

ABSOLUTE ASSIGNMENT OF A COMPANY'S BOOK DEBTS—IS REGISTRATION REQUIRED?

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Does an absolute assignment of a company's book debts require registration under section 131(1) of the *Companies Act*?¹ Prior to the enactment of the new *Bankruptcy Act*² in 1995 registration was not required. Section 131(1) applied—and continues to apply—only to “charges”.³ It was trite that a discount or a sale of book debts constituted an absolute assignment⁴ and hence did not constitute a charge.⁵ Such an arrangement was, accordingly, not encompassed by section 131.⁶ This principle was underscored by section 2 of the *Bills of Sale Act*,⁷ under which choses in action do not constitute “personal chattels”.

The position is less certain since the inclusion in the 1995 Act of section 104, which copies the language of section 344(1) of the *Insolvency Act 1986*⁸ of the United Kingdom. Like the English provision, the new section 104(1) encompasses

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¹ Cap. 50, 1994 Rev. Ed. Sing.

² Cap. 20, 2000 Rev. Ed. Sing., in force since 15 July 1995. The 1995 Act replaced the 1985 version of the Act.

³ In many cases it is difficult to determine whether a given assignment is absolute or by way of charge. It is accepted that a general assignment may be absolute even if it coupled with a right to re-purchase. Moreover, the mere use of the word “security” in an assignment does not necessarily render it an assignment by way of charge. See, generally, *Chitty on Contracts*, 29th ed. (London: Sweet & Maxwell, 2004) §§10-012 *et seq* and the following leading cases: *Tancred v. Delagoa Bay Co.* (1889) 23 Q.B.D. 239; *Durham Bros. v. Robertson* [1898] 1 Q.B. 775; *Hughes v. Pump House Hotel Co.* [1901] 2 K.B. 190; *Care Shipping Corp. v. Latin American Shipping Corp.* [1983] Q.B. 105; *The Halycon the Great* [1984] 1 Lloyd's Rep. 283.

⁴ Under the *Civil Law Act*, Cap. 43, 1999 Rev. Ed. Sing., s. 4(8). This provision reproduces s.136 of the *Law of Property Act, 1925* (U.K.), 15 & 16 Geo. V., c. 20, which replaced the *Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66, s. 25(6).

⁵ *Olds Discount Co. Ltd v. John Playfair Ltd.* [1938] 3 All E.R. 275; *Chow Yoong Hong v. Choong Fah Rubber Manufactory* [1962] A.C. 209; *Campbell Discount Co. Ltd v. Bridge* [1962] A.C. 600.

⁶ But note that, in certain cases, an absolute assignment may nevertheless constitute a charge, and hence be registrable under s.131 of the *Companies Act* if its real object is to operate as a security: see *Chitty on Contracts*, *supra* note 3 § 19-065, and cases there cited, in particular *Lloyds and Scottish Finance Ltd. v. Cyril Lord Carpets Sales Ltd.* [1992] B.C.L.C. 609 (HL).

⁷ Cap. 24, 1985 Rev. Ed. Sing., based on the *Bills of Sale Act, 1878* (U.K.), 41 & 42 Vict., c. 31 and the *Bills of Sale 1878 (Amendment) Act, 1882* (U.K.) 45 & 46 Vict., c. 43.

⁸ c. 45.

any “general assignment”⁹ of book debts (or any class thereof) by a debtor who is subsequently adjudicated a bankrupt. Under sub-section (2), such an assignment “shall be void against the Official Assignee as regards book debts which were not paid before the presentation of the bankruptcy petition, unless the assignment has been registered under the *Bills of Sale Act*”.

In the United Kingdom, section 344(1) can be traced back to the 1914 Act.¹⁰ In contrast, Singapore did not adopt a comparable provision in its law of bankruptcy prior to 1995. At first glance, it may appear that the enactment of section 104 does not alter the position as regards absolute assignments of a company’s book debts. Under sub-section (2), already quoted, a failure to register such an assignment avoids it as against the Official Assignee. There is no mention of a liquidator.

On further reflection, though, the position is complicated by section 131(3)(d) of the *Companies Act*, which requires the registration of “a charge or an assignment created or evidenced by an instrument which if executed by an individual, would require registration as a bill of sale”. Under section 131(1), failure to register any charge listed in sub-section (3) avoids it against the liquidator and any creditor of the company.

It may be countered that this analysis overlooks the fact that an absolute assignment is not a “charge” and hence remains outside the ambit of section 131(1). Support for this view is to be found in section 131(3), which states that registration applies to the type of “charges” listed in its clauses. This construction—to be referred to as the “restrictive construction”—supports the view that clause (d), too, applies only if the assignments mentioned in it constitute “charges”. Additional support for this view is derived from section 104(4) of the *Bankruptcy Act*, under which “an assignment of book debts shall be treated as if it were a bill of sale otherwise than by way of security for the payment of money.” True, this sub-section is made only “for the purposes of registration under the *Bills of Sale Act*.” All the same, it indicates that, conceptually, such assignments are not *per se* “bills of sale by way of security” or “charges” made to secure payment.

Regrettably, the arguments in support of the restrictive construction are not conclusive. Section 131(3)(d) refers to “charges and assignments” which means that its application is not confined to “charges”. Support is to be found in section 104(3), which states that, for the purposes of section 104, “assignment” “includes” an assignment by way of security or charge on book debts. It does not state that, for the purposes of this provision, an assignment “means” an assignment by way of charge. An absolute assignment is, thus, not excluded from the ambit of section 104. This supports the conclusion that a general assignment effected by a company, which would have to be registered as a bill of sale if executed by an individual even if “absolute”, is encompassed by section 131(3)(d). If not registered as a “charge”, it would be avoided against the liquidator and the company’s creditors! This construction—to be referred to as the “broad construction” of section 104—cannot be dismissed out of hand.

⁹ The expression “general assignment” was used so as to exclude assignments of specific choses in action from the ambit of s. 104. This is in line with the main object of the initial provision, which sought to avoid pre-dated assignments effected so as to defeat the claims of the bankrupt’s creditors.

¹⁰ *Bankruptcy Act, 1914* (U.K.), 4 & 5 Geo. V., c. 59, s. 43.

The existence of the two incompatible constructions of section 104(1) of the *Bankruptcy Act* (when read in conjunction with section 131(3)(d) of the *Companies Act*) has a bearing on the drafting of certain standard financial agreements. True, the drafting of an assignment by way of charge of book debts—executed in the context of an overdraft facility and incorporated in a floating or fixed charge—does not require re-examination. Such a charge would, in any event, require registration under section 131(3)(f) or (g) of the *Companies Act*. In contrast, problems arise where a company grants an absolute assignment of book debts, for instance in the context of a factoring arrangement or of the discount of the proceeds of documentary credits opened in favour of the customer. Does such an absolute assignment require registration under section 131(3)(d)?

A draftsman faced with the problem must choose his course carefully. If he is convinced that the restrictive construction, discussed earlier, would be adopted by the courts, his correct course is to disregard section 104. His advice to clients would, then, be that, as such an absolute assignment is not a “charge”, it remains outside the ambit of section 131(1) of the *Companies Act*. In consequence, it would be perfected against third parties without registration as a charge, provided notice of the assignment was given to the debtor—the party from whom the debt is due.¹¹

If the draftsman takes the view that both constructions are arguable, he would have to proceed on the basis that even an absolute assignment of a book debt may, if executed by a company, fall within the ambit of section 131(3)(d). To avoid the need of registering it, he would have to ensure that it is not caught by section 104 of the *Bankruptcy Act*.

The clue is to be found in section 104(3), under which, *inter alia*, a “general assignment” does not include “an assignment of book debts due at the time of the assignment from specified debtors or of debts becoming due under specified contracts.”¹² This exception encompasses, *inter alia*, the factoring of book debts due to the customer—the assignor—from specified account parties and an assignment of the proceeds of letters of credit issued in respect of specified export transactions.

Obviously, care has to be taken in the definition of the debts to be covered by the relevant assignment. The best method is to designate the relevant “debtors” or “debts” in a schedule, and to provide that the list may be augmented from time to time. Apart from ensuring in this manner that the assignment does not constitute a “general assignment” as defined in section 104, the maintenance of such a schedule helps to remove any doubts about the debts covered by the relevant agreement. The course recommended has, thus, the advantage of obviating ambiguities. It is a useful device bound to avoid pitfalls resulting from lack of clarity at the time a transaction is incepted.

¹¹ Under the statute an absolute assignment is incomplete until notice thereof is given to the debtor: *Civil Law Act*, s. 9. No form or specific formula is prescribed for such notice: *Van Lynn Developments Ltd. v. Pelias Construction Co. Ltd.* [1969] 1 Q.B. 607. Note further that, under the time honored rule in *Dearle v. Hall* (1823) 1 Russ. 1, priorities between competing assignees are determined by the time notice is given to the debtor. Further, unless notice is given, the debtor is discharged if he pays the debt to the assignor: See, generally, *Chitty on Contracts*, *supra* note 3 §§19-016—19-017 and 19-067—19-068.

¹² The sub-section further excludes “an assignment of book debts included either in a transfer of business made in good faith and for value or in an assignment of assets for the benefit of creditors generally”. This clause does not affect agreements such as factoring of debts or assignments of proceeds of letters of credit.

The suggestions made in the foregoing paragraphs pertain to the drafting of a company's absolute assignments. The legislature too ought to reflect on the points raised. One course would be to add to section 104 a further sub-section stating that, as matter of caution, it is declared that section 104 does not affect the registration scheme applicable to companies' charges as set out in section 131(3) of the *Companies Act*.