Loose & Griffiths on Liquidators

The Role of a Liquidator in a Winding Up

Eighth Edition

Peter Loose MA, Solicitor

Michael Griffiths LLM



Published by Jordan Publishing Limited 21 St Thomas Street Bristol BS1 6JS

Whilst the publishers and the author have taken every care in preparing the material included in this work, any statements made as to the legal or other implications of particular transactions are made in good faith purely for general guidance and cannot be regarded as a substitute for professional advice. Consequently, no liability can be accepted for loss or expense incurred as a result of relying in particular circumstances on statements made in this work.

© Jordan Publishing Limited 2014

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any way or by any means, including photocopying or recording, without the written permission of the copyright holder, application for which should be addressed to the publisher.

Crown Copyright material is reproduced with kind permission of the Controller of Her Majesty's Stationery Office.

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978 1 84661 730 0

CONTENTS

Preface	v
Table of Cases	xvii
Table of Statutes	XXXV
Table of Statutory Instruments	xliii
List of Abbreviations	xlix
Chapter 1	
Status of a Liquidator	1
Liquidator as trustee	1
Liquidator as agent	3
Liquidator as an officer of the company	4
Liquidator as insolvency practitioner	5
Chapter 2	
Commencement of Voluntary Winding Up	7
Grounds for a voluntary winding up	8
Members' voluntary winding up	9
Creditors' voluntary winding up	10
Preliminaries to the appointment of a liquidator in a members'	
voluntary winding up	11
Declaration of solvency	11
Members' meeting	12
Quorum	13
Resolution	13
Directors' powers	13
Preliminaries to the appointment of the liquidator in a creditors'	
winding up	14
The resolution	14
Notice	14
Quorum	14
Directors' powers	16
Acceptance of appointment and conversion of members' voluntary	10
winding up to creditors' voluntary winding up	22
Procedure on appointment of liquidator in a members' winding up	23
Procedure on appointment of liquidator in a creditors' voluntary	_0
winding up	27
<i>U</i> 1	

Chapter 3	
The EC Regulation on Insolvency Proceedings	33
Introduction	33
European jargon	34
The aim of the Regulation	34
Forum shopping	36
Proceedings subject to the Regulation	37
Types of proceedings	38
Main proceedings	39
Proceedings outside the Regulation	40
Jurisdiction for main proceedings	42
Secondary proceedings	46
The nature of secondary proceedings	48
Office-holders to whom the Regulation applies	48
Territorial proceedings	49
The importance of commencing main proceedings	50
Claims	53
Rescue plans	53
Proceedings after closure of secondary proceedings	54
Choice of law	54
Exceptions to the general rule as to applicable law	55
Rights in rem	55
Set-off Set-off	57
Reservation of title	57
Contracts relating to immovable property	58
Payment systems and financial markets	59
Contracts of employment	60
Effect on rights subject to registration	61
Community patents and trade marks	61
Detrimental acts	62
Protection of third party purchasers	62
Effects of insolvency proceedings on law suits pending	63
Recognition	63
Powers of the liquidator	64
Public policy	65
Opening of secondary proceedings	65
Review of the Regulation	66
The impact of the Regulation	67
Chapter 4	
Compulsory Winding Up	69
Jurisdiction	70
Who may petition?	72
(a) The company	72
(b) The directors	73
(c) A creditor or creditors	73
(d) A contributory	77
(e) The Secretary of State	80

Contents ix

(f)	The Official Receiver	80
(g)	The Attorney-General	82
(h)		82
(i)	A clerk of a magistrates' court	82
(j)	A supervisor of a corporate voluntary arrangement (CVA)	82
(k)	An administrator or administrative receiver	83
(1)	The Financial Conduct Authority	83
	nds for winding up	83
(a)		
()	company be wound up by the court	83
(b)	Where the company being a public company which was	
(-)	registered as such on its original incorporation has not been	
	issued with a certificate under CA 2006, s 761 and more than	
	one year has expired since it was so registered	84
(c)	Where the company is an old public company and has not	
(-)	re-registered as required by the Companies Act 1980	84
(d)	Where the company has not commenced business within a year	
(/	from incorporation or has suspended business for a whole year	84
(e)	Where the membership falls below two	85
(f)	Where the company is unable to pay its debts	85
. ,	Γhe relationship between cash flow and balance sheet insolvency	92
(g)	Where the court is of the opinion that it is just and equitable	
(0)	that the company should be wound up	94
Proced		99
(a)		99
(b)		100
(c)	The hearing	101
(d)	Opposition by the company	103
(e)	Provisional liquidator	103
Cl	- 5	
Chapt	er 5 s of Winding Up and Appointment of the Liquidator	109
	of commencement	109
	ess ceases	110
		110
	rs of the liquidator rs of company	111
	± •	114
_	any's property	114
	f the company name: phoenix companies transfers	122
	edings may be restrained	123
	ors' powers cease	123
	1	120
Emplo Notice		
	e oyees' claims	128
	•	128
	idancy	129
	of inspection of registers	129
	s of inspection of registers	131
rioatii	ng charges	132

Connected person and associate	135
Forfeiture	136
Disclaimer and rescission	136
Executions and attachments	137
Chapter 6	
Duties of the Liquidator	141
Preliminary duties	141
Duty to maintain liquidator's record	142
Duty to take possession of property	143
Duty as to bank accounts	144
Duty to settle list of contributories	146
Duty to examine conduct of officers	149
Proceedings following examination of the conduct of directors etc	150
Disqualification and unfitness	151
Fraud, etc in anticipation of winding up	157
Transactions in fraud of creditors	158
Misconduct in course of winding up	158
Material omissions	159
Duty to recover assets and to institute proceedings	160
Examination of officers	160
Recovery of property: s 234	167
Misfeasance: s 212	169
Fraudulent trading: s 213	174
Wrongful trading: s 214	177
Duty to recover transactions at undervalue and preferences: ss 238, 239	183
Transactions (at an undervalue) defrauding creditors: s 423	188
Duty to pay creditors	194
Duty to distribute the surplus	197
Duty to keep accounts, books and papers	197
Duty to dissolve the company	199
Chapter 7	
Powers of the Liquidator	201
Powers exercisable on a liquidator's own authority in a voluntary winding up and with the approval of the court or the liquidation	
committee in a compulsory winding up	201
To bring and defend actions in the name of the company	201
To carry on business	204
Powers exercisable on a liquidator's own authority in all cases	205
To sell assets	205
To act in the company's name	206
To prove	206
To take out representation	206
To draw cheques	206
To borrow	207
To appoint agents	207

Contents xi

To take necessary steps	207
To settle contributions	208
To call meetings	209
To pay debts	210
Powers exercisable with sanction	211
Restricted powers exercisable before the creditors' meeting	212
Other powers	213
Meetings of creditors	213
Meetings of committee	213
Register	213
Powers of directors	214
Reconstruction and sale	214
Distribution of property	215
Application to court	218
Disclaimer	220
Chapter 8	
Creditors	229
Duty to creditors	229
Procedure	231
Letter to creditors	232
Form of claim	232
Dividends	234
Consideration of proofs	237
Admission and rejection of proofs	240
Debts which are provable	242
Contingent or uncertain debts	244
Foreign currency	244
Discounts	245
Rent and periodical payments	245
Future debts	245
Negotiable instruments	245
Interest on debts	245
Mutual credit and set-off	246
Secured creditors	249
Invalid securities	251
Priorities	254
Invalidation of transactions: transactions at undervalue (s 238)	255
Preferences (s 239)	256
Extortionate credit transactions (s 244)	258
Avoidance of certain floating charges (s 245)	258
Transactions defrauding creditors (s 423)	261
Time-limits	263
Relevant times	263
Relevant time under ss 238 and 239 as fixed by s 240	263
Relevant time under s 244	264
Relevant time under s 245	264

Court orders	264
Sections 238, 239: undervalue and preferences	264
Section 244: extortionate credit transactions	266
Section 423: transactions (at an undervalue) defrauding creditors	267
Ultra vires	267
Reservation of title	271
Trust property	272
Landlords' forfeiture and distress	272
CRAR	277
Voluntary arrangements	283
The moratorium envisaged by the Insolvency Act 2000	289
Moratorium where directors propose voluntary arrangement	289
Companies that cannot seek a moratorium	289
Applications for a moratorium	290
Directors of an eligible company may apply to the court for a	
moratorium	290
Proposed extension of the moratorium	296
Challenging voluntary arrangements	296
Other compromises and arrangements	302
Chapter 9	
The Liquidation Committee and Meetings	303
Members' winding up	303
Creditors' winding up and compulsory winding up	305
Appointment of liquidation committee	305
Liquidation committee where winding up follows immediately on	
administration	312
Meetings of creditors	312
Procedure for meetings of creditors	314
Resolutions by correspondence	317
Chapter 10	
Matters Arising in Winding Up	319
Remuneration of liquidator	319
Removal of liquidator	322
Voluntary winding up	322
By the court	322
By meetings	325
Compulsory winding up	326
Vacancies	327
Death	327
Resignation	328
Removal – vacation of office	329
Filling of vacancies	329
Release of liquidator	331
Misfeasance	332
Joint liquidators	333
Change of registered office	333

Contents	X111

Personal indemnity	334
Solicitors' and other costs	334
Registered land	336
Stamp duties	336
Liquidators, receivers and administrative receivers	337
Receivership continues	337
Receiver's right to the assets	338
Validity of receiver's appointment	338
Liquidator as receiver	339
Manager carrying on business	339
Misfeasance by receiver	339
Preferential debts	341
Receiver's remuneration	341
Abolition of the power to appoint an administrative receiver in new	
securities	342
Administration orders and liquidation	342
Insolvency in members' winding up	343
Compulsory order after voluntary winding up	344
Chapter 11	
Payment of Debts	345
Expenses of the winding up	345
Preferential debts	350
Floating charges	352
Ordinary creditors	356
Deferred creditors	357
Chapter 12	
Rights and Liabilities of Members	359
Contributions: contributories	359
Liability of contributories: are their shares paid up?	360
Lists and calls from contributories	362
Distribution to members	365
Chapter 13	
Completion of Winding Up	371
Returns regarding directors	371
Tax clearances	375
Final account	375
Final meetings	376
Notices of final meetings	376
Essential business at final meetings	377
Remuneration	377
Procedure at final meetings	379
Return of final meetings and release	379
Dissolution	380
Bona vacantia	383

Chapter 14	
The Administration Procedure	385
Introduction	385
Pre-packaged administrations	386
What is administration?	386
The purpose in more detail	387
Administrations and other insolvency procedures	389
Terminology used	390
General duties of the administrator	391
Re Consumer & Industrial Press Ltd	392
The administrator	392
Protection for purchasers from administrators	396
Restrictions against administrations	396
Routes into administration since 15 September 2003	397
Appointment by the court	397
Appointment by the holder of a floating charge	400
Appointment by the company or its directors	401
Moratorium	402
Approval of the administrator's proposals	403
'Pre-packs'	403
Statement of Insolvency Practice 16	405
Practitioners	405
Legal authority for pre-packs	405
Preparatory work	405
Disclosure	405
Conclusion	406
Partnerships and LLPs	407
Duration of administration	417
Application to LLPs and partnerships	418
Post-administration disposals of property and assets	418
Employment matters and the application of TUPE	419
Insolvency	421
'Phoenix companies' - s 216 of the Insolvency Act 1986	424
Substantial property transactions involving directors – s 193 of the	
Companies Act 2006	425
Statement of Insolvency Practice 16	425
Practitioners	425
Legal authority for pre-packs	426
Preparatory work	426
Disclosure	426
Chapter 15	420
The Financial Collateral Arrangements (No 2) Regulations 2003	429
Introduction Terminals are	429
Terminology	430
Purpose Who is affected?	430
What arrangements are covered?	430 430
What arrangements are covered?	430

Contents	ΧV
----------	----

Relaxation of registration and other requirements	432
Enforcement against companies in administration	432
Disapplication of other insolvency legislation	433
Close-out netting clauses	433
Debts in foreign currency	434
Right of use in a security financial arrangement	435
Appropriation of collateral	435
Conflict of law and book entry securities	436
Appendix 1	
Check-lists for Winding Up and Liquidation	439
Appendix 2	
Precedent Letters with Statutory and Practice Forms	449
Appendix 3	
Penalties	575
Appendix 4	
Disqualification of Directors	587
Appendix 5	
Guides to Professional Conduct and Ethics	639
x 1	Z=4
Index	671