TERMINATION OF APPOINTMENT AND REMEDIES FOR BREACH OF DUTIES BY COMPANY LIQUIDATORS IN NIGERIA, BRITAIN AND BANKRUPTCY PRACTITIONERS IN UNITED STATES OF AMERICA

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Introduction

This paper examines the termination of appointment and remedies for breach of duties by company liquidators/bankruptcy practitioners in Nigeria, Britain and bankruptcy in United States of America.

Termination of Appointment of a Company Liquidator in Nigeria

The appointment of a liquidator may be terminated in a number of ways by death,[1] insolvency,[2] removal, and resignation[3] or by release.[4] It is now necessary to look a little more closely at the exact nature of procedure in which a liquidator's appointment may be terminated.

Resignation

A liquidator in compulsory winding up who desires to resign his office shall summon separate meetings of the creditors and contributories of the company to decide whether or not the resignation shall be accepted. If the creditors and contributories by ordinary resolution both agree to accept the resignation of the liquidator, he shall file with the Registrar General, a memorandum of the resignation and shall send notice thereof to the official Receiver after which the resignation takes effect.[5] The rule does not apply to voluntary winding up subject to supervision. Where the liquidator was not appointed by the court, the procedure is that the liquidator sends a report of the meetings to the official receiver, having reported the results thereof to the court. The official receiver or the liquidator then applies to the court by summons in order for the court to determine whether or not the resignation is to be accepted. The court then gives such directions or makes such orders as it deems necessary.

The above procedure is similar to the procedure of resignation of a liquidator in England. A liquidator appointed by the court may resign under the companies Act of 1985 by virtue of section 536(i). Under this procedure, a liquidator who desires to resign his office must summon separate meetings of the creditors and contributories.[6] If the creditors and contributories by ordinary resolution both agree to accept the resignation of the liquidator, he must file with the

[1] Section 422 (5) of CAMA, Rule 41 (8) of Companies Winding Up Rules 2001
[2] Ibid Rule 151
[3] Ibid Rule 41
[4] Ibid Rule 163
[5] Ibid Rule 150
[6] Rule 167 of the English Companies Winding-up Rule 1949

Registrar of Companies a memorandum of his resignation and must send a notice of it to the official Receiver, and the resignation takes effect. In any other case the liquidator must report to the court the result of the meetings and must send a report to the official receiver.[7]

Order of Release

Where the liquidator has realized all the property of the company, or so much there of as may, in his opinion, be realized without needlessly protracting the liquidation, and has distributed a final dividend, if any, to the creditors and adjusted the rights of the contributors among themselves, and made a final return, if any, to the contributors who has resigned, or has been removed from his office, he may apply to the commission for release[8] and may be released subject to an appeal to the court.[9] Hence, the liquidatorship draws to an end when the affairs of the company have been wound up that is, all the assets of the company have been realized or at least substantially realized, so that it may be unnecessary to prolong or continue with and the liquidator has distributed the assets and adjusted the rights of the contributories and has submitted his final report to the commission, or, he has resigned, he has been removed from office. But until a formal release has been granted, the liquidator is still under the obligations of the liquidatorship. The release is a clean bill of health, given by the commission upon being satisfied, from the liquidator's report and perhaps from the results of the periodic audits, that the liquidator has no taints and that the affairs of the company are truly at an end. The provision of section 431 of CAMA is similar to section 545(2) of the Companies Act of England 1985 as regard to the release of a liquidator. The provision of section 431 of CAMA provides for release of a liquidator in voluntary winding up.

[7] Section 431 (1) & (2) CAMA
[8] Section 431 of CAMA
[9] Section 431 (1) & (2) CAMA of

Effects of Release

An order of release has important consequences: it operates as a removal from office, it terminates the liquidator's power to deal with company's property[10] and it has the effect of discharging him from all liability in relation to his conduct as liquidator.[11] We submit that for those interested in the liquidation it is therefore a serious matter, and to ensure that they are not summarily deprived of their remedies for breach of duty by the liquidator, CAMA and the Companies Winding up Rules contain safeguards designed to protect their interest. In the first place, the liquidator must give notice of his intention to apply for release, to all creditors must give notice of his intention to apply for release, to all creditors who have proved their debt[12] and must accompany this notice with a summary of all receipts and payments in the winding up. He then applies to the Commission formally to be released. The commission, upon receipt of the application, causes a report to be prepared on the audit of the liquidator's account. The commission then examines the report together with any objections, if any, to the application for release by any contributory, creditor or notice of his intention to do so to all the creditors who have proved their debts and to all the contributories, and must send with the notice a summary of all receipts and payment in the winding up.[13] The Secretary of State may, on the liquidator's application cause a report on his account to be prepared.[14] On his complying with all the secretary of state's requirements the secretary of the state may take into consideration the report and any objections which may be urged by any creditor or contributory or person

[10] *See Rye V Purcell* (1929) 1 KB 446
[11] For the reason it is a valuable right, but liquidators seldom apply for their release because of the expense involved.
[12] Rule 177 of Companies Winding-up Rule 2001
[13] English Companies Winding-Up Rule of 1949
[14] Section 545 (2) of England Companies Act of 1985

interested against the release of the liquidator, and must grant or withhold the release, subject to an appeal to the high court.[15]

If the release of the liquidator is withheld, the court may, on the application of any creditor or contributory or person interested, make such order as it thinks just, charging the liquidator with the consequences of any act or default which he may have done or made contrary to his duty.[16] An order of the secretary of state releasing the liquidator discharges him from all liability in respect of any act done or default made by him in the administration of the company's affairs or otherwise in relation to his conduct as liquidator.[17] But any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact.[18] On a liquidator being released, he must handover to the Official Receiver or the new liquidator, as the case may be, all books kept by him and all other books, documents, papers and accounts, in his possessions relating to the office of liquidator.[19] His release does not take effect until he has done so.

Removal of a Liquidator

A liquidator may "on cause shown", be removed by the court.[20] There is no indication of who may apply for the liquidators removal, both a creditor or contributory would certainly have the necessary locus standi, also the liquidator himself.[21]

Grounds for Removal

[15] Ibid Section 545 (3)
[16] Ibid Section 545 (4)
[17] Ibid Section 545 (5)
[18] Ibid Section 545 (5)
[19] Ibid Rule 180 (1)
[20] Section 422 (5) of CAMA
[21] *Re Leymar Construction Property Ltd.* (1978) 3 A.C.L.R. 622

Jessel M.R. in Re Sir John Moore Gold Mining Co[22] believes that the phrase "on cause shown" referred to "some unfitness of person – it may be from personal character or from his connection with other parties or from circumstances in which he is mixed up". On this principle, the court has removed a liquidator whose independence or fiduciary position was compromised[23] by personal indebtedness to the company[24] or by his effort to prevent misfeasance proceedings from being taken against him.[25] It has also been established in Re Adam Eyton & Co[26] that a liquidator may also be removed from office whenever the court is satisfied that this is in the best, substantial and honest interest of the liquidation. This requirement may be satisfied by proof of some breach of duty[27] on the party of the liquidator or want of efficiency[28] or conflict of duty[29] on the part of liquidator.

5.3 Remedies for Breach of Duties by Company Liquidators in Nigeria

Where a liquidator has not obtained an order of release or discharge, the creditors have a variety of remedies against him in respect of breaches of duty committed in the course of winding up. We shall now discuss some of these remedies as regard to prior dissolution and after dissolution. Before dissolution of the company the remedies against the liquidator are dependent on their availability upon the fact that the company is still in existence and the liquidator is still in the process of conducting the winding up.

Injunction

[22] (1987) 12 CH.D 326
[23] *Re Devonishire Silkstone Coal Co.* (1878) W.N. 71
[24] *Re Mutual Livestock Financial & Agency CO.* (1886) 12 V.L.R. 777
[25] *Re Sir John Moore Gold Mining Co.* (1932) S.R. (N.S.W) 301
[26] (1887) 36 CH.D 299 at 306
[27] *Re Scotch Granite Co.* (1868) 17 L.T. 538
[28] *Re Federal Bank of Australia* (1893) 20 VLR 199
[29] *Re Intercontinental Properties Ltd.* (1977) 2 A.C.L.R. 488, 492

The remedy of injunction has been sought to prevent a liquidator from committing a breach of duty by applying for an injunction to restrain him from taking a particular course of action. Such orders have been granted where the liquidator was proposing to sell property in respect of which a creditor claimed a lien[30] or to distribute the assets without making provision for the plaintiff debt.[31] However, this sort of remedy is hardly resorted to because of the ample powers of supervision by the creditors, committee of inspection, the court, and the corporate affairs commission normally make it unnecessary to resort to independent proceedings of this kind in order to control the conduct of liquidators in the winding up process.

Remedy to Account for Profit

In consequence of the fiduciary position which exists between a liquidator and the company which he is winding up, the liquidator is debarred from making profits, entering into contracts with the company, or utilizing knowledge acquired in the course of his duties for the purpose of private gain. If he fails to observe this duty, any contract so made is liable to be set aside[32] and he may be made to account for benefits which he has received.[33]

Misfeasance proceedings

Misfeasance can be used to refer to an improper performance of lawful act. It is the doing of a lawful act in an unlawful way.[34] As used in section 507 of CAMA, "misfeasance and breach of trust" includes a breach by a promoter, director, manager, auditor, liquidator or officer of his duty to the company and the direct result of this, has been misapplication or loss of its assets and for which he could be made responsible in an action. In Re Llynvi and Tondu Co,[35]

[30] *Blakely V. Dent* (1876) 15 W.R. 663
[31] *Re Telegraph Construction Co.* (1780) 10 Eq. 384
[32] *Silkstone Coal Co. V. Edey* (1900) 1 CH 167. Also see Rule 144 of Companies Winding up Rule 2001
[33] *Christie V. Edwards* (1939) 1 D.L.R. 158
[34] *Mitra's Legal and Commercial Dictionary* (Calcutta), Eastern Law House, 4th Ed. P. 536
[35] (1889) 6 T.L.R. 11

North J is reported to have said that the proper mode of recovering secret profits from a liquidator was not to surcharge his accounts with the amount of the profit but to take misfeasance proceedings against him. Whether or not it is the only way, there is no doubt that proceedings for misfeasance are the usual procedure in cases where it becomes necessary to inquire into the conduct of a liquidator with a view to compelling him to repay or restore any money or property which he has misapplied or become accountable for, or ordering him to make compensation for misfeasance or breach of trust.

Such proceedings have been instituted in a variety of situations, such as where the liquidator has made an imprudent compromise,[36] has sold assets at an undervalue[37] has paid an unenforceable debt[38] or failed to discharge the liabilities of the company.[39] However, the remedy is available only on certain conditions, some of which tend to diminish its usefulness rather considerably. It creates no new rights but simply provides a summary procedure for enforcing existing rights to money and property which are then passed into the general funds of the company, and it is therefore available only while the company is still in existence prior to dissolution.[40] Furthermore, it is now settled that the procedure can only be invoked in respect of something akin to breach of trust,[41] so that ordinary common law negligence on the part of the liquidator is outside its scope.[42] In order to sustain claim on misfeasance, the applicant must show that there is a breach of duty or misfeasance in the nature of a breach of trust or duty, loss arising thereof, and an interest in the result of the application. The

[36] *Re Windsor Steam Coal CO.* (1929) 1 CH 151
[37] *Re B. Johnson & Co. (Builders) Ltd.* (1955) CH 634 Where, however the Liquidator was exonerated
[38] *Re Home & Colonial Insurance Co.* (1930) 1 CH 102
[39] *Re Watch Makers Alliance Ltd* (1905) Tax Cas 177
[40] *Thomas Franklin& Co. V. Cameron* (1935) 36 S.R.
[41] *Re B. Johnson & Co. (Builders) Ltd. Supra*
[42] In new brilliant freehold *Gold Mining Co. V. Mills* (1928) St. R. Qd 120 at 126 it was started that a liquidator need not display a greater degree of skill and care than a director, but this circumscribes his duties too narrowly.

misfeasance or breach of duty must be in relation to the company and so also must the money or property involved be that of the company. The "misfeasance" which must be in the nature of a breach of trust must be "an act resulting in actual loss of the company".[43]

Forfeiture of Remuneration

Although, the Companies Act does not expressly provide for it, but the court certainly has the power of depriving the liquidator of his remuneration on account of breach of duty on his part. In bankruptcy this power is sometimes exercised in conjunction with an order for the removal of the trustee, but, although a liquidator who is removed on grounds of misconduct may suffer forfeiture of his remuneration,[44] he will not ordinarily be deprived of his right to receive expenses he has paid out of his own funds.[45] All of the above remedies presuppose the continued existence of the company. The question whether any remedies are available against a liquidator after the company has been dissolved, is one of some difficulty. A liquidator cannot be made liable once he has obtained his discharge from the court.[46] A liquidator must ensure that the property of the company shall be applied first in satisfaction of its liabilities equally, and subject thereto, distributed among the members of the company. This has been construed as imposing upon the liquidator an absolute duty, unlimited in point of time, and one which persists even after the affairs have been fully wound up and the company dissolved. In *Pulsford V Devenish*[47] it was held that a liquidator who knowingly and wilfully failed to pay a debt of which he was aware and was therefore personally liable in an action for damages for breach of statutory duty at the instance of the unpaid creditor. Hence, it is sufficient to

[43] Buckley Op. Cit. 673
[44] *Re le Club Athletique Canadian Inc.* (1918) 20 QUE. P.R. 119
[45] *Re New Zealand Times Co.* (1914) N.Z. L.R. 677
[46] *Toronto V. Wade* (1932) 4 D.L.R. 928
[47] (1903) 2 Ch 625

show that the Plaintiffs debt would or-ought to have been paid had the liquidator performed his duties with the requisite degree of care and skill.

Furthermore, it has been held that not even dissolution of the company will relieve the liquidator of his obligation to account for monies received by him in breach of his duty not to profit from his office. In *Christie V Edwards*[48] it was decided by the supreme court of Canada that a liquidator could be made to account to the former shareholders for sums received by the company and retained by him in excess of what was required to discharge the liabilities in winding up. The court further stated that relief of this kind is available even after dissolution in a representative form of action brought by or on behalf of all those beneficially interested in the assets.

Moreover, the courts have refused to treat a liquidator, while discharging his duties in the winding up, as a trustee for individual creditors or members, who consequently are unable to sue him for breach of trust.[49] But it was suggested in Re Hill's Waterfall Estate and Gold Mining Co,[50] that, once all the liabilities have been discharged, and nothing remains to be done except to distribute among the members assets to which they are entitled by virtue of a scheme of arrangement, then the individual shareholders become equitable owners of that property. It follows that a stage may be reached in the winding up of a company when the liquidator does become a bare trustee of assets distributable among the members and so would be unable to resist an action brought to compel transfer of the assets in question.[51] If this is correct, his status as trustee would, it is submitted, remain unaffected by dissolution of the company.

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[48] (1940) S.C.R. 410
[49] *Leon V. York C. Matic Ltd.* (1966) 1 WLR 1450
[50] (1896) 1 CH 947
[51] *Miller & Maund Ltd. V. Commissioner of Stamp Duties* (1959) Tas. SR 94 .

Termination of Appointment and Remedies for Breach of Duties of Liquidators in Britain

Grounds for Termination of Appointment of Liquidators

Misconduct

The liquidator normally have a duty to ascertain whether any misconduct has been conducted by those in control of the company which has caused prejudice to the general body of creditors. In some legal systems, in appropriate cases, the liquidator may be able to bring an action against errant directors or shadow directors for either wrongful trading or fraudulent trading. The liquidator may also have to determine whether any payments made by the company or transactions entered into may be voidable as a transaction at undervalue or an unfair preference.[52]

Priority of claims

The liquidator must determine the company's title to property in its possession. Property which is in the possession of the company, but which was supplied under a valid retention title clause will generally have to be returned to the supplier. Property which is held by the company on trust for third parties will not form part of the company's assets available to pay creditors.[53] Before the claims are met, secured creditors are entitled to enforce their

[52] Law society of Scotland (LSS)
[53] *Re Oasis Merchandising* (1998) 1 Ch 170

claims against the assets of the company to the extent that they are subject to a valid security interest. In most legal systems, only fixed security takes precedence over all claims; security by way of floating charge may be postponed to the preferential creditors.

Claimants with non-monetary claims against the company may be able to enforce their rights against the company. For example, a party who had a valid contract for the purchase of land against the company may be able to obtain an order for specific performance, and compel the liquidator to transfer title to the land to them, upon tender of the purchase price.[54] After the removal of all assets which are subject to retention of title arrangements, fixed security, or are otherwise subject to proprietary claims of others, the liquidator will pay the claims against the company's assets.

Where, during the investigation of the affairs of the company, the liquidator uncovers wrongdoing on the part of the management of the company, he may have power to bring proceedings for wrongful trading or. in extreme cases, for fraudulent trading.

However, the liquidator cannot normally enter into a champertous agreement to assign the fruits of an action to a third party offering to finance the litigation, if the right to the said action accrued solely as a result of the liquidator's statutory duties, instead of being a right to action that had existed before the liquidator came on the scene. The liquidator may also seek to set aside transactions which were entered into by the company in the time immediately preceding the company going into liquidation where he forms the view that they constitute an unfair preference or a transaction at an undervalue.[55]

[54] *Re Coregrange Ltd* (1984) BCLC 453
[55] Stapledon. Institutional Shareholders and Corporate Governance 132 (1996)

Removal

Depending upon the type of the liquidation, the liquidator may be removed by the court, by a general meeting of the members or by a general meeting of the creditors.

The court may also remove a liquidator and appoint another if there is "cause showed" by the applicant for his removal. It is not normally necessary to demonstrate personal misconduct or unfitness for this purpose. However, it will be enough if the liquidator fails to display sufficient vigour in the discharge of his duties, for instance, by not establishing the current assets and recent trading of the company or in not attempting to secure favourable terms for the company in relation to the disposal of its assets.[56]

Wrongful trading

Mokal reports that in all but three cases brought involving allegations of wrongful trading, the companies were closely held and/or the claims were made against "shadow" directors (e.g. controlling shareholders) rather than actual directors. None of the three exceptions invoked a public-quoted company. According to John Armour,[57] he uncovered six unfair prejudice cases involving publicly traded companies brought between 1998 and 2000. Of these only three involving allegations of misfeasance by the company's directors and in none of these cases was the plaintiff (referred to as a "claimant" under English civil procedure rules) claiming damages or were thus) successful with their action.[58]

[56] *Prudential Assurance Co. Ltd. v. Newman industries Ltd* (1982) Ch. 204, see also Section 171 – 172 of the Insolvency Act 1986
[57] Armour J. *Enforcement Strategies in UK Company Law: A Roadmap and Empirical Assessment*", a paper prepared for Harvard Law School conference on Enforcement in Corporate Law, March 2007
[58] Law commission. Shareholder remedies LCCP M2 (1996), 235-238.

While with the US the fact that corporate law claims can theoretically be filed in 50 states means searches of judgments available on electronic databases is the only feasible way to carry out a nationwide search for law suits involving directives brought under corporate law. Matters are potentially more straightforward in the UK. While in terms of court organization the UK is comprised of three jurisdictions (England and Wales, Scotland, and Northern Ireland). The English courts dominate corporate and securities litigation in a way not replicated by any state in the US. London as a preeminent global financial centre thoroughly dominates the UK corporate and financial sectors.

As a result the UK is effectively a unitary jurisdiction for the purposes of corporate litigation involving publicly traded companies. That means counting cases filed on a nationwide basis is at least a theoretical possibility. Translating theory into practice is unfortunately not a straightforward task. Cases filed in English courts are not publicly available and are only available for inspection at the discretion of court officials. Hence, it is necessary to seek and carry out a search of cases filed, and the searching itself have to be done by hand because there is no electronic database.[59]

Court actions

Cases involving claims against directors of publicly traded companies under company law are almost certain to be brought in the chancery Division of the high court of England and Wales, based in London. All court proceedings in England and Wales involving applications based on provisions in companies' legislation must, be for companies having a paid-up capital of more

[59] The law commission's study was anonmized So it is impossible to tell whether any of the six public companies in question was publicly traded or not. as of 2002 there were 12,400 Plcs on the register of companies but only 610 companies in question was publicly trade or not. As of 2002 there were 12,400 Plcs on the register of companies but only 1600 companies listed on the London Stock exchange: Brenda.

that £20.000, and started in the companies' court specialist list within the chancery Division. All listed companies will almost certainly meet this financial criterion.[60]

Remedies for Breach of Company Liquidators Duties in Britain

Under section 178 of the Insolvency Act 1986 United Kingdom, the consequences of a breach or threatened breach of the duties are the same as for breach of the corresponding other principles in law, i.e. common law or equitable principles.

The remedy for a breach of section 174 of the Insolvency Act 1986 United Kingdom (Duty to exercise reasonable care, skill and diligence) will usually be damages. Other remedies for breachs of other general duties may include:

a) An injunction

b) Setting aside of the transaction and account of profits

c) Restoration of company property held by the directors

d) Damages

e) Termination of the director's service contract.[61]

Termination of Appointment and Remedies for Breaches of Duties by Bankruptcy Practitioners in the United States of America

This aspect of this chapter is a careful examination of the determination of appointment and remedies for breaches of duty by bankruptcy practitioners in the United States of America. It is usual that the company ceased to carry on its business prior to liquidation. Once the company

[60] Hannigan. *Company Law* (2003) 22.
[61] Rizwaan Janeel-Mokal. *Corporate Insolvency Law: Theory and Application* 289-92.

is undergoing bankruptcy. The company must cease to carry on business unless the liquidator decides it is necessary (bankruptcy practitioners) to carry on the business for a brief period in order to finalise is affairs.[62] The corporations Act states that various acts of the company after the commencement of the liquidation will be null and void including any transfer of shares or transfer of the company's property, unless the liquidator consents. Commonly, contracts are terminated by the commencement of the liquidation. Should a breach of contract occur as a result of the winding up the other party will be a creditor in the liquidation.

During the liquidation, wherever the name of the company appears it must be followed by the words "in liquidation. Persons who specialize in company liquidations and are part of a law, accounting or audit practice, can act as bankruptcy practitioner/liquidator as they must have no conflicts of interest. It is better not to use one lawyer, accountant or audit firm as one's liquidator, so as not to reach a potentially complicated position. It is best not to use the company's lawyer, auditor as one's liquidator. When considering who can legally act as the liquidator of a company, the under-listed requirements are imperative.

Termination of Appointment of Bankruptcy Practitioners in the United States of America

The Corporation Act dictates who can act as the bankruptcy practitioner of a company. The general rule is that a liquidator must:[63]

- Be a natural person
- Be a registered liquidator with ASIC

[62] Armour J. *Enforcement Strategies in UK Company Law: A Roadmap and Empirical Assessment*", paper prepared, for Harvard Law School conference on Enforcement in Corporate Law March 2007.
[63]U.S. Courts Bankruptcy Statistics Fiscal Year 2008

- Not owe the company more than $5,000
- Not be owed by the company more than $5,000
- Not be an auditor of the company or a partner of the auditor
- Not be employee or “officer” of the company, that is, not a director, secretary, or receiver and manager of the company.
- Not be an officer of any company that is a mortgage of property of the company.
- Not be a partner or employee or employer of an officer of the company.

Where the company to be liquidated is a proprietary company, many of the above provisions do not apply in the case of a proprietary company the liquidator must.

- Be a natural person
- Not owe the company more than $5,000
- Not be owed by the company more than $5,000.

So the legislation relating to the members’ voluntary liquidator of a proprietary company is liberal in that a liquidator does not require any specific qualification. However, the practicalities are quite different in that the process could involve the movement of large sums of money and there is a need to be concerned about a number of statutes such as the income Tax Assessment Act. Fringe Benefits Tax Assessment Act and the Stamp Duties Act. Therefore, in practice, in the vast majority of cases the process is handed over to a registered company liquidator/bankruptcy practitioner who will have the relevant experience.

In the past it was common practice for a company to turn to its auditor to act as liquidator of a company within the group. In recent years there have been a number of laws and ethical pronouncements of professional bodies that restrict the services an auditor can provide to an

audit client. The pronouncement of the professional bodies and the laws of various jurisdictions are quite complex.

- If a subsidiary company is being liquidated and it has assets of any value then neither the lawyer, auditor nor a partner of the auditor should act as the liquidator. The principle underlying this view is that an auditor should never conduct transactions on behalf of an audit client or enter into transactions with an audit client as the counterparty.
- If company is registered with the SEC in the SCA in the CSW then an accounting firm that is the auditor of the group should not allow another partner of that firm to act as liquidator irrespective of the value of any assets remaining in the company.

Any proposed liquidator should make themselves very familiar with the full range of responsibilities and power of a liquidator and the stringent duties imposed on the liquidator.[64]

Remedies for Breach of Duties by Bankruptcy Practitioner in the United States of America

Court involvement

As a general rule, a liquidator is given wide powers and responsibilities so, it is not necessary to involve the court in a members voluntary liquidation. However, during the liquidation a creditor member may ask a court to address specific questions that arise in the winding up, review the liquidator's remuneration or exercise any power that a court possesses in a compulsory winding up. Also, at any time during a member's voluntary liquidation the

[64]II U.S.C S 109

liquidator might form the opinion that the company will be unable to pay its debts in full, in which case they must either apply to the court for the official liquidation of the company, appoint a voluntary administrator or convene a meeting of creditors. If individual creditors cannot bring a claim for breach of duty against the liquidator, what remedy is available to creditors when the company in liquidation has suffered loss in consequence of breach of duty by the liquidator.

In the absence of special relationship with the liquidator, the only remedy that individual creditors will have in respect of an alleged breach of duty in the conduct of the liquidation will be a claim. Section 212 of the 1986 Act provides inter alia a remedy to companies in liquidation for the payment of damages for breach of statutory duty or negligence by the liquidator. Individual creditors have standing to bring proceedings under S. 212 on 'In the absence of a special relationship, an administrator/liquidator does not owe a duty of care to individual creditors in respect of its conduct of the administrator/liquidation

Insolvency and Corporate Restructuring

The In-House Lawyer as from May 2008 behalf of the relevant company can handle insolvency and corporate restructuring, although any order will be in favour of the company and not the individual bringing the proceedings. Paragraph 75 of Schedule Bl to the 1986 Act provides the same remedy for companies in administration in respect of breach of duty by the administrator and grants individual creditors standing to bring a claim on behalf of the company. Section 212 and paragraph 75 do not give an individual creditor a cause of action against the liquidator/administrator in its own right. They merely give that creditor standing to bring claim on behalf of the relevant company. In consequence, the creditor will only have a right to share

in the proceeds of any damages awarded to the company to the extent that it is entitled to a dividend as a creditor.

Claims under S. 212 and paragraph 75 are, therefore, only likely to be attractive to either senior secured creditors, or a junior creditor who can agree with all other creditors that it should receive an increased share of the proceeds of any successful claim that is commensurate with the cost risk it will assume by bringing that claim against the liquidator/ administrator.

Creditors who have suffered loss in consequence of a breach of duty by the liquidator in its conduct of the liquidation may commence a claim under S. 212 of the l986 Act but they will be prosecuting the claim on behalf of the company and will only share in the proceeds of that claim to the extent that they are entitled to a dividend in the liquidation. Other remedies are in the area of;

1. Liquidators costs
2. Creditors with fixed charge over assets
3. Costs incurred by an administrator
4. Amounts owing to employees for wages/superannuation (director limit $2000)
5. Payments owing in respect of worker's injuries
6. Amounts owing to employees for leave (director limit $1500)
7. Retrenchment payments owing to employees

8. Creditors with floating charge over assets

9. Creditors without security over assets

Dissolution

Having wound-up the company's affairs, the bankruptcy practitioner/liquidator must call a final meeting of the members (if it is a members' voluntary winding-up), creditors (if it is a compulsory winding-up) or both (if it is a creditors' voluntary winding-up). The liquidator is then usually required to send final accounts to the Registrar and to notify the court. The company is then dissolved.

However, in most jurisdictions, the court has discretion for a period of time after dissolution to declare the dissolution void to enable the completion of any unfinished business.

Striking off the Register

In some jurisdiction, the company may elect to simply be struck off the Register as a cheaper alternative to a formal winding-up and dissolution, in such cases an application is made to the Registrar, and they may strike off the company if there is reasonable cause to believe that the company is not carrying on business or has been wound-up and, after enquiry, no case is shown why the company should not be struck off. However, in such cases the company may be restored to the Register if it is just and equitable so to do (for example, if the rights of any creditors or members have been prejudiced). As in Re Price Land Limited (1977) IBC LC 467.[65]

[65](1977) IBC LC 467

In the event the company does not file an annual return or annual accounts, and the company's file remains inactive, in due course, the Registrar of Companies House will strike the company off the register.

Fresh Start Options for Limited Liability Companies (Ltd)

In America, many companies in debt decide it's more beneficial to start again by creating a new company. In business terms this will mean liquidating a company as the only option and then resuming under a different name with the same customers, clients and suppliers. In some instances, it will be ideal for the company, to begin trading profitably having left unfavourable lease arrangement and huge debt behind.

Modern Law and Debt Restructuring

The principal focus of modern insolvency legislation and business debt restructuring practices no longer rests on the elimination of insolvent entities but on the remodelling of the financial and organisational structure of debtors experiencing financial distress so as to permit the rehabilitation and continuation of their business.[66] For private households, it is argued to be insufficient to merely dismiss debts after a certain period. It is important to assess the underlying problems and to minimise the risk of financial distress to re-occur. It has been stressed that debt advice, a supervised rehabilitation period, financial education and social help

[66] Mokal W.J. Credit and Bankruptcy Act R 12

to find sources of income and to manage household expenditures better need to be equally provided during this period of rehabilitation.

In the United States (US), discharge is conditioned to a lesser extent. Nevertheless, it should be noted that the spectrum is broad. Other Member States do not provide the option of a debt discharge. Sometimes debt settlement plans can result in a reduction of the debt (maximally half of the amount) or an extension of the payment period of maximally five years; nevertheless, it does not foresee debt discharge.[67]

Bankruptcy fraud is a white-collar crime. While difficult to generalize across jurisdictions, common criminal acts under bankruptcy statutes typically involve concealment of assets, concealment or destruction of documents, conflict of interest, fraudulent claims, false statements or declarations, and fee fixing or redistribution arrangements. Falsifications on bankruptcy forms often constitute perjury. Multiple filings are not in and of themselves criminal, but they may violate provisions of bankruptcy law. In the U.S. bankruptcy fraud statutes are particularly focused on the menial state of particular action. Bankruptcy fraud is a federal crime in the United States. The bankruptcy court will typically confirm the plan and the debtor and creditors will be bound by its terms. Creditors have no say in the formulation of the plan other than to object to the plan, if appropriate, on the grounds that it does not comply with one of the Code's statutory requirements. Generally, the payments are made to a trustee who in turn disburses the funds in accordance with the terms of the confirmed plan.

When the debtor completes payments pursuant to the terms of the plan, the court will formally grant the debtor a discharge of the debts provided for in the plan. However, if the debtor fails

[67] Corporate Insolvency Law: Theory and application p. 50

to make the agreed terms by payments or fails to seek or gain court approval of a modified plan, a bankruptcy court will often dismiss the case on the motion of the trustee. Pursuant to the dismissal, creditors will typically resume pursuit of state law remedies to the extent a debt remains unpaid.

In Chapter 11, the debtor retains ownership and control of its assets and is re-termed a *debtor in possession* ("DIP"). The debtor in possession runs the day to day operations of the business while creditors and the debtor work with the Bankruptcy Court in order to negotiate and complete a plan. Upon meeting certain requirements such as fairness among creditors, priority of certain creditors, creditors are permitted to vote on the proposed plan. If a plan is confirmed the debtor will continue to operate and pay its debts under the terms of the confirmed plan.' If a specified majority of creditors do not vote to confirm a plan, additional requirements may be imposed by the court in order to confirm the plan.[68]

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109- 8. I 19 Stal. 23 (April 20, 2005) ("BAPCPA"), Substantially amended the Bankruptcy Code. Many provisions of BAPCPA were forcefully advocated by consumer lenders and were just as forcefully opposed by many consumer advocates, bankruptcy academies, bankruptcy judges, and bankruptcy lawyers. The enactment of BAPCPA followed nearly eight years of debate in Congress. Most of the law's provisions became effective on October 17, 2005. Upon signing the bill, then President Bush stated:

> Under the new law, Americans who have the ability to pay will be required to pay back at least a portion of their debts. Those who fall behind their state's median income will not be required to pay back their debts. The new km will also make it more difficult for serial filers to abuse the most generous

[68]U.S.C S 707(b)(2)(B)

> bankruptcy protections. Debtors seeking to erase all debts will now have to wait eight years from their last bankruptcy before they can file again. The law will also allow us to clamp down on bankruptcy mills that make their money by advising abusers on how to game the system.[69]

Among its many changes to consumer bankruptcy law, BAPCPA enacted a "means test", which was intended to make it more difficult for a significant number of financially distressed individual debtors whose debts are primarily consumer debts to qualify for relief under Chapter 7 of the Bankruptcy Code. The "means test" is employed in cases where an individual with primarily consumer debts has more than the average annual income for a household of equivalent size, computed over a 180 day period prior to filing. If the individual must "take" the "means test", their average monthly income over this 180 day period is reduced by a series of allowances for living expenses and secured debt payments in a very complex calculation that-may or may not accurately affect that individual's actual monthly budget. If the results of the means test show no disposable income (or in some cases a very small amount) then the individual qualifies for Chapter 7 relief. If a debtor does not qualify for relief under Chapter 7 of the Bankruptcy Code, either because of the Means Test or because Chapter 7 does not provide a permanent solution to delinquent payments for secured debts, such as mortgages or vehicle loans, the debtor may still seek relief under Chapter 13 of US Code. A Chapter 13 plan often does not require repayment to general unsecured debts, such as credit cards or medical bills.

BAPCPA also requires individuals seeking bankruptcy relief to undertake credit counselling with approved counselling agencies prior to filing a bankruptcy petition and to undertake education in personal financial management from approved agencies prior to being granted a

[69]U.S.C S 727(a)(8).

discharge of debts under either Chapter 7 or Chapter 13. Some studies of the operation of the credit counselling requirement suggest that it provides little benefit to debtors who receive the counselling because the only realistic option for many is to seek relief under the Bankruptcy code.[70]

On October 17, 2005 the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) went into effect. This legislation was the biggest reform to the bankruptcy laws since 1978. The legislation was enacted after years of lobbying efforts by banks and lending institutions and was intended to prevent abuses of the bankruptcy laws.[71]

[70]The library of congress-U.S. Congressional bill status and text of the Bankruptcy Abuse Prevention and Consumer protection Act of 2005

[71]Retrieved from *http://en.wikipeddia.org/wiki/chaptert,titleII,unitedstatecode* Categories: United States bankruptcy legislation/chapters of the United States Code on January 23 2014.