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In Practice

Authors Andrew Gregson and James Bell

Registration of UK company charges – theory and practice

In this article the authors consider the practical aspects of the UK-wide rules for registration of company charges, including features of the new e-filing regime. Statute references are to the Companies Act 2006.

WHY REGISTER?

Since April 2013 company charge registration is voluntary (with no criminal sanction for failure to register). Nevertheless, a compelling reason for secured creditors to register charges at Companies House is that failure to do so will render the charge void “(so far as any security on the company’s property or undertaking is conferred by it)” against a liquidator, administrator and any creditor of the company. Parties are often unaware that the underlying debt is also accelerated as a result of failure to register (s 859H), which could cause cross-defaults under other debt, in addition to having negative consequences in its own right.

The priority of competing charges is not addressed in the Companies Acts and is governed by a combination of common law rules and provisions of the Insolvency Act 1986. A second key reason for registering a charge is to try to fix third parties with notice of matters on the register. Those who search the register and read the charging document will have *actual* notice of restrictions recorded on Form MR01 (eg the negative pledge clause) and other restrictions contained in the charging instrument. As regards those who do not search the register, two questions remain unresolved: To whom is registration now *constructive* notice? And exactly what do affected third parties have notice of? It would seem that parties reasonably expected to search the register will be fixed with notice of at least the matters recorded on the Form MR01.

Registration is therefore critical to ensure that the secured creditor ranks ahead of other creditors. A common misconception is that registration is the “priority point” (as is the case with specialist asset registers and many overseas company charge registers). In England, the priority point is the date of creation of the charge. Since interested parties have 21 days to register a charge, this leaves an “invisibility period” during which those searching the register may be unaware of a prior ranking charge.

RELEVANT CHARGORS

Section 859A covers charges created by UK-registered companies and these provisions apply also to limited liability partnerships (LLPs). If a general partnership includes a company (or LLP) as a partner, the charge is usually registered against that company (or LLP). In the case of security taken over the assets of a limited partnership (not of itself a legal entity), this will be granted by the general partner because it holds the partnership assets on behalf of the partnership. There are conflicting views as to whether such security needs to be registered at Companies House, but in our experience security granted by limited partnerships (LPs) is increasingly common (for instance, in the context of acquisition finance and fund finance transactions) and usual practice is to register the security

against the general partner and/or manager of the LP if these entities are UK companies or LLPs.

Companies House registration requirements for overseas companies were abolished in October 2011, but those with a registered UK establishment are required to keep their own registers of certain registrable charges, together with copies of the instruments creating such registrable charges, either at the establishment or at such other place in the UK notified to the registrar. This is often forgotten and failure to comply is an offence, punishable with a fine.

IS THERE A “CHARGE”?

For the registration rules, “charge” includes a mortgage, a charge and various other forms of security recognised under Scots law (s 859A(7)). Since an assignment of an intangible asset takes effect as a mortgage, an assignment by way of security is a “charge” for these purposes. Pledges and liens will usually fall outside the scope of this definition (because the security is either possessory or it is not “created” by the company), but contractual liens (ie legal liens extended by contract) sometimes warrant closer scrutiny to determine whether there is a registrable charge.

Often the categorisation of a contract will be uncertain. The English law notion of “charge” is quite fluid and case law recognises the difficulty of providing an exhaustive definition. A charge has been described as a proprietary interest granted by way of security without a transfer of title or possession to the beneficiary. It is also common to describe a charge as the appropriation of an asset in discharge of a liability. The “equity of redemption” is also a key ingredient of a charge. The label given to the instrument is not always conclusive and this can necessitate careful analysis on some transactions (for instance, receivables financings featuring “true sales”). The Companies Act (CA) 2006 envisages that there can be a registrable charge with no instrument (for which there is a Form MR08).

The treatment of security confirmations is another grey area. It is doubtful that a mere “confirmation” of security constitutes a charge for these purposes, since the confirmation does not create any new proprietary interest or new appropriation of the assets subject to the charge. Companies House has taken this view and since April 2013 appears to routinely reject filings which do not contain an express charging clause (which did not, in our experience, reflect practice before that date). However, if significant amendments are being made to the underlying debt, there is a possibility that an agreement of “confirmation” could involve the creation by a company of a new charge* (which, if not registered, would be void).

STATUTORY REQUIREMENTS VS FORM FILLING

Most charge filings are made using Companies House Form MR01. The statutory framework for this form is found in s 859D. Prior to 6 April 2013, the provisions relating to registration of security by Scottish companies were recorded in a separate chapter of Part 25 CA 2006. This explains Scots law terminology in Form MR01, which may be unfamiliar such as “fixed security” (in the sense used in s 859D(4)), “standard security”

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Further Reading:

- * Syndicated lending and the “purview doctrine”: how to preserve guarantees when varying the guaranteed obligation (2017) 8 JIBFL 459.
- ** All-asset security on leveraged financings: the scope of “excluded assets” (2016) 11 JIBFL 635.

(security over land in Scotland) or an “assignment in security” (a fixed charge taken over incorporeal moveable assets in Scotland). Form MR01 requires filers to indicate whether the charge includes property required to be registered in another UK asset-specific register. The aim of this is to allow those searching the register to cross-refer to other registers. In our experience, this box is the source of frequent automatic rejections of e-filings, for instance, if Companies House staff are unable to locate the corresponding reference in a schedule to the charging document.

Filers are also required to indicate whether the charge includes a floating charge, and if so whether it is expressed to cover all the property and undertaking of the company. On a strict reading of this question, this is a test which will very rarely be satisfied, since some charges will be fixed, some floating. It is also very common for an all assets debenture to exclude certain assets.** Practitioners have generally adopted a pragmatic approach to this test, ticking the box in all cases where there is an “all assets”-style debenture; the aim is surely to give those searching the register notice that the chargee may have the ability to appoint an administrator.

ENGLISH LAW RELEASE MECHANICS

Foreign lawyers often assume that a Companies House release filing operates to release the relevant charge (as is the case in the US, for instance). Instead it is usually the deed of release which causes a charge to be satisfied and the release will take effect once that document is signed and delivered. However, there is no requirement to “file” the deed of release; Companies House does not need to see it. Companies House release filings (for which there is no fee and no time limit) are little more than window dressing. The reason for making the filing is to give the company a clean charges register, an online profile more conducive to the obtaining of new finance. Nevertheless it is common to see documents (for instance, share purchase agreements) which show a misunderstanding of English law release mechanics (eg share purchase agreement conditions precedent which include duly filed charge releases). The implication is that (a) the release filing is somehow possible before the release occurs; and (b) that the filing effects the release.

Release filings can be made using Form MR04 (relevant where the debt for which a charge was given is “satisfied”) or MR05 (where charged property is released or divested). From a practical perspective it is not possible to file MR05 if MR04 has already been filed, since the relevant charge will already be marked by Companies House as “satisfied”. Second, there may be cases where a charge is indeed released but it is impossible to file Form MR04 because part of the underlying debt for which the charge was given remains outstanding. This can lead to charges being marked as “outstanding” on the charges register long after their release.

WEB FILING

A significant development in the 2013 reforms was the introduction of web filing. Although filing is comparatively easy, there are pitfalls to avoid.

- The e-filing screens include a certification box which does not appear on the paper Form MR01, auto-populated with a certification statement which includes confirmation that the PDF file submitted is a true copy and that any redactions are legitimate. Filers need to consider whether the default wording is appropriate (for instance,

when filing a copy supplied by a foreign notary or when appending a translation, for which a further statement is required). There is no need to duplicate the certification by writing on (or stamping) the scanned copy.

- Companies House makes multiple checks before accepting an e-filing application. Rejections are common. Perceived mismatches between the various tick-box statements and the charge document will trigger rejections (for instance, where a short form accession deed omits the negative pledge), as will the absence of an express charging clause. It is common to fall foul of the Companies House checking procedures when e-filing, so it is important to file charges as soon as possible.
- A certificate of registration features little more than a company name, number and a unique reference code. Consequently, if a company grants more than one charge on the same day, it can be difficult to match each certificate of registration with the relevant charge. Filers may have to pay to access the register to match up the numbered certificate with the correct charging document.

PITFALLS TO AVOID

Parties often display misconceptions about the registration rules. Note:

- If the assets charged are located outside the UK, this makes no difference to the s 859A requirement to register the charge in the UK. It is irrelevant that security is granted abroad under a different governing law;
- Since April 2013, charge documents are posted online, with only limited possibilities for redaction (signatures, account identifiers and personal data). There is therefore a risk that documents with “charge-like” features could become publicly available. Even if sensitive commercial information is instead set out in documents not filed, parties are exposed to “inspection risk” if such related transaction documents contain provisions which would enable a third party to identify the subject matter of the charge (s 859P);
- Filing at Companies House alone is insufficient to the extent that a charge relates to items for which there is a UK asset-specific register (real estate, intellectual property, ships and aircraft);
- It is an offence to make a statement to the registrar which is “misleading, false or deceptive in a material particular” (s 1112);
- Late filing after the 21-day deadline is possible, subject to the conditions set out in s 859F. In practice, however, guidance from the Courts Service shows that this is not a mere formality. For instance, a solvency certificate will be required from directors of the charging company and other supporting documents may be required to ensure that third parties are not prejudiced;
- Parties often forget filing triggers which may occur during the life cycle of a charge. These include registration of property acquired which remains subject to a charge (s 859C; Form MR02) and registration of enforcement of security (s 859K; Form RM02);
- Once a certificate has been issued, nothing posted on the register in relation to an existing charge can be amended unless there is a release. Subsequent amendments to charge documents can only be registered if a new charge is created. For instance, if a new security agent is appointed this cannot be reflected on the register. ■