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# COMPANIES BILL 2012

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*Unofficial version*

As amended in ~~Committee~~Report Stage (Seanad)  
on ~~17<sup>th</sup> June~~30<sup>th</sup> September 2014

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**Arthur Cox**

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## PART 7

### CHARGES AND DEBENTURES

#### Chapter 1

##### Interpretation

###### [Definitions (*Part 7*)

[408]. [(1)] 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 of the company (and in *section [409](8)* and *sections [414] to [421]* 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, [

(c) shares, bonds or debt instruments,]<sup>318</sup>

([d]) units in collective investment undertakings or money market instruments; or

([e]) claims and rights (such as dividends or interest) in respect of any thing referred to in any of ~~the foregoing paragraphs~~ *paragraphs (b) to (c)*<sup>319</sup>;

“property”, in relation to a company, includes any assets or undertaking of the company.]<sup>320</sup>

[(2) Any exclusion provided in *subsection (1)* to what is defined in that subsection as constituting a “charge” may be varied by order made by the Minister if the Minister considers that it is necessary or expedient to do so in consequence of any Community act adopted after the commencement of this section relating to financial collateral arrangements.]<sup>321</sup>

[[3] For the avoidance of doubt, in the case of a mortgage or charge created over both—

(a) an interest in anything specified in any of *paragraphs (a) to ([e]) of subsection (1)*;

and

(b) any property, assets or undertaking not falling within any of those paragraphs,

the mortgage or charge shall, other than to the extent to which it is created over an interest in anything specified in any of the foregoing paragraphs of *subsection (1)*, be regarded as a charge within the meaning of this Part.]<sup>322</sup>

#### Chapter 2

##### Registration of charges and priority

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

[409]. (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 –

<sup>318</sup> Substituted by point 88 of Seanad Committee Amendments.

<sup>319</sup> Substituted by point 51 of Seanad Report Amendments.

<sup>320</sup> Substituted by point 73 of Committee Amendments.

<sup>321</sup> Inserted by point 89 of Seanad Committee Amendments.

<sup>322</sup> Inserted by point 149 of Report Amendments.

(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<sup>323</sup> 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.

(8) If there is a change among the one or more persons entitled to a charge registered under this Part, the fact of that change having occurred, and particulars of the person or persons now entitled to the charge, may be delivered, in the prescribed form, to the Registrar and registered by him or her.

(9) Nothing in this section or any other provision of this Part authorises the delivery to the Registrar of a deed, or any supplemental document to it, and this Part does not impose or confer any duty or power on the Registrar to examine any deed or any supplemental document to it.

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<sup>323</sup> Deleted by point 90 of Seanad Committee Amendments.

**Duty of company with respect to registration under section [409] and right of others to effect registration.**

[410]. (1) It shall be the duty of the company that creates the charge to comply with the procedure under section [409](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 [409](3) or (4) with respect to its registration and the person's using that procedure (and in compliance with section [409](3) or (4)) shall have the same effect as if the company had used that procedure (and in compliance with section [409](3) or (4)).

(3) Where such a person uses that procedure (and in compliance with section [409](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.**

[411]. (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 [409](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**

**412.** (1) For the purposes of this section—

- (a) "relevant rule of law" means a rule of law that governs the priority of charges created by a company, and for the avoidance of doubt, any enactment governing the priority of such charges is not encompassed by that expression,
- (b) the reference in subsection (2) to any priority that one charge, by virtue of a person's not having notice of a matter, enjoys over another charge or charges shall be deemed to include a reference to any priority that an advance made on foot of a charge, by virtue of a person's not having notice of a matter, enjoys over a subsequent charge or charges.

(2) On and from the commencement of this section, any relevant rule of law shall stand modified in the manner specified in subsection

(3), but not so as to displace any priority, whether before or after that commencement, that one charge, by virtue of a person's not having notice of a matter, enjoys over another charge or charges.

(3) That modification is that, for the part of the rule that operates by reference to the time of creation of the 2 or more charges concerned, there shall be substituted a part that operates by reference to—

- (a) the dates of receipt by the Registrar of the prescribed particulars of the 2 or more charges concerned, or

- (b) if the date of receipt by the Registrar of the prescribed particulars of the 2 or more charges is the same, the respective times, on the date concerned, of receipt by the Registrar of those particulars.

(4) References in *subsection (3)* to the date, or time, of receipt of the prescribed particulars are references to—

- (a) if the procedure under *subsection (3)* of *section 409* is complied with in relation to a particular charge, the date, or time, 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 409* is complied with in relation to a particular charge, the date, or time, 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)*.

(5) *Subsections (2)* and *(3)* 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.

(6) Subject to *subsection (7)*, in relation to particulars of a charge received by the Registrar pursuant to *section 409(3)* or *(4)*, the following provisions apply so far as those particulars consist of particulars of a negative pledge, any events that crystallise a floating charge or any restrictions on the use of any charged asset (and particulars of any such matter are referred to subsequently in this subsection as “extraneous material”):

- (a) the Registrar shall not be under any duty to<sup>324</sup> enter in the register under *section 414* particulars of the extraneous material pursuant to that section;
- (b) the fact that the Registrar has received the particulars of the extraneous material 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.

(7) *Subsection (6)* 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.

(8) In this section “negative pledge” means any agreement entered into by the company concerned and any other person or persons that—

- (a) provides that the company shall not, or shall not otherwise than in specified circumstances—
  - (i) borrow moneys or otherwise obtain credit from any person other than that person or those persons,
  - (ii) create or permit to subsist any charge, lien or other encumbrance or any pledge over the whole or any part of the property of the company, or
  - (iii) alienate or otherwise dispose of in any manner any of the property of the company,

or

- (b) contains a prohibition, either generally or in specified circumstances, on the doing by the company of one or more things referred to in one, or more than one, provision of *paragraph (a)*.]<sup>325</sup>

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

[413]. (1) If judgment is recovered against a company and that judgment is subsequently converted into a judgment mortgage

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<sup>324</sup> Substituted by point 52 of Seanad Report Amendments.

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 60, 60A or 60B set out in the Schedule of Forms to the Land Registration Rules 2012 (S.I. No. 483 of 2012) as amended by the Land Registration Rules 2013 (S.I. No. 389 of 2013)]<sup>326</sup>; 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] If rules are made under section 126 of the Registration of Title Act 1964 or, as the case may be, section 48 of the Registration of Deeds and Title Act 2006—

(a) replacing a form that is referred to in *subsection (4)(a)* or *(b)*, as appropriate, the reference in that provision to the form shall be read as a reference to the form as so replaced, or

(b) amending a form that is so referred to, the reference in that provision to the form shall be read as a reference to the form as it stands so amended.]<sup>327</sup>

[7] This section shall not apply to any judgment mortgage created before the commencement of this section.

### **Register of charges.**

[414]. (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 [409](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 [409](4)* is complied with, the respective dates and times of

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<sup>325</sup> Substituted by point 91 of Seanad Committee Amendments.

<sup>326</sup> Substituted by point 150 of Report Amendments.

<sup>327</sup> Substituted by point 151 of Report Amendments.

- 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 [413](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.**

[415]. (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) [ [Without prejudice to the generality of the definition, in *section [408]* of that expression, in *subsection (3)*]<sup>328</sup> “property” includes an interest in, or right over, property.

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

[416]. (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 [...] <sup>329</sup>charged has been released from the charge or has ceased to form part of the

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<sup>328</sup> Substituted by point 75 of Committee Amendments.

<sup>329</sup> Deleted by point 76 of Committee Amendments.

company's property[...] <sup>330</sup>,

and, where the satisfaction or release has not been signed by or on behalf of the chargee, [after giving notice to the person who, for the time being, stands registered as the person entitled to such charge or to the judgment creditor] <sup>331</sup> 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 [...] <sup>332</sup> has been released from the charge or has ceased to form part of the company's property [...] <sup>333</sup>,

as the case may be.

(3) Where the Registrar 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.**

[417]. (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

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- (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,

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<sup>330</sup> Deleted by point 77 of Committee Amendments.

<sup>331</sup> Substituted by point 152 of Report Amendments.

<sup>332</sup> Deleted by point 78 of Committee Amendments.

<sup>333</sup> Deleted by point 79 of Committee Amendments.

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.**

[418]. (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 Registrar.

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

(3) *Sections [215] to [217]* (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.**

[419]. (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[, and the foregoing reference to the time allowed under those provisions includes the time allowed under those provisions as extended by an order (if such has been made) under section 106 of the Act of 1963]<sup>334</sup>.

#### **[ Transitional provisions in relation to priorities of charges**

**420.** (1) In this section “charge to which the special transitional case applies” means a charge referred to in the case set out in *section 419(2)*.

(2) Subject to *subsection (3)*, the modification by *section 412* of any rule of law there referred to (in this section referred to as the “*section 412* rule modification”) shall not apply in relation to the issue of the priority of any charge (within the meaning of Part IV of the Act of 1963), created before the commencement of this Part, as against a charge falling within this Part created on or after that commencement.

(3) The *section 412* rule modification shall apply in relation to the issue of the priority of a charge to which the special transitional case applies (as against a charge falling within this Part created on or after commencement of that Part) if the first-mentioned charge has not been registered under Part IV of the Act of 1963 before that commencement.

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<sup>334</sup> Inserted by point 92 of Seanad Committee Amendments.

(4) For the purposes of the application of the *section 412* rule modification to the issue of priority falling within *subsection (3)*, references in *section 412* to the date, or time, of receipt of the prescribed particulars shall, in relation to a charge to which the special transitional case applies, be read as references to the date, or time, of delivery to, or receipt by, the Registrar (under and in compliance with Part IV of the Act of 1963, as continued by *section 419*) 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 the requirement in the second sentence of section 102(1) of the Act of 1963 shall be disregarded for the purposes of *subsection (4)*.]<sup>335</sup>

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

[421]. 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.**

[422]. (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

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<sup>335</sup> Substituted by point 93 of Seanad Committee Amendments.

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.**

[423]. 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.**

[424]. (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 [425]*, 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.**

[425]. 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 [424]*, as the case may be.

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

[426]. 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.

**Chapter 4**

Prohibition on Registration of Certain Matters affecting Shareholders or Debentureholders

**Registration against company of certain matters prohibited.**

[427]. (1) Subject to *subsection (3)*, the Registrar has, in relation to any company, no jurisdiction to accept receipt of, or to register in the register –

(a) an order of any authority (whether judicial or otherwise) affecting a shareholder or debentureholder of the company; or

(b) any notice of the making thereof.

(2) Any jurisdiction of an authority (whether judicial or otherwise) subsisting before the commencement of this section to make an order requiring that there be registered in the register, or that there be received by the Registrar –

(a) an order of that authority affecting a shareholder or debentureholder of a company; or

(b) a notice of the making of an order referred to in *paragraph (a)*,

shall, after that commencement, cease to be exercisable.

(3) Nothing in this section affects the jurisdiction of any authority (whether judicial or otherwise) under *Chapter 3 of Part 13* or *Chapter 2 of Part 14*.

