



Preserving Value for the Greater Good
Transactions at an Undervalue under the Companies
(Winding Up and Miscellaneous Provisions)
(Amendment) Ordinance 2016

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Various Insolvency Mischiefs

- Removal of value pre-liquidation to detriment of creditors of the insolvency estate
- Favouring of directors / shareholders and their associates
- Discriminatory treatment between creditors / erosion of pari passu principle



Possible Prevention Tools

- Undoing transactions entered into with an intent to defraud / harm creditors
e.g. UK – *Insolvency Act 1986* ('IA 1986'), ss.213 / 423; HK – *Conv. & Prop. Ord. (Cap 219)*, s.60; Bermuda – *Conv. Act 1983*, ss.36A-G
- Preventing extortionate credit bargains / unduly favourable security arrangements
e.g. UK – *IA1986*, ss.244-245; HK – *Co. (Winding Up and Misc. Prov.) Ord. (Cap 32)* ('CWUMPO'), ss.264B(1) / 267; Aus. – *Corp. Act 2001*, s.588FD
- Targeting transactions with directors
e.g. UK – *Co. Act 2006*, ss.188-226; Aus. – *Corp. Act 2001*, s.588FDA



Possible Prevention Tools

- Common law anti-deprivation principle and the rule in *British Eagle*

Belmont Park Investments PTY Ltd v BNY Corporate Trustee Services Ltd & Anr [2011] UKSC 38; *British Eagle Int. Airlines Ltd v Cie Nationale Air France* [1975] 1 WLR 758

- Avoiding preferential transactions

e.g. UK - IA 1986, s.239; HK – CWUMPO, ss.266-266B; Aus. – Corp. Law 2001, s.588FA

- Avoiding transactions at an undervalue

e.g. UK – IA1986, ss.238-; HK – CWUMPO, ss.265A-E;
Aus. (uncommercial transactions) – Corp. Law 2001, s.588FB;
Cayman – Co. Law (2016 Rev.), s.146 (n.b. intent requirement)



Transactions at an Undervalue

England & Wales / Hong Kong Requirements

- Company in liquidation (or administration (E&W)) – action is only available to office-holder
IA 1986, s.238(1) / CWUMPO, s.265D
- Qualifying transaction at an undervalue
IA 1986, s.238(4) / CWUMPO, s.265E
- At a “relevant time”
IA 1986, ss.238(2) & 240 / CWUMPO, ss. 265D(2) & 266B



Transactions at an Undervalue

England & Wales / Hong Kong Requirements

- Company did not enter into the transaction in good faith for the purpose of carrying on its business and no reasonable grounds to believe would benefit
IA 1986, s.238(5) / CWUMPO, s.265D(4)

- Court has a discretion to make whatever order it thinks fit for restoring the position

IA 1986, ss.238(3) & 241 / CWUMPO, ss. 265D(3) & 266C



Qualifying Transactions

- Gift / transaction under which the company receives no consideration
IA1986, s.238(4)(a) / CWUMPO, s.265E(a)
- Value to the company *“in money or money’s worth is significantly less than the value, in money or money’s worth”* of consideration provided by the company
IA 1986, s.238(4)(b) / CWUMPO s.265E(b)
- Company must be party to gift or transaction
Re Ovenden Colbert Printers Ltd [2013] EWCA Civ. 1408;
Re Hampton Capital Ltd [2015] EWHC 1905 (Ch)



Qualifying Transactions

- Granting of security / giving a guarantee?

Re M C Bacon Ltd [1990] BCC 78; *Taliby v HSBC Bank plc* (unrep. 28.vii.2014) *cf.* *Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542

- Creation of a trust?

Re Lewis's of Leicester Ltd [1995] BCC 514

- Payment of a dividend / share buyback?

BTI 2014 LLC v Sequena SA & Ors [2016] EWHC 1686; *Dickinson v NAL Realisations (Staffordshire) Ltd* [2017] EWHC 28



Qualifying Transactions

- Court must consider all related transactions
Phillips v Brewin Dolphin Bell Lawrie Ltd [2001] 1 WLR 143
- Impugnable and past consideration disregarded
Barber v CI Ltd [2006] BCC 927; *Re Sonatacus Ltd* [2007] EWCA Civ 31; *Re Bangla Television Ltd* [2006] EWHC 2292 (Ch)
- A presumption of inadequate consideration?
Re Kiss Cards Ltd [2016] EWHC 1276



At a “relevant time”

England and Wales: *IA 1986, s.241*

The relevant time is:

- The period of 2 years ending with the onset of insolvency;
- Between an administration application and the making of an administration order; or
- Between the filing of a notice of intention to appoint an administrator and the making of that appointment,

So long as in each case the company:

- At that time cannot pay its debts as they fall due; or
- Becomes unable to pay its debts in consequence of that transaction.



At a “relevant time” Hong Kong: *CWUMPO, s.266B*

The relevant time is:

- The period of 5 years ending with the winding up of the company

So long as the company:

- At that time cannot pay its debts as they fall due; or
- Becomes unable to pay its debts in consequence of that transaction.



At a “relevant time”

Presumptions in England and Wales / Hong Kong

- Inability to pay debts at the time of, or as a consequence of, the transaction is presumed if transaction with a connected person
IA1986, s.242(b) / CWUMPO, s.266B(3)
- CWUMPO specifically excludes transactions with persons connected only by employment
- Directors and shadow directors, their associates and associates of the company are connected persons
IA 1986, s.249 / CWUMPO, s.265A; Re a company (No.005009 of 1987) (1988) 4 BCC 424



At a “relevant time”

Associates under *IA 1986, s.435*

- An individual’s associates are:
 - Husbands, wives, civil partners and certain defined relatives
 - Such relatives’ husbands, wives and civil partners
 - Defined relatives of the individual’s husband, wife or civil partner
- A company is an associate of a person if that person has control or that person and his associates together control it
- Companies may be associates where there is common control by a person and/or their associates



At a “relevant time”

Associates under new *CWUMPO*, ss.265B and 265C

- An individual’s associates are:
 - Spouses, cohabitants and certain defined relatives
 - Such relatives’ spouses and cohabitants
 - Defined relatives of the individual’s spouse or cohabitant
- Employers and employees are associates of each other
- A company is an associate of a person if that person has control or that person and his associates together control it
- Companies may be associates where there is common control by a person and /or their associates



Good Faith Defence

IA 1986, s.238(5); CWUMPO, s.265D(4)

- Must show both that:
 - Company entered into the transaction in good faith and for the purposes of carrying on its business; and
 - There were reasonable grounds for believing that the transaction would benefit the company.



Relief

IA 1986, s.238(3); CWUMPO, s.265D(3)

- Court shall / may make such order as it thinks fit for restoring the position to what it would have been absent the transaction
- May decline to make an order
Re Paramount Airways Limited (in admin.) [1993] Ch 23; *Re MDA Investment Management Ltd* [2003] EWHC 2277 (Ch) and [2004] EWHC 42; *Re Parkside International Ltd* [2008] EWHC 3554
- Focus is on restoring the company's position cf. benefiting third parties
Lord v Sinai Securities Ltd [2004] EWHC 1764 (Ch)



Relief

IA 1986, s.241(1); CWUMPO, s.266C(1)

- Specific power to order:
 - Re-vesting of transferred property or proceeds of sale
 - Release or discharge of security given by company
 - Payment to the company from those who have benefited
 - Resurrection of discharged guarantees or security obligations
 - Creation of security for the discharge of any order made by the court
 - Limitation of rights of a person subject to an order made by the court to prove in the winding up



Relief

IA 1986, s.241(2)-(4); CWUMPO, s.266C(2)-(4)

- Order may be made against a person who was not party to the transaction or that person's property BUT:
 - Must not prejudice interests in property acquired from persons other than the company in good faith and for value
 - Must not require payment from persons who benefited in good faith and for value, and who were not directly a party to the transaction



Relief

IA 1986, s.241(2)-(4); CWUMPO, s.266C(2)-(4)

- Absence of good faith presumed in respect of:
 - Those with notice of the undervalue, or of the presentation of a winding up petition or liquidation (or administration in E&W) of the company
 - Associates of the company or person with whom the company entered into the transaction



Further Issues

- Extra-territorial effect

Re Paramount Airways Ltd (in admin.) [1993] Ch 223

- Liquidator's claims not part of the company's property at the commencement of liquidation

Re Oasis Merchandising Services Ltd [1998] Ch 170; IA 1986, s176ZB

- Assignability

IA1986, s.246ZD(2)