



UNFAIR PREFERENCES

ELEMENTS OF AN UNFAIR PREFERENCE



A transaction was entered into



The transaction was at a time when the company was insolvent



The company and the creditor are parties to the transaction



In respect of an unsecured debt



During the 6 months ending on the relation back day



The transaction results in the creditor receiving more than it would receive if the transaction were set aside and the creditor prove in the liquidation

COMMON DEFENCES

1.

Disputing
Insolvency

Disputing Insolvency

At the time of the transaction the company was not insolvent

Usually difficult and costly for creditors to dispute

2.

Running
Account

Running Account

Transaction is for commercial purposes an integral part of a continuing business relationship

Peak indebtedness rule

3.

Good
Faith

Good Faith

Payments received by the creditor in good faith without reasonable grounds to suspect

Sometimes difficult for larger organisations to prove

OFFENSIVE STRATEGIES TO MINIMISE PREFERENCE RISK

1

ASSIGN THE DEBT

2

BE A SECURED CREDITOR OF THE COMPANY

3

CHARGING CLAUSES

4

RETENTION OF TITLE CLAIMS

5

CASH ON DELIVERY AND PREPAYMENTS

1

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CASH ON DELIVERY AND PREPAYMENTS



COMPANY OWES
CREDITOR \$100k



COMPANY PAYS
CREDITOR \$100k



THIRD PARTY
GIVES COMPANY
\$100k TO PAY
CREDITOR

PREFERENCE

CREDITOR



**COMPANY OWES
CREDITOR \$100k**

DEBTOR

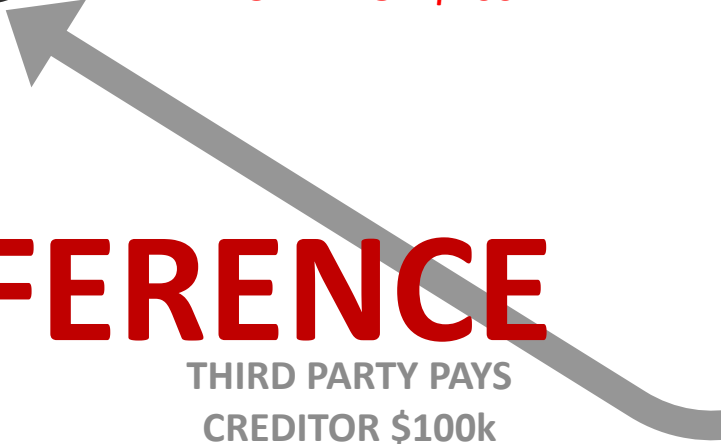


**COMPANY
NOW OWES
\$100k TO
THIRD PARTY**

**THIRD
PARTY**

PREFERENCE

**THIRD PARTY PAYS
CREDITOR \$100k**





COMPANY OWES
CREDITOR \$100k

DEBT IS ASSIGNED TO
THIRD PARTY

CONSIDERATION
FOR ASSIGNMENT



**NOT A
PREFERENCE**

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CASH ON DELIVERY AND PREPAYMENTS

RETENTION OF TITLE CLAIMS

Previously ROT creditors were not secured

The liquidator has to prove that the creditor had an unsecured debt

Practically it will often be difficult for the liquidator to prove

PPS Act now defines ROT as security

Creditor can argue they were fully secured at time of payments

Judicially untested in relation to PPS Act

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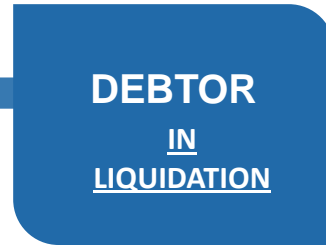
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**CASH ON DELIVERY AND
PREPAYMENTS**

NEW DEFENCE SET OFF



COMPANY OWES
CREDITOR \$100k



~~CREDITOR STILL
OWES \$50k~~

CREDITOR SETS OFF \$50k STILL
OWED AGAINST LIQUIDATION
CLAIM

~~LIQUIDATOR
SUES FOR \$50k PREFERENCE~~



LIABILITY NOW \$0

NEW DEFENCE SET OFF

- ✓ | Not really all that new
- ✓ | Applied for some time in insolvent trading: *Re Parker* (1997) 80 FCR 1
- ✓ | NSW Court of Appeal support: *Buzzle Operations v Apple Computer Australia* [2011] NSWCA 109
- ✓ | Successfully applied to unfair preferences: *Morton v Rexel Electrical Supplies* [2015] QDC 49
- ✓ | “Policy” counterarguments
- ✓ | Yet to be squarely tested in a superior court

PRACTICAL TIPS

- ✓ | Be aware
- ✓ | If you receive a preference claim check if a debt is still owed by the company in liquidation
- ✓ | Get advice

Polczynski Contact

Want more? [Contact us.](#)



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