

# An introduction to Antecedent Transactions: Preferences

Andrew Brown

30 November 2021



# Plan of Action

- What is a preference?  
Definitions
- The 'Desire to Prefer' test
- 
- The 'Relevant Time' test:  
periods and insolvency
- Court orders for relief and  
defences
- Limitation Issues

# What are Antecedent Transaction Claims?

- Allows an officeholder to reverse a transaction, or seek compensation akin to a reversal
- Specifically defined types of transactions which fall within 'relevant periods' when a company/person is insolvent
- Both individual and corporate insolvency
- Preference Payments (s.239 & s.340 IA 1986)
- TUVs (s.238 & s.339 IA 1986)
- S.423 IA 1986 claims (a type of TUV)
- Extortionate Credit Transactions / Avoidance of Floating Charges

# What is a preference?

- The preferring of a single creditor over the body of creditors.
- If in the relevant time:
  - (a) that person is one of the company/bankrupt's creditors or a surety or guarantor for any of its debts;
  - (b) the company/bankrupt does anything which puts that creditor into a better position than the position they would have been in if that thing had not been done and the company/bankrupt became insolvent.
- The creditor must be put in a better position than they otherwise would be in any insolvency.

## Examples:

- Paying a specific creditor's debt;
- Granting a charge over company/personal assets to create a secured creditor out of an unsecured one;
- Returning goods not paid for;
- Compliance with a court order: matrimonial proceedings.

## **'The Desire to Prefer' – What is this?**

- The Court can only order relief where it finds a desire to put the creditor in a preferential position to the general body of creditors – subjective element. State of mind of the creditor is irrelevant.
- Doesn't need to be dominant purpose, merely a purpose (Re MC Bacon Ltd [1990]).
- In bankruptcy, the state of mind of the bankrupt. In corporate cases, look to the directors of the company.

# Proving a Desire to Prefer

- Can be difficult to prove a subjective mindset if no smoking gun
- Any contemporaneous material: emails, letters, company minutes, indicating a desire to pay one creditor rather than others.
- Looks at facts, if particular body of creditors not paid anything, but another is without obvious commercial reason, then rely on that.
- Helpfully, there is a presumption sometimes.
- Where the recipient is connected (corporate) or an associate (bankruptcy), then the Court will presume a desire to prefer.
- Best practice is not to rely solely on presumptions.

## **A potential defence?**

- If a company forced (for good commercial reason) to prefer a creditor, then it will not be taken to desire it.
- Hostage payments to key suppliers for fresh supplies, then it will not have desire.
- Likewise, the grant of security to an existing lender for further loans might fall outside the desire to prefer.



## **'RELEVANT TIME'**

- Requirement that a preference payment must be in the 'relevant time' under s.239(2)
- Starting position: 6-months ending with onset of insolvency
- For connected persons: 2-years
- Onset of insolvency: petition, app for admin, notice of admin appointment via QFCH

## Connected Persons?

- Connected Person? Defined by s(s). 249 and 435
- For bankruptcy, spouses, relatives (including adopted and 'half-blood'), business partners.
- Includes: directors for companies and their 'associates,' ie. spouses, relatives, business partners
- Includes companies with shared controlling shareholders, or two companies controlled by associates.

## **Insolvency - Relevant Time**

- The Company/Bankrupt needed to be insolvent at the date of the transaction or becomes so as a result.
- No presumption as in TUVs
- Court consider the commercial reality of the situation: balance-sheet and cash-flow tests.

# Relief?

- Both s.239 and s.340 give the Court a discretion as to what it awards
- 'The Court shall [...] make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference'
- Broad discretion as to what it may order (examples at s.241)
- Re Paramount Airways Ltd [1993] Ch. 223
- The Court can award nothing, if in the interests of justice
- Re Fowlds [2021]: Court awarded no award despite a preference being proven as disproportionate effect on the third-party recipient

# Limitation

- S.8 & 9 Limitation Act 1980
- S.8 – 12 years if non-monetary relief sought (ie. return of property, etc)
- S.9 – 6 years if monetary relief sought
- Most likely to be s.9 as most claims are for money

**Any Questions?**

**No, then on to Emma**

Andrew Brown

[abrown@radcliffechambers.com](mailto:abrown@radcliffechambers.com)

# Radcliffe Chambers

Radcliffe Chambers  
11 New Square  
Lincoln's Inn  
London WC2A 3QB

T: 020 7831 0081  
F: 020 7405 2560  
DX: 319 London  
[clerks@radcliffechambers.com](mailto:clerks@radcliffechambers.com)

[www.radcliffechambers.com](http://www.radcliffechambers.com)

