

Antecedent Transactions in the BVI and Cayman Islands: a beginner's guide

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Introduction

Antecedent transactions are certain categories of transactions that have been entered into by a company during the time immediately before the commencement of its winding-up or liquidation (these terms are used interchangeably in this guide) which may be the subject of a liquidator's review.

This guide examines what transacting parties need to know about the potential implications antecedent transactions may have on doing business with BVI and Cayman Islands companies.

Antecedent Transaction Prerequisites

The company must be insolvent and have had liquidators appointed to it.

One of the primary concerns of the liquidator in administering a liquidation estate is to ascertain the extent of the property owned by the company so that it can be realised and the proceeds distributed to creditors. A review of transactions entered into by the company close to its insolvency is one way a liquidator may seek to increase the pool of assets of the company available for distribution.

Each of the antecedent transaction prerequisites is discussed in our jurisdiction-specific client guides '[What a credit needs to know about liquidating an insolvent BVI company](#)' and '[What a credit needs to know about liquidating an insolvent Cayman company](#)'.

We summarise the salient points below.

When is a company insolvent?

Different tests apply in the BVI and the Cayman Islands. A company must be balance-sheet or cash-flow insolvent (BVI) or cash-flow insolvent (Cayman Islands) to warrant the presentation of a winding-up petition against it.

Appointment of liquidators

The appointment of liquidators is made by the High Court (BVI) and the Grand Court (Cayman Islands). In both jurisdictions, liquidators are officers of the court and operate under its supervision.

Commencement of winding-up

The liquidation of a BVI company commences at the time at which a liquidator is appointed. The winding-up of a Cayman Islands company by the court is deemed to commence at the time of the presentation of the petition for winding-up (known in some other common law jurisdictions as the 'relation-back day').

Liquidators' Investigations

A liquidator's powers and duties are explained in our jurisdiction-specific client guides.

There are three primary means by which a liquidator can look to increase the insolvent estate to maximise returns to creditors:

- Antecedent / voidable transactions
- Disclaiming onerous property
- Claims against directors, third party service providers (such as auditors)

This guide is limited to a consideration of antecedent / voidable transactions and the disclaimer of onerous property.

Antecedent Transactions

Each jurisdiction has constructed parameters in its legislation as to the kinds of transactions that a company could have validly entered into if it is later the subject of liquidation. These provisions are collectively referred to as, across common law jurisdictions, the avoidance provisions or 'clawback' provisions; the aim being to specify what pre-liquidation transactions may be reviewed and potentially set aside in a winding-up on the application of the liquidator.

In the BVI, the Insolvency Act, Revised Edition 2020 (as amended) (**Insolvency Act**) refers to antecedent transactions as 'voidable transactions'.

The different types of antecedent transactions under the BVI and Cayman Islands law are discussed below.

Preference Claims

These provisions allow for the recovery of preference payments and seek to redress payments made by a company in tenuous financial standing to one creditor in preference, or ahead of, other creditors.

BVI 'unfair preferences'

In order to establish an 'unfair preference' claim, the Insolvency Act requires a liquidator to establish that the transaction:

- (a) is an **insolvency transaction**: entered into at a time when the company was insolvent or the transaction caused the company to become insolvent;
- (b) was entered into within the **vulnerability period**: the period commencing six months prior to the onset of insolvency and ending on the appointment of the liquidator (see '**Commencement of winding-up**' above);
- (c) is a transaction between the company and a creditor; and
- (d) has the effect of putting the creditor in a better position than the position the creditor would have been in if the transaction had not been entered into.

Protective provisions

A transaction will not be an unfair preference if it took place in the company's ordinary course of business. The onus is on the creditor to demonstrate or explain the circumstances in which the transaction took place.

Orders available to a liquidator

If a liquidator can establish each of the above requirements, the liquidator can make an application to the High Court for orders to restore the position of the company to what it would have been in if the company had not entered into that transaction. The nature of the orders a liquidator may seek are wide-ranging and include requiring any assets transferred as part of the transaction to be vested in the company and/or the return of any payments or benefits received because of the transaction to the liquidator as administrator of the insolvent estate.

Connected persons

As with some other common law jurisdictions, if the transaction was entered into by the company with a connected person:

- the vulnerability period is extended to two years prior to the onset of insolvency; and
- there is a presumption in favour of the liquidator that, unless the contrary is proved, the transaction was an insolvency transaction and it did not take place in the ordinary course of business.

A **connected person** is defined broadly in the Insolvency Act and includes:

- (a) a promoter of the company;
- (b) a director or member of the company or of a related company;
- (c) a beneficiary under a trust of which the company is or has been a trustee;
- (d) a related company;
- (e) another company whose director is also a director of the company;
- (f) a nominee, relative, spouse or relative of a spouse of a person referred to at paragraphs (a) to (c) above;
- (g) a person in partnership with a person referred to in paragraphs (a) to (c) above; and
- (h) a trustee of a trust having as a beneficiary a person who is a connected person.

Cayman Islands 'voidable preferences'

The Cayman Islands Companies Act (as amended) (**Companies Act**) provides that:

- (a) every transfer out by a company of something of value;

- (b) prior to the commencement of a liquidation of the company (see '[Commencement of winding-up](#)' above);
- (c) in favour of a creditor;
- (d) at a time when the company is unable to pay its debts;
- (e) *with a view to giving such creditor a preference over the other creditors,*

shall be invalid if the transfer or transaction took place within six months before the commencement of the company's liquidation.

The material difference under the Cayman Islands law is that a liquidator seeking to challenge a pre-appointment transaction as a voidable preference must prove an intention to prefer. This is a high threshold to meet as on appointment to a subject company, the liquidator is a stranger to its affairs and, post appointment, only has at their disposal whatever books and records they are able to secure (or which have been delivered up by the company's management).

Protective provisions

There are no protective provisions under the Companies Act. This is perhaps offset by the high threshold a liquidator must meet to succeed in a voidable preference action.¹

Orders available to a liquidator

If a liquidator can prove an intention to prefer and each of the other requirements above, the liquidator can make an application to the Grand Court for orders to restore the position of the company to what it would have been in if the company had not entered into that transaction².

Related parties

If a payment has been received by a related party of the company, the liquidator has the benefit of a presumption in their favour that the payment or transaction was made with a view to giving that related party creditor a preference.

A creditor will be a **related party** if it can control the company or exercise significant influence over the company in making financial and operating decisions.

Uncommercial / Undervalue Transactions

The purpose of these provisions is to prevent transactions that involve clear inequality of exchange between the transacting parties. The most common example is where a company receives insufficient consideration for its property.

Unlike preference claims, the transaction does not have to be between the company and one of its creditors. The transaction may be between the company and any other (transacting) party and this is more likely to be the case.

BVI 'transactions at an undervalue'

In order to establish a 'transaction at an undervalue', the Insolvency Act requires a liquidator to establish that the transaction:

- (a) was a gift or otherwise entered *on terms that provide for the company to receive no consideration; or alternatively, the consideration for which provided by the transacting party was significantly less than the value...provided by the company;* and
- (b) is an insolvency transaction; and
- (c) is entered into within the vulnerability period (see '[BVI 'unfair preferences'](#)' above).

What is considered 'significantly less' in value will depend on the facts of each case.

¹ See generally *Skandinaviska Enskilda Banken AB (Publ) v Conway and another* (as Joint Official Liquidators of Weaving Macro Fixed Income Fund Ltd) [2019] UKPC 36.

² *Ibid.*

Protective provisions

A transaction will not be one at an undervalue if the company entered into it in good faith and for the purposes of its business and at the time it entered into the transaction, *there were reasonable grounds for believing that the transaction would benefit the company*. While the onus is on the liquidator bringing the claim to demonstrate it was at an undervalue, it is sensible for transacting parties to be able to explain the commercial rationale of the transaction. This ensures that if a liquidator seeks to challenge a transaction the transacting party has the commercial justification prepared.

Orders available to a liquidator

Please refer to our discussion under 'BVI 'unfair preferences'' above.

Cayman Islands 'dispositions made at an undervalue'

The Companies Act provides that every disposition of property made at an undervalue by or on behalf of a company *with intent to defraud its creditors* shall be voidable on the instance of a liquidator.

Disposition is defined broadly to include every form of conveyance, transfer, assignment, lease, mortgage, pledge or other transaction by which any legal or equitable interest in property is created, transferred or extinguished and **undervalue** means:

- (a) no consideration for the disposition; or
- (b) consideration which is significantly less than the value of the property the subject of the disposition.

The material difference under the Cayman Islands law is that a liquidator seeking to challenge a pre-appointment disposition must prove an *intention to defraud*, defined in the Companies Act as being an intention to wilfully defeat an obligation owed to a creditor. This is very a high threshold for the liquidator to meet.

Protective provisions

In the case where a disposition is set aside by the court, if the court is satisfied that the transacting party has not acted in bad faith:

- (a) the transacting party will have a first and paramount charge over the subject property of an amount equal to the costs properly incurred by that party in defence of the proceedings (by the liquidator); and
- (b) the relevant disposition will be set aside subject to the proper fees, pre-existing rights and other claims and interests of the transacting party and any predecessor transacting party who has not acted in bad faith.

Orders available to a liquidator

Any application by a liquidator to challenge a disposition under these provisions must be made within six years after the date of the relevant disposition.

Fraudulent Trading

BVI

This claim is available to a liquidator if, before the commencement of the liquidation of a company (see '**Commencement of winding-up**' above), the liquidator is satisfied that the business of the company has been carried on:

- (a) *with intent to defraud* creditors of the company or creditors of any other person; or
- (b) for any fraudulent purpose.

On a successful application by a liquidator, the court may declare that any person knowingly a party to the carrying on of business in such a manner liable to make contribution to the company's assets. An intention to defraud is a very high threshold for the liquidator to meet.

Cayman Islands

This claim is available to a liquidator if, during a company's winding-up, it appears that any business of the company has been carried on:

- (a) *with intent to defraud* creditors of the company or creditors of any other person; or
- (b) for any fraudulent purpose.

Again, as in the case for dispositions made at an undervalue, the onus is on the liquidator to prove the intention to defraud. Given the very high threshold, this head of claim is not often pursued.

Orders available to a liquidator

On an application made by a liquidator under this head of claim, the court may declare that any persons knowingly parties to the fraudulent carrying on of business are liable to make such contributions to the company's assets as the court thinks proper.

Voidable Floating Charges

BVI

A floating charge created by a company is voidable on an application by the liquidator if:

- (a) it is an insolvency transaction; and
- (b) was created within the vulnerability period (see 'BVI 'unfair preferences'' above).

Protective provisions

A floating charge will not be voidable to the extent that it secures:

- (a) money advanced or paid at the same time or after the creation of the charge;
- (b) the discharge or a reduction of liability of the company at the same time or after the creation of the charge;
- (c) the value of assets or services provided to the company at the same time or after the creation of the charge; or
- (d) interest payable pertaining to any amounts identified at (a) to (c) above.

Connected persons

If the floating charge was created in favour of a connected person within the vulnerability period, there is a presumption in favour of the liquidator that, unless the contrary is proved, the transaction was an insolvency transaction.

Orders available to a liquidator

Please refer to our discussion under 'BVI 'unfair preferences'' above.

Cayman Islands

There is no statutory voidable floating charges equivalent.

Extortionate Credit Transactions

BVI

The Insolvency Act provides that a transaction entered into within the vulnerability period for, or involving the provision of, credit to the company is an extortionate credit transaction if, having regard to the risk accepted by the person providing the credit:

- (a) the terms of the transaction required *grossly exorbitant payments to be made*; or
- (b) the transaction otherwise *grossly contravenes ordinary principles of fair trading*.

What constitutes 'grossly exorbitant' has not yet been considered by the High Court; however the language employed by the legislation suggests that such a transaction would need to be quite out of the ordinary to be caught by this provision.

The vulnerability period applicable for this category of antecedent transaction is five years prior to the onset of insolvency.

Orders available to a liquidator

Please refer to our discussion under 'BVI 'unfair preferences'' above.

Cayman Islands

There is no statutory extortionate credit transaction equivalent.

Disclaimer of Onerous Property

BVI

Under the Insolvency Act, a liquidator can disclaim any onerous property of the company by:

- (a) filing a notice of disclaimer (**NOD**) with the court; and
- (b) within 14 days of the date on which the NOD is filed, giving notice to every person whose rights are, to the knowledge of the liquidator, affected by the disclaimer.

The liquidator commits an offence if notice is not given to affected persons in accordance with subparagraph (b) above.

For the purposes of the Insolvency Act, **onerous property** includes:

- (a) an unprofitable contract; or
- (b) assets of the company which are unsaleable or not readily saleable, or which may give rise to a liability to pay money or perform an onerous act.

Subject to the following section, disclaimer takes effect on the date when the NOD is filed at court. The effect of disclaimer is that it operates to determine, with effect from the date of disclaimer, the rights, interests and liabilities of the company in or in respect of the property disclaimed but this does not, save for releasing the company from further liability, affect the rights and liabilities of any other person.

Parties affected or with an interest in property

A liquidator's right to disclaim property is subject to the right of a person interested in property, or whose rights would be affected by the disclaimer of property, serving a notice to elect (**NOE**) on the liquidator requiring the liquidator to elect whether to disclaim the property.

If an NOE is served on the liquidator, the liquidator is not entitled to disclaim the property by filing an NOD to the court unless they do so within 28 days of the date of service of the NOE.

A party affected by disclaimer, whether by service of an NOE or by a liquidator's disclaimer via the filing of an NOD, may claim in the liquidation as a creditor.

Cayman Islands

There is no statutory disclaimer of onerous property equivalent.

Contacts

For further information, please reach out to our contacts specialising in Litigation in our [BVI, Cayman Islands](#) and [Hong Kong](#) offices, or Restructuring and Insolvency in our [BVI, Cayman Islands](#) and [Hong Kong](#) offices.