



**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?

1. **Section 245 Insolvency Act 1986:** the office holder (i.e. liquidator) may issue an Application to the Court under the Insolvency Act 1986 or the Insolvency (England and Wales) Rules 2016 seeking a declaration that the floating charge in question (i.e. a floating charge on a company's undertaking or property which was created during the relevant period (i.e. noting that under section 245(3) that time period may be up to either 2 years or 1 year ending with the onset of insolvency)) is invalid under section 245 Insolvency Act 1986. Theoretically, if the criteria set out in section 245 is met, the floating charge is automatically invalid. Therefore, the office holder may wish first to write to the floating charge holder to inform them that they are of the opinion that their floating charge is invalid.
2. **Section 6 of the Company Directors Disqualification Act 1986 (the "CDDA"):** the Secretary of State (or the Official Receiver on the instructions of the Secretary of State in instances where the company has been wound up by the Court) may apply to the Court for a disqualification order to be made under section 6, CDDA. As the title of section 6 states, it is the "Duty of the Court to disqualify unfit directors" where the requirements of section 6 are satisfied, i.e. in summary that: "*the person's conduct as a director [i.e. a current or former director of a company that has become insolvent or dissolved] of that company (either taken alone or taken together with the person's conduct as a director of one or more other companies or overseas companies) makes the person unfit to be concerned in the management of a company.*" (section 6(1)(b)). If such an order is granted, the individual may be disqualified from being a director, receiver of a company and/or acting as an insolvency practitioner for a period of between two to 15 years.
3. **Section 246ZB of the Insolvency Act 1986:** a liquidator or administrator may issue an Application to the Court (acting for the benefit of all creditors) seeking a declaration that a director (or a shadow director under section 246ZB(7) Insolvency Act 1986) is liable to "*make such contribution (if any) to the company's assets as the court thinks proper*" for wrongful trading. Specifically, it must be proved under section 246ZB(2) Insolvency Act 1986 that:
  - a. the company has entered insolvent administration;
  - b. at some time before the company entered administration, that person 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; and
  - c. the person was a director of the company at that time.
4. **Section 127 of the Insolvency Act 1986** provides: "*In a winding up by the court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void.*"

Therefore, a liquidator may:

- a. issue an Application to the Court, seeking a validation order under section 127, whereby the Court may validate certain dispositions generally or a specific transaction (i.e. to make certain payments to its employees, or suppliers, for example). The grant of such an Order lies in the Court's discretion; or

- b. seek to enforce section 127 Insolvency Act 1986 in order to retrieve assets of the Company that were disposed of during the period between the Winding Up Petition and the Winding Up Order.

It should be noted that section 127(2) Insolvency Act 1986 expressly states that section 127 "has no effect in respect of anything done by an administrator of a company while a winding-up petition is suspended under paragraph 40 of Schedule B1."

### 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.

A company that is eligible to apply to the Court to put a Moratorium into place under Part A1 of the Insolvency Act 1986 must be able to show that it is or is likely insolvent / i.e. unable to pay its debts.

Assuming that the type of Company in question is not expressly excluded from the application of Part A1 of the Insolvency Act 1986, the Moratorium will apply and will have the effect of staying the enforcement of pre-Moratorium debts (i.e. debts that fall due prior to the Moratorium or during the Moratorium period itself, as result of a pre-Moratorium obligation). However, the following types of debts do not form part of the stay, otherwise referred to as the "payment holiday", and therefore must be paid by the Company:

1. The Monitor's remuneration or expenses;
2. Good or services supplied during the Moratorium;
3. Rent in relation to a period during the Moratorium;
4. Wages or salary arising under a contract of employment;
5. Redundancy payments; or
6. Debts or other liabilities arising under a contract or other instrument involving "financial services".<sup>1</sup>

### 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?

In certain circumstances, yes. Generally speaking, an Administrator is able to require suppliers of specific, "essential goods and services" to continue to supply the Company during the administration (under section 233 Insolvency Act 1986), though that Administrator may be requested to provide a personal guarantee in favour of such a supplier in relation to the 'new' or continued supply provided during the Company's administration (under section 233(1)(a) and (2)(a) Insolvency Act 1986).

Section 233(2)(b) Insolvency Act 1986 precludes the supplier of essential goods and services from conditioning the supply "or doing anything which has the effect of making it a condition

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<sup>1</sup> INSOL Guidance, Module 3B, page 38.

*of the giving of the supply, that any outstanding charges in respect of a supply given to the company before the effective date [i.e. the date on which the Company entered into administration (section 233(4) Insolvency Act 1986)] are paid."*

"Essential goods and services" are defined as: the supply of gas, electricity, water, communications, point of sale terminals, computer hardware and software, information, advice and technical assistance in connection with the use of information technology, data storage and processing and website hosting (section 233(3), (3A) Insolvency Act 1986).

Section 233A further facilitates an Administrator's ability to require the continued supply of essential goods and services from its counterparties, as this provision renders ipso facto clauses (i.e. those which terminate a contract upon a party's entry into administration, for example) / "insolvency-related terms" ineffective; these terms includes provisions that seek to alter the terms of the contract in question, including an increase the price of the good or service in question.

In relation to the supply of non-essential goods and services, section 233B(2)(b) Insolvency Act 1986 has a similar effect to sections 233 and 233A Insolvency Act 1986, and precludes a counterparty from enforcing an insolvency related termination provision from the date of the company entering into administration until the appointment of the administrator ceases to have effect under either paragraphs 76 to 84 of Schedule B1 or an order under section 901F of the Companies Act (section 233B(8)(b) Insolvency Act 1986). Although suppliers of non-essential goods and services cannot condition the provision of their services upon payment of any pre-administration debts of the Company being paid (section 233B(7) Insolvency Act 1986), such a supplier does not have a statutory right to demand a personal guarantee from the Administrator regarding the 'new' / continued supply during the administration (cf. section 233 Insolvency Act 1986).

However, it should be noted that:

1. certain suppliers listed in Schedule 4ZZA to the Insolvency Act 1986 (i.e. those involved in the provision of financial services) are exempt from the application of section 233B. As a result, the following suppliers may seek to enforce an insolvency-related termination provisions in their contracts with a company in administration: insurers, banks, electronic money institutions, recognised investment exchanges and clearinghouses, securitisation companies and overseas companies involved in provision of these services (section 233B(10) Insolvency Act 1986);
2. the company or Administrator may consent to a purported termination by a supplier of non-essential goods and services (under section 233B(5)(a) and (b) Insolvency Act 1986); and
3. the Court may order that the contract in question is terminated, on an application by a party and on ground that the contract would cause the supplier hardship (under section 233B(5)(c) Insolvency Act 1986).

Therefore, an Administrator is not able to require all suppliers to continue to supply it with certain goods and services during the Company's 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?



1. The ordinary, statutory priority of payments in a liquidation is as follows:

Section 115 Insolvency Act and rules 6.42 and 7.108 of the Insolvency Rules 2016 state that the following expenses are payable out of the company's assets, in priority to preferential creditors, holders of floating charges and the company's unsecured creditors, to be paid in the following order of priority:

- a. Expenses that are properly incurred by the liquidator in preserving, realizing or getting in any of the assets of the company (including the conduct of any legal proceedings);
- b. The cost of any security provided by the liquidator;
- c. Any amount payable to a person to assist in the preparation of a statement of affairs or accounts;
- d. Any necessary disbursements by the liquidator in the course of the winding up (including, for example, any expenses incurred by members of the liquidation committee);
- e. The remuneration of any person who has been employed by the liquidator to perform any services for the company;
- f. The remuneration of the liquidator;
- g. The amount of any corporation tax on chargeable gains accruing on the realization of any asset of the company; and
- h. Any other expenses properly chargeable by the liquidator in carrying out the liquidator's functions in the winding up.<sup>2</sup>

Once the expenses of the liquidation have been paid in full, the assets of the company may then be used to pay, in the following order of priority:

- a. Preferential creditors (defined in sections 386, 387 and Schedule 6; section 175). Specifically:
  - i. Ordinary Preferential Creditors; then
  - ii. Secondary Preferential Creditors.
- b. Floating charge holders (in accordance with section 176A Insolvency Act 1986. Floating charge holders are typically paid in the order in which charges were created, and the liquidator is subject to making a "prescribed part" of the company's net property available to the satisfaction of the unsecured creditors) under section 176A Insolvency Act 1986.
- c. Unsecured creditors.
- d. Shareholders (i.e. any surplus funds are to be distributed to the Company's shareholders, in accordance with the Company's Memorandum and Articles of Association).

It is open to creditors to agree contractually to subordinate their priority / the distribution waterfall.

2. Each class of creditor or expense enjoys the following rights:

- a. **Preferential creditors** and the classes of preferential debts (i.e. a category of creditor(s) who is afforded preferential statutory treatment, for example employees of an insolvent company) rank *pari passu*, meaning that if there is insufficient company assets to pay each preferential creditor in full, those creditors share equally in the available assets, in proportion to the debt owed to each creditor. Preferential debts include: employee's wages and accrued holiday and sickness pay, certain contributions to occupational pensions schemes and certain eligible deposits, for example.

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<sup>2</sup> INSOL Guidance, Module 3B, page 52.

- b. **Floating Charge Holder:** a charge is a type of security interest. A floating charge is a charge that is not fixed to a particular asset(s) and is registrable with Companies House. Floating charges are typically granted over shares in a company, real property, equipment and goodwill, or over the "undertaking" of a company. Floating charges can be granted over present and future assets.

Section 251 Insolvency Act 1986 defines a floating charge as: "*a charge which, as created, was a floating charge and includes a floating charge within section 462 of the Companies Act (Scottish floating charges).*"

Unless and until the floating charge crystallizes, the chargor is able to deal with the asset(s) in question in the ordinary course of its business. Upon crystallization of the floating charge (i.e. the winding up of a company, the appointment of a receiver or both, or the occurrence of an event stated in the Debenture; Re Woodroffes (Musical Instruments) Ltd [1986] Ch 366) the chargor is no longer able to deal with the assets that are subject to the floating charge.

If a floating charge was created before 15 September 2003, then that qualifying charge holder is able to appoint an administrative receiver under section 72A Enterprise Act 2002 to enforce their floating charge.

However, it should be noted that the floating charge holder is not able to participate in the distribution of the "prescribed part" that the liquidator is obliged to make available to the satisfaction of unsecured creditors (as explained above).<sup>3</sup>

- c. **Unsecured Creditors:** i.e. those without any form of security or title to assets (for e.g. trade suppliers) may not receive a distribution in an insolvent liquidation. However, unsecured creditors have a statutory right to vote on the appointment of a liquidator, the remuneration of an office-holder (as well as the ability of 10% in value of the unsecured creditors to apply to the Court to reduce / fix / vary such remuneration), for example at either a creditors meeting or via one of the creditors' decision procedures. Generally speaking, a vote in favour of a particular action by the majority in value of the unsecured creditors is sufficient for that decision to be passed. Moreover, and in the context of a CVA, if at least 75% in value of the company's unsecured creditors agree to the CVA, then the CVA will bind all unsecured creditors.
3. The order of priority of payments set out in (1) above would change per (a) and (b) below, 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:
- a. Certain unpaid pre-Moratorium or Moratorium debts (that do not form part of the payment holiday) will be paid in the liquidation in priority to the liquidator's fees and expenses (i.e. these expenses are afforded "super priority" under section 174A Insolvency Act); and

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<sup>3</sup> INSOL Guidance, Module 3B, page 55.

- b. Unsecured or secured pre-Moratorium bank debt will also be afforded "super priority" if that debt: (i) falls within the definition of "financial services" of the Insolvency Act 1986; and (ii) it is not an accelerated debt.

**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;

Before addressing questions 4.1-4.3, I set out below a chronology of key events in order to orient each answer.

Date	Event
January 2023	Company suffers cash flow problems. Directors approve the sale of two laser cutting machines to another Director, Angela Bannister for £40,000.
Prior to June 2023	Unspecified loans granted by Ambitus Bank plc to the Company.
June 2023	Floating Charge granted by the Company in favour of Ambitus Bank plc over the whole of the Company's undertaking.
13 January 2024	Creditor's Winding Up Petition is issued; i.e. the onset of the Compulsory Liquidation of the Company.

28 January 2024	Aluminium Alumini Ltd, a supplier of metal to the Company demanded (i) payment of £20k sums due, and (ii) an advance payment of £8k for on-going supplies, up to the end of February 2024.
28 February 2024	The Company enters into Compulsory Liquidation.

In relation to the Ambitus Bank plc, the floating charge holder, the key issues are: (i) when did the floating charge crystallise, (ii) what right(s) does Ambitus Bank plc have in relation to its security interest, and (iii) what action, if any, can the Liquidator take against Ambitus Bank plc in attempt to avoid the enforcement of the floating charge?

First, it is assumed that Ambitus Bank plc's floating charge crystallised (and therefore became enforceable) upon the Company's entry into Compulsory Liquidation on 28 February 2024. However, the terms of the Debenture have not been disclosed.

Assuming this is the case, the Company (as chargor) can continue to run the business undertaking (i.e. the charged assets) in the normal course of its business, without interruption from Ambitus Bank plc up until its entry into compulsory liquidation (i.e. during the period June 2023 to 28 January 2024).

As the floating charge was created in June 2023 (i.e. after 15 September 2003), section 72A of the Enterprise Act 2002 has the effect of precluding Ambitus Bank plc from appointing an administrative receiver to enforce the floating charge on its behalf upon the Company's entry into compulsory liquidation. Instead, Ambitus Bank plc might consider seeking to appoint an out-of-court administrator, as the holder of a now enforceable and therefore a "qualifying floating charge" under paragraph 15 of Schedule B1 to the Insolvency Act 1986. In order to do so, Ambitus Bank plc must file a notice of the appointment with the relevant court, identifying an administrator who has provided their consent to act and confirmation that they believe one or more statutory objectives is reasonably likely to be achieved by their appointment.<sup>4</sup> However, if a provisional liquidator has been appointed, which is likely upon the Company's entry into liquidation on 28 February 2024 (and assumed issuance of the Winding Up Order on that day), then this fact would defeat the floating charge holder's application to appoint an administrator in this case.

It is assumed that Ambitus Bank plc is an entity that is not connected to the Company. As the floating charge was granted less than 1 year prior to the onset of the Company's insolvency (i.e. on 13 January 2024), the floating charge is capable of being avoided under section 245 Insolvency Act 1986.

In order to do so, the Liquidator must prove:

1. Ambitus Bank plc was a pre-existing unsecured creditor of the Company - it is assumed, on the facts provided, that Ambitus Bank plc did not take any form of security when granting the "loans" to the Company, and therefore it was an unsecured creditor of the Company at that time; and
2. The floating charge was granted shortly before the Company entered compulsory liquidation.

<sup>4</sup> INSOL Guidance, module 3B, page 15.

Regarding (2) above, it is not known whether the Court would find a period of c. 6 ½ months to be sufficiently close enough to the Company's entry into compulsory liquidation to satisfy this element of the claim. If the floating charge is caught by section 245 Insolvency Act 1986, then that floating charge would be invalid. Ambitus Bank plc would therefore remain an unsecured creditor in the Company's liquidation, in the amount of the unspecified "loans" it granted to the Company.

Assuming that Ambitus Bank plc's floating charge is not avoided under section 245 Insolvency Act 1986, and it did not attempt to enforce its floating charge prior to the Company's entry into compulsory insolvency or otherwise commit any other act of wrongdoing, the Liquidator is required to realise the liquidation estate's assets and then to pay the following expenses and creditors from the liquidation estate, in the following order of priority:

1. Expenses: as listed in the answer to question 3.2 above, and including, for example expenses that are properly incurred by the liquidator in preserving, realizing or getting in any of the assets of the company.
2. Preferential creditors: for example, wages of the Company's employees.
3. Holders of floating charges: Ambitus Bank plc is assumed to be the only floating charge holder, and so provided that the expenses and preferential creditors are satisfied in full, any monies remaining in the liquidation would then be applied to Ambitus Bank plc's floating charge.

A further consideration for the Liquidator is to investigate the circumstances of the Company's grant of the debenture in favour of Ambitus Bank plc, and in particular, whether any wrongdoing was committed by the bank / its representatives in applying pressure to the Company to do so. This may give rise to additional claims for the Liquidator to consider.

#### Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

#### Transaction at an Undervalue

The facts state that the Company's sale of two laser cutting machines to Angela Bannister in January 2023 was for 60% less than the purchase price of the machines the year prior, and that this transaction was concluded at a time that the Company "continued to suffer cash flow problems".

Section 238 Insolvency Act 1986 enables certain transactions entered into within 2 years prior to the commencement of the Company's liquidation to be set aside as "transactions at an undervalue".

The 1986 Act defines "transaction" broadly, and it captures any arrangement, such as the sale of the laser machines in question.

The Liquidator must show that the Company entered into a transaction with another person (i.e. Angela) for a consideration which, in money or money's worth was, at the date of the transaction (i.e. January 2023), significantly less than the value (£40,000), in money or money's worth, of the consideration provided by the Company (£100,000). Although the value of the machines is likely to have depreciated since the Company's purchase of the machines, the fact that the consideration paid by Angela is 60% less than the purchase price

by the Company would appear to satisfy this element of the action. In addition, the sale took place in January 2023, within the 2 years prior to the Company's commencement of the Company's liquidation on 13 January 2024.

Moreover, as the sale was to Angela, a Director of the Company and therefore a 'connected person' for the purposes of the Insolvency Act 1986, the Liquidator does not need to provide the Court with evidence of the Company's insolvency as of the date of the sale to Angela; it is assumed that the Company was insolvent as of that date.

However, Angela may wish to contest any such application to set aside the sale by arguing that her purchase was made in good faith and for the purpose of enabling the Company to realise some value and thus be able to carry on its business, noting that the Company was experiencing cash flow problems at the relevant time.

It is not known how the Court would rule on any such application, however, if the Liquidator is successful in its application, then the Court would make an order setting aside the transaction and restoring the parties to the position they would have been in, had that transaction not been made. This action therefore has the potential to recover value of the benefit of the Company's creditors.

#### **Angela Bannister's possible Breach of Duty(ies)**

The Liquidator may bring a misfeasance action(s) against Angela under section 238 Insolvency Act 1986, following the procedure as laid down in section 212 Insolvency Act 1986.

Based on the limited facts available, it appears that Angela may have breached the following duties she owes to the Company:

1. The general duty to act with care and skill (i.e. it may be argued that the proposal to sell and the approval of the sale of the laser cutting machines to Angela was negligent); and
2. The fiduciary duty to act in the best interest of the Company. If an alternative purchaser would be willing to pay substantially more than £40,000 Angela paid to receive the machines, but yet the transaction still went ahead, then Angela is not acting in the best interests of the Company in declining to sell the machines to the other, prospective purchaser and losing the benefit of recouping additional value for the Company; and
3. The fiduciary duty not to act where the director has a conflict of interest and duty. On one hand, Angela has an interest to maximise the purchase price of the machines to recoup maximum value for the company, however, on the other hand (as purchaser) she has an interest to minimise the amount she is to pay. Angela therefore has a conflict of interests. It is presumed that this interest was properly disclosed to the Company's Board of Directors and that she either was precluded from voting on the proposed transaction or otherwise acted in accordance with the Company's Memorandum and Articles of Association on this point. However, without more information, the Liquidator is advised to investigate if this conflict of interest was disclosed and if the proper voting procedure was followed.

#### **Other Director's possible Breach of Duty(ies)**

Depending on the circumstances, the Liquidator may also have a misfeasance claim(s) against the other Directors of the Company for any failure by individual(s) to act with due

care and skill, and/or to act in the best interests of the Company, as outlined above, in voting to approve the sale of the laser cutting machines to Angela, given the Company was suffering from cash flow problems at the time.

### Disqualification of a Director(s)

In addition, the Liquidator may consider making an application to the Court under sections 214 and 246Z Insolvency Act 1986 against a director (any or all of them, depending on the facts not known), for wrongful trading and requesting that they make a contribution to the Company's assets. This remedy is worthwhile considering, since we are informed that the Company had cash flow problems in January 2023 but yet continued to trade for over a year.

The Liquidator would be required to prove to the Court by way of evidence that:

1. The Company has gone into insolvent liquidation (i.e. the Winding Up Order);
2. At some point prior to the commencement of the winding up of the Company, the director(s) in question knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation; and
3. That at the time the person reached that conclusion or ought to have reached that conclusion, that person was a director of the Company.

If shown, the burden of proof would then shift to the director(s) to establish a defence under section 214(4) Insolvency Act 1986. In short, the director(s) are required to take "every step" with a view to reducing the potential loss to the Company's creditors. We do not have sufficient facts to conclude as to the likelihood of success of this action or any such defence, however, the fact that the Company was experiencing cash flow problems in January 2023 but continued to trade (possibly incurring additional liabilities in doing so) and to pay Aluminium Alumini Ltd a total of £28,000 is, on its face, in need of an explanation from the director(s). This is all the more so given that we have no indication that the Company obtained expert (legal or financial) advice, or put the Company into liquidation itself (noting that the Winding Up Petition was issued by the Company's creditors). If successful, the director(s) would be required to make a contribution to the Company's assets to accord with the increase in the Company's liabilities at that time (c. £28,000 on the known facts), and may also be subject to a Disqualification Order under section 6 CDDA 1986, which would, inter alia, prevent that person from being a director a company or acting directly or indirectly in the promotion, formation or management of a company (unless leave of the Court is obtained).

### Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

The issue is whether the payments totalling £28,000 by the Company to Aluminium Alumini Ltd, which were made after the Winding Up Petition was issued against the Company but prior to the Company entering into compulsory liquidation, constitute a voidable disposition of the Company's assets under section 127 Insolvency Act 1986 and/or a voidable preference under section 239 Insolvency Act 1986.

### Voidable Dispositions

Section 127 Insolvency Act 1986 provides: "*In a winding up by the court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void*". (emphasis added)

'Disposition' is broadly defined in the Insolvency Act 1986 to include any payment of money, as well as the sale or transfer of a company's assets. Therefore, the payments of £28,000 to Aluminium Alumini Ltd after 13 January 2024 (i.e. the date of the Winding Up Petition) fall within the scope of this section.

The Court has the discretion to find the payments void or to (upon an Application to the Court) grant a validation order, rendering the payments valid. The Court will be mindful not to disrupt the statutory order of distributions among creditors as set out in the Insolvency Act 1986 and to not provide preferential treatment to Aluminium Alumini Ltd who, based on these facts, is a pre-liquidation creditor, who had £20k of its debt paid off, immediately before the Company entered into compulsory liquidation.

The Court will consider various factors, including whether the payments to Aluminium Alumini Ltd were made in good faith, and if the payments totaling £28,000 were necessary to ensure the continued supply of metal to the Company and thus its on-going trade, for the benefit of the general body of unsecured creditors. We are informed that metal is considered to be a key resource for the company. Pausing here, it seems that the £20,000 payment of existing debt cannot be said to facilitate the on-going supply of metal or continued trade of the Company, since that relates to aged debts of the Company. Therefore, it is likely that the £20,000 payment will be set aside as a voidable disposition of the Company's assets under section 127 Insolvency Act 1986.

However, the £8,000 payment might be sanctioned by the court and upheld as valid, if it considers, on balance, that payment to be in the best interests of the creditors as a whole, and not just Aluminium Alumini Ltd. The Company's payment of £8,000 in cash on delivery of the metal to Aluminium Alumini Ltd is also a relevant factor for the Court to consider, as is whether Aluminium Alumini Ltd / its agent was aware of the presentation of the Winding Up Petition against the Company when Aluminium Alumini Ltd made its demands for payment.

### Voidable Preference

The Liquidator may apply to the Court to set aside the payment(s) as voidable preferences, preferring Aluminium Alumini Ltd over the Company's other creditors in an unpermitted manner, under section 239 Insolvency Act 1986.

The Liquidator may issue such an Application because:

1. the Company is now in compulsory liquidation;
2. Aluminium Alumini Ltd was, at the time of receiving the £28,000 on / around 28 January 2024 was a creditor of the Company;
3. The transfer of those monies by the Company arguably placed Aluminium Alumini Ltd in a better position than they would have been in had those payments not been made;
4. The Company (arguably) was influenced by a desire to prefer Aluminium Alumini Ltd over its other creditors;
5. The preference was given to Aluminium Alumini Ltd (presumed to be an entity not connected to the Company) within 6 months prior to the onset of the Company's liquidation; and
6. At the time the preference was given, the Company was either unable to pay its debts as they fell due (within the meaning of section 123 Insolvency Act 1986) or became unable to pay its debts as a consequence of giving the preference. Therefore, the Liquidator should investigate the evidence available to it regarding the Company's cash flow problems that date back to January 2023, to determine



whether that was a short term issue, for example, or whether it is sufficient evidence that the Company was insolvent for the purposes of section 239 Insolvency Act 1986.

Each of the above elements must be satisfied for the Liquidator to be successful in its section 239 Insolvency Act 1986 application. It is noteworthy that English case law has found that there no intention to prefer a particular creditor in instances where the Company was solely motivated by commercial factors / a desire for the Company to continue trading, which might be the case here (at the very least, in respect of the £8,000 payment to secure future supplies).

**\* End of Assessment \***