

Late Registration and Rectification of Company Charges

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Introduction

Why the need to register?

Companies Act 2006

s.859H Consequence of failure to deliver charges

(3) Where this section applies, the charge is void (so far as any security on the company's property or undertaking is conferred by it) against—

- (a) a liquidator of the company,
- (b) an administrator of the company, and
- (c) a creditor of the company.

(4) Subsection (3) is without prejudice to any contract or obligation for repayment of the money secured by the charge; and when a charge becomes void under this section, the money secured by it immediately becomes payable.

-> Contractual remedy against the borrower remains

Overview

1. Legal Framework
2. Possible Issues
3. Example Scenarios
4. Practice and Procedure

Part 1: Legal Framework

s.859A Charges created by a company

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(2)The registrar must register the charge if, before the end of the period allowed for delivery, the company or any person interested in the charge delivers to the registrar for registration a section 859D statement of particulars.

(3)Where the charge is created or evidenced by an instrument, the registrar is required to register it only if a certified copy of the instrument is delivered to the registrar with the statement of particulars.

(4)“The period allowed for delivery” is 21 days beginning with the day after the date of creation of the charge (see section 859E), unless an order allowing an extended period is made under section 859F(3).

(5)Where an order is made under section 859F(3) a copy of the order must be delivered to the registrar with the statement of particulars.

Legal Framework Cntd.

s.859F Extension of period allowed for delivery

(1) Subsection (3) applies if the court is satisfied that—

- (a) neither the company nor any other person interested in the charge has delivered to the registrar the documents required under section 859A or (as the case may be) 859B before the end of the period allowed for delivery under the section concerned, and
- (b) the requirement in subsection (2) is met.

(2) The requirement is—

(a) that the failure to deliver those documents—

(i) was accidental or due to inadvertence or to some other sufficient cause, or

(ii) is not of a nature to prejudice the position of creditors or shareholders of the company, or

(b) that on other grounds it is just and equitable to grant relief.

(3) The court may, on the application of the company or a person interested, and on such terms and conditions as seem to the court just and expedient, order that the period allowed for delivery be extended.

Legal Framework Cntd.

s.859I Entries on the register

...

(6) In the case of registration under section 859A or 859B, the certificate is conclusive evidence that the documents required by the section concerned were delivered to the registrar before the end of the relevant period allowed for delivery

Legal Framework Cntd.

s.859M Rectification of register

(1) Subsection (3) applies if the court is satisfied that—(a) there has been an omission or mis-statement in any statement or notice delivered to the registrar in accordance with this Chapter, and (b) the requirement in subsection (2) is met.

(2) The requirement is that the court is satisfied—(a) that the omission or mis-statement—(i) was accidental or due to inadvertence or to some other sufficient cause, or (ii) is not of a nature to prejudice the position of creditors or shareholders of the company, or (b) that on other grounds it is just and equitable to grant relief.

(3) The court may, on the application of the company or a person interested, and on such terms and conditions as seem to the court just and expedient, order that the omission or mis-statement be rectified.

Legal Framework Cntd.

s.859N Replacement of instrument or debenture

(1) Subsection (2) applies if the court is satisfied that—(a) a copy of an instrument or debenture delivered to the registrar under this Chapter contains material which could have been omitted under section 859G;

(a) a copy of an instrument or debenture delivered to the registrar under this Chapter contains material which could have been omitted under section 859G;

(b) the wrong instrument or debenture was delivered to the registrar; or

(c) the copy was defective.

(2) The court may, on the application of the company or a person interested, and on such terms and conditions as seem to the court just and expedient, order that the copy of the instrument or debenture be removed from the register and replaced.

(3) A copy of the court's order must be sent by the applicant to the registrar for registration

Legal Framework Cntd.

s.1096 Rectification of the register under court order

(1)The registrar shall remove from the register any material—
(a)that derives from anything that the court has declared to be invalid or ineffective, or to have been done without the authority of the company, or
(b)that a court declares to be factually inaccurate, or to be derived from something that is factually inaccurate, or forged, and that the court directs should be removed from the register.

...

(3)The court may make an order for the removal from the register of anything the registration of which had legal consequences only if satisfied that the interest of the company, or (if different) the applicant, in removing the material outweighs any interest of other persons in the material continuing to appear on the register.

...

(5)A copy of the court's order must be sent to the registrar for registration.

Part 2: Possible Issues

1. Failure to deliver particulars within the 21-day period provided in s.859A, requiring an extension.
2. Incorrect particulars on the MR01 form accompanying the charge.
3. Wrong charge registered (for example, an earlier version).
4. Charge wrongly registered.

Part 3: Example Scenarios

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Scenario 1:

Borrower's solicitor with conduct of the matter goes away and neglects to delegate the task of registration to a colleague. Solicitor then attempts to deliver the particulars after 21 days, leading to rejection by the Registrar.

Issue: Particulars not delivered within the 21-day period allowed for delivery.

Scenario 1:

Borrower's solicitor with conduct of the matter goes away and neglects to delegate the task of registration to a colleague. Solicitor then attempts to deliver the particulars after 21 days, leading to rejection by the Registrar.

Issue: Particulars not delivered within the 21-day period allowed for delivery.

Remedy

Issue claim seeking an extension of time pursuant to s.859F, citing inadvertence (and/or does not prejudice creditors and/or it is just and equitable to grant relief).

Scenario 2:

Charge created on 01 March 2024. MR01 states that the charge was created on 21 March 2024. Particulars delivered 31 March 2024 and accepted by the Registrar.

Issues: Incorrect information on the MR01 and charge registered out of time.

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Remedy

Seemingly two issues. However...

859I Entries on the register

(6) In the case of registration under section 859A or 859B, the certificate is conclusive evidence that the documents required by the section concerned were delivered to the registrar before the end of the relevant period allowed for delivery.

Therefore, apply under s.859M to correct error in the notice.

Scenario 3:

Various versions of the charge are exchanged and amended prior to creation of the charge. As a result of inadvertence, the borrower's solicitor delivers an earlier version of the charge. This is accepted. The error is then identified after the 21-day period for delivery has elapsed.

Issue: Incorrect charge appears on the register

Scenario 3:

Various versions of the charge are exchanged and amended prior to execution of the charge. As a result of inadvertence, the borrower's solicitor delivers an earlier version of the charge. This is accepted. The error is then identified after the 21-day period for delivery has elapsed.

Issue: Incorrect charge appears on the register.

Remedy

Application under section s.859N(2) for an order that the copy of the instrument or debenture be removed from the register and replaced.

Scenario 4:

A charge is signed by an individual who purports to act for the borrower company. The charge is registered and the company then becomes aware of the charge which has been registered without due authority.

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Issue: Charge on the register without the company's authority.

Remedy

Apply under s.1096 to rectify the register. As the registration has had legal consequences (seemingly), will need to show that interest of the company/applicant outweighs interest of other persons.

Part 4: Procedure

Part 4: Procedure and best Practice

Pre-issue

1. PD 49A.22.3(7)(b) and (c) – Usual place of issue is County Court at Central London.
2. PD 49A.5(1) – Proceedings to be started by Part 7 or Part 8 Claim Form as appropriate – invariably Part 8 Claim Form.
3. Addition of the Registrar as a Defendant? No clear rule in statute. PS 49.1.2 *“It is strongly recommended that the Registrar of Companies is joined as a respondent and served with the application”* (in s.1096 claims) and Companies House Guidance states something similar– distinction in practice between where the Registrar will be required to do something more than simply registering.
4. Witness statement explaining the error along with supporting exhibits.
5. Statement of solvency from director with **wet ink signature** (14 days)
6. Letter of non-objection from the Registrar (in appropriate cases).

Part 4: Procedure and best Practice

Post-issue

1. Listed for a paper determination - remember updated solvency evidence from director ahead of date given for determination.
2. In person hearing: block-listed – deliver the original charge and updated solvency evidence to your barrister to be produced at the hearing.

Part 4: Procedure and best Practice

Post-determination

1. Only 21 days from date of hearing to deliver particulars. Otherwise, new claim required.
2. Copy of order must be delivered with particulars.
3. Act promptly!

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Terminating Contracts: Avoiding Traps and Pitfalls

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Overview

- What termination rights exist and have they arisen?
- Has right to terminate been lost?
- Effecting a termination.
- Effects of termination.

Assess the Termination Rights

- Starting point: contract terms.
 - Termination for “cause”.
 - Termination for convenience.
- “Any breach” provisions.
 - Common provision, but a very common trap for the unwary.
 - *Vivienne Westwood Ltd v Conduit Street Development Ltd* [2017] EWHC 350 (Ch) at [56]-[58].
 - Likely excludes “trivial” or “de minimis” breaches but will not require breach to be “material” or “substantial”.
 - But beware: see, e.g., *The Antaios* [1981] 2 Lloyd’s Rep 284 and *Rice v Great Yarmouth DC* [2000] WL 823961 m – suggest breach must be repudiatory in character.

Assess the Termination Rights

- Is notice to remedy required prior to termination?
 - Check contractual provisions carefully.
 - May distinguish between remediable and irreparable breaches.
 - See, e.g., *Expert Clothing Service and Sales Limited v Hillgate House Limited* [1986] Ch 340 – is harm capable of being retrieved, e.g. by performing act out of time?
 - Stipulations as to time are unlikely to be irreparable, without more.
 - Necessary to cure breach: e.g. *Bains v Arunvill Capital Ltd* [2020] EWCA Civ 545 – letter stating that party will perform insufficient.

Assess the Termination Rights

- Do the common law rights still apply?
 - Clear wording is required to oust.
 - E.g.: *"This Agreement shall commence on 1 Feb 2016 and shall continue, unless terminated in accordance with this [termination clause] for [X] years..."* – *James Kemball v K Line (Europe) Ltd* [2022] EWHC 2239 (Comm).
 - Sufficient to exclude termination rights at common law (*obiter*).
 - Not necessary to expressly preserve common law rights.

Assess the Termination Rights

- Rights at common law:
 - Cf conditions, innominate/intermediate terms and warranties.
 - Most provisions will be deemed to be innominate terms: *Grand China Logistics v Spar Shipping* [2016] EWCA Civ 982.
 - *Hong Kong Fir Shipping Co Ltd v Kawasaki Kaisha Ltd* [1962] 2 WLR 474. Breach must deprive the party of substantially all the benefit which the parties intended that party to get under the contract.
 - Take care: if the breach in question triggers 'notice to cure', unlikely to justify termination at common law straight away: *Maurice MacNeill Iona Ltd v C21 London Estates* [2018] EWCA Civ 1823.

Assess the Termination Rights

- Renunciation is also repudiatory.
 - Words of conduct which amount to refusal to perform, or intention not to perform.
 - Cf situation in which both parties have abandoned their obligations.
 - Mere inactivity unlikely to be sufficient: *Allied Marine Transport Ltd v Vale de Rio Doce Navegacaco* [1985] 1 WLR 925.

Assess the Termination Rights

- Termination for insolvency.
 - No common law right to do so.
 - Beware the corporate customer (of goods and non-financial services) – protected by s.233B(3)-(4) Insolvency Act 1986.
 - By contrast, insolvency officeholder may terminate, depending on circumstances.

Assess the Termination Rights

- Termination on reasonable notice?
 - Is there scope for reasonable notice to terminate without cause?
 - Check contractual provisions carefully.
 - Seldom works in fixed-term contracts or ones with express termination rights: e.g., *Burke Partnership v Body Shop* [2023] EWHC 2897 (Ch). Five-year term which could be terminated without cause left no scope for implication of right to terminate earlier.

Assess the Termination Rights

- Beware effects of contractual 'estoppel'.
- *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386 and *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221.

Loss of Termination Rights

- Waiver by election.
 - Election is simply the choice between keeping the contract going and termination.
 - Once the choice is communicated, it cannot be undone.
 - Electing party must:
 - Be aware of the right to terminate.
 - Election requires outward representation or conduct. Any statement or conduct which is only consistent with knowing exercise of the alternative rights will be sufficient.
 - Inaction for short period, or allowing time to perform, pressing for performance (for a short period), usually insufficient.
 - Preserving right to to terminate can help but is not absolute: *Lombard North v European Skyjets* [2022] EWHC 728 (QB).

Loss of Termination Rights

- Waiver by election (cont.).
 - By contrast, the following will usually amount to a waiver:
 - Calling for further performance.
 - Asserting rights to payments which will only arise if the contract has been affirmed (cf. rights which would survive termination).
 - Continuing to perform one's own obligations.
 - Pursuing litigation without taking the point.

Loss of Termination Rights

- No waiver clauses.
 - Usually only sufficient to prevent inaction amounting to waiver.
 - Unlikely to cure the effects of positive acts or statements: e.g., *Prakash Industries Ltd v Peter Beck Und Partner* [2022] EWHC 754 (Comm).
 - Depending on the drafting, may not cover waiver by election at all: *Tele2 International Card Co v Post Office Ltd* [2009] EWCA Civ 9.

Effecting Termination

- Important to comply with contractual notice provisions to the letter.
- *Mannai principle*: minor defects in unilateral contractual notices will not invalidate the notice if the reasonable recipient, with requisite knowledge of background, would not be perplexed.
- Two stage process (*Trafford v Total Fitness* [2002] EWCA Civ 1513):
 - Consider proper construction of notice.
 - Match up notice against relevant requirements of the contract to see if they are met.
 - *Mannai* principle only relevant to stage 1, not stage 2.
 - Blue paper/pink paper point.

Effecting Termination

- State the grounds for termination – although no strict requirement at common law.
- Check the methods of transmission of notice.
 - Beware the commonest trap of all: "*shall*" does not mean must.
 - Clear and unequivocal communication may therefore be enough.

Effects of Termination

- Commonest trap of all: effect is not rescission.
 - Same under common law and express contractual rights.
 - The contract still exists and has a legal effect: not undone as if never made: *State Trading Corp of India v Golodetz & Co* [1989] 2 Lloyd's Rep 277.
 - Further performance of main contractual duties end but secondary obligations and accrued rights survive.
 - Check for survivorship provisions.

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