



Insolvency Act 1986

1986 CHAPTER 45

The First Group of Parts Company Insolvency ; Companies Winding Up

PART VI

MISCELLANEOUS PROVISIONS APPLYING TO
COMPANIES WHICH ARE INSOLVENT OR IN LIQUIDATION

Adjustment of prior transactions (administration and liquidation)

238 Transactions at an undervalue (England and Wales)

- (1) This section applies in the case of a company where—
 - (a) an administration order is made in relation to the company, or
 - (b) the company goes into liquidation;and " the office-holder " means the administrator or the liquidator, as the case may be.
- (2) Where the company has at a relevant time (defined in section 240) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section.
- (3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.
- (4) For the purposes of this section and section 241, a company enters into a transaction with a person at an undervalue if—
 - (a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or
 - (b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.

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- (5) The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied—
- (a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and
 - (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.

239 Preferences (England and Wales)

- (1) This section applies as does section 238.
- (2) Where the company has at a relevant time (defined in the next section) given a preference to any person, the office-holder may apply to the court for an order under this section.
- (3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference.
- (4) For the purposes of this section and section 241, a company gives a preference to a person if—
 - (a) that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities, and
 - (b) the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.
- (5) The court shall not make an order under this section in respect of a preference given to any person unless the company which gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (4)(b).
- (6) A company which has given a preference to a person connected with the company (otherwise than by reason only of being its employee) at the time the preference was given is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (5).
- (7) The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of a preference.

240 " Relevant time " under ss. 238,239

- (1) Subject to the next subsection, the time at which a company enters into a transaction at an undervalue or gives a preference is a relevant time if the transaction is entered into, or the preference given—
 - (a) in the case of a transaction at an undervalue or of a preference which is given to a person who is connected with the company (otherwise than by reason only of being its employee), at a time in the period of 2 years ending with the onset of insolvency (which expression is defined below),
 - (b) in the case of a preference which is not such a transaction and is not so given, at a time in the period of 6 months ending with the onset of insolvency, and

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- (c) in either case, at a time between the presentation of a petition for the making of an administration order in relation to the company and the making of such an order on that petition.
- (2) Where a company enters into a transaction at an undervalue or gives a preference at a time mentioned in subsection (1)(a) or (b), that time is not a relevant time for the purposes of section 238 or 239 unless the company
- (a) is at that time unable to pay its debts within the meaning of section 123 in Chapter VI of Part IV, or
 - (b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction or preference ;
- but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by a company with a person who is connected with the company.
- (3) For the purposes of subsection (1), the onset of insolvency is—
- (a) in a case where section 238 or 239 applies by reason of the making of an administration order or of a company going into liquidation immediately upon the discharge of an administration order, the date of the presentation of the petition on which the administration order was made, and
 - (b) in a case where the section applies by reason of a company going into liquidation at any other time, the date of the commencement of the winding up.

241 Orders under ss. 238, 239

- (1) Without prejudice to the generality of sections 238(3) and 239(3), an order under either of those sections with respect to a transaction or preference entered into or given by a company may (subject to the next subsection)—
- (a) require any property transferred as part of the transaction, or in connection with the giving of the preference, to be vested in the company,
 - (b) require any property to be so vested if it represents in any person's hands the application either of the proceeds of sale of property so transferred or of money so transferred,
 - (c) release or discharge (in whole or in part) any security given by the company,
 - (d) require any person to pay, in respect of benefits received by him from the company, such sums to the officeholder as the court may direct,
 - (e) provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction, or by the giving of the preference, to be under such new or revived obligations to that person as the court thinks appropriate,
 - (f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for the security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction or by the giving of the preference, and
 - (g) provide for the extent to which any person whose property is vested by the order in the company, or on whom obligations are imposed by the order, is to be able to prove in the winding up of the company for debts or other liabilities which arose from, or were released or discharged (in whole or in part) under or by, the transaction or the giving of the preference.

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- (2) An order under section 238 or 239 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the company in question entered into the transaction or (as the case may be) the person to whom the preference was given; but such an order—
- (a) shall not prejudice any interest in property which was acquired from a person other than the company and was acquired in good faith, for value and without notice of the relevant circumstances, or prejudice any interest deriving from such an interest, and
 - (b) shall not require a person who received a benefit from the transaction or preference in good faith, for value and without notice of the relevant circumstances to pay a sum to the office-holder, except where that person was a party to the transaction or the payment is to be in respect of a preference given to that person at a time when he was a creditor of the company.
- (3) For the purposes of this section the relevant circumstances, in relation to a transaction or preference, are—
- (a) the circumstances by virtue of which an order under section 238 or (as the case may be) 239 could be made in respect of the transaction or preference if the company were to go into liquidation, or an administration order were made in relation to the company, within a particular period after the transaction is entered into or the preference given, and
 - (b) if that period has expired, the fact that the company has gone into liquidation or that such an order has been made.
- (4) The provisions of sections 238 to 241 apply without prejudice to the availability of any other remedy, even in relation to a transaction or preference which the company had no power to enter into or give.

242 Gratuitous alienations (Scotland)

- (1) Where this subsection applies and—
- (a) the winding up of a company has commenced, an alienation by the company is challengeable by—
 - (i) any creditor who is a creditor by virtue of a debt incurred on or before the date of such commencement, or
 - (ii) the liquidator;
 - (b) an administration order is in force in relation to a company, an alienation by the company is challengeable by the administrator.
- (2) Subsection (1) applies where—
- (a) by the alienation, whether before or after 1st April 1986 (the coming into force of section 75 of the Bankruptcy (Scotland) Act 1985), any part of the company's property is transferred or any claim or right of the company is discharged or renounced, and
 - (b) the alienation takes place on a relevant day.
- (3) For the purposes of subsection (2)(b), the day on which an alienation takes place is the day on which it becomes completely effectual; and in that subsection "relevant day" means, if the alienation has the effect of favouring—

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- (a) a person who is an associate (within the meaning of the Bankruptcy (Scotland) Act 1985) of the company, a day not earlier than 5 years before the date on which—
 - (i) the winding up of the company commences, or
 - (ii) as the case may be, the administration order is made; or
 - (b) any other person, a day not earlier than 2 years before that date.
- (4) On a challenge being brought under subsection (1), the court shall grant decree of reduction or for such restoration of property to the company's assets or other redress as may be appropriate; but the court shall not grant such a decree if the person seeking to uphold the alienation establishes—
- (a) that immediately, or at any other time, after the alienation the company's assets were greater than its liabilities, or
 - (b) that the alienation was made for adequate consideration. or
 - (c) that the alienation—
 - (i) was a birthday, Christmas or other conventional gift, or
 - (ii) was a gift made, for a charitable purpose, to a person who is not an associate of the company,which, having regard to all the circumstances, it was reasonable for the company to make:
- Provided that this subsection is without prejudice to any right or interest acquired in good faith and for value from or through the transferee in the alienation.
- (5) In subsection (4) above, "charitable purpose " means any charitable, benevolent or philanthropic purpose, whether or not it is charitable within the meaning of any rule of law.
- (6) For the purposes of the foregoing provisions of this section, an alienation in implementation of a prior obligation is deemed to be one for which there was no consideration or no adequate consideration to the extent that the prior obligation was undertaken for no consideration or no adequate consideration.
- (7) A liquidator and an administrator have the same right as a creditor has under any rule of law to challenge an alienation of a company made for no consideration or no adequate consideration.
- (8) This section applies to Scotland only.

243 Unfair preferences (Scotland)

- (1) Subject to subsection (2) below, subsection (4) below applies to a transaction entered into by a company, whether before or after 1st April 1986, which has the effect of creating a preference in favour of a creditor to the prejudice of the general body of creditors, being a preference created not earlier than 6 months before the commencement of the winding up of the company or the making of an administration order in relation to the company.
- (2) Subsection (4) below does not apply to any of the following transactions—
- (a) a transaction in the ordinary course of trade or business;
 - (b) a payment in cash for a debt which when it was paid had become payable, unless the transaction was collusive with the purpose of prejudicing the general body of creditors;

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- (c) a transaction whereby the parties to it undertake reciprocal obligations (whether the performance by the parties of their respective obligations occurs at the same time or at different times) unless the transaction was collusive as aforesaid;
 - (d) the granting of a mandate by a company authorising an arrestee to pay over the arrested funds or part thereof to the arrester where—
 - (i) there has been a decree for payment or a warrant for summary diligence, and
 - (ii) the decree or warrant has been preceded by an arrestment on the dependence of the action or followed by an arrestment in execution.
- (3) For the purposes of subsection (1) above, the day on which a preference was created is the day on which the preference became completely effectual.
- (4) A transaction to which this subsection applies is challengeable by—
- (a) in the case of a winding up—
 - (i) any creditor who is a creditor by virtue of a debt incurred on or before the date of commencement of the winding up, or
 - (ii) the liquidator; and
 - (b) in the case of an administration order, the administrator.
- (5) On a challenge being brought under subsection (4) above, the court, if satisfied that the transaction challenged is a transaction to which this section applies, shall grant decree of reduction or for such restoration of property to the company's assets or other redress as may be appropriate:
- Provided that this subsection is without prejudice to any right or interest acquired in good faith and for value from or through the creditor in whose favour the preference was created.
- (6) A liquidator and an administrator have the same right as a creditor has under any rule of law to challenge a preference created by a debtor.
- (7) This section applies to Scotland only.

244 Extortionate credit transactions

- (1) This section applies as does section 238, and where the company is, or has been, a party to a transaction for, or involving, the provision of credit to the company.
- (2) The court may, on the application of the office-holder, make an order with respect to the transaction if the transaction is or was extortionate and was entered into in the period of 3 years ending with the day on which the administration order was made or (as the case may be) the company went into liquidation.
- (3) For the purposes of this section a transaction is extortionate if, having regard to the risk accepted by the person providing the credit—
 - (a) the terms of it are or were such as to require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of the credit, or
 - (b) it otherwise grossly contravened ordinary principles of fair dealing;

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and it shall be presumed, unless the contrary is proved, that a transaction with respect to which an application is made under this section is or, as the case may be, was extortionate.

- (4) An order under this section with respect to any transaction may contain such one or more of the following as the court thinks fit, that is to say—
- (a) provision setting aside the whole or part of any obligation created by the transaction,
 - (b) provision otherwise varying the terms of the transaction or varying the terms on which any security for the purposes of the transaction is held,
 - (c) provision requiring any person who is or was a party to the transaction to pay to the office-holder any sums paid to that person, by virtue of the transaction, by the company,
 - (d) provision requiring any person to surrender to the office holder any property held by him as security for the purposes of the transaction,
 - (e) provision directing accounts to be taken between any persons.
- (5) The powers conferred by this section are exercisable in relation to any transaction concurrently with any powers exercisable in relation to that transaction as a transaction at an undervalue or under section 242 (gratuitous alienations in Scotland).

245 Avoidance of certain floating charges

- (1) This section applies as does section 238, but applies to Scotland as well as to England and Wales.
- (2) Subject as follows, a floating charge on the company's undertaking or property created at a relevant time is invalid except to the extent of the aggregate of—
- (a) 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,
 - (b) 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, and
 - (c) the amount of such interest (if any) as is payable on the amount falling within paragraph (a) or (b) in pursuance of any agreement under which the money was so paid, the goods or services were so supplied or the debt was so discharged or reduced.
- (3) Subject to the next subsection, the time at which a floating charge is created by a company is a relevant time for the purposes of this section if the charge is created—
- (a) in the case of a charge which is created in favour of a person who is connected with the company, at a time in the period of 2 years ending with the onset of insolvency,
 - (b) in the case of a charge which is created in favour of any other person, at a time in the period of 12 months ending with the onset of insolvency, or
 - (c) in either case, at a time between the presentation of a petition for the making of an administration order in relation to the company and the making of such an order on that petition.
- (4) Where a company creates a floating charge at a time mentioned in subsection (3)(b) and the person in favour of whom the charge is created is not connected with the

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company, that time is not a relevant time for the purposes of this section unless the company—

- (a) is at that time unable to pay its debts within the meaning of section 123 in Chapter VI of Part IV, or
 - (b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction under which the charge is created.
- (5) For the purposes of subsection (3), the onset of insolvency is—
- (a) in a case where this section applies by reason of the making of an administration order, the date of the presentation of the petition on which the order was made, and
 - (b) in a case where this section applies by reason of a company going into liquidation, the date of the commencement of the winding up.
- (6) For the purposes of subsection (2)(a) the value of any goods or services supplied by way of consideration for a floating charge is the amount in money which at the time they were supplied could reasonably have been expected to be obtained for supplying the goods or services in the ordinary course of business and on the same terms (apart from the consideration) as those on which they were supplied to the company.

246 Unenforceability of liens on books, etc.

- (1) This section applies in the case of a company where—
- (a) an administration order is made in relation to the company, or
 - (b) the company goes into liquidation, or
 - (c) a provisional liquidator is appointed ;
- and " the office-holder " means the administrator, the liquidator or the provisional liquidator, as the case may be.
- (2) Subject as follows, a lien or other right to retain possession of any of the books, papers or other records of the company is unenforceable to the extent that its enforcement would deny possession of any books, papers or other records to the officeholder.
- (3) This does not apply to a lien on documents which give a title to property and are held as such.