Section 238 includes several limbs of relevant transaction however the relevant limb to consider here covers transaction with another person, for consideration which was at the date of the transaction significantly less than the consideration given by the company. Here the purchaser bought the assets for 40% of the company's purchase price suggesting a 60% depreciation in 1 year, this sounds excessive but would need to be successfully argued by the liquidator.

In order to be reviewable under Section 238 the transaction, must have occurred within 2 years of the relevant time (here the issuance of the winding-up petition being 13 January 2024). The sale of the laser cutting machines was made around 1 year prior to the relevant date and the transaction is therefore reviewable.

In order to set aside the transaction, the company must have been unable to pay its debts as they fall due. We know that the transactions were undertaken because the company was facing financial difficulties. Moreover, because the transaction was with a director or the company who is a connected party there is a presumption of financial difficulty. It appears highly unlikely such presumption could be rebutted.

It might be the case that the company could show that the transaction was entered into in good faith, for the purpose of the carrying on its business and at the time it had reasonable grounds to believe the transaction would benefit the company then it may be able to persuade the court not to make an order voiding the transaction (Section 238).

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

The payments made to Aluminium Alumini were made 1 month prior to the winding up petition. Section 239 provides for transactions to be voided where they were made shortly before the onset of formal insolvency procedures to place one of its creditors in a better position than others.

A successful application to set aside a transaction under section 239 must show:

- the person who was "preferred" was at the time of the transaction a creditor of the company;
- that something was done by the company which put that person in a better position they otherwise would have been in insolvency;
- the company was influenced to take such action by a desire to prefer such creditor; and
- the transaction/preference was made in the relevant period.

We know that Aluminium Alumini was a creditor of the company as the company owed it outstanding fees at the time.

An action was taken to put Aluminium Alumini in a better position in a liquidation of the company by choosing to pay them all of its outstanding deb. It is assumed that at this time they were not the only creditor with which the company had arrears. Prior to the payment, if the company went into liquidation Aluminium Alumini would have been sharing in the distributions on a pari passu basis with other unsecured creditors. In receiving this payment, they have effectively been elevated to a senior basis.

The next criteria is whether the company took such action with a desire to actually prefer the creditor in this way. The desire to keep an essential supply going is not the same as a desire to prefer the creditor. The fact that pressure was applied by the creditor does not impact the assessment. Other provisions that restrict the demand of owed sums are not in force here as at the time the company was not in a formal insolvency procedure. The burden of proof would be on the office holder to establish a desire to prefer Aluminium Alumini.

Finally, we know the transaction was made around a month before the winding-up petition and it is therefore within the relevant time.

*** End of Assessment ***