

## Fraud and Antecedent Transactions – The Legislation

If you or one of your clients suffers a fraud that results in financial loss, there are statutory provisions within the insolvency legislation to assist in making a recovery. These provisions deal with what is termed “antecedent transactions”, namely transactions entered into by the company in the period prior to its insolvency.

**The relevant provisions of the legislation are as follows:**

1. Section 238 Transactions at an Undervalue
2. Section 239 Preference Payments
3. Section 244 Extortionate Credit Transactions
4. Section 245 Avoidance of Floating Charges

In addition, Section 212 of The Insolvency Act 1986 deals with misfeasance on the part of the officers of the company and Section 423 deals with Transactions intended to defraud Creditors.

It is important to note that instances of fraud and serious misconduct in insolvency situations remain the exception rather than the rule, but it is nonetheless important to be aware of the rights and remedies available to creditors in such situations.

When Andy Pear, a partner at BM Advisory, was appointed as Administrator over a long-established family wholesale business, it soon became apparent that the primary reason for the failure of the business was attributable to systematic fraud on the part of one member of the family.

This fraud had remained undetected over a considerable period of time, notwithstanding that it involved considerable sums of cash being withdrawn from the company’s bank account disguised as legitimate supplier payments. Through extensive forensic examination of the company’s financial records, including bank statements and BACS payments, it became apparent that the fraud amounted to a sum in excess of £4million.

The provisions of the legislation dealing with antecedent transactions enable the insolvency practitioner to issue proceedings for recovery of money and/or assets dissipated in the period prior to the insolvency.

The methods of detecting fraud have advanced considerably in recent years and investigations will now be driven by technology, including the collection and analysis of electronic files to supplement the traditional approach of reconstructing financial ledgers and other records.

A summary of the key provisions of the legislation is provided below:

### **Section 238 – Transactions at an Undervalue (TUV)**

**When applicable:**

Upon administration order, voluntary winding-up or compulsory winding up. The applicant must be the insolvency practitioner.

**Definition:**

Where a gift or no consideration or the value received by the company is significantly less in money or money’s worth.

**Defence:**

- That the transaction was entered into in good faith, and
- That there were reasonable grounds for believing it would benefit the company

**Relevant time:**

The company must have been insolvent at the time of the transaction (or became insolvent as a consequence of it) and the transaction must have occurred within two years prior to the commencement of the insolvency.

**Section 239 –Preferences****When applicable:**

As for section 238, plus the applicant must also be the insolvency practitioner.

**Definition:**

The preferred person must be a creditor, guarantor or surety who is placed in a better position in the event of the insolvency that they would otherwise have been. The company must have been influenced by a desire to prefer.

**Defence:**

The absence of a desire to prefer.

**Relevant time:**

- The company must have been insolvent at the time of the preference (or became insolvent as a consequence of it).
- The preference must have been given within the six month period prior to the commencement of insolvency, OR
  - Two years before the commencement of the insolvency where the parties are connected

**Section 244 –Extortionate Credit Transactions****When applicable:**

As for sections 238 and 239, plus the applicant must be the insolvency practitioner.

**Definition:**

- The company is or has been a party to a transaction involving the provision of credit to it,
- Having regard to the risk undertaken by the provider of credit. The terms of the agreement require grossly exorbitant payments to be made, or otherwise grossly contravenes ordinary principles of fair dealing.

**Relevant time:**

Unlike sections 238 and 239 there is no requirement that the company was insolvent at the date of the transaction and the relevant time is three years in all cases.

**Section 245 –Avoidance of Floating Charges****When applicable:**

This section applies in situations identical to section 238 and section 239, however no application to Court is required – the office holder merely applies the section.

**Definition:**

This section invalidates a floating charge created at a relevant time, except to the extent of any fresh consideration granted.

**Relevant time:**

- Where the parties are unconnected, the company must have been insolvent at the time of the creation of the charge and the relevant time is 12 months prior to the onset of insolvency,

- Where the parties are connected there is no requirement that the insolvency be proved at all and the relevant time is extended to two years prior to the onset of insolvency.

## **About BM Advisory**

BM Advisory specialises in providing restructuring, recovery and insolvency solutions for businesses and individuals, delivering tailored advice and helping to preserve stakeholder value.

Led by hands-on partners with an in-depth understanding of the issues that can impact upon business performance and success, the BM Advisory team has a proven track record of finding innovative solutions, improving business performance, advising individuals and restructuring businesses in times of distress.

For more information about how BM Advisory can help you, your clients or your business, visit our website at [www.bm-advisory.com](http://www.bm-advisory.com) or contact:

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