



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.

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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 Administrator, the company, directors, one or more creditors, court officials where the company has failed to pay a fine, may bring an action under section 245 of the Insolvency Act 1986.
- Any person (eg. A liquidator, administrator etc.) who has evidence that directors permitted a company to commit an offence under section 6 of the Company Directors Disqualification Act 1986 to bring an action.
- An Administrator and/or Liquidator may bring an action under section 246ZB of the Insolvency Act 1986 during administration or liquidation proceedings. In addition, to a creditor.
- The liquidator may bring an action under section 127 of the Insolvency Act 1986.

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.

There is a stay on enforcement of pre-moratorium debts (i.e. debts falling due before the Moratorium and which fall due during the Moratorium by reason of a pre-moratorium obligation) except in so far as they consist of amounts payable in respect of:

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

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?

An 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. An administrator will frequently need to obtain or

retain essential supplies in order to fulfil its purpose of administration and rescuing the company.

The appointment of an administrator does not automatically terminate a company's supply contracts (executory contracts). Section 233 of the Insolvency Act 1986 (IA) applies to gas, electricity, water and communication services. Communication services is further defined in the IA to include the supply of goods and services such as POS terminals, computer hardware and software, information, website hosting etc. Pursuant to the IA section 233 5 d) "communications services" do not include electronic communications services to the extent that they are used to broadcast or otherwise transmit programme services.

Suppliers under executory contracts are not permitted to require payment of outstanding debts in order to secure a new or continued supply to the company in administration. It should be noted that section 233 IA, however, permits a supplier to stipulate that the administrator must personally guarantee payment of charges in respect of the new supply.

The IA pursuant to section 233A, a supplier under an executory contract for such services is generally unable to rely upon an "insolvency related term" or clause in the contract to entitle the supplier to terminate the supply, alter the terms of the supply or compel higher payments for continued supply and services. Such a provision will be void and have no effect to the contract or the company if and when the company enters an insolvency procedure.

By further amendments for the protection of companies the IA was amended pursuant to section 233B, which prohibits clauses which allow the supplier of any goods or services to terminate or "do any other thing" in relation to the executory contract if the company enters a formal insolvency procedure. Therefore, prevents suppliers from terminating a supply upon the company's insolvency but also prevents suppliers from making it a condition of continued supply that pre-insolvency arrears are paid and from making other changes to the contract such as increasing prices. Under section 233B, a supplier cannot insist in a personal guarantee from the administrator in contract with section 233.

The only avenue for a supplier to terminate an executory contract where the company is by consent by administrator and if the court is satisfied that the continuation of the contract would cause the supplier hardship. In such circumstances the court has power under section 233B to grant permission for termination of the executory contract.

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?

When a company enters into liquidation its creditors are paid in a particular order as required by IA section 115 and rules 6.42 and 7.108 of the Insolvency Rules 1986 (IR). The order in which creditors are paid is very specific and was designed to protect those with direct and indirect interest or rights in the company's remaining assets.

Pursuant to section 115 of the IA and rules 6.42 and 7.108 of the IR, priority is given over the company's preferential creditors, any holders of floating charges and the company's unsecured creditors. The following is the order of priority of payments in a liquidation:

1. Expenses that are properly incurred by the liquidator in preserving, realising or getting in any of the assets of the company (including the conduct of any legal proceedings,
2. The cost of any security provided by the liquidator,
3. Any amount payable to a person to assist in the preparation of a statement of affairs or accounts,
4. Any necessary disbursements by the liquidator in the course of the winding up,
5. The remuneration of the liquidator,
6. The amount of any corporation tax on chargeable gains accruing on the realisation of the assets of the corporation, and
7. Any other expenses properly charged by the liquidator in carrying out his functions,

Once the expenses are paid in full, the assets of the company are then used to pay preferential creditors. The preferential creditors are secured creditors and therefore a creditor who as the benefit of some form of mortgage or charge on the assets of the debtor.

Preferential debts are classified as ordinary and secondary. Ordinary preferential debts are paid before secondary preferential debts. However, preferential debts rank equally in their respective classes and therefore entitled to equal portions when paid.

The following debts are listed as Ordinary Preferential debts under Schedule 6 IA any sums owed by the company for:

1. An employee's contributions to occupational pension scheme,
2. Holiday remuneration,
3. Absence from work through sickness,
4. Levies on the production of coal and steel referred to in article 49 and article 50 of the European Coal and Steel Community Treaty, and
5. Claims ordered under the Reserve Forces (Safeguard of Employment) Act 1985.

The following debts are defined as secondary preferential debts under IA section 386 are paid after Ordinary Preferential Debts listed above:

1. Monies owed to eligible person in respect of eligible deposit,
2. PAYE income tax deductions .

Once preferential have been paid, the next creditor in line to be paid are any floating charge holder. Before a floating charge holder's debt can be paid, the liquidator must first consider the application of IA section 176A. A floating charge created on or after 15 September 2003 and the company has gone into liquidation or administration, the liquidator/administrator is under the duty to make a "prescribed part" of the company's net property available for the satisfaction of unsecured debts and must distribute any of this prescribed to a floating charge holder except if it is the excess of the amount required to satisfy all the unsecured debts.

After payment to a floating charge holder and consideration to IA section 176A (where necessary), the unsecured creditors are paid (these creditors that have no security).

After the unsecured creditors, and there are sufficient funds to pay all the creditors, any surplus is distributed amongst the shareholders of the company in accordance with the company's constitution. The right of his shareholder will be determined pro rata the shareholder's respective shareholdings.

if the company had been subject to a Moratorium during the 12-week period prior to the commencement of the liquidation

A peculiarity of the Moratorium under Part A1 of the IA, is that if the company is not rescued as a going concern and enters into liquidation with 12 weeks of the end of the Moratorium, the priority of debts in that subsequent administration or liquidation may be different to the priority of debts which existed prior to the Moratorium.

In the event that an insolvency event occurs within 12 weeks of the expiry of a moratorium under Part A1 of the IA, the above explained priority of distribution would change. Under section 174A Moratorium debts and priority pre-moratorium debts (being those debts for which the company doesn't have a payment holiday eg. Debts owed to employees or financial services debts are paid in priority to even the liquidator's fees and expenses). Section 174A therefore affords certain unsecured debts a form have super-priority, save that debt which is accelerated during the moratorium does not enjoy such priority (which is a change to the Bill that would have entitled a lender to accelerate a debt during the moratorium and to enjoy super-priority in respect of such debt). There is no requirement to have a particular outcome in mind at the time of entry into a moratorium.

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

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

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

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

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

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

Using the facts above, answer the questions that follow.

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

Question 4.1 [maximum 5 marks]

The floating charge in favour of Ambitus Bank plc;

In respect of the floating charge in favour of Ambitus Bank plc before any payment can be made to any floating charge holder, consideration must be given to IA section 176A. Section 176A applies to a company with a floating charge created on or after 15 September 2003 and the company has gone into liquidation.

In this case the floating charge was created on in June 2023, therefore section 176A would apply. The liquidator will be 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 Ambitus Bank plc (a floating charge holder) except if it is in excess of the amount required to satisfy all the unsecured the unsecured debts. Where the company’s net property does not exceed GBP 10,000, the prescribed part is 50% of that property, if less than GBP 10,000 then the duty to make the distribution of the prescribed part does not apply.

Section 245 IA will also apply where a liquidation and the provision is aimed at preventing pre-existing unsecured creditors in this case Ambitus Bank plc obtaining the security of the floating charge having shortly before a company enters in a formal insolvency procedure. It will render invalid floating charges given by a company at a relevant time in substance that “new consideration is provided for the charge.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

Section 238 and 239 IA would apply, a liquidator may attack a transaction which was entered prior to the company entering liquidation where the transaction was at an undervalue. In this case the laser cutting machines were sold to Angela Bannister a director of Ambitus Bank plc GBP 40,000 in cash, when the machines had originally been bought for GBP 100,000 a year before is an undervalue of GBP 60,000.

The liquidator will have to show that the transaction in consideration of GBP 40,000 was at the date of the transaction significantly less than the value of the machines. The transaction occurred January 2023 a year before the winding up petition was issued within two years prior to the commencement of the liquidation will also be taken into consideration as the “relevant time” of the transaction. The liquidator will also have to prove that the transaction was made in bad faith seeing that Angela new of its prior value before the transaction and as a director about the laser cutting machines at an undervalue.

The court may make an order to restore the position to what it would have been if the two machines had not been sold (the entering of the transaction).

The liquidator may also consider an application on section 127 IA for a validation of disposition order where a company conducts a transaction in the ordinary course of business which are entered into bona fide are not permitted, the parties interested in the assets of the company could be prejudiced.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

Section 233 of the Insolvency Act 1986 (IA) applies to supply of services. Suppliers under executory contracts are not permitted to require payment of outstanding debts in order to secure a new or continued supply to the company in administration. Therefore, Aluminium Alumini Ltd is barred from doing so.

The IA pursuant to section 233A, a supplier under an executory contract for such services is generally unable to rely upon an “insolvency related term” or clause in the contract to entitle the supplier to terminate the supply, alter the terms of the supply or compel higher payments for continued supply and services. Such a provision will be void and have no effect to the contract or the company if and when the company enters an insolvency procedure.

By further amendments for the protection of companied the IA was amended pursuant to section 233B, which prohibits clauses which allow the supplier of any goods or services to terminate or “do any other thing” in relation to the executory contract if the company enters a formal insolvency procedure. Therefore, prevents suppliers from terminating a supply upon the company’s insolvency but also prevents suppliers from making it a condition of continued supply that pre-insolvency arrears are paid and from making other changes to the contract such as increasing prices. Under section 233B, a supplier cannot insist in a personal guarantee from the administrator in contract with section 233.

The only avenue for Aluminium Alumni Ltd to terminate an executory contract where the company is by consent by the liquidator and if the court is satisfied that the continuation of the contract would cause the supplier hardship. In such circumstances the court has power under section 233B to grant permission for termination of the executory contract. Given the circumstances it is not likely that such an order can be reasonably be made.

*** End of Assessment ***