



Topics of interest in this issue...

When can transactions at an undervalue be attacked?

Legal/beneficial ownership and constructive trusts

Warning over spiralling borrowing

Those applying to have a company struck off the Companies Register - beware!

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This is the latest of our insolvency issues newsletter, summarising the topics that may affect your clients. If you would like to discuss any of the issues that we have raised in more detail, then please contact us and we will be happy to assist.

When can transactions at an undervalue be attacked?

The time limits within which 'transactions at an undervalue' can be upset under Sections 238 and 339 of the Insolvency Act are reasonably well understood: 2 years for companies, 5 years for individuals. Section 423, which deals with such transactions which may be viewed as defrauding creditors, has always been more difficult to prove. But the recent *Sands v Clitheroe* case revisits the criteria for succeeding and great care is required to avoid falling foul of Section 423.

The facts in the *Sands* case were as follows: Mr Clitheroe, a practicing solicitor, gifted his interest in his home to his wife: at the time he was solvent and a partner in a fairly secure practice but effected the transfer in order to protect the family home in the event of the financial collapse of the partnership; after being made bankrupt 15 years later and, despite all of his creditors being 'new', the court upset the transaction.

The court decided that where the intent of the transaction had been to put assets beyond the creditors' reach, even though none of the bankruptcy debts existed at the time, the transaction fell within Section 423, for which there is no time limit. Notably, Section 423 applies equally to companies as to individuals.

The case shows that if a transaction is for full value or the reasons for the transaction are other than to put assets beyond the reach of creditors, it will be 'safe' from attack under Section 423, regardless of how long ago the transaction occurred. It is, therefore, imperative that the reasons for a transaction are fully documented rather than leaving a court to assume it was to avoid creditors. It also highlights that, where there could be a dispute as to value, it would be wise to retain evidence of the basis of valuation well beyond the appropriate statute of limitations period.

Legal/beneficial ownership and constructive trusts

The recent *Oates v Stimson* case has

highlighted the need for advisers when ascertaining parties' interests to consider not only the legal and beneficial ownership of a property but also the potential for a constructive trust to exist.

The case concerned how the equity should be split between two legal owners of a house. The parties had previously reached an oral agreement for Mr Oates to sell his interest to Mr Stimson, whereby the latter met all the outgoings and paid for certain improvements, over an eight year period despite not formalising the sale.

Although the Law of Property (Miscellaneous Provisions) Act 1989 requires a sale of an interest in land to be in writing, the Court of Appeal decided that the conduct of the parties had created a constructive trust, "rendering it unconscionable not to permit him to enforce the oral agreement".

Therefore, if you have a client who falls on hard times and his wife continues to pay all the property outgoings over time, you need to look deeper than mere legal and assumed beneficial ownership when exploring their respective positions. Is there an earlier oral agreement and a course of conduct between them that affects their interests, and thus their available solutions?

Warning over spiralling borrowing

In 2007 1.3 million debt consolidation loans were issued to people aiming to manage all their debt in one package. A recent survey has shown that 25% of people taking out a consolidation loan have gone on to borrow more and failed to discharge their existing debts. The new voluntary Banking Code, which came into force in April 2008, says that banks must do more to help customers in financial difficulty and issue more warnings about the dangers of failing to pay off other debts.

Our personal debt advisory website www.relief4debt.co.uk clearly sets out the options available to an individual with debt problems.

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Those applying to have a company struck off the Companies Register - beware!

- The Companies Act 2006 introduces changes to company law that will directly affect directors and shareholders. From 1 October 2009 the time limit for making an application to Court for the restoration of a liquidated company to the register after dissolution will be six years. The time limit is currently two years. The six year time limit will also apply to companies struck off and dissolved by application of the directors (presently 20 years). It remains essential, therefore, that thorough due diligence is undertaken to identify and deal with all actual and contingent liabilities and onerous contracts to avoid any future action against the company and its directors.
- When a company is struck off owning property, that property vests in the Crown as 'bona vacantia'. As share capital and non-distributable reserves (including the share premium) cannot be repaid otherwise than by liquidation or the buy back of shares, or Court Order, the equivalent assets

will pass to the Crown. Thankfully, the Office of the Treasury Solicitor has confirmed that where a company has been struck off by application of the directors it will waive the right to recover any unauthorised distribution of less than £4,000.

Insolvency Issues via Email

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About Mercer & Hole

Mercer & Hole is a medium sized firm of chartered accountants with 18 partners and approximately 150 staff.

Our Rescue, Recovery and Insolvency team has many years experience assisting companies and individuals who are facing financial problems. They are happy to have an initial, free of charge, meeting at which they can explore the options best suited to your particular circumstances. This will enable them to provide a service tailored to your specific needs.

The Mercer & Hole Rescue, Recovery and Insolvency team has extensive experience covering the breadth of restructuring and recovery work. Our partners and managers have many years of experience helping companies and individuals facing financial problems.

Initial consultations are free of charge and without commitment.



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