



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?

Based on the analysis of the **Insolvency Act, 1986** and the **Company Directors Disqualification, 1986**, the actions in the stated provisions may be brought to address issues arising in insolvency contexts, including the avoidance of prejudicial transactions, disqualification of directors for unfit conduct, accountability for wrongful trading, and protection of company assets for the benefit of creditors.

Section 245 of the Insolvency Act 1986 deals with the avoidance of floating charges. Actions under this section may be initiated by the liquidator or administrator of an insolvent company to challenge certain floating charges created before the onset of insolvency.

Section 6 of the Company Directors Disqualification Act 1986 allows for the disqualification of directors based on unfit conduct. The Act allows for court action to disqualify unfit directors, which can be brought by the Secretary of State or the Official Receiver on the instructions of the Secretary of State where the Company is wound up by the Court.

Section 246ZB of the Insolvency Act 1986 relates to wrongful trading in administration. This section allows an Administrator or liquidator [also under Section 241] to make an application to the Insolvency Court for a declaration that a director should contribute to the company's assets for wrongful trading. The Section applies if the company has entered insolvent administration, and at some time before the company entered administration, the Directors knew or ought to have concluded that there was no reasonable prospect that the company would avoid entering insolvent administration or going into insolvent liquidation.

Section 127 of the Insolvency Act 1986 addresses the voidance of property dispositions after the commencement of winding up. This action can be brought by the liquidator of a company that is being wound up. The section is designed to ensure that any dispositions of the company's property made after the winding-up petition was presented are considered void unless the court orders otherwise, to protect the assets available for distribution to creditors.

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.

Chapter 4 of the Insolvency Act 1986 on the overview and construction of references to payment holidays outlines the key impacts of a moratorium under the Insolvency Act 1986, focusing on restrictions regarding the enforcement or payment of certain pre-moratorium debts.

Section A18 provides the debts that do not form part of the payment holiday under **Part A1 of the Insolvency Act 1986** when a company is subject to a Moratorium as follows: -

- a) **The monitor's remuneration or expenses** - this, however, does not include remuneration in respect of anything done by a proposed monitor before the moratorium begins.
- b) Goods or services supplied during the moratorium.

- c) Rent in respect of a period during the moratorium.
- d) **Wages or salary arising under a contract of employment** - this includes a sum payable in respect of a period of holiday (for which purpose the sum is to be treated as relating to the period by reference to which the entitlement to holiday accrued), a sum payable in respect of a period of absence through illness or other good cause, a sum payable instead of holiday, and a contribution to an occupational pension scheme.
- e) Redundancy payments under Part 11 of the Employment Rights Act 1996 or Part 12 of the Employment Rights (Northern Ireland) Order 1996, or a payment made to a person who agrees to the termination of their employment in circumstances where they would have been entitled to a redundancy payment under that Part if dismissed.
- f) **Debts or other liabilities arising under a contract or other instrument involving financial services** - these contracts include contracts and instruments such as financial contracts, securities financing transactions, derivatives, spot contracts, etc.

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 Insolvency Act 1986 grants the administrators the power to require suppliers of goods and services to continue their supply even when the company is under administration. This provision is designed to assist the Administrator in the objectives of Administration, ensuring that the Company can continue trading in an effort to rescue the company or achieve a better outcome for all creditors than through liquidation. Suppliers are thus legally obligated to continue their supply, which can be critical for maintaining the viability of the company during this period.

More specifically, under **Section 233 of the Insolvency Act**, an Administrator can demand the continuation of essential supplies like gas, electricity, water, and communications services. Suppliers, on the other hand, can require personal guarantees from the office-holder for new supplies but cannot demand payment for past dues as a condition for future supply. This provision ensures that vital services remain uninterrupted and supports the priority of payment of debts incurred before the company enters administration.

In addition to the protection granted to the Company under Administration hereinabove, **Section 233A of the Insolvency Act** provides for further protections for essential goods or services supplied to a company facing administration by rendering termination clauses that are triggered once a company is placed under administration, ineffective.

Where an insolvency-related term of a contract ceases to have effect under this section the supplier may terminate the contract, only if the following conditions are met: -

- a) the insolvency office-holder consents to the termination of the contract.
- b) the court grants permission for the termination of the contract if satisfied that the continuation of the contract would cause the supplier hardship.; or

- c) any charges in respect of the supply that are incurred after the company entered administration or the voluntary arrangement took effect are not paid within the period of 28 days beginning with the day on which payment is due.

The supplier may also terminate the supply only if the following conditions are met: -

- a) the supplier gives written notice to the insolvency office-holder that the supply will be terminated unless the office-holder personally guarantees the payment of any charges in respect of the continuation of the supply after the company entered administration or the voluntary arrangement took effect; and
- b) the insolvency office-holder does not give that guarantee within the period of 14 days beginning with the day the notice is received.

However, contracts entered before **October 1, 2015**, are exempt from these provisions.

Section 233B of the Act complements the above provisions and provides that where under a provision of a contract for the supply of goods or services to the company the supplier is entitled to terminate the contract or the supply because of an event occurring before the start of the insolvency period, and the entitlement arises before the start of that period, the entitlement may not be exercised during that period.

Section 233B [7] further provides that the supplier shall not make it a condition of any supply of goods and services after the time when the company becomes subject to the relevant insolvency procedure, or do anything which has the effect of making it a condition of such a supply, that any outstanding charges in respect of a supply made to the company before that time are paid.

This above section is designed to safeguard the continuity of essential goods and services to a company during administration. It prevents the automatic termination of supply contracts solely due to the company's insolvency status, ensuring vital supplies continue uninterrupted.

In **P&O Princess Cruises International Ltd v The Demise Charterers of the Vessel 'Columbus'** [2021] EWHC 113 (Admlty) (26 January 2021), the Court noted that the purpose of the amendments post-Covid was "to introduce greater flexibility into the insolvency regime, allowing companies breathing space to explore options for rescue whilst supplies are protected, so they can have the maximum chance of survival".

Question 3.2 [maximum 9 marks]

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

The order of priority of payments in a liquidation is as follows: -

- a. Expenses of winding up and the liquidator's remuneration.

Under **Section 115 of the Insolvency Act 1986**, after the payment of any liabilities to which section 174A applies, all expenses properly incurred in the winding up, including the

remuneration of the liquidator, are payable out of the company's assets in priority to all other claims.

The said **Section 174A** provides that in the winding up of a Company, the following are payable out of the company's assets (in the order of priority shown) in preference to all other claims—

- a) any prescribed fees or expenses of the official receiver acting in any capacity in relation to the company;
- b) moratorium debts and priority pre-moratorium debts.

b. Preferential debts under Section 175 of the Act.

Based on **Section 175 of the Insolvency Act**, preferential debts are to be paid with priority over all other debts, except for liabilities under section 174A and the expenses of the winding up. Sub-section 1A and 1B classify the 2 different types of preferential debts and the Payment Order and provide that: -

- a) Ordinary Preferential Debts are to be paid in full and rank equally among themselves. If the assets are insufficient, they are reduced equally.
- b) Secondary Preferential Debts are to be paid after ordinary preferential debts and also rank equally among themselves. They are to be paid in full unless assets are insufficient, in which case the debts are reduced equally.

Schedule 6 of the Act lists the said preferential debts as follows: -

- a) **Debts due to the Inland Revenue** - this includes sums due at the relevant date from the debtor on account of deductions of income tax from taxable earnings paid during the period of 12 months next before that date.
- b) **Debts due to Customs and Excise** - this includes value added tax referable to the period of 6 months next before the relevant date.
- c) **Social Security Contributions** - includes all sums due from the debtor on account of Class 1 or Class 2 contributions under the Social Security Contributions and Benefits Act 1992 or the Social Security (Northern Ireland) Act 1975, and sums assessed on the debtor on account of Class 4 contributions up to the 5th April next before the relevant date.
- d) **Contributions to Occupational Pension Schemes** - this refers to any sum owed by the debtor that applies to contributions to occupational pension schemes and state scheme premiums.
- e) **Remuneration of Employees** - this includes amounts owed by the debtor to an employee or former employee in respect of remuneration for the period of 4 months next before the relevant date, accrued holiday remuneration, and sums owed in respect of money advanced for the purpose of paying debts that would fall within this category. It also covers amounts ordered to be paid under the Reserve Forces (Safeguard of Employment) Act 1985 for defaults made before the relevant date.

c. Debt owed to the floating charge holder

Section 176A of the Insolvency Act 1986, introduced by the Enterprise Act 2002, outlines provisions related to the treatment of a company's assets under a floating charge in liquidation. It mandates that a specified part of the company's net assets, known as the "prescribed part," must be allocated for the satisfaction of unsecured debts before any distribution to the holder of a floating charge, except if the remainder after satisfying unsecured debts exceeds the required amount.

However, this requirement does not apply if the company's net assets fall below a minimum threshold, making the distribution to unsecured creditors disproportionately costly, or if it is overridden by a voluntary arrangement or compromise with creditors. **Under Section 176A (9)** the provisions of the section apply only to floating charges created after 15 September 2003.

This position was buttressed in **Thorniley & Anor v HM Revenue & Customs & Anor [2008] EWHC 124 (Ch) (05 February 2008)**, where the Court held that

*"Section 176A does not of course itself confer any power of distribution on an administrator or liquidator. **Its purpose is to set aside a portion of the company's assets secured by the floating charge for the satisfaction of unsecured debts and to do so by restricting the right of the floating charge holder to have recourse to those assets to satisfy the debts due under the floating charge: see s.176A(2)(b) and (6). As mentioned earlier, the power of distribution (in the case of an administrator) is contained in paragraph 65 of Schedule B1 to the Insolvency Act. Any distribution would have to be consistent with the administrators' statement of proposals approved at a creditors' meeting and it is, I think, significant that paragraph 52(1)(b) of Schedule B1 (which deals with the obligation to send out copies of the statement of proposals to creditors) removes that obligation in cases where the administrator thinks: -***

"(b)that the company has insufficient property to enable a distribution to be made to unsecured creditors other than by virtue of section 176A(2)(a)"

d. Unsecured Creditor

Unsecured creditors have no security and are therefore paid out last. In most cases, after the payment of the aforementioned debts and expenses of liquidation, there is nothing left for distribution among the unsecured creditors.

e. Shareholders

Shareholder debts are only paid if there is any surplus left after paying the secured, preferential and unsecured creditors and all expenses in liquidation. It is important to note that in fact for shareholders, **Section 76 of the Act** provides for instances where they might be required to contribute to the assets of a company in liquidation when a company, having made payments out of capital for the redemption or purchase of its own shares, is wound up and its assets, along with the amounts contributed to its assets, are insufficient to cover its debts, liabilities, and winding-up expenses.

Where a Company has been subject to a Moratorium under Part A1 of the Insolvency Act 1986 during the 12-week period prior to the commencement of the liquidation, the priority changes as provided for under **Section 174A of the Insolvency Act 1986**. Section 174A ensures that specific debts, incurred before and during the moratorium, are given precedence over other claims during the liquidation process.

The priority of payments in this case would be as follows: -

- a) **Prescribed Fees or Expenses** - the highest priority is given to any prescribed fees or expenses of the official receiver acting in any capacity related to the company and are to be satisfied first from the company's assets.

Following the official receiver's expenses, the debts are categorized as moratorium debts and priority pre-moratorium debts and are payable in preference to all other claims. These include: -

- b) Monitor's Remuneration or Expenses.
- c) Payment for goods or services supplied during the moratorium.
- d) Rent for premises used by the company during the moratorium.
- e) Payments for wages or salaries for employment before or during the moratorium.
- f) Liabilities for redundancy payments due before or during the moratorium.
- g) Debts arising from contracts involving financial services that fell due before or during the moratorium, excluding debts incurred due to acceleration or early termination clauses.

This prioritization under **Section 174A** shows an intention to protect creditors and parties that have provided essential services during the moratorium, ensuring they are not disadvantaged due to the company's financial distress and the moratorium's protective measures. It also ensures that liquidation is done in an orderly process.

Secured creditors are not provided for in the priority order for the reason that even in liquidation, a secured creditor has a right to enforce their security in compliance with the provisions of the **Insolvency Act 1986**.

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;

Section 245 of the Insolvency Act 1986 addresses the invalidity of floating charges created by a company during a relevant time before insolvency, except to the extent of the value of consideration provided to the company either as money, goods, services, or through the discharge or reduction of debt. Relevant times include 2 years before insolvency for charges created in favour of connected persons and 12 months for other persons.

The floating charge was granted in June 2023, which is 7 months before the winding-up order issued in February 2024. In the circumstances, the liquidator may act and seek to invalidate the floating charge if there is evidence that the company was insolvent at the time of the charge's creation and that the charge did not represent new value to the company. However, the Bank is not described as a connected person under the Act and if the Charge was for new value, then the charge may be found to be valid.

The liquidator may also consider the issue of preference under **Section 239 of the Insolvency Act, 1986** which provides that if a company favours a creditor, surety, or guarantor in a way that improves their position in the event of insolvency, the liquidator can seek a court order to reverse the preference. The court will restore the situation to what it would have been without the preference. There's a presumption that preferences to connected individuals were influenced by a desire to favour them, unless proven otherwise.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

The sale of the 2 laser machines to a director for GBP 40,000 in cash yet the machines had been bought for GBP 100,000 a year before may be seen as a preference under **Section 239 of the Insolvency Act, 1986** and a sale at an undervalue under **Section 238 of the Insolvency Act, 1986**.

Under **Section 238 of the Insolvency Act, 1986**, where the company has at a relevant time (defined in section 240) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under the section. Relevant time under the Section 240 in the case of a transaction at an undervalue or of a preference which is given to a person who is connected with the company (otherwise than by reason only of being its employee), is the period of 2 years ending with the onset of insolvency.

The Act further provides that a company enters into a transaction with a person at an undervalue if: -

- a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration; or

- b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.

Based on **Section 249 of the Act**, a person is connected with a company if he is a director or shadow director of the company or an associate of such a director or shadow director, or he is an associate of the company. Angela Bannister is connected to the Company by virtue of being a director of the Company.

In the present case, given Angela Bannister's position as a director and the significant discount on the laser cutting machines, this transaction can be considered a preference under **Section 239 of the Insolvency Act** and a transaction at an undervalue under **Section 238 of the Insolvency Act, 1986**. This allows the administrator to file the respective application before the Insolvency Court.

As provided for by the Court in **Phillips (Liquidator of A. J. Bekhor & Company) and Another v. Brewin Dolphin Bell Lawrie (Formerly Brewin Dolphin & Company Limited) and Another [2001] UKHL 2**, under section 238(3), the court has a broad discretion to make "such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction".

In the present case, the liquidator can apply for a court order to reverse the transaction and return the assets or their value to the company's estate for equitable distribution among creditors.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

A payment made to a creditor shortly before entering liquidation could be examined if they appear to give that creditor an advantage over others. Under **Section 239 of the Insolvency Act**, as quoted in **Re Stealth Construction [2011] EWHC 1305 (Ch)**, the provision focuses not on the conduct or state of mind of the creditor concerned, but on that of the directors or others acting for the company.

In **BTI 2014 LLC (Appellant) v Sequana SA and others (Respondents)**, the court stated that: -

"Section 239 of the 1986 Act affords protection to creditors where (1) a company enters administration or goes into liquidation, (2) a preference was given within a period of six months before the commencement of insolvency proceedings, or a period of two years in a case involving connected parties, and (3) the company was unable to pay its debts (within the meaning of section 123) at the time the preference was give or in consequence of it. The court, on the application of the administrator or liquidator, is to make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference."

In the present case, if these payments were made to ensure the continuation of an essential supply and were not intended to prefer Aluminium Alumini Ltd unfairly, they might be justifiable in a Court of law as it could be argued that special circumstances existed that forced the Directors to make the said preference. The Directors could also argue that the decision to give preference were made based on reasonable business judgment and were not intended to give undue preference to Aluminium Alumini Ltd.

Similarly, the liquidator can apply for a court order to reverse the transaction and return the assets or their value to the company's estate for equitable distribution among creditors if it is proved that: -

- a) The company gave a preference at a time that it was unable to pay its debts or became unable to pay its debts in consequence of the transaction or preference.
- b) The preference was influenced in deciding to give it by a desire to produce the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.

It is also important to note that **Section 233B [7] of the Insolvency Act, 1986** provides that the supplier shall not make it a condition of any supply of goods and services after the time when the company becomes subject to the relevant insolvency procedure, or do anything which has the effect of making it a condition of such a supply, that any outstanding charges in respect of a supply made to the company before that time are paid.

*** End of Assessment ***