

Companies (Floating Charges) (Scotland) Act, 1961

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CHAPTER 46

An Act to amend the law of Scotland so as to empower companies to give security by way of floating charges; and for purposes connected therewith. [27th July, 1961]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) It shall be competent under the law of Scotland for an incorporated company (whether a company within the meaning of the Act of 1948 or not), for the purpose of securing any debt incurred or to be incurred by it (including any balance arising or which may arise on cash account), to create in favour of the creditor a charge, in this Act referred to as a floating charge, over all or any of the property, heritable and moveable, which may from time to time be comprised in its property and undertaking.

Power of incorporated companies to create floating charges.

(2) A floating charge created by a company shall not affect any property which ceases prior to the commencement of the winding up of the company to be comprised in, and remains outwith, the company's property and undertaking, but shall on the commencement of the winding up of the company, subject to sections one hundred and six A and three hundred and twenty-two of the Act of 1948 (which relate among other things to the validity of floating charges), attach to the property then comprised in the company's property and undertaking not being excepted property, but subject to the rights of any person who—

- (a) has effectually executed diligence on the property or any part of it, or
- (b) holds a fixed security over the property or any part of it ranking in priority to the floating charge, or

(c) holds over the property or any part of it another floating charge so ranking ;

and, subject as aforesaid, the provisions of the Act of 1948 relating to winding up, except paragraph (c) of subsection (1) of section three hundred and twenty-seven thereof, shall have effect as if the charge were a fixed security over the property to which it has attached in respect of the principal of the debt to which it relates and any interest due thereon :

Provided that nothing in this subsection shall prejudice the operation of subsection (5) of section three hundred and nineteen of the Act of 1948 (which provides among other things for the payment of certain debts in certain circumstances out of property comprised in or subject to a floating charge).

(3) In the last foregoing subsection "excepted property" in relation to a floating charge means such property, or property of such descriptions, as may be specified in the instrument creating the floating charge as being excepted from the charge.

Creation of floating charges by Scottish companies.

2. A floating charge may be created, in the case of a company which the Court of Session has jurisdiction to wind up, only by the execution, under the seal of the company, of an instrument of charge as nearly as practicable in the form set forth in the First Schedule to this Act, or of a bond or other written acknowledgement of debt incorporating words to the like effect as the form so set out, and there may be excepted from the charge such property or property of such descriptions as may be specified in that behalf in the instrument, bond or acknowledgement.

References in this Act to the instrument by which a floating charge was created are, in the case of a floating charge created by words in a bond or other written acknowledgement, references to the bond or, as the case may be, the other written acknowledgement.

Effect of floating charges in relation to heritable property in Scotland.

3. For the avoidance of doubt it is hereby declared that a floating charge shall, subject to the Act of 1948, have effect in accordance with this Act in relation to any heritable property in Scotland to which it relates, notwithstanding that it is not recorded in the Register of Sasines.

Extension of power of court to wind up a company.

4.—(1) Section two hundred and twenty-two and subsection (5) of section three hundred and ninety-nine of the Act of 1948 (which specify the circumstances in which certain companies may be wound up by the court) shall, in relation to a company which the Court of Session has jurisdiction to wind up, have effect as if they included the following circumstances, that is to say, if there is subsisting a floating charge over property comprised in the company's property and undertaking, and the court is satisfied that the security of the creditor entitled to the benefit of the floating charge is in jeopardy.

(2) The security of a creditor shall, for the purposes of the foregoing subsection, be deemed to be in jeopardy if the court is satisfied that events have occurred or are about to occur which render it unreasonable in the interests of the creditor that the company should retain power to dispose of the property which is subject to the floating charge.

5.—(1) Where any property of a company being wound up is subject both to a floating charge and to a fixed security arising by operation of law, the fixed security shall have priority over the floating charge. Ranking of floating charges.

(2) Where any such property is subject both to a floating charge and to a fixed security not falling under the foregoing subsection the fixed security shall have priority over the floating charge unless—

- (a) the contract or undertaking creating the fixed security was made or granted after the commencement of this Act, and
- (b) the floating charge was registered before the right of the creditor in the fixed security was constituted as a real right, and
- (c) the instrument creating the floating charge prohibited the company from subsequently creating any fixed security having priority over, or ranking equally with, the floating charge.

(3) Where any such property is subject to two or more floating charges, those charges shall rank with one another according to the time of their registration :

Provided that if, in the case of any two or more such charges, the instruments creating them each contain a provision that they shall rank with one another equally, they shall so rank.

(4) For the purposes of this section the registration of any two or more floating charges which have been received by the registrar for registration by the same post delivery shall be deemed to be simultaneous and those charges shall accordingly rank with one another equally.

(5) This section shall be without prejudice to subsection (5) of section three hundred and nineteen of the Act of 1948 (which relates to preferential payments).

6. For the purpose of securing the publication of floating charges created by companies and other charges so created which ought to be published for the information of persons considering taking security from such companies by way of floating charge, the Act of 1948 shall have effect subject to the amendment set out in the Second Schedule to this Act. Registration of charges.

Further
amendment to
Act of 1948.

7. The Act of 1948 shall have effect as if—

(a) in section three hundred and eighteen, at the end thereof, there were inserted the following proviso :—

“ Provided that the holder of a debenture secured by a floating charge shall not be required to value and deduct the security for the purpose of voting at meetings of creditors of the company.” ;

(b) in section three hundred and nineteen, in subsection (5), in paragraph (b), after “ England ” there were inserted “ or Scotland ” ;

(c) in section four hundred and fifty-five, in subsection (1), after the definition of “ financial year ”, there were inserted the following definition :—

“ “ floating charge ” includes a floating charge within the meaning of the Companies (Floating Charges) (Scotland) Act, 1961.” ;

(d) in the Fifteenth Schedule, after the entry relating to section one hundred and six of the said Act, there were inserted the following entries—

“ 106A Registration of charges created by companies registered in Scotland.

106B(1) Duty of company to register charges created by company (Scotland).

106C Duty of company to register charges existing on property acquired (Scotland).

106K Extension of Part IIIA.”

Interpretation.

8.—(1) In this Act unless the context otherwise requires—

11 & 12 Geo. 6.
c. 38.

(a) “ Act of 1948 ” means the Companies Act, 1948, as amended by any other Act including this Act ;

(b) “ company ” means a company to which section one of this Act relates ;

(c) “ fixed security ” in relation to any property of a company means any security, other than a floating charge or a charge having the nature of a floating charge, which on the winding-up of the company in Scotland would be treated as an effective security over that property, and (without prejudice to that generality) includes a security over that property created by way of an *ex facie* absolute disposition or assignation qualified by a back letter ;

(d) references to registration in relation to a floating charge are references to the delivery to or receipt by the registrar of companies, in accordance with section one hundred and six A of the Act of 1948, for registration, of the prescribed particulars of the charge, and "registrar" shall be construed accordingly.

9.—(1) This Act may be cited as the Companies (Floating Charges) (Scotland) Act, 1961.

Citation,
extent and
commence-
ment.

(2) This Act shall extend to Scotland only.

(3) This Act shall come into force at the expiration of a period of three months beginning with the date on which it is passed.

SCHEDULES

Section 2.

FIRST SCHEDULE

FORM OF INSTRUMENT OF CHARGE

We Limited, incorporated under the Companies Act, 1948 [*or as the case may be*] and having our registered office at in Scotland DO HEREBY in security of GRANT in favour of [*designed*] and their successors and assignees whomsoever a FLOATING CHARGE over the whole of the property which is, or may be from time to time while this instrument is in force, comprised in our property and undertaking, with the exception of any such property falling within any of the following descriptions, viz.:— [*To be attested with the common seal of the company.*]

Section 6.

SECOND SCHEDULE

REGISTRATION OF CHARGES

The Act of 1948 shall have effect with the addition immediately after section one hundred and six thereof of the following provisions, and accordingly sections one hundred and four and one hundred and five of that Act shall cease to have effect in relation to companies to which the said provisions apply :—

“ PART IIIA

REGISTRATION OF CHARGES (SCOTLAND)

Registration of Charges with Registrar of Companies

Registration of charges created by companies registered in Scotland.

106A.—(1) Subject to the provisions of this Part of this Act every charge created after the fixed date by a company registered in Scotland, being a charge to which this section applies, shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company unless the prescribed particulars of the charge together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge is created or evidenced, are delivered to or received by the registrar of companies for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured ; and when a charge becomes void under this section the money secured thereby shall immediately become payable.

(2) This section applies to the following charges:—

- (a) a charge on land wherever situated, or any interest therein, including a charge created by a bond and disposition or assignation in security or by an ex facie absolute disposition or assignation qualified by a back letter, but not including a charge for any rent, ground

annual or other periodical sum payable in respect of the land ;

- (b) a security over the uncalled share capital of the company ;
- (c) a security over incorporeal moveable property of any of the following categories, that is to say—
 - (i) the book debts of the company ;
 - (ii) calls made but not paid ;
 - (iii) goodwill ;
 - (iv) a patent or a licence under a patent ;
 - (v) a trademark ;
 - (vi) a copyright or a licence under a copyright ;
- (d) a security over a ship or any share in a ship ;
and
- (e) a floating charge.

(3) In the case of a charge created out of the United Kingdom comprising property situated outside the United Kingdom, the period of twenty-one days after the date on which the copy of the instrument creating it could, in due course of post, and if dispatched with due diligence, have been received in the United Kingdom shall be substituted for the period of twenty-one days after the date of the creation of the charge as the time within which, under subsection (1) of this section, the particulars and copy are to be delivered to the registrar.

(4) Where a charge is created in the United Kingdom but comprises property outside the United Kingdom, the copy of the instrument creating or purporting to create the charge 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 situated.

(5) Where a negotiable instrument has been given to secure the payment of any book debts of a company the deposit of the instrument for the purpose of securing an advance to the company shall not, for the purposes of this section, be treated as a charge on those book debts.

(6) The holding of debentures entitling the holder to a charge on land shall not for the purposes of this section be deemed to be an interest in land.

(7) Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture-holders of that series are entitled *pari passu* is created by a company, it shall, for the purposes of this section, be sufficient if there are delivered to or received by the registrar, within twenty-one days after the execution of the deed containing the

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charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars:—

- (a) the total amount secured by the whole series ; and
- (b) the dates of the resolutions authorising the issue of the series and the date of the covering deed, if any, by which the security is created or defined ; and
- (c) a general description of the property charged ; and
- (d) the names of the trustees, if any, for the debenture-holders ; and
- (e) in the case of a floating charge, a statement of the restrictions, if any, on the power of the company to grant further securities ranking in priority to, or *pari passu* with, the floating charge :

together with a copy of the deed containing the charge, or, if there is no such deed, of one of the debentures of the series :

Provided that, where more than one issue is made of debentures in the series, there shall be sent to the registrar for entry in the register particulars of the date and amount of each issue ; but any omission to do this shall not affect the validity of the debentures issued.

(8) Where any commission, allowance or discount has been paid or made either directly or indirectly by a company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be sent for registration under this section shall include particulars as to the amount or rate per cent. of the commission, discount or allowance so paid or made, but any omission to do this shall not affect the validity of the debentures issued :

Provided that the deposit of any debentures as security for any debt of the company shall not, for the purposes of this subsection, be treated as the issue of the debentures at a discount.

(9) For avoidance of doubt it is hereby declared that, in the case of a charge created by way of an *ex facie* absolute disposition or assignation qualified by a back letter, the compliance with subsection (1) of this section shall not of itself render the charge unavailable as security for indebtedness incurred after the date of the compliance.

(10) In this Part of this Act the expression “the fixed date” means the date of coming into operation of the

Companies (Floating Charges) (Scotland) Act, 1961, and references to the date of creation of a charge are—

- (a) in the case of a floating charge, the date on which the instrument creating the floating charge was executed by the company creating the charge, and
- (b) in the case of any other charge, the date on which the right of the person entitled to the benefit of the charge was constituted as a real right.

Duty of company to register charges created by company (Scotland).

106B.—(1) It shall be the duty of a company to send to the registrar of companies for registration the particulars of every charge created by the company and of the issues of debentures of a series requiring registration under the last foregoing section, but registration of any such charge may be effected on the application of any person interested therein.

(2) Where registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the registrar on the registration.

(3) If any company makes default in sending to the registrar for registration the particulars of any charge created by the company or of the issues of debentures of a series requiring registration as aforesaid, then, unless the registration has been effected on the application of some other person, the company and every officer of the company who is in default shall be liable to a default fine of fifty pounds.

Duty of company to register charges existing on property acquired (Scotland).

106C.—(1) Where a company registered in Scotland acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Part of this Act, the company shall cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the registrar of companies for registration in manner required by this Act within twenty-one days after the date on which the transaction was settled:

Provided that, if the property is situated and the charge was created outside Great Britain, twenty-one days after the date on which the copy of the instrument could in due course of post, and if despatched with due diligence, have been received in the United Kingdom shall be substituted for twenty-one days after the settlement of the transaction as the time within which the particulars and the copy of the instrument are to be delivered to the registrar.

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(2) If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine of fifty pounds.

Register of charges to be kept by registrar of companies (Scotland).

106D.—(1) The registrar of companies shall keep, with respect to each company, a register in the prescribed form of all the charges requiring registration under this Part of this Act, and shall, on payment of such fee as may be specified by regulations made by the Board of Trade, enter in the register with respect to such charges—

(a) in the case of a charge to the benefit of which the holders of a series of debentures are entitled, such particulars as are specified in subsection (7) of section 106A of this Act ;

(b) in the case of any other charge—

(i) if the charge is a charge created by the company, the date of its creation, and if the charge was a charge existing on property acquired by the company, the date of the acquisition of the property ; and

(ii) the amount secured by the charge ; and

(iii) short particulars of the property charged ; and

(iv) the persons entitled to the charge ; and

(v) in the case of a floating charge a statement of the restrictions, if any, on the power of the company to grant further securities ranking in priority to, or *pari passu* with, the floating charge.

(2) The registrar shall give a certificate under his hand of the registration of any charge registered in pursuance of this Part of this Act, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of this Part of this Act as to registration have been complied with.

(3) The register kept in pursuance of this section shall be open to inspection by any person on payment of such fee, not exceeding one shilling for each inspection, as may be specified by regulations made by the Board of Trade.

(4) The powers to make regulations conferred by this section on the Board of Trade shall be exercisable by statutory instrument, which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Copy of certificate of registration to be sent to debenture holder (Scotland).

106E.—(1) The company shall, within thirty days of the issue by them of any debenture, or certificate of debenture stock, payment of which is secured by a charge requiring registration under this part of this Act, cause a copy of the certificate of registration given under the last foregoing section in respect thereof to be sent to the holder of the debenture or certificate of debenture stock.

(2) If default is made in complying with this section the company and any officer thereof who knowingly and wilfully authorises or permits the default shall, without prejudice to any other liability, be liable to a fine not exceeding one hundred pounds.

Entries of satisfaction and release of property from charge (Scotland).

106F. The registrar of companies, on evidence being given to his satisfaction with respect to any registered charge—

- (a) that the debt for which the charge was given 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,

may enter on the register a memorandum of satisfaction in whole or in part, or 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, and where he enters a memorandum of satisfaction in whole he shall, if required, furnish the company with a copy thereof.

Rectification of register of charges (Scotland).

106G. The court, on being satisfied that the omission to register a charge within the time required by this Act or that the omission or mis-statement of any particular with respect to any such charge or in a memorandum of satisfaction was accidental, or due to inadvertence or to some other sufficient cause, or 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 relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the court just and expedient, order that the time for registration shall be extended, or, as the case may be, that the omission or mis-statement shall be rectified.

Provisions as to Company's Register of Charges and as to Copies of Instruments creating Charges

Copies of instruments creating charges to be kept by company (Scotland).

106H. Every company shall cause a copy of every instrument creating any charge requiring registration under this Part of this Act to be kept at the registered office of the company :

Provided that, in the case of a series of uniform debentures, a copy of one debenture of the series shall be sufficient.

Company's register of charges (Scotland).

106I.—(1) Every company shall keep at the registered office of the company a register of charges and enter therein all charges specifically affecting property of the company and all floating charges on the undertaking or any property of the company, giving in each case a short

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description of the property charged, the amount of the charge, and, except in the case of securities to bearer, the names of the persons entitled thereto.

(2) If any officer of the company knowingly and wilfully authorises or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding fifty pounds.

Right to inspect copies of instruments creating mortgages and charges and company's register of charges (Scotland).

106j.—(1) The copies of instruments creating any charge requiring registration under this Part of this Act with the registrar of companies, and the register of charges kept in pursuance of the last foregoing section, shall be open during business hours (but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day shall be allowed for inspection) to the inspection of any creditor or member of the company without fee, and the register of charges shall also be open to the inspection of any other person on payment of such fee, not exceeding one shilling for each inspection, as the company may prescribe.

(2) If inspection of the said copies or register is refused, every officer of the company who is in default shall be liable to a fine not exceeding five pounds and a further fine not exceeding two pounds for every day during which the refusal continues.

(3) If any such refusal occurs in relation to a company the court may by order compel an immediate inspection of the copies or register.

Extension of Part IIIA.

106k. The provisions of this Part of this Act shall extend to floating charges on property in Scotland which are created, and floating charges on property in Scotland which is acquired, by an incorporated company (whether a company within the meaning of this Act or not) which is not registered in Scotland if—

- (a) the property in question includes heritable property in Scotland, or
- (b) the company has an established place of business in Scotland.”

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