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# Substantial disposals by administrators in the first 8 weeks: when is the purchaser a “connected person”?

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## Table of Contents

<b>Overview .....</b>	<b>2</b>
Deceptively short checklist .....	2
<b>Introduction .....</b>	<b>6</b>
Consequence of a breach .....	7
SIPs continue .....	7
<b>Connected person .....</b>	<b>8</b>
<b>Limb (a): Relevant person .....</b>	<b>9</b>
Director, officer and shadow director.....	10
Officer or manager.....	10
Associate .....	13
Non-employee associate.....	14
Are directors (or officers) non-employee associates? .....	15
Timing for being a relevant person.....	18
Company as a relevant person .....	19
Individuals as associates .....	19
<b>Limb (b): Connected company .....</b>	<b>20</b>
Chain effect – link person.....	21
Timing of connection .....	22
<b>Annex: Overview of “associate” under s435 of the Insolvency Act 1986.....</b>	<b>25</b>

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This paper is a more detailed analysis based on chapters 13 and 20 in David Pollard ‘*Connected and Associated: Insolvency and Pensions Law*’ (2021, Bloomsbury Professional). Cited below as ‘**Pollard: Connected and Associated**’.

## Overview

Following the changes made in April 2021 by the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021, if a substantial disposal is envisaged within the first eight weeks of an administration, the parties, in particular the administrator, need to check whether the proposed purchaser is or is not a “connected person” with the company in administration. If it is a connected person then the purchaser usually needs to provide a report from an “independent” evaluator.

The relevant tests for being a connected person are set out in the legislation: para 60A of Schedule B1 to the Insolvency Act 1986. However, the tests are rather complex and use many other concepts (which themselves can be tricky) from other parts of the legislation – such as “associate”, “director”, and “officer”.

### Test for connected person:

Ultimately the question of whether or not a purchaser (called below **BidCo**) is a “connected person”, so triggering the obligations, may in many cases be not very clear.

Prohibited connections can spring out of the unknown. This can point to a desire to make this easier by arranging for BidCo to be a newly incorporated company.

There can be a breach of the statutory requirements, even if this is inadvertent or reasonable care was taken. There is no express sanction for a breach in the legislation, but this could be the source for other claims on the administrator – for example a misfeasance claim or a claim for removal.

Administrators may seek confirmations of status from relevant parties (eg a prospective purchaser) but this seems not to be conclusive – and may be tricky to get.

All of this points towards a cautious (but potentially more costly) approach of getting an evaluator’s report in all cases unless BidCo is clearly not connected (or the disposal is clearly outside 8 weeks).

A more detailed legal analysis is given below, drawing from, and extending the commentary in, my book *‘Connected and Associated: Insolvency and Pensions Law’*.

I attempt to summarise the position, by starting with a deceptively short checklist.

## Deceptively short checklist

Assuming that the disposal by the company in administration is to a proposed purchaser which is a company (and not an individual), this would mean that the prospective purchaser (BidCo) will be a connected person if it falls in any of the boxes (1) to (6) in Column A (there is a further explanation in column B):

<b>Column A</b> <b>BidCo is a connected person if</b> <b>(a) a ‘relevant person’ – ie</b> <b>within (1), (2) or (3); or</b> <b>(b) a ‘connected company’ - ie</b> <b>within (4), (5) or (6)</b>	<b>Column B</b> <b>Further explanation</b>
<b>Relevant person:</b> (1) Is BidCo a <i>director, officer</i> or <i>shadow director</i> of the insolvent company?	The terms <i>director, shadow director</i> and <i>officer</i> have their usual meanings under the Insolvency Act 1986, s251 <sup>2</sup> .
<b>Relevant person:</b> (2) Is BidCo a <i>non-employee associate</i> of the insolvent company?	<p>“<i>associate</i>” has the meaning in Insolvency Act 1986, s435 – see outline attached.</p> <p>“<i>non-employee associate</i>” means an associate <u>other than</u> one who is associated by virtue of being an employee. A director or officer is also someone who is associated with a company by virtue of being treated as an employee and on balance is probably also <u>not</u> a ‘non-employee associate’.</p>
<b>Relevant person:</b> (3) Is BidCo a <i>non-employee associate</i> of a director, officer or shadow director of the insolvent company?	<p>“<i>associate</i>” has the meaning in Insolvency Act 1986, s435 – see outline attached.</p> <p>For individuals an associate includes a person and their spouse (and former spouse) and a large class of relatives (and their spouses and former spouses) of that person (and their spouse or former spouse)</p> <p>“<i>non-employee associate</i>” means an associate <u>other than</u> one who is associated by virtue of being an employee – see box above.</p>
<b>Connected company:</b> (4) Is BidCo a <i>non-employee associate</i> of someone (X), where X <u>is</u> also a ‘relevant person’ (within (1), (2) or (3) above) in relation to the insolvent company	
<b>Connected company:</b> (5) Is BidCo a <i>non-employee associate</i> of someone (X), where X was <u>previously</u> a relevant person (within (1), (2) or (3) above) in relation to the insolvent company	
<b>Connected company:</b> (6) Was BidCo <u>previously</u> a <i>non-employee associate</i> of someone (X), where X is <u>currently</u> also a relevant person (within (1), (2) or (3) above) in relation to the insolvent company	

<sup>2</sup> Broadly, “*director*” includes a ‘de facto’ director (ie someone who acts as a director even though not formally appointed).

“*officer*” includes the company secretary and a “manager”. It probably also includes:

- the insolvent company’s auditor,
- the insolvency practitioner (IP) acting in relation to the insolvent company; and
- anyone else in a managerial role (but probably only if senior or important).

“*shadow director*” means “a person in accordance with whose directions or instructions the directors are accustomed to act”, with some specific exclusions for (i) professional advice, (ii) instructions etc given in the exercise of a function under an enactment and (iii) guidance or advice given by a Minister of the Crown.

At its extremes, a proposed purchaser company can be a “connected person” with an insolvent company in administration if there is just one person – whom I call a “link person” - who both:

- is (or was) a non-employee associate of the insolvent company or of a director (or shadow director) or officer of the insolvent company;
- and
- is (or was) a non-employee associate of the purchaser company or of a director (or shadow director) or officer of the purchaser company.

One (partial) way of checking this might be for both sides – ie the insolvent company (through the administrators) and the potential purchaser to prepare a list of their “relevant persons” – that is their associates and the associates of their directors and officers and then cross check both lists to see if they have any names in common.

But often a potential major difficulties here can be

- not just in identifying the associates of the companies (the associate definitions are themselves quite wide);
- but also in identifying all three of:
  - the direct (and former directors) of a company – although these should be listed in the company’s records or at the companies registry (but these may not be complete or include “de facto” directors);
  - the shadow directors (and former shadow directors) and officers (and former officers) of a company (the company’s records of these may not be complete); and
  - the associates of such persons.

It will often be a practically impossible task for a BidCo (or the administrators or an InsolventCo) to identify all its associates. It can be very difficult for an individual director or officer to confirm all of his or her associates.

An example is on the next page. This show how wide the “connected person” tests can be.

And this is without considering some of the perhaps less obvious potential links, for example: relatives connected by adoption or illegitimate status, or whether someone is (or was) a “reputed” husband or wife or civil partner.

## Example:

Suppose there is a company in administration (InsolventCo) envisaging a substantial disposal to a purchaser (BidCo), where:

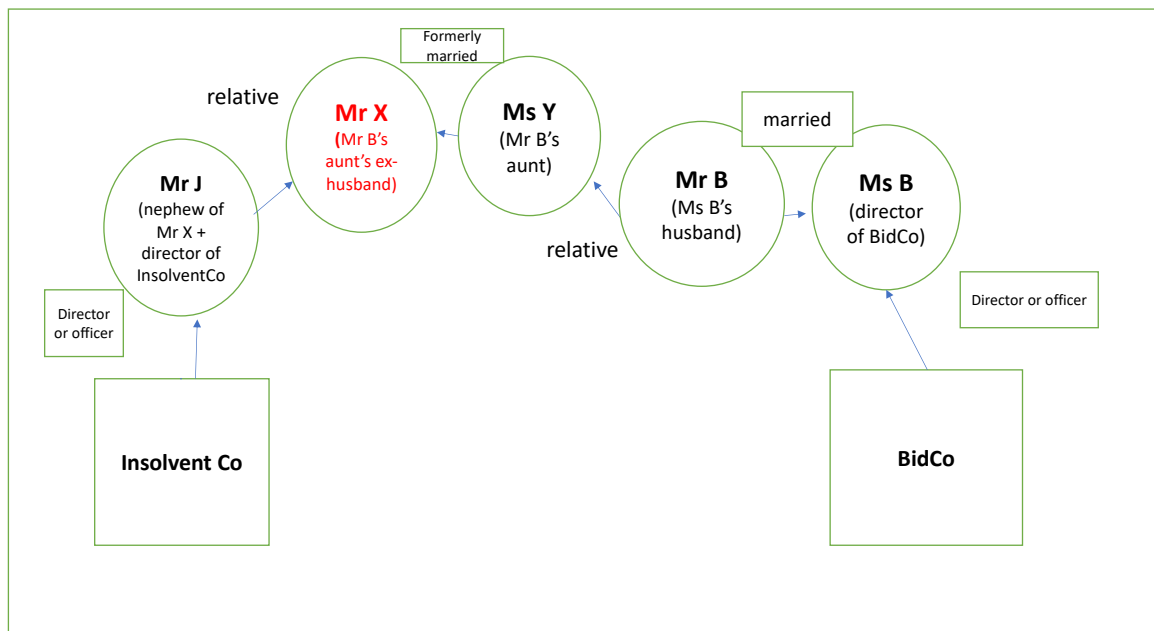
- BidCo has a director – Ms B
- Ms B’s husband has an aunt (MsY), who’s former husband is Mr X
- InsolventCo has a former director – Mr J
- Mr J is a nephew of Mr X<sup>3</sup>.

In this scenario, Mr X is the “link person” and means that BidCo is a connected person with InsolventCo.

- Mr X is an associate of Ms B
  - Mr X is an associate of Ms B as being a former husband (s435(8)) of a relative (ie Ms Y, the aunt) of Ms B’s husband – s435(2)(c)(ii)
  - The aunt (MsY) is a relative of Ms B’s husband – s435(8)
- So Mr X is (currently) a “relevant person” in relation to Bidco
  - as a non-employee associate of a director of Bidco – para 60A(4)(a)(ii)
- Mr X is also a non-employee associate of Mr J
  - Mr X is an associate of Mr J as Mr X is a relative of Mr J - s435(2)(8)
- Mr J used to be a director of InsolventCo, so Mr X has been (in the past) a “relevant person” in relation to InsolventCo (as a non-employee associate of a former director of InsolventCo) – para 60A(4)(b)

So BidCo is connected with InsolventCo – para 60A(4)(b) as (i) Mr X is a relevant person of one (BidCo) and (ii) has been a relevant person of the other (InsolventCo).

A diagram chart showing these relationships is below.



A more detailed technical analysis of the provisions follows.

<sup>3</sup> The analysis below is pretty much the same if Mr J is a nephew of Mr X’s current or a former wife.

## Introduction

1. This paper looks at the connection tests relevant in deciding on the application of the restrictions in place from April 2021 on substantial disposals by an administrator within the first eight weeks of the administration. It looks at the relevant connection for who is a connected person – the new post-April requirements only apply to a disposal to a ‘connected person’<sup>4</sup>.
2. The new statutory requirements were introduced on and from 30 April 2021 by regulations under the Insolvency Act 1986 (**IA 1986**), Schedule B1, paragraph 60A<sup>5</sup> (**para 60A**). The regulations are the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021<sup>6</sup> (the **Administration Disposal Regs 2021**).
3. These apply on a ‘substantial’ disposal by the administrator of a company in administration of a business or assets of a company in administration in the first eight weeks of the administration. Broadly, the administrator must not make such a substantial disposal in the first eight weeks to a ‘connected person’ unless the company’s creditors have consented or a relevant report from an individual who is an ‘evaluator’ has been obtained.
4. The new requirement is either:
  - to obtain advance creditor approval for the disposal (by including it in the statement of proposals under IA 1986, Sch B1, para 49, and obtaining creditor approval to it – Administration Disposal Regs 2021, reg 4); or
  - a connected person obtains a qualifying report from an “evaluator” (Administration Disposal Regs 2021, regs 5 to 8). If this route is followed and a disposal is made, the notification requirements in reg 9 must also be met.
5. The requirements only apply for disposals which both:
  - (a) are made in the first eight weeks of the start of the administration; and
  - (b) where the disposal, hiring out or sale involves all or a ‘substantial part’ of the company’s business or assets. This could involve one or more transactions.The para 60A requirements are not limited to a ‘pre-pack’ arrangement which has been agreed or set up in advance of the start of the administration<sup>7</sup>.
6. The provisions are not limited just to sales of assets, but include other disposals, including a “hiring-out” – reg 3(3). However, to simplify matters, this paper refers to the relevant counterparty to, or recipient of, the disposal (ie the disposee) as the “**purchaser**”.
7. A separate paper<sup>8</sup> will look at the different test of when an individual satisfies the independence test and so can act as an evaluator.

<sup>4</sup> As defined in IA 1986, Sch B1, para 60A(3) to (6). The full text is set out in a box below.

<sup>5</sup> IA 1986, Sch B1, para 60A added by the Small Business, Enterprise and Employment Act 2015 (**SBEEA 2015**). Para 60A expired at the end of 25 May 2020, but was revived by the Corporate Insolvency and Governance Act 2020 (**CIGA 2020**), s8 with effect from 26 June 2020.

<sup>6</sup> SI 2021/427. The Regulations came into force on 30 April 2021 – reg 1(1).

<sup>7</sup> For an overview, outlining some of the difficulties, see the note by Tom Robinson ‘All-change for Pre-Packs: New Regulations restricting business and asset sales by Administrators’ (30 April 2021), on the Wilberforce Chambers website at <https://www.wilberforce.co.uk/wp-content/uploads/2021/04/All-change-for-Pre-Packs-Tom-Robinson-Wilberforce.pdf>

<sup>8</sup> *Major Disposals by administrators in the first 8 weeks: when is the evaluator independent?*

8. The Administration Disposal Regs 2021 came into force at the end of April 2021. They apply only to administrations that commence on or after 30 April 2021.<sup>9</sup>
9. The definition of “connected person” in para 60A is potentially wide. It seems that the administrator will need to verify if a potential purchaser (or lessee etc) is or is not a connected person. This may not be an easy task as the definition is both quite wide and fairly complex.
10. In practice the administrator can be expected to ask a purchaser to confirm that he, she or it<sup>10</sup> is not a connected person (and may seek to place such a confirmation in the disposal agreement). In addition to this, the administrator would be prudent in attempting a degree of independent due diligence.

### **Consequence of a breach**

11. There is no express penalty in para 60A or the Administration Disposal Regs 2021 on an administrator or express avoidance of the transaction if there is a breach of the restriction in para 60A or the Administration Disposal Regs 2021. A breach could probably support other sanctions, such as removal as the administrator (IA 1986, Sch B1, para 88) or a claim for loss by reason of misfeasance (IA 1986, Sch B1, para 75) or perhaps professional body sanctions for the administrator.
12. It is noticeable that the prohibition in para 60A does not depend on the administrator’s knowledge that the purchaser is a connected person. It seems to be a breach of para 60A if the purchaser is in fact a connected person, even if the administrator did not know this, and could not reasonably have discovered this<sup>11</sup>. Knowledge (or lack of care) could be relevant for some of the ancillary sanctions (eg whether the failure to ascertain the purchaser’s status is misfeasance within IA 1986, Sch B1, para 75).

### **SIPs continue**

13. Following the Administration Disposal Regs 2021, two relevant Statements of Insolvency Practice (SIP) were re-issued by R3 with effect from 30 April 2021:
  - SIP 13 (Disposal of Assets to Connected Parties in an Insolvency Process); and
  - SIP 16 (Pre-Packaged Sales in Administrations).
14. These SIPs continue to apply. Their ambit:
  - can be wider than the para 60A provisions (for example SIP 13 applies to all payments to a connected party, even after the first 8 weeks of the administration); and

<sup>9</sup> The day on which the Administration Disposal Regs 2021 came into force – reg 1(2).

<sup>10</sup> This paper does not address the issues that can arise if the purchaser is more than one person, for example a partnership or set of trustees or if the disposal is divided between different persons. Note the wording of reg 3(3)(a) referring to “one or more connected persons”.

<sup>11</sup> Contrast the requirement for an evaluator to be “independent” within the Administration Disposal Regs 2021. This looks to be a knowledge test based on “no reason to believe”: reg 6(4) states that the individual evaluator “is to be taken to have met” the independence requirements in reg 12 “if the administrator has no reason to believe that the individual did not meet those requirements.”

- can be narrower than para 60A (for example SIP 16 only applies to a “pre-pack”, ie a disposal set up before the administration, but para 60A will apply to all substantial disposals within the first 8 weeks to a connected person).

15. Turning now to a more detailed review of the connected person provision.

## Connected person

16. Para 60A uses the terms ‘connected person’ and ‘connected’. These are separately defined in para 60A. The usual term ‘connected with’, as more generally applied in IA 1986, s 249, is not used in the definitions of ‘connected person’ or ‘connected’ in para 60A<sup>12</sup>.

17. The term ‘connected person’ is defined in IA 1986, Sch B1, para 60A(3) to (6):

- (3) In sub-paragraph (1), ‘connected person’, in relation to a company, means—
- (a) a relevant person in relation to the company, or
  - (b) a company connected with the company.
- (4) For the purposes of sub-paragraph (3)—
- (a) ‘relevant person’, in relation to a company, means—
    - (i) a director or other officer, or shadow director, of the company;
    - (ii) a non-employee associate of such a person;
    - (iii) a non-employee associate of the company;
  - (b) a company is connected with another if any relevant person of one is or has been a relevant person of the other.
- (5) In sub-paragraph (4), ‘non-employee associate’ of a person means a person who is an associate of that person otherwise than by virtue of employing or being employed by that person.
- (6) Subsection (10) of section 435 (extended definition of company) applies for the purposes of sub-paragraphs (3) to (5) as it applies for the purposes of that section.

18. The term ‘associate’ is used in para 60A, and this is defined by reference to the usual ‘associate’ test in IA 1986, s435, but with a modification (relating to a ‘non-employee associate’), discussed below.

19. The definition of a connected person in para 60A(3) catches two groups:

- (a) **relevant persons:** those who are ‘relevant persons’ in relation to the company<sup>13</sup> (ie the insolvent company in relation to which the administrator was appointed).

These include directors, shadow directors or other officers of the insolvent company as well as any ‘non-employee associates’ of the insolvent company or of a director, shadow director or other officer of the insolvent company; and

<sup>12</sup> But the term “connected” as defined in s249 is used in the Administration Disposal Regs 2021.

<sup>13</sup> IA 1986, Sch B1, para 60A(3)(a).



- (b) **connected companies:** ‘companies connected with the company’<sup>14</sup> in administration.

A company is connected with another company if a “relevant person” (see (a) above) in respect of one of the companies is, or has been, a relevant person in respect of the other. This is different from the usual definition of ‘connected’ in IA 1986, s249.

20. For this purpose a company seems likely to include any body corporate, whether incorporated in Great Britain or elsewhere – para 60A(6) (the reference in para 60A(6) to IA 1986 s435(10) is, in my view, likely to be seen as a simple cross referencing error, with the correct reference being to s435(11) instead). A company seems to include a limited liability partnership (LLP – Limited Liability Partnerships Act 2000), but not, if established under the law of England and Wales and not comprising only bodies corporate, a normal partnership (Partnership Act 1890) or a limited partnership (Limited Partnerships Act 1907). The corporate status of non-English and Welsh partnerships (eg Scottish<sup>15</sup> or overseas) can be more tricky.

## Limb (a): Relevant person

21. The term ‘relevant person’ means, under para 60A(4)(a), anyone who is:
- (i) a director or other officer or a shadow director of the insolvent company; or
  - (ii) a ‘non-employee associate’ of a director or other officer or shadow director of the insolvent company; or
  - (iii) a ‘non-employee associate’ of the insolvent company.
22. This is broadly similar in effect to when someone is ‘connected with’ a company under IA 1986, s 249. The only differences are that
- (a) **Officers included:** in para 60A(4) the relevant person test catches someone who is an officer (or an associate of an “officer”) of the company, as well as someone who is a director or shadow director (or an associate of a director or shadow director). By way of contrast, the ‘connected with’ test in s 249 does not refer to an officer; and
  - (b) **Non-employee associate:** in para 60A(4) not all associates (of the insolvent company or of a director or other officer or shadow director of the insolvent company) are included as a ‘relevant person’, only those who are a ‘non-employee associate’. Conversely the ‘connected with’ definition in s 249 catches all associates of a director or shadow director of the company, including employees.

For the purposes of para 60A(4), the term ‘non-employee associate’ of a person is defined to mean a person who is an “associate” (see IA 1986, s245) of that person otherwise than by virtue of employing or being employed by that person – para 60A(5) and see discussion further below.

<sup>14</sup> IA 1986, Sch B1, para 60A(3)(b).

<sup>15</sup> Partnership Act 1890, s4(2) provides that Scottish partnerships are a legal person distinct from the partners.

## Director, officer and shadow director

23. These terms have the same meanings as elsewhere in IA 1986 and raise their own issues. It may not be obvious whether or not a particular person is an officer or shadow director of a company. The identity of current and former directors should be simpler to determine (at least for a company incorporated in part of the UK), given that their details should have been registered at the companies registry.
24. The terms ‘director’, ‘officer’ and ‘shadow director’ as used in para 60A are defined in IA 1986, s251<sup>16</sup>. The definitions of those terms in IA 1986, s251 apply for the purposes of para 60A, because s251 applies for the ‘First Group of Parts’ in IA 1986, which Group of Parts includes s8 applying Schedule B1.
25. In particular, under IA 1986, s251:
- (a) A ‘director’ “includes any person occupying the position of director, by whatever name called”.
    - This will include a ‘de facto’ director, even though not formally appointed as a director.
    - In the UK directors are usually individuals, but it is currently possible for a company to itself be appointed a director<sup>17</sup>.
  - (b) A ‘shadow director’ means “a person in accordance with whose directions or instructions the directors are accustomed to act”, with some specific exclusions for (i) professional advice, (ii) instructions etc given in the exercise of a function under an enactment and (iii) guidance or advice given by a Minister of the Crown.
  - (c) An ‘officer’ includes a director, manager or secretary. The term “manager” is not expressly defined further.

## Officer or manager

26. There can be some difficulty with the meaning of the term “officer” as used in section 251. The definition is inclusive and not exclusive and leaves it open as to who is a “manager” (which is not a defined term). This is a general problem arising in many statutes<sup>18</sup>.

### Meaning of the terms “officer” and “manager”

#### Officer

In *Re Western Counties Steam Bakeries and Milling Company* [1897] 1 Ch 617, a case dealing with whether a firm of accountants fell within a class of “any director, manager, liquidator or other officer”, Lindley LJ held (at p627) that:

<sup>16</sup> For further discussion of these terms, see Chapters 21 to 25 in Pollard ‘*Connected and Associated*’.

<sup>17</sup> For an example, see *Re Paycheck Services 3 Limited* [2010] UKSC 51, [2011] 1 All ER 430. Companies Act 2006, s156A will, when inserted by the Small Business, Enterprise and Employment Act 2015, s87, prohibit corporate directors of a company incorporated in Great Britain, but subject to exceptions in regulations.

<sup>18</sup> For further discussion of ‘officer’ or ‘manager’, see Chapter 25 in Pollard ‘*Connected and Associated*’. See also Hoflet ‘Elephants and officers: problems of definition’ (1996) 17 Company Lawyer 258.

### Meaning of the terms “officer” and “manager”

”to be an officer there must be an office, and an office imports a recognised position with rights and duties annexed to it... it would be an abuse of words to call a person an officer who fills no such position either de jure or de facto, but who happens to do some of the work which he would have to do if he were an officer in the proper sense of the word”.

See also *Re London and General Bank* [1895] 2 Ch 166 and *Mutual Reinsurance Co Ltd v Peat Marwick Mitchell* [1997] 1 BCLC 1.

The expressions “officer” and “manager” were considered in *Re Racal Communications; Re a Company No 009966 of 1979* [1980] Ch 138, a case about the obtaining of evidence from an officer (defined in the same way as in IA 1986, s251 to include a ‘manager’) under the Companies Act 1948. In an unreserved judgment, Lord Denning MR noted (at p144) that, in relation to an officer, “Its meaning may depend on the context in which it is used”<sup>19</sup>. Shaw LJ commented (at p144) that the term ‘manager’ should not be too narrowly construed as being limited to a director or general manager, but includes someone who “exercises a supervisory control which reflects the general policy of the company or which is “related to the general administration of the company”. See also the recent Irish Supreme Court decision in *DPP v TN* [2020] IESC 26 (discussed below).

See also the Australian cases: *ASIC v Citigroup (No 4)* [2007] FCA 963 and *Buzzle v Apple Computer* [2011] NSWCA 109.

#### Examples of officers:

- Auditors once appointed are generally officers: *Re London and General Bank* [1895] 2 Ch 166 and *Re Western Counties Steam Bakeries and Milling Company* [1897] 1 Ch 617.
- The company secretary is an officer, being expressly within the definition in s 251.
- The administrators of a company appointed under IA 1986 will each almost certainly be officers of the company<sup>20</sup>.
  - Similarly liquidators would be officers and so are (probably) administrative receivers<sup>21</sup>.
  - It is less clear whether or not a nominee or supervisor of a company voluntary arrangement (CVA) or a monitor of a Part A1 moratorium<sup>22</sup> are officers (even if they are insolvency practitioners).
- Bankers, solicitors and other professional advisers are not, as such, officers (unless appointed to an office under the company): *Re Imperial Land Co of Marseilles*, *Re National Bank* (1870) LR Eq 298, *Re Western Counties Steam Bakeries and Milling Company* [1897] 1 Ch 617 at p627.
- An agent is not, as such, an officer. See for example s 219(3) of IA 1986, which refers to “every officer and agent of the company” being obliged to give

<sup>19</sup> Other cases make it clear that terms such as ‘director’ and ‘officer’ take colour from their context: see *Allianz Global Investors GmbH v G4S Ltd* [2022] EWHC 1081 (Ch) at [132], citing *Re Paycheck Services 3 Limited* [2010] UKSC 51, [2011] 1 All ER 430 and *Secretary of State v Deverell* [2001] Ch 340, CA.

<sup>20</sup> In *R (Palmer) v Northern Derbyshire Magistrates’ Court* [2021] EWHC 3013 (Admin), [2022] ICR 531, the Divisional Court confirmed that administrators were each an officer of the company over which they were appointed (for the purposes of the <sup>20</sup>Trade Union and Labour Relations (Consolidation) Act 1992). See also in a contractual context *Schofield v Smith* [2022] EWCA Civ 824 at [53].

<sup>21</sup> To the contrary on receivers, see *Re B Johnson & Co (Builders Ltd)* [1955] Ch 634, but this was considering the jurisdiction for misfeasance claims.

<sup>22</sup> A moratorium under Part A1 of IA 1986, as inserted by CIGA 2020.

### Meaning of the terms “officer” and “manager”

reasonable assistance to a prosecutor, drawing a distinction, at least for that provision, between an officer and an agent.

- It seems likely that a director (Mr A) of a company (B Co) which is itself a director of another company (C Co) is not an officer of that other company. That is, Mr A is not an officer of C Co: *Masri v Consolidated Contractors International Co SAL (No 4)* [2008] EWCA Civ 876<sup>23</sup> at [19] and [20] discussing the meaning of “officer” in the context of examination of an officer of a company.

### Manager

The term ‘manager’ means someone who manages: *Giles v Barton* (1875) LR 10 QB 329 and *Re Western Counties Steam Bakeries and Milling Company* [1897] 1 Ch 617 per Rigby LJ at p632.

However the term “manager’ is vague and must be construed in context: *R v Boal* [1992] QB 591, CA at 597E and *DPP v TN* [2020] IESC 26 at [144]. It may be that the term “manager’ is given a wider view for cases, such as the application of para 60A, where the end result is not a criminal conviction on the manager<sup>24</sup> – contrast:

- *In re A Company* [1980] Ch 138, CA (wide view - judge power to require documents to be produced); with
- *Registrar of Restrictive Trading Agreements v W H Smith & Son Ltd* [1969] 1 WLR 1460, CA (narrow view: order for attendance) or *R v Boal* [1992] QB 591, CA at 596 to 598 (narrow view: criminal conviction).

Similar “manager” wording is found in many statutes, in particular in relation to criminal offences, where a “director, manager, secretary or other similar officer” can be convicted of an offence in some circumstances if the company commits an offence and they consented or connived (or caused it by their neglect) with the commission of the offence by the company<sup>25</sup>.

By analogy with those criminal cases, it could be likely that in order to be a manager a person must actually be involved in running the company<sup>26</sup>.

In *R v Boal* [1992] QB 591, the Court of Appeal held that the deputy manager of a bookshop was not a manager for these purposes as he “could well have been regarded as responsible only for the day to day running of the bookshop rather than enjoying any sort of governing role in respect of the affairs of the company itself”.

In *DPP v TN* [2020] IESC 26 the Irish Supreme Court doubted the test in *Boal* and referred back to the criminal court whether an individual described as a facility manager or environmental consultant could be a ‘manager’ within the Waste Management Act 1996.

Examples from other jurisdictions are that the term “manager” has been held not to include:

- a hotel front desk employee in Hong Kong (*HKSAR v Chui Shu Shing* [2017] HKCFA 43); nor

<sup>23</sup> [2009] 2 WLR 699. The decision of the Court of Appeal was overturned on appeal, but this point was not discussed.

<sup>24</sup> In *DPP v TN* [2020] IESC 26, following an extensive discussion of the Irish and UK cases, the Irish Supreme Court made this point at [80].

<sup>25</sup> An example is IA 1986, s432(2). See in relation to insolvency practitioners, Pollard ‘*Corporate Insolvency: Employment and Pension Rights*’ (7<sup>th</sup> edn, 2022, Bloomsbury Professional) at chapter 18 (Direct criminal or civil penalty liability).

<sup>26</sup> See eg *R v Boal* [1992] QB 591 (Fire Precautions Act 1971), *Armour v Skeen* [1977] IRLR 310 (Health and Safety at Work etc Act 1974) and *Woodhouse v Walsall MBC* [1994] 1 BCLC 435 (Control of Pollution Act 1974). See “*Corporate Criminal Liability: an options paper*” (Law Commission. June 2022) at 9.10.

### Meaning of the terms “officer” and “manager”

- an outback station manager in Australia (*Windbox Pty Ltd v Daguragu Aboriginal Land Trust (No 3)* [2020] NTSC 21).

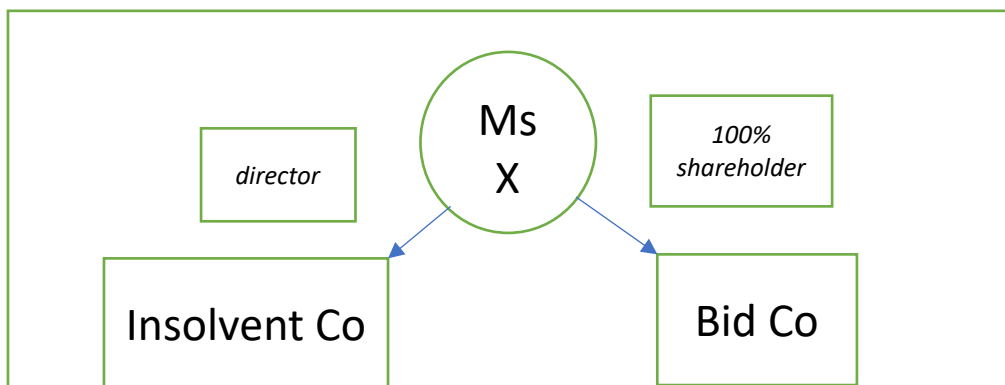
## Associate

27. The term ‘associate’ has the meaning given by IA 1986, s435 – see s436(1). For the purposes of para 60A, a ‘non-employee associate’ of a person means someone who is an associate of that person “otherwise than by virtue of employing or being employed by that person”.<sup>27</sup>

28. The term “associate” under s435 is quite complex. It is outlined further below and discussed in more detail in *Pollard ‘Connected and Associated’*.

29. The second category listed at 21(ii) above, a ‘non-employee associate’ of a director or other officer or shadow director, is an example of a ‘chain’ applying.<sup>28</sup>

30.



For example, a purchaser company (BidCo) may not be a direct associate of the insolvent company, but BidCo will still be a “related person” of the insolvent company if it is a non-employee associate of a director (or of an officer or shadow director) of the insolvent company. Eg if:

- BidCo is “controlled” by Ms X (eg Ms X owns all the shares in BidCo – s435(10)) and
- Ms X is a director (or officer) of the Insolvent company

then BidCo will be both an associate of Ms X (s435(7)) and a ‘non-employee associate’ of Ms X and hence a “related person” of the insolvent company (as Ms X is a director of that company) under para 60A(4)(a)(ii).

<sup>27</sup> IA 1986, Sch B1, para 60A(3)(b).

<sup>28</sup> See 2.9 in *Pollard ‘Connected and Associated’* on the chain principle.

## Non-employee associate

31. A person who is only associated with a company just as an employee of the company is not, by reason of that alone, a ‘relevant person’ under para 60A in relation to that company. This is because although they are (as an employee) an associate of the company (under s435(4)), they are not a ‘non-employee associate’ (as defined in para 60A(5)) and so do not fall within para 60A(4)(iii) as a ‘non-employee associate of the company’.

32. IA 1986, s435(4) treats an employee of a company as an associate of the company for s435 purposes, stating:

(4) A person is an associate of any person whom he employs or by whom he is employed.

The definition of non-employee associate in para 60A clearly is meant to refer to the effect of s435(4). Para 60A(5) provides:

‘non-employee associate’ of a person means a person who is an associate of that person otherwise than by virtue of employing or being employed by that person.

33. However it is less slightly clear what happens if a particular individual is not only an employee, but is also associated (within IA 1986, s435) with the company in some other capacity? This could be if the individual employee was also either:

- (a) a director or other officer or shadow director of the insolvent company (or a ‘non-employee associate’ of such a person – eg one of the directors of the company is a close relative of the individual employee); or
- (b) ‘associated’ (within s435) with the insolvent company in some other non-excluded way (eg as a major shareholder<sup>29</sup>).

It seems likely in relation to (a)<sup>30</sup>, and certain in relation to (b), that this would mean that the individual employee would still be a “relevant person” in relation to the company. The fact that the employee does not qualify as a relevant person within para 60A(4)(a)(iii) (because although an associate, he or she is not a ‘non-employee associate’) does not seem to prevent them from qualifying as a ‘relevant person’ in some other way<sup>31</sup>.

Taking the example at 30 above, but making Ms X an employee of InsolventCo (and not a director or officer), gives the result that BidCo is not a relevant person in relation to Insolvent Co. If:

- BidCo is “controlled” by Ms X (eg Ms X owns all the shares in BidCo – s435(10)) and
- Ms X is an employee (but not a director or officer) of the Insolvent company

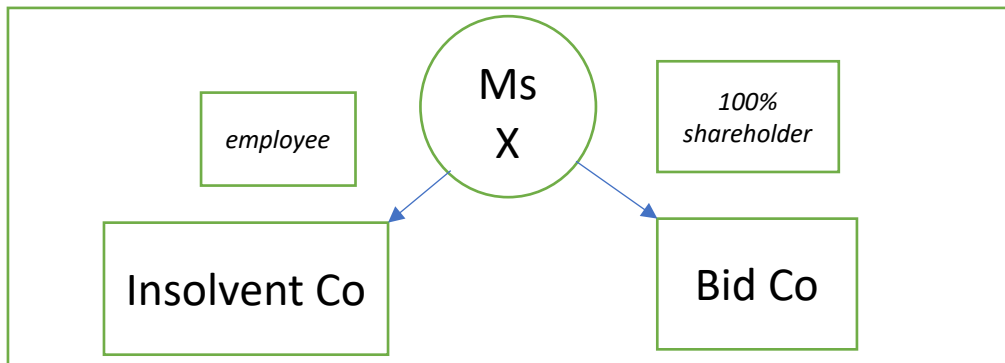
then BidCo will be an associate of Ms X (s435(7)) and a ‘non-employee associate’ of Ms X. But BidCo will not by reason of this alone be a non-employee associate of InsolventCo or of a director or officer of Insolvent Co.

<sup>29</sup> Whether “control” under s435(10) based on shareholding continues after the start of a formal insolvency of the company is a complex area. see Chapters 47 to 61 in Pollard *‘Connected and Associated’*.

<sup>30</sup> I say “likely” here because an association via a director (or officer) may be excluded – see 34 below.

<sup>31</sup> This is similar to the argument under IA 1986, s435 of association being a multiple test. See eg Chapter 29 in Pollard *‘Connected and Associated’*.

Hence BidCo is not a “related person” of the insolvent company under para 60A(4)(a) (unless it is associated in some other way).



### Are directors (or officers) non-employee associates?

34. A person who is a director (or officer) of a company is an associate of the company within s435. This is because s435(9) provides for a director (or other officer)<sup>32</sup> to be treated under s435 as an employee of the company and so be an associate of the company under the ‘employs’ or ‘employed’ provision in s435(4). IA 1986, s435(9) states:

(9) For the purposes of this section any director or other officer of a company is to be treated as employed by that company.

35. This raises the question as to whether a director (or officer) is a ‘non-employee associate’ within para 60A(5) or not. As noted above, para 60A(5) does not include an association (under s435) if it arises “by virtue of employing or being employed by that person”.

36. For a director (or other officer) of a company, s435(9) only applies to make them an associate by treating them as an employee. As a matter of statutory interpretation, the question is whether a director (or other officer) is treated in the same way as an employee, and so is not by reason of that alone within the ‘non-employee associate’ definition in para 60A(5)? Or does the employment treatment of a director (or officer) under s435(9) only apply to s435 and not to para 60A(5)?

A further example is set out on the next page.

<sup>32</sup> But not, as such, a shadow director.

Taking the example at 30 above, but making Ms X a director of both Insolvent Co and of BidCo, gives the result that:

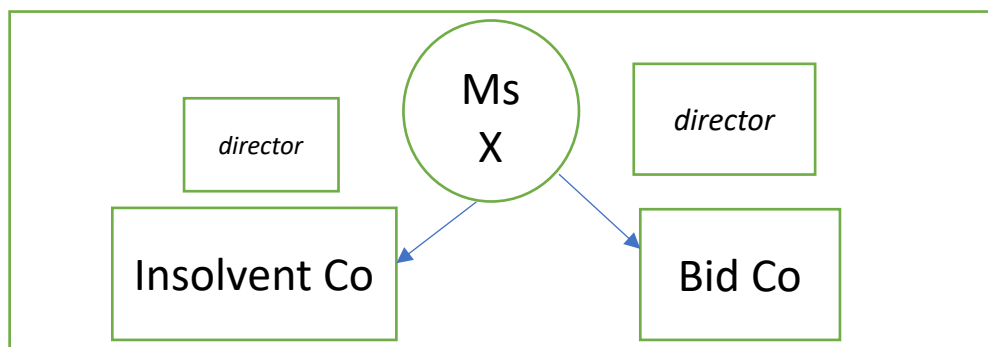
- BidCo is a relevant person in relation to Insolvent Co if the director association is a ‘non-employee association’, but
- BidCo is not a relevant person in relation to Insolvent Co if the director association is not a ‘non-employee association’ (absent some other association of BidCo).

If:

- Ms X is a director of BidCo; and
- Ms X is a director of the insolvent company

then BidCo will be an associate of Ms X (s435(9), applying s435(4)), but will only be a ‘non-employee associate’ of Ms X if the director association between BidCo and Ms X is a ‘non-employee association’.

Hence BidCo is only a “related person” of the insolvent company under para 60A(4)(a)(ii) by reason of the association of BidCo with its director, Ms X, if this is a ‘non-employee association’ (unless BidCo is associated with Insolvent Co or Ms X or some other director or officer in some other way).



37. Whether or not directors (or officers) are non-employee associates is a tricky point of statutory interpretation. In my view the better view is that a person whose association is only as a director (or officer) is not a ‘non-employee associate’.
38. The definition in para 60A(5) uses the associate test found in s435 and in effect refers to the employee test in s435(4). It seems as a consequence that a director (or officer) - who is only ‘associated’ by reason of the deeming provision in s435(9) applying s435(4) – is to be treated in the same way as an employee and so not a non-employee associate for the purposes of para 60A(5).
39. There are contrary arguments, including (a) that there is perhaps less reason for excluding directors (and officers) as well as employees and (b) that as a matter of interpretation, the provision in s435(9) treating directors and officers as if employees (and hence associates) is stated only to apply for “the purposes of this section”. It is arguably only for the purposes of s435 and not (at least expressly) for the purposes of para 60A. But ultimately in my view they are less convincing.

It is a risk point for the administrators and potential purchaser if they would be willing to take a view on the status of a director or officer as not falling within the



non-employee associate test if this was the crucial point in deciding if the as meaning that the potential purchaser fell outside the connected person test.

40. There does not seem to be any immediately obvious clear guidance on this point in the legislative materials. Para 60A had its origin as a response by Parliament to an independent review by Teresa Graham on Pre-pack sales<sup>33</sup> (the **Graham Review**), which reported in 2014. The Graham Review led to provisions in SBEEA 2015 amending IA 1986 to give the government power to make regulations (s129, SBEEA 2015 inserting para 60A into IA 1986, Sch B1).

41. The Graham Review stated on this (with some comments added in footnotes):

#### Connected sales

7.45 One of the most common concerns about pre-packs that I heard time and again related to connected party pre-packs. A connected sale broadly refers to where an individual with control of the insolvent company exercises control over new company (the purchaser). It can refer to business sales where an individual is a director of either companies, or where a company exercises control both in old company and new company because of its level of share capital.[1]

.....

9.5 .A ‘connected party’ is a concept well-known in insolvency law, where the subject is covered in the Insolvency Act 1986 itself<sup>34</sup>. My proposal does not follow this template for ‘connected party’ but rather would extend to the following:

i) a connected party is

- a director, shadow director or company officer of the insolvent company;
- an associate of a director, shadow director or company officer of the insolvent company; and
- an associate of the insolvent (see section 249 of the 1986 Act<sup>35</sup>)

who becomes:

- a director, shadow director, company officer of the new company;
- exercises control over the new company as defined in section 435(10) (subject as (iii) below)
- an associate of a director, shadow director or company officer of the new company ; and
- an associate of the new company.

ii) “Associate” means any person set out in section 435 of the 1986 Act with the exclusion of subsection (4) which relates to employees (who are not directors or shadow directors)<sup>36</sup>.

iii) For the purposes of determining whether any person or company has control of a company under section 435(10) of the 1986 Act, sales to secured lenders who hold security for the granting of the loan (with related voting rights) as part of the lender’s normal business activities over one third or more of the shares in both the insolvent company and the new company are not included<sup>37</sup>.

<sup>33</sup> *Graham Review into Pre-pack Administration*, Report to The Rt Hon Vince Cable MP (June 2014). See <https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration>

<sup>34</sup> Comment: This is presumably intended to be a reference to the “connected with” test in IA 1986, s249. However s249 does not actually refer to “connected party” as such.

<sup>35</sup> Comment: This is presumably a cross referencing error. The term “associate is defined in IA 1986, s435, not s249.

<sup>36</sup> Comment: This refers to an express exclusion of s435(4) – as compared to the ultimate enactment in para 60A of the “non-employee associate” concept, which does not refer expressly to s435(4).

<sup>37</sup> Comment: This “tweak” does not appear in para 60A as enacted. Lenders can become associated with a company (under s435(10) by reason of holding security (and voting power) over the shares in a company. See eg Chapter 29 in Pollard ‘*Connected and Associated*’.

9.6 The reason for this slight tweak – which I do not recommend be repeated anywhere else in the insolvency legal or regulatory framework – is to avoid causing unnecessary damage (and so lead ultimately to more business failures) to the restructuring of larger companies (and groups of companies) where a lender may have voting rights associated with their debt. The reference to lending as part of normal business activities is to prevent group companies trying to bring themselves into this exception by making an intra-group loan and taking security.

42. As can be seen, the ultimate legislation in para 60A did not follow the suggested wording in the Graham Review. But it may perhaps have been thought that the provisions actually enacted were to similar effect. Noticeably, the Graham Review wording would have excluded s435(4) altogether, which would have had a clearer knock on effect of excluding directors (and officers) from being associates as well (as s439(9) in effect piggy backs on the employee provision in s435(4)).
43. In practice this issue may not make much difference to the position of some directors (or officers). Even if (as I argue above) a director (or officer) is not a ‘non-employee associate’ of the insolvent company within para 60A(4)(a)(iii), a director (or officer) of the insolvent company is clearly a ‘relevant person’ in relation to the insolvent company under para 60A(4)(a)(i).
44. But it could make a difference where the prospective purchaser company itself has as one of its directors a person who is also a director of the insolvent company. Is such a prospective purchaser company then a “relevant person” of the insolvent company by reason of being a “non-employee associate” of a director (or officer) of the insolvent company within para 60A(4)(a)(ii)?

### Timing for being a relevant person

45. The first limb of para 60A, the ‘relevant person’ provision in para 60A(4)(a), seems to look only at current relevant persons – ie presumably at the time of the relevant disposal by the administrator. The ‘relevant person’ definition (unlike the connected company definition in the second limb) does not expressly look at persons who were previously a relevant person. For example ‘relevant person’ does not include a former director or associate (eg shareholders with over one-third of the voting power) of the company now in administration).
46. This seems an odd result, as a director (say) could cease to be a relevant person by just resigning. But this seems to be mandated by both (a) the language of the Administration Disposal Regs 2021 (eg the definition of ‘substantial disposal’ in reg 3(3)(a) as a disposal ‘to one or more connected persons’) and (b) the contrast with the express inclusion of former relevant persons (“is or has been a relevant person”) in the connected company definition in para 60A(4)(b).
47. It can be relevant that it is not clear under para 60A as to when the relevant disposal takes place – eg is it at the time of entry into the relevant sale contract, or only when the contract becomes unconditional (and so the disposal could be seen to take effect in equity?) or when the actual assets are transferred (or leased etc). A cautious approach will be to test at all these times (see 67 to 69 below).

## Company as a relevant person

48. A ‘relevant person’ can clearly include a company<sup>38</sup> if it is a direct associate<sup>39</sup> of the insolvent company<sup>40</sup> or a ‘non-employee associate’ of a director, officer or shadow director of the insolvent company<sup>41</sup>, with the term ‘associate’ having the usual meaning under in IA 1986, s435. It is also possible that a company could be a director, officer or shadow director of the insolvent company.
49. An example would be if the purchaser (BidCo) has parent company which has a large shareholder (over 1/3<sup>rd</sup> voting power) who is also a director of the insolvent company. This is because BidCo is associated with a person who ‘controls’ it<sup>42</sup> – s435(7) - and ‘control’ is defined to include holding over 1/3<sup>rd</sup> of the voting power at a general meeting of BidCo or a company that itself controls BidCo – s435(10)(b).
50. Such association of one company with another can apply by aggregating groups of shareholders to give control (see eg s435(6), (7) and (10)). This can get quite complex and is discussed in more detail in *Pollard ‘Connected and Associated’*<sup>43</sup>.

## Individuals as associates

51. The class of individuals who are a ‘relative’ of another individual (under s435(8)) and so associated with that other individual (s435(2)) is potentially very wide<sup>44</sup>. This will mean that such relatives are each a ‘relevant person’ if they are thereby associated with someone who is a director (or officer or shadow director) of the insolvent company.
52. A person is an associate of an individual (s435(2)) if that person is:
- the individual’s spouse<sup>45</sup> or civil partner;
  - a relative of the individual;
  - a relative of the individual’s spouse or civil partner;
  - the spouse or civil partner of a relative of the individual; or
  - the spouse or civil partner of a relative of the individual’s spouse or civil partner.

References to a spouse or civil partner include:

- a former husband, wife or civil partner; and
- a ‘reputed’ husband, wife or civil partner.

<sup>38</sup> As mentioned above, for this purpose a company seems likely to include any body corporate, whether incorporated in Great Britain or elsewhere – para 60A(6) (the reference in para 60A(6) to IA 1986 s435(10) is likely to be seen as a simple cross referencing error, with s435(11) being correct).

<sup>39</sup> A company is unlikely to be capable of being an employee (see ch 24 in *Pollard ‘Connected and Associated’*) so it is likely that any associate status can only be as a non-employee associate. But see above for the more tricky point with directors.

<sup>40</sup> Para 60A(4)(a)(iii).

<sup>41</sup> Para 60A(4)(a)(ii).

<sup>42</sup> This example uses association through control and is therefore very clearly involves BidCo as a ‘non-employee associate’ of the shareholder in BidCo’s parent.

<sup>43</sup> See Parts 8 and 9 in *Pollard ‘Connected and Associated’*.

<sup>44</sup> See Part 6 in *Pollard ‘Connected and Associated’*.

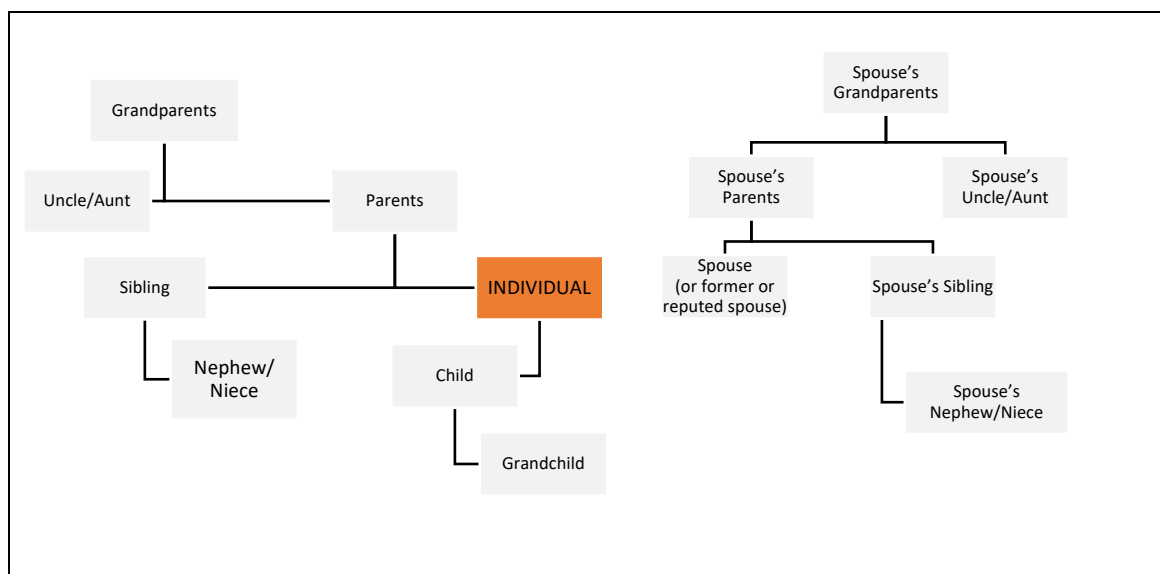
<sup>45</sup> Section 435 does not use the term ‘spouse’, but it is used here as shorthand for a husband or wife.

53. A ‘relative’ in relation to a person is that person’s brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant – s435(8).

This includes treating:

- “any relationship of the half blood as a relationship of the whole blood”; and
- any stepchild or adopted child of a person as his or her child; and
- an illegitimate child as the legitimate child of his or her mother and reputed father.

54. This means that a wide range of individuals are often associated with another individual (and vice-versa). All the persons identified in the chart below, plus in each case their current (or former or reputed) ‘spouses’, would be ‘associates’ of the individual:



55. This chart is not a complete picture. Under s435(8), “relatives” also include lineal ancestors (eg a great grand parent) or lineal descendants (eg a great grand child) of a person (ie in this context the individual or their spouse).

## Limb (b): Connected company

56. The second limb of ‘connected person’ can apply in relation to a company and is potentially wider than the first limb relating to a ‘relevant person’. It could apply to a purchaser company even if it is not itself a relevant person – ie an associate (under IA 1986, s435) of the insolvent company (or one of its directors or officers).

57. A prospective purchaser which is a company could be within para 60A if it falls within the second limb in para 60A(3)(b) as a ‘connected company’, ie even if it is not a ‘relevant person’ within the first limb in para 60A(3)(a).

58. Para 60A(3)(b) provides:

(b) a company is connected with another if any relevant person of one is or has been a relevant person of the other.

59. This second limb only applies to a purchaser (etc) who is a company (ie a body corporate – para 60A(6)). It does not apply to an individual or group of individuals who are the purchaser. If the purchaser is a partnership, then the issue may depend on whether any of the members of the partnership are a body corporate – (see 10 and 20 above).
60. The second limb of ‘connected person’ expressly includes ‘a company connected with the company’<sup>46</sup> - Sch B1, para 60A(3)(b). For this purpose, a company is connected with another if:
- ‘any relevant person of one is or has been a relevant person of the other’ – Sch B1, para 60A(4)(b) (emphasis added).
61. As mentioned at 20 above, for this purpose a company seems likely to include any body corporate, whether incorporated in Great Britain or elsewhere – para 60A(6) (the reference in para 60A(6) to IA 1986, s435(10) is likely to be seen as a simple cross referencing error, with s435(11) being correct).
62. Working out if a particular company is a connected company with the insolvent company may involve quite a complex process, in particular because of:
- (a) the width of the ‘non-employee associate’ test and its application to officers and shadow directors – see above; and
  - (b) the “chain” effect of the purchaser company being a ‘relevant person’ in relation to another person, who is themselves a ‘relevant person’ in relation to the insolvent company – see 63 below; and
  - (c) the reference in limb (b) to a person who ‘is or has been’ a relevant person – see 67 below. By way of contrast, the term ‘relevant person’ seems to look only at current relevant persons – ie presumably at the time of the relevant disposal (see 45 above and 67 to 69 below).

### Chain effect – link person

63. The ‘connected company’ limb of the defined term ‘connected person’ in para 60A only applies if the purchaser is a company (ie a body corporate – see 20 and 59 above).
64. Such a company as a potential purchaser (**BidCo**) is a connected company in relation to the insolvent company in administration (**InsolventCo**) if there is any person (called here a “**link person**”) who:
- is or has been a relevant person in relation to BidCo (ie a director, officer, or shadow director of BidCo or a non-employee associate of BidCo (or of a director/shadow director/officer of BidCo);
  - and
  - is or has been a relevant person in relation to Insolvent Co (ie a director, officer, or shadow director of non-employee associate of InsolventCo (or of a director/shadow director/officer of the InsolventCo).

This link person could be an individual or a company.

<sup>46</sup> Ie the insolvent company in relation to which the administrator was appointed.

65. Seemingly the “link person” must be currently a ‘relevant person’ of either BidCo or InsolventCo (or both).
66. One way of checking for a connection under this limb would be to seek to draw up two separate lists:
- one listing all the persons who are or used to be a relevant person in relation to Bidco; and
  - one listing all those who are or used to be a relevant person in relation to InsolventCo,
- and then comparing the lists to see if there are any common names.

### Timing of connection

67. The timing for being a “connected person”, must presumably involve considering whether the test applies at the time of the disposal. It seems appropriate that this should apply :
- at the time of the relevant agreement or contract (or at least when it becomes unconditional<sup>47</sup>); and
  - at the time of relevant transfer; and
  - in between.
- This is because it seems likely that both are the time of disposal.
68. For limb (a), the relevant person limb, this seems to be a test at the relevant time. It does not catch a person if they used to be a relevant person before the time of the test – see 45 above.
69. Conversely for the connected company limb, this includes someone who “is or has been a relevant person”. This means that it applies to former relevant persons.
70. On the timing point, there seem to be four possible cases here looking at a potential “link person” in the ‘connected company’ test. At the relevant time:
- (a) A person is a relevant person in relation to the insolvent company and that person is a relevant person in relation to the purchaser company
  - (b) A person is a relevant person in relation to the insolvent company and that person was a relevant person in relation to the purchaser;
  - (c) A person was a relevant person in relation to the insolvent company and that person is a relevant person in relation to the purchaser;
  - (d) A person was a relevant person in relation to the insolvent company and that person was a relevant person in relation to the purchaser.
71. The better analysis of the wording seems to be that in cases (a), (b) and (c) the purchaser company *is* at the relevant time a connected company with the insolvent company. In case (d) it is more likely that it is not.

<sup>47</sup> See eg the decision of the Court of Appeal on a conditional disposal in *The General Electric Company Plc v The Plessey Company Plc* (1989) 22 March, [1989] 3 WLUK 307.

72. Case (a) is fairly obvious. The person is at the relevant time a relevant person in relation to both companies. So they are connected.
73. Cases (b) and (c) are both cases where the person *is* a relevant person in relation to one company and *has been* a relevant person in relation to the other. This seems to mean that, in both cases, the purchaser is connected with the insolvent company. The test in para 60A(4)(b) applies ‘if any relevant person of one is or has been a relevant person of the other’. This wording applies both ways – is there someone who is a relevant person of one and who *has been* a relevant person in relation to the other? In both cases (b) and (c) this is met.
74. Case (d) is less clear (but would have the practical consequence of reducing the prospect of very historic sharing of a relevant person catching a company). The test in para 60A(4)(b) of ‘if any relevant person of one is or has been a relevant person of the other’ seems to require that the person being considered must currently be a relevant person in relation to one of the companies.
75. If not (ie where the person used to be a relevant person of both BidCo and InsolventCo) then the person is not a ‘relevant person of one’ and so the test in para 60A(4)(b) is not met. This seems to flow from the position that in order to be a relevant person in relation to a company, the person must *currently* be such a person. The definition of ‘relevant person’ in para 60A(4)(a) does not (unlike the connected company limb in para 60A(4)(b)) refer to persons who were formerly a relevant person.
76. The analysis in tabular form is:

<b>Person A as a relevant person. At the relevant time:</b>	<b>A <u>is</u> a relevant person in relation to purchaser company</b>	<b>A <u>was</u> a relevant person in relation to purchaser company</b>
<b>A <u>is</u> a relevant person in relation to the insolvent company</b>	(a) the purchaser co <b>is</b> at the relevant time a connected company with the insolvent co	(b) the purchaser co <b>is</b> at the relevant time a connected company with the insolvent co
<b>A <u>was</u> a relevant person in relation to the insolvent company</b>	(c) the purchaser co <b>is</b> at the relevant time a connected company with the insolvent co	(d) the purchaser co <b>is not</b> at the relevant time a connected company with the insolvent co

77. The Insolvency Service guidance issued in April 2021 to administrators<sup>48</sup> on the Administration Disposal Regs 2021 outlines this issue, but does not purport to give an exhaustive list of who is a “connected person”:

<sup>48</sup> Insolvency Service: *Requirements for independent scrutiny of the disposal of assets in administration, including pre-pack sales* (Published 30 April 2021). [www.gov.uk/government/publications/requirements-for-independent-scrutiny-of-the-disposal-of-assets-in-administration-including-pre-pack-sales/requirements-for-independent-scrutiny-of-the-disposal-of-assets-in-administration-including-pre-pack-sales](http://www.gov.uk/government/publications/requirements-for-independent-scrutiny-of-the-disposal-of-assets-in-administration-including-pre-pack-sales/requirements-for-independent-scrutiny-of-the-disposal-of-assets-in-administration-including-pre-pack-sales) .[Accessed 25 November 2022]

### **3. Connected person**

A connected person is either an individual or a company that is connected to the company entering administration. All references in this guidance to a connected person should be read in this way. Below is a list of those who would fall within the definition of a connected person.

This list is not exhaustive and you may need independent legal advice if there is any doubt about whether a person’s relationship to the company makes them a connected person.

A connected person could be:

- director of the company
- secretary of the company
- spouse, ex-spouse, child or sibling of a director or any other officer of the company
- business partner of a director of the company
- a company that is controlled by any of the above listed individuals
- any person or company who has control over the company, including shareholders with a third or more voting rights. This could include secured lenders.

It is the responsibility of the insolvency practitioner to establish if a party is connected to the company.

78. The Insolvency Service comments that it is for the administrators to check if the counterparty to the relevant disposal is a connected person.

79. Depending on the circumstances, this can be quite an onerous task, in particular given the width of the ‘associate’ definition (eg relatives of former spouses of a director) and the difficulty in the administrator being able to work out with certainty whether some of the tests are met – eg a ‘reputed’ spouse or a shadow director.

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## Annex: Overview of “associate” under s435 of the Insolvency Act 1986

Some general points:

- All wholly owned companies in a group are associated with each other.
- Directors are associated with the company on whose board they sit, but not necessarily with its subsidiaries. Similarly, an employee is associated with his or her employer (and vice versa).
- A company is associated with each of its directors, officers and employees.
- Significant shareholders (over one-third voting power) will have ‘control’ and so are associated with the company (and its subsidiaries).
  - This can also apply (at the same time) to another person who has a contractual power to exercise the votes (which can include a lender with security over shares).

The definitions of ‘connected’ and ‘associate’ are complex and contain many nuances. For further analysis, see Pollard *‘Connected and Associated: Insolvency and Pensions Law’* (Bloomsbury Professional, 2021).

### Associated persons

#### Relatives:

A person is an associate of an individual if that person is:

- the individual’s spouse or civil partner;
- a relative of the individual;
- a relative of the individual’s spouse or civil partner;
- the spouse or civil partner of a relative of the individual; or
- the spouse or civil partner of a relative of the individual’s spouse or civil partner.

References to a spouse or civil partner include:

- a former husband, wife or civil partner and
- a ‘reputed’ husband, wife or civil partner.

A ‘relative’ in relation to a person is that person’s brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant.

#### Partnerships:

A person is an associate of any person with whom he is in partnership and of the husband, wife, civil partner or relative of any individual with whom he is in partnership. A Scottish firm is an associate of any person who is a member of the firm.

#### Trusts:

A trustee is associated with beneficiaries of the trust (but excluding pension schemes and employees’ share schemes) and vice versa.

### **Employees:**

A person is an associate of any person whom he employs or by whom he is employed<sup>49</sup>.

### **Directors and officers**

Any director or other officer of a company is to be treated as employed by that company and so an associate. The term “**officer**” probably includes the company secretary and a “manager”. The term “**manager**” means someone who manages (and will depend on the context).

If a person is associated with another person then they are associates of each other.

### **Companies associated with other companies:**

A company is an associate of another company if:

- the same person has control of both or a person has control of one and persons who are his associates, or he and persons who are his associates, have control of the other; or
- a group of two or more persons has control of each company and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate.

A company is an associate of another person if that person has control of the company or if that person and persons who are his associates together have control of the company.

There are special rules for members of a limited liability partnership.

### **Control**

A person is to be taken as having control of a company if:

- the directors of the company or of another company that has control of it (or any of them) are accustomed to act in accordance with his directions or instructions; or
- he, she or it is entitled to exercise, or control the exercise of, one-third or more of the voting power at any general meeting of the company or of another company that has control of it.

If two or more persons together satisfy either of the above conditions, they are to be taken as having control of the company.

Control can arise with just one-third of the voting power:

- A person has ‘control’ of a company if he, she or it has (or can control the exercise of) one-third or more of the voting power in the company at any general meeting (or controls an entity that controls the company).
- Such control may be possible through a voting agreement (eg by a lender with a mortgage or charge over the shares).

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<sup>49</sup> See Chapter 27 in Pollard ‘Connected and Associated’.

- It is also possible that separate holdings of separate shareholders can be added together to give joint control (particularly if the shareholders are associated).

### **Connected persons (s239)**

A person is connected with a company if that person is:

- a director or shadow director of the company;
- an associate of such a director or shadow director; or
- an associate of the company.

A person (an individual or company) can only be connected with a company. A person cannot be connected with an individual.

### **Is there a chain of links?**

The ‘associate’ test does not generally link – that is, if A is associated with B and B is associated with C, this does not mean (by itself) that A is associated with C.

But there are at least two exceptions to this:

- if A controls B and B controls C, this usually means A controls C (and so A is associated with C); and
- if A is associated with B and B is a director (or shadow director) of a company (XCo), this means A is connected with XCo.

### **Control = one-third of the voting power**

A person has **control** of a company if either:

- he, she or it has (or is entitled to exercise) one-third or more of the voting power in the company (or in a controller of the company) at any general meeting; or
- the directors of the company .

Such control may be possible through a voting agreement.

It is also possible that separate holdings of separate shareholders can be added together to give joint control (particularly if the shareholders are associated).