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32. Antecedent recoveries – other antecedent recoveries

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Introduction

32.1 Introduction

The main purpose of liquidation and bankruptcy proceedings is to effect an orderly and equitable realisation and distribution 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 or more creditors being treated more favourably than another, the transaction may give rise to recovery rights by the liquidator or the trustee. Similarly, if a person other than a creditor has benefited from the company or bankrupt to the detriment of creditors generally, the Insolvency Act (The Act) may provide a remedy. These remedies would generally be termed “antecedent recoveries”. The Act provides the liquidator or the trustee with opportunities to recover assets/monies and/or to avoid certain events for the benefit of all creditors.

32.2 Scope of this guidance

This guidance gives advice and information on forms of antecedent recovery other than preferences and transactions at an undervalue (which are covered in 31 – Antecedent recoveries).

Realisation of antecedent recoveries

32.3 Identifying potential recoveries

The recoveries referred to in this guidance are not likely to be scheduled as assets in the bankrupt’s application or the Preliminary Information Questionnaire (PIQB/PIQC). The information contained therein, however, may be used to establish the occurrence of an event/transaction which could lead to recovery action. For instance, transactions which have removed property from the company’s or the bankrupt’s estate.

Where a property or other asset, (collectively referred to as property), has been sold or otherwise transferred the official receiver, acting as liquidator or trustee, should seek to satisfy themselves that the property was transferred at a fair market value. Any transaction with a relative or associate of the company or bankrupt should be investigated.

32.4 Antecedent recoveries contractor

The Service has an agreement with Clarke Willmott for them to act in all antecedent recovery matters) on the official receiver’s behalf. Paragraphs 31.5 to 31.15 give an overview of the agreement and procedures relating to it.

32.5 Further guidance

Further guidance on the realisation of antecedent recoveries can be found in paragraphs 31.16 to 31.21

Antecedent recoveries – common themes

32.6 See paragraphs 31.100 – 31.117 for guidance on common themes

Avoidance of charges - companies only

32.7 Avoidance of charges – general

Charges can be avoided on two grounds:

- due to provisions in The Act relating to the creation of floating charges in the period leading up to winding-up (these are covered paragraphs 32.9 to 32.23), or
- due to provisions in the Companies Act 2006 relating to the non-registration of charges (which are covered in paragraphs 32.24 to 32.31).

32.8 Realising antecedent recoveries

As explained in paragraphs 31.16 or 31.21, all antecedent recoveries are handled by The Service's antecedent recovery contractor.

32.9 Floating charges – general

A floating charge is a charge on property that is constantly changing in value and identity (for example, stock, book debts and work in progress). Although rare, it is theoretically possible for a fixed charge to be created over changing assets[1].

The essential characteristic of a floating charge which distinguishes it from a fixed charge is that a floating charge does not attach to a specific item of property. The holder of a floating charge has no right to possession of the assets covered by the charge until one of the events specified in the charge instrument causes the charge to crystallize[2]. In the meantime, the chargor is left free to use the charged asset and

remove it from the charge without the prior consent of the chargeholder[3]. When the property passes out of the ownership of the company (due, for example, to the sale of the item), it ceases to be subject to the charge. Conversely, where the company acquires property, for example, the purchase of new stock, that stock will become subject to the charge.

1. Re Cimex Tissues Ltd [1994] BCC 626

2. Cimex Tissues Ltd [1995] 1 BCLC 409

3. Re Spectrum Plus Ltd (in liquidation) [2005] 2 AC 680

32.10 Avoidance of floating charges under the Insolvency Act 1986 – purpose of provisions

The Act contains provisions to ensure that creditors who obtain floating charges in the period leading up to the winding-up do something to deserve the charge and are not simply seeking to convert unsecured debt into secured debt. The consequence being that they are put into a better position in the event of the company being wound up[1].

1. Section 245

32.11 Avoidance of floating charges - administration

It should be noted that the provisions of The Act dealing with the avoidance of charges includes charges created in the lead up to an administration. This aspect is not dealt with in any detail in this guidance because it does not apply to the work of the official receiver. Suffice to say that the principles and effects of those provisions are largely the same as those relating to compulsory liquidation.

32.12 Avoidance of floating charges under the Insolvency Act 1986 – general principles

The general principle of the provisions in The Act relating to the avoidance of floating charges is that a floating charge created in the period leading up to the winding-up of the company) is automatically void unless the charge relates to the provision of new monies, goods or services, or the discharge or reduction of a debt[1] (see paragraphs 32.14 – 32.22). The provisions do not cover fixed charges unless that charge was originally created as a floating charge[2]. The granting of a fixed charge may be

challenged as a preference (see guidance on preferences in paragraphs 31.22 – 31.52)

1. Section 245(2)

2. Section 251

32.13 Relevant time

The period during which the creation of a floating charge would be avoided under the provisions in the Act are as follows:

- for connected parties (see paragraph 31.105), two years ending with the presentation of the winding up petition[1]. The company need not have been insolvent at the time of the creation of the charge
- for non-connected parties, 12 months ending with the presentation of the winding up petition[2] and with the company being unable to pay its debts at the time of the creation of the charge or if it became unable to pay its debts as a consequence of the transaction under which the charge was created[3]

Whether a person is connected or not is relevant at the date of the charge rather than the date of winding up. If the person subsequently changes status, from connected to unconnected or vice-versa, it will not affect the relevant time consideration.

1. Section 245(3)(a)

2. Section 245(3)(b)

3. Section 245(4)

32.14 Giving of new value

As outlined in paragraph 32.14, a floating charge granted during the relevant time (see paragraph 32.13) is automatically void except to the extent that there is a corresponding benefit to the company. This is commonly referred to as “new value” The Act provides that new value is the aggregate of[1]

- money paid, or goods or services supplied[2]
- the discharge or reduction of any debt of the company[3]
- interest payable in relation to the above[4]

A creditor would be able to rely on their charge and therefore have a higher priority in the liquidation to the extent that the charge related to the amount of new value outlined above. Other sums owing under the charge would fall to be dealt with as an unsecured debt.

Crucially, the new value must be given either at the same time as the charge is granted or following the granting of the charge to qualify for the exception.

1. Section 245(2)

2. Section 245(2)(a)

3. Section 245(2)(b)

4. Section 245(2)(c)

32.15 Goods or services as new value

The terms “goods” or “services” are not defined in The Act. The service would normally be expected to involve the provision of skill or labour, or the provision of facilities. There is also some doubt as to what is covered by the term “goods”. In the definition given in the Sale of Goods Act[1] many forms of consideration which arise in the normal course of business would be excluded.

In the absence of any case law on the matter it is thought that the terms goods and service should be given the widest interpretation for the purpose of these provisions of The Act. Ultimately, where there is doubt as to whether or not goods or services have been provided it is advisable to seek the advice of Clarke Willmott prior to a formal instruction.

1. Sale of Goods Act 1979 section 61(1)

32.16 Money as new value

For money to qualify under the “new value” exception it would be necessary for the beneficiary of the charge to make a transaction in the manner of a money payment. This does not necessarily have to be cash. It may be a cheque or a direct bank transfer. It is important that there is a real payment of money. It will not be sufficient for the monies to be paid and then immediately returned to the beneficiary. Likewise an agreement not to press for repayment of a debt does not qualify as a money payment. In short, the company must receive a money payment that it can keep and use[1].

1. Re Matthew Ellis Ltd [1933] Ch 458

32.17 Discharge or reduction of a debt as new value

There is no special interpretation to be applied to the term “discharge or reduction of a debt” when deciding whether the transaction constitutes “new value”. It should be

noted that the debt discharged or reduced does not have to be one owing to the person obtaining the charge, it may be a debt owed to a third party. The important thing is that the charge is given in consideration of the reduction (see paragraph 32.20).

32.18 Interest as new value

As well as applying to new money, new goods or services or the discharge or reduction of a debt, the extent to which a charge is not avoided can also apply to interest payable on the charged debt. The interest should be at a reasonable level and, where it is not, may not be permitted.

An unreasonably high level of interest may also be challenged as an extortionate credit transaction (see guidance on Extortionate Credit Transactions later in this guidance).

32.18 Valuation of the new value

So far as new lending or the discharge or reduction of a debt are concerned, it is unlikely that there would be any question as to the value of the transaction as each of these would be a straight money transaction. That is, the amount due under the charge should relate directly to the amount lent or debt reduced plus any interest payable.

For goods or services provided as new value the official receiver as liquidator should be concerned with the actual value of the goods or services at the time of the transaction and not the price agreed between the company and the chargee[1]. Where necessary the official receiver should consider the use of agents to undertake a valuation.

1. Section 245(6)

32.19 New value must be at same time as giving of charge

In addition to being for new value, the provision of the new monies, goods or services, or reduction of a debt that led to the creation of the charge, must have been in consideration of the charge. That is, given or paid at the same time as, or subsequent to, the creation of the charge in order for the charge not to be avoided.

So far as new monies, goods or services are concerned, the new value must have been provided directly to the company to do with as it wishes[1]. It cannot come with “strings attached”.

The only circumstance where a charge may be created after the transaction would be where there is an equitable charge created by agreement, but formal execution of the charge has yet to take place[2]. That said, if the equitable charge is not registered within 21 days of creation it would be automatically void under provisions in the Companies Act 2006 (see paragraph 32.24)

1. Section 245(2)(a)

2. Power v Sharp Investments Ltd [1994] 1 BCLC 111

32.20 Delay between transaction and charge

A very short delay between transaction and charge may only be allowed if that delay was so short as to be trifling - even where the delay is not the beneficiary's fault. An example of a coffee break between the two events has been given. It does not matter whether the delay was excusable or inexcusable[1].

1. Power v Sharp Investments Ltd [1994] 1 BCLC 111

32.21 Consideration for the charge in "running" accounts

Whilst there is a general principle that any floating charge created over existing debt would be void, it is possible to effectively convert unsecured debt into secured debt in running or ongoing accounts. For example, where a company owes a debt to a creditor, it may give a floating charge to that same creditor in respect of which further lending is granted to validate the charge. Subsequently, when the company makes a repayment to the creditor this payment will be allocated to the earlier unsecured, debt, thereby reducing the proportion of unsecured debt in relation to the secured debt[1].

1. Re Yeovil Glove Co Ltd [1965] Ch 148

32.22 Effect of the avoidance of the floating charge

The main effect of the avoidance of the floating charge is that the creditor will, to the extent that the charge does relate to "new value", lose their status as a secured creditor and charged assets will become free to be dealt with in the liquidation.

The avoidance has no effect on the amount of the debt owed but simply that any part of the debt that does not relate to "new value" can not be covered by the floating charge and thus remains unsecured[1].

1. Re Parkes Garage (Swadlincote) Ltd [1929] 1 Ch 139

32.23 Date of avoidance

The charge becomes invalid as of the date of the winding-up rather than back-dated to the date of the creation of the charge. Therefore, any payments made under the charge prior to the winding-up are not open to challenge under these provisions, but may be open to challenge as a preference (see guidance on preferences in paragraphs 31.22 – 31.52).

On the basis of this principle, the avoidance of the charge would end the appointment of any administrative receiver appointed under the charge created in the relevant, but would not have any affect on actions taken by the receiver in the interim.

32.24 Avoidance due to non-registration of a charge

The Companies Act 2006[1], contains provisions relating to the registration of company charges. A charge must be registered with the Registrar of Companies within 21 days of its creation or, 21 days of the date that the charged property was acquired by the company[2], failing which the charge is void against the liquidator[3]. (see paragraph 32.29). In these circumstances the chargeholder would lose the benefit of their security and would be treated as an ordinary unsecured creditor.

The provisions relate to charged property outside the UK[4], though the time limit in which the charge must be registered is different (see paragraph 32.28).

See paragraph 32.29 for details of the effect of the non-registration of a charge.

1. Companies Act 2006 part 25, chapter 1

2. Companies Act 2006 section 870

3. Companies Act 2006 section 874

4. Companies Act 2006 section 866

32.25 Action to be taken by the official receiver

The official receiver should, in the normal course of events, carry out a search of the register of charges maintained by the Registrar of Companies (see paragraph 32.27). Where there is evidence that a charge has not been registered correctly the

official receiver should seek the appointment of The Service's antecedent recovery contractor, Clarke Wilmott, to take action to avoid the charge.

Where there is doubt as the validity of the charge the official receiver should obtain the certificate issued by the Registrar of Companies when the charge was registered (see paragraph 32.26).

32.26 Registration of a charge

The Companies Act 2006 specifies the types of charges which must be registered[1].

In addition to the company itself, the charge may be registered by any person interested in the charge[2]. This is effected by sending the particulars of the charge, together with any instrument (document) by which the charge is created or evidenced, to the Registrar of Companies[3]. The Registrar of Companies will enter the particulars of the charge in the register[4] (see paragraph 32.27) and issue a certificate[5], which is conclusive evidence that the relevant requirements of the Companies Act have been satisfied[6].

Where the property is in Scotland or Northern Ireland, it is sufficient to send to the registrar a copy of the certificate issued by the registrar in that other jurisdiction, rather than the instrument proving the charge[7].

1. Companies Act 2006 section 860(7)

2. Companies Act 2006 section 860(3)

3. Companies Act 2006 section 860(1)

4. Companies Act 2006 section 869(4)

5. Companies Act 2006 section 869(5)

6. Companies Act 2006 section 869(6)(b)

7. Companies Act 2006 section 867

32.27 Register of charges

The Registrar of Companies is obliged to maintain, in respect of each company, a register of all charges requiring registration under the relevant provisions[1]. The register contains the following particulars[2]:

- the date of its creation or, if the charge already existed on the property when it was acquired by the company, the date of the acquisition
- the amount secured by the charge
- short particulars of the property charged
- the persons entitled to the charge

These details may be viewed at Companies House

1. Companies Act 2006 section 869(1)

2. Companies Act 2006 section 869(4)

32.28 Late registration

In certain cases the 21 day period for registration is automatically extended, for example where the charged property is outside the United Kingdom and extra time is usually needed to obtain a document proving the charge[1] [2].

Otherwise the 21 day period may only be extended with the sanction of the court[3]. In those circumstances the court would need to be satisfied that the failure to obtain registration in time was accidental and did not prejudice the position of the creditors or shareholders of the company[4].

1. Companies Act 2006 section 870(1)(b)

2. Companies Act 2006 section 870(2)(b)

3. Companies Act 2006 section 873

4. Companies Act 2006 section 873(1)

32.29 Effect of non-registration

Failure to deliver to the Registrar of Companies the particulars of a registrable charge within 21 days of its creation may result in a fine for the company and any officers in default[1]. Also the charge, so far as it confers security over the company's property, is void against the liquidator of a company or any creditor of the company[2]. If the charge has not been correctly registered, the appointment of any receiver under that charge will be invalid against the liquidator. The debt due to the charge holder is not avoided but it would only rank as an unsecured debt in the liquidation. Where the charge is avoided, the whole of the debt together with any interest due is repayable on demand[3].

1. Companies Act 2006 section 860(5

2. Companies Act 2006 section 874(1)

3. Companies Act 2006 section 874(3)

32.30 Rectification of errors and omissions

If there are errors or omissions in the particulars which were delivered to the Registrar of Companies the company or an interested person may apply to court for an order that the error or omission be rectified. This also applies to any charges

which have not been registered within the specified time. The court will need to be satisfied that the omission was accidental and had not prejudiced the position of the company's creditors or shareholders[1].

1. Companies Act 2006 section 873

32.31 Keeping of a register of charges by the company

In addition to the requirements to furnish the Registrar of Companies with details of the charge, a company must also maintain a register of charges[1] which is open to inspection[2]. Unlike the provisions regarding registration of the charge, failure to maintain the register does not invalidate the charge, though it can result in a fine for every officer who was in default[3].

1. Companies Act 2006 section 876

2. Companies Act 2006 section 877

3. Companies Act 2006 section 876(4)

Recoveries from directors and other company officers

32.32 Recoveries from directors – general

There are a number of different circumstances where a company director may be liable to recoveries by the liquidator or creditors of a company. In summary those circumstances may be categorised into three areas:

- as a result of a breach of duty or misfeasance
- following misconduct or breach of a specific statutory provision
- as a debtor of the company – for example an overdrawn loan account

32.33 Recoveries from other persons

In certain circumstances recoveries may be made against persons other than the director.

32.34 Actions by the company

It is possible for a company to bring a claim against a director for negligence, misfeasance, breach of statutory duty or breach of fiduciary duty under the common law. The Act provides a mechanism for these types of claims to be brought by creditors, contributories, the official receiver or the liquidator[1]. So far as concerns these types of actions, this guidance will cover only the procedure for the official receiver to bring actions under the Act.

1. Section 212

32.35 Importance of investigating potential recoveries and seeking evidence of breach or debt

The official receiver when investigating the affairs of a company[1] should be aware of any potential recoveries that may benefit the company. This may arise where there has been a breach by the director or where the director owes the company money. The official receiver, as liquidator, will need to establish that the director has committed a breach or owes the company money and attempt to establish the amount of compensation or debt that is due. The official receiver will also need to check that any breach has not been sanctioned by the company.

The evidence that is likely to be appropriate will vary from breach to breach and from company to company and it is not easy to give specific guidance. Studying the examples of breaches and comparing the actions of the director to the requirements the law should assist.

1. Section 132

32.36 Recoveries – general

Unlike other forms of antecedent recoveries, recoveries of the type covered by this Part are not ‘recoveries’ at all in the strict sense of the word, as the court does not necessarily seek to restore the company to a position that it would have been in had a transaction not have taken place. Instead the court will seek to have the director (or other liable person) pay compensation for the loss to the company caused by their action/inaction. It is not intended that the payment should be punitive, that is, to punish the director or other person[1].

1. Morphitis v Bernasconi [2003] Ch 552

32.37 Recoveries for a breach of duty/misfeasance

A director has a duty to act in the best interests of the company and not, for example, to seek personal profit when carrying out their role as director.

Where a director has misapplied, or retained, or become accountable for any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary duty (including a duty of care)[1] in relation to the company[2], the official receiver, as liquidator, can bring a claim in the court, for the court to examine the director's conduct and compel them:

- to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just[3], or
- to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just[4]

These provisions apply equally to any of the company's officers (including a shadow director[5] and a de-facto director)[6] [7] or a company secretary, and the order for compensation may be apportioned between the directors as the court sees fit[8]

1. Re D'Jan of London Ltd [1993] BCC 646

2. Section 212(1)

3. Section 212(3)(a)

4. Section 212(3)(b)

5. Gemma Ltd v Davies [2008] BCC 812

6. Section 212

7. Section 206(3)

8. Re Morcambe Bowling Ltd [1969] 1 All ER 753

32.38 Dealing with a recovery from a director

When the official receiver establishes that a recovery/claim may be made against a director of the company (see paragraph 32.37), they should pass the matter to the Service's antecedent recovery contractor.

In general the official receiver must ensure that they have carried out the full range of functions necessary to fulfil their duties including pursuing bankruptcy proceedings against a director or pursuing a forced sale of property/properties although prior permission from the Senior Official Receiver's team must be sought.

In taking any steps to make recoveries the official receiver must consider the following:

- the likely costs of taking the action and whether in the event the action is unsuccessful that these costs will be indemnified by the contractor

- that the action must represent value for money and there should be a reasonable prospect of a return to the estate after legal costs

Where bankruptcy proceedings are to be pursued then to avoid a conflict of interest, the bankruptcy case should be dealt with by a different official receiver as trustee.

32.39 Directors' duties

The Companies Act 2006 provides a statement of a director's duties, which are split between general duties and specific duties, as follows:

General duties

To promote the success of the company

To exercise independent judgement

To exercise reasonable care skill and diligence

To avoid conflicts of interest

Not to accept benefits from third parties

To declare an interest in a proposed transaction or arrangement with a company

Specific statutory duties

To declare an interest in existing transactions or arrangements

To have the company approve a substantial property transaction

To have the company approve loans or quasi-loans

To have the company approve a payment for loss of office

To obtain a trading certificate (see paragraph 31.4B.88F)

In connection with the company's purchase of its own shares

Whilst this list is not exhaustive and other actions of a director may constitute a breach, it should give some indication of the areas in which the official receiver should direct their enquiries.

32.40 Examples of recoveries for breach of duty/misfeasance

The following are examples of behaviours which could be classed as misfeasance or a breach of duty:

- the director has received monies or other consideration from the company, other than the proper remuneration for services provided, which has resulted in a material loss to the company[1]

- the director has authorised payments or other dispositions of property to himself/herself or to connected persons which has resulted in a loss to the company[2] [3]
- the director has been responsible for the improper investing or payment of the company's money[4] [5] [6]
- the director has been responsible for the payment of dividends out of capital, illegal or ultra-vires dividends/distributions[7] [8]
- the director has been responsible for the non-disclosure to the company of any contracts, dealings or other transactions in which use was made of the company's assets or property, including goodwill, and which has resulted in a material loss to the company[9]
- the director has failed to disclose an interest in a property purchased by the company[10] [11]
- the director has been responsible for any material loss to the company occasioned by the sale, assignment, transfer or property other than in the normal course of business[12]
- the director failed to introduce a proper accounting system into the company[13]
- the director paid redundancy to an ex-employee when none were due and overpaid redundancy to another[14]
- the director failed to read a proposal for insurance before signing it[15]

1. Re Halt Garage Ltd [1982] 3 All ER

2. Re Barton Manufacturing Ltd [1998] BCC 827

3. Mullarkey and others v Broad and another [2008] 1 BCLC 638

4. Re Pantone 485 Ltd, Miller v Bain [2002] 1 BCLC 266

5. Gillespie Investments Limited v Thomas Graham Gillespie [2010] CSOH 113

6. Cook v Green [2009] BCC 204

7. Dovey v Cory [1901] AC 477 HL

8. Precision Dippings Ltd Precision Dippings Marketing Ltd [1986] Ch 447

9. Re J Franklin & Sons Ltd [1937] 4 All ER 43

10. Re Lady Forrest (Murchison) Gold Mine Ltd [1901] 1 Ch 582

11. Re Leeds and Hanley Theatres of Varieties Ltd [1902] 2 Ch 809, CA

12. Viscount of the Royal Court of Jersey v Shelton [1986] 1 WLR 985

13. Re Westlowe Storage and Distribution Ltd [2000] BCC 851

14. Re Brian D Pierson (Contractors) Ltd [1999] BCC 26

15. Re Pantone 485 Ltd, Miller v Bain [2002] 1 BCLC 266

32.41 Breach of duty/misfeasance following professional advice

When a director is subject to an application for recovery, the court may grant relief (allow a lesser amount of some/all of the compensation to be paid) if the director was shown to have acted on professional advice[1] [2]. The court would, however, be unlikely to grant relief to the director if to do so would leave a position where they benefitted from the loss caused to the company or creditors[3].

It is open to the director to seek a contribution from any professional advisors in these circumstances[4].

1. Singer v Beckett; Re Continental Assurance Co of London plc (No.4) [2007] BCLC 287

2. Re Ortega Associates Ltd [2008] BCC 256

3. Re Marini Ltd [2004] BCC 172

4. Re International Championship Management Ltd [2007] BCC 95

32.42 Recoveries for a breach of trust – general

A company director is considered to be a trustee for the company's property which comes under their control[1]. A director who has misapplied, retained or otherwise become accountable for the company's property must make good any resultant losses to the company and/or any personal gains[2]

1. Gwembe Valley Development Co Ltd v Koshy (no 3) [2003] EWCA Civ 1048

2. Flitcroft's Case (1882) 21 ChD, 519

32.43 Claims for misfeasance/breach of duty and the right of set-off

An amount to be ordered by the court to be paid by a director (see paragraph 32.38) cannot be set-off[1] against sums owing by the company to that director[2].

1. Rule 14.25

2. Re Anglo-French Co-operative Society, ex p Pelly (1882) 21 ChD 492, CA

32.44 Recoveries following specific statutory misconduct

The official receiver, as liquidator, may seek a recovery from a director following misconduct defined in the Act, namely:

- fraudulent trading (see paragraph 32.45)
- wrongful trading (see paragraph 32.46)

32.45 Fraudulent trading

If it appears that any business of the company has been carried on with intent to defraud creditors of the company or of any other person, or for any fraudulent purpose, the court may, on the application of the liquidator, declare that any persons (not just company officers) who were knowingly parties to the carrying on of the business in the manner mentioned above are liable to make such contributions to the company's assets as the court thinks fit[1].

For a successful recovery action under the provisions relating to fraudulent trading it is necessary to demonstrate that there was an intent to defraud[2].

Fraudulent trading is also a criminal offence[3]. Information on fraudulent trading as a crime can be found in the Enforcement Investigation Guide.

1. Section 213

2. Morphitis v Bernasconi [2003] Ch 552, Atkinson v Corcoran (2011) EWHC3484

3. Companies Act 2006 section 993

32.46 Wrongful trading

Where a director, former director or shadow director[1], knew or ought to have concluded that there was no reasonable prospect that the company would avoid insolvent liquidation, and took the decision to carry on trading, the court, on the application of the liquidator, may declare that the director is liable to make such contribution to the company's assets as the court thinks proper[2] [3].

Simply allowing the company to continue to trade when insolvent would not put the director in contravention of these provisions. It must be shown that they ought to have known, or concluded, that there was no reasonable prospect of avoiding insolvent liquidation[4].

Information regarding wrongful; trading as a matter of unfit conduct can be found in the Enforcement Investigation Guide.

1. Section 214(7)

2. Section 214(1)

3. Section 214(2)

4. Hawkes Hill Publishing Co Ltd [2007] BCC 937, Roberts v Frohlich (2011) EWHC257

32.47 Wrongful trading – conditions in which the court will make an order

The court will not make an order requiring a director to make a contribution to the company's assets in connection with wrongful trading if it is satisfied that the director, knowing that there was no prospect of avoiding insolvent liquidation, took every step with a view to minimising the potential loss to the company's creditors as they ought to have taken[1]. In reaching this conclusion the court will take into account the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as that director[2] and the actual knowledge, skill and experience of the director[3].

In addition, the court must be satisfied that the company's position was worse as at the date of liquidation than it was when there was knowledge of insolvency to make an order for contribution[4]. It is possible that not all directors would be found liable as each individual's role and knowledge will be separately assessed by the court[5].

1. Section 214(3)

2. Section 214(4)(a)

3. Section 214(4)(b)

4. Re Marini Ltd [2004] BCC 172

5. Singer v Beckett; Re Continental Assurance Co of London plc (No.4) [2007] BCLC 287

32.47 Wrongful trading following professional advice

Where a director takes the decision to continue trading the court may grant relief (allow a lesser amount of contribution to be paid) if they were acting on professional advice[1].

1. Singer v Beckett; Re Continental Assurance Co of London plc (No.4) [2007] BCLC 287

32.48 Recovery in relation to director's remuneration – including pension contributions and benefits in kind

Remuneration might be in the form of a straight salary or benefits in kind such as a company car, health plan or pension contributions.

It has been held that if there is the power of a company to award remuneration to its directors, remuneration cannot be challenged solely on the basis that it was not to the benefit of the company[1]. The court, however, did give examples of general circumstances where a challenge might be appropriate:

- the remuneration is so excessive as to contribute a fraud on creditors
- although the director could receive payment simply for holding office, if the payment was above the amount which might be reasonably paid to the director in question, it might be held to be a gift out of capital

32.49 Remuneration considered to be unreasonable or excessive

Generally, excessive remuneration is remuneration which goes beyond what is reasonable in all circumstances. Reasonableness might be measured in terms of what the company could afford[1 2]. Whilst this is a useful rule of thumb, it should be applied with care and without an over-reliance on hindsight.

Reasonableness cannot be measured by the remuneration that the director and their family need to live on[1] and does not necessarily equate to the market rate for a director[3].

The director should have reasonable grounds for believing that the company can or will be able to afford the remuneration whether on its own or through a third-party (see paragraph 32.50). If not, the remuneration should be deferred or taken as loans (see paragraph 32.53).

1. Re Stanford Services Ltd (1987) BCC 326 at 336

2. Re CSTC Ltd [1995] BCC 173 at 181

3. Re Cargo Agency Ltd [1992] BCC 388

32.50 Decision to fix remuneration

The decision to fix remuneration rests with the company when it operates under Table A of the Companies Acts 1948 or 1985[1 2]. If the directors allow or fail to stop the company paying unreasonable remuneration this might be a matter of misfeasance leading to a civil recovery.

Where the company operates under Table A of the Companies Act 2006[3], it is the directors who fix the remuneration. Any remuneration fixed that is unreasonable

might similarly be considered misfeasance, for which a recovery might be appropriate.

Remuneration that is reasonable when the decision is taken to fix it might become unreasonable following a change of circumstances, such as a change in the company's financial position)[4]. If so, the remuneration should cease, or the company should stop trading[5].

1. Companies Act 1948, Table A article 76

2. Companies Act 1985, Table A article 82

3. Companies Act 2006, Table A article 19(2)

4. Re Synthetic Technology Ltd [1993] BCC 549

5. Re Ward Sherrard Ltd [1996] BCC 418

32.51 Retrospective remuneration

Directors often draw money from the company and only at year end decide whether to account for the drawings as dividends, loans (see paragraph 32.53) or remuneration.

When deciding whether remuneration fixed retrospectively is reasonable, it is necessary to take account of the ascertainable facts when the director took the decision to fix the remuneration and not the position of the company during the period to which the remuneration relates.

32.52 Remuneration and tax liability

Remuneration cannot be justified and would be considered to be excessive if the company cannot afford to pay the tax due on that remuneration.

32.53 Debts owed to the company by a company officer

Where a company officer owes money to the company under a contract or other arrangement (such as an overdrawn loan account), this should be pursued through the normal channels for debt recovery and not, for example, as a matter of misfeasance[1].

In addition, the official receiver should consider if any other company officers may be liable under a breach of duty if the loan was not made with the consent of the company.

1. Re Etic Ltd [1928] Ch 861

32.53 Personal liability following use of a prohibited name

When a company uses a prohibited name (see paragraph 32.55), a person will be personally responsible for any debts incurred when they were involved in the management of the 'new' business and/or incurred at a time when they were acting or willing to act on the instructions of the person restricted from using the name (see paragraph 32.56)[1].

When only part of the business was conducted under a prohibited name, the person will be liable only for those debts incurred under the prohibited name[2].

The person will be jointly and severally liable for the relevant debts with the company[3], and liability is automatic i.e. there is no need for a court order or conviction. When the official receiver is liquidator of the successor company, they should seek a recovery from those liable (see paragraph 32.56).

1. Section 217

2. Glasgow City Council v Craig [2010] BCC 235

3. Section 217(2)

32.54 Restriction on re-use of a company name

When a company goes into insolvent liquidation, the Act[1] provides that any person who has been a director or shadow director of that company in the 12 months prior to the making of the winding-up order[2] is not allowed to use (see paragraph 32.56) the name (known as a prohibited name –see paragraph 32.55) of the company for a period of five years from the day the company went into liquidation[3].

1. Section 216

2. Section 216(1)

3. Section 216(3)

32.55 Prohibited name

A company name becomes a prohibited name if:

it is a name by which the company in liquidation was known at any time in the period of 12 months prior to the making of the winding up order (note that it does not just apply to the registered name), or

- it is name which is so similar to a name used by the company as to suggest an association with that company

32.56 Use of a prohibited name

A person is considered to be using a prohibited name if they

- is a director of a company that is known by the prohibited name, or
- is in any way, whether directly or indirectly concerned or takes part in the promotion, formation or management of any such company, or
- Is in any way, whether directly or indirectly, concerned with or takes part in the carrying on of a business (not a company) under the prohibited name

32.57 Exceptions to restrictions on re-use of a company name

Apart from the person restricted from re-using a prohibited name (see paragraph 32.54) obtaining the permission of court[1] [2], there are three cases where a director will be able to use the name without incurring personal liabilities:

- where the new business/company acquires the whole, or substantially the whole, of the business of an insolvent company, under arrangements made by an insolvency practitioner acting as liquidator, administrator, administrative receiver or supervisor of a voluntary arrangement, and gives notice to the insolvent company's creditors following the procedure in the Rules[3]. If the director applies to the court for permission (see paragraph 32.55) to use the prohibited name (see above) within seven days of the making of the order, they may continue to use the name for a period of six weeks from the date of the winding-up order or until the date that the court deals with the application for permission, whichever is sooner[4]
- where the 'new' business/company has been known by the prohibited name for a period at least 12 months ending on the day of the winding-up order[5]

1. Section 216(3)

2. Rule 22.3

3. Rules 22.4 and 5

4. Rule 22.6

5. Rule 22.7

32.55 Applications for permission to re-use a prohibited name

An application for permission to re-use a company name must be served on the Secretary of State at least 14 days before the hearing[1].

Such applications are dealt with by Investigations and Enforcement Directorate who will contact the official receiver in relevant cases to seek any views on the application.

1. Rule 22.3

32.56 Considerations in respect of an application to re-use a company name

Clearly, where a director wishes to re-use the name it is likely that the name will have some value to the director. The official receiver should therefore consider whether there is in any goodwill value in the name. Such a transfer could be conducted on an informal basis – by an exchange of letters – if the purchasing director were content to proceed in that way. The Secretary of State can advise the court of any prospective sale and the court may make the granting of permission conditional on the payment being made.

32.57 Liability when acting whilst disqualified

Where a person is:

- in contravention of a disqualification order, or whilst an undischarged bankrupt, without leave of court is involved in the management of a company, or
- involved in the management of the company, and they act or is willing to act on instructions given without leave of the court by a person whom they know at that time to be the subject of a disqualification order or to be an undischarged bankrupt

That person will be liable for any debts incurred when they were involved in the management of the company and/or incurred at a time when they were acting or willing to act on the instructions of the disqualified person or undischarged bankrupt[1].

The person will be jointly and severally liable for the relevant debts with the company[2], and liability is automatic – there is no need for a court order or conviction. The creditor may pursue the person for settlement of their debt.

When the official receiver is liquidator of a company where there has been such a breach they should seek a recovery from those liable.

1. Company Directors Disqualification Act 1986 section 15

2. Company Directors Disqualification Act 1986 section 15(2)

32.58 Liability when company has purchased own shares

Where a private company wishes to purchase its own shares, the company's directors must make a statutory declaration specifying the amount of permissible capital payment for the shares in question and stating that there will be no grounds on which the company could be found unable to pay its debts, and will carry on business for at least a year[1].

If the company is wound up within a year of re-purchasing shares out of capital, and the aggregate amount of the company's assets is not sufficient for the payment of its debts and liabilities and the expenses of winding-up, any director who signed the declaration may be liable to contribute to the assets of the company[2].

The directors are jointly and severally liable with the shareholders whose shares were repurchased for the amount received as consideration on the repurchase[2]. A director may be able to avoid such a liability if they can show that they had reasonable grounds for forming the opinion set out in the statutory declaration[3].

In circumstances where the director is obliged to make a contribution under these provisions, the official receiver should pass the matter to Clarke Willmott.

1. Section 709

2. Section 76

3. Section 76(2)(b)

32.59 Trading certificate under the Companies Act

A company registered as a public company (plc) on its original certificate of incorporation must satisfy the Registrar of Companies that it meets the requirements for share capital for such a company before it may commence trading[1]. The company does this by sending a Form SH50 (https://www.gov.uk/government/publications/apply-for-trading-certificate-for-a-public-company-sh50) to the Registrar containing a statement of compliance signed by a company officer[2]. If the Registrar is satisfied with the information provided, they will issue a certificate, often known as a trading certificate[2].

A company re-registering from a private company to a public company does not have to apply for a trading certificate.

1. Companies Act 2006 section 763

2. Companies Act 2006 section 762

32.60 Personal liability in connection with failure to obtain a trading certificate

If a company does business or exercises any borrowing powers without obtaining a trading certificate and then fails to comply with obligations in connection with that activity within 21 days of being called to do so, the directors of the company are jointly and severally liable to indemnify the other party to the transaction in respect of any loss or damage suffered by them by reason of the company's failure to comply with those obligations[1].

1. Companies Act 2006 section 761(2)

32.61 Illegal (ultra-vires) dividends/distributions

A company can declare a dividend only if it has sufficient distributable reserves, as defined by the Companies Act 2006[1]. Any unlawful dividends are repayable by the shareholders in receipt of the payment[2]. In deciding whether the distribution is unlawful, it is irrelevant if the company was solvent at the time of the distribution[3] and ignorance of the law is no defence[4].

Where the directors authorise or fail to stop an unlawful dividend payment being made, this would be misfeasance in respect of which a civil recovery may be made[5].

1. Companies Act 2006 section 830

2. Companies Act 2006 section 847

3. Bairstow v Queen's Moat Houses plc [2001] 2 BCLC 531

4. It's a Wrap (UK) Ltd v Gula [2006] All ER (D) 161

5. Re Loquitor Ltd, Inland Revenue Commissioners v Richmond [2003] EWHC 999

Avoidance of dispositions

32.63 Avoidance of dispositions – general

The purpose of the provisions relating to avoidance of dispositions of property are to ensure that the estate is preserved in the period between the service of the petition and the making of the order. Without the relevant provisions there would be a risk that the directors of the company or the bankrupt may seek to dissipate assets in advance of the making of the order and consequent appointment of a liquidator or a trustee. Additionally, the provisions seek to maintain the principle that the assets of a company or bankrupt are distributed in an ordered manner to avoid any one creditor or person benefiting unfairly.

32.64 Avoidance of dispositions – general rules

So far as companies are concerned, the general rule is that any disposition of property entered into by the company after the commencement of a winding-up is void unless the disposition is authorised or validated by the court[1]. This includes a disposition which benefits the company[2].

For bankruptcies, dispositions of property or payments made after the date of the bankruptcy application or, as the case may be, presentation of the bankruptcy petition and up to the vesting of the estate in the trustee are void unless approved by the court[3].

1. Section 127

2. Gray's Inn Construction Co Ltd [1980] 1 WLR 711

3. Section 284 (3)

32.65 Identifying voidable transactions

Transactions from or to the bank account can be identified from the accounting records or bank statements. Information about the transfer of other assets may be obtained in the interview with the company director or bankrupt. Information may also come from suppliers and/or creditors, such as copies of statements of account which may reveal transactions after the presentation of the petition.

32.66 Recovery of void dispositions

Whilst the Act is quite clear that dispositions after the commencement of the winding-up or presentation of a bankruptcy petition are void (unless the court orders otherwise), it gives no guidance on the consequences of avoiding the disposition, or what should be done about it. It has been held that the invalidation of a disposition of the insolvent's property and the recovery of the property disposed of are two separate matters, and that the remedy is a matter to be decided by general law[1].

In most cases the liquidator or trustee will simply apply to court for an order that the disposition be declared void and the property disposed of be returned or the position restored to what it was prior to the disposition.

1. Re J Leslie Engineers Co Ltd [1976] 1 WLR 292

32.67 Realising voidable transactions

All antecedent recoveries are handled by The Service's antecedent recovery contractor (Paragraphs 31.5 to 31.15 give an overview of the agreement and procedures relating to it).

32.68 Costs in contested proceedings

In contested proceedings the liquidator or trustee will generally be entitled to an order for costs where they are successful. Where the liquidator or trustee is unable to recover their costs, they will be treated as an expense in the liquidation[1] [2].

Where proceedings are unsuccessful the costs are not automatically treated as an expense in the liquidation or bankruptcy[3], but the court may exercise its discretion to allow this[4].

1. Rules 2016 rules 6.44, 7.111 and 7.112

2. Rule 10.149

3. Mond v Hammond Suddards [2000] Ch 40

4. Lewis v Commissioners of Inland Revenue [2002] BCC 198

32.69 Property

Property is specifically defined in the Act to include "money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property"[1].

1. Section 436

32.70 Disposition

The Act gives no definition of the word "disposition". The dictionary definition is given as "a bestowal by deed or gift"[1]. A disposition may be viewed as having occurred where there has been a transaction involving the transfer of ownership rights in assets of the company or bankrupt.

1. The Concise Oxford Dictionary, Ninth Edition, 1996

32.71 Examples of relevant dispositions

The following have been held to be dispositions of a company's property within the meaning of the relevant provision of the Act:

- an outright transfer of company assets, by gift, sale or exchange[1][2][3]
- the grant of a mortgage, charge or lease over the assets[4][5][6]
- the grant of a declaration of trust, or other form of interest, in the assets[7]
- a payment made with company money (including payments made against debts)[8][9][10][11]

1. Re Wiltshire Iron Company (1867-1868) LR 3 Ch App 443

2. Re AI Levy (Holdings) [1964] Ch 19

3. Re Tramway Building and Construction Co Ltd [1988] Ch 293

4. Re International Life Assurance Society (1870) LR 10 Eq 312

5. Re Park Ward & Co Ltd [1926] Ch 828

6. Re Steane's (Bournemouth) Ltd [1950] 1 All ER 21

7. Re Selmar Pty Ltd [1978] VR 531

8. Re Liverpool Civil Service Association ex p Greenwood (1873-1874) 9 Ch App 511

9. Re Clifton Place Garage Ltd [1970] Ch 477

10. Re Western Welsh International System Buildings Ltd (1985) 1 BCC 99296

11. Re Webb Electrical Ltd [1988] 4 BCC 230

32.71 Examples of transactions that are not dispositions

The following have been held to be transactions that are not dispositions of property within the meaning of the relevant provision of the Act:

- a transfer of property held by the company as trustee[1]. This is analogous to the bankruptcy provisions within The Act[2]
- a transfer of property under a contract entered into prior to the commencement of winding up or bankruptcy[3]
- the incurring of liabilities by the company or bankrupt
- the use or consumption of the company's assets by itself or bankrupt by themselves

1. Section 284(6)

2. All Benefit Pty v Registrar General (1993) II ACSR 578

3. French's (Wine Bar) [1987] 3 BCC 173

32.72 Payment to the petitioning creditor

The payment by the debtor of the petition debt in advance of the order being made is not be a voidable transaction provided that the petition is withdrawn as a result of the payment. This is because that a post-petition transaction only becomes voidable once the order is made. Where, however, the petitioning creditor is substituted by another[1] [2] and an order is subsequently made, that payment, to the original petitioner would be recoverable as a voidable transaction[3].

1. Rule 7.17

2. Rules 10.27 and 10.28

3. Re Western Welsh International System Buildings Ltd (1985) 1 BCC 99296

32.73 Disposition of charged property

A disposition of an asset subject to security in favour of a chargeholder would be a voidable transaction in a bankruptcy (unless the disposition was made by the chargeholder), but not in a liquidation[1]. This is because the company provision[2] states that only a disposition of property owned by the company would be voidable, whereas the bankruptcy provision[3] merely refers to property transferred by the bankrupt, apart from property held on trust[4].

1. Re Margart Pty, Hamilton v Westpac [1985] BCLC

2. Section 127

3. Section 284

4. Section 284(6)

32.74 Disposition avoided where floating charge in operation - company only

Where a disposition is declared void and property is recovered as a result, it is considered that the property should be treated as though it had never left the company. Therefore, the property would fall within the scope of a floating charge, and it would be open to an administrative receiver to lay claim to the property[1] where the charge was created before 15 September 2003[2].

1. Mond v Hammond Suddards (No.1) [1996] 2 BCLC 470

2. Enterprise Act 2002 (Commencement No 4 and Transitional Provisions and Savings) Order 2003

32.75 Disposition of property by Trustee where subsequent petition presented

Where the official receiver, as trustee, is dealing with a bankruptcy case and a bankruptcy petition is presented against the same person, the provisions of the Act relating to voidable transactions[1]would not apply to dispositions made by the official receiver, as those provisions apply only to the bankrupt.

There are provisions in the Act[2], however, that have the same effect on the trustee as do those relating to voidable transactions on the bankrupt. These provide that any disposition of property, or monies that are the fruits of the sale of property of the bankrupt is void unless it was made with the consent of the court[3]. This includes monies from IPA/IPOs[4] and property claimed as after-acquired property[5].

1. Section 284

2. Section 334

3. Section 334(2)

4. Section 334(3)(b)

5. Section 334(3)(a)

32.76 Payments into a Company's or bankrupt's bank account – account in credit

Where a Company's or bankrupt's bank account is in credit, any payments into the account after the commencement of the winding up), or the presentation of the petition for bankruptcy, are considered to be invalid dispositions, which may be recovered from the bank. When a company or individual pays monies into an account (whether by cheque or cash), the monies are technically exchanged for a claim against the bank and this transaction counts as a disposition[1].

Assuming that the bank is solvent, the fact that the deposits are considered to be invalid transactions is academic as the bank will be required to remit the balance on the account to the liquidator or trustee in bankruptcy.

1. Re Gray's Inn Construction Co Ltd [1980] 1 WLR 711

32.77 Payments into a Company's or bankrupt's bank account – account overdrawn

Where the account is overdrawn, any monies paid into the account during the relevant period will result in the company's or bankrupt's indebtedness to the bank

being cleared in part or in full. Such a transaction would count as a disposition which would be void under the relevant provisions of the Act and may be recovered from the bank.

32.78 Payments out of a company's or bankrupt's bank account – account in credit

Where the Company's or bankrupt's bank account is in credit any payments out of the account are considered to be in favour of the payee, rather than the bank, and recovery action would, accordingly, be against the payee and not the bank[1].

1. Bank of Ireland v Hollicourt (Contracts) Ltd [2001] Ch 555

32.79 Payments out of a Company's or bankrupt's bank account – account overdrawn

When a bank authorises a payment from an overdrawn account, this is effectively a further loan from the bank to the company or bankrupt. The honouring of the payment by the bank cannot, therefore, be a disposition of the Company's or bankrupt's property. When the bank as agent consequently passes this "loan" money on to the payee, it becomes a disposition of property as, by then, the "loan" money has become the company's or bankrupt's property. The monies are recoverable by the liquidator or trustee from the payee[1].

1. Coutts & Co v Stock [2000] 1 WLR 906, Train Construction Ltd Rose v AIB Group (UK) Plc (2003) EWHC

32.80 Transfer of shares

The transfer of shares in a company and alterations in the status of its members made after the commencement of the winding-up are void under the relevant provisions, unless validated by the court.

32.81 Disposition pursuant to an order of court

Where a disposition made during the relevant period is made in compliance with a general court order, it will still be void unless ratified by the insolvency court[1]. Where the party who benefitted from the order has incurred costs in enforcing the order and that order has resulted in a benefit to the estate (such as tracing assets), the court may allow those costs to be recovered from the estate[2]. A court order ordering a

transfer of property would not constitute a disposition but steps taken in compliance with it would[3].

1. Re Flint [1993] Ch 319

2. Treharne v Forrester [2003] EWHC 2784 (Ch)

3. Re Mordant [1995] BCC 209

32.82 Increase in value of disposed property

Where the disposed property increases in value by the operation of market forces, the liquidator or trustee should reclaim the original property and any increase in value arising since the disposition. Where, on the other hand, the property has increased in value due to actions on the part of the person who acquired the property (perhaps, due to sensible investment or improvements made) the liquidator or trustee may be required to compensate the beneficiary for an amount equal to the increase in value caused by their actions[1].

1. Greenwood v Bennett [1973] QB 195

32.83 Effectiveness of avoidance of disposition provisions

The relevant provisions of the Act have no effect until the winding-up commences, or the bankruptcy order is made. All dispositions entered into after the date of the presentation of the petition are valid at the time that they are carried out, but will become void (subject to court approval) if a winding-up order or bankruptcy order is subsequently made. Once a winding up order or bankruptcy order is made an earlier post-petition disposition will become retrospectively void and its validity will be dependent on whether the court is minded to validate it.

Post winding-up dispositions would also be caught by the provisions of the Act, though this does not affect the liquidator's or trustee's ability to dispose of the company's or bankrupt's property[1] [2].

1. Insolvency Act 1986 schedule 4, paragraphs 6, 10 and 13

2. Insolvency Act 1986 schedule 5, paragraphs 9, 12 and 13

32.84 Moratorium in advance of a CVA

Where directors of an eligible company obtain a moratorium to enable them to put forward proposals for a CVA the operation of the relevant provision of the Act[1]is suspended for the duration of the moratorium[2].

1. Section 127

2. Insolvency Act 2000 section 1 and schedule 1, paragraph 12(2)

32.85 No effect on administrator while petition suspended

The relevant provisions of the Act have no effect in respect of anything done by an administrator of a company while a winding-up petition is suspended[1].

1. Section 127(2)

32.86 Validation of post-petition dispositions

The Act sets no guidelines or statutory guidance as to the principles that should be applied when a court is deciding an application for the validation of a post-petition disposition. Courts have viewed that the exercise of discretion in this respect has been left to the same general principles which apply to every kind of judicial discretion[1].

Provided a person has some discernable interest in the matter, they have standing to make application for the validation of a post-petition disposition. This might include, for example, shareholders or creditors of the company[2].

The following paragraphs outline the matters that may be taken into consideration by courts when deciding this type of application.

1. Re Steane's (Bournemouth) Limited [1950] 1 All ER

2. Re Argentum Reductions (UK) Ltd 1974 WL 41939

32.87 Validation before or after the order

An application for validation may be made before or after the transaction becomes void. The application can also be made in advance of the transaction, to gain the court's approval of a particular disposition or a general continuation of trading[1].

1. Re Al Levy (Holdings) Ltd [1964] Ch 19

32.88 Validation – benefit to creditors

The court's primary concern is to establish whether the proposed/past transaction will/did benefit the general body of creditors[1]. The court will not normally allow a transaction that benefits a sole creditor, or group of creditors or another person, unless there are special reasons - for example, if the transaction is necessary for

continued trading that will/has the benefit of improving the position of the business – see paragraph 32.89 for further information on validations of continued trading[2].

Approval will tend to be given where assets are sold at a fair market value, as this would not change the overall position of the insolvent[3].

1. Re Burton and Deakin Ltd [1977] 1 WLR 390, Wilson v SMC Properties Ltd (2015) EWHC 870

2. Re Webb Electrical Limited (1988) 4 BCC 230

3. Re Fairway Graphics Limited [1991] BCLC 468

32.89 Validation – continuance of trading

The court may give a general validation to the continuation of trading where that continuation would lead to the business being preserved to allow it to be sold as a going concern[1]. In deciding whether to allow continued trading the court will need to consider whether the interests of unsecured creditors are being met[2] and the financial position of the company. Where the company is considered to be irretrievably insolvent it is unlikely that validation will be given[3].

It may be beneficial to the general body of creditors for the court to validate the completion of a contract that the insolvent is engaged in.

1. Re Wiltshire Iron Co (1867-1868) LR 3 Ch App 443

2. Re Gray's Inn Construction Co Ltd [1980] 1 WLR 711

3. Re a Company (No 007523 of 1986) (1987) 3 BCC 57

32.90 Validation – disposition in good faith and in ignorance of the petition

Courts have tended to give validation where dispositions were made in good faith, in the ordinary course of business and where the parties were unaware that the petition had been presented, unless the transaction appeared to involve an attempt to prefer the recipient[1].

For a party to successfully argue that they were without notice of the service of the petition, it will normally be necessary to show that the transaction took place before the advertisement of the petition[2]. The advertisement of the petition is considered to constitute notice to the whole world[3].

1. Denney v John Hudson and Co Ltd [1992] BCC 503

2. Hollicourt (Contracts) Ltd v Bank of Ireland [2000] 1 WLR 895

3. Re J Leslie Engineers Co Ltd [1976] 1 WLR 290 CA

32.91 Validation - disposition entirely post-petition

Where the disposition is due to an entirely post-petition event (i.e. where both the supply of goods and payment for those goods were made after the petition), the court will normally validate the transaction. This is because there would be no dissipation of the insolvent's property provided that the equivalent value is being given and received[1]. Where the transaction is at an undervalue validation is unlikely to be given.

1. Re Gray's Inn Construction Co Ltd [1980] 1 WLR 711

32.92 Validation – payment in respect of pre-petition debts

Normally, the court will not validate a transaction which involves the payment of a creditor, or a group of creditors or another person, to the detriment of the general body of creditors (see paragraph 32.88). Validation may be given, however, where, such a payment would have the result of benefiting the general body of creditors, for example a business paying arrears in respect of a lease to allow that lease to be sold when it might otherwise have become forfeit[1].

1. Re AI Levy (Holdings) Ltd [1964] Ch 19

Extortionate credit transactions

32.93 Extortionate credit transactions - introduction

The provisions of the Act relating to extortionate credit transactions[1] [2] allow the liquidator or trustee to apply to court for credit transactions to be adjusted. For instance when the company or bankrupt has been charged an unfairly high rate of interest, has been subject to unfair credit terms (such as severe default provisions) or was in a vulnerable position at the time of the transaction. It has to be said that applications to adjust credit transactions under the Act are very rare and there appears to be no case law on the matter. There have been, though, applications to adjust credit transactions under similar provisions in the Consumer Credit Act 1974 (see paragraph 32.94) which give some idea as to how the courts view matters in this regard.

The difficultly in bringing actions is thought to be as a result of the wording of the Act that requires the terms of the credit transaction to be not just exorbitant but “grossly” exorbitant (see paragraph 32.100)[3] [4].

1. Section 244

2. Section 343

3. Section 244(3)

4. Section 343(3)

32.94 Legislative background

The relevant provisions in the Act are based on similar provisions in the Consumer Credit Act 1974 which allowed debtors to challenge unfair and extortionate terms in credit agreements. It should be noted that these provisions were repealed and replaced by provisions relating to “unfair relationships” in the Consumer Credit Act 2006[1], though the 2006 Act has no effect on existing insolvency legislation.

1. Consumer Credit Act 2006 section 19

32.95 Realising an excessive credit transaction

All antecedent recoveries are handled by The Service’s antecedent recovery contractor, Clarke Wilmott.

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

- the date of the presentation of the winding-up or bankruptcy petition
- a copy of the agreement entered into
- an explanation of the company’s/bankrupt’s circumstances when they entered into agreement
- any explanations given by the company director or bankrupt for entering into the agreement
- a statement of account with the creditor

32.96 Vulnerable transactions

Under the provisions of the Act the following credit transactions are vulnerable to an action for adjustment by the office holder:

- where 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[1] [2], or
- where it grossly contravened ordinary principles of fair dealing[3] [4]

There is no definition on the Act of what constitutes “grossly exorbitant”, but case law decided under the similar provisions of the Consumer Credit Act 1974 give some indication of the considerations by courts in deciding such matters. These are outlined in paragraph 32.104.

1. Section 244(3)(a)

2. Section 343(3)(a)

3. Section 244(3)(b)

4. Section 343(3)(b)

32.97 Burden of proof

If the liquidator/trustee considers that a credit transaction or agreement is extortionate, they may apply to the court for an order setting it aside (see paragraph 32.96). Unlike many of the other provisions relating to the recovery of transactions, the burden of proof in actions to adjust extortionate credit transactions is on the creditor to prove that the transaction was not extortionate or otherwise unfair[1] [2].

1. Section 244(3)

2. Section 343(3)

32.98 Time limit

In order for a transaction to be successfully challenged it must have been entered into within three years of the date of the making of the winding up or the bankruptcy order[1] [2].

1. Section 244(2)

2. Section 343(2)

32.99 Provision of credit

For a transaction to be vulnerable to an action for adjustment it must be a transaction for, or involving, the provision of credit.

The term “credit” is not defined in the Act but is defined in the Consumer Credit Act 1974 as including a “cash loan and any other form of financial accommodation”[1].

It can be taken, therefore, that any transaction entered into by a debtor for those things that would normally be recognised as credit transactions (such as loans, hire-purchase or deferred payment) are capable of being caught under the wording of the Act, as are any matters related to the credit transaction, such as the provision of security.

1. Consumer Credit Act 1974 section 9

32.100 Grossly exorbitant terms or unfair contravention of principles of fair dealing

The Act requires that the terms entered into, or the circumstances where the debtor entered into the credit agreement, to be grossly exorbitant or grossly contravening the ordinary principles of fair dealing[1] [2]. In order, therefore, that a transaction could be successfully overturned, the official receiver, as liquidator/trustee, would need to demonstrate that the transaction, or the terms of the transaction, were unfair or exorbitant to a large margin against the norm. It should be noted that the transaction does not have to have been taken out in unfair circumstances and contain unfair terms to be capable of being adjusted. It would be sufficient to demonstrate either feature.

1. Section 244(3)

2. Section 343(3)

32.101 Grossly exorbitant terms – interest rate

In the context of this chapter the most important term to any credit transaction is usually the interest rate. It is this term that is most likely to be subject to scrutiny when considering whether or not a credit transaction contained grossly exorbitant terms.

Neither the Act nor the Consumer Credit Act(s) give any indication as to a level of interest that would be considered to be grossly exorbitant. This may appear to be an oversight but it is considered that were there to be a prescribed level then creditors may be afforded the opportunity to structure credit terms in such a way as to avoid falling foul of the prescribed level. In other respects, the setting of a prescribed level may have the effect of stifling credit lending as lenders who would otherwise have lent in high risk circumstances (albeit, at a higher than usual level of interest) may be discouraged by the possibility of the transaction being adjusted at a later date. It would be difficult to set a level that would automatically have the effect of avoiding both possible consequences and, in the event, matters have been left to the courts to decide.

There have been cases decided which give some indication as to the mind of the court when deciding these matters. The highest level of interest to be unsuccessfully challenged was 48% (where the lender took considerable risk lending the money, and provided it quickly)[1] but lower rates of interest have been successfully challenged. In cases where good security was given, rates of 42% and 39% have been successfully challenged.

Of course, ultimately each case will turn on the facts. Paragraph 32.102 contains an overview of the areas likely to be considered by a court when deciding matters.

1. Ketley v Scott [1981] ICR 241 and White V Davenham Trust Ltd (2011) BCC 77

32.102 Matters to be considered when deciding whether an interest rate is grossly exorbitant

As outlined in paragraph 32.101, the rate of interest charged is not in itself always sufficient to persuade the court that it is grossly exorbitant. The rate charged must be considered alongside other factors, such as:

- security – generally, interest should be charged at a lower rate where security is given
- sisk – The higher the level of risk to which the lender is exposed, the higher the rate of interest to be expected. A poor credit rating normally equals a greater risk
- urgency – Where the borrower requires the money urgently and, perhaps, leaves the lender insufficient time to do the normal credit checks, the rate of interest charged might be expected to be higher

32.103 Other potentially grossly exorbitant credit terms

The rate of interest charged may not be the term in a credit transaction that could be considered to be grossly exorbitant. Matters such as the redemption terms, upwards movement in the interest rate charged contrary to the underlying rate or severe default provisions may also be considered.

32.104 Grossly contravening the ordinary principles of fair dealing

There is no prescriptive list of the types of matters that would constitute a credit transaction contravening the ordinary principles of fair dealing. Some examples are as follows:

- an agreement signed without the borrower having proper opportunity to read the terms and conditions
- an agreement entered into in threatening or intimidating circumstances
- an agreement entered into in breach of the relevant Consumer Credit Act provisions, such as those relating to the regulations on advertising
- an agreement entered into at a time, or in circumstances, where the borrower was vulnerable
- where the borrower was induced to enter into the agreement by false or misleading statements
- where important details have been hidden in the small print
- where interest is charged on monies not lent (such as a first payment deducted from the amount advanced)

32.105 Exorbitant credit transactions – advice

Where there is doubt as to whether a credit agreement is in breach of the relevant Consumer Credit Act, advice may be sought from the local Trading Standards Department. Contact details can be found at https://www.gov.uk/find-local-trading-standards-office.

32.106 Remedies

Having found the transaction to have extortionate terms, or to be contrary to the ordinary principles of fair dealing, the court has wide-ranging powers to adjust the transaction. Specifically, the court may order one or more of the following[1] [2]

- provision setting aside the whole or any part of any obligation created by the transaction
- provision otherwise varying the terms of the transaction or varying the terms on which any security for the purposes of the transaction is held
- provision requiring any person who is or was party to the transaction to pay to the liquidator/trustee any sums paid to that person, by virtue of the transaction, by the debtor
- provision requiring any person to surrender to the liquidator/trustee any property held by themselves as security for the purposes of the transaction
- provision directing accounts to be taken between any persons

The court is not obliged to make an order, however, even where it finds that the transaction was exorbitant.

1. Section 244(4)

2. Section 343(4)

32.107 Alternative remedies

An extortionate credit transaction may also be challenged as a transaction at an undervalue.

Transactions defrauding creditors

32.108 Transactions defrauding creditors – scope of the provisions

The provision in the Act[1] relating to transactions defrauding creditors applies equally to both companies and bankruptcies.

1. Section 423

32.109 Transactions defrauding creditors - general

Essentially, the purpose of the provisions in the Act relating to transactions defrauding creditors are to enable the setting aside of transactions at an undervalue where the intention of the transaction was to put assets out of the reach of creditors.

On the face of it, the provisions relating to transactions defrauding creditors[1] are similar to the provisions relating to transactions at an undervalue[2] [3], in that both sets of provisions require that property has been transferred for less than its value.

When considered in more detail, however, there are some key differences between the two provisions. Some of the differences make it easier for the official receiver, as liquidator or trustee, to challenge transactions; some make it more difficult; and others are of little consequence.

See paragraphs 32.111 and 32.112 for information relating to the differences between transactions defrauding creditors and transactions at undervalue.

1. Section 423

2. Section 238

3. Section 339

32.110 Realising transactions defrauding creditors

All antecedent recoveries are handled by The Service's antecedent recovery contractor, Clarke Wilmott.

The following are the areas on which the official receiver should, ideally, obtain information before instructing the contractor 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 company director or the bankrupt for the transaction
- details of why the transaction was undertaken
- evidence of the asset position of the beneficiary

32.111 Transactions defrauding creditors versus transactions at an undervalue – differences consequential on the official receiver

The two differences between the provisions in the Act relating to transactions defrauding creditors and transactions at an undervalue that are most likely to have an impact on the official receiver when considering whether to challenge a transaction are:

- there is no time limit during which a transaction must have occurred for it to be recoverable as a transaction defrauding creditors whereas there are time limits applying to recoveries as transactions at an undervalue
- for a successful recovery of a transaction defrauding creditors it will be necessary to show that the transaction was entered into with the intention of putting assets beyond the reach of creditors or a creditor. It is not sufficient just to show that this was the consequence of the transaction. It must have been the intention of the person entering into it[1]

Where the transaction has taken place within the relevant time limits it is better for the official receiver to challenge it as a transaction at an undervalue, due to the lower

burden of proof. Otherwise the official receiver will need to consider a challenge of the transaction as a transaction defrauding creditors.

1. Section 423(3)

32.112 Transactions defrauding creditors versus transactions at an undervalue – differences with no direct consequence on the official receiver

In addition to the differences outlined above there are other differences between the provisions relating to transactions defrauding creditors and those relating to transactions at an undervalue that are less likely to have a direct impact on the official receiver:

- unlike the provisions relating to transactions at an undervalue, a recovery action under the provisions relating to transactions defrauding creditors need not take place within a formal insolvency proceeding and does not require that the transferee was insolvent at the time of the transaction
- a recovery action under the provisions relating to transactions at an undervalue may only be brought by the relevant office holder, whereas a recovery under the provisions relating to transactions defrauding creditors may be brought, additionally, by any "victim" of the transaction[1] (see paragraph 31.113)

1. Section 424(1)

32.113 Who may apply for an order under the provisions relating to transactions defrauding creditors?

The ability to have a transaction defrauding creditors set aside is not limited to office-holders. Nor is it limited to bringing actions against companies or individuals in some form of formal insolvency proceeding. The company or individual need not even be, or have been, insolvent for an action to be brought[1]. An action can be brought by any "victim" of the transaction, whether or not that victim was the creditor who the transferor had in mind when entering into the transaction[2].

In circumstances where the company or individual is in liquidation or bankruptcy, however, any "victim" of the transaction must first obtain leave of court before bringing an action[3].

When the action is brought by one “victim” of the transaction, the action is treated as having been brought by all victims of the transaction[4]. Consequently any sums awarded in the action should be awarded to all those prejudiced. Generally speaking, the court will achieve this by re-vesting the property in the company/individual and allowing individual creditors to pursue claims against the company/individual[5].

1. Section 424(1)

2. Sands v Clitheroe [2006] BPIR 1000

3. Section 424(1)(a)

4. Section 424(2)

5. Dora v Simper [2000] 2 BCLC 561

32.114 Undervalue transactions

A key component of the provisions relating to transactions defrauding creditors is that, for a successful recovery, it will be necessary to show that the asset was transferred at an undervalue[1].

The following transactions are identified in the Act as being those that are undervalue:

- a gift or transaction to a person on terms that provide for the company/individual to receive no consideration
- a transaction for a consideration the value of which, in money or money’s worth, is significantly less that the value, in money or money’s worth, of the consideration provided to the company/individual
- a transaction with a person in consideration of marriage or the formation of a civil partnership

1. Section 423(1)

32.115 Identifying and assessing transactions at an undervalue

As outlined in paragraph 32.114, 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. 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)

32.116 Purpose behind the transaction

In addition to the need to show that the transaction was at an undervalue a successful recovery would also require that it be shown that the transaction was entered into for the purpose of[1]:

- putting assets beyond the reach of a person who is making, or may at some time make, a claim against them, or
- otherwise prejudicing the interests of such a person in relation to the claim which they are making or may make

Despite the title of the provision relating to transactions defrauding creditors, it is not necessary to show fraud in any technical or criminal sense on the part of the person transferring the property[2].

1. Section 423(3)

2. National Westminster Bank plc v Jones [2001] 1 BCLC 98

32.117 Necessary to prove intention

For a successful recovery under the provisions relating to transactions defrauding creditors, it is necessary to show that one of the purposes detailed in paragraph 32.116 was the actual intended purpose of the transaction.

The intention behind the transaction may, ideally, be proved by evidence provided by those involved in the transaction. When this is not possible it is possible to draw inferences from the timing and circumstances of the transaction[1]. It should be noted that just because the consequence of the transaction was to put assets beyond the reach does not mean that this was the intention[2] [3].

1. Moon v Franklin [1996] BPIR 196

2. IRC v Hashimi [2002] BCC 943

3. Papanicola v Fagan [2008] EWHC 3348 (Ch)

32.118 More than one purpose behind the transaction

An intention to put assets beyond the reach of creditors may not have been the only purpose behind a transaction. It is possible that a person may have had more than one reason for entering into the transaction. In these cases the court would look to

see that the intention to put assets beyond the reach of creditors was a “substantial purpose” behind the decision to enter into the transaction[1] [2].

There may be a good reason for entering into the transaction (for example, to save a business or the family home) but this does not mean that the purpose was not to put assets beyond the reach of creditors[3].

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

2. IRC v Hashimi [2002] BCC 943

3. Arbuthnot Leasing International Ltd v Havelet Leasing Ltd (No 2) [1990] BCC 636

32.119 Deciding a purpose – companies

A company itself cannot be said to be able to have a purpose in mind and any purpose in the “mind” of the company must, of course, be formed in the mind of those human beings controlling the company[1]. In order to successfully challenge a transaction defrauding creditors, the official receiver would need to show that the decision to enter into the transaction 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 one director and identifying the controlling mind would be a simple matter. For the vast majority of these and the other cases dealt with by the official receiver, the person causing the company to undertake the transaction will be the sole director or directors as a group and therefore, there will be no difficulty in showing that they were acting on behalf of the company, and had authority to do so.

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 (a “blanket” authority, as it were) 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. Lennard’s Carrying Company, Limited Appellants; v Asiatic Petroleum Company, Limited Respondents [1915] AC 705

2. Tesco Supermarkets Ltd v Natrass [1972] AC 153

32.120 Professional advice

Assuming all relevant features to suggest that a transaction defrauding creditors has taken place are present then the fact that the decision to enter into the transaction was taken based on professional advice will not save it from challenge[1].

1. Arbuthnot Leasing Limited v Havelet Leeasing Ltd (No 2) [1990] BCC 63

32.121 Remedies

Having found that a transaction is a transaction defrauding creditors under the provisions of the Act the court may make such order as it thinks fit for[1]:

- restoring the position to what it would have been if the transaction had not been entered into; and
- protecting the interests of persons who are victims of the transaction

The Act provides a "menu" of possible forms of relief that it is in the power of the court to order[2] but the power of the court is not restricted to this list.

The court has discretion to set aside the whole or any part of the transaction[3].

1. Section 423(2)

2. Section 425

3. Chohan v Saggar [1994] BCC 134

32.122 Discretion of court not to make order

It has been held that the court has discretion to decline to make an order setting aside the transaction (see paragraph 32.121) where, for example, to do so would result in a hardship to the recipient[1]. It is envisaged that this discretion would be only exercised rarely[2].

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

2. Arbuthnot Leasing International ltd v Havelet Leasing Ltd (No 2) [1990] BCC 63

32.123 Effect of remedy on third parties

When deciding on the appropriate remedy to be ordered to set aside the transaction the court may also make an order providing for the extent to which the interests of third parties who may have had dealings in the property since it was transferred are to be protected[1].

An order made setting aside a transaction defrauding creditors may affect the property of, or impose an obligation on, a person whether or not they are the person with whom the debtor entered into the transaction. In this respect, however, the Act gives protection to those who acquired the property in good faith, for value and without notice of the relevant circumstances[2].

1. Arbuthnot Leasing International ltd v Havelet Leasing Ltd (No 2) [1990] BCC 636

2. Section 425(2)(b)

32.124 Misfeasance – companies only

The entering into a transaction defrauding creditors may constitute a misfeasance and breach of duty on the part of the directors and, therefore, the liquidator may consider bringing an action for misfeasance[1].

The advantage of this over an action to recover a transaction defrauding creditors is that an order can be made against the directors to repay the sums personally.

An action for misfeasance may be brought alongside an action to recover a transaction defrauding creditors, 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 Safetywear v Dodd [1988] BCLC 250

Avoidance of general assignment of book debts (bankruptcy only)

32.125 Introduction – assignment of book debts

When a bankrupt has been running a business book debts may have been assigned in an attempt to raise money. The general idea being that monies from the assignment can be used to finance the business immediately, rather than waiting for the debts to be paid to the business in the normal course of events.

Where the assignment is of all the book debts, or a particular class of book debt it is called a “general assignment”.

32.126 Avoidance of general assignments

Where there has been a general assignment of book debts, the assignment is void against the trustee as regards debts which were not paid prior to the presentation of the bankruptcy petition, unless the assignment was registered under the Bills of Sale Act 1878[1]. The provisions do not have any effect on the assignment of specific book debts.

32.127 Effect of an avoidance of a general assignment

As the avoidance affects only those book debts that were not paid prior to the presentation of the bankruptcy petition[1], the provisions have only partial retrospective effect. The official receiver, as trustee, can recover those book debt payments passed to the assignee where the payment of the debt was after the date of the presentation of the petition. Those book debts that are unpaid would become “free” assets in the estate.

1. Section 344(2)

32.128 Reasons for avoidance of general assignments of book debts

The main reasons for the provisions relating to the avoidance of general assignments of book debts are to encourage registration as, without registration, it can be difficult to establish whether a proper price has been paid in respect of the assignment. Registration also gives persons dealing with the debtor opportunity to check the position of their book debts. The lack of registration may give a misleading impression that the debtor’s financial position is healthy in that the book debts may appear to be free of assignment.

So far as the official receiver, as trustee, is concerned, an inspection of the registration documents (see paragraph 32.132) in conjunction with the bankrupt’s accounting records would give the opportunity to assess whether or not the debts were assigned at their true value. If not, the matter may be pursued as a transaction at an undervalue.

32.129 Action to be taken by the official receiver

When the official receiver considers that a general assignment of book debts contravenes the provisions of the Act (see paragraph 32.126), then they should issue a letter to the bankrupt’s book debtors instructing them to make payments to the official receiver. See paragraph 32.130.

32.130 Realising voidable general assignments

Al antecedent recoveries are handled by the Service’s antecedent recovery contractor, Clarke Wilmott.

The value of the recovery should include both amount to be recovered in respect of debts paid after the presentation of the petition and the value of the remaining unpaid book debts.

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

- the date of the of bankruptcy petition
- the date of the assignment
- evidence that a search has been made of the register of bills of sale (see paragraph 32.133)
- details of the book debts paid and passed over to the assignee
- details of the book debts unpaid
- any explanations given by the bankrupt for the transaction

32.131 Registration under the Bills of Sale Act 1878

For the purposes of these provisions, The Act treats the general assignment of book debts as if it were a bill of sale (a document that transfers ownership of property from one person to another) and states that the provisions of the Bills of Sale Act 1878 with respect to the registration of bills of sale apply[1].

The Bills of Sale Act 1878 provides that an applicable bill of sale must be registered within seven clear days of its making[2], and must be renewed at least once every five years[3]. The method of registering the bill of sale is to send to the High Court the original bill of sale, together with a witness statement attested in front of a solicitor stating that the effect of the bill of sale has been explained to the person granting the assignment[4].

1. Section 344(4)

2. Bills of Sale Act 1878 section 8

3. Bills of Sale Act 1878 section 11

4. Bills of Sale Act 1878 section 10

32.132 Entry in the register of bills of sale

The register of the Bills of Sale Act 1878 contains the particulars of registered bills of sale and an alphabetical list of the names of guarantors.

Following receipt of the documents detailed in paragraph 32.131, the High Court will seal a copy of the assignment, or a schedule to the assignment and return this to the applicant. They will also issue a “debt number” which will be notated on the sealed assignment. This number relates to the assignment’s position in the register. The

official receiver should seek to obtain this sealed assignment from the bankrupt to confirm registration of the general assignment.

32.133 Searching the register of bills of sale

Where there is doubt as to whether a general assignment of book debts has been registered under the Bills of Sale Act 1878 the official receiver may conduct a search of the register by issuing a letter to the High Court of Justice Enforcement Section. The letter should give details of the persons who may have been party to the assignment, and also such details as are known of the assignment itself (such as the date and the property concerned). The request should be accompanied by a payment of £40 made payable to “HMCTS” and should be sent to:

Judgements and Orders Section

Room E15-17

Royal Courts of Justice

Strand

LONDON

WC2A 2LL

Tel no: 020 7947 6221

This office will provide a certificate showing details of the registration and for a further fee of £5 will provide an office copy of the documents provided in support of the application of registration (see paragraph 32.132)

32.134 Provisions apply only to bankrupts engaged in business

The relevant provisions of the Act apply only to those bankrupts engaged in business[1]. The Act defines “business” to include “a trade or profession”[2], so the provisions would cover professionals such as doctors, dentists or accountants.

In reality, it is unlikely that a bankrupt who is not a trader would have book debts to assign. Activities carried out purely for pleasure which happen to make a profit would not be considered to be engaging in a business as, under the accepted definition of the term, a business is something capable of making a profit, which is carried out with a view to making a profit[3]. The decision as to whether something is a business or not would appear to turn on the original intention of the person carrying on the activity.

1. Section 344(1)

2. Section 436

3. Smith v Anderson (1880) 15 ChD 247

32.135 What is a book debt?

The definition of a book debt has been held to mean debts which are “commonly entered in books”[1].

Further, it has been held that a definition of “book debts” includes debts which would or could, in the ordinary course of business, be entered in well-kept books and, therefore, the fact that the debts may not have been entered into a book is irrelevant[2].

Also included in the definition of book debts are future debts and future rents under a hire purchase or rental agreement[3]. A bank balance is not[4].

1. Shipley v Marshall (1863) 12 CB (NS)

2. Independent Automatic Sales Ltd and Another v Knowles & Foster [1962] 1 WLR 974

3. Independent Automatic Sales Ltd and Another v Knowles & Foster [1962] 1 WLR 974

4. Re Bright life Ltd [1987] 1 Ch 200

32.136 Definition of assignment

“Assignment” is defined in the Act as including “assignment by way of security or charge on book debts”, so is not limited to assignment by way of sale[1].

The granting of a charge over book debts may also be challenged as a preference.

1. Section 344(3)(a)

32.137 General assignments not covered by the Act

The Act[1] aims to avoid only transactions detrimental to creditors and so excludes some assignments which are likely to be beneficial. Therefore, a general assignment of book debts as part of the transfer of a business made in good faith and for value is not voidable under these provisions, nor is an assignment for the benefit of creditors generally[2].

1. Section 344

2. Section 344(3)(b)(ii)

32.138 Specific assignments of book debts

The provisions of the Act cover only general assignments of book debts, so the assignment of a specific book debt would not fall foul of the provisions[1]. For a book debt to be considered a specific debt it would be necessary that the debt is identified with clarity and precision in the document of assignment[2].

An assignment of a specific book debt, or class of debt (see paragraph 32.139), may be challenged as a voidable transaction.

1. Section 344(3)(b)(i)

2. Re Paddle River Construction Ltd (1961) 35 WWR 605

32.139 Assignment of a class of book debts

A general assignment does not have to relate to all book debts to be potentially voidable. The assignment could be of a certain class of book debt which have a common factor. For example, an assignment of all debts due from “ABC Ltd” or all debts due during a certain period could fall foul of the provisions. This would be termed a “class” of book debts.

32.140 Factoring agreements

The assignment of book debts most likely to have occurred in a bankruptcy case would be where the bankrupt has entered into a factoring agreement and, on the face of it, it would appear that this is a general assignment that would fall foul of the provisions of the Act.

Where, however, the agreement with the factoring company requires that each book debt is assigned and approved for payment individually, this would not be a voidable assignment under the provisions as it would be considered that each debt is being assigned specifically[1](see paragraph 32.138). It is likely that all factoring agreements with recognised factoring companies operate in this way but the official receiver, as trustee, should obtain a copy of any factoring agreement entered into by the bankrupt and check the details.

1. Hill v Alex Lawrie Factors Ltd [2000] BPIR 1038

Recovery of excessive pension contributions

32.141 Recovery of excessive pension contributions - general

As covered in guidance on pensions (chapter 57), the law[1] provides that where a bankruptcy order is made on a petition presented after 29 May 2000, an approved pension held by the bankrupt will, generally speaking, fall outside of the bankruptcy estate. Similarly, the bankrupt may have protected rights under an unapproved pension scheme which means that the pension rights would not vest in the trustee.

To avoid the potential risk that individuals facing bankruptcy may choose to place assets out of the reach of creditors by liquidating those assets and putting the funds into a pension scheme, the Act also has provisions[2] that allow the trustee to recover excessive pension contributions that have unfairly prejudiced the bankrupt's creditors.

1. Welfare Reform and Pensions Act 1999 section 11

2. Welfare Reform and Pensions Act 1999 section 15

32.142 Scope of provisions

The provisions relating to excessive contributions cover both pensions that are excluded from the bankruptcy estate by the provisions of the Welfare Reform and Pensions Act 1999 or due to their having protected or excluded rights.

It is not necessary for the provisions to apply to pension schemes not falling into either of those two categories as any such pension scheme would vest in the trustee of the bankruptcy estate and would be dealt with accordingly.

32.143 Action to be taken by the official receiver

Having considered the information and advice in this Part of the chapter, and having established that excessive contributions have been made, the official receiver should seek to instruct The Service's antecedent recovery contractor at the soonest possible opportunity. In the meantime, they should write to the pension company and put them on notice that they consider that excessive contributions have been made into the pension and request that no payments are made out of the pension pending further instruction. A copy of this letter should be sent to the bankrupt.

32.144 Realising excessive pension contributions

As explained in detail in paragraphs 31.16 or 31.21, all antecedent recoveries are handled by The Service's antecedent recovery contractor, Clarke Wilmott.

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

- the date of the of bankruptcy order
- details of the pension
- evidence of the contributions made (for example, bank statements)
- details of the bankrupt's financial position when the contributions were made
- any explanations given by the bankrupt for the contributions
- evidence/view as to why the official receiver considers the contributions to be excessive

32.145 Relevant contributions

In addition to being excessive (see paragraph 32.146), the contributions made to the pension scheme must be "relevant" contributions. The Act provides that relevant contributions are those:

- which the individual has at any time made on their own behalf[1], or
- which have at any time been made on their behalf[2]

In reality, it is unlikely that any contributions made to a bankrupt's pension would not fall into one of these two categories.

1. Section 342A(5)(a)

2. Section 342A(5)(b)

32.146 Excessive contributions

There is no definition in the Act as to what may be considered an "excessive" contribution. Whether contributions to a pension are excessive or not would depend on whether the contributions unfairly prejudiced the bankrupt's creditors (see paragraph 32.147). This in turn, would depend on the bankrupt's circumstances at the time they made the contributions[1]. For example, contributions made at the expense of a bankrupt's business capital or other household expenses may be considered to be excessive. Similarly, consideration should be given to the bankrupt's income and lifestyle and historical pension contributions. Contributions made by one bankrupt who continues to make contributions during difficult times

may not be considered to be excessive whereas payments started by another bankrupt in similar circumstances may be considered to be so.

HM Revenue and Customs set a limit (for tax relief purposes) on the amount that can be contributed to a pension being 15% of remuneration. This figure should give the official receiver a reference point when considering whether payments to a pension by a bankrupt are excessive.

1. Section 342A(6)

32.147 Effect of the excessive contributions - prejudiced insolvent's creditors

It is not necessary to show that the excessive contributions prejudiced the bankrupt's creditors at the time they were made or that this was in the bankrupt's mind when they made the contributions. It is necessary only to show that the effect of the contributions was to unfairly prejudice the creditors as at the date of the bankruptcy order[1].

Generally speaking, any contributions made in the period leading up to bankruptcy could be described as having prejudiced the bankrupt's creditors. It is, therefore, important to show that the contributions unfairly prejudiced the creditors and, in this respect, it will be necessary to consider the circumstances at the time the contributions were made.

1. Section 342A(2)

32.148 Powers of enquiry

The trustee, in making enquiries into a bankrupt's pension arrangement, has power to require a person responsible for the administration of the pension to provide them with such information regarding the arrangement that they may reasonably require[1].

The person responsible for the pension has nine weeks in which to respond to such a request[2], though this period may be extended by the court[3].

1. Section 342C(1)

2. The Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002 regulation 10(1)

3. The Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002 regulation 10(2)

32.149 Remedy available

If the court is satisfied that the contributions made were excessive it may make an order restoring the position to what it would have been had the excessive contributions not been made[1].

The court may give effect to this order by further ordering that the pension company makes a payment direct to the trustee[2]. The court may also make an order adjusting the sums payable by the pension company to the bankrupt to take into account the effective reduction in contributions[3].

The order is binding on the pension company and overrides the scheme's rules so far as is necessary to give the order effect[4]. Any rules or enactments barring the assignment of pension rights do not apply to an order made under these provisions of the Act[5].

1. Section 342A(2)

2. Section 342B(1)(a)

3. Section 342B(1)(b) & (c)

4. Section 342B(7)

5. Section 342C(2)

32.150 Pension "sharing" cases

Where debits have been made to the bankrupt's pension under a pension "sharing" arrangement, and the rights transferred to the third party are the fruits of excessive contributions, the court may treat the rights transferred as recoverable but, before doing so, recovery should be sought from the rights remaining with the bankrupt[1].

1. Section 342A(3) and (4)

32.151 Amount recoverable

The amount recoverable from the pension provider is the lesser of the amount of the excessive contributions or the value of the bankrupt's interest in the pension[1].

1. Section 342C(3)