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Insolvency checklist

Guidance note

SPORT ENGLAND

Chartered Governance Institute UK & Ireland

May 2022

Contents

If you have any feedback on the content of these resources, or additional questions that you'd like to discuss, please contact the SGA:
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Reviewed: May 2022 Date of next review: May 2023

Introduction

Insolvency legislation is complex but there are a number of things to keep in mind and remember. If you are in any doubt, seek professional advice to inform your decision making.

Acting promptly and seeking appropriate advice as soon as financial difficulties arise, rather than waiting until the organisation is financially doomed, will reduce the risks of personal liabilities. Immediate steps should be taken to deal with matters properly as soon as there is any risk of insolvency, in order to minimise the risks of losses to creditors and protect the interests of other stakeholders, so far as possible in the circumstances.

There are two principal tests of solvency, the cash flow test and the balance sheet test.

Solvency – cash flow test

- The test centres on whether the organisation can pay its debts in full (including any interest) as they fall due over the next 12 months.

- A company is deemed unable to pay its debts if:

    - it is unable to pay a debt of £750 or more within 21 days of a formal demand in the prescribed form
    - execution issued on a judgement remains unsatisfied in whole or in part (England and Wales)
    - the court is satisfied that the company is unable to meet its debts as they fall due
    - the court is satisfied that the value of the company's assets is less than the amount of its liabilities
    - a charge for payment on an extract decree, extract registered bond or extract registered process has expired without payment (Scotland), or
    - a certificate of unenforceability has been granted in respect of judgement (Northern Ireland).

Solvency – balance sheet test

- This centres on whether the realisable value of the assets continues to exceed the value of liabilities. It can only be relied on, in the 'going concern' context, if the directors/trustees can reasonably assume that the organisation will continue to operate.
- If the directors/trustees are not confident that the organisation will continue to operate, they must make their calculation on the basis that activity will stop and so they must also include all liabilities that would crystallise on a winding up when they assess whether the balance sheet solvency tests can be met.

The checklists below outline the steps to be taken as regards appointing an administrator, appointing a receiver and winding up an organisation.

Administration

In circumstances where the directors realise the company will become insolvent, but has not reached that point, they might wish to appoint an administrator to manage the company until it is able to continue, be sold or, if these are not possible, to wind up the company.

Procedure

- There are a number of methods for appointing an administrator, including:
    - on application to the court by the company, a majority of its directors, a qualifying floating charge holder or one or more creditor
    - an out-of-court appointment by a qualifying floating charge holder
    - the company or a majority of its directors
    - the liquidator of the company
    - the supervisor of a company voluntary arrangement
- Once a company is in administration, all business documents issued by it must state the name of the administrator and that the business and affairs of the company are being managed by the administrator.
- As soon as practical after appointment, the administrator must publicise their appointment, file notice at Companies House and forward a copy to the company and all known creditors.
- While an administration order is in force, the company cannot be wound up and an administrative receiver cannot be appointed or, if previously appointed, they must vacate office. There are restrictions on enforcing any security over the company's property, selling any goods and starting any legal proceedings.

Filing requirement

Form AM01

Receivership

An administrative receiver is a receiver or manager of the whole or substantially the whole of a company's property and business, appointed by or on behalf of the holders of debentures of the company secured by a floating charge. An appointee under a fixed charge will normally have no power to manage the business and is, as such, known merely as 'a receiver'.

Receivers are appointed either by the courts or by debenture holders.

- Check the deed of appointment and a copy of the debenture (or Trust Deed) in order to consider the validity of the debenture and the receiver's appointment.

Procedure

Appointment by the court

- A court may appoint a receiver on the application of a mortgagee or a debenture holder in the following circumstances:
    - where repayment of principal and/or interest is in arrears
    - when the security has become crystallised into a specific charge by the making of a Winding-up Order or passing of a resolution to wind up
    - where the security of the mortgagee or the debenture holder is in jeopardy

    - a receiver may also be appointed by the court on the application either of a contributory (i.e. a person liable to contribute to the assets of the company in the event of its being wound up) or of the company. The court will sometimes appoint a receiver and a manager on a short-term basis if the directors are not fulfilling their functions of management – for instance, because of a dispute between them, and pending a general meeting where there has been no governing body. A court will not, however, appoint a receiver if winding up would be more appropriate.

Appointment by debenture holders

- The appointment is made under a deed executed by the debenture holder and is, together with the debenture, evidence of his or her capacity. The appointment of a receiver usually arises in the following circumstances:
    - failure to pay the principal and/or interest in accordance with the terms of the debenture
    - where a borrowing limit has been exceeded and has not been reduced within a specified period, or
    - a breach of some other provisions in the debenture or trust deed.

Filing requirement

Form RM01

Notes

The appointment as receiver or manager must be accepted before the end of the next business day following receipt of the instrument of appointment, and shall be deemed to be effective from the time and date the instrument of appointment was received.

Winding up (liquidation)

Winding up involves the realisation of the company's assets. The process is administered by a licensed insolvency practitioner who is appointed as liquidator of the company.

Winding up is frequently known as liquidation.

There are several methods of winding up.

- Members' voluntary winding up, only available where the company is solvent, requiring the directors to give a declaration that the company can meet its debts in full, with interest, during the period of 12 months commencing on the date of commencement of winding up.
- Creditors' voluntary winding up, applicable where a declaration of solvency cannot be given.
- Winding up by the courts.
- Winding up by special resolution of the members.
- On petition of a judgement creditor where a debt of not less than £750 has not been paid within 21 days of a demand in the prescribed form.
- It is just and equitable that the company be wound up.
- The company fails to meet specific statutory requirements such as minimum number of shareholders.

Procedure

Members voluntary

- The company's board of directors resolves to make a declaration of solvency, which must embody a statement of assets and liabilities, and be made within five weeks immediately before the passing of the resolution to wind up. The declaration has to be filed with the Registrar of Companies within 15 days of the passing of the resolution to wind up.
- The board of directors will also authorise the calling of a general meeting at which a special resolution to wind up will be considered. An ordinary resolution will suffice if the period of life of the company has expired or the occurrence of an event on the happening of which the articles provide that the company should be wound up.
- If the resolution is passed, it will be necessary to appoint a liquidator. This may be done by an ordinary resolution of the company.
- The resolution to wind up, signed by the chair of the meeting, should be published in the London Gazette or the Edinburgh Gazette, as appropriate, within 14 days of being passed. The resolution and all documents for publication in each Gazette must be authenticated by a solicitor or a member of an established body of accountants or secretaries. The resolution to wind up must also be filed within 15 days with the Registrar of Companies.
- The liquidator must, within 14 days of his or her appointment, advertise his or her appointment in each Gazette and give notice to the Registrar of Companies.

Creditors voluntary

- A meeting of the board of directors will authorise the calling of a general meeting to consider an ordinary resolution that the company, by reason of its liabilities, cannot continue and that it is advisable to wind up.
- A meeting of the creditors should be called by the company to be held within 14 days of the members' meeting to consider the resolution to wind up. At least seven days' notice of the meeting must be given to the creditors. Notice of the creditors' meeting should be advertised in the appropriate Gazette and two local newspapers.
- The notice must state either:
    - the name and address of the insolvency practitioner who will give such information to the creditors before the meeting takes place as they may reasonably require; or
    - a place in the principal area of business of the company where a list of names and addresses of the company's creditors will be available for inspection without charge.
- The creditors' meeting will be presided over by one of the directors, who should prepare a statement of affairs in the prescribed form, verified by affidavit, to be laid before the creditors' meeting.
- At the general meeting an ordinary resolution is passed to wind up and an ordinary resolution is passed to nominate the liquidator.
- At the creditors' meeting, which must be attended by the proposed liquidator, the directors may answer questions put to them by the creditors concerning the administration of the company, although there is no legal requirement for them to do so.
- The liquidator shall be the person nominated by the creditors or, where no other person has been so nominated, the person (if any) nominated by the company. Where a different person is nominated by the creditors, any member or creditor of the company may apply to the court within seven days for an order that the members'

nomination shall remain liquidator instead of, or jointly with, the creditors' nomination, or that some other person be appointed.

By the court

- When the court makes a Winding-up Order, the official receiver becomes the liquidator.
- The official receiver may require officers of the company or other persons as specified to prepare, swear and submit a statement of affairs within 21 days.
- Separate meetings of creditors and contributories may be summoned by the official receiver at his or her discretion for the appointment of some other person to be liquidator of the company. Contributions are defined by the Insolvency Act s.79, but are usually synonymous with the term 'members'. The official receiver remains liquidator if another person is not appointed. The official receiver must summon a meeting for the appointment of another liquidator if 25% of the creditors requisition him or her to do so.
- The court may make any appointment or order to give effect to the wishes of the meetings or make any other order that it may think fit.
- The creditors and contributories may nominate as liquidator any person who is qualified to act as an insolvency practitioner, and in the absence of a nomination by the creditors, the contributories' nominee (if any) will be the liquidator.
- At any time the official receiver may apply to the Secretary of State for the appointment of a liquidator in his or her place. Any such liquidator must send notice of his or her appointment as the court may direct.

Specific winding up regulations apply to charitable incorporated organisations and Scottish charitable incorporated organisations, which specify the procedures to be followed. The procedures to be followed by other charities will depend on the legal form they take and, in some situations, may also be affected by the charity's governing document.

Filing requirements

There are a variety of forms that are required depending upon which of the three methods of winding up is used. Public notification of formal winding up is normally required (via Companies House, the Charity Commission/OSCR). There will be additional public filing requirements during the course of the winding up of any limited liability organisation (e.g. company, CIO, SCIO). The liquidator or proposed liquidator will normally arrange filing of the relevant forms.

Notes

- On the appointment of a liquidator, all the powers of the directors or trustees cease.
- The creditors have the power to appoint a liquidation committee, which may sanction the continuation of some of the directors' powers.
- The remuneration of the liquidator is fixed by the liquidation committee or, if there is no committee, by the creditors.

Liabilities

If the assets of an unincorporated charitable trust or unincorporated members' association are insufficient to meet debts and liabilities, the trustees/committee members are at risk of personal liability.

There may be some relevant insurance or, in the case of a members' association, the committee members may have an indemnity from the association's members. This is rare and, even if it does exist, it may not in fact provide protection.

The trustees of incorporated charities, such as charitable CLGs or CIOs are less likely to incur personal liability. However, especially in an insolvent winding up there are particular risks associated with:

- breaches of trust (which amounts to a breach of a trustee's fiduciary duties to the charity)
- any personal guarantees that may have been given
- wrongful or fraudulent trading.

Date of approval

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Date of next review

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