

## WHEN IS A PROPERTY TRANSACTION NOT A PROPERTY TRANSACTION?

...When it can be set aside under insolvency law on the basis that it is a transaction at an undervalue. In times of recession as businesses suffer it can be tempting for a company to move assets into what is viewed as a safe haven, e.g. into a director's name or a director's wife's or husband's name. There are some basic rules to remember on any company sale or transfer of land:

- A transaction is at an “undervalue” if no consideration is provided or the consideration provided by the person acquiring the asset, whether it be in money or “money's worth”, is significantly less than the value in money or money's worth of the asset being acquired.
- The transaction has been entered into within two years prior to the company becoming insolvent (going into administration or liquidation)
- The company was unable to pay its debts at the time of the transaction or became unable to pay its debts as a result of the transaction (the administrator or liquidator will examine the company's balance sheet and other evidence of insolvency will also be considered, such as judgments being entered into against the company, execution over the company's assets and payment of creditors only on the issue of statutory demands).
- Where there is any transaction between a company and a “connected person” it will be presumed that the company was insolvent at the time of the transaction, unless the contrary can be proved.
- A “connected person” is
  - a director
  - a shadow director
  - an “associate” of such a director or shadow director
  - an “associate” of the company
- An “associate” is widely defined. A company can be an associate of another company if the same person has control of both, or a person has control of one and his associates have control of the other. An individual's associates can include their husband or wife, their relative, the husband or wife of their relative, their husband or wife's relative or the husband or wife of such a relative. Relatives include siblings, uncles, aunts, nephews, nieces and former or reputed husbands and wives.

If the above conditions for a transaction at an undervalue are satisfied either an administrator or a liquidator can apply to the court to set aside the transaction. The court may make any order it thinks fit to restore the position to what it would have been if the company had not entered into that transaction. This includes returning property or the proceeds of the sale to the company.

There is a defence in that a court will not make an order to set aside a transaction at an undervalue if it is satisfied that the company entered into the transaction in good faith and for the purpose of carrying on its business; and at the time it did so there were reasonable grounds for believing that the transaction would benefit the company. Therefore, the court would not, for example, set aside a bona fide transaction to sell assets at a reduced price to help cash flow.

So: if a buyer (particularly a “connected person”) is concerned that a transaction could potentially be viewed as a transaction at an undervalue they should ensure that they gives proper value for the asset and that there is some documentary evidence of this, e.g. an independent valuation.

If you wish to discuss any of the issues raised in this article, or for information on any other commercial property matters, please contact Jenny Harbord of Murrell Ashworth LLP using the following details:

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