NATURE DUTIES AND RIGHTS OF COMPANY LIQUIDATORS IN BRITAIN

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Introduction

This paper is a lucid appraisal of the nature, duties and rights of company liquidators in Britain. In most jurisdictions, a liquidator's powers are specified by statutes.[1] Certain powers are generally exercisable without the requirement of any approvals; others may require sanction, either by the court, by an extraordinary resolution (in a members' voluntary winding up) or the liquidation committee or a meeting of the company's creditors (in a creditors' voluntary winding up). The liquidator would usually require permission to pay creditors and to make compromises or arrangement with creditors.

[1]Schedule 4 to the Insolvency Act 1986 United Kingdom

NATURE, DUTIES AND RIGHTS OF COMPANY LIQUIDATORS IN BRITAIN

Without sanction (unless it is a compulsory winding-up) the liquidator may carry on legal proceedings and carry on the business of the company so far as may be necessary for a beneficial winding-up. Without sanction, the liquidator may, sell company property, claim against insolvent contributories, raise money on the security of company assets, and do all such things as may be necessary for the winding-up and distribution of assets. Compulsory liquidation of a company is when the company is ordered by a court to be wound up.[2]

The High Court, or a county court with the appropriate jurisdiction, may order the winding-up of a company. This maybe, for example, on the petition of a creditor or creditors on the grounds that the company cannot pay its debts.

A company is regarded as unable to pay its debts if, for example, a creditor:

- Is owed more than £750;
- Presents a written demand in the prescribed from (known as a statutory demand) to the company; and
- The company fails to pay, secure or agree a settlement of the debt to the creditor's reasonable satisfaction.

There are other situations where a company is deemed unable to pay its debt. The court may also order the company to be wound up on the petition of:

- The company itself;
- The company's directors or one or more members;
- The Secretary of State for Business enterprise and Regulatory Reform:

[2] Sections 165-168 of the Insolvency Act 1986 United Kingdom.

- The Financial Services Authority (formerly the Securities and Investment Board) or the Official Receiver;
- The Official Receiver

In the case of a European Company (EC) registered in Britain, the Secretary of State may petition the Court for a winding up order on the grounds that it appears that the European Company does not have both its head officer and registered office in Britain. Unless the court directs other arrangements, the petition must be advertised in the Gazette. If the petition is successful, the company must send the winding-up order to the Registrar straightaway and it will be placed on the company's public record.

The petition itself is not presented to the Registrar so it will not appear on the public records. The Official Receiver becomes liquidator on the making of a winding-up order against a company, unless the court orders otherwise. Liquidation can either be compulsory (sometimes referred to as a creditors' liquidation) or voluntary (sometimes referred to as a shareholder's liquidation, although some voluntary liquidations are controlled by the creditors).

The parties who are entitled by law to petition for the compulsory liquidation of a company vary from jurisdiction, but generally, a petition may be lodged with the court for the compulsory liquidation of a company by;

- The company itself
- Any creditor who establishes a prima facie case
- Contributories[3]
- The Secretary of State (or equivalent)

[3]Sections 74 and 75 of the Insolvency Act 1986 United Kingdom

- The Official Receiver

Grounds for Liquidation

The grounds upon which one can apply for a compulsory liquidation also differs between jurisdiction, but the normal grounds to enable an application to the court for an order to compulsorily wind-up the company are;

1. The company has so resolved
2. The company was incorporated as a public company, and has not been issued with a trading certificate (or equivalent) within 12 months of registration
3. It is an "old public company" (i.e. one that has not re-registered as a public company or become a private company under more recent companies legislation requiring this)
4. It has not commenced business within the statutory prescribed time (normally one year) of its incorporation, or has not carried on business for a statutorily prescribed amount of time.
5. The number of members has fallen below the minimum stipulated by statute.
6. The company is unable to pay its debts as they fall due
7. It is just and equitable to wind up the company.[4]

In practice, the vast majority of compulsory winding up applications are made under one of the last two grounds. An order will not generally be made if the purpose of the application is to enforce payment of a debt which is bona fide disputed.[5] A just and equitable" winding up enable the ground to subject the strict legal rights of the shareholders to equitable considerations. It can take account of personal relationships of mutual trust and confidence in

[4]Section 122 of the Insolvency Act 1986, United Kingdom
[5]See *Stonegate Security Ltd. V. Gregory* (1980) Ch 576, Per Buckley L.J. at 579

small parties, particularly, for example, where there is a breach of an understanding that all of the members may participate in the business,[6] or of an implied obligation to participate in management.[7] An order might be made where the majority shareholders deprive the minority of their right to appoint and remove their own director.[8] Once liquidation commences (which depends upon applicable law, but will generally be when the petition was originally presented, and not when the court makes the order),[9] dispositions of the company's property are generally void,[10] and litigation involving the company is generally restrained.[11]

Upon hearing the application, the court may either dismiss the petition, or make the order for winding-up. The court may dismiss the application if the petitioner unreasonably refrains from an alternative course of action.[12] The court may appoint an official receiver, and one or more liquidators, and has general powers to enable rights and liabilities of claimants and contributories to be settled. Separate meetings of creditors and contributories may decide to nominate a person for the appointment of liquidator and possibly of supervisory liquidation committee.

The liquidator presents an account to final meetings of creditors and members of the company. He or she must advertise the meetings in the gazette at least one month before. Voluntary liquidation occurs when the members of the company resolve to voluntarily wind-up the affairs of the company and dissolve. Voluntary liquidation begins when the company passes the resolution, and the company will generally cease to carry on business at the time (if it has not

[6]See *Ebrahimi V Westbourne Galleries* (1972) 1 AER 492
[7]See *Tay Bokchoon V Tahansan SDN BhD* (1987) BCLC 472
[8]*Re A & BC Chewing Gum Ltd* (1975) 1 WLR 472
[9]Section 129 Insolvency Act United Kingdom
[10]Section 127 Insolvency Act 1986, United Kingdom
[11]Section 130 of the Insolvency Act 1986, United Kingdom
[12]*Re A Company* (No 001573 of 1983) (1983) COM LR 202

done so already). If the company is solvent, and the members have made a statutory declaration of solvency, the liquidation will proceed as a members' voluntary winding-up. In such case, the general meeting will appoint the liquidator(s). If not, the liquidation will proceed as a creditor's voluntary winding-up, and a meeting of creditors will be called to which the directors must report on the company's affairs. Where a voluntary liquidation proceeds by way of creditor's voluntary liquidation, a liquidation committee may be appointed.

Where a voluntary winding-up of a company has begun, a compulsory liquidation order is still possible, but the petitioning contributory would need to satisfy the court that a voluntary liquidation would prejudice the contributories .A corporate voluntary arrangement is when a company makes an agreement with its creditors by proposing a 'composition in satisfaction of its debt' or a 'scheme of arrangement of its affairs'. This means an arrangement, approved by the court, in which the company has formally agreed on some terms with its creditors for the settlement of its debts.

A corporate voluntary arrangement may be proposed by:

- The administrator, if there is an administration order;
- The liquidator, if the company is being wound up; or
- The directors, in other circumstances.

When the directors have proposed the arrangement, the nominee appointed to supervise its implementation reports to the court within 28 days on whether, in his or her opinion, meetings of the company and of its creditors should be called. The meetings summoned by the nominee decide whether to approve the arrangement which, subject to certain restriction, may be approved with or without modifications. It is then binding on all creditors who had notice of

the meeting and were entitled to vote. All creditors who had notice of the meeting are bound by the terms of the arrangement.

There are two kinds of voluntary liquidation:

- Members' voluntary liquidation (MVL) – which means the directors have made a statutory declaration of insolvency;
- Creditors' voluntary liquidation (CVL) – which means that the directors have not made such a declaration.

Members' voluntary liquidation takes place when the directors of a company believe that the company is solvent. A majority of the company's directors must make a statutory declaration of solvency in the 5 weeks before a resolution to wind up the company is passed. The statutory declaration will state that the directors have made a full inquiry into the company's affairs and that, having done so, they believe that the company will be able to pay its debts in full within 12 months from the start of the winding-up.

The declaration will include a statement of the company's assets and liabilities as at the least practicable date before making the declaration. The liquidation starts when the members, in general meeting, pass a resolution (Companies Act 1985 or Companies Act 2006) (usually a special resolution) to wind up the company voluntarily.

Notice of the special resolution for voluntary winding-up of the company must be published in the Gazette within 14 days of the general meeting. The company must also send a copy of the declaration and the special resolution to the Registrar within 15 days of the general meeting. A company may go into creditors' voluntary liquidation when it cannot pay its debts. The

company passes a special resolution (Companies Act 1985 or Companies Act 2006) to say that it cannot continue in business because of its liabilities and that it is advisable to wind up.

The resolution must be:

- Advertised in the Gazette within 14 days; and
- Sent to the Registrar within 15 days.

A meeting of creditors must be held in the next 14 days after passing the resolution. Notice of the meeting must be sent to the creditors at least 7 days before the meeting. Also, the directors must prepare a statement of affairs for consideration at the meeting, and appoint one of them to attend and preside over the meeting.

When the liquidator is appointed, the directors must provide him or her with a statement of affairs and otherwise co-operate with the liquidator. Creditor's voluntary liquidation is appropriate when the company is insolvent, and not viable. The market has declined for the company's services or products. And when the directors don't believe that they have the determination needed to rescue the company, it is used as part of the restructuring of a group. The meeting must be advertised in the Gazette and in two newspapers in the area where the company has its principal place of business. If the liquidator decides that the company will not be able to pay its debts in full in the period stated in the directors' statutory declaration of insolvency, he or she must call a meeting of the creditors which must be held within 28 days. The liquidation becomes a creditor's voluntary liquidation from the date of the meeting.

The liquidator must;

- Post a notice of the meeting to each creditor at least 7 days before the date of the meeting;

- Advertise the date of the meeting in the Gazette and in 2 newspapers in the area where the company has its principal place of business; and
- Prepare a statement of affairs for consideration at the meeting. A copy of the statement must be sent to the Registrar within 7 days of the meeting.

Duties of Company Liquidators in Britain

In compulsory liquidation, the liquidator must take control of all property to which the company appears to be entitled.[13] The exercise of his powers is subject to the supervision of the court. He may be compelled to call a meeting of creditors or contributories when requested to do so by those holding above the statutory minimum.[14]

In a voluntary winding-up, the liquidator may exercise the court's power of setting a list of contributories and of making calls, and he may summon general meetings of the company for any purpose he thinks fit.[15] In a creditor's voluntary winding-up, he must report to the creditor's meeting on the exercise of his powers.[16] The liquidator is generally obliged to make returns and accounts,[17] owes fiduciary duties to the company and should investigate the causes of the company's failure and the conduct of its managers, in the wider public interest of action being taken against those engaged in commercially culpable conduct.[18] A liquidator who is appointed to wind-up a failing business should act with professional efficiency and not exercise the sort of complacency that might have caused the business to wane in the first place.

The following are some of the important Duties of the Company Liquidator;

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[13]Section 144 of the Insolvency Act 1986 United Kingdom
[14]In the United Kingdom, One-Tenth of the Total Value → see Section 168 Insolvency Act 1986 United Kingdom
[15]Section 165 of the Insolvency Act 1986 United Kingdom
[16]Section 166 Insolvency Act 1986 United Kingdom
[17]Section 170 Insolvency Act 1986 United Kingdom
[18]*Re Pantmaenog* (2004) IAC 158

Submission of Report to the tribunal: Where a winding-up order is made by the court. On the application of the Company Liquidator within sixty days from the order, he should submit an exhaustive Company Report to the Tribunal containing details of assets and liabilities of the Company, amount of capital issued, subscribed or paid up, details of trademarks and intellectual properties, details of subsisting contracts, joint ventures and collaborations, details of holding and subsidiary companies or any other information which the Tribunal may direct or the company Liquidator.[19]

Act as Custodian of Company's Property: The Company Liquidator is to act as custodian of Company's property and should take control over all the property, effects and actionable claims to which the company is or appears to be entitled to and take such steps and measures, as may be necessary, to protect and preserve the properties of the company. The Company Liquidator has to submit periodical reports to the tribunal at the end of each quarter.[20] **Maintenance of Company' Books of Account:** The Company Liquidator has to maintain proper and regular books of accounts including accounts of receipts and payments made by him. A liquidator runs the liquidation, fills out all the forms, collects assets and turns them into cash. He works out the debt and pays the creditors from the assets, if there were any. Other duties include to carry on the business of the company so far as may be necessary for the beneficial winding up of the company; to execute, in the name and on behalf of the company, all deeds, receipts, and other documents; to raise on the security of the assets of the company, any money required; to institute or defend any suit, prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company; to invite and settle claim of

[19] Ibid
[20] Ibid

creditors and distribute sale proceeds; and to do all such other acts and things as may be necessary for the winding up of the company and distribution of its assets.[21]

Essentially, liquidators convert the assets of the business into cash and adjudicate the claims of the creditors by working out how much is owed by the company. They investigate and report upon the conduct of the offices of the company directors and shadow directors. Liquidators make payments where monies and dividends are available to creditors in order of priority.[22]

Post Liquidation Duty

The liquidator presents an account to final meetings of creditors and members of the company. He or she must advertise the meetings in the gazette at least one month before. Within one week of the meeting having taken place, the liquidator must send the account to the Registrar and a return of the final meeting. Unless the court makes an order deferring the dissolution of the company, it is dissolved three months after the return and account are registered at Companies House.

The Official Receiver has a duty to investigate the company's affairs and the causes of its failure. He also decides whether to call meetings of the creditors and contributories (that is, those people liable to contribute to the assets of the company if it is wound up) for the purpose of appointing a liquidator in his place. If he decides not to call meetings, he must notify the creditors, contributories and the court of his decision.[23]

On the other hand, if he decides to call meetings, a liquidator may then be appointed in place of the Official Receiver. The liquidator must notify the Registrar of his or her appointment

[21] Ibid
[22] Ibid
[23] Ibid

immediately. If the position of liquidator becomes vacant at any time, the official receiver becomes the liquidator for the duration of the vacancy.[24]

Rights of Company Liquidators in Britain

The Liquidators rights in a Creditors Voluntary Liquidation are many and varied. In addition his rights will vary significantly because of the different circumstances he will encounter in each company he becomes liquidator of. The following are the general principles a liquidator should follow in this type of liquidation.

Asset Recovery

- Collect the debt of the company.
- Close bank accounts and collect and credit balances.
- Assemble stock and offer for sale.
- Dispose of any plant and equipment.
- Deal with any other known or identified assets.

Administration

- Establish receipts and payments accounts.
- Open dedicated bank account to receive all realized funds.
- Contact all creditors.

Reporting

- Investigate the company and the actions of the directors.
- Submit report to the ODCE under section 56 of the Company Law Enforcement Act 2001.

[24] Ibid

- Provide end of year reports to Creditors and Members including Receipts and Payments Accounts.
- Submission of Forms to Companies registration Office regarding the progress of the Liquidation Creditors.[25]

The liquidator is appointed to wind up the company's affairs. The liquidator does this by calling in all the company's assets and distributing them to its creditors. If anything is left over, the liquidator distributes it among the members of the company. Within 14 days of being appointed, a liquidator must publish a notice of appointment in the Gazette and notify the Registrar. If the liquidation is voluntary, the liquidator must also give notice in a newspaper in the area where the company has its principal place of business.

The liquidator must send a statement of affairs and Form 4.20 to the Registrar within 7 days of the creditors' meeting. The liquidator must also send a statement of receipts and payments for the first 12 months of liquidation. After that, statements must be sent every 6 months until the winding-up is complete. All liquidators, administrators, administrative receivers and supervisors taking office on or after 29 December 1986 must be authorized insolvency practitioners.

Insolvency practitioners may be authorized by:

- The Chartered Association of Certified Accountants;
- The Insolvency Practitioner's Association;
- The Institute of Chartered Accountants in England and Wales;
- The Institute of Chartered Accountants in Ireland;

[25] Ibid

- The Institute of Chartered Accountants of Scotland;
- The Law Society;
- The Law Society of Scotland; or
- The Secretary of State for Trade and Industry.

The liquidator, administrative receiver, administrator or Official Receiver has a duty to send the Secretary of State for Business, Enterprise and Regulatory Reform, a report on the conduct of all directors who were in office in the last 3 years of the company's trading. The Secretary of State has to decide whether it is in the public interest to seek a disqualification order against a director.

Examples of the most commonly reported conduct are:

- Continuing the company's trading when the company was insolvent;
- Failing to keep proper accounting records;
- Failing to prepare and file accounts or make returns to Companies House; and
- Failing to send in returns or pay to the Crown any tax that is due.

When the registrar receives notice from the liquidator of the final meeting of creditors or notice from the Official Receiver that winding-up is complete, the Registrar will register it and publish its receipt in the Gazette. Unless the Secretary of State directs otherwise, the company will be dissolved three months after the notice was registered at Companies House. If the Official Receiver, acting as liquidator, is satisfied that the company's realizable assets (that is, assets which could be sold or disposed of to raise money) will not cover the expenses of winding-up and that no further investigation of the company's affairs is necessary, he may

apply to the Registrar for early dissolution of the company. The company will be dissolved three months after the application is registered at Companies House.[26]

EU companies that have not registered a place of business or branch within England and Wales can submit details of insolvency proceedings opened in another Member State of the EU Council Regulation (EC) No. 1346/2000 became effective 31 May 2002. The Regulation is directly applicable and an integral part of each member state's law (except Denmark where parallel legislation will apply).

To implement the Regulation in the UK, it was necessary to make some limited changes to the Insolvency Act 1986 and the Insolvency Rules. The Regulation restricts where insolvency proceedings can be opened to the country where the debtor has his "centre of main interests". It requires insolvency proceedings opened under the Regulation to be recognized, and liquidators to be able to exercise their powers, in all member states.[27]

The relevant company insolvency proceedings covered by the Regulation in the UK are:

- Winding up by or subject to the supervision of the court;
- Creditors' voluntary winding up (with confirmation by the court);
- Administration; and
- Corporate voluntary arrangements under insolvency legislation.

The Regulation does not apply to receiverships – administrative or otherwise – nor to members' voluntary winding up or to winding-up orders. As a result of the regulations a number of statutory forms (relating primarily to the opening of insolvency proceedings) have

[26] Ibid
[27] Ibid

been amended and one new form (Form 7.20 Confirmation by Court of Creditors' Voluntary Winding Up) has been introduced.

Insolvency proceedings opened in this Britain will continue as normal. However, insolvency proceedings may be opened in another EU Member State if the company has its centre of main interests there. The public records of companies registered in England and Wales will show insolvency proceedings opened in another Member State of the EU. This will be the only indication that there are insolvency proceedings taking place abroad, the T (for liquidation) marker will not appear against the company name on the Registrar's index of company names.[28] Insolvency proceedings may be opened in the UK and be governed by UK law if the company has its centre of main interests here.

Alternatively, insolvency proceedings may be opened in another Member State. The public records of EU companies that have registered a place of business or branch within England and Wales will show insolvency proceedings opened in another Member State of the EU. This will be the only indication that there are insolvency proceedings taking place abroad and the T (for Liquidation) marker will not appear against the company name on the registrar's index of company names.[29]

[28] Reiner Kraakman, Henry Hansmanu ,Paul L. Davies, Klaus Hopt. Gerard Hertig, Hidek Kawda: *The Anatomy of Corporate Law* (Oxford University Press, 2004) pp. 50 – 51.
[29] David Kershaw: *Company Law in Context* (Oxford University Press, 2009) pp. 30 – 32.