

Mercian Law

Commercial Debt Recovery Specialists

POST INSOLVENCY RECOVERY OPTIONS

Corporate Insolvency

A liquidator can seek certain transactions entered into by the company prior to the commencement of the winding up be overturned. For example:

In the case of voluntary winding up – the passing of resolutions.

In the case of compulsory winding up, the presentation of the petition.

Transactions at an undervalue

The debtor company must have:

- Within 2 years prior to winding up, the company transacted either a gift whose consideration value was less than consideration paid by the company.
- At the time or as a result of the transaction the company was unable to pay it's debts as they fell due, which the liquidator has to prove.
- Insolvency will be presumed if the transaction is in favour of a person connected with the company.
- Connected persons are directors, shadow directors, associates and includes, spouse, partner, a company in their control and any trustee for the above.
- A transaction cannot be upset if it is entered into by the company in good faith for the purpose of carrying on it's business and, at the time of the transaction, there were reasonable grounds for believing that it would benefit the company.
- There is no need to prove an intention to defraud creditors, nor is there a need to prove knowledge by the directors of the insolvency.

Preferences

The state of mind of the directors is crucial. They must have been influenced by a desire to put the creditor in a better position. Desire is presumed if the preference is in favour of a connected person.

- The transaction must have been entered into six months prior to commencement of the winding up. Two years if in favour of a connected person
- The liquidator must prove that the company was solvent at the time of the transaction or became insolvent as a result. Presumed if transaction was in favour of a connected person.

- Preferences may be to a guarantor, in particular director's personal guarantees of a company overdraft.

Remedies

The court has wide powers to remedy the injustice caused by these transactions. Including:

- Require a return of money or property
- Require a transfer to the company or individual of property representing the subject matter of the transaction
- Discharge any security given by the company or individual
- Require a payment to be made to the liquidator or trustee in respect of benefits received
- Impose new or revived obligations on any guarantor
- Require security to be provided
- Enable the person under an obligation above to become an unsecured creditor in the proceedings

Transactions to avoid payments of debts and defrauding creditors

Putting assets beyond the reach of a person who is making, or may at some time make a claim against the debtor, or otherwise prejudicing the interest of such a person in relation to the claim which he is making, or may make.

Applications to the Court, on behalf of every victim of the transaction, can be made by:

- The Official Receiver
- Trustee in Bankruptcy (Individual insolvency)
- Liquidator or administrator (Company insolvency)
- Victim of the transaction, with leave of the Court
- Supervisor of the voluntary arrangement

There is no time limit to make the application. The applicant must show the dominant purpose was to put assets beyond the reach of an actual or potential creditor or otherwise prejudice the interest of a creditor.

Extortionate Credit Transaction

A liquidator or Trustee in Bankruptcy can seek to upset such transactions entered into during the 3 years pre commencement of winding up or bankruptcy.

Extortionate = Grossly exorbitant or grossly contravening the ordinary principles of fair dealing.

Invalidation of floating charges

Such charges are invalid if created within 12 months prior to commencement of winding up, or 2 years if the charge was in favour of a person connected with the company, unless:

- The company was solvent at the time, or
- The company received benefit after the creation of the charge

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