

Insolvency Technical Bites:

Disposals in administration:

- (1) Who is a “connected” purchaser?
- (2) When is an evaluator independent?

David Pollard and Tom Robinson
Wilberforce Chambers

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Insolvency Technical bite

- New restrictions on sales and other disposals in administration
- under paragraph 60A of Sch B1 to the Insolvency Act 1986 and the Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021 (SI 2021/427)
- On and from 30 April 2021

- Short webcasts
- focusing on particular aspects of new legislation
 - Under 10 minutes each

- This webcast will cover two elements of new regulations that govern disposals to “connected persons” in administration:
 - a) Who is a “connected person”?
 - b) For a connected disposal, who can be an “evaluator”?

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Insolvency and Pensions Technical bites

Caution!

- These webcasts are just discussions
- Intended for professional advisers
 - If you are not a solicitor, you should get legal advice from a solicitor
 - If you are a solicitor, you should consider formally instructing a barrister
- This is quite new legislation – enacted, but **only recently in force**
- Much will depend on the facts of each situation

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Summary of the new Regulations

- * they apply to administrations commencing on / after 30.4.21
- * they impose a new requirement on administrators who seek to dispose, hire out or sell all or a substantial part of a company's property to one or more "connected persons" (hereafter a "disposal").
- * they apply to disposals in the 1st 8 weeks of the administration

SIP16 (pre pack sales) and SIP 13 (disposals to connected person) may still apply even if disposal is outside reg 60A

eg if purchaser is not a connected person

or

sale is later than 8 weeks

SIP16 applies "to all pre-packaged sales in administrations, irrespective of who the purchaser may be."

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Summary of the new Regulations

* the new requirement is to obtain either:

a) Advance creditor approval for the disposal by

- a) including it in the Statement of Proposals under paragraph 49 of Sch B1, and
- b) obtaining creditor approval to it (regulation 4); or

b) A connected person obtains a report from an “evaluator”:

a) an independent person with

- a) relevant knowledge and experience (regulation 10); and
- b) insurance in place (regulation 11)

b) that gives an opinion on whether the consideration and grounds for the disposal are “reasonable in the circumstances”.

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Summary of the new Regulations

Number of tricky points in the new requirements:

Eg:

- What is a disposal?
- When is a disposal in the first 8 weeks?

See Thomas Robinson note *“All change for pre-packs”* (30.4.2021) on www.wilberforce.co.uk

This technical bite is focusing on the connection tests for:

- “connected person” (ie the entity acquiring the assets); and
- the evaluator (ie the person giving a report)

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1. Who is a connected person?

Under para 60A(3) of Sch B1:

A connected person in relation to the company (ie the insolvent company in relation to which the administrator was appointed – called below InsolventCo)

is defined as meaning anyone within either or both of the following two wide categories:

- (a) a ‘relevant person’ in relation to the insolvent company; and
- (b) a company that is ‘connected with’ the insolvent company.

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1. Who is a connected person? - relevant person

Para 60A(4)(a): 'relevant person' in relation to a company means under anyone who is:

- (i) a director or other officer or a shadow director of the company; or
- (ii) a 'non-employee associate' of a director or other officer or shadow director; or
- (iii) a 'non-employee associate' of the company.

NB – this is not the test for connection in s.249, IA 86

BUT it is the same as in s249, save for the exclusion of solely employee associates

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1. Who is a connected person? - relevant person

“non-employee associates”

- Defined as an associate “otherwise than employing or being employed by that person” – para 60A(5)
- So an employee who has some other association – eg a director – will still be a relevant person

Terms “officer”, “shadow director” and “director” likely to have usual IA 1986 meanings. Officer will include IP acting in relation to InsolventCo – *R (Palmer) v Northern Derbyshire Magistrates’ Court* [2021] EWHC 3013 (Admin).

“associate” has the wide meaning in IA 1986, s435

- On the meaning of associate under s435, see generally Pollard: *Connected and Associated: Insolvency and Pensions Law* (2021).

“company” prob has same (wide) meaning as in IA 1986, s435(11)

- (para 60A(6) refers to s435(10), but this seems to be an error)

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2. Who is a connected person?

- Connected company

A company is connected with another company if :

- “any relevant person of one is or has been a relevant person of the other”
– para 60A(4)(b)

No time limit here

Eg an individual former director of InsolventCo does not seem to be a connected person

- so can resign and a disposal to them will fall outside the new rules?
- But if the individual becomes a director of a BidCo, then BidCo will be a connected person
 - (the individual is a relevant person of BidCo and has been a relevant person of InsolventCo)
 - Presumably only if individual becomes a director of BidCo before the disposal
 - (not clear if contract or completion?)

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Is BidCo a connected person?

In practice most potential purchasers are likely to be a company (whether UK or overseas).

Such a BidCo is a connected person of InsolventCo if any of **3 limbs** apply:

- 1 BidCo is a non-employee associate of the InsolventCo; or
- 2 BidCo is a non-employee associate of a director/shadow director/officer of InsolventCo; or
- 3 There is any person (called here a “link person”) who:
 - is or has been a non-employee associate of BidCo (or of a director/shadow director/officer of BidCo);
and
 - is or has been a non-employee associate of InsolventCo (or of a director/shadow director/officer of the InsolventCo)

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Is BidCo a connected person?

- 1 BidCo is a non-employee associate of the insolvent co; or
- 2 BidCo is a non-employee associate of a director/shadow director/officer of the insolvent co; or

Limbs 1 and 2 can raise the usual tricky issues of BidCo being (quasi s249) connected with InsolventCo – eg

- A common director; or
- BidCo being a shadow director of InsolventCo;
- BidCo (or another member of its group) having s435(10) “control” of InsolventCo (or a controller of InsolventCo)

Can be tricky issues – see Pollard “*Connected and Associated*”

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Is BidCo a connected person?

Or under Limb 3

3 There is any person (“link person”) who:

- is or has been a non-employee associate of BidCo (or of a director/shadow director/officer of BidCo); and
- is or has been a non-employee associate of the insolvent co (or of a director/shadow director/officer of InsolventCo)

Seemingly “link person” must be currently a relevant person of either BidCo or InsolventCo.

- Cannot be formerly a relevant person for both?
- Follows from defn? – must still be a relevant person for one?
- For this purpose, a company is connected with another if ‘any relevant person of one is or has been a relevant person of the other’ – Sch B1, para 60A(4)(b).

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How to tell when this requirement applies?

A connected person also includes ‘a company connected with the company’ – Sch B1, para 60A(3)(b).

For this purpose, a company is connected with another if ‘any relevant person of one is or has been a relevant person of the other’ – Sch B1, para 60A(4)(b).

Person A as a relevant person. At the relevant time:	A <u>is</u> a relevant person in relation to BidCo	A <u>was</u> a relevant person in relation to BidCo
A <u>is</u> a relevant person in relation to InsolventCo	(a) BidCo <u>is</u> at the relevant time a connected company with InsolventCo	(b) BidCo <u>is</u> at the relevant time a connected company with InsolventCo
A <u>was</u> a relevant person in relation to InsolventCo	(c) BidCo <u>is</u> at the relevant time a connected company with InsolventCo	(d) BidCo <u>is not</u> at the relevant time a connected company with InsolventCo

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Is BidCo a connected person?

Or under Limb 3

3 There is any person (“link person”) who:

- is or has been a non-employee associate of BidCo (or of a director/shadow director/officer of BidCo); and
- is or has been a non-employee associate of InsolventCo (or of a director/shadow director/officer of InsolventCo)

Seemingly link person must be currently a relevant person of either BidCo or InsolventCo. Cannot be formerly a relevant person for both?

Wide defn of associate in IA 1986, s435. Includes:

- persons in a partnership with a person or
- trustees of a trust where that person is a beneficiary
- many relatives (eg) former divorced spouses (or “reputed” spouses) of uncles and aunts of a person

Relatives include in relation to an individual:

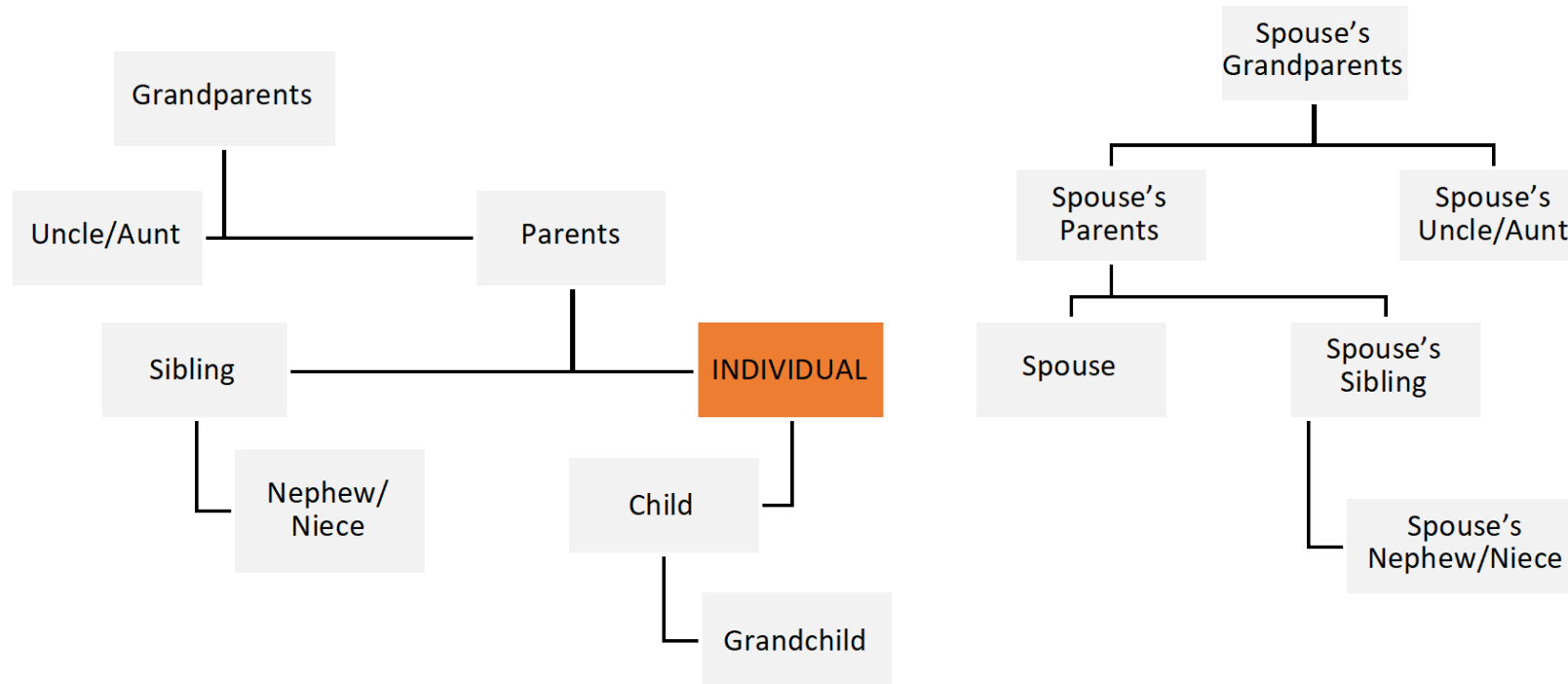
- spouses (and former spouses)
 - – spouse includes civil partner and “reputed” spouse
- children (and grandchildren), parents (and grandparents) and uncles and aunts, nieces and nephew (but not cousins) of the individual or his or her spouse
- and the spouses and former spouses of all of the above (eg includes divorced previous spouse of individual’s current spouse).

How easy is it to find out if there could be some person who is a “relative” of both a director of BidCo and a (current) or former director of InsolventCo?

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Is BidCo a connected person?



All the persons identified above, plus their current and former 'spouses', would be s435 'associates' of the individual.

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Is BidCo a connected person?

Suppose:

- Bidco has a director – Ms B
- Ms B’s husband has an aunt, who’s former husband is Mr X
- InsolventCo has a former director – Mr I
- Mr I is a nephew of Mr X’s wife

From these facts:

- Mr X is an associate of Ms B
 - Mr X is an associate as a former husband (s435(8)) of a relative of Ms B’s husband – s435(2)(c)(ii).
 - The aunt is a relative of Ms B’s husband – s435(8)
- So Mr X is a “relevant person” in relation to Bidco
 - as a non-employee associate of a director of Bidco – para 60A(4)(a)(ii)
- Mr X is also an associate of Mr I
 - Mr X is an associate as Mr X’s wife is a relative of Mr I
- So Mr X has been a “relevant person” in relation to InsolventCo
- So BidCo is connected with InsolventCo – para 60A(4)(b)
 - Mr X is a relevant person of one (BidCo) and has been a relevant person of the other (InsolventCo)

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Evaluators

Evaluators must:

- satisfy the requirement as to independence - reg 12; and
- not be “excluded” under reg 13.
- Reg 6(3):
 - ...”the individual making the report is to be taken to have met the requirements for being an evaluator in regulation 10(b) and (c) if the administrator has no reason to believe that the individual did not meet those requirements.”
 - Regs 10(b) and (c) refer to the requirements under regs 11 (insurance) and 12 (independence) and the exclusions under reg 13.
 - Arguably a subjective test? But administrator duty of care/absence of misfeasance?

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Evaluators

Evaluators must satisfy the requirement as to independence (Reg 12) and not be “excluded” under Reg 13

A number of requirements for the individual acting as evaluator. He or she must not be:

- (a) connected (s249) with InsolventCo – reg 12(1)(a); or
- (b) an associate of the connected person (ie BidCo) – reg 12(1)(b); or
- (c) connected with BidCo - reg 12(1)(b). This could only apply if the prospective recipient is a company (under s 249, it is not possible for a person to be ‘connected with’ an individual) **OR**
- (d) someone who knows or has reason to believe has a conflict of interest (regs 12(1)(c) + 12(2)) or
- (e) someone* who has given relevant insolvency advice (see reg 12(1)(d) in the last 12 months to InsolventCo or a connected person (para 60A(3)?) with InsolventCo – reg 12(1)(d); or
- (f) the administrator – reg 13(a)(i); or
- (g) an associate of the administrator – reg 13(a)(ii); or
- (h) connected with a company with which the administrator is connected – reg 13(a)(iii)
- (i) [other conditions in reg 13 – eg not bankrupt or removed as a charity trustee].

* seemingly only if the individual has given advice – not his or her employer or associates

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Evaluators must satisfy the requirement as to independence (Reg 12) and not be “excluded” under Reg 13

Limb (h) above looks potentially difficult.

- The evaluator must not be “connected with a company with which the administrator is connected” – reg 13(a)(iii)

Given the width of the ‘connected with’ definition in s249, it may be no easy task for either the prospective evaluator or the administrator to (say) each produce lists of companies with which they are connected.

On the meaning of connected under s249, see generally Pollard: *Connected and Associated: Insolvency and Pensions Law (2021)*, in particular at ch 19.

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Overview

- All in all, question of whether or not a BidCo is a connected person, so triggering the obligations, may in many cases be not very clear.
- Prohibited connections can spring out of the unknown. Can point to desire for BidCo to be a newly incorporated company?
- There can be a breach (even if inadvertent or with reasonable care).
- Administrators may seek confirmations of status from relevant parties (eg a prospective purchaser) but this may not be not conclusive – and may be tricky to get
- No express sanction for a breach, but could be others on the administrator – eg misfeasance claim, claim for removal?
- All of this points towards getting an evaluator's report in all cases unless clearly not connected (or clearly outside 8 weeks)?

See further Pollard: *Connected and Associated: Insolvency and Pensions Law* (2021, Bloomsbury Professional)

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Connected and
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David Pollard

Bloomsbury Professional
LAW

Thank you

dpollard@wilberforce.co.uk

trobenson@wilberforce.co.uk

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