

# s.127 Void Dispositions

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# Section 127(1) IA

In a winding up by the court, any **disposition of the company's property**, and any transfer of shares, or alteration in the status of the company's members, made after the **commencement of the winding up** is, **unless the court otherwise orders, void.**

# Policy

*“The invalidation of dispositions of a company's assets after the date of presentation of a winding up petition is **part of the statutory scheme** designed to prevent the directors of a company, when liquidation is imminent, from disposing of the company's assets to the prejudice of its creditors and to preserve those assets **for the benefit of the general body of creditors.**”*

**Coutts & Co. v Stock [2000] 1 WLR 906**

per Lightman J

# Commencement of Winding Up

# Commencement of Winding Up

- Ordinarily, compulsory winding up deemed to commence at the time of presentation of winding up petition: s.129(2) IA86
- BUT where creditor's petition presented on or after 27 April 2020, winding up deemed to commence on making of winding up order: para.9, Sch.10 CIGA20

**“Disposition”**

# Meaning of “disposition”

Adrian Walters (Vulnerable Transactions in Corporate Insolvency):

*“on a strict reading...a mere shift in value will not usually be caught unless it is accompanied by the transfer of some identifiable property right from the company to another party. However, in cases...where value is subtracted from the company and transferred to another party, the court may be persuaded to adopt a more purposive construction...on the basis that the counterparty is enriched at the expense of the insolvent estate.”*

# Meaning of “disposition”

## Roy Goode (Principles of Corporate Insolvency Law):

- “Disposition” must be given a wide meaning if the purpose of s.127 is to be achieved
- Includes any act which, in reducing or extinguishing the company’s rights in an asset, transfers value to another person: (e.g. lien, surrender of lease, giving up of contractual rights, set-off)
- BUT must lead in real, not merely technical sense, to transfer of value (e.g. extinguishment of chose in action on collection of debt not disposition)

# Payments

- Payment into Company's bank account is disposition in favour of bank
- BUT only relevant if: (i) account is overdrawn; or (ii) bank is or becomes insolvent
- Payment out of bank account is disposition in favour of recipient (but not bank) (*Bank of Ireland v Hollicourt (Contracts) Ltd* [2000] 1 WLR 895)

# Settlement of claim

*Re Officeserve Technologies Ltd* [2017] EWHC 1920  
(Ch)

- Transfer of intangible property (e.g. assignment of debt owed to company) void
- Mischief (reducing the company's assets with which to pay debts) same where debt owed to company released
- Destruction or reduction in value of property right belonging to Company causing an *immediate and equivalent accrual* in value to another person within the mischief

# Settlement of claim

- Release of contractual rights by a creditor company in favour of debtor constitutes a 'disposition'
- Sufficient that identifiable property by some act having legal consequences ceases to be in the ownership of the company and *the value* accrues to some other person
- Examples: surrender of lease, release of debt, cancellation of charge

# Transfer of beneficial ownership

## *Akers v Samba* [2017] UKSC 6

- Transfer by trustee of legal interest in property held on trust for debtor company is not disposition of company's property
- Company's property continues despite disposal of legal title unless and until disposal overrides it
- If the disposal overrides company's interest as regards transferee of legal title, not because of any disposal of company's interest

# Validation Orders

# PDIP, para 9.11.7

The court will need to be satisfied by credible evidence either that the company is **solvent** and able to pay its debts as they fall due or that a particular transaction or series of transactions in respect of which the order is sought will be **beneficial to or will not prejudice the interests of all the unsecured creditors as a class.**

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

*“A disposition carried out in good faith in the ordinary course of business at a time when the parties are unaware that a petition has been presented may, it seems, normally be validated by the court ...unless there is any ground for thinking that the transaction may involve an attempt to prefer the disponent, in which case the transaction would probably not be validated.”*

per Buckley LJ

# Express Electrical Distributors v Beavis [2016] EWCA Civ 765

*“...save in exceptional circumstances, a validation order should only be made...if there is some **special circumstance** which shows that the **disposition** in question **will be** (in a prospective application case) or **has been** (in a retrospective application case) **for the benefit of the general body of unsecured creditors**, such that it is appropriate to disapply the usual pari passu principle.”*

per Sales LJ

# MKG Convenience Ltd [2019] EWHC 1383 (Ch)

- For Applicant to show that circumstances make validation order appropriate
- Court may in principle make findings based on inference BUT only if satisfied appropriate on all facts
- Not to be automatically assumed that transactions in the ordinary course of business, or even sales of assets at full value, are necessarily for the benefit of creditors

# MKG Convenience Ltd [2019] EWHC 1383 (Ch)

- Payments for pre-petition supplies cannot have added to Company's assets at date of petition
- Whether payments for post-petition supplies were for benefit of creditors depends on whether the stocks delivered were either: (i) sold at a profit, the proceeds being paid into the Company's accounts such that they became available to the liquidators; or (ii) remained in the Company's possession at the date of the winding up order such that they came into the liquidators' control.

# Retrospective orders: hindsight?

## Officeserve Technologies:

*“In my judgment, s 127 is not, and is not intended to be, a prescription for the behaviour of company directors in future. Instead it is intended to, and does, help resolve problems of the past, each on the particular facts of their case. If a decision taken at the time (which according to the legislative rule is to be treated as void unless validated) has turned out well for the creditors, then the decision-maker may be given credit for that. If on the other hand the decision has turned out badly for the creditors, then it is not easy to see what legislative policy is being served by foisting a bad bargain on the creditors. Accordingly, the court in considering whether to make a validation order is entitled to take account of what has happened subsequently.”*

# Macclesfield Town Football Club Ltd

**HOT OFF THE PRESS!**



- WUP presented in January 2019
- In Jun 2019, Co borrows £120k from A (to fund unexpected shortfall in cashflow) and grants debenture to A, but no validation order obtained
- In Aug/Sep 2019, validation orders granted for payments to other creditors
- Following WUO, A applies for retrospective validation order
- Chief ICCJ Briggs holds:
  - At time, loan was for benefit of creditors – allowed Co to continue trading
  - Liquidation caused by subsequent events (i.e. COVID)
- Retrospective Order granted

# Recovering Void Dispositions

# Nature of Claim

## Officeserve Technologies Ltd v Annabel's (Berkeley Square) Ltd [2019] EWHC 2168 (Ch)

- Right of recovery determined by general law
- If void disposition is transfer of property right, claim to return of possession of asset is tortious
- If void disposition is payment, claim in unjust enrichment, is *in principle* appropriate form of claim
- BUT does not necessarily have all the characteristics to be found in cases not involving insolvency

# Defences

## Good Faith for Value

- Not available: *Officeserve v Annabel's*

## Change of Position

- Available in principle: *Officeserve v Annabel's*
- BUT circumstance in which can succeed constrained in same way and for same reasons as exercise of court's discretion to validate AND not easy to think of circumstance in which court would refuse validation order but allow change of position defence: *MKG*
- In any event, *Officeserve* may be wrongly decided: cf *Skandinaviska Enskilda Banken AB v Conway* [2019] UKPC 36

# Defences

## Estoppel by Representation

- Separate and distinct defence to change of position: *National Westminster Bank plc v Somer International (UK) Ltd* [2002] QB 1286
- Subject to “exception” where mistaken payment so large as to bear no relation to any detriment incurred: *Avon County Council v Howlett* [1983] 1 WLR 605
- Available in principle BUT defendant must show representation that payment is not a disposition liable to be avoided under s.127 AND such representation could not be allowed to mature into an estoppel (because parties cannot contract out of s.127): *Officerserve v Annabel's*

# Defences

## Ministerial Receipt

Goff & Jones: *The Law of Unjust Enrichment* (9<sup>th</sup> ed) at 4-68:

*“A defendant who receives assets in his capacity as an agent may immediately hand them over to his principal, or simply hold them as bailee pending further instructions, and in either case he may derive no personal benefit from the assets. In these circumstances he may be able to escape liability in unjust enrichment on the basis that he received the assets ministerially, and did not receive them for his own personal use and benefit.”*

See *Parry: Transaction Avoidance in Insolvencies* (3<sup>rd</sup> ed) at 3.38-3.45

# Misfeasance Claims and s.127

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- Post-petition duty to act in interests of company's creditors as a whole
- Breach of duty to cause/permit void dispositions
- Cause of action against director (breach of fiduciary duty) separate and distinct to cause of action against recipient (restitution)...

# Misfeasance Claims and s.127

- ...but may be “closely analogous”
  - payments to settle debts (i.e. preferences) or purchase goods/services will not be (no loss to the Company)
  - TUVs/gifts will be (loss to the Company is the same)
- Take care when settling claims!

# Forthcoming Webinars

## 9 December 2020

### Insolvency Practitioners: the Standard of Care

Holly Doyle (Guildhall Chambers) and Rachel Lai (Director, Menzies LLP), two of the authors of the upcoming book "Insolvency Practitioners: Appointments, Duties, Powers and Liability" (Elgar) will talk about:

- the standard of care applied to IPs
- the role of expert evidence in claims against IPs
- practical examples of such claims, including those relating to advice, pre-packs, conducting litigation and more.

## 17 December 2020

### Employment Issues in Insolvencies

Debbie Grennan and Samuel Parsons (Guildhall Chambers) will explore how employment issues interrelate with the IP's duty to maximise returns for creditors, minimise claims in the insolvency, and will cover the situations in which IPs may also be personally responsible.