

Undervalue claims: *the art of stating the obvious?*

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Introduction

1. Most insolvency practitioners, whether solicitors or accountants, consider undervalue claims as an obvious and well established part of their armoury for attacking antecedent transactions. However as soon as the word “obvious” crops up it is worth remembering what R. Buckminster Fuller (an American designer and architect, and something of a polymath, who died shortly before the Insolvency Act 1986 came into existence) had to say: *“Everything you've learned in school as 'obvious' becomes less and less obvious as you begin to study the universe. For example, there are no solids in the universe. There's not even a suggestion of a solid. There are no absolute continuums. There are no surfaces. There are no straight lines.”*
2. And so it is with undervalue claims; you think they are obvious, but the more you look at them the less obvious they become. It is perhaps surprising that the transaction at undervalue legislation is now over 20 years old yet significant legal issues remain “up for grabs”. We will touch on some of those legal uncertainties below, as well as to consider the live practical issues facing the office holder seeking to make a recovery in times where asset values have been declining.
3. Accordingly, we intend to look at transactions at undervalue under the following headings:
 - Corporate and personal claims: similarities and differences
 - Identifying the undervalue: Is Re M C Bacon still good law?
 - Identifying the time: when the intention is formed or acted on?
 - Relief: what is the extent of the discretion?
 - Relief: restoration and other relief.
4. We shall now consider each in turn.

Corporate and personal claims: similarities and differences

The sections

5. The relevant sections of the Insolvency Act 1986 (sections 238, 240, 241 & 339, 341 & 342) are annexed to these notes for ease of reference.

Similarities

6. Let's start with some general similarities: Transaction at undervalue claims are focused on the mischief of asset depletion (and fragmentation) of the insolvent estate, whether corporate or personal, in a time period before the onset of a formal insolvency procedure, known as “the relevant time”, which parliament considers to be unacceptable. It is not a universal requirement that the person was insolvent at the time the transaction occurred, though that criterion is necessary in corporate claims and is present in personal claims more than 2 years from the onset of insolvency. This lack of a consistent theme reflects the lack of clarity as regards the precise statutory purpose of the claims; is it to protect the estate from “fraud”, albeit fraud need not be proven (the emphasis on presumptions in relation to connected persons might suggest so), or is it a special statutory recognition, where an insolvency event has occurred, of a more universal concern to protect against unjust enrichment? It is also important to recognize at the outset that the legislation is concerned with asset depletion at the expense of the general body of creditors i.e. the unsecured creditors. The strong dividing line between secured and unsecured creditors was emphasized by the House of Lords as long ago as 1976 (*Ayerst v C & K (Construction) Ltd* [1976] AC 167) and was re-emphasised most recently by Lord Hoffmann in *Leyland DAF (Re Buchler and another v Talbot and another and others* [2004] UKHL 9). As appears below however there remains an active

debate as to whether a secured creditor may in certain circumstances gain a benefit from an order under sections 238 or 339.

7. The following specific similarities are worth noting:

- i. The claims are office holder claims: only the office holder can make an application to the court (in the case of corporate insolvencies, both administrators and liquidators can bring claims). Furthermore, there is no cause of action, as such, which vests in the company;
- ii. Both sections 238 and 339 state that the court “shall” on such applications “make such order as it thinks fit for restoring the position to what it would have been if the [company]/[individual] had not entered into” the transaction in question. As appears below this is an interesting mix of mandatory and permissive language;
- iii. Both sections 238 and 339 define “transaction at undervalue” to include gifts or transactions “for a consideration the value of which, in money or money’s worth, is significantly less than the value, in money or money’s worth, of the consideration provided by the [company]/[individual]”;
- iv. Both sections (sections 240 and 341) provide that transactions can only be set aside if they are made within the “relevant time”, and contain presumptions of insolvency (where necessary) where the transaction was with a connected person or an associate (whilst there is a presumption of insolvency in connection with transactions at undervalue in favour of “associates/connected parties”, there is no such presumption in relation to preference claims);
- v. Both sections 241 and 342 enable wide ranging orders to be made, including assets to be recovered from third parties, but both provide some protection for third parties, other than the person who acquired the interest from the company/individual, who are bona fide purchasers for value.

Differences

8. What about the differences? Some of the key differences are as follows:

- i. Company transaction at undervalue claims only reach back 2 years (section 240(1)(a)) from the onset of insolvency where as personal claims can reach back for 5 years (section 341(1)(a)) (by contrast the “relevant time” for preference claims is the same for both bankruptcy and administration /liquidation claims - 2 years against “associates /connected parties” and just 6 months in all other cases);
- ii. In corporate claims there is the “good faith” defence under section 238(5) where the transaction was entered into in good faith and for the purpose of carrying on its business, and at the time in question there were reasonable grounds for believing that the transaction would benefit the company. There is no such equivalent for personal claims, though as appears below it is considered there may be scope for developing such a defence even in personal claims;
- iii. In corporate claims the company must also have been insolvent for the time to be a “relevant time” in all cases, or rendered insolvent by reason of the transaction (section 240(2)) where as in personal cases of less than 2 years insolvency need not be proven (section 341(2)).

Identifying the undervalue: Is *Re M C Bacon* still good law?

Introduction

9. The elements required to establish an undervalue transaction were set out by Millet J as he then was over 20 years ago in *Re M C Bacon* [1990] BCLC 324 @ 340 in the following terms:

“To come within that paragraph the transaction must be (i) entered into by the company; (ii) for a consideration; (iii) the value of which measured in money or money’s worth; (iv) is significantly less than the value; (v) also measured in money or money’s worth; (vi) of the consideration provided by the company”

10. This simple re-statement of the law remains good today. What is less clear is whether Millet J’s holding in *Re M C Bacon* @ 340-341 that the grant of security cannot constitute a transaction at undervalue remains good law. Before considering that issue it is worth considering some other key elements in order to identify the undervalue in the transaction.

The valuation process

11. Five general points are worth noting here, which points are of equal application to corporate and personal claims.
12. Firstly, generally speaking the Court is looking at the value of the asset from the point of view of an open market purchase at arms length. See for example the observations of Lord Scott in *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] 1 WLR 143 @ para 30. This will frequently require expert evidence.
13. Secondly, it is also clear from *Re M C Bacon* that the outgoing and incoming value is to be viewed from the perspective of the company or individual in question. The Court is not concerned to prevent a windfall accruing to a special purchaser, though in certain circumstances the fact that a higher value may be generated by the company or individual will be relevant. So too, it might be thought, if the asset is effectively valueless on the open market it may be said that there can be no transaction at undervalue. However the Courts have been mindful to protect against such arguments. Simply because there may not be an open market does not mean the asset has no value. It may be necessary for the Court to assume a hypothetical purchaser in a notional market; see the decision of Neuberger J in *Craven (Builders) Ltd v Secretary of State for Health* (28 October 1999, unreported), and followed by Norris J at first instance in *Reid v Ramlort* reported at [2005] 1 BLC 331 @ 350-351.
14. Thirdly, the question of what is the transaction which is being valued must also be looked at somewhat flexibly. The Courts are encouraged to look at the transaction as a whole (see *Phillips v Brewin Dolphin* above, and see also the more recent decision in *Freakley*) and may consider a range of possible values (*Reid v Ramlort*). Equally however in certain cases the Court may be persuaded to look at only one step or one part of the transaction. For further discussion and examples see *DEFRA v Feakins* [2005] EWCA Civ 1513 and the more recent decision of *Delaney v Chen* [2010] EWHC 6 (Ch).
15. Fourthly, there is a line of authorities (including: *Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co Ltd* [1903] AC 426; *In re Bradberry* [1948] 1 Ch 35; *Simpson v Jones (Inspector of Taxes)* [1968] 1 WLR 1066; *County Personnel (Employment Agency) Ltd v Alan R. Pulver & Co* [1987] 1 WLR 916, *Charles v Hugh James Jones & Jenkins* [2000] 1 WLR 1278 and *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] UKHL 2, [2001] 1 WLR 143) supporting the valuation of certain rights and/or liabilities as at a certain date but by reference to the subsequent events that had occurred. Thus, it is argued, the Court may use the benefit of hindsight, or “the hindsight principle”, when valuing the incoming and outgoing consideration.
16. In paragraph 26 of his opinion in *Brewin Dolphin*, Lord Scott addressed the question whether, in assessing the equality of exchange under section 238(4)(b), it was appropriate to take into

account events subsequent to the transaction to resolve the uncertainty which existed as at the date of the transaction:

“26. Mr Mitchel submitted that that these ex post facto events ought not to be taken account when valuing PCG’s sub-lease covenant as at 10 November 1989. I do not agree. In valuing the covenant as at that date, the critical uncertainty was whether the sublease would survive for the four years necessary to enable all the four £312,500 payments to fall due, or would survive long enough to enable some of them to fall due, or would come to end before any had fallen due. Where the events, or some of them, on which the uncertainties depend have actually happened, it seems to me unsatisfactory and unnecessary for the court to wear blinkers and pretend that it does not know what has happened. Problems of a comparable sort may arise for judicial determination in many different areas of the law. The answers may not be uniform but may depend upon the particular context in which the problem arises. For the purposes of section 238(4) however, and the valuation of the consideration for which a company has entered into a transaction, reality should, in my opinion, be given precedence over speculation. I would hold, taking account of the events that took place in the early months of 1990, that the value of PCG’s covenant in the sublease of 10 November 1989 was nil. After all, if, following the signing of the sublease, AJB had taken the sublease to a bank or finance house and had tried to raise money on the security of the covenant, I do not believe that the bank or finance house, with knowledge about the circumstances surrounding the sublease, would have attributed any value at all to the sublease covenant.

27. Where the value of the consideration for which a company enters into a section 238 transaction is as speculative as is the case here, it is, in my judgment, for the party who relies on that consideration to establish its value. PCG and Brewin Dolphin are, in the present case, unable to do so.”

17. The ratio of *Brewin Dolphin* in this respect was summarised by the later Court of Appeal decision in *Reid v Ramlort* [2003] 1 BCLC 499 at para 17 in the following terms:

“I take that ratio to be that (1) the value of the consideration in money or money’s worth is to be assessed as at the date of the transaction, (2) if at that date value is dependent on the occurrence or non-occurrence of some event and that event occurs before the assessment of value has been completed then the valuer may have regard to it, but (3) the valuer is entitled, indeed bound, to take account of all other matters relevant to the determination of value as at the date of the transaction. The first proposition appears from the second sentence of the passage in paragraph 26 I have quoted in paragraph 12 above. The second proposition is reflected in the third sentence of that quotation. In my view the third proposition is inherent in the last two sentences of paragraph 26 and the first sentence of paragraph 27 of the speech of Lord Scott of Foscote.”

18. In *Goode, Principles of Corporate Insolvency Law*, 3rd Edition, further critical analysis of these decisions is made by reference to the distinction drawn by the accountancy profession between adjusting and non-adjusting events in determining balance sheet value (@ 11-31). An adjusting event being one which helps to establish the value at the transaction date where as a non-adjusting event is one which simply reduces or increases such value at the time the event occurs. *Goode* suggests that *Brewin Dolphin* did not concern a non-adjusting event, and the reference to the use of the hindsight principle might be read as being restricted accordingly.
19. Jonathan Parker LJ also offered the observation in *Reid v Ramlort* @ para 112 that the hindsight principle is unlikely to have a role to play where the transaction is conducted in an open and transparent market, but may have a role to play where there is no recognised methodology for pricing certain risks.
20. Fifthly, where an asset is being transferred free of any security then it is the unencumbered asset which is to be assessed or valued. However where an asset is transferred subject to security the value being assessed as being transferred is the company or individual’s interest in the remaining equity/ equity of redemption. Ordinarily however, where a charged asset is

being transferred the identity of the mortgagee will change and the Courts are looking at the value of the unencumbered asset.

The giving of security for a past debt

21. In *M C Bacon* Millet J concluded that the grant of a debenture has no monetary value and therefore no consideration had left the company for the purposes of section 238. This decision was followed by the Court of Appeal in *National Bank of Kuwait v Menzies* [1994] 2 BCLC 306.

22. But substantial doubt has now been cast on the validity of this decision following the decision of the House of Lords in *Leyland Daf* (above, at para 29, 51), as observed by Arden LJ in *Hill v Spread* [2007] 1 BCLC 450 @ para 93 & 138.

23. In *Leyland Daf* @ para 51 Lord Hoffman stated as follows:

*“Bankruptcy and companies liquidation are concerned with the realisation and distribution of the insolvent's free assets among the unsecured creditors. They are not concerned with assets which have been charged to creditors as security, whether by way of fixed or floating charge. Secured creditors can resort to their security for the discharge of their debts outside the bankruptcy or winding up. Assets subject to a charge belong to the charge holder to the extent of the amounts secured by them; only the equity of redemption remains the property of the chargor and falls within the scope of the chargor's bankruptcy or winding up. As James LJ observed in *In re Regent's Canal Ironworks Co* (1877) 3 Ch D 411, 427 charge holders are creditors "to whom the [charged] property [belongs] ... with a specific right to the property for the purpose of paying their debts". Such a creditor is a person who "is to be considered as entirely outside the company, who is merely seeking to enforce a claim, not against the company, but to his own property" per James LJ in *In re David Lloyd & Co* (1877) 6 Ch D 339, 344.”*

24. In itself this does not appear to be inconsistent with the decision in *M C Bacon*; Millet J is not suggesting in *M C Bacon* that liquidations are to do with realisations for secured creditors. Moreover what Lord Hoffman was concentrating on in this passage was identification of what assets fall within the insolvent estate for the benefit of the creditors as a whole, and identification of which creditors are to benefit. He was not seeking to make observations as regards the scope of any antecedent recovery provisions. Whilst his decision is consistent with the notion that such antecedent recovery provisions are focused on recoveries for unsecured creditors that does not detract from the validity of the decision in *M C Bacon*. What about *Hill v Spread* then?

25. At paragraph 93 of the judgment of Arden LJ in *Hill v Spread* [2007] 1 BCLC 450 it was noted that whilst Millet J held that the grant of security cannot constitute a transaction at undervalue, it does not follow from this that a transaction involving the grant of security can never amount to a transaction for no consideration. She went on to observe at paragraph 138 that whilst there is no change in the physical assets of the debtor when security is given there seems to be no reason why the value of the right to have recourse to the security which the debtor creates by granting the security should be left out of the account. Ultimately however her observations are obiter dicta, and only exploratory, and ultimately she did not express a final view on this point, it not being necessary to do so for the purposes of disposing of the appeal.

26. It has also been noted by academic commentators (Armour & Bennett, *Vulnerable Transactions in Corporate Insolvency* @ para 2.91) that it is odd that where as a disposition is taken to occur for the purposes of section 127 when the charge is granted it should be excluded from consideration for the purposes of section 238. That said, there are other inconsistencies in the antecedent recovery provisions of the Insolvency Act. Furthermore in *M C Bacon* Millet J was not suggesting that a charge could not be considered to be a disposal, he was simply focusing on the incoming and outgoing valuation process in that respect and whether the company's assets had been depleted or diminished.

27. So, it is suggested, the issue remains a live one. In view of the observations of Arden LJ in *Hill v Spread*, however, if a sustainable case can be mounted for saying that the granting of security does have some value which can be “put into the account” then it would appear to be vulnerable to attack.

Identifying the time: when the intention is formed or acted on?

28. There are two linked issues here. In order to identify the time one has to first identify the transaction in issue.
29. In the context of a preference claim it was decided in *Wills v Corfe Joinery Ltd* [1998] 2 BCLC 75 that the Court was required to consider the desire as at the date when the cheques were drawn, not when it was agreed they would be paid.
30. In the context of transactions at undervalue the question might be framed as whether one is looking at the date of the contract or the date of disposal? Generally speaking the Courts are willing to accept that it is the date of disposal of the asset which is the critical time in the transaction in question. See for example the observations of Jonathan Parker J in *Re Brabon* [2001] 1 BCLC 11 @ 33.
31. It is probably the case however that if the equitable interest passed at an earlier date it may be said that it is the date when the equitable interest passed that the Court is required to consider.

Relief: what is the extent of the discretion?

32. As noted above the language of the section contains an interesting combination of mandatory and permissive language. If the legislative requirements are satisfied the Court “shall” make such an order “as it thinks fit” for restoring the position. There are two ways to argue this. It may be argued that the extent of the discretion is only directed at what the Court thinks is fit to restore the position, but nevertheless the Court is required to fashion a remedy to achieve that end (“the limited discretion”). On the other hand, it may be argued that the use of the words “as it thinks fit” entitles the Court to conclude that no relief is appropriate even if the legislative requirements are satisfied (“the wider discretion”). As appears below, it is considered by the authors that, the precise ambit of the discretion and the way it is to be applied remains a live issue.
33. In *Reid v Ramlort* Jonathan Parker LJ offers the following observations at para 125 and 126:
- “[125]...as a matter of general approach, in deciding what is the appropriate remedy where there has been a transaction at an undervalue the court does not start with a presumption in favour of monetary compensation as opposed to setting the transaction aside and re-vesting the asset transferred. Indeed, in my judgment, in considering what is the appropriate remedy on the facts of any particular case the court should not start from any a priori position. Each case will turn on its particular facts, and the task of the court in every case is to fashion the most appropriate remedy with a view to restoring, so far as it is practicable and just to do so, the position as it ‘would have been if [the debtor] had not entered into the transaction’. In some cases that remedy may take the form of reversing the transaction; in others it may not. In some cases it may take the form of an order for monetary compensation; in others it may not.*
- [126] Moreover, in deciding how to exercise the statutory discretion as to remedy the court must inevitably have regard to subsequent events, and to the facts as they are at the date of the order. The court cannot turn the clock back or rewrite history”*
34. It may be said that this offers support for the view that the discretion is a limited one, focusing on what type of remedy is appropriate rather than whether a remedy should be granted at all.

35. This point was considered by the then Vice Chancellor in *Re Paramount Airways Limited (In Administration) (No 2) [1993] Ch 223* when he said "Sections 238, 239, 339 and 340 provide the court 'shall' on an application under those sections, make such order as it thinks fit for restoring the position. Despite the use of the verb 'shall', the phrase 'such order as it thinks fit' is apt to confer on the court an overall discretion. The discretion is wide enough to enable the court, if justice so requires, to make no order against the other party to the transaction...."
36. This approach was followed in *Singla v Brown [2007] BPIR* when the court held that, in exceptional cases, it was appropriate to make "no order" even though a breach of s.339 had occurred.
37. In a recent decision in *4Eng Limited [2009] EWHC 2633 (Ch)*, which was a section 423 case (nevertheless the language is materially identical), Sales J took the view that his discretion was wider than simply focusing on what was the appropriate remedy, but included whether any remedy at all was appropriate to be granted (see the discussion at para.s 12 to 14). He considered that factors similar to those raised in defence of unjust enrichment claims would be relevant, such as whether or not there has been an honest change of position by the counterparty. In this way it can be seen that a defendant to a section 339 claim might, by the back door, introduce a defence of honest change of position. However this also highlights a potential flaw in the reasoning of the Judge. It may be said the reasoning of Sales J is deficient in this respect, because why should the legislature provide for a specific bona fide purchaser for value defence for those who are not a counterparty to the transaction yet fail to provide for such a defence for the counterparty?
38. It might be said that the approach taken by Sales J is supported by the earlier decision of Jonathan Parker J in *Re Brabon*. In particular @ p37 Jonathan Parker J concluded that in negative equity cases the Court could and would decline to grant any relief because any restoration would not benefit the mortgagor, despite the fact that the legislative requirements of undervalue had been met. However it is respectfully suggested that *Re Brabon* does not provide full support for the approach taken by Sales J in *4Eng*, because *Re Brabon* was one of those cases where no benefit would have flowed to the debtor, and the unsecured creditors, even if the transaction had been at full value. It cannot be taken as an authority for a wide ranging discretion of the type contemplated by Sales J in *4Eng*.
39. In *4Eng* Sales J clearly considered it advantageous and deliberate (see para 16) that a wide jurisdiction as to remedy has been granted by the legislature because this would allow the Court to fashion relief carefully tailored to the justice of the particular case. However that does not leave much certainty for the office holder, who is having to assess whether a case should be brought and what relief he or she will get at the end of the case.

Relief: restoration and other relief

40. As noted in *Reid v Ramlort* referred to above, there is no presumption as such in favour of an order restoring assets in specie transferred away as opposed to a monetary payment or order being made. It must be remembered that whilst applicants in transaction at undervalue cases speak of setting aside the transaction, in truth the legislature contemplates no such thing. The transaction remains good in law. Instead what the Court is attempting to do is to fashion a remedy so as to put the creditors back into the position they would have been if the transaction had not been entered into. Furthermore, the fact that it cannot do so completely is not an impediment. There may be tactical and practical advantages to an applicant, or a defendant, in presenting the case as being a case for restoration or a money payment however.
41. As a practical consideration, the applicant may wish to gain the benefit of a rise in house prices. Equally however, the applicant may wish to avoid a fall in house prices, depending on when in the economic cycle the transaction has occurred. Where as the default approach in a rising market was to seek a restoration order, it may now be more preferable for the applicant to seek a monetary payment order, coupled with an order for interest. Whether the Court is willing to grant such relief is another matter. Ultimately the Court is being asked to restore the position to what it would have been if the transaction had not occurred, and it might be said that this requires the Court to consider what the asset which would have been kept is now worth. From the defendant/respondent's perspective that is an argument worth making. On the other hand if it can be shown the defendant/respondent has in fact realized a benefit, a real benefit, through the sale which occurred at the time then it would be unjust to allow them to retain that benefit, even if had the asset been maintained the estate would not be in a position to make that benefit subsequently due to a loss in market value in the intervening period.
42. There is also the interesting question of the destination of recoveries. The traditional view going back to the decision in *Re Yagerphone* [1935] 1 Ch 392 is that recoveries by office holders of statutory causes of action do not become part of the general assets of the company, but instead are impressed with a special statutory trust in favour of unsecured creditors. This view has been endorsed in the more recent decision of the Court of Appeal in *Re Oasis* [1998] Ch 170.
43. A slightly different, but linked question, is whether any pre-existing security can bite onto recoveries. In the ordinary case if a transfer is made of an asset free from the security then what the court is being invited to restore is the position of an asset free from security. Where however a charge is not overridden by a transfer and the property transferred is recovered, it may well be the case that the charge bites on recovered property; see *Goode* (above) @ 11.140. In that circumstance however it is questionable whether the Court should be making any order at all; the purpose of the legislation is to protect unsecured creditors not secured creditors.
44. A sustained argument has been made by some academic commentators (notably Armour and Bennett, above, at 2.144) for the proposition that whilst this might be right in the context of a liquidation the position in an administration is very different. Here, it is said, the administration is being carried out for a range of purposes, and not simply for the benefit of making realizations for unsecured creditors, and accordingly recoveries made in an administration should simply join the general body of the assets of the company. This is an interesting argument; it is not believed any reported case has considered it. If correct it could have substantial implications for office holders decision making process as to whether recovery actions should be delayed until a company has passed into liquidation.
45. Finally, in the context of the relief sought it is worth considering limitation issues. An action for an order under section 238 has been held to be an action on a specialty and therefore subject to a 12 year limitation period. However where the action is simply to recover a sum of money a six year period will apply. See *Re Priory Garages (Walthamstow) Ltd* [2001] BPIR 144. Following the majority decision in *Hill v Spread*, it is also apparent that such time does

not start to run until either the bankruptcy or winding up or administration order has been made.

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Appendix: Extracts from The Insolvency Act 1986

238 Transactions at an undervalue (England and Wales).

(1) This section applies in the case of a company where—

[F1(a) the company enters administration,]

(b) the company goes into liquidation;

and “the office-holder” means the administrator or the liquidator, as the case may be.

(2) Where the company has at a relevant time (defined in section 240) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section.

(3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.

(4) For the purposes of this section and section 241, a company enters into a transaction with a person at an undervalue if—

(a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or

(b) the company enters into a transaction with that person for a consideration the value of which, in money or money’s worth, is significantly less than the value, in money or money’s worth, of the consideration provided by the company.

(5) The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied—

(a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and

(b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.

Annotations:

Amendments (Textual)

F1S. 238(1)(a) substituted (15.9.2003) by 2002 c. 40, ss. 248(3), 279, Sch. 17 para. 25 (with s. 249(1)-(3)(6)); S.I. 2003/2093, art. 2(1), Sch. 1 (subject to arts. 3-8 (as amended by S.I. 2003/2332, art. 2))

Modifications etc. (not altering text)

C1S. 238 excluded (25.4.1991) by Companies Act 1989 (c. 40), ss. 154, 155, 165(1)(a); S.I. 1991/878, art. 2, Sch. .

C2S. 238 restricted (25.4.1991) by Companies Act 1989 (c. 40), s. 182(4), Sch. 22 para. 8(1)(a); S.I. 1991/878, art. 2, Sch. .

S. 238 restricted (31.3.1996) by 1995 c. 20, s. 110(1), Sch. 4 para. 3(5)(a); S.I. 1996/517, art. 3(2) (subject to transitional provisions and savings in arts. 4-6, Sch. 2) (which amending Act was itself repealed (1.4.1996) by 1995 c. 40, ss. 6(1), 7(2), Sch. 5 (with Sch. 3 paras. 3, 16))

S. 238 restricted (1.4.1996) by 1995 c. 43, ss. 44, 50(2), Sch. 2 para. 3(5)

S. 238 restricted (11.12.1999) by S.I. 1999/2979, reg. 17(1)(a)

S. 238 restricted (24.3.2003) by 2002 c. 29, ss. 427(1)-(5), 458(1)(3); S.I. 2003/333, art. 2, Sch. (subject to arts. 3-13 as amended by S.I. 2003/531)

C3S. 238 applied (with modifications) (4.4.2006) by The Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030), reg. 2, Sch. 1 Art. 23 paras. 1-3 (subject to Sch. 1 Art. 23 paras. 6-9)

240 “Relevant time” under ss. 238, 239.

(1) Subject to the next subsection, the time at which a company enters into a transaction at an undervalue or gives a preference is a relevant time if the transaction is entered into, or the preference given—

(a) in the case of a transaction at an undervalue or of a preference which is given to a person who is connected with the company (otherwise than by reason only of being its employee), at a time in the period of 2 years ending with the onset of insolvency (which expression is defined below),

(b) in the case of a preference which is not such a transaction and is not so given, at a time in the period of 6 months ending with the onset of insolvency, **F1** . . .

[F2] (c) in either case, at a time between the making of an administration application in respect of the company and the making of an administration order on that application, and

(d) in either case, at a time between the filing with the court of a copy of notice of intention to appoint an administrator under paragraph 14 or 22 of Schedule B1 and the making of an appointment under that paragraph.]

(2) Where a company enters into a transaction at an undervalue or gives a preference at a time mentioned in subsection (1)(a) or (b), that time is not a relevant time for the purposes of section 238 or 239 unless the company—

(a) is at that time unable to pay its debts within the meaning of section 123 in Chapter VI of Part IV, or

(b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction or preference;

but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by a company with a person who is connected with the company.

(3) For the purposes of subsection (1), the onset of insolvency is—

[F3] (a) in a case where section 238 or 239 applies by reason of an administrator of a company being appointed by administration order, the date on which the administration application is made,

(b) in a case where section 238 or 239 applies by reason of an administrator of a company being appointed under paragraph 14 or 22 of Schedule B1 following filing with the court of a copy of a notice of intention to appoint under that paragraph, the date on which the copy of the notice is filed,

(c) in a case where section 238 or 239 applies by reason of an administrator of a company being appointed otherwise than as mentioned in paragraph (a) or (b), the date on which the appointment takes effect,

(d) in a case where section 238 or 239 applies by reason of a company going into liquidation either following conversion of administration into winding up by virtue of Article 37 of the EC Regulation or at the time when the appointment of an administrator ceases to have effect, the date on which the company entered administration (or, if relevant, the date on which the application for the administration order was made or a copy of the notice of intention to appoint was filed), and

(e) in a case where section 238 or 239 applies by reason of a company going into liquidation at any other time, the date of the commencement of the winding up.]

Annotations:

Amendments (Textual)

F1Word in s. 240(1)(b) repealed (15.9.2003) by 2002 c. 40, ss. 248(3), 278, 279, Sch. 17 para. 26(3), Sch. 26 (with s. 249(1)-(3)(6)); S.I. 2003/2093, art. 2(1), Sch. 1 (subject to arts. 3-8 (as amended by S.I. 2003/2332, art. 2))

F2S. 240(1)(c)(d) substituted (15.9.2003) for s. 240(1)(c) by 2002 c. 40, ss. 248(3), 279, Sch. 17 para. 26(2) (with s. 249(1)-(3)(6)); S.I. 2003/2093, art. 2(1), Sch. 1 (subject to arts. 3-8 (as amended by S.I. 2003/2332, art. 2))

F3S. 240(3)(a)-(e) substituted (15.9.2003) for s. 240(3)(a)(aa)(b) by 2002 c. 40, ss. 248(3), 279, Sch. 17 para. 26(4) (with s. 249(1)-(3)(6)); S.I. 2003/2093, art. 2(1), Sch. 1 (subject to arts. 3-8 (as amended by S.I. 2003/2332, art. 2))

Modifications etc. (not altering text)

C1S. 240 applied (with modifications) (4.4.2006) by The Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030), reg. 2, Sch. 1 Art. 23 paras. 2, 3

241 Orders under ss. 238, 239.

(1)Without prejudice to the generality of sections 238(3) and 239(3), an order under either of those sections with respect to a transaction or preference entered into or given by a company may (subject to the next subsection)—

(a)require any property transferred as part of the transaction, or in connection with the giving of the preference, to be vested in the company,

(b)require any property to be so vested if it represents in any person's hands the application either of the proceeds of sale of property so transferred or of money so transferred,

(c)release or discharge (in whole or in part) any security given by the company,

(d)require any person to pay, in respect of benefits received by him from the company, such sums to the office-holder as the court may direct,

(e)provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction, or by the giving of the preference, to be under such new or revived obligations to that person as the court thinks appropriate,

(f)provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for the security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction or by the giving of the preference, and

(g)provide for the extent to which any person whose property is vested by the order in the company, or on whom obligations are imposed by the order, is to be able to prove in the winding up of the company for debts or other liabilities which arose from, or were released or discharged (in whole or in part) under or by, the transaction or the giving of the preference.

(2)An order under section 238 or 239 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the company in question entered into the transaction or (as the case may be) the person to whom the preference was given; but such an order—

(a)shall not prejudice any interest in property which was acquired from a person other than the company and was acquired [**F1**in good faith and for value], or prejudice any interest deriving from such an interest, and

(b)shall not require a person who received a benefit from the transaction or preference [**F1**in good faith and for value]to pay a sum to the office-holder, except where that person was a party to the

transaction or the payment is to be in respect of a preference given to that person at a time when he was a creditor of the company.

[**F2(2A)**Where a person has acquired an interest in property from a person other than the company in question, or has received a benefit from the transaction or preference, and at the time of that acquisition or receipt—

- (a)he had notice of the relevant surrounding circumstances and of the relevant proceedings, or
 - (b)he was connected with, or was an associate of, either the company in question or the person with whom that company entered into the transaction or to whom that company gave the preference,
- then, unless the contrary is shown, it shall be presumed for the purposes of paragraph (a) or (as the case may be) paragraph (b) of subsection (2) that the interest was acquired or the benefit was received otherwise than in good faith.]

[**F3(3)**For the purposes of subsection (2A)(a), the relevant surrounding circumstances are (as the case may require)—

- (a)the fact that the company in question entered into the transaction at an undervalue; or
 - (b)the circumstances which amounted to the giving of the preference by the company in question;
- and subsections (3A) to (3C) have effect to determine whether, for those purposes, a person has notice of the relevant proceedings.

[**F4(3A)**Where section 238 or 239 applies by reason of a company's entering administration, a person has notice of the relevant proceedings if he has notice that—

- (a)an administration application has been made,
- (b)an administration order has been made,
- (c)a copy of a notice of intention to appoint an administrator under paragraph 14 or 22 of Schedule B1 has been filed, or
- (d)notice of the appointment of an administrator has been filed under paragraph 18 or 29 of that Schedule.]

[**F5(3B)**Where section 238 or 239 applies by reason of a company's going into liquidation at the time when the appointment of an administrator of the company ceases to have effect, a person has notice of the relevant proceedings if he has notice that—

- (a)an administration application has been made,
- (b)an administration order has been made,
- (c)a copy of a notice of intention to appoint an administrator under paragraph 14 or 22 of Schedule B1 has been filed,
- (d)notice of the appointment of an administrator has been filed under paragraph 18 or 29 of that Schedule, or
- (e)the company has gone into liquidation.]

(3C)In a case where section 238 or 239 applies by reason of the company in question going into liquidation at any other time, a person has notice of the relevant proceedings if he has notice—

- (a)where the company goes into liquidation on the making of a winding-up order, of the fact that the petition on which the winding-up order is made has been presented or of the fact that the company has gone into liquidation;
- (b)in any other case, of the fact that the company has gone into liquidation.]

(4)The provisions of sections 238 to 241 apply without prejudice to the availability of any other remedy, even in relation to a transaction or preference which the company had no power to enter into or give.

Annotations:

Amendments (Textual)

F1Words in s. 241(2)(a)(b) substituted (26.7.1994) by 1994 c. 12, ss. 1(1), 5, 6(2) (with ss. 5, 6(3))

F2S. 241(2A) inserted (26.7.1994) by 1994 c. 12, ss. 1(2), 5, 6(2) (with ss. 5, 6(3))

F3S. 241(3)(3A)(3B)(3C) substituted (26.7.1994) for s. 241(3) by 1994 c. 12, ss. 1(3), 5, 6(2) (with ss. 5, 6(3))

F4S. 241(3A) substituted (15.9.2003) by 2002 c. 40, ss. 248(3), 279, Sch. 17 para. 27(2) (with s. 249(1)-(3)(6)); S.I. 2003/2093, art. 2(1), Sch. 1 (subject to arts. 3-8 (as amended by S.I. 2003/2332, art. 2))

F5S. 241(3B) substituted (15.9.2003) by 2002 c. 40, ss. 248(3), 279, Sch. 17 para. 27(3) (with s. 249(1)-(3)(6)); S.I. 2003/2093, art. 2(1), Sch. 1 (subject to arts. 3-8 (as amended by S.I. 2003/2332, art. 2))

Modifications etc. (not altering text)

C1S. 241 applied (with modifications) (4.4.2006) by The Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030), reg. 2, Sch. 1 Art. 23 paras. 2, 3

339 Transactions at an undervalue.

(1)Subject as follows in this section and sections 341 and 342, where an individual is adjudged bankrupt and he has at a relevant time (defined in section 341) entered into a transaction with any person at an undervalue, the trustee of the bankrupt's estate may apply to the court for an order under this section.

(2)The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction.

(3)For the purposes of this section and sections 341 and 342, an individual enters into a transaction with a person at an undervalue if—

(a)he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration,

(b)he enters into a transaction with that person in consideration of marriage **[F1**or the formation of a civil partnership], or

(c)he enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual.

Annotations:

Amendments (Textual)

F1Words in s. 339(3)(b) substituted (5.12.2005) by Civil Partnership Act 2004 (c. 33), ss. 261(1), 263, Sch. 27 para. 119; S.I. 2005/3175, art. 2(2) (subject to art. 2(3)-(5))

Modifications etc. (not altering text)

C1S.339 applied (with modifications) by S.I. 1986/1999, art. 3, Sch. 1 Pt. II

S. 339 applied (with modifications) (4.4.2006) by The Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030), reg. 2, Sch. 1 Art. 23 paras. 1-3 (subject to Sch. 1 Art. 23 paras. 6-9)

C2S. 339 restricted by Drug Trafficking Offences Act 1986 (c.32, SIF 39:1), s. 15(6)(a)(7)

S. 339 restricted by Criminal Justice (Scotland) Act 1987 (c. 41, SIF 39:1), ss. 30(6), 34(5)(a), 47(4)(a)

S. 339 restricted (25.4.1991) by Companies Act 1989 (c. 40), s. 182(4), Sch. 22 para. 8(1)(a); S.I. 1991/878, art. 2, Sch.

S. 339 restricted by 1986 c. 32, s. 15(6)(a)(b) (as substituted (prosp.) by 1993 c. 36, ss. 13(9), 78(3) (with s. 78(6)) (which amending provision was repealed (3.2.1995) by 1994 c. 37, ss. 67, 69(2), Sch. 3))

S. 339 restricted (3.2.1995) by 1994 c. 37, ss. 32(5)(a), 69(2), Sch. 2 para. 5 (with s. 66(2))

S. 339 restricted (1.11.1995) by 1988 c. 33, s. 84(6)(a) (as substituted by 1995 c. 11, s. 8(7) (with s. 16(5)(6)); S.I. 1995/2650, art. 2)

S. 339 restricted (1.4.1996) by 1995 c. 43, ss. 44, 50(2), Sch. 2 para. 2(5)

S. 339 restricted (11.12.1999) by S.I. 1999/2979, reg. 17(1)

S. 339 restricted (24.3.2003) by 2002 c. 29, ss. 419(1)-(4), 458(1)(3); S.I. 2003/333, art. 2, Sch. (subject to arts. 3-13 (as amended by S.I. 2003/531, arts. 3, 4))

C3S. 339 excluded (25.4.1991) by Companies Act 1989 (c. 40), ss. 154, 155, 165(1)(a); S.I. 1991/878, art. 2, Sch.

C4S. 339 modified (3.2.1995) by 1994 c. 37, ss. 32(5)(b), 69(2), Sch. 2 para. 5 (with s. 66(2))

341 "Relevant time" under ss. 339, 340.

(1) Subject as follows, the time at which an individual enters into a transaction at an undervalue or gives a preference is a relevant time if the transaction is entered into or the preference given—

(a) in the case of a transaction at an undervalue, at a time in the period of 5 years ending with the day of the presentation of the bankruptcy petition on which the individual is adjudged bankrupt,

(b) in the case of a preference which is not a transaction at an undervalue and is given to a person who is an associate of the individual (otherwise than by reason only of being his employee), at a time in the period of 2 years ending with that day, and

(c) in any other case of a preference which is not a transaction at an undervalue, at a time in the period of 6 months ending with that day.

(2) Where an individual enters into a transaction at an undervalue or gives a preference at a time mentioned in paragraph (a), (b) or (c) of subsection (1) (not being, in the case of a transaction at an undervalue, a time less than 2 years before the end of the period mentioned in paragraph (a)), that time is not a relevant time for the purposes of sections 339 and 340 unless the individual—

(a) is insolvent at that time, or

(b) becomes insolvent in consequence of the transaction or preference;

but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by an individual with a person who is an associate of his (otherwise than by reason only of being his employee).

(3) For the purposes of subsection (2), an individual is insolvent if—

(a) he is unable to pay his debts as they fall due, or

(b) the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities.

[F1(4)A transaction entered into or preference given by a person who is subsequently adjudged bankrupt on a petition under section 264(1)(d) (criminal bankruptcy) is to be treated as having been entered into or given at a relevant time for the purposes of sections 339 and 340 if it was entered into or given at any time on or after the date specified for the purposes of this subsection in the criminal bankruptcy order on which the petition was based.]

[F1(5)No order shall be made under section 339 or 340 by virtue of subsection (4) of this section where an appeal is pending (within the meaning of section 277) against the individual's conviction of any offence by virtue of which the criminal bankruptcy order was made.]

Annotations:

Amendments (Textual)

F1S. 341(4)(5) repealed (*prosp.*) by Criminal Justice Act 1988 (c. 33, SIF 39:1), ss. 123, 170, 171, Sch. 8 para. 16, Sch. 16

Modifications etc. (not altering text)

C1S. 341 applied (with modifications) by S.I. 1986/1999, art. 3, Sch. 1 Pt. II

S. 341 applied (with modifications) (4.4.2006) by The Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030), reg. 2, Sch. 1 Art. 23 paras. 2, 3

342 Orders under ss. 339, 340.

(1)Without prejudice to the generality of section 339(2) or 340(2), an order under either of those sections with respect to a transaction or preference entered into or given by an individual who is subsequently adjudged bankrupt may (subject as follows)—

(a)require any property transferred as part of the transaction, or in connection with the giving of the preference, to be vested in the trustee of the bankrupt's estate as part of that estate;

(b)require any property to be so vested if it represents in any person's hands the application either of the proceeds of sale of property so transferred or of money so transferred;

(c)release or discharge (in whole or in part) any security given by the individual;

(d)require any person to pay, in respect of benefits received by him from the individual, such sums to the trustee of his estate as the court may direct;

(e)provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction or by the giving of the preference to be under such new or revived obligations to that person as the court thinks appropriate;

(f)provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for the security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction or by the giving of the preference; and

(g)provide for the extent to which any person whose property is vested by the order in the trustee of the bankrupt's estate, or on whom obligations are imposed by the order, is to be able to prove in the bankruptcy for debts or other liabilities which arose from, or were released or discharged (in whole or in part) under or by, the transaction or the giving of the preference.

(2)An order under section 339 or 340 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the individual in question entered into the transaction or, as the case may be the person to whom the preference was given; but such an order—

(a)shall not prejudice any interest in property which was acquired from a person other than that individual and was acquired [F1in good faith and for value], or prejudice any interest deriving from such an interest, and

(b) shall not require a person who received a benefit from the transaction or preference [F1 in good faith and for value] to pay a sum to the trustee of the bankrupt's estate except where he was a party to the transaction or the payment is to be in respect of a preference given to that person at a time when he was a creditor of that individual.

(2A) Where a person has acquired an interest in property from a person other than the individual in question, or has received a benefit from the transaction or preference, and at the time of that acquisition or receipt—

(a) he had notice of the relevant surrounding circumstances and of the relevant proceedings, or

(b) he was an associate of, or was connected with, either the individual in question or the person with whom that individual entered into the transaction or to whom that individual gave the preference,

then, unless the contrary is shown, it shall be presumed for the purposes of paragraph (a) or (as the case may be) paragraph (b) of subsection (2) that the interest was acquired or the benefit was received otherwise than in good faith.]

(3) Any sums required to be paid to the trustee in accordance with an order under section 339 or 340 shall be comprised in the bankrupt's estate.

[F3(4) For the purposes of subsection (2A)(a), the relevant surrounding circumstances are (as the case may require)—

(a) the fact that the individual in question entered into the transaction at an undervalue; or

(b) the circumstances which amounted to the giving of the preference by the individual in question.

(5) For the purposes of subsection (2A)(a), a person has notice of the relevant proceedings if he has notice—

(a) of the fact that the petition on which the individual in question is adjudged bankrupt has been presented; or

(b) of the fact that the individual in question has been adjudged bankrupt.

(6) Section 249 in Part VII of this Act shall apply for the purposes of subsection (2A)(b) as it applies for the purposes of the first Group of Parts.]]

Annotations:

Amendments (Textual)

F1 Words in s. 342(2)(a)(b) substituted (26.7.1994) by 1994 c. 12, ss. 2(1), 5, 6(2) (with ss. 5, 6(3))

F2 S. 342(2A) inserted (26.7.1994) by 1994 c. 12, ss. 2(2), 5, 6(2) (with ss. 5, 6(3))

F3 S. 342(4)-(6) substituted for s. 342(4) (26.7.1994) by 1994 c. 12, ss. 2(3), 5, 6(2) (with ss. 5, 6(3))

Modifications etc. (not altering text)

C1 Ss. 342-345 applied (with modifications) by S.I. 1986/1999, art. 3, Sch. 1 Pt. II

S. 342 applied (with modifications) (4.4.2006) by The Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030), reg. 2, Sch. 1 Art. 23 paras. 2, 3