This guidance is tailored specifically for official receivers. It is discretionary and not designed for use by third parties. This version was the most up to date guidance available to official receivers as at 16 March 2020.

31. Antecedent recoveries

Annexes

Annex A - Types of antecedent recovery

Chapter content

Introduction

31.1 General

The main purpose of liquidation and bankruptcy is to effect an orderly and equitable realisation of assets for the general benefit of creditors and contributories. If some act occurs in the run-up to the insolvency which leads to one creditor being treated more favourably than another, the transaction may well be one which gives rise to recovery rights by an administrator, liquidator or trustee. Similarly, if a person other than a creditor has benefited from the company or bankrupt to the detriment of creditors generally, the Act may provide a remedy. These remedies would generally be termed “antecedent recoveries”. The Act provides an administrator, liquidator or trustee with opportunities to recover assets/monies and/or to avoid certain events (e.g. the granting of charges) for the benefit of all creditors.

31.2 Explanation of term antecedent

The term "antecedent" means a preceding thing or circumstance, and is used to describe this sort of transaction as it occurred before a particular event (e.g. the presentation of the petition or the date of the bankruptcy order) usually within a specified time prescribed by the Act.

Annex A is a table containing a summary of information relating to the different types of antecedent recoveries dealt with in this guidance and guidance contained in 32 – Antecedent Recoveries – other antecedent recoveries.

31.3 Identifying potential recoveries

It is unlikely that the recoveries referred to in this guidance will be scheduled as assets in the bankruptcy application or the PIQ. However, during the course of a preliminary examination, it may be possible to detect that a transaction removing the property from the company or the bankrupt's estate may have occurred and recovery action may be possible.

Paragraph 31.6 gives guidance of the types of events that may lead to an antecedent recovery.

31.5 Antecedent recoveries contractor

The Insolvency Service has an agreement with Clarke Willmott to deal with all antecedent recoveries (see paragraph 31.7) on behalf of official receivers. Paragraphs 31.6 to 31.16 give an overview of the Service Contract and procedures.

31.6 Events leading to an antecedent recovery

Where real property has been sold or otherwise transferred, the official receiver acting as liquidator or trustee should always seek to satisfy themselves that the property was transferred at a fair market value. Any transaction with a relative or associate of the insolvent may be viewed with suspicion, as a transaction at an undervalue in these circumstances is not uncommon.

Where there have been new borrowings by the insolvent, consideration should be given as to whether the monies have been used to discharge debts owed to other creditors, particularly connected creditors, as this may be a preference.

31.7 No Minimum level of recovery

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Clarke Willmott will accept instructions in respect of all antecedent recoveries and there is no minimum amount.

31.8 Conditional fee arrangement

[Text redacted]

31.9 Referral to Clarke Willmott

The official receiver should endeavour to refer antecedent recoveries to Clarke Willmott via the Debt View website at the earliest possible opportunity (as time is usually of the essence in these matters), but not before the relevant information is obtained. This can be in advance of the transfer of the case to an LTADT if there are other matters delaying the case transfer of the case to the team.

The method of referral is by completion of an ARIA (Antecedent Recovery Instruction to Agent) form, a Word template produced in ISCIS. This form sets out the information that is required to make a referral;

- estimated amount of debt
- name of person who owes money
- details of conduct/transaction
- other matters to consider (listed on the ARIA)

The matter should not be referred until the form is substantially complete, assuming the information is held or otherwise possible to obtain.

It is accepted that some of the required information may not be available and a decision will have to be taken to refer the matter with incomplete information if a potential recovery is not to be lost.

Once the form has been completed it should be submitted to Clarke Willmott via the Debt View website. Information on the service provided by Clarke Willmott and full guidance on using the Debt View website is available on the Clarke Willmott intranet page.

31.10 Further enquiries following referral

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If, after initial consideration, Clarke Willmott agrees with the official receiver's view that there are reasonable grounds to pursue a realisation, they will take such action as is necessary to pursue recovery including seeking such further information from the beneficiary of the transaction as is necessary including, if appropriate, seeking and conducting private examinations[1, 2].

This should not, though, be an excuse for referring a matter with incomplete information, and the information required to be provided in the referral form (see paragraph 31.9) should, in any case, be necessary to enable the official receiver to make a sound judgement that there is a matter of recovery.

1. Section 236

2. Section 366

31.11 Discussion with insolvent or beneficiaries prior to referral

To avoid any prejudice on actions taken by Clarke Willmott, the official receiver should avoid asserting any intention or right to recover either a specified amount or by reference to a specific statutory provision when discussing or corresponding with the insolvent or beneficiary – either before or after the instruction to Clarke Willmott has been issued.

31.12 Recovery action successful

[Text redacted]

31.13 Expenses of winding up/bankruptcy

Costs relating to the conduct of any legal proceedings which the official receiver, as liquidator or trustee, has the power to bring which are properly chargeable or incurred are expenses of the liquidation or bankruptcy, respectively, and can, therefore, be paid out of the estate[1, 2]

1. Rule 7.108

2. Rule 10.149

31.14 Disbursement costs

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The disbursements required for legal action will depend on the nature of each case. However, typical disbursements, which Clarke Willmott expect to incur, include court fees for issuing proceedings, possible Counsel's fees, if the action is defended, and enforcement fees if any judgment obtained requires enforcement.

31.15 Decision to take legal action under conditional fee agreement

While the action will be brought in the name of the official receiver, the decision to take a legal action will rest entirely with Clarke Willmott, and will be taken only in the following circumstances:

- the action is against the correct beneficiary of the transaction
- there is proof that the debt is or was owed by that person, or that there is a valid cause of action against that person
- the beneficiary has assets against which a judgement could be enforced or, having considered the matter, Clarke Willmott are willing to proceed prior to assessing the assets of the beneficiary
- [Text redacted]

31.16 Antecedent recoveries in Limited Liability Partnerships and partnerships

The legislation relating to Limited Liability Partnerships ("LLP")[1] extends the antecedent recovery provisions in the Act to LLPs. In addition, there are special provisions relating to the recovery of withdrawals from the partnership.

Similarly, the provisions of the Act relating to antecedent recoveries are applied to partnerships by virtue of the Insolvent Partnerships Order 1994[2].

1. Limited Liability Partnerships Regulations 2001

2. Insolvent Partnerships Order 1994 Articles 7 and 8

31.17 Antecedent recoveries and deceased insolvents

The provisions in the Act relating to transactions at an undervalue and to preferences also apply to deceased insolvents[1].

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1. Administration of Insolvent Estates of Deceased Persons Order 1986 schedule 1, Part II, paragraph 26 adopting Insolvency Act 1986 sections 339 and 340 and Administration of Insolvent Estates of Deceased Persons Order 1986 schedule 1, Part II, paragraph 36 adopting Insolvency Act 1986 section 423

31.18 Limitation periods

Generally, the law[1] sets time limits to the period under which debts etc. can be recovered. Although the legislation makes no particular provision for time limits in respect of the recovery of monies due in respect of antecedent recoveries in formal insolvency, case law has developed in this area.

In essence, the relevant legislation sets two time periods under which debts should be recovered. These are 12 years for an action on a specialty (an obligation under a contract, bond or other instrument)[2] and six years for any sum due by virtue of any enactment. Where there is an element of fraud on the part of the debtor, the time period does not begin to run until the fraud has, or should have, been discovered.

It has been held that an action to recover a transaction under the provisions in the Act relating to antecedent recoveries is a specialty and, therefore, the 12 year period applies[3]. The court in that case considered that, where the substance of the claim was the recovery of monies rather than the setting aside of a transaction, the shorter six-year period may apply.

Generally speaking, the official receiver should aim to commence proceedings (where appropriate) within the shorter, six year, period to avoid the recovery being out of time.

1. Limitation Act 1980

2. Limitation Act 1980 section 8

3. Re Priory Garage (Walthamstow) Ltd, Anwar v Giblet (Ch, 23 May 2000)

31.19 Assignment of antecedent recoveries – companies

It has been held that a claim for an antecedent recovery is not an item of property belonging to a company in liquidation[1, 2]. One of the practical consequences of this is that such a claim may not be assigned due to a bar on the trading of claims. In October 2015 the legislation was amended to allow for the assignment of the following types antecedent recovery claims:

- fraudulent trading

- wrongful trading
- transactions at an undervalue
- preferences
- extortionate credit transactions

This applies to all cases where the company enters administration or goes into liquidation on or after 1 October 2015[3].

1. Re Oasis Merchandising Services Ltd [1998] Ch 17

2. Re Yagerphone Ltd [1935] Ch 392

3. Small Business, Enterprise and Employment Act 2015 (Commencement No.2 and Transitional Provisions) Regulations 2015 schedule 1, paragraph 16

31.20 Assignment of antecedent recoveries – bankruptcy

It has been held that a claim for an antecedent recovery is not an item of property belonging to the bankrupt[1, 2]. One of the practical consequences of this is that such a claim may not be assigned due to a bar on the trading of claims. The legislative change in October 2015 that provided for the assignment of certain antecedent recovery claims in company cases (see paragraph 31.19) did not apply to bankruptcy cases.

1. Re Oasis Merchandising Services Ltd [1998] Ch 17

2. Re Yagerphone Ltd [1935] Ch 392

31.21 Proceeds of antecedent recovery claim or assignment of claim not available to satisfy claims of floating chargeholders

In cases where the company entered administration, or went into liquidation, on or after 1 October 2015[1], the proceeds of any claim, or assignment of any claim, in respect of the following types of antecedent recoveries are not to be treated as property which would be available for the satisfaction of claims of holders of debentures secured by, or holders of, any floating charge created by the company:

- fraudulent trading
- wrongful trading
- transactions at an undervalue

- preferences
- extortionate credit transactions

1. Small Business, Enterprise and Employment Act 2015 (Commencement No. 2 and Transitional Provisions) Regulations 2015 schedule 1, paragraph 17

Preferences

31.22 Preferences - introduction

The provisions of the Act relating to preferences[1, 2] allow the office-holder to challenge the doing by a company or individual (or the suffering of anything by a company or individual) of an act which has the effect of putting a creditor (or guarantor) in a position which, in the event of the company going into insolvent liquidation or the individual entering into bankruptcy, will be better than the position they would have been in if that act had not been carried out.

The ability of the liquidator or trustee to challenge such transactions is subject to time limits (see paragraph 31.30), the financial position of the company/debtor at the time of the transaction (see paragraph 31.31), the relationship between the company/individual and the beneficiary of the transaction (see paragraph 31.26) and the purpose of the transaction (see paragraph 31.24).

1. Section 239

2. Section 340

31.23 Realising preferences

The following are the areas on which the official receiver should, ideally, obtain information before instructing the contractor (Clarke Wilmott) and include on the ‘details of conduct/transaction’ section of the ARIA form

- any connection between the beneficiary and the insolvent
- the date of insolvency (as opposed to the date of the order)
- details of the payment that constitutes the preference
- the value of any assets transferred
- the sum of monies owed to the beneficiary
- evidence of the desire to prefer
- the amount of monies owed to other creditors at the date of the transaction
- any explanations given by the bankrupt or the insolvent for the transaction

- evidence of the asset position of the beneficiary
- details of any of the insolvent's property charged to the beneficiary

31.24 Desire to prefer

The key point so far as regards deciding whether a preference has taken place is to decide whether or not the debtor was influenced by a desire to put the creditor in a better position (desire to prefer) than they would otherwise have been as a consequence of an insolvency event[1, 2].

The debtor must have been influenced by a desire to prefer, but this need not have been the dominant intention. In other words, for a preference to be successfully challenged, the desire to prefer the creditor must have been part of the decision to enter into the transaction, but it need not have been the only factor nor, even, the factor that tipped the scales in favour of entering into the transaction.

Desire can be inferred from the circumstances of the case. It has been held by the court that there was no desire to prefer when the company granted its bank a debenture over its assets and therefore there was no preference[3].

Just because the creditor gains an advantage does not, of itself, mean that the debtor had a desire to prefer that creditor. It would still be incumbent upon the office-holder to prove that the desire to prefer was actually a motivating factor[4].

1. Section 239(5)

2. Section 340(4)

3. MC Bacon Ltd [1990] BCLC 324

4. Lewis v Hyde [1990] BCC 78, 88

31.25 When must the desire to prefer exist?

The desire to prefer must exist at the date that the decision was made to make the payment that constitutes the preference, rather than that date that the payment was actually made[1].

This might be important where the desire to prefer was present when the decision to make the payment was made, but was not present when the payment was made (if, for example, a friendship had broken down).

1. Lewis v Hyde [1990] BCC 78, 88

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31.26 Desire to prefer – connected party or associate

Where the person who benefitted from the preference is a connected party (see paragraph 31.105) (or an associate, then it is presumed (unless the contrary can be shown) that the debtor was influenced by a desire to prefer[1, 2].

1. Section 236(6)

2. Section 340(5)

31.27 Desire to prefer – companies

A company itself cannot be said to have desire, and any desire in the "mind" of the company must, of course, be formed in the mind(s) of those human beings controlling the company – e.g., the directors[1]. In order to successfully challenge a preference, the official receiver, as office holder, would need to show that the decision to prefer arose from a proper decision by those controlling the company – i.e., those with the controlling "mind" of the company.

Commonly in cases dealt with by the official receiver, the company has a small number of directors and, in these cases, identifying the controlling mind would be a relatively simple matter. For the vast majority of these cases, the person(s) causing the company to undertake the transaction will be the sole director or the directors as a group and, therefore, there should be no difficulty in showing that they were acting on behalf of the company, and had authority to do so[1].

Where an employee, other than a director, took the decision to effect the transaction, it will be necessary to show that they had appropriate direct authority to act on behalf of the company – to be the "mind" of the company. The motivation of the person with authority needs to be considered[2].

1. Re Agriplant Services Ltd [1997] BCC 842

2. Tesco Supermarkets v Natrass [1972] AC 153

31.28 Transactions not normally viewed as preferences if desire to prefer not a motivating factor

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A key feature of a preference is the desire on the part of the debtor to put the beneficiary of the transaction in a better position in any subsequent liquidation or bankruptcy then they would have been had the transaction not taken place.

Simply because the creditor gains an advantage from the transaction does not, of itself, mean that the debtor had a desire to prefer that creditor. It would still be incumbent upon the office-holder to prove that the desire to prefer was actually a motivating factor.

An exception to this is where the transaction favours a person connected to or associated with the insolvent, in which case the desire to prefer is presumed unless the contrary can be shown.

31.29 Improvement in position

As outlined in paragraph 31.25, one of the key features of a preference is that there must have been a desire to improve the position of the creditor. The Act is silent on the measurement to be applied to assess the improvement. Whilst it is not conclusive the case law on the subject has generally held that the improvement is to be measured against a hypothetical winding up or bankruptcy made immediately after the transaction rather than the date of actual insolvent liquidation or bankruptcy[1].

1. Willis and another v Corfe Joinery Ltd [1998] 2 BCLC

31.30 Time period

In a compulsory liquidation the transaction must have been entered into within six months of the “onset of insolvency” (for a compulsory liquidation)[1] or the presentation of the petition (bankruptcy cases)[2]. The “onset of insolvency” is the date of the presentation of the petition[3], unless the liquidation follows administration – in which case the “onset of insolvency” is the date of the making of the administration order[4].

Where the beneficiary of the preference is a connected party (see paragraph 31.105), or an associate, the time period is extended to two years prior to the onset of insolvency or the presentation of the bankruptcy petition[5] [6].

1. Section 240(1)(b)

2. Section 341(1)(c)

3. Section 129

4. Section 240(3)(d)

5. Section 240(1)(a)

6. Section 341(1)(b)

31.31 Time period – financial position

In addition to the time limits detailed in paragraph 30.30, it is also necessary, for companies, to show that the company was unable to pay its debts at the time of the transaction, or became unable to pay its debts as a result of the transaction[1] So far as bankruptcies are concerned, it is necessary to show that the debtor was insolvent at the time of the transaction or became insolvent as a consequence of the transaction[2].

1. Section 240(2)

2. Section 341(2)

31.32 Types of transactions that may be viewed as preferences

The repayment (or part-repayment) of a debt is the most likely example of a transaction that may be viewed as a preference. Other examples would be the repayment of a guaranteed loan (see paragraph 31.39), the granting of a charge or the return of goods obtained on credit.

31.33 Repayment of directors' loan accounts

So far as company liquidations are concerned, one of the more common examples of a preference would be in respect of a director causing a company to repay an outstanding loan account owed to one or more of the directors.

31.34 Payments to creditors in relation to a court order

Simply because a payment to a creditor is in respect of an order of court does not prevent that payment being challenged as a preference where, otherwise, it would be open to challenge - e.g. if a creditor had obtained a court judgement, payment of that debt could still constitute a preference[1]. It would, though, still be necessary to

show that all other features of a preference were present in the transaction for a successful recovery.

1. Section 239(7)

31.35 Payment under an existing obligation

Simply because a payment is given by a debtor under an existing obligation (such as a pre-agreed repayment plan) does not mean that it is not a preference. The relevant date for deciding whether a preference has taken place is the date of the payment and not the date that the decision was taken to make the payment[1].

Conversely, the date of the desire to prefer (see paragraph 31.24) is the date of the decision to make the payment, whereas the date to decide whether a preference has taken place is the date of the payment (see paragraph 31.25).

1. Willis and another v Corfe Joinery Ltd [1998] 2 BCLC

31.36 Delay in payment of new debt

Where there has been a delay in payment between the debt being incurred and the payment being made, this may constitute a preference as the supplier has, in the period between supply and payment, become a creditor. It has been held that this circumstance should not automatically be viewed as a being a preference without looking at the reasons behind the delay – for example, the person with authority to make the payment may have been unavailable during the relevant period[1].

1. Re Brian D Pierson (Contractors) Ltd BCC 26

31.37 Return of goods – retention of title

Where goods supplied on credit are returned to a supplier, this would normally constitute a preference (assuming all the other features were present) as those goods would otherwise be available to the estate for the benefit of the general body of creditors. Where, however, those goods were supplied on a “retention of title” basis there cannot be a preference if they were returned as this would have happened as a result of the making of the winding up or bankruptcy order anyway.

On the other hand, a preference may have taken place where the returned goods that were subject to a retention of title clause were perishable or in some other way affected adversely by the passage of time (perhaps, seasonal goods). The early return of the goods would have the effect of putting the creditor in a better position

than they would have been if they had re-claimed the goods following the making of the winding-up or bankruptcy order – when the goods may have devalued.

31.38 Giving up an asset to a creditor

A transaction does not have to involve a cash payment to be considered a preference. For example, the giving up of an asset to a creditor can be considered to be a preference and the asset or, where this is not possible, the value of the asset transferred should be recovered.

31.39 Guarantee debts

Where a debtor pays a debt which is guaranteed, it may be that the motivation was to put the guarantor in a better position, rather than the creditor. In these circumstances the recovery action may be made against the creditor or guarantor. Recovery may be made against the creditor despite the debtor's intention to prefer the guarantor, rather than the creditor. If an order is made against the creditor, the court may order that the guarantee be re-instated to prevent any injustice. Typically, this will be experienced in company liquidations where the director causes the company to pay or part-pay a debt that they had personally guaranteed.

Where a guarantee debt is secured on the insolvent's property, there can be no preference if it is repaid as the debt would be repaid anyway under the security in the event of liquidation or bankruptcy (see paragraph 31.42). The repayment of any resultant shortfall would, of course, be a preference if all other features were present.

31.40 Bank accounts

It is likely that a payment into a bank account will have been motivated by need to have a place to put the monies, rather than a desire to put the bank in a better position. Different considerations would apply where the debt to the bank was covered by a guarantee (see paragraph 31.39).

That said, in certain circumstances, it may be considered that the bank was a connected party (see paragraph 31.105) and, therefore, it would be presumed that there was a desire to prefer (see paragraph 31.24). For a bank to be considered a connected party (see paragraph 31.105) it will have to have been sufficiently involved to have been considered a shadow director[1, 2]. It should be noted that, whilst this is theoretically possible, it is improbable.

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Payments into or out of a bank account may constitute a voidable transaction (see new guidance 32)

1. Section 251

2. Re a Company (No 005009 of 1987) (1988) 4 BCC 424

31.41 Creditor pressure

The most likely circumstance in which it may be viewed that a payment to a creditor is not a preference is where that payment was made as a result of pressure applied by the creditor. The pressure may be threats to bring legal or recovery action, or threats to cease to supply the debtor – but, importantly, the threat(s) must be genuine.

31.42 Payment to a secured creditor

Payment to a secured creditor would not normally be a preference as they would not be getting any more than would be available to them following the making of the winding-up or bankruptcy order. Things would be different, though, were the payment over and above that which the secured creditor would have received in the liquidation or bankruptcy proceedings.

31.43 The giving of a charge as a preference

Where there is the grant of a charge securing both pre-existing debts and new monies, the recoverable preference may be in respect of the amount of the charge that covers or seeks to cover the pre-existing debt only[1].

The granting of a floating charge may also be challenged where there has been no new benefit provided (see new guidance 32).

1. Burns v Stapleton (1959) 102 CLR 97

31.44 New consideration

Where the granting of a charge or other security to a creditor relates to new lending, there cannot be a preference as there is no overall change in the position of the debtor, even if the charge holder was an existing creditor of the debtor as payment is matched with consideration.

Similarly, where there has been new consideration in the form of goods or services supplied on credit there can be no preference.

Otherwise, suppliers or lenders may be discouraged from dealing with (and, possibly, helping to rescue) a struggling business.

31.45 Right of set-off

Whilst a creditor reducing a debt under a right of set-off may, on the face of it, appear to be a preference, it is unlikely to be so as it is usually instigated by the creditor with no active involvement from the debtor[1].

A preference may have taken place where a debtor allows the creation of a right of set-off where none is allowed under law[2] or where the debtor gives their consent to the exercise of the right.

1. Re Exchange Travel Holdings [1996] BCC

2. Rule 14.25

31.46 Payment to a supplier in advance

Payment to a supplier in advance of the delivery of goods, or on “cash-on-delivery” terms cannot be a preference as that supplier was not a creditor in respect of that transaction.

31.47 Payment of a debt for the provision of professional services

Where a debtor repays a debt to a professional advisor (perhaps, a solicitor or an accountant), it is possible that they were motivated by a desire to retain the services of that advisor at a difficult time, rather than to put them in a better position. In that circumstance, it is unlikely to be a transaction open to challenge as a preference[1].

1. Re Ledingham-Smith (A Bankrupt) [1993] BCLC 635

31.48 Knowledge available to immediate and subsequent recipients of the property

The knowledge available to the recipient of the property is irrelevant so far as deciding whether or not a preference has taken place. It matters not whether the

recipient was aware of, or ignorant of, the financial position of the debtor, as the Act is concerned only with the motivations of the debtor (see paragraph 31.24). Even if the creditor has received the preference honestly, and in good faith, this will not alone prevent the recovery of the preference.

Where the property is transferred from the beneficiary of the transaction to a subsequent party, the subsequent party is protected from being subject to an order restoring the position (see paragraph 31.49) if the property was acquired in good faith and for value[1, 2]. Where the person who acquired the property had knowledge of the proceedings and surrounding circumstances, or is an associate or connected person, then the onus to prove good faith is on that person and the property is capable of recovery in the usual way[1, 2].

1. Section 342(2)(a)

2. Section 241(2)(a)

31.49 Remedies - preferences

Unless the claim has been assigned (which is only possible in company cases – see paragraph 31.19), only the office holder has the power to apply to court for an order restoring the position where there is evidence that a company or individual has entered into a transaction resulting in a preference[1, 2].

The general principle is that, having decided that a preference has been made, the court shall make such order as it thinks fit for restoring the position to what it would have been if the company/individual had not entered into the transaction[3, 4]. In this regard, the court has wide discretion as to the order it may make restoring the position. The Act provides a “menu” of possible remedies[5, 6] but the court is not limited to those options. The order can be made against the recipient of the property or their successors in title (but see paragraph 31.48 for an important defence for innocent third parties).

1. Section 238

2. Section 339

3. Section 238(3)

4. Section 339(2)

5. Section 241(1)(a)-(f)

6. Section 342(1)(a)-(f)

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31.50 Discretion of court not to make order

It has been held that the court has discretion to decline to make an order restoring the position (see paragraph 31.49) where, for example, to do so would result in a hardship to the recipient[1].

1. Re Paramount Airways Limited (in administration) [1993] Ch 223 CA

31.51 Effect of remedy on recipient of property

When deciding on the appropriate remedy to be ordered to restore the position of the estate, the court may also make an order providing for the extent to which the recipient of the property who repays the debt or returns the property may prove in the proceedings as a creditor[1, 2].

1. Section 241(1)(g)

2. Section 342(1)(g)

31.52 Misfeasance – companies only

An action for misfeasance (see new guidance 32) may only arise where there has been a financial loss to the company. The giving of a preference does not result in any financial loss to the company – simply a change in the classification of the company's creditors and cannot, therefore, be a matter of misfeasance[1].

1. Continental Assurance Co of London plc [2001] BPIR 733

Transactions at an undervalue

31.53 Introduction

The provisions of the Act relating to transactions at an undervalue[1, 2] allow the office-holder to challenge the gifting or undervalue transfer of property entered into by the insolvent in the period leading up to the commencement of the winding-up or bankruptcy.

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The ability of the liquidator or trustee to challenge such transactions is subject to time limits (see paragraph 31.60), the financial position of the company/debtor at the time of the transaction (see paragraph 31.63), the relationship between the company/debtor and the recipient of the property (see paragraph 31.64) and the purpose of the transfer.

Crucially, unlike similar provisions relating to transactions defrauding creditors[3] (see new guidance 32) there is no requirement to show that the transaction was carried out with the intention to put assets out of the reach of creditors, it is enough to show that the transaction was, in fact, a transaction at an undervalue.

1. Section 238

2. Section 339

3. Section 423

31.55 Realising transactions at an undervalue

The following are the areas on which the official receiver should, ideally, obtain information before instructing the contractor (Clarke Wilmott) and include on the 'details of conduct/transaction' section of the ARIA form:

- any connection between the beneficiary and the insolvent
- the date of insolvency (as opposed to the date of the order)
- details of any assets transferred
- the date of the transfer
- the valuation of the assets transferred and details of the basis for this valuation
- details of any consideration given for the asset
- any explanations given by the bankrupt or the insolvent for the transaction
- evidence of the asset position of the beneficiary

31.56 Transactions defrauding creditors

In addition to the provisions relating to transactions at an undervalue, the Act contains provisions allowing for the challenge of undervalue transactions where an intention to put assets out of the reach of creditors can be shown[1].

Whilst the need to show an intention to put assets out of the reach of creditors makes this provision less useful to challenge suspect transactions, it does have the positive feature of having no time limit as regards the date in which the transaction must have taken place to be recoverable.

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1. Section 423

31.57 Types of transaction that may be considered as undervalue

The following transactions are identified in the Act as being those that are capable of displaying “undervalue”:

- a gift or transaction to a person on terms that provide for the company/individual to receive no consideration[1, 2]
- a transaction 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 to the company/individual[3, 4]
- a transaction with a person in consideration of marriage or the formation of a civil partnership (bankruptcy only)[5]

1. Section 238(4)(a)

2. Section 339(3)(a)

3. Section 238(4)(b)

4. Section 339(3)(b)

5. Section 339(3)(c)

31.58 Person entering into the transaction must be the insolvent

For a transaction to be voidable under the provisions of the Act, it must have been entered into by the insolvent (rather than a third party). The sale of property by a mortgagee under power conferred under its security would not, therefore, be a relevant transaction[1] – but the transaction could still be “attacked”[2].

Conversely, the court has held that a sale of property by a receiver could be a relevant transaction and open to challenge, as the receiver can be considered to be an agent of the company and its directing mind at the time of the transaction[3].

1. Re Brabon [2000] BCC 1171

2. Corbett v Halifax Building Society [2002] EWCA 1849

3. Demite Ltd v Protec Health Ltd [1998] BCC 638

This guidance is tailored specifically for official receivers. It is discretionary and not designed for use by third parties. This version was the most up to date guidance available to official receivers as at 16 March 2020.

31.59 Definition of transaction

The word “transaction” is defined in the Act to include “a gift, agreement or arrangement”[1]. The definition can be taken to include the provision of services, loans or property and guarantees and does not require that the transaction takes place under a formal agreement such as a contract.

1. Section 436

31.60 Relevant time

For a transaction at an undervalue to be successfully challenged, it must have taken place within a certain time period (see paragraph 31.61) and under a certain financial circumstance (see paragraph 31.62).

31.61 Time period

In a compulsory liquidation the transaction must have been entered into within two years of the “onset of insolvency”[1] (for a compulsory liquidation the “onset of insolvency” is the date of the presentation of the petition[2]).

In a bankruptcy the transaction must have been entered into within a period of five years ending with the day of the presentation of the petition[3].

Transactions that occur after the date of the presentation of the petition would be automatically void[4] [5] (see new guidance 32 for information on voidable property transactions).

1. Section 240(1)(a)

2. Section 129

3. Section 341(1)(a)

4. Section 127

5. Section 284

31.62 Time period - connected parties and associates

The relevant time period is the same for connected parties or associates as it is for unconnected parties. There is, though, some relevance to the relationship between

the recipient and the debtor as regards assumptions to be made regarding the insolvency of the debtor (see paragraph 31.64).

31.63 Time period – financial position

In addition to the time limits detailed in paragraph 31.61, it is also necessary to show that the company was unable to pay its debts at the time of the transaction or became unable to pay its debts as a result of the transaction[1]. Evidence in support of this would be items such as accounts and accounting information, demands for payment from creditors or Crown departments or increasing overdrafts on bank accounts.

So far as bankruptcies are concerned, if the transaction is more than two years prior to the presentation of the petition, it is necessary to show that the debtor was insolvent at the time of the transaction or became insolvent as a consequence of the transaction[2]. Evidence in support of this would be documents such as accounts and accounting information, demands for payment from creditors or Crown departments or increasing overdrafts on bank accounts.

1. Section 249(2)

2. Section 341(2)

31.64 Financial position – connected parties and associates

Where the beneficiary of the transaction is a connected party (see paragraph 31.105) or an associate, insolvency is presumed, unless the contrary can be shown[1, 2].

In other words, where the beneficiary of the transaction is a connected party (see paragraph 31.105) or an associate, the onus is on the insolvent (or the beneficiary) to show that they (the insolvent) were not insolvent at the time of the transaction.

1. Section 240(2)

2. Section 341(2)

31.65 Consideration for money or money's worth

It is necessary to show that a transaction was entered into for no consideration or for consideration that was significantly less than the true value of the property transferred. There is no statutory definition of “significantly less” and courts have tended to decide each case on the particular facts. In one case[1] a difference of 10% between the consideration and true value was held to be the result of a genuine difference of opinion and, therefore, not a transaction at an undervalue. In another case, a difference of 20% was held to be a transaction at an undervalue[2].

1. Re Marini Ltd [2004] BCC 172

2. Gil v Baygreen Properties Ltd [2004] EWHC 1732 (Ch)

31.66 Valuation of consideration and of property transferred

In order to decide whether property has been transferred for money or money’s worth, it is necessary to value not only the property transferred (which should be relatively straightforward assuming that records are available for the insolvent’s affairs), but also the consideration received – which may not be quite so straightforward. Paragraphs 31.69 to 31.72 outline the areas to be taken into account when assessing the value of the property and paragraphs 31.73 to 31.77 give information and advice of the matters to be taken into account when assessing the valuation of the consideration given for the asset.

It should be noted, though, that it is not necessary to attribute an exact value to either the item transferred or the consideration received[1].

1. Clements (liquidator of HHO Licensing Ltd) v Henry Hadaway Organisation Ltd [2007] EWHC 2953 (Ch)

31.69 Value of property

The valuation of the property disposed of by the insolvent should be considered from the perspective of the debtor, taking into account their position at the time of the transaction[1]. For example, it may be acceptable for a debtor to dispose of property for less than market value to ensure a quick sale to improve the cash position of a business.

An assessment of the value of the property disposed of by the insolvent should include only the actual value of the property, and not any consequent detriment to the insolvent’s affairs (for example, damage caused to the business by the sale of a

key asset, perhaps to a competitor), unless that detriment was an agreed part of the transaction.

1. Re MC Bacon Ltd [1990] BCC 78

31.70 Events affecting value subsequent to transfer

The court may take subsequent events into account when deciding the actual value of the property. For example, the sale of a life policy at a time that the debtor was terminally ill. At the time of the sale the policy may have had no value but, on the subsequent death of the debtor, it accrued a value. In this case the court took into consideration the likely potential value at the time of the transaction[1].

1. Reid v Ramalort Ltd [2004] EWCA Civ 800

31.71 Valuation – instructing agents

Where the official receiver is uncertain as to the value of property disposed of by the insolvent, they should consider the use of agents to carry out a valuation.

31.72 Show that debtor had an interest in the property

It is important to show that the debtor actually had an interest in the property transferred to demonstrate that a transaction at an undervalue has taken place. Where a third party has paid for an asset over which the debtor had use and subsequently transferred, it is likely to be difficult to show that the debtor had a beneficial interest[1, 2].

1. Mears v Latif [2005] EWHC 1146

2. Pozzuto v Iacovides [2003] EWHC 431

31.73 Definition of consideration

The term “consideration” is not defined in the Act. In one legal dictionary[1] it is defined as “a compensation, matter of inducement, or [the giving of one thing of value for another thing of like value], for something promised or done”. Consideration can take

the form of benefit to the recipient or detriment to the donor[2] See paragraph 31.76 for further information on detriment as consideration.

1. Mozeley & Whiteley's Law Dictionary

2. Currie v Misa (1874-1875) LR 10 Ex 153

31.74 Retrospective consideration

For consideration to be considered valid in terms of the transaction, it should be made in relation to that transaction and it should be understood by both parties that payment is due under the transaction at the time that the goods or services are provided[1]. It is not sufficient to give payment for the goods or services when there was an original intention that they would be provided free – or, at least, no agreement that they would be chargeable (for example, a director of a company being paid retrospectively for "management services" in excess of their agreed contract in the period leading up to winding-up). In such circumstances the application of the provisions relating to the recovery of transactions at an undervalue should be considered.

1. Lampleigh v Brathwait (1615) Hobart 105

31.75 Consideration provided by third-parties

For consideration to be considered valid, it need not be provided directly by the recipient of the property – what is important is that the insolvent benefits from the transaction. For example, it has been held that where company A agrees to sell an asset to company B on terms that C agrees to enter into some collateral agreement with A, the consideration for the asset will be the combination of any consideration expressed in the agreement with B and the value of the agreement with C[1].

1. Phillips v Brewin Dolphon Bell Lawrie [2001] 1 WLR 143 HL

31.76 Detriment as consideration

Detriment to the recipient of the property (for example, the giving up of some right over the property of the insolvent) can be considered valid consideration so long as that detriment was an intentional part of the transaction[1].

An application for the recovery of a transaction at an undervalue where the stated consideration was the waiving of a debt repayment succeeded as the court held that the transaction would have been, in any case, a preference[2].

1. Agricultural Mortgage Corp plc v Woodward [1994] BCC 688 CA

2. Re Peppard [2009] BPIR 331

31.77 Transaction in consideration of marriage – bankruptcy only

Historically, marriage has been considered to be a valid consideration in its own right for the transfer of property[1]. Under the Act, however, any transaction in consideration of marriage or the formation of a civil partnership is automatically a transaction at an undervalue and is open to challenge[2].

Similarly, it has been ruled that consideration in respect of love and affection or similar emotional sentiments cannot be considered to have a value in excess of nominal[3] and, therefore, any gift or transaction where that is the only consideration is likely to be open to challenge[4].

1. De Mestre v West [1891] AC 264

2. Section 339(3)(b)

3. Moon v Franklin [1996] BPIR 196

4. Royscott Spa Leasing v Lovett [1995] BCC 502 CA

31.78 Transfers of property following matrimonial proceedings

It has been held that, generally speaking and assuming the court is in full possession of the facts when making the order, the spouse receiving property under a property adjustment order in divorce proceedings (particularly, contested divorce proceedings) is considered to have given consideration equivalent to the value of the property transferred, since it is the responsibility of the court to effect a fair distribution of the property of the marriage[1] (see paragraph 31.79). In such cases, the provisions of the Act in relation to transactions at an undervalue are not satisfied and the order cannot be attacked as a transaction at an undervalue.

It is anticipated that applications to set aside property adjustment orders as transactions at an undervalue will be rare.

1. Haines v Hill [2007] EWCA Civ 1284

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31.79 Responsibility of court to effect fair division of property

It has been held that the responsibility of a Family Court is to seek to give a fair division of matrimonial property which allows each party to go forward – a fair division should not be confused with an equal division. One party may have greater need to the property – for example, if they have responsibility for caring for children of the marriage[1].

1. Haines v Hill [2007] EWCA Civ 1284

31.80 Challenging property adjustment orders

In exceptional circumstances it may be possible for the trustee in bankruptcy to demonstrate collusion, fraud, mistake, misrepresentation or some broadly similar circumstances and, in this case, the transaction is capable of being challenged[1]. It can be assumed that ancillary relief or property adjustment orders resulting from a hard fought trial are far less likely to be tarnished by collusion or fraud on the creditors than consent orders.

If property was transferred outside of the matrimonial proceedings, then it may be possible to show that the court was not aware of the true position when making the property adjustment order and, therefore, challenge to that order as a transaction at an undervalue could be considered.

If the property adjustment order was made on the basis of a “clean break”, with the court of the opinion that the property awarded was the only provision for the future financial needs of the spouse, but it transpires that the other spouse is continuing payments under a voluntary maintenance arrangement, or has returned to the former family home, then the order may be open to challenge.

1. Re Kumar (a bankrupt) [1993] 1 WLR 225

31.81 Enquiries to make regarding the transfer of property in matrimonial proceedings

Due to the need to establish the history, background and detail of the property adjustment order, it is necessary for the official receiver to make enquiries into the agreement reached by the divorcing parties.

The official receiver should obtain a copy of the property adjustment order and consider this against other facts regarding the bankrupt's affairs of which they are aware. Apart from considering the bankrupt's current circumstances (for example, have they really left the former marital home, does the spouse have the stated responsibility for childcare?), some consideration should be given to historical issues to ensure that assets were not transferred outside of the matrimonial proceedings (the usual enquiries, such as accounting for large sums expended or transferred).

31.82 Sale and lease-back schemes

Sale and lease-back schemes (sometimes called sale and rent-back schemes) are designed to allow a homeowner to sell their property but remain living in it by entering into a rental agreement with the purchaser. The benefit to the homeowner is that there may be a release of equity from the property and/or a lowering of the monthly accommodation expense (where the rent charged is lower than the mortgage payments) without having to leave the property.

31.83 Sale and lease-back schemes as transactions at an undervalue

Prior to regulation, the key feature of a typical sale and lease-back scheme was that the property was usually sold to the business operating the scheme at less than the true market value of the property. It is this aspect which may open the scheme up to challenge as a transaction at an undervalue where the entering into the scheme is followed by the bankruptcy of the former homeowner with the relevant time period.

Assuming that all the other features of a transaction at an undervalue are in place then any agreement that provided for the property to be sold at less than its market value should be challenged as a transaction at an undervalue. It is likely that a below-market value sale of a property under one of these schemes would meet all the relevant conditions to be challenged as a transaction at an undervalue.

The decision on how best to attack the agreement would normally be left to The Service's antecedent recovery contractor (Clarke Wilmott) but options available to the sale and lease-back business are to restore the property to the bankruptcy estate (holding the rights of the original chargeholder – assuming they were paid in full) or making good the loss to the estate.

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31.84 Sale and lease-back agreement as a transaction defrauding creditors

Where it can be shown that the sale of the property was conducted with the intention of putting assets beyond the reach of creditors, then the sale may be challenged as a transaction defrauding creditors (see new guidance in 32). The official receiver would not normally attack the transaction under these provisions, but seek recovery as a transaction at an undervalue.

31.85 Sale and lease-back agreement fees as a transaction at an undervalue

Prior to regulation of the sector, it was not unusual for a sale and lease-back scheme to involve fees that might be described as exorbitant or, certainly, unreasonable. It is likely that the fees paid will be in excess of any true value in the service provided by the sale and lease-back business. Where the official receiver considers this to be the case, any unreasonable fees may be recovered as a transaction at an undervalue.

31.86 Public sector Mortgage to Rent Scheme

The Mortgage Rescue Scheme (“MRS”) is a programme of schemes operated in the public sector to support homeowners in financial difficulties.

Under the MRS, a homeowner whose house is at risk of repossession can apply to their local authority for assistance and support. One of the schemes available under MRS is the Mortgage to Rent Scheme. Under this scheme, the local authority (liaising with the CAB) can negotiate a sale of the property to a Registered Social Landlord (“RSL”), who will then rent the property back to the former homeowner.

Unlike many commercial “sale and leaseback” schemes, one of the key features of the Mortgage to Rent scheme is that the property is purchased by the RSL at market value, following an independent valuation. 10% of the sale price is used to deal with the costs of the conveyance of the property to the RSL.

The fact that the property is transferred at market value means that a property dealt with under the Mortgage to Rent scheme is unlikely to be challengeable as a transaction at an undervalue. The official receiver should, though, inspect paperwork relating to the transfer to satisfy themselves that there are no matters of concern.

31.87 Payments to employees

Where a payment is made under contract, it would be difficult to argue that the transaction was undervalue, as it is likely that the employee would have provided services to the value of the payment made.

Where a payment is made outside of the contract, such as a bonus, it may, in theory, be open to challenge as a transaction at an undervalue. In a liquidation, however, such a payment may be defended as one made in good faith to the benefit of the company – where the goodwill of the employee was necessary during a difficult period financially. A payment made upon termination of employment would be harder to justify on the same basis. This defence is not available in a bankruptcy.

31.88 Birthday, Christmas or other conventional gifts

The fact that a gift is given as a present for a birthday, Christmas or other, similar, celebration or event does not prevent it being open to challenge under the Act. The official receiver, as liquidator or trustee, should seek to recover the gift if this is, otherwise, worthwhile when the value of the item is taken into consideration.

31.89 Purchase of goods or services at an inflated price

It is not just the disposal or undervalue sale of property that could be considered to be a transaction at an undervalue. The purchase of goods or services at an inflated price would also be caught under the relevant provision.

31.90 Offset of a debt by the transfer of property

Where a debtor offsets a debt by the transfer of property to a creditor, this could be considered to be a transaction at an undervalue if the property was worth more than the debt owed. Of course, this transaction could also be challenged as a preference.

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31.91 Rental of property as a transaction at an undervalue

Property transferred on a temporary basis could constitute a transaction at an undervalue. For example where property is rented out by the debtor for insufficient consideration or, conversely, where property is taken on by the debtor on a rental basis at an inflated price.

31.92 Guarantees given as a transaction at an undervalue

Where a debtor gives a guarantee for the debts of a third-party, this is considered to be a transaction at an undervalue which the official receiver, as liquidator or trustee, may seek to attack as a means to recover any payments made under the guarantee or to release the guarantee. Typically, this circumstance will arise where a company has guaranteed the debts of another in the same group or where a bankrupt has guaranteed the debts of a company of which they are a director.

31.93 Charges as transactions at an undervalue

It has been held that where a debtor grants a charge, they do not dispose of property of any value and, therefore, there cannot be a transaction at an undervalue[1]. The granting of a charge could be open to challenge as a preference.

The realisation of a charged assets has the effect of depleting the debtor's assets but also the depletion, or extinction, of the liability secured by the charge and, therefore, there cannot be a transaction at an undervalue.

The sale of an asset at undervalue by a chargeholder could nevertheless give rise to a claim against the vendor[2].

1. Re MC Bacon Ltd [1990] BCLC 325

2. Corbett v Halifax Building Society [2002] EWCA 1849

31.94 Remedies - transactions at an undervalue

This guidance is tailored specifically for official receivers. It is discretionary and not designed for use by third parties. This version was the most up to date guidance available to official receivers as at 16 March 2020.

Unless the claim has been assigned (which is only possible in company cases – see paragraph 31.19) the office holder has the power to apply to court for an order restoring the position where there is evidence that a company or individual has entered into a transaction at an undervalue[1, 2].

The general principle is that, on hearing such application, the court shall make such order as it thinks fit for restoring the position to what it would have been if the company/individual had not entered into that transaction[3, 4]. In this regard, the court has wide discretion as to the order it may make restoring the position. The Act provides a "menu" of possible remedies[5, 6], but the court is not limited to these options. The order can be made against the recipient of the property or their successors in title (though, see paragraph 31.96 for an important defence for innocent third parties).

1. Section 238

2. Section 339

3. Section 238(3)

4. Section 339(2)

5. Section 241(1)(a)-(f)

6. Section 342(1)(a)-(f)

31.95 Discretion of court not to make order

It has been held that the court has discretion to decline to make an order restoring the position (see paragraph 31.94) where, for example, to do so would result in a hardship to the recipient[1]. Examples of this may be where the insolvent passed property to a charity or to employees at the cessation of trade.

The court may exercise discretion not to make an order even where there is evidence that a transaction at an undervalue had taken place – where, for example, the transaction was undertaken to correct a mistake in an earlier conveyance[2].

The court will also consider whether it is worthwhile making the order when the effect of the order may be to restore the insolvent to a worse position than arrived at following the transaction[3].

1. Insolvency Act 1986 section 342(1)(a)-(f)

2. Re Paramount Airways Limited (in administration) [1993] Ch 22

3. Singla v Brown and another [2007] EWHC 405 (Ch)

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31.96 Transactions in good faith – companies only

The court cannot make an order restoring the position (see paragraph 31.94) if it is satisfied[1]

- that the company entered into the transaction in good faith and for the purpose of carrying on its business, an
- that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.

The general principle here is that the court should be satisfied that a reasonable board of directors could have genuinely considered the transaction to be beneficial to the company and the continuation of its business. Hindsight is irrelevant so far as deciding these matters is concerned.

This defence is not available in a bankruptcy case.

1. Section 238(5)

31.97 Position of immediate and subsequent recipients of the property

The position of the recipient of the property is irrelevant so far as deciding whether or not a transaction at an undervalue has taken place. It matters not whether the recipient was aware of, or was ignorant of, the financial position of the debtor[1].

Where the property is transferred from the recipient to a third party, the third party is protected from being subject to an order restoring the position if the property was acquired in good faith and for value[2] [3]. Where the third party who acquired the property had knowledge of the proceedings and surrounding circumstances, or is an associate or connected person, then the onus to prove good faith is on that person[2] [3].

1. Re Barton Manufacturing Co Ltd [1998] BCC 827

2. Section 241(2)(a)

3. Section 342(2)(a)

31.98 Effect of remedy on recipient of property

This guidance is tailored specifically for official receivers. It is discretionary and not designed for use by third parties. This version was the most up to date guidance available to official receivers as at 16 March 2020.

When deciding on the appropriate remedy to be ordered to restore the position of the estate, the court may also make an order providing for the extent to which the recipient of the property may prove in the proceedings as a creditor[1, 2]

1. Section 241(1)(g)

2. Section 342(1)(g)

31.99 Misfeasance – companies only

The entering into a transaction at an undervalue may constitute a misfeasance and breach of duty on the part of the director(s) and, therefore, the liquidator may also consider bringing an action for misfeasance[1].

The advantage of this over an action to recover a transaction at an undervalue is that an order can be made against the director(s) to repay the sums personally.

An action for misfeasance may be brought alongside an action to recover a transaction at an undervalue, though the loss may only be recovered once and any sums recovered must not exceed the amount originally lost to the company.

1. West Mercia Safteyware v Dodd [1998] BCLC 250

Common themes

31.100 Summary

Several of the provisions in the Act relating to antecedent recoveries have common themes, such as a presumption of intent for parties associated to the insolvent or the consequence of insolvency at a relevant time.

The following paragraphs provide a reference source for other parts of this guidance.

31.101 Commencement of a winding up

Where an order is made for the winding-up of a company by the court, the winding-up is deemed to commence at the time of the presentation of the petition[1]. The use of the word “time” in the relevant provision of the Act would suggest that the winding-up begins at the precise time of the day that the order was made.

If the company was in voluntary liquidation prior to the making of the compulsory winding-up order then the commencement is the time when the resolution for winding-up was passed, though dispositions in the voluntary winding-up are deemed to be valid unless the court, on proof of fraud or mistake, directs otherwise.

If the winding-up follows an administration, the commencement of the winding-up is the date of the making of the administration order.

1. Section 129(2)

31.102 Commencement of bankruptcy

A bankruptcy commences on the day on which the order is made[1].

1. Section 278

31.103 Inability to pay debts - companies

For a company, the circumstances in which it is deemed to be unable to pay its debts are listed in the Act[1]:

- if a creditor in a sum exceeding £750 has served the company with a statutory demand requiring the company to pay the sum due and the company has, for a period of three weeks, failed to pay the sum due[2]
- if an execution or other process issued on a judgement, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part[3]
- if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities[4]

If there are unpaid invoices, it may be inferred that the company is unable to pay its debts[5].

In the case of a transaction at an undervalue, where the recipient of the property is a connected party (see paragraph 31.105), there is an assumption that the company was unable to pay its debts at the relevant time, unless it can be shown otherwise[6].

1. Section 123

2. Section 123(1)(a)

3. Section 123(1)(b)

4. Section 123(2)

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5. Taylor's Industrial Flooring [1990] BCC 44

6. Section 240(2)

31.104 Insolvency – bankruptcy

In a bankruptcy case, with regard to a transaction at an undervalue or a preference, the individual is considered to be insolvent if:

- they are unable to pay their debts as they fall due[1], or
- the value of their assets is less than the amount of their liabilities[2]

For transactions at an undervalue there is a presumption of insolvency, unless the contrary can be shown, where the transaction was entered into with an associate (see paragraph 31.106) of the debtor (other than by reason of employment[3].

1. Section 341(3)(a)

2. Section 341(3)(b)

3. Section 341(2)

31.105 Connected parties (company)

Under the provisions of the Act, a person is connected with a company if:

- they are a director or shadow director of the company or an associate (see paragraph 31.106) of such a director or shadow director, or
- they are an associate (see paragraph 31.106) of the company

A shadow director is defined in the Act as "a person in accordance with whose directions or instructions the directors of the company are accustomed to act". The Act goes on to give an exemption where the advice is given in a professional capacity[1].

1. Section 251

31.106 Associates - general

Under the definition provided by the Act, a person is an associate of an individual if that person is:

- the individual's husband, wife or civil partner
- a relative (see paragraph 31.108) of:
    - the individual, or

    - the individual's husband, wife or civil partner, or
- the husband or wife or civil partner of a relative of –
    - the individual, or
    - the individual's husband or wife or civil partner[1]

Additionally, a person is an associate (see paragraph 31.106) of any person with whom they are in partnership, and of the husband or wife or civil partner or a relative of any individual with whom they are in partnership[2].

Further, a person is an associate (see paragraph 31.106) of any person whom they employ or by whom they are employed[3]. A director of a company is treated as an employee of the company[4]. Note, though that an employee does not count as an associate (see paragraph 31.106) for the provisions of Act relating to the presumption of desire to prefer (see paragraph 31.24).

1. Section 435(2)

2. Section 435(3)

3. Section 435(4)

4. Section 435(9)

31.107 Reputed husband, wife or civil partner

References in the relevant provision of the Act to husband, wife or civil partner are to be taken to include a former or reputed husband, wife or civil partner[1].

It has been held that the phrase 'reputed husband, wife or civil partner' refers to a couple who, although not married, hold themselves out to be husband and wife – for example, where the woman had taken their partner's name as if they were married. The court has held that the phrase means the 'habit or reputation' of marriage and does not include couples who simply co-habit. Even if a couple are in a relationship which has all the features of a marriage, they are not considered to be 'reputed husband, wife or civil partner' unless they hold themselves out to be husband and wife or civil partners[2].

1. Section 435(8)

2. Smutwaite v Simpson-Smith and Mond (No.2) [2006] BPIR 1438

31.108 Relatives

This guidance is tailored specifically for official receivers. It is discretionary and not designed for use by third parties. This version was the most up to date guidance available to official receivers as at 16 March 2020.

A relative of a person is defined as “the individual’s brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant”. The Act goes on to state that any relationship of the half-blood is to be considered of the full-blood and the stepchild or adopted child of a person is to be considered as their child. Additionally, an illegitimate child is to be considered the legitimate child of their mother and reputed father[1, 2].

1. Section 435(8)

2. Smutwaite v Simpson-Smith and Mond (No.2) [2006] BPIR 1438

31.109 Associate of a company

A company is an associate of another company if:

- the same person has control (see paragraph 31.110) of both, or
- a person has control (see paragraph 31.110) of one and persons who are their associate (see paragraph 31.106) or themselves and persons who are their associate (see paragraph 31.106), have control of the other, or
- a person has control (see paragraph 31.110) of one and themselves and persons who are their associate (see paragraph 31.106) have control of the other
- a group of two or more persons has control of each company, and the groups either consist of the same persons, or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom they are an associate. For example, if one company is controlled by a husband and wife and the other is controlled by that same husband and their wife’s brother[1]

The relevant provisions apply to companies in countries outside England and Wales (that is, a company outside England and Wales can be considered to be connected to a company registered in England and Wales)[2].

1. Section 435(8)

2. Smutwaite v Simpson-Smith and Mond (No.2) [2006] BPIR 1438

31.110 Control of a company

A person is considered to have control of a company if[1]:

- the directors of the company (or of another company which has control of it) are accustomed to act in accordance with their directions or instructions, or

- they are entitled to exercise, or control the exercise of, one third or more of the voting power at any general meeting of the company or another company that has control of it;

Where two or more persons together satisfy either of the above conditions, they are to be taken as having control of the company.

1. Section 435(8)

31.116 Antecedent recoveries and deceased insolvents

The provisions in the Act relating to antecedent recoveries apply to deceased insolvents (see chapter 54) as they do to bankrupts with one small amendment. The time limits for seeking an order to recover a preference, or a transaction at an undervalue, ends not with the making of the bankruptcy petition, but with the death of the debtor.

31.117 Antecedent recoveries – misconduct

Antecedent recoveries are made under civil law although the facts giving rise to such recoveries may also lead to prosecutions for criminal offences and may be considered in disqualification proceedings or as conduct befitting a Bankruptcy Restriction.

In the period leading up to the formal insolvency, persons connected with a company or the individual subject to bankruptcy may have been aware of the difficulties and impending failure in advance of creditors. It is possible that steps may have been taken to reduce some liabilities rather than others, to give some advantage over the general body of creditors or to undertake some other transaction which would put assets beyond the reach of creditors. It is necessary to consider whether any actions have been taken to subvert the equitable principles of insolvency taking into consideration when the company or individual first became insolvent or became insolvent for the last time and whether the actions adversely affected creditors generally.

Advice on the misconduct aspect of an antecedent recovery may be found in the Enforcement Investigation Guide.