



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?

Section 245 of the Insolvency Act 1986 provides that it applies as does section 238. Section 238 applies in the case of a company where: (a) the company enters administration, (b) the company goes into liquidation, with the “office-holder” being defined as the administrator or the liquidator as the case may be. As such, a liquidator or an administrator, as the case may be, may bring an action under s 245.

Section 7 of the Company Directors Disqualification Act 1986 provides that the Secretary of State, or if the Secretary of State so directs, the official receiver (in certain cases pertaining to winding-up), is to make an application for a disqualification order under s 6, if it appears to the Secretary of State that it is in the public interest that a disqualification order should be made against any person. Therefore, the Secretary of State, or the official receiver (if so directed) may bring an action under s 6.

As for section 246ZB of the Insolvency Act 1986 which relates to wrongful trading: administration, it provides that the administrator may make an application to the court for a declaration that a person (who is or has been a director of the company) is to be liable to make such contribution (if any) to the company’s assets as the court thinks proper. As such, an administrator can bring an action under s 246ZB.

Section 127 Insolvency Act 1986 relates to dispositions being void unless they have been validated by the court. The liquidator will thus often use s 127 to retrieve assets of the company which has been disposed during the period between the petition of winding up and the winding up order being made. At the same time, the court has a discretion to make validation orders for disposals that have been made, and such applications for such orders are reasonably common. The court also has a discretion to make sanction orders for dispositions which have not yet occurred. This means that persons whom disposals have been made in favor of, and persons seeking to receive assets (in disposal) from the company may bring an action under s 127 as well.

Question 2.2 [maximum 5 marks]

List any **five (5)** of the debts which do not form part of the payment holiday under Part A1 of the Insolvency Act 1986 when a company is subject to a Moratorium.

The five debts are debts for: (a) the remuneration or expenses of the monitor; (b) goods or services supplied during the Moratorium; (c) rent during the Moratorium period; (d) wages or salary pursuant to a contract of employment; and (e) 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?

Yes, an administrator who wishes to continue to operate the business of the company in administration can require suppliers of goods and services to continue to supply those goods and services during administration. The relevant law is found in sections 233, 233A and 233B of the Insolvency Act 1986.

Pursuant to s 233, an administrator can ask suppliers of essential supplies, such as gas, electricity, water, and of goods and services such as computer hardware and software, point of sale terminals, and data storage and processing to continue to provide supply. The suppliers can make it a condition of giving such supply that the administrator personally guarantees the payment of any charges made in respect of the supply. But, the supplier cannot make it a condition of giving the supply that outstanding charges relating to supplies previously given to the company before the effective date are paid.

Additionally, s 233A provides that suppliers of such services generally cannot rely on insolvency-related terms in contracts of supply that would have entitled the supplier to terminate the supply, alter the terms relating to the supply, or compel higher payments for continuing to provide supply. These protections have been expanded by s 233B which prohibits clauses allowing the supplier of goods or services to terminate or to “do any other thing” relating to such a contract if the company enters into formal insolvency procedures.

Essentially, the administrator can rely on s 233B to prevent suppliers from terminating the supply of needed goods and services upon the company entering into administration, and also to prevent the suppliers from making demands for arrears to be paid and for other changes to be made to the contract, in order for the administrator to secure continued supply. It is important to note that under s 233B, suppliers cannot insist on personal guarantees from the administrator (c.f. s 233).

Importantly, s 233B further extends these restrictions on termination to all other suppliers, that are not caught under s 233 (with some exceptions).

However, it must be noted that a contract may still be terminated by a supplier under s 233B, in a situation where the company or the administrator consents to such termination, or on successful application to the court, if the court is satisfied that the continuation of the contract by the supplier would cause the supplier hardship.

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?

As a start, the holders of fixed security (or fixed charges) such as mortgages will usually enforce their security outside any formal insolvency. The liquidator can only realise assets which belong to the company. For instance, in cases of assets that are subjected to hire purchase, or if the contracts have provided for the retention of title, the liquidator would have no rights against such assets. As such, in substance, holders of fixed security have the highest priority of payments in a liquidation.

Next comes the statutory order for the priority of payments in a liquidation. Without accounting for the Moratorium debts (found under s 174A Insolvency Act 1986 and dealt with later), the expenses of the winding up, including remuneration for the liquidator, has highest priority, pursuant to s 115. Some of the main winding-up expenses (in order of priority) include: (a) expenses incurred by liquidator in preserving, realising or getting in any assets of the company; (b) cost of security provided by liquidator; (c) amounts payable to persons who have assisted in preparation of statement of affairs or accounts; (d) any necessary disbursements by liquidator; (e) remuneration of persons employed by liquidator to perform services for company; (f) remuneration of the liquidator; (g) corporation tax on chargeable gains resulting from the realisation of company assets; and (h) any other expenses properly chargeable by the liquidator in performing the winding-up.

After that comes the preferential creditors, as per ss 386, 387 and Schedule 6. Pertinently, liquidators must act in accordance with the preferential debt regime and follow the priority of preferential creditors. Preferential debts are further subdivided in two classes, ordinary and secondary. Ordinary preferential debt ranks ahead of secondary preferential debts. For preferential debts within their respective classes, they rank equally and are paid in equal proportion should the company's assets not be sufficient to pay them all. Schedule 6 provides for the following preferential debts: (1) sum owed on an employee's contribution to an occupational pension scheme (contributions deducted from earnings of the company's employees for a period of 4 months prior to commencement of winding up); (2) sum owed on an employer's contribution to an occupational pension scheme in the period of 12 months before the relevant date; (3) remuneration owed by the company to an employee, up to a period of 4 months prior to commencement of winding up, capped at GBP 800; (4) amounts owed by company by way of accrued holiday remuneration; (5) claims for monies advanced to pay wages or holiday remuneration; (6) levies on the production of coal and steel; (7) claims for sums the company is ordered to pay under the Reserve Forces (Safeguard of Employment) Act 1985; (8) sums owed by company in respect of an eligible deposit that does not exceed compensation payable under the Financial Services Compensation Scheme; (9) sums owed by the company in respect of eligible deposits that exceed any compensation payable under the Financial Services Compensation Scheme; (10) sums owed by the company in relation to deposits made through a non-UK branch of a credit institution (with some other conditions); and (11) student loan repayments, VAT payments, PAYE income tax deductions, national insurance deductions, and Construction Industry Scheme deductions. Items (9)-(11) are secondary preferential debts, and as such, are paid after the other ordinary preferential debts listed above.

Next, after payment to the preferential debts have been made, the floating charge holder will be paid. In situations where there is more than one floating charge holder, priority is determined based on which floating charge is created first. Importantly, before making distributions to the floating charge holders, pursuant to s 176A, the liquidator has to make a "prescribed part" of the company's net property available to pay unsecured debts. This part of the company's assets cannot be distributed to the floating charge holder, unless there is excess to the amount required to satisfy all the unsecured debts. For the purposes of calculation, the net property available is the amount of the company's property which would otherwise have been available to pay the floating charge holders. This is calculated after the liquidation expenses and preferential debts have been paid off. The prescribed part is 50% of the net property where the company's net property does not exceed GBP 10,000. However, where the net property is less than GBP 10,000, or where the liquidator thinks that the costs of distribution to the unsecured creditors would be disproportionate to the benefits, then there is no duty to make distribution of the "prescribed part". As for the situation where the company's net property exceeds GBP 10,000, the "prescribed part" is the total of 50% of the first GBP 10,000, plus 20% of the excess in value above GBP 10,000, with the maximum value of the "prescribed part" being GBP 800,000. Note that the floating charge holder (or any secured creditor) who may have outstanding unsecured balances owing to them are not permitted to participate in such a distribution.

Next comes the unsecured creditors. These are creditors that have no security.

Ranking below the unsecured creditors are the shareholders. Assuming there are sufficient funds to pay all the creditors, the remaining funds are to be distributed to the shareholders pursuant to the Company's constitution.

Finally, the concept of subordination may be relevant as well to the priority of payments to creditors. A subordination agreement is essentially an agreement between creditors to vary their priority, i.e. for one creditor to take priority over another. For instance, the highest-ranking secured creditor agrees to subordinate their priority to a lender. These agreements are valid because they do not affect the priority of other creditors.

With respect to how the priority mentioned above would 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 liquidation, s 174A is relevant. Section 174A applies where the proceedings for the winding up of a company are begun before the end of the period of 12 weeks beginning with the day after the end of any moratorium for the company under Part A1. In essence, pursuant to s 174A, certain pre-Moratorium debts, and Moratorium debts are paid in priority to all other claims, even those of the liquidator's fees and expenses. It therefore affords certain unsecured debts priority in a subsequent liquidation. Section 174A defines such "priority pre-moratorium debt" to include: (a) pre-moratorium debt that is payable in respect of the remuneration or expenses of the monitor, goods or services supplied, rent, or wages and salary (arising from a contract of employment) during the Moratorium; (b) pre-moratorium debt that consists of a liability to make a redundancy payment which fell due before or during the Moratorium; (c) pre-moratorium debt that arises out of a contract or other instrument involving financial services, which is not relevant accelerated debt, and which fell due before or during the Moratorium.

For completeness, s 174A also provides priority for any prescribed fees or expenses of the official receiver acting in any capacity in relation to the company.

As explained previously, since holders of fixed security will usually enforce their security outside of any formal insolvency, s 174A would not affect their priority in this sense.

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

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

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

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

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

cash on delivery basis, for further supplies which amounted to further payment of GBP 8,000 up to the date of the winding up order.

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

Using the facts above, answer the questions that follow.

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

Question 4.1 [maximum 5 marks]

The floating charge in favour of Ambitus Bank plc;

The issue in relation to the floating charge is whether it would be liable to be avoided. This is because the floating charge was granted by BLL (the company) to Ambitus Bank shortly before the creditor's winding up petition was issued. In particular, the issue is whether the floating charge was created for any "new" consideration, rather than for past consideration. The relevant statutory provision is s 245 Insolvency Act 1986.

Section 245 provides that where a floating charge is created in favour of a person who is not connected with the company, the relevant time would be any time the floating charge is created within the period of 12 months prior to the onset of insolvency. In the present case, since Ambitus Bank plc is not a connected person to the company, this timeline applies, and is met because the floating charge was granted about 6 months before the creditor's winding up petition was issued.

Section 245 renders floating charges created within the relevant time to be invalid except to the extent of the aggregate of the value of new consideration. The two main categories of new consideration are firstly, the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the company at the same time as, or after, the creation of the charge. In this connection, the consideration must be given at the same time or shortly after the creation of the charge. In situations where an agreement is made for the formal execution of the charge to take place after payments made to the company, there must be minimal delay between the two. The second category is the value of so much of that consideration as consists of the discharge or reduction, at the same time as, or after, the creation of the charge, of any debt of the company.

In the present case, it does not appear that any new consideration (in the form of further loans, or a reduction of debts owed) was given by Ambitus Bank plc to BLL for the floating charge. Therefore, the floating charge given by BLL is not for new consideration, but rather for past consideration. As such, it would be caught by s 245 and be rendered invalid.

Ambitus Bank plc may make an argument that there was new consideration in the sense that the floating charge was given by BLL under pressure from Ambitus Bank plc in order to prevent it from demanding repayment of the company's loans. Ambitus Bank's forbearance could arguably be seen as "new" consideration such that the floating charge would not be caught by s 245. However, whether this conception of "new" consideration would be successful would depend on the common law of the UK.

For completeness, even though the floating charge granted in favour of Ambitus Bank plc may amount to a preference as well (within the ambit of s 239), the liquidator would not be able to avoid it on that

basis. This is because it appears that the floating charge was granted because of commercial considerations (i.e. to prevent the bank from demanding repayment of the company's loans, which would presumably cause it to enter into insolvency). Therefore, there would be no desire to prefer the bank, and an avoidance action of preference cannot be sustained.

Question 4.2 [maximum 6 marks]

The sale of the laser cutting machines; and

The sale of the laser cutting machines to Angela Bannister raises the issues of whether the transaction should be avoided due to it being a transaction at an undervalue. Moreover, the liquidator may have a course of action against Angela Bannister for misfeasance or for her potential breaches of her fiduciary duties to BLL.

With respect to the issue of the transaction being at an undervalue, the relevant statutory provision is s 238 of the Insolvency Act 1986. Pursuant to s 240, the relevant time for transactions at an undervalue is a period of 2 years before the onset of insolvency, where the transaction is given to a person who is connected with the company. This is such a case because Angela Bannister is a director of BLL, and the transaction was entered into a year before the creditor's winding up petition was brought.

Pursuant to s 238, a company enters into a transaction with a person at an undervalue if 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. On the facts, this is likely to be fulfilled because Angela Bannister was sold the laser cutting machines for consideration of GBP 40,000, when the machines had been bought by BLL for GBP 100,000 just a year ago. Even accounting for some level of depreciation of the assets, the sale of the laser cutting machines at a price point which is so much lower than the purchase price a mere year ago strongly suggests that this was a transaction at an undervalue.

The defences found in s 238 to a transaction at an undervalue do not appear to be available to Angela Bannister in the present case. There does not appear to be any grounds to show that the company entered into this transaction with Angela Bannister in good faith and for the purposes of carrying on its business, and that at the time it did so, there were reasonable grounds for believing that the transaction would benefit the company. Although BLL was suffering from cash flow problems, it did not make sense for them to sell the laser cutting machines to Angela Bannister for GBP 40,000 only. They could have sold it on the open market, or obtained loan financing with the machines as security.

As a remedy, the court may make such an order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.

With regard to the issue of misfeasance and breaches of fiduciary duty, the relevant statutory provision is s 212. The section is a summary procedure which simplifies actions brought against the former officers of the company. It does not create new causes of actions, but creates a simplified procedure for causes of action which the company could enforce. Section 212 provides that the court may consider the conduct of certain persons, and, if misfeasance or breaches of duties are found, order the repayment, restoration, or accounting of money or property, or the contribution of such sums to the company's assets by way of compensation, as the court thinks just.

In the present case, it is likely that the court may find that Angela Bannister has breached her fiduciary duties because she has acted in conflict with the company's interests by entering into an agreement

to purchase the laser cutting machines for a consideration of GBP 40,000. She also likely has acted in breach of her duties to act in the best interests of the company for the same actions. As such, the court will be likely to make an order for compensation to BLL.

Question 4.3 [maximum 4 marks]

The payments to Aluminium Alumini Ltd.

The payments to Aluminium Alumini Ltd raises the issue of whether these payments should be avoided on the basis of them being preferences. The relevant statutory provision is s 239 Insolvency Act 1986. Pursuant to s 240, the relevant time for preferences is a period of 6 months before the onset of insolvency. This is applicable in the present case because Aluminium Alumini Ltd is not a person connected with the company. It is merely one of the company's key suppliers.

For an application pursuant to s 239 to succeed, it must be shown that: (a) the person whom the preference was made in favour of was at the time of the transaction, a creditor of the company; (b) something was done, or suffered to be done, by the company that had the effect of putting that person in a better position if the company gone into insolvent liquidation, as compared to if nothing had been done; (c) the company was influenced by a desire to produce the effect in (b) for the person preferred, in giving the preference; and (d) the preference was given at the relevant time, as per s 240.

In the present case, element (a) is not contentious because Aluminium Alumini Ltd was a creditor of the company at the material time. Element (b) is not contentious because the sum of GBP 20,000 was paid to Aluminium Alumini Ltd to cover existing liabilities, and further payments were made in the form of cash on delivery. If this was not done, Aluminium Alumini Ltd may not have been able to claim the full sum after BLL became insolvent (i.e. they are now in a better position as compared to if the company went insolvent). Element (d) is not contentious because the preference was made within the relevant time (of 6 months before the onset of insolvency).

As for element (c), in my view, it is unlikely for the liquidator to succeed in making a case out that the company was influenced by a desire to prefer Aluminium Alumini Ltd when making the payments. This is because of the guidance provided by Millett J in *Re MC Bacon Ltd* where Millett J delineated between the concept of intention (objective) and desire (subjective). Essentially, Millett J stated that a person may intend the necessary consequences of his actions, but a person can choose the lesser of two evils without desiring either option. Thus, although the company may have intended to prefer Aluminium Alumini Ltd, this does not mean that they desired to do so as well. On the facts, it appears that the company may not have had any choice in the matter, and had to choose the lesser of two evils, by paying Aluminium Alumini Ltd off. This is due to Aluminium Alumini Ltd being one of the company's key suppliers, and the company viewing the continued supply of metals from it being essential. If the company did not agree to Aluminium Alumini Ltd's terms and make the payments, further supplies may not have been forthcoming, and the company would not have been able to continue its operations. Since the company is likely to be taken as having been influenced solely by commercial considerations in making the preference (i.e. securing an essential supply of resources for the business) to continue with its trading, there can be no desire to prefer.

*** End of Assessment ***