

## Introduction

This note is a simple guide to liquidation and other insolvency procedures and should be read in conjunction with the Companies (Guernsey) Law, 2008, Parts XXI to XXIV (the “Law”).

Please remember that if your company is considering liquidation, or any other measures to deal with insolvency, you should seek appropriate professional advice.

## General information

### 1. What are insolvency proceedings?

These are formal measures taken to deal with company debt. There are different types of company insolvency proceedings, all covered in this advice note.

### 2. Do insolvency proceedings apply to all types of companies?

In general the procedures apply to both cellular and non-cellular companies. The procedures relating to cellular companies vary at times.

Remember: Not all companies in liquidation are insolvent.

### 3. Do all companies have to go through insolvency proceedings before being dissolved?

No. If the Registrar has reason to believe that a company is not carrying on business or is not in operation, its name may be struck off the register and dissolved without going through liquidation. A company that is not trading may also apply to the Registrar to be struck off the register. This procedure is not an alternative to formal insolvency proceedings.

More information about striking off and dissolution of a company is available in our guidance note Strike-off, Dissolution and Restoration.

## Administration

### 1. What is an administration order?

An administration order is an order directing that, during the period for which the order is in force, the affairs, business and property of the company shall be managed by a person (the “administrator”) appointed for the purpose by the Court.

An order is made by the Court if:

- it is satisfied that a company does not satisfy or is likely to become unable to satisfy the statutory solvency test; and

it considers that the making of an order may achieve one or more of the purposes set out in the Law.

## **2. What then are the purposes of an administration order?**

An administration order is aimed to achieve:

- the survival of the company and the whole or any part of its undertaking, as a going concern; or
- a more advantageous realisation of the company's assets than would be effected on a winding up;

and an order shall specify the purpose for which it is made.

## **3. Who may apply for an administration order?**

An application for an administration order may be made by:

- the company;
- the directors of the company;
- any member of the company;
- any creditor of the company, including any contingent or prospective creditor;
- the Guernsey Financial Services Commission, in respect of supervised companies and companies engaged in financial services business;
- in the case of a company in respect of which the Court has made an order for winding up or which has passed a resolution for voluntary winding up, the liquidator;
- in the case of an incorporated cell company, an incorporated cell of the incorporated cell company;
- in the case of an incorporated cell, its incorporated cell company;
- in the case of a cell of a protected cell company, the protected cell company;

or by all or any of those parties, together or separately.

## **4. What are the effects on a company of being in administration?**

Following an administration order being made:

- any application for the company's winding up is dismissed;
- no resolution for voluntary winding up of the company can be passed; and
- generally legal proceedings cannot be commenced against the company.

During the period between the presentation of an application for an administration order and following the making of such an order:

- no resolution may be passed or order made for the company's winding up; and
- no proceedings may be commenced or continued against the company except with the consent of the administrator or the leave of the Court and subject to such terms and conditions as the Court may

impose.

## **5. Who must be told that a company is in administration?**

When an administration order is made the administrator shall:

- forthwith send to the company notice of the order;
- forthwith send a copy of the order to the Registrar;
- in the case of a cell of a protected cell company, forthwith send to the protected cell company notice of the order;
- within 28 days after the making of the order:-
  - unless the Court order otherwise, send notice of the order to all creditors of the company so far as he is aware of their addresses;
  - where the order is in respect of an incorporated cell company, send notice of the order to its incorporated cells;
  - where the notice is in respect of an incorporated cell, send notice of the order to its incorporated cell company;
  - in the case of a supervised company or a company engaged in financial services business, send notice of the order to the Guernsey Financial Services Commission; and
  - within such time as the Court may direct, to such other persons as the Court may direct.

The Registrar shall give notice of the administration order in such manner and for such period as he thinks fit.

## **6. What powers does the administrator have?**

The administrator may do all things as may be necessary or expedient for the management of the affairs, business and property of the company and unless the Court order otherwise he has all of the powers specified in Schedule 1 to the Law.

Additionally he may:

- apply to the Court for directions to the extent or performance of any function and any matter arising in the course of his administration;
- remove any director of the company and appoint any person to be a director of it, whether to fill a casual vacancy or otherwise; and
- call any meeting of the members or creditors of the company.

## **7. What does the process of administration involve?**

The administrator may require all or any of the following persons to submit to him a statement ("statement of affairs") in such form as he may require as to the affairs of the company:

- those who are or have been officers of the company;
- those who have taken part in the company's formation at any time within the period of one year before the date of the administration order;
- those who are in the company's employment or have been in its employment within the preceding year,

and are in the administrator's opinion capable of giving the information required;

- those who are or have within the preceding year been officers of or in the employment of a company which is, or within the preceding year was, an officer of the company.

The statement of affairs shall be verified by affidavit of the persons required to submit it and shall show:

- particulars of the company's assets, debts and liabilities;
- the names and addresses of its creditors;
- any securities held by any of its creditors;
- the dates when those securities were respectively given; and
- such further or other information as the administrator may require.

## **8. When does administration end?**

The administrator may at any time apply to the Court for the administration order to be discharged or varied if it appears to him that:

- the purpose or each of the purposes specified in the order has been achieved or is incapable of achievement; or
- it would otherwise be desirable or expedient to discharge or vary the order.

Where an administration order is discharged or varied the administrator shall:

- within 7 days after the day of the order, send a copy of the order effecting the discharge or variation to the Registrar; and
- within such time as the Court may direct, send a copy to such other persons as the Court may direct.

## **9. Who is responsible for the administrator's costs and expenses?**

The administrator's remuneration, and any costs, charges and expenses properly incurred in the administration are payable from the company's assets in priority to all other claims. The administrators' fees are fixed by the Court.

## **Voluntary liquidation**

### **1. When can a company go into voluntary liquidation?**

A company may be wound up voluntarily:

- when the period (if any) fixed by the memorandum or articles for the duration of the company expires, or
- the event (if any) occurs on the occurrence of which the memorandum or articles provide that the company shall be dissolved,

provided that in each case the company passes an ordinary resolution to be wound up voluntarily; or

- the company passes a special resolution that it be wound up voluntarily.

A copy of the resolution must be delivered to the Registrar within 30 days of it being passed. Failure to comply does not render the resolution void but the company is guilty of an offence and liable to a fine.

## **2. What notice must be given of a voluntary winding up?**

The Registrar shall give notice of the fact that the company has passed either a special resolution or an ordinary resolution for voluntary winding up in such manner and for such period as he thinks fit.

## **3. When does the liquidation actually start?**

A voluntary winding up commences upon the passing of the resolution for voluntary winding up.

## **4. What are the consequences of a voluntary winding up?**

In a voluntary winding up, the company must, by ordinary resolution (a) appoint a liquidator to wind up the company's affairs and to realise and distribute its assets, and (b) fix the liquidator's remuneration.

A company which is being voluntarily wound up may, by special resolution, delegate to its creditors or to any committee thereof the power to appoint a liquidator and to fill any vacancy in the office of liquidator and to enter into any arrangement regarding the power to be exercised by the liquidator and the manner in which they are to be exercised. Any act done by the creditors in pursuance of any such delegated power shall have effect as if done by the company.

Upon the appointment of a liquidator, all powers of the directors cease, except to the extent that the company by ordinary resolution or the liquidator sanctions their continuance. If anyone purports to exercise any powers of a director when their powers have ceased then they will be guilty of an offence and could face a fine of up to £10,000.

If, for whatever reason, no liquidator is appointed by the company, the Court may, on the application of any member or creditor, appoint a liquidator.

From the commencement of a voluntary winding up the company shall cease to carry on business except in so far as may be expedient for the beneficial winding up of the company. Subject to this, the company's corporate state and powers, notwithstanding anything to the contrary in its memorandum or articles, continue until it is finally dissolved.

Any transfer of a company's shares made after the commencement of a winding up, other than a transfer made to or with the sanction of a liquidator, is void.

## **5. What are the main duties of a liquidator?**

The liquidator is appointed to wind up the company's affairs. The liquidator does this by realising the company's assets and discharging the company's liabilities, and having done so, distributes any surplus amongst the members according to their respective entitlements in accordance with the Law.

On the expiration of one year beginning on the date of commencement of a voluntary winding up, and on the expiration of each succeeding year, the liquidator shall, if the winding up is not complete, summon a general meeting of the company when he shall lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year.

## **6. What happens when the company's affairs are fully wound up?**

As soon as the company's affairs are fully wound up the liquidator shall:

- prepare an account of the winding up, giving details of the conduct of the liquidation and the disposal of the company's property, and stating whether or not any person has appropriated or otherwise misapplied any of the company's assets, become personally liable for any of the company's debts or liabilities, or has otherwise been guilty of any misfeasance or breach of fiduciary duty in relation to the company or of any other matter referred to in the Law has come to his attention, and
- call a general meeting of the company at which the account shall be presented and an explanation shall be given of it.

After such a meeting the liquidator shall give notice to the Registrar of the holding of the meeting and of its date. The Registrar shall publish the fact of the final meeting and that the company is to be dissolved in such manner and for such period as he thinks fit.

On the expiration of 3 months beginning on the date of the delivery of such notice, the company is dissolved.

## **Compulsory Winding Up**

### **1. What is compulsory liquidation?**

Compulsory liquidation of a company is when the company is ordered by a court to be wound up.

### **2. In what circumstances can the Court wind a company up?**

A company may be wound up by the Court if:

- the company has by special resolution resolved that the company be wound up;
- the company does not commence business within one year beginning on the date of its incorporation;
- the company suspends business for a whole year;
- the company has no members (other than the company itself where it holds its own shares as treasury shares);
- the company is unable to pay its debts;
- the company has failed to comply with a direction of the Registrar to change its name;
- the company has failed to hold a general meeting of its members (unless it has passed a waiver resolution in accordance with the Law);
- the company has failed to send its members a copy of its accounts or reports in accordance with the Law; or
- the Court is of the opinion that it is just and equitable that the company should be wound up.

### **3. What is meant by 'unable to pay its debts'?**

A company shall be deemed to be unable to pay its debts if:

- a creditor to whom the company owes a sum exceeding £750 which is then due serves on the company through the office of Her Majesty's Sergeant at the company's registered office a written demand for payment; and
- the company, for a period of 21 days immediately following the date of service, neglects to pay the sum or to secure payment to the reasonable satisfaction of the creditor,

or if it is proved to the satisfaction of the Court that the company fails to satisfy the statutory solvency test.

A company satisfies the statutory solvency test if:

- it is able to pay its debts as they become due;
- the value of the company's assets is greater than the value of its liabilities;
- in the case of a supervised company (being supervised by the Guernsey Financial Services Commission)

the company satisfies any other requirements as to solvency imposed in relation to it by or under certain Guernsey laws which protect investors; regulate insurance business, insurance managers and intermediaries; supervise banks; and regulate fiduciaries.

In determining whether the value of a company's assets is greater than the value of its liabilities the directors:

- must have regard to (i) the most recent accounts of the company, and (ii) all other circumstances that the directors know or ought to know affect, or may affect, the value of the company's assets and the value of the company's liabilities; and
- may rely on valuations of assets or estimates of liabilities that are reasonable in the circumstances.

#### **4. Who can apply for a company to be compulsorily wound up?**

An application for the compulsory winding up of a company may be made to the Court by the company, by any director, member or creditor thereof or by any other interested party.

An application for the compulsory winding up of a supervised company or a company engaged in a financial services business shall not be heard unless a copy of the application is serviced on the Guernsey Financial Services Commission not less than 7 days before the day of the hearing of the application.

Additionally an application for the compulsory winding up of a company may be made by the Department of Commerce and Employment or the Guernsey Financial Services Commission if it is desirable that the company should be wound up for the protection of the public or of the reputation of the Bailiwick.

#### **5. Who acts as the liquidator when an order is made to compulsory wind up a company?**

On the making of a compulsory winding up order the Court shall appoint a liquidator nominated by the applicants or, where no person has been nominated, make such appointment as it thinks fit.

Before appointing a person to the office of liquidator, the Court may satisfy itself as to whether he is qualified to be appointed.

#### **6. What are the powers of the liquidator?**

A liquidator has power:

- to bring or defend civil actions in the name of and on behalf of the company;
- to carry on the business of the company to the extent expedient for the beneficial winding up of the company;
- to make calls of capital;
- to sign all receipts and other documents in the name of and on behalf of the company, and to do any other act relating to the winding up, and for these purposes to use the company seal whenever necessary; and
- to do any act authorised by the Court.

Following the appointment of the liquidator all the powers of the directors cease, except to the extent that the liquidator or the Court sanctions their continuance. If anyone purports to exercise any powers of a director when their powers have ceased then they will be guilty of an offence and could face a fine of up to £10,000.

The company shall cease to carry on business except in so far as may be expedient for the beneficial winding up of the company and subject to this the company's corporate state and powers shall, notwithstanding anything to the contrary in its memorandum and articles, continue until dissolution.

Any transfer of a company's shares made after the commencement of a winding up, other than a transfer made to

or with the sanction of a liquidator, is void.

## **7. Is notice required to be given of a compulsory winding up?**

The liquidator shall within 7 days after being appointed send a copy of the compulsory winding up order to the Registrar. The Registrar shall give notice of the fact that the company is being compulsorily wound up in such manner and for such period as he thinks fit.

## **8. What happens when the winding up is complete?**

When the liquidator has realised the company's assets he shall apply to the Court for the appointment of a Commissioner of the Court to examine his accounts and to distribute the funds derived from the company's assets.

The Commissioner shall:

- arrange a creditors meeting for the purpose of examining and verifying the financial statements and creditors claims and preferences; and
- fix a date for the distribution of the company assets.

If a claim is disputed the Commissioner shall refer the decision on the claim to the Court; but otherwise, subject to the comments below, the liquidator may distribute such part of the company's assets as he thinks fit in relation to any claim.

A notice shall, on 2 occasions falling in successive weeks, be placed in La Gazette Officielle stating the day of the meeting or, as the case may be, the distribution (which day shall not in either case be less than 14 days after the day of the second notice).

## **9. Who bears the expenses in a compulsory winding up?**

All costs, charges and expenses properly incurred in the compulsory winding up, including the remuneration of the liquidator, are payable from the company's assets in priority to all other claims. The liquidator's fee shall be fixed by the Court.

## **Distribution of company's property**

### **1. What happens to a company's property on a voluntary or compulsory winding up?**

Subject to the provisions of:

- the Law and any rule of law as to preferential payments;
- any agreement between the company and any creditor thereof as to the subordination of the debts due to that creditor to the debts due to the company's other creditors; and
- any agreement between the company and any creditor thereof as to set-off;

the company's assets in any winding up shall be realised and shall be applied in satisfaction of the company's debts and liabilities *pari passu*. Any surplus shall thereafter be distributed (unless the memorandum or articles provide otherwise) among the members according to their respective rights and interests in the company.

## **RIDER**

This paper is intended as a general review and aide memoire. It does not create a retainer or lawyer-client relationship and does not provide comprehensive or specific legal advice concerning the matters contained within it. This paper should not be relied upon as giving or providing advice on any individual case.