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A Point on the Companies Consolidation

An accountant friend recently asked my advice on what he called a quick, simple point arising under the Companies Act 1985. Refraining from the retort that there is no such thing as a quick, simple point on anything to do with statutes, I set to work. What follows is the result.

The 1985 Act is described in its long title as an Act 'to consolidate the greater part of the Companies Acts'. The description indicates that the Act is what is called 'straight' consolidation, incorporating no amendments introduced by the consolidating Act itself. My friend's point concerns s 196(2), which deals with the payment of debts out of assets subject to a floating charge. Why, he asks, does this say that priority debts 'shall be paid out of assets coming to the hands of the receiver' when the provision it reproduces, namely s 94(1) of the Companies Act 1948, says such debts 'shall be paid out of any assets coming to the hands of the receiver'? Is a change of law intended?

My first impulse was to reply that this is a trivial difference, and since the 1985 Act is 'straight' consolidation no change of law can be intended. That is the established doctrine (as spelt out in s 232 of my book Statutory Interpretation). But then I reflected that such glib answers are not enough in this field. For one thing it is also established doctrine that a change in wording is presumed to betoken an intention to change the meaning (see s 149 of the said work).

So I traced the history of s 196(2). I found that it entered the law as s 3 of the Preferential Payments in Bankruptcy Amendment Act 1897, where the wording was 'shall be paid forthwith out of any assets coming to the hands of the receiver'. In s 107(1) of the Companies (Consolidation) Act 1908, which was a 'straight' consolidation, this language was retained. In s 78(1) of the Companies Act 1929, also a 'straight' consolidation, the word 'forthwith' mysteriously disappeared but the language was otherwise the same. As mentioned above, it was also the same in the corresponding provision of the next consolidation, s 94(1) of the Companies Act 1948.

At this point I became distracted by the disappearance of 'forthwith'. The word had I found had been considered important by Astbury J in the course of the argument in Woods v Winskill [1913] 2 Ch 303. Had it perhaps been repealed in the paving Act to the 1929 consolidation, the Companies Act 1928? Investigation showed that this was indeed the case (see s 118 of and Schedule 3 to the 1928 Act), though the repeal had escaped the notice of Danckwerts J in Westminster City Council v Haste [1950] 2 All ER 65.

So might the word 'any' have been similarly repealed in the paving legislation to the 1985 consolidation? This was embodied in the Companies Acts (Pre-Consolidation Amendments) Order 1984 and the Companies Acts (Pre-Consolidation Amendments) (No 2) Order 1984, both made under a power contained in s 116 of the Companies Act 1981 and giving effect to recommendations made by the Law Commissions (Cmnd 9114 and 9272). However on examination these orders were found to make no amendments to s 94 of the 1948 Act.

Did the word 'any' in s 94(1) and its earlier corresponding provisions have any material significance? The Court of Appeal seemed to think so in In re Lewis Merthyr Consolidated Collieries Ltd [1929] 1 Ch 498. The question in the case was whether, where a debenture was secured both by a fixed charge and a floating charge, what was then s 107(1) of the 1908 Act gave priority in respect of assets subject to the fixed charge as well as in respect of assets subject to the floating charge. In holding that it did not, Tomlin J had said in the court below (p 506): 'It seems to me that you do have to put some limitation upon the phrase "any

assets", because it obviously cannot mean "any" assets'. In upholding this, Lord Hanworth MR said (p 512) that it was admitted on all hands that the words "any assets" must have some limitation.

So what is the conclusion? After careful, not to say troubled, thought I am of opinion that the draftsman of the 1985 Act did not intend to effect a change in the law by his omission of the word 'any' from s 196(2). Whether he was wise to omit it is another matter. Certainly its omission makes In re Lewis Merthyr Consolidated Collieries Ltd less easy to apply, though I believe it still does apply to the same effect as before.

If by his change in a form of words that on this point had survived unaltered through three previous consolidations the draftsman of the 1985 Act had intended to codify the effect of In re Lewis Merthyr Consolidated Collieries Ltd the alteration would have been welcome. A more drastic change of wording would however have been required to achieve such a codifying effect. Moreover, as I have often lamented, it is not the practice to use the opportunity afforded by consolidation to codify in this way.

So I am left with the depressing conclusion that, thanks to a draftsman's vagary, I have thrown away a whole morning's labour in establishing that a change of words does not betoken a change of meaning. My accountant friend also wasted some time on it too. I wonder how many other professional people will find themselves going through the same useless motions when they consider s 196(2) and the case law and commentaries on it and its predecessors. As they do so they might reflect sardonically on the prevailing theory that consolidation improves the state of the law, rendering it more readily accessible.

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