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**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**.

6.1If 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 . . .:

1. within 10 weeks of the commencement of the administration.
2. within eight weeks of the commencement of the administration.
3. within four weeks of the commencement of the administration.
4. 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?

1. 40 business days.
2. One year and 20 business days.
3. One year and 40 business days.
4. 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?

1. 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.
2. 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.
3. The purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the said financial difficulties.
4. 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?

1. The administrator.
2. Any secured creditor with the benefit of a qualifying floating charge.
3. The purchaser.
4. The company’s auditor.

**Question 1.5**

Which one of the following **is not** a debtor-in-possession procedure?

1. Administration.
2. Restructuring Plan.
3. Scheme of Arrangement.
4. 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?

1. Malaysia.
2. Australia.
3. India.
4. 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?

1. Wrongful trading.
2. Breach of fiduciary duty.
3. Being found guilty of an indictable offence in Great Britain.
4. 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?

1. Five business days.
2. Twenty business days.
3. Ten days.
4. Three months.

**Question 1.9**

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

1. 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.
2. An insolvency officeholder from an EU Member State is automatically recognised by the courts in the UK if appointed before Brexit.
3. 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.
4. 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?

1. Six months.
2. Five years.
3. Two years.
4. 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) Lets us discuss who may bring actions under section 245 of the Insolvency Act 1986:

Unlike many of the other avoidance provisions, the operation of section 245 is automatic. It does not depend on application being made by the liquidator or administrator.

Section 245 applies only in the context of liquidation and administration. According to this if any floating charge is created within a specifies period ( 2 years in case of connected persons and 12 months for not connected persons) prior to onset of insolvency is rendered invalid except that charge holder advanced value to the debtor at the same time as, or after, the creation of the charge. It applies only if at the time of the creation of the charge the company was either unable to pay its debts (within the meaning of Section 123 of the Act) or becomes unable to do so in consequence of the transaction.

Therefore, the operation of Section 245 is automatic if the creation of floating charge is caught under the provisions of Section 245.

(ii) Now let’s see who may bring an action under section 6 of the company Directors Disqualification Act 1986:

An application to the court for a disqualification order will be made by the Secretary of State ( or the Official receiver on the instructions of the secretary of State where the company in question has been wound up by the court). The court must make a disqualification order against a person whenever the requirements of Section 6 are satisfied. The main purpose of the disqualification regime is to protect the public and to act as a deterrent to wrongdoing directors so as to assist in raising the standards of behaviour of directors.

(iii) Now let’s discuss, who may bring as action under Section 246ZB of the Insolvency Act 1986:

The application can be filed by the administrator. This can not be filed by creditor or contributory.

Section 246B of the Act applies to wrongful trading (Administration proceedings).

Subject to subsection (30, if while a company is in administration it appears that subsection (2) applies in relation to a person who is or has been a director of the company, the court, on the application of the administrator, may declare that that person is liable to make such contribution (if any) to the company’s assets as the court thinks fit.

(iv) Now let’s see who may bring action under Section 127 of the Insolvency Act 1986:

The answer is, the liquidator may bring action under Section127 of the Insolvency Act 1986.

One of the main purposes of liquidation is to ensure that a company’s property, which it owns when the liquidation commences, is distributed to its creditors according to statutory order. In a compulsory winding up, Section 127 of the act avoids any disposition of property of the company made after the commencement of winding up, unless the court otherwise orders. It is common for a company which is subject to a winding up petition to carry on trading with the intention of defending petition. If it does carry on trading, and fails to defend the petition, the winding up order which may be made months after the petition, will avoid any disposition of company property which has happened in the interim period. The liquidator will often therefore take steps to enforce Section 127 in order to retrieve company assets disposed off 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 2020 Act introduces the new Moratorium by way of a new Part A1 to the Insolvency Act 1986. The Moratorium is a standalone procedure and is not linked to any other procedure. The Moratorium is a debtor-in-possession procedure whereby the directors remain in control of the company, subject to the supervision of a monitor. The intention behind entering the Moratorium is to rescue the company as a going concern.

There is a stay on enforcement of pre-Moratorium debts (that is , 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. The monitor’s remuneration or expenses;
2. Goods or services supplied during the Moratorium;
3. Rent in respect of a period during the Moratorium;
4. Wages or salary arising under a contract of employment;
5. Redundancy payments;
6. Debts or other liabilities under a contract or other instrument involving” financial services”

Which term is somewhat inexactly 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?

[There are enabling provisions in the Insolvency Act which empowers an administrator who wishes to continue to operate the business of the company in administration can very well require suppliers of goods and services to continue to supply those goods and services during administration. Section 233, 233A and 233B contains relevant provisions on this subject.

An administrator will frequently need to obtain certain essential supplies. Section 233 of the Act applies to supply of gas, electricity, water and communications services. The definition of communications services includes the supply of goods and services such as point of sale terminals, computer hardware and software, information, advice and technical assistance, date storage and processing and website hosting. Suppliers are not permitted to require payment of outstanding debts in order to secure a new or continued supply to the company in administration. However, section 233 of the Act permits to stipulate that the administrator must personally guarantee payment of charges in respect of the new supplies.

Section 233A expanded section 233 by adding a restriction on the supplier terminating essential supply

Contracts captured under section 233 where the customer has entered into administration or a CVA has taken effect.

The 2020 Act has now expanded these protections for an insolvent company by adding Section233B to the Act. Section 233B prohibits clauses which allow the supplier of any goods or services to terminate or “do any other thing” in relation to that contract if the company enters a formal insolvency procedure.

A provision of a contract for the supply of goods or services to the company is of no effect when the company enters an insolvency procedure, if, under that provision the contract would terminate, or the suppliers would be entitled to terminate the contract or to “do any other thing” upon the company enters an insolvency procedure. Section 233B 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 on a personal guarantee from the administrator (as it can under section 233).

However, under Section 233B, a contract may still be terminated by a supplier where the company or insolvency office-holder consents or, on application to the court, the court is satisfied that continuation of the contract would cause the supplier hardship, and grants permission for termination.

Section 233B complements the existing section 233 and 233A of the Act which, in similar terms, prohibit termination by utility, communication and IT suppliers. Section 233B opens up the restriction on termination to all other suppliers (with a limited number of exceptions, for example, insurers; banks; electronic money institutions; recognised investment exchanges and clearing houses; securitisation companies; and overseas companies with corresponding functions).]

**Question 3.2 [maximum 9 marks]**

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

[An official hierarchy laid down by the Insolvency Act 1986, determines which group of creditors is paid first during an insolvent liquidation. When a creditor enters liquidation, each class of creditors must be paid in full (the exception being ‘prescribed part’ secured creditors) before funds are allocated to the next.

A liquidator may only realise assets which belongs to the company. If debts have been effectively assigned to a financier or assets are subject to hire purchase or retention contracts, the liquidator will have no right those assets.

Depending upon the circumstances, the holder of a qualifying floating charge may choose to enforce its charge by appointing an administrator which will usually prevent a liquidator being appointed until the administration is completed. It is possible for a such a charge holder to consent to the appointment of a liquidator rather than an administrator, in which case the liquidator may realise the charged assets as part of the liquidation and pay out the floating charge holder according to the charge holder’s priority.

Following order of priority is prescribed for payments in liquidation before funds are allocated to the next:

1. Expenses of winding up, including the liquidator’s remuneration ( Section 115)

Under section 115 of the Act ( and Rules 6.42 and 7.108 of the Rules) a number of expenses are given priority over the company’s preferential creditors, any holder of the floating charge and the company’s unsecured creditors. These expenses are also paid in following order of priority:

1. Expenses that are properly incurred by the liquidator including legal expenses
2. Cost of any security provided by the liquidator
3. Professional expenses payable to a person who assisted in preparation of statement of affairs or accounts
4. Necessary disbursement by the liquidator in the course of winding up
5. Remuneration of any person employed by liquidator to perform services for the company
6. And then remuneration of the liquidator subject to applicable rules
7. Corporation tax on chargeable gains accruing on realisation of any assets of the company; and
8. Any other legitimate expenses chargeable by the liquidator in carrying out his duties

It should be noted that the liquidator’s own fee is also behind a number of categories of expenses.

1. Preferential creditors as defined in sections 386, 387 and Schedule 6 : Section 175:

Once the expenses of the liquidation as explained in above paragraphs, the assets of the company are then used to pay preferential creditors ( before any payment may be made to holders of floating charges or to unsecured creditors). The category of preferential creditor largely comprises of employees and some taxation liabilities but there are some other tyope of liabilities also.

There are two classes of preferential debts, ordinary and secondary.

Ordinary preferential debts are paid before secondary preferential debts.

Preferential debts, in their respective classes, rank equally amongst themselves and so abate in equal proportion if the company’s assets are insufficient to pay them all.

The following debts are listed as preferential under schedule 6 of the Act:

1. Employees contribution to an occupational pension scheme ( on salaries paid during 4 months prior to commencement of winding up).
2. Employer’s contribution to an occupational pension scheme in period of 12 months before the relevant date
3. Employee’s remuneration for whole or any part of the period of 4 months prior to commencement of winding up ( max 800 GBP)
4. Accrued holiday remuneration for any period of employment before winding up
5. Claims for monies advanced to pay wages or holiday remuneration
6. Levies on production of coal and steel referred to in article 49 and 50 of the European Coal and steel community Treaty
7. Amount payable as per order passed under Reserve Forces ( safeguard of employment ) Act 1985
8. Eligible deposit as does not exceed the compensation that would be payable in respect of the deposit under the Financial Services Compensation Scheme

Then Following Secondary preferential creditors ( under section 386 of the Act) are paid after “ordinary” preferential debts :

1. Eligible deposit as exceeds any compensation that would be payable in respect of deposit under the Financial services Commission Scheme
2. Amount in respect of deposit that was made through authorised non-UK branch of credit institution and eligible deposit it had been made through a UK branch of that credit institution
3. PAYE income tax deductions, national insurance deductions, VAT payments, construction industry scheme deductions and student loan repayments.
4. Floating Charge holder:

After preferential creditors have been paid, the turn for payments comes for floating charge holders.

There may be multiple floating charge holders and if that is the case then priority between them usually turns upon which floating charge was created first.

Now, “Prescribed part”:

Even before any payment can be made to any floating charge holder the liquidator must first consider the application of Section 176A of the Act.

According to Section 176A of the Act, the liquidator (or administrator) is under 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 the prescribed part to a floating charge holder except insofar as it is in excess of the amount required to satisfy all the unsecured debts. Where the company’s net property does not exceed GBP 10,000, the prescribed part is 50% of that property. If its less than GBP 10,000 then if the liquidator thinks that making distribution to unsecured creditor would be disproportionate, then prescribed part would not apply. Where it exceeds GBP 10,000, then prescribed part is 50% of first GBP 10,000 in value plus 20% of the excess in value above 10000, subject to max of 8,00,000 GBP.

A floating charge holder ( or indeed any secured creditor) who may have an outstanding unsecured balance owing to it, is not permitted to participate in the distribution of the prescribed part.

1. Unsecured Creditors:

Creditor with no security, often ordinary trade creditors, are paid out last in the statutory order.

1. Shareholders:

If there are sufficient funds to pay all the creditors 9 and interest on their debts) any surplus is distributed amongst the shareholders according to the company’s constitution.

Now let’s discuss how would this priority change if the company had been subject to Moratorium under Part a1 of the Insolvency Act 1986 during the 12-weeks period prior to the commencement of the liquidation.

The 2020 Act introduced the new Moratorium by way of a new Part A1 to the Act. This Moratorium is a standalone procedure and is a debtor-in-possession procedure whereby the directors remain in control of the company subject to supervision of a monitor.

The procedure effectively required the company to be able to pay debts as they fall due during the Moratorium. The Moratorium provides a stay of actions in relation to debts incurred prior to Moratorium only. There are restrictions on the company paying most of its pre-Moratorium debts, the so-called “payment holiday” . Floating charges would not crystallise during the Moratorium period.

Peculiarity of this Moratorium under New Part A1 is that if the company is not rescued as a going concern but instead enters administration or liquidation within 12 weeks of the end of 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.

Section 174A provides that certain unpaid pre-Moratorium or Moratorium debts ( the debts which are not part of the payment holiday), 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 therefore affords certain unsecured debts a form of “super priority” in a subsequent liquidation. For example, if a director has not been paid for months prior to a Moratorium, if the Moratorium leads to an unsuccessful rescue attempt and the company enter liquidation, the pre-Moratorium unsecured debt of the director will acquire “super priority” in the liquidation. Unsecured (or secured) pre-Moratorium bank debt, falling within the definition of “financial services” will also acquire such a “super priority” although there is an exception which prevents such liabilities acquiring such “super priority” where the debt is accelerated debt, that is, any pre-moratorium financial services debt which fell due by reason of the operation of, or exercise of rights under, an acceleration or early termination provision in the financial services contract.]

**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 relevant issues regarding the floating charge in favour of Ambitus Bank Plc are:

1. Validity of the floating charge considering facts of the case and relevant applicable laws
2. Whether the charge was created at the time when the company was insolvent or in a financial difficulty
3. Whether the floating charge ranks ahead of the claims of other creditors.

Statutory provisions to consider and actions which could be taken by liquidator:

One need to go thru the provisions of section 245 and 123 of the Insolvency Act 1986 among other relevant provisions and decide on the question.

Analysis:

1. Section 245 of the Act applies only to floating charges.
2. It applies where a company is in administration or liquidation and the provision is aimed at preventing pre-existing unsecured creditors obtaining the security of a floating charge shortly before a company enter a formal insolvency procedure.

c. It does not prevent lenders who are providing fresh funding to the company from taking a floating charge for that new funding.

d. It renders invalid floating charge given by the company at a relevant time, except to the extent, in substance, that “new” consideration is provided for the charge.

e. Where the person in whose favour the floating charge is created is not connected with the company, the relevant time is any time within the period of 12 months prior to the onset of insolvency, but only if at the time of the creation of the charge the company was either unable to pay its debts ( within the meaning of section 123 of the Act) or became unable to do so in consequences of the transaction.

f. Although the floating charge in invalidated, the underlying debt remains valid.

Relevant facts of the case:

1. The floating charge was granted in June 2023
2. This period is within 12 months prior to the onset of insolvency as the winding up petition was issued on 13 Jan 2024
3. The company is into liquidation and this floating charge was aimed at preventing pre-existing unsecured creditors ( we know from the facts that 20000 GBP was payable to Aluminium Alumini Ltd). The company was into cash flow problems. It is also a fact that floating charge was created under pressure to prevent the bank from demanding repayment of company’s loans. Therefore, had this been not created as such, the amount realisable on account of floating charge (which will now be taken away by floating charge holder i.e. this bank) would have been available to be distributed amongst unsecured creditors.
4. No fresh funding was given by the bank also.

Therefore, the liquidator may take an action and get the creation of floating charge invalidated.]

**Question 4.2 [maximum 6 marks]**

The sale of the laser cutting machines; and

[The relevant issues regarding the sale of the laser cutting machines to Angela Bannister are:

1. Validity of the transaction
2. Whether the transaction was at an undervalue
3. Whether the transaction was in good faith and for the purpose of carrying on its business
4. The timing of the transaction

Statutory provisions to consider:

Section 238 of the Insolvency Act 1986

Section 123 of the Insolvency Act 1986

Section 241 of the insolvency Act 1986

To consider whether the liquidator may take an action in relation to the sale of the laser cutting machines.

As part of the underlying policy of the Act to treat all unsecured creditors fairly and equally, the Act permits certain transactions which were entered into shortly before the company entered formal insolvency to be open to attack.

Under section 238 of the Act, a liquidator (or administrator) may attack a transaction which was entered prior to the company entering liquidation or administration was at an undervalue.

Under Section 238, the liquidator or administrator must show that the company:

1. Made a gift to another person; or
2. Entered into a transaction with another person on terms that provided for the company to receive no consideration; or
3. Entered into a transaction with another person for a consideration which, in money or money’s worth , was, at the date of transaction, significantly less than the value, in money or money’s worth, of the consideration provided by the company.

In order to be attacked, the transaction must have taken place at a “relevant time” which is in the period of two years prior to the commencement of the liquidation or administration.

Whether or not the transaction was with a connected person, it is a prerequisite of liability under section 238 that, at the time the transaction was entered into, either the company was unable to pay its debts as they fell due within the meaning of section 123 of the Act or became unable to pay its debts within the meaning of that section in consequence of the transaction. In the case of transaction with a connected person, however, the company is presumed to have been insolvent, or to have become insolvent as result of the transaction, unless the contrary is proved.

If the respondent to an application satisfies the court that the transaction was entered into by the company is in good faith and for the purpose of carrying on its business, and that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company, then the court shall not make an order under Section 238.

The overriding power of the court, if it concludes that there has been a transaction at an undervalue, is to make an order restoring the position to what it would have been if the transaction not entered.

Protection is afforded, however, to certain persons by section 241 which provides that an order shall not prejudice any interest in property which was acquired from a person other than the company, and which was acquired in good faith and for value.

Conclusion based on the facts of the case:

Relevant facts of the case:

1. Winding up order followed a creditor’s winding up petition issued on 13 January 2024
2. Sometimes 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 100000 a year before. However, it is not clear what should have been the fair market value of the transaction but it suggests a potential undervalued transaction.
3. The timing of the transaction is within 2 years. Its within the “relevant time” as per section 238, which is in the period of two years prior to the commencement of the liquidation or administration.
4. The transaction with a director, who is a connected person.
5. Since it is a prerequisite of liability under section 238 that, at the time the transaction was entered into, either the company was unable to pay its debts as they fell due within the meaning of section 123 of the Act or became unable to pay its debts within the meaning of that section in consequence of the transaction. It is also mentioned that in the case of transaction with a connected person, however, the company is presumed to have been insolvent, or to have become insolvent as result of the transaction, unless the contrary is proved. So, it will satisfy this condition too.
6. “Good faith” condition is to be proved by the respondent once the matter is filed with the court by the liquidator. There are enough reasons to believe by the liquidator that the transaction was not in good faith.
7. Section 241, protection is not to be tested here as the transaction is direct by the company to its director.

Considering the facts of the case, my advice to the liquidator would be to attack the transaction.]

**Question 4.3 [maximum 4 marks]**

The payments to Aluminium Alumini Ltd.

[The relevant issues regarding the payments to Aluminium Alumini Ltd are :

1. Whether the payments are preference transaction
2. Whether the payments were made at the time when the company was insolvent
3. Whether the payment placed this creditor in better position than other creditors
4. Whether the payments were is the course of ordinary course of business
5. Whether the preference was given in relevant time
6. Whether this decision was to influence by a desire to prefer the creditor.

Statutory provisions to consider:

Section 239 of the Insolvency Act 1986

As part of the transaction avoidance provisions of the Act, section 239 relates to preferences which may be avoided by the court on application of a liquidator or an administrator.

Underlying purpose of Section 239 of the Act is to prevent a company, shortly before entering a formal insolvency procedure, from placing one creditor in better position than others.

The application may be made only if the company has gone into liquidation or administration. In order to succeed on an application under section 239 must show that:

1. The person whom it is alleged has been preferred was, at the time of the transaction, a creditor of the company ( or surely or guarantor)
2. The transaction had the effect of putting that person in a better position, in the event the company going into insolvent liquidation, than the position they would have been in if thing had not been done
3. The decision was influenced by a desire to produce the effect referred to in (b) above in relation to the person preferred; and
4. The preference was given at a “relevant time”

The relevant time is within two years prior to onset of insolvency (if in favour of a connected person otherwise its 6 months.

Whether or not the preference was given to a connected person, it is prerequisite of liability under section 239 that at the time of the preference was given, either company was unable to pay its debts as they fell due within the meaning of section 123 of the Act or became unable to pay its debts within the meaning of that section in consequence of the preference.

The requirement which is the most difficult to establish is the need to show the company was influenced by a desire to prefer the creditor. The guidance as to the meaning of the relevant desire was provided by Millett J. in the leading case, Re MC Bacon Ltd. Millet J drew a distinction between intention, which is an objective concept, and desire, which is a subjective one.

Now whether the liquidator can take action for these payments to Aluminium Alumini Ltd.

It can be discussed based on the facts and relevant provisions of the case as under:

1. Liquidation order came on 28 February 2024
2. Winding up petition issued on 13 January 2024
3. The Aluminium Alumini Ltd is a key supplier of the company and sent an email to director demanding immediate payment of outstanding dues and to supply further on cash basis
4. The board considered it as they considered the supply of the material being supplied by the supplier.
5. The Board authorised a payment of GBP 20000 to cover existing liabilities and agreed to further payments on cash basis, for further supplies which amounted to GBP 8000 upto the date of winding up order.

Conclusion:

The payments to Aluminium Alumini Ltd were made shortly before the winding up order. The relevant time is within two years prior to onset of insolvency as this is not a connected party. It suggests that the company was insolvent at the time of making these payments.

The payments were made to settle existing liabilities and secure further supplies, which could be considered valuable consideration.

The continued supply of metal was essential to the company’s business, and the payment may ne seen as being made in the ordinary course of business.

Hence in my view the liquidator may not be able to challenge the payments to Aluminium Alumini Ltd unless he can demonstrate that the payments were made with the intention to prefer one creditor over other or that they were made when the company was insolvent with no prospect of repayment.]

**\* End of Assessment \***