



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3B

**THE INSOLVENCY SYSTEM OF THE UNITED KINGDOM
(ENGLAND AND WALES)**

This is the **summative (formal) assessment** for **Module 3B** of this course and is compulsory for all candidates who selected this module as one of their compulsory modules from **Module 3**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

The mark awarded for this assessment will determine your final mark for **Module 3B**. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment3B]**. An example would be something along the following lines: 202223-336.assessment3B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 3B as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2024**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 3B as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2024** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. If you elect to submit by 1 March 2024, you **may not** submit the assessment again by 31 July 2024 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Please select the **most correct ending** to the following statement:

The Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021 restrict pre-pack sales which constitute a substantial disposal of the company's property to connected parties where the disposal occurs . . . :

- (a) within 10 weeks of the commencement of the administration.
- (b) within eight weeks of the commencement of the administration.**
- (c) within four weeks of the commencement of the administration.
- (d) on the day the company enters administration.

Question 1.2

What is the **maximum length** of a Moratorium under Part 1A of the Insolvency Act 1986 to which creditors can consent without any application to the court?

- (a) 40 business days.
- (b) One year and 20 business days.
- (c) One year and 40 business days.
- (d) One year.**

Question 1.3

Which of the following **is not** a requirement for a company that wishes to enter into a Restructuring Plan under Part 26A of the Companies Act 2006?

- (a) The company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.
- (b) A compromise or arrangement is proposed between the company and its creditors, or any class of them, or its members, or any class of them.
- (c) The purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the said financial difficulties.

(d) The company is, or is likely to become, unable to pay their debts, as defined under section 123 of the Insolvency Act 1986.

Question 1.4

In cases where the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021 apply and an independent report from an Evaluator is obtained, the independent report must be obtained by whom?

- (a) The administrator.
- (b) Any secured creditor with the benefit of a qualifying floating charge.
- (c) The purchaser.
- (d) The company's auditor.

Question 1.5

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

- (a) Administration.
- (b) Restructuring Plan.
- (c) Scheme of Arrangement.
- (d) Company Voluntary Arrangement.

Question 1.6

Section 426 of the Insolvency Act 1986 contains provisions for UK courts to provide assistance to overseas courts from certain listed jurisdictions. Which of the following is not a listed jurisdiction under section 426?

- (a) Malaysia.
- (b) Australia.
- (c) India.
- (d) Hong Kong.

Question 1.7

Which one of the following **is not**, in itself, a separate ground for disqualification of a director under the Company Directors Disqualification Act 1986?

- (a) Wrongful trading.
- (b) Breach of fiduciary duty.

- (c) Being found guilty of an indictable offence in Great Britain.
- (d) Being found guilty of an indictable offence overseas.

Question 1.8

The filing by a company's directors of a Notice of Intention to Appoint an administrator produces a short-term moratorium on actions against the company which lasts for how long?

- (a) Five business days.
- (b) Twenty business days.
- (c) Ten days.**
- (d) Three months.

Question 1.9

Which of the following statements is incorrect?

- (a) An insolvency officeholder from an EU Member State will be automatically recognised by the courts in the UK whether the officeholder was appointed before or after Brexit.**
- (b) An insolvency officeholder from an EU Member State is automatically recognised by the courts in the UK if appointed before Brexit.
- (c) An insolvency officeholder from an EU Member State appointed after Brexit may apply to a UK court for recognition under the Cross Border Insolvency Regulations.
- (d) An insolvency officeholder from an EU Member State cannot apply to a UK court for recognition under section 426 of the Insolvency Act 1986.

Question 1.10

Under section 216 of the Insolvency Act 1986, a director of a company which has been wound up insolvent may not, unless an exception applies, be a director of a company that is known by a prohibited name if the director has been a director of the company during which period prior to the insolvent liquidation?

- (a) Six months.
- (b) Five years.
- (c) Two years.
- (d) Twelve months.**

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 5 marks]

Who may bring an action under: (i) section 245 of the Insolvency Act 1986, (ii) section 6 of the Company Directors Disqualification Act 1986, (iii) section 246ZB of the Insolvency Act 1986, and (iv) section 127 of the Insolvency Act 1986?

- (i) Section 245 of the Insolvency Act 1986 - the office holder, including - the administrator, the administrative receiver, the liquidator, or the provisional liquidator.
- (ii) Section 6 of the Company Directors Disqualification Act 1986 - the Secretary of State
- (iii) Section 246ZB of the Insolvency Act 1986 - the administrator
- (iv) Section 127 of the Insolvency Act 1986 - the liquidator; validation order may be applied for by company against whom the winding-up petition has been presented or any interested party to a transaction with a company against which a winding-up petition has been presented

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.

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 (inclusive of holiday and sick pay and contributions to occupational pension schemes).
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?

Administrators possess powers under Schedule B1 of the Insolvency Act 1986 to manage the company's affairs during administration. The ability to require suppliers of goods and services to continue to supply those goods and services during the administration period is addressed under Schedule 1, Paragraphs 9 and 14, and Schedule B1, Paragraph 59 of the Insolvency Act 1986.

Paragraph 14 of Schedule 1 empowers the administrator to carry on the business of the company. Paragraph 59 of Schedule B1 empowers administrators to "carry on the business of the company so far as is necessary for the management of its affairs." This includes the ability to "do all such things as may be necessary for the management of the affairs, business and property of the company." The administrator pursuant to Paragraph 9 of Schedule 1 has the "power to do all acts and to execute in the name and on behalf of the company any deed, receipt or other document". In respect of specifically requiring suppliers to continue supplying goods and services, administrators may exercise their powers under this paragraph to enter into contracts and agreements with suppliers to ensure the continued operation of the business during the period of administration.

It is important to note however, that this power is subject to some limitations and conditions. Administrators have a duty to act in the best interests of all creditors and must

exercise their powers for a proper purpose. Furthermore, paragraph 57(3) of Schedule B1 provides an additional check and balance mechanism as it requires administrators to attend on the creditors' committee (if one exists) and provide the committee with information about the exercise of his functions. This of course would include the administrator's decision to continue obtaining the supply of goods and services.

Section 233 enables the administrator to obtain or retain certain essential supplies including water, gas, electricity, and communication services. Suppliers are prohibited from demanding payment of unpaid debts to acquire a new or continued supply to the company in administration. Furthermore, section 233A generally does not allow a supplier to depend upon an insolvency related term in a supply contract which would otherwise entitle the supplier to terminate the supply, modify the terms of the supply or demand higher payments for continued supply. Notwithstanding these protections, section 233 empowers a supplier to require that the administrator personally guarantee that the new supply will be paid for.

However, section 233B has broadened an insolvent company's protections by prohibiting clauses which permit the supplier of any goods and services to terminate or "do any other thing" in respect of that contract if the company enters a formal insolvency process. It thus prevents suppliers from terminating a supply because of the company's insolvency, bars suppliers from making payment of pre-insolvency arrears a pre-requisite for continued supply and stops suppliers from altering the contract, for example by increasing prices.

Unlike under section 233, a supplier under section 233B cannot require that the administrator provide a personal guarantee. However, a supplier may terminate a contract on the consent of the company or office holder, or where the court grants permission for termination upon being satisfied that continuation of the contract would cause the supplier hardship.

Section 233B therefore complements sections 233 and 233A by not only prohibiting termination by utility, communications, and IT suppliers, but goes further by imposing a restriction on termination to all other suppliers (with a limited number of exceptions such as banks, insurers, and securitisation companies). These provisions along with the paragraphs under Schedule 1 and Schedule B mentioned above work together ensure the smooth continued operation of the business of a company in administration.

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?

Under the UK Insolvency Act 1986, order of priority determines the sequence in which the company's assets are used to meet expenses and are distributed to creditors.

1. Fixed Charge Holders

Fixed charge creditors have a specific security interest (charge) over a particular asset or class of assets of the company. They possess the highest priority in the liquidation process and are entitled to be paid out of the proceeds from the realisation of the assets subject to their charge. The liquidator would usually only realise assets subject to a fixed charge with the consent of the charge and must distribute the proceeds of such assets to the holders of fixed charge securities in the order of priority of their respective charges.

2. Expenses of the liquidation, including the liquidator's remuneration
Section 115 of the Act (and rules 6.42 and 7.108 of the Rules) dictate that certain expenses are prioritised over the company's preferential creditors, floating charge holders, and unsecured creditors. Those expenses are also payable in an order of priority:
 - i. Expenses properly incurred by the liquidator in preserving, realising, or getting in any of the company's assets (including conducting legal proceedings)
 - ii. The cost of security the liquidator provides
 - iii. Sums payable to a person to assist in preparing a statement of affairs/accounts
 - iv. Necessary disbursements by the liquidator during the liquidation
 - v. Remuneration of persons employed by the liquidator to perform services for the company
 - vi. Remuneration of the liquidator
 - vii. Corporate tax on chargeable gains accruing on the realisation of any of the company's assets; and
 - viii. Any other expenses properly incurred by the liquidator in executing the liquidator's functions in the liquidation.

It is notable that the liquidator receives their fees and costs incurred in realising assets subject to a fixed charge from the sale proceeds of those assets, rather than from the assets available to the company's creditors as a whole. The liquidator agrees the fees and costs with the fixed charge security holder. Agreement of the liquidator's remuneration with a fixed charge security holder may be unnecessary if rule 18.38 of the Insolvency Rules 2016 applies. Rule 18.38 permits a liquidator to obtain scale-based remuneration where the liquidator realises assets "on behalf of" the secured creditor. However, ideally, agreement rather than a reliance on rule 18.38 is the best course of action.

3. Preferential creditors (sections 386,387 and Schedule 6: section 175)
After the liquidation expenses have been met in their entirety, the company's assets are then used to pay preferential creditors. There are two classes of preferential debts - ordinary and secondary. Ordinary preferential debts take priority to and are thus paid before secondary preferential debts. However, all claims within each category rank equally as against each other and so are paid in equal proportion if the company's assets are not enough to pay them in their entirety.

Ordinary preferential debts under Schedule 6 typically arise where employees have claims for certain unpaid sums such as wages, holiday pay, sick leave pay, and certain contributions to employee pension schemes. However, such claims are significantly limited under the Insolvency Act and statutory protection is more broadly provided under the Employment Rights Act 1996.

Secondary preferential debts under section 386 include sums owed in relation to certain deposits under the Financial Service Compensation Scheme and PAYE income tax deductions, national insurance deductions, VAT payments and student loan repayments.

4. The prescribed part
Before the liquidator may distribute asset realisations to floating charge holders, the liquidator must first give consideration section 176A of the Insolvency Act which applies to companies in liquidation with a floating charge created on or after 15 September 2003. Section 176A places the liquidator under a duty carve out the prescribed part of the company's net property available for distribution to unsecured creditors and should not distribute any of this amount to a floating charge holder unless it exceeds the

amount needed to meet all unsecured debts. Net property is defined as the amount of the company's property which would otherwise be available to satisfy the debts of floating charge holders. Net property is calculated after the payment of liquidation expenses and preferential debts. If the company's net property is no more than GBP 10,000, the prescribed part is 50% of that property. If the company's net property is greater than GBP 10,000, the prescribed part is 50% of the first GBP 10,000 in value plus 20% of the excess above GBP 10,000 and is capped at GBP 800,000. The duty to make the distribution of the prescribed part does not apply where the property is less than the prescribed minimum of GBP 10,000 and the liquidator is of the opinion the distribution to unsecured creditors would outweigh the benefits. The court will only disapply the requirement to make a prescribed part in exceptional circumstances.

Notably, no secured creditor who may possess an outstanding unsecured balance owing to it is allowed to participate in the distribution of the prescribed part (*Thorniley v Harris* [2008] EWHC 124 (Ch)).

5. Floating Charge Holders

After the above expenses and debts are dealt with, floating charge holders are paid any remaining realisations from assets subject to floating charges. The liquidator makes these payments according to the priority of the charge holders security. For this purpose, a floating charge is one that was a floating charge at its creation (section 251). Upon the liquidator's appointment, floating charges created in the 12 months before the insolvency date are void, except where they secure new lending to the company (section 245). Where a floating charge is made in favour of a connected creditor (e.g. a shadow director or a director) the 12-month period is extended to 2 years.

6. Unsecured Creditors

The liquidator pays creditors with no security from a combination of any remaining asset realisations and the prescribed part on a *pari passu* basis. The exceptions to this are:

- a. Where such creditors are deferred under section 74(2)(f)
- b. Where a "relevant financial institution" is insolvent (section 387A). In such an insolvency, section 176AZA allows certain unsecured creditors to rank ahead of other unsecured creditors (statutory subordination). Ordinary non-preferential debts rank ahead of secondary non-preferential debts, which rank ahead of tertiary non-preferential debts.

A secured creditor that is not fully repaid from the realisation of assets subject to its security may seek to claim a shortfall as an unsecured claim. However, to do so the liquidator can only use realisations made from unsecured assets. Secured creditors are not entitled to any distribution of the prescribed part to repay a shortfall.

7. Shareholders

After the repayment of all creditors in full (including interest on their debts), any remaining funds are distributed amongst the shareholder according to the terms of the company's constitution. Typically, distribution is permitted pro rata the shareholder's respective shareholdings. Practically speaking, it is unusual for shareholders to receive anything from an insolvency process, other than in a solvent liquidation as a company may generally only distribute assets to shareholders if it has available distributable profits which is highly unlikely where the company is insolvent.

Moratorium under Part A1 of the Insolvency Act 1986

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, certain classes of debt rank must be paid in priority to all other claims (note however that this

does not impact the rights or ranking in the liquidation of creditors holding fixed charges). Where the company is in liquidation, official receiver fees will however be prioritised over these debts (section 174A(2)(a)). Note also that floating charges will not crystallise during the Moratorium.

The debts to which the priority applies to moratorium debts and priority pre-moratorium debts. Moratorium debts are any debts or liabilities which are due during or after the Part A1 moratorium because of an obligation incurred during it (section A53(2)).

Priority pre-moratorium debts are the following debts or liabilities where the company becomes subject to them before or while the moratorium is in force due to an obligation incurred before the moratorium comes into force (sections A53 and 174(A), and paragraph 64A(1), Schedule B1):

- The monitor's remuneration or expenses.
- Payment for goods or services supplied during the moratorium.
- Rent in respect of a period during the moratorium.
- Wages or salary arising under a contract of employment
- redundancy payment; or
- Debts or other liabilities due under a contract or other instrument involving financial services that fell due before or during the moratorium (unless it fell due only as a result of the use or operation of acceleration provisions in the relevant arrangements that were triggered in the run up to, or during, the 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 determining the validity and enforceability of the floating charge in favour of Ambitus Bank plc, the liquidator must consider the following relevant issues:

- a. The timing of the grant, i.e., the implications of the grant shortly before the onset of the Company's compulsory liquidation.
- b. The purpose of the grant, i.e., whether the floating charge over the Company's entire undertaking was granted to secure existing loans owed to Ambitus as part of ordinary commercial dealings, or whether it was based on a desire to prefer Ambitus over other creditors
- c. Consideration received, i.e., whether the Company received adequate consideration in exchange for the grant of the floating charge or whether it was granted for insufficient or no consideration
- d. Whether the evidence suggests the Company granted the floating charge with an intention to defraud creditors or unfairly prioritising Ambitus bank

The relevant provisions of the Insolvency Act 1986 that the liquidator should consider include:

- Section 127 which avoids any disposition of the company's property after the commencement of winding up, unless the court orders otherwise.
- Section 239 which deals with preferences and allows the court to set aside transactions that put a creditor in a better position than they would have been in the event of the company's winding-up. Preferences are generally viewed as actions taken by a company to favour certain creditors over others, often to the detriment of the general body of creditors.
- Section 245 which covers floating charge avoidance and allows the court to set aside floating charges created by the company within a certain period before the onset of insolvency, provided certain conditions are satisfied.

The commencement date with respect to the Company is the date of the presentation of the petition to wind up, i.e., 13 January 2024 and the avoidance provision acts in a backdated manner. Unless the Company successfully defends those dispositions would be avoided. Section 127 therefore enables the liquidator to take steps to retrieve company assets disposed of during the period between the petition and the winding up order. Disposition of property as defined by the section includes a charge.

If the effect of the grant of a debenture to Ambitus Bank, a creditor of the Company, shortly before the Company becomes insolvent or enters liquidation, is to give Ambitus Bank a preference over other creditors, the liquidator may attempt to challenge it as a preference under section 239. Critically however, the Company must have desired to produce this effect in relation to Ambitus. The burden of proof rests on the liquidator. It is important to note that in determining whether the grant of the debenture amounts to a preference, the fact that Ambitus applied pressure to the Company is irrelevant unless the Company demonstrated the requisite desire. In other words, an intention to grant security to a creditor in the event of insolvency does not in itself amount to a desire to prefer. In **Re MC Bacon Ltd**, a liquidator argued that the grant of a debenture in favour of the company's bank to secure past indebtedness amounted to a preference. However, the Court held that where the company was wholly reliant on the bank's support for continued business, such that if the debenture were not granted the bank would withdraw support and where if the bank withdrew support the company would be forced into immediate liquidation, the grant of the debenture was not motivated by a desire to prefer the bank, but rather by the desire to avoid calling in of the overdraft and the company being able to carry on its business.

Therefore, if it is determined that the Company was entirely reliant on Ambitus to continue its business and its motivation for the grant of the debenture was prevent the bank from demanding repayment of the company's loans it is likely that the Court will not set aside this transaction on the basis of it being a preference.

A floating charge created in the year before the Company's insolvency is valid only to the extent of new consideration then or later provided to the Company. Therefore, if the liquidator can demonstrate that:

- i. The floating charge was given to Ambitus in exchange only for prior consideration, i.e., to secure loans previously made;
 - ii. It was made at a relevant time, that is, within one year before the onset of insolvency;
 - iii. At the time the floating charge was created, the company was unable to pay its debts or became unable to pay its debts because of the charge
- the Court may deem the charge invalid.

This liquidator may find this provision particularly useful to attack this floating charge if it is determined that it was granted by the Company to secure Ambitus' loans to the company that were previously unsecured.

If the liquidator successfully challenges the validity of the floating charge which was granted over the whole of the Company's undertaking, the Court may set it aside, allowing the liquidator to access assets covered by the charge for the benefit of the company's creditors.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

The sale of the laser cutting machines to Angela Bannister against the background of the Company's impending liquidation potentially casts doubt on the fairness and legality of the transaction. The liquidator should bear in mind the following key considerations:

- a. The sale was a connected person transaction. The purchaser of the machines, Angela Bannister, was a director of the company and therefore a connected person under the Insolvency Act. Such transactions are subject to closer scrutiny, particularly if they occur at a time when the company is in financial distress. While the burden was on the liquidator in the case of the grant of the debenture to Ambitus Bank, the burden shifts on Angela as a connected person to rebut the presumption the company was influenced by a desire to prefer her. The liquidator must therefore consider whether the intention was to unfairly benefit Angela Bannister to the detriment of other creditors.
- b. The timing and circumstances surrounding the sale. The sale took place in January 2023, at a time when the company was experiencing cash flow problems. This raises concerns about whether the sale was conducted in anticipation of the company's insolvency or to prefer a particular creditor (Angela Bannister) over others.
- c. The fairness and commercial reasonableness of the sale price. The machines were sold for GBP 40,000 in cash, significantly less than their original purchase price of GBP 100,000. This suggests a potential undervaluation of the assets, which could be indicative of a transaction at an undervalue. It raises questions as to whether the price paid by Angela was fair and commercially reasonable. The potential unfairness is exacerbated by the fact that Angela was director of the Company, and the machines were sold to her by other directors of the Company, casting doubt on the arms-length nature of the transaction.

The relevant statutory provisions under the 1986 Act that the liquidator may consider include:

- S. 238 addresses transactions at an undervalue and allows the court to set aside transactions entered into by the company at an undervalue with the intent to defraud creditors.
- S. 239 which deals with preferences and enables the court to set aside transactions that put a creditor in a better position than they would have been in the event of the company's liquidation.
- Section 249 which defines "connected persons"

Based on the foregoing, if the liquidator can show that the sale of the laser cutting machines to Angela Bannister was conducted improperly, such as through an undervaluation of the Company's assets or with the desire to prefer her as a connected, the liquidator may commence legal proceedings to challenge the validity of the transactions under Act. If successful, the Court may set aside the transaction could be set aside, potentially allowing the liquidator to recover the assets for the benefit of the company's creditors.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

The payments to Aluminium Alumini Ltd ("AAL") raise concerns about the appropriateness and validity directors' actions at a time of the Company's impending liquidation which may have an adverse effect on the funds available to satisfy creditors. Key considerations for the liquidator include:

- a. The timing and circumstances surrounding the payments to AAL: The payments were made to AAL a month before the winding-up order was issued, at a time when the Company was facing financial difficulties and pressure from its creditors.
- b. Essential Supplies: AAL is described as one of the company's key suppliers, and the continued supply of metal was deemed essential for the company's operations.
- c. Payment Authorisation: The directors authorised the payments to AAL to cover existing liabilities and agreed to further payments for ongoing supplies on a cash on delivery basis. The liquidator must consider whether these actions were impermissible and subject to challenge.

Relevant provisions of the Insolvency Act 1986:

- Section 127 which avoids any disposition of the company's property after the commencement of winding up, unless the court orders otherwise.
- Section 233B - which has broadened an insolvent company's protections by increasing the class of goods and services covered (in comparison to limited list of essential goods and services under section 233) and prohibiting clauses which permit the supplier of any goods and services to terminate or "do any other thing" in respect of that contract if the company enters a formal insolvency process. It thus prevents suppliers from terminating a supply because of the company's insolvency and bars suppliers from making payment of pre-insolvency arrears a pre-requisite for continued supply.
- Unlike under section 233, a supplier under section 233B cannot require that the liquidator provide a personal guarantee that the new supply will be paid for. However, a supplier may terminate a contract on the consent of the company or office holder, or where the court grants permission for termination upon being satisfied that continuation of the contract would cause the supplier hardship.

In the circumstances, s. 233B permits the liquidator to challenge the GBP 20,000 payments made to AAL to cover existing liabilities. It prevents AAL from exercising a right to vary the contract that is triggered by the Company going into liquidation. Furthermore, AAL cannot exercise a contractual termination right in respect of a pre-insolvency breach if the right is not exercised before the commencement of insolvency proceedings. The liquidator may also seek to challenge the GBP 8,000 payment to cover new liabilities as the section also prevents AAL from doing “any other thing” in respect of that contract upon Company entering a formal insolvency process. This would include modifying the contractual terms to require cash on delivery for further supplies.

Section 127 enables the liquidator to take steps to retrieve company assets disposed of during the period between the petition and the winding up order. Disposition of property as defined by the section includes the payment of money. However, the impact of section 127 is not absolute, and the court retains a discretion to make a validation order. In the present case, where goods have been paid for on terms of cash on delivery, the court will consider the benefit to the Company including whether the payment will enable further supplies to be received and the enable the continuation of the Company’s business.

*** End of Assessment ***