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## Part 7

### Charges and Debentures

#### Chapter 1

##### Interpretation

###### **Definition ( Part 7 ).**

**401.** In this Part “charge”, in relation to a company, means a mortgage or a charge, in an agreement (written or oral), that is created over an interest in any property, assets or undertaking of the company (and in *sections 407 to 414* includes a judgment mortgage) but does not include a mortgage or a charge, in an agreement (written or oral), that is created over an interest in –

- (a) cash;
- (b) money credited to an account of a financial institution, or any other deposits, shares, bonds or debt instruments;
- (c) units in collective investment undertakings or money market instruments; or
- (d) claims and rights (such as dividends or interest) in respect of any thing referred to in any of the foregoing paragraphs.

#### Chapter 2

##### Registration of charges and priority

###### **Registration of charges created by companies.**

**402.** (1) Every charge created, after the commencement of this section, by a company shall be void against the liquidator and any creditor of the company unless either the procedure set out in –

- (a) *subsection (3)* – the “one-stage procedure”; or
- (b) *subsection (4)* – the “two-stage procedure”,

with respect to the charge’s registration is complied with.

(2) If, in purported compliance with the requirements of this Part as to the taking of steps in that behalf, there is received by the Registrar particulars of a charge that omit the required particulars in respect of one or more properties to which the charge relates, *subsection (1)* shall be read as operating to render void (as against the liquidator and any creditor of the company) the charge as it relates to the particular property or properties in respect of which that omission occurs but not otherwise.

(3) The procedure for registration under this subsection referred to in *subsection (1)* as the one-stage procedure consists of the taking of steps so that there is received by the Registrar, not later than 21 days after the date of the charge's creation, the prescribed particulars, in the prescribed form, of the charge.

(4) The procedure for registration under this subsection referred to in *subsection (1)* as the two-stage procedure consists of the following, namely the taking of steps :

(a) so that there is received by the Registrar a notice stating the company's intention to create the charge (being a notice in the prescribed form and containing the prescribed particulars of the charge); and

(b) so that, not later than 21 days after the date of the Registrar's receipt of the notice under *paragraph (a)* (the "first-mentioned notice"), there is received by the Registrar a notice, in the prescribed form, stating that the charge referred to in the first-mentioned notice has been created.

(5) If the requirement under *paragraph (b)* of *subsection (4)* is not complied with, within the period specified in that paragraph, the notice received under *paragraph (a)* of that subsection in relation to the charge shall be removed by the Registrar from the register.

(6) *Subsection (1)* is without prejudice to any contract or obligation for repayment of the money secured by the charge concerned and when a charge becomes void under that subsection, the money secured by it shall immediately become payable.

(7) Where a charge is created in the State but comprises property outside the State, the prescribed particulars, in the prescribed form (and, as the case may be, the notice under *subsection (4)(b)*) may be sent for registration under this section, notwithstanding that further proceedings may be necessary to make the charge valid or effectual according to the law of the country in which the property is situate.

**Duty of company with respect to registration under *section 402* and right of others to effect registration.**

**403.** (1) It shall be the duty of the company that creates the charge to comply with the procedure under *section 402(3)* or *(4)* with respect to the charge's registration but this is without prejudice to *subsection (2)*.

(2) Any person interested in the charge may use the procedure under *section 402(3)* or *(4)* with respect to its registration and the person's using that procedure (and in compliance with *section 402(3)* or *(4)*) shall have the same effect as if the company had used that procedure ( and in compliance with *section 402(3)* or *(4)*).

(3) Where such a person uses that procedure (and in compliance with *section 402(3)* or *(4)*), the person may recover from the company the amount of fees properly paid by that person to the Registrar in respect of the registration of the charge concerned.

**Duty of company to register charges existing on property acquired.**

**404.** (1) Where a company acquires any property which is subject to a charge that, if it had been created by the company after the acquisition of the property, would have given rise to the duty under *section 402(1)* on the part of the company with respect to the charge's registration, then the company shall have the following duty.

(2) That duty is to take steps so that there is received by the Registrar, not later than 21 days after the date on which acquisition of the property concerned is completed, the prescribed particulars, in the prescribed form, of the charge.

(3) If default is made in complying with this section, the company and any officer of the company who is in default shall be guilty of a category 4 offence.

**Priority of charges.**

**405.** (1) Unless the priority of the charges is otherwise governed by an enactment (apart from this Act), the priority of charges created by a company shall, subject to *subsection (4)*, be determined by reference to the date of receipt by the Registrar of the prescribed particulars, that is to say, a charge the prescribed particulars in respect of which are received by the Registrar on a date that is earlier than that on which those in respect of another charge are received by the Registrar shall have priority over that other charge.

(2) Where the date of receipt by the Registrar of the prescribed particulars of the several charges is the same, *subsection (1)* shall be read as operating to accord priority to the charge received earliest in time on the date concerned by the Registrar and other references in this Part concerning priority by reference to the date of receipt, and in particular, such references in *section 406(6)*, shall be read and operate accordingly.

(3) References in *subsection (1)* to the date of receipt of the prescribed particulars are references to –

- (a) if the procedure under *subsection (3)* of *section 402* is complied with in relation to a particular charge, the date of receipt by the Registrar of the prescribed particulars, in the prescribed form, of the charge; or

(b) if the procedure under *subsection (4) of section 402* is complied with in relation to a particular charge, the date of receipt by the Registrar of the notice, in the prescribed form and containing the prescribed particulars, in relation to the charge under *paragraph (a) of that subsection (4)*.

(4) *Subsection (1)* shall not affect any agreement between persons in whose favour charges have been created in relation to the priority that those charges shall, as between them, have.

(5) Subject to *subsection (6)*, in relation to particulars of a charge received by the Registrar pursuant to *section 402 (3) or (4)*, the following provisions apply so far as those particulars consist of particulars of a negative pledge -

(a) the Registrar shall not enter in the register under *section 407* particulars of the negative pledge pursuant to that section;

(b) the fact that the Registrar has received the particulars of the negative pledge shall have no legal effect,

but nothing in the foregoing affects the validity of the receipt by the Registrar of the other particulars of the charge.

(6) *Subsection (5)* does not apply to particulars of a negative pledge included in particulars of a floating charge granted by a company to the Central Bank for the purposes of either providing or securing collateral.

(7) In this section “negative pledge” means any agreement entered into by the company concerned and any other person or persons that provides that the company shall not, or shall not otherwise than in specified circumstances –

(a) borrow moneys or otherwise obtain credit from any person other than that person or those persons; or

(b) create or permit to subsist any charge, lien or other encumbrance or any pledge over the whole or any part of the property or undertaking of the company.

#### **Registration and priority of judgment mortgages.**

**406.** (1) If judgment is recovered against a company and that judgment is subsequently converted into a judgment mortgage affecting any property of the company, the judgment mortgage shall be void against the liquidator and any creditor of the company unless the procedure set out in *subsection (2)* with respect to the judgment mortgage's registration is complied with.

(2) The procedure for registration under this subsection consists of the taking of steps so that there is received by the Registrar, together with the relevant judgment mortgage document, the prescribed particulars, in the prescribed form, of the judgment mortgage, not later than 21 days after the following date.

(3) That date is the date on which notification by the Property Registration Authority of the judgment mortgage's creation is received by the judgment creditor.

(4) In *subsection (2)* the “relevant judgment mortgage document” means a certified copy of, as appropriate -

(a) Form 112 set out in the Schedule of Forms to the Land Registration Rules 1972 (S.I.No.230 of 1972); or

(b) Form 16 set out in the Schedule to the Registration of Deeds (No.2) Rules 2009 (S.I. No.457 of 2009),

used for the purposes of converting the judgment concerned into a judgment mortgage.

(5) For the purposes of this section, it shall be presumed, until the contrary is proved, that the judgment creditor received notification, of the judgment mortgage's creation, from the Property Registration Authority on the third day after the date on which that notification is sent by it to the judgment creditor or his or her agent.

(6) Unless the priority of the judgment mortgage is otherwise governed by an enactment, the priority of a judgment mortgage affecting any property of a company as against any other such judgment mortgage or a charge created by the company shall, subject to *subsection (8)*, be determined by reference to the date of receipt of the prescribed particulars, that is to say, a judgment mortgage the prescribed particulars in respect of which are received on a date that is earlier than that on which those in respect of another judgment mortgage or a charge are received shall have priority over that other judgment mortgage or that charge.

(7) References in *subsection (6)* to the date of receipt of the prescribed particulars are references to -

(a) in the case of a judgment mortgage, the date of receipt by the Registrar, in compliance with *subsection (2)*, of the prescribed particulars in the prescribed form in relation to the mortgage, together with the relevant judgment mortgage document referred to in that subsection; and

(b) in the case of a charge created by the company -

(i) if the procedure under *subsection (3)* of *section 402* is complied with in relation to a particular charge, the date of receipt by the Registrar of the prescribed particulars, in the prescribed form, of the charge; or

(ii) if the procedure under *subsection (4) of section 402* is complied with in relation to a particular charge, the date of receipt by the Registrar of the notice, in the prescribed form and containing the prescribed particulars, in relation to the charge under *paragraph (a) of that subsection (4)*.

(8) *Subsection (6)* shall not affect any agreement between persons in whose favour judgment mortgages or charges have been created in relation to the priority that those mortgages or charges shall, as between them, have.

(9) This section shall not apply to any judgment mortgage created before the commencement of this section.

**Register of charges.**

**407.** (1) The Registrar shall keep, in relation to each company, a register in the prescribed form, of the charges requiring registration under this Part, and shall, on payment of such fee as may be prescribed, enter in the register, in relation to such charges, the following particulars :

(a) without prejudice to *paragraphs (e) and (f)*, in the case of a charge created by the company, the date of its creation and –

(i) where the procedure for registration under *section 402(3)* is complied with, the date and time of receipt by the Registrar under that provision of the prescribed particulars, in the prescribed form, of the charge; and

(ii) where the procedure for registration under *section 402(4)* is complied with, the respective dates and times of receipt by the Registrar of the notices under *paragraphs (a) and (b)* of that provision in relation to the charge;

(b) without prejudice to *paragraphs (e) and (f)*, in the case of a charge existing on property acquired by the company, the date of the acquisition of the property by the company;

(c) without prejudice to *paragraphs (e) and (f)*, in the case of a judgment mortgage, the date of the mortgage's creation and the date and time, in relation to it, of receipt by the Registrar, under *section 406(2)*, of the prescribed particulars in the prescribed form together with the relevant judgment mortgage document referred to in that provision;

(d) without prejudice to *paragraphs (e) and (f)*, in the case of floating charge granted by the company to the Central Bank for the purposes either of providing or securing collateral, particulars of any provision of the charge that has the effect of prohibiting or restricting the company from issuing further securities that rank equally with that charge or modifying the ranking of that charge in relation to securities previously issued by the company;

(e) short particulars of the property charged ; and

(f) the persons entitled to the charge.

(2) The register kept in pursuance of this section shall be open to inspection by any person on payment of such fee, if any, as may be prescribed.

#### **Certificate of registration.**

**408.** (1) The Registrar shall give a certificate of the registration of any charge registered in pursuance of this Part.

(2) Subject to *subsection (3)*, such a certificate shall be conclusive evidence that the requirements of this Part as to the registration of the charge have been complied with.

(3) To the extent that the particulars of a charge delivered to the Registrar in purported compliance with this Part omit the required particulars in respect of one or more properties to which the charge relates, the evidential effect of the certificate provided under *subsection (2)* shall not extend to the particular property or properties in respect of which that omission occurs.

(4) In *subsection (3)* “property” includes an interest in, or right over, property.

#### **Entries of satisfaction and release of property from charge.**

**409.** (1) The Registrar may exercise the powers under *subsection (2)*, on evidence being given to his or her satisfaction with respect to any charge registered under this Part —

(a) that the debt in relation to which the charge was created has been paid or satisfied in whole or in part; or

(b) that part of the property or undertaking charged has been released from the charge or has ceased to form part of the company’s property or undertaking,

and, where the satisfaction or release has not been signed by or on behalf of the chargee, after giving notice to the person to whom such charge was originally given or to the judgment creditor, as the case may be.

(2) Those powers are to enter on the register a memorandum —

(a) of satisfaction in whole or in part; or

(b) of the fact that part of the property or undertaking has been released from the charge or has ceased to form part of the company’s property or undertaking,

as the case may be.

(3) Where the Register enters such a memorandum of satisfaction in whole, he or she shall, if required, furnish the company with a copy of it.



(4) The Registrar may accept as evidence of a satisfaction or release referred to in *subsection (1)(a) or (b)* a statement in the prescribed form signed by a director and secretary of the company, or by 2 directors of the company, stating that the satisfaction or release has occurred.

(5) Where a person signs a statement referred to in *subsection (4)* knowing it to be false, the person shall be guilty of a category 2 offence.

(6) Where a person signs a statement referred to in *subsection (4)* and in doing so did not honestly believe on reasonable grounds that the statement was true, and the court considers that the making of that statement -

(a) contributed to the company being unable to pay its debts;

(b) prevented or impeded the orderly winding-up of the company; or

(c) facilitated the defrauding of the creditors of the company,

the court, on the application of the liquidator or examiner or receiver of the property of, or any creditor or contributor of, the company, may, if it thinks it proper to do so, make the following declaration.

(7) That declaration is that that signatory shall be personally liable, without limitation of liability, for all or such part as the court may specify of the debts and other liabilities of the company.

**Extension of time for registration of charges and rectification of register.**

**410.** (1) The court may grant the following relief where it is satisfied that the omission to register a charge within the time required by this Part or that the omission or misstatement of any particular with respect to any such charge or in a memorandum of satisfaction -

(a) was accidental or due to inadvertence or to some other sufficient cause; or

(b) is not of a nature to prejudice the position of creditors or shareholders of the company,

or that on other grounds it is just and equitable to grant that relief in respect of such an omission or misstatement.

(2) That relief is to order, on such terms and conditions as seem to the court just and expedient, that the time for registration shall be extended, or, as the case may be, that the omission or misstatement shall be rectified.

(3) An application for relief under this section may be made on behalf of the company or any other person interested.

**Copies of instruments creating charges to be kept.**

**411.** (1) A company shall keep a copy of every instrument creating any charge in relation to it and requiring registration under this Part, including, in the case of a judgment mortgage, a copy of the relevant judgment mortgage document that was received by the Register.

(2) All such copies kept by the company shall be kept at the same place.

(3) *Sections 212 to 214* (rights of inspection, etc.) apply to those copies.

(4) If default is made in complying with *subsection (1)* or *(2)*, the company concerned and any officer of it who is in default shall be guilty of a category 3 offence.

**Registration of charges created prior to commencement of this Part.**

**412.** (1) Notwithstanding *section 4*, sections 99 to 106, 108 to 110 and 112 of the Act of 1963 shall continue to apply to charges (within the meaning of Part IV of that Act) created before the commencement of this Part.

(2) For the avoidance of doubt, the cases in which those provisions of the Act of 1963 continue to apply include any case where, as respects a charge (within the meaning of Part IV of that Act) created before the commencement of this Part, the time allowed under those provisions for the registration of that charge under that Part IV has not expired on that commencement.

**Transitional provisions in relation to priorities of charges.**

**413.** (1) In this section “charge to which the special transitional case applies” means the charge referred to in the case set out in *section 412(2)*.

(2) Subject to *subsection (3)*, the priority of any charge (within the meaning of Part IV of the Act of 1963), being a charge created before the commencement of this Part, as against a charge falling with this Part created on or after that commencement, shall be governed by the law in force immediately before that commencement.

(3) The priority of the charge to which the special transitional case applies, where that charge has not been registered under Part IV of the Act of 1963 before the commencement of this Part, as against a charge falling with this Part created on or after that commencement shall be governed by *section 405* or *406*, as the case may be (that is to say, the provisions of that section that apply where the matter is not otherwise governed by an enactment ( apart from this Act)).

(4) For the purposes of the application of *section 405* or *406* to the issue of priority falling within *subsection (3)*, references in either section to the date of receipt of the prescribed particulars shall, in relation to the charge to which the special transitional case applies, be read as references to the date of delivery to, or receipt by, the

Registrar (under and in compliance with Part IV of the Act of 1963, as continued by *section 412*) of the matters that are required by that Part to be so delivered or received for the purposes of registering the charge thereunder.

(5) Non-compliance with requirement in the second sentence of section 102(1) of the Act of 1963 shall be disregarded for the purposes of *subsection (4)*.

**Netting of Financial Contracts Act 1995 not to affect registration requirements.**

**414.** Nothing in section 4(1) of the Netting of Financial Contracts Act 1995 affects —

- (a) the requirement to register a charge under this Part; or
- (b) the consequences of failing to register a charge under this Part.

**Chapter 3**

Provisions as to debentures

**Liability of trustees for debenture holders.**

**415.** (1) Subject to the provisions of this section, the following provision shall be void, namely, any provision contained —

- (a) in a trust deed for securing an issue of debentures; or
- (b) in any contract with the holders of debentures secured by a trust deed,

in so far as it would have the effect of exempting a trustee of it from, or indemnifying him or her against, liability for breach of trust where he or she fails to show the degree of care and diligence required of him or her as trustee, having regard to the provisions of the trust deed conferring on him or her any powers, authorities or discretions.

(2) *Subsection (1)* shall not invalidate—

- (a) any release otherwise validly given in respect of anything done or omitted to be done by a trustee before the giving of the release; or
- (b) any provision enabling such a release to be given—
  - (i) on the agreement to the provision of a majority of not less than three-fourths in value of the debenture holders present and voting in person or, where proxies are permitted, by proxy at a meeting summoned for the purpose, and

- (ii) either with respect to specific acts or omissions or on the trustee dying or ceasing to act.

(3) *Subsection (1)* shall not operate—

(a) to invalidate any provision in force on 1 April 1964 so long as any person then entitled to the benefit of that provision or afterwards given the benefit of it under *subsection (4)*, remains a trustee of the deed in question; or

(b) to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him or her while any such provision was in force.

(4) While any trustee of a trust deed remains entitled to the benefit of a provision saved by *subsection (3)*, the benefit of that provision may be given either—

(a) to all trustees of the deed present and future; or

(b) to any named trustee or proposed trustees of the deed,

by a resolution passed by a majority of not less than three-fourths in value of the debenture holders present in person or, where proxies are permitted, by proxy at a meeting summoned for the purpose in accordance with the provisions of the deed, or if the deed makes no provision for summoning meetings, a meeting summoned for the purpose in any manner approved by the court.

#### **Perpetual debentures.**

**416.** A condition contained in any debentures or in any deed for securing any debentures shall not be invalid by reason only that the debentures are by those means made irredeemable or redeemable only on the happening of a contingency however remote, or on the expiration of a period however long, notwithstanding any rule of law to the contrary.

#### **Power to re-issue redeemed debentures.**

**417.** (1) Where a company has redeemed any debentures then—

(a) unless any provision to the contrary, whether express or implied, is contained in the constitution or in any contract entered into by the company; or

(b) unless the company has, by passing a resolution to that effect or by some other act, shown its intention that the debentures shall be cancelled,

the company shall have power to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place.

(2) Subject to *section 418*, on a re-issue of redeemed debentures, the person entitled to the debentures shall have the same priorities as if the debentures had never been redeemed.

(3) Where a company has deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures have remained so deposited.

**Saving of rights of certain mortgagees in case of re-issued debentures.**

**418.** Where any debentures which have been redeemed before 1 April 1964 are re-issued on, or subsequently to, that date, the re-issue of the debentures shall not prejudice, and shall be deemed never to have prejudiced, any right or priority which any person would have had under or by virtue of any charge created before that date if section 104 of the Companies (Consolidation) Act 1908 had been enacted in –

(a) the Act of 1963; or

(b) in the case of a re-issue occurring on or after the commencement of this section, this Act, instead of section 95 of the Act of 1963 or *section 417*, as the case may be.

**Specific performance of contracts to subscribe for debentures.**

**419.** A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance.