

PROCEEDS OF CRIME ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 9: Insolvency etc.

Bankruptcy in England & Wales

Section 417: Modifications of the 1986 Act

559. The purpose of Part 9 is to explain what happens when the same property is subject both to criminal confiscation legislation and to insolvency legislation. The Part is United Kingdom-wide and much of it is based on earlier legislation. *Sections 417-419* deal with the interaction of the insolvency legislation of England and Wales with the confiscation legislation of England and Wales, Scotland and Northern Ireland (“the 1986 Act” means the Insolvency Act 1986 in this context). This is necessary because both the criminal confiscation legislation and the insolvency legislation throughout the United Kingdom affect property in other jurisdictions.
560. The basic rule expressed by *section 417* is that, if at the time a person is adjudged bankrupt under the 1986 Act a restraint order has previously been made or a receiver or administrator has previously been appointed in respect of any of his property, that property is excluded from his estate for the purpose of the bankruptcy. So any of that property first goes to satisfy the confiscation order, rather than being dispersed to creditors. The legislation is designed to prevent defendants from attempting to use the insolvency legislation to defeat the purpose of the confiscation legislation.
561. *Schedule 11* makes some related consequential amendments to the Insolvency Act 1986. They deal with the problem that property can only be included in a bankrupt’s estate at the time the bankruptcy order is made. If restraint or receivership action is underway when the bankruptcy order is made, any unconfiscated property cannot be given to the creditors at a later date. The amendments provide that property not required for confiscation can subsequently be included in the bankrupt’s estate. See also the note on *Schedule 11, paragraph 16*, amendments to the Insolvency Act 1986.

Section 418: Restriction of powers

562. This section, on the other hand, explains the circumstances under which the bankruptcy legislation takes priority. If a person is adjudged bankrupt before a restraint order is made or a receiver or administrator is appointed, no property that is for the time being comprised in the bankrupt’s estate may then be placed under restraint or subject to realisation under the confiscation legislation. However, once the creditors have been satisfied, any remaining property may be used to satisfy the confiscation order.
563. Further to the problem described under the previous section and dealt with in *Schedule 11, paragraph 16, subsections (3)(d) and (e)* prevent the confiscation court from exercising its powers in relation to property left over after a confiscation order has been satisfied. This will ensure that, where a bankruptcy order has been made, any surplus sums will go into the bankrupt’s estate for distribution to creditors, rather than

being distributed by the Crown Court to the defendant and others under the confiscation legislation.

Section 419: Tainted gifts

564. This section deals with the procedure under the insolvency legislation for voiding a gift made by a bankrupt to a third party, so that it can be used to pay creditors. This procedure is similar to the procedure for recovering tainted gifts in the confiscation legislation. Where a person holds a gift, it is possible for the confiscation legislation and the insolvency legislation both to lay claim to the same property simultaneously. The section explains what happens when this situation arises.
565. The approach to gifts adopted by *section 419* is similar to the overall approach in *Part 9* of the Act, which was described in the notes on *sections 417* and *418* above. *Section 419* makes it clear that where restraint or receivership action has been taken against property in the hands of the gift recipient, then the power to void the gift under the insolvency legislation cannot be exercised for as long as that action is underway.

Sequestration in Scotland

Section 420-422: Modifications of the 1985 Act; Restriction of powers; Tainted gifts

566. *Sections 420-422* make corresponding provision in relation to property which may form part of the debtor's estate under the Scottish insolvency legislation (primarily, the Bankruptcy (Scotland) Act 1985).

Bankruptcy in Northern Ireland

Sections 423-425: Modifications of the 1989 Order; Restriction of powers; Tainted gifts

567. *Sections 423-425* contain corresponding provision in relation to property which may be subject to proceedings under the insolvency legislation in Northern Ireland (the Insolvency (Northern Ireland) Order 1989).

Winding up in England & Wales and Scotland

Section 426: Winding up under the 1986 Act

568. *Section 426* deals with the situation where an insolvent company rather than an individual holds realisable property. Broadly, if action is taken under the confiscation legislation before a winding up order is made, confiscation takes precedence over insolvency. The provision is thus analogous to that which applies to personal bankruptcy in England and Wales or Northern Ireland, and sequestration in Scotland. This section covers the company insolvency legislation of both England and Wales and Scotland. The same legislation, the Insolvency Act 1986, applies to company insolvency in the two jurisdictions.

Section 427: Tainted gifts

569. *Section 427* makes provision like that in *sections 419, 422* and *425* for the situation where a tainted gift is made not by an individual but by a company. The purpose of the section is to ensure that where restraint or receivership action has been taken against property in the hands of the gift recipient, then the power to void the gift under the insolvency legislation cannot be exercised for as long as that action is underway.

Winding up in Northern Ireland

Section 428: Winding up under the 1989 Order

570. The Insolvency Act 1986 does not apply to company insolvencies in Northern Ireland. In Northern Ireland, the relevant legislation is the Insolvency (Northern Ireland) Order 1989. This section contains provision similar to that in [section 426](#), except that it deals with the situation where a company insolvency falls under the 1989 Order rather than the 1986 Act.

Section 429: Tainted gifts

571. [Section 429](#) makes provision like that in [section 427](#). It covers the situation where a gift qualifies both as a tainted gift under the confiscation legislation and as a voidable gift under the Northern Ireland company insolvency legislation.

Floating charges

Section 430: Floating charges

572. A floating charge is a charge over the property of a company or society. Unlike an ordinary charge, it does not attach to any particular property of the company or society but “floats” over all its property. The charge-holder may under certain circumstances have a receiver appointed to recover the value of the charge.
573. This section applies to companies which may be wound up in any part of the United Kingdom. It is designed to address the situation where a charge-holder’s receiver might be appointed at the same time as a confiscation receiver. It establishes a scheme of priorities so that only one of the receivers acts at any given time. It provides that if a charge-holder’s receiver has been appointed, then any property in relation to which that receiver’s functions are exercisable is not subject to restraint or realisation action under the confiscation legislation. Any property left after the value of the charge had been distributed to creditors would, however, subsequently be available for restraint and realisation.
574. Conversely, if a restraint order is made or realisation action is taken against property before the appointment of the charge-holder’s receiver, it is the charge-holder’s receiver who is prevented from taking action in relation to the property. This does not mean that the charge-holder can no longer recover the value of the charge. The confiscation receiver’s functions must still be exercised in this situation in accordance with [section 69](#), which requires the powers of restraint and receivership to be exercised with a view to allowing third parties to retain or recover the value of any interest held by them. This includes an interest under a floating charge.

Limited liability partnerships

Section 431: Limited liability partnerships

575. Limited liability partnerships are a new form of corporate structure created by the Limited Liability Partnerships Act 2000. This section provides that [sections 426, 427](#) and [430](#)(company insolvency and floating charges) are to apply to limited liability partnerships in much the same way as they apply to any other company.

Insolvency practitioners

Section 432: Insolvency practitioners

576. This section reproduces earlier legislation and explains what is to happen when an insolvency practitioner takes action against property subject to a restraint order. The main purpose of the provision is to protect insolvency practitioners who unwittingly

*These notes refer to the Proceeds of Crime Act 2002
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interfere with property subject to a restraint order from liability, except insofar as is caused by their negligence, and to enable such insolvency practitioners to recover their expenses.