- if the company has broken any of the conditions of its application for example, it has traded, changed its name or become subject to insolvency proceedings during the three-month period before the application, or afterwards;
- if the directors have not informed interested parties;
- if any of the declarations on the form are false;
- if some form of action is being taken, or is pending, to recover any money owed (such as a winding-up petition or action in a small claims court);
- if other legal action is being taken against the company;
- if the directors have wrongfully traded or committed a tax fraud or some other offence (see ss 1004 and 1005 of the 2006 Act).

Offences

It is an offence:

- to apply when the company is ineligible for striking off;
- to provide false or misleading information in, or in support of, an application;
- not to copy the application to all relevant parties within seven days;
- not to withdraw application if the company becomes ineligible.

The offences attract a fine of up to a maximum of £5,000 on summary conviction (before a magistrates' court or Sheriff Court) or an unlimited fine on indictment (before a jury). If the directors breach the requirements to give a copy of the application to relevant parties and do so with the intention of concealing the application, they are also potentially liable to not only a fine but also up to seven years' imprisonment. Anyone convicted of these offences may also be disqualified from being a director for up to 15 years.

Declaration of solvency

Where it is proposed to wind up a company voluntarily, the directors, or a majority of them if there are more than two, may at a meeting of the board make a statutory declaration that they have made a full enquiry into the affairs of the company and have formed the opinion that it will be able to pay its debts in full within a stated period of not more than 12 months from the beginning of the winding-up. To be effective, such declaration must be made within the five weeks before the passing of the winding-up resolution or on that date but before the resolution was passed, and must be delivered to the Registrar of Companies for registration, and must embody a statement of the company's assets and liabilities as at the latest practicable date before the making of the declaration, though errors and omissions will not necessarily render the statement invalid. Thus, in ***De Courcy* v *Clements*** [1971] 1 All ER 681, the statement of the company's assets and liabilities was held to be valid even though it omitted to state that a debt of £45,000 was owed by the company to a third party. Megarry J observed that what is now the Insolvency Act 1986 did not require absolute perfection since, among other things, a liquidator who forms the opinion that the company will not be able to pay its debts in full within the period specified in the declaration of solvency must forthwith summon a creditors' meeting and put the matter to them. The creditors can petition for a compulsory winding-up, notwithstanding the voluntary liquidation, and might therefore be regarded as adequately protected. Directors making such a declaration without reasonable grounds are liable to heavy penalties.

The advantage to the company of such a declaration is that the winding-up is then a 'members' voluntary winding-up'. In the absence of such a declaration, it must be a 'creditors' voluntary winding-up'.

Commonly HMRC (which is no longer a preferential creditor) has not completed its tax assessments on the company and has not therefore been paid. Nevertheless, if funds are available to pay HMRC when liability (which has been approximated) is ascertained, a members' voluntary winding-up may continue and there is no need to convert to a creditors' voluntary, nor are the directors liable for a false declaration that the company's debts will be paid during the stated period of not longer than 12 months.

Members' voluntary winding-up

The company in general meeting, and by ordinary resolution, must appoint one or more liquidators for the purpose of winding up the company and distributing its assets, and may fix the remuneration to be paid to him or them. The appointment may be made at the same meeting at which the resolution for winding-up was passed.

On the appointment of the liquidator all the powers of the directors cease, except in so far as their continuance is sanctioned either by the company in general meeting or by the liquidator. However, a resolution for voluntary winding-up does not automatically dismiss all employees but if the liquidator does not carry on the business, which he may do for beneficial winding-up, e.g. to complete work in progress so that the finished articles may be sold more profitably, then employees are dismissed (***Reigate* v *Union Manufacturing Co (Ramsbottom)*** [1918] 1 KB 592).

If a liquidator dies, resigns, or otherwise vacates his office, the company may in general meeting and subject to any arrangement with its creditors, fill the vacancy. Such a meeting may be convened by any contributory or, if there were more liquidators than one, by those continuing. However, as a general rule a single shareholder cannot constitute a meeting for the purpose of making a valid appointment of a liquidator (***In Re London Flats Ltd***, 1969, see Chapter 20), except in the case of the single-member company.

See p. 412

Meetings

If the liquidator at any time forms the opinion that the company will be unable to pay its debts in full within the period stated in the statutory declaration, he must forthwith summon a meeting of creditors. When the liquidator calls the meeting of creditors the company is deemed to be in a creditors' voluntary scheme, and that meeting may exercise the same powers as a creditors' meeting at the beginning of a liquidation which is initiated as a creditors' winding-up, including appointing their nominee as liquidator and a liquidation committee.

In any event, if the winding-up continues for more than a year, the liquidator must summon a general meeting of the company at the end of the first year and of each succeeding year, or at the first convenient date within three months from the end of the year, or such longer period as the BIS may allow. He must lay before the meeting an account of his acts and dealings, and the conduct of the winding-up during the preceding year.

As soon as the affairs of the company are fully wound up, the liquidator must make up an account of the winding-up showing how it has been conducted, and how the property of the company has been disposed of, and then call a general meeting of the company in order to lay the account before it and explain it. The meeting is called by advertisement in the *London*

Gazette, specifying the time, place and object of the meeting. The advertisement must be published at least one month before the meeting.

Within one week after the meeting the liquidator must send to the Registrar of Companies a copy of the account, and make a return to him of the holding of the meeting and its date. If no quorum was present at the meeting, the liquidator makes a return to the effect that the meeting was duly summoned and no quorum was present, and this is deemed to constitute compliance. The Registrar must publish in the *London Gazette* notice of the receipt by him of the return of the holding of the meeting.

The Registrar then registers the account and return as to the meeting and three months after such registration the company is deemed to be dissolved. The liquidator or any interested person may apply to the court for the deferment of dissolution and, if the grounds seem adequate, the court may defer the date as it thinks fit. The court may, after the dissolution, make an order declaring the dissolution void, again on the application of the liquidator or any interested person being someone who has a claim against its assets, e.g. a creditor.

In the case of creditors, and others generally, the court cannot order restoration to the Register after two years, but in the case of those wishing to make claims for personal injury against the company, the time can be extended for a longer period up to the maximum time allowed for bringing the claim under the Limitation Act 1980. For example, where the injury was not apparent at the time of an accident the time is three years after the injury did become apparent. Thus, if there is an injury to the head which later is seen to have caused blindness, the time would be three years after discovering the blindness; so a company responsible for the initial injury could be restored to the Register, so that a claim could be made against it some years after it had been dissolved. These restoration provisions apply regardless of the method of winding-up. This will enable a person to get a judgment and make a claim on the company, the claim then being, in effect, met by the company's insurers. It is, however, necessary to make the claim against the company before the insurance indemnity is triggered and the above provisions enable this to be done.

Where the liquidator has been obliged to call a meeting of creditors because of insolvency, these procedures are modified and those appropriate to a creditors' voluntary winding-up apply.

Creditors' voluntary winding-up

Where a company proposes to wind up voluntarily and the directors are not in a position to make the statutory declaration of solvency, the company must call a meeting of its creditors not later than the fourteenth day after the members' meeting at which the resolution for voluntary winding-up is to be proposed. Notices of this meeting are to be sent by post to creditors not less than seven days before the day of the creditors' meeting.

The company must advertise a notice of the creditors' meeting once in the *London Gazette* and once at least in two local newspapers circulating in the district where it has its registered office or principal place of business.

The directors must place before the creditors' meeting a full statement of the company's affairs, together with a list of creditors and the estimated amount of their claims, and appoint a director to preside at the meeting. The notice of the meeting must give the name and address of an insolvency practitioner who will give creditors information about the company or state a place where a list of creditors can be inspected.

Appointment of liquidator

The creditors and the company at their respective meetings may nominate a liquidator. If the creditors do not nominate one, the company's nominee becomes the liquidator. If the creditors and the company nominate different persons, the person nominated by the creditors has preference. However, where different persons are nominated, any director, member or creditor of the company may, within seven days after the date on which the nomination was made by the creditors, apply to the court for an order to appoint the company's nominee to act either instead of or in conjunction with the creditors' nominee, or alternatively to appoint some other person.

At the same meeting the creditors may, if they think fit, appoint a liquidation committee to act with the liquidator (see Chapter 26 ➡). On the appointment of a liquidator all the powers of the directors cease, except in so far as the liquidation committee, or, if there is no such committee, the creditors sanction their continuance. The position of employees is the same as in a members' voluntary winding-up.

➡ See p. 578

If a vacancy occurs, by death, resignation or otherwise, in the office of liquidator, other than a liquidator appointed by or by the direction of the court, the creditors may fill the vacancy.

Where the winding-up continues for more than a year, the liquidator must summon a general meeting of the company and a meeting of the creditors at the end of the first and each succeeding year, or within three months of that time, and lay before the meetings an account of the conduct of the winding-up during the preceding year. The BIS may allow modifications to the time limit.

Centrebinding

In the past, when no particular qualifications were required to undertake insolvency work, it was possible for the members in a creditors' voluntary to appoint a liquidator from among a group of unscrupulous persons prepared to participate in fraud. The person appointed would then proceed to dispose of the company assets and dissipate the proceeds often into other enterprises of the directors or their associates. This was done without the holding of a creditors' meeting to affirm the appointment of the liquidator, and by the time the creditors became aware of the liquidation it was too late to do anything about it. The difficulty was that the disposal of the assets by the members' liquidator was quite legal. The court so decided in ***Re Centrebind*** [1966] 3 All ER 889 and the procedure became known as 'centrebinding'.

The practice has been brought to an end for two reasons as follows:

(a) the requirement of qualified insolvency practitioners; *and*
(b) because of s 166, which provides that until a meeting of creditors has been called to approve the company's liquidator, that liquidator has power only to take control of the company's property and to sell perishable goods. Any other dispositions of the company's property are invalid.

Final meetings and dissolution

As soon as the affairs of the company are fully wound up, the liquidator makes an account of the winding-up, and calls a general meeting of the company and a meeting of the creditors to lay before them the account and give an explanation of it. This meeting must be advertised in the *London Gazette*, specifying the time and place and object, the advertisement being published one month at least before the meeting.

Within one week after the date of the meeting or, if they are not held on the same date, after the date of the later meeting, the liquidator must send to the Registrar a copy of the account and a return of the holding of the meetings and their dates. If a quorum is not present at either meeting, the return should specify that the meeting was duly summoned and that no quorum was present and this will suffice. As with a members' voluntary liquidation, the Registrar registers the returns and the company is dissolved at the end of three months, subject to the rights of the liquidator or of interested persons to apply for the date to be deferred. The Registrar must cause to be published in the *London Gazette* notice of the receipt by him of the return of the holding of the meeting.

Applications to court

The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding-up of a company, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court, and the court may accede to these requests and make such orders as it thinks just. A copy of any such order must be sent forthwith by the company, or otherwise as may be prescribed, to the Registrar of Companies for minuting in his books relating to the company.

Rights of creditors and contributories

Notwithstanding the fact that the company is being wound up voluntarily, a creditor or contributory may still apply to have it wound up by the court, but the court must be satisfied that, in the case of a contributory, the rights of the contributories will be prejudiced by a voluntary winding-up.

Alternatives to winding-up

There are two ways in which a company can be dissolved without following winding-up procedures.

Striking off at the instigation of the Registrar: defunct companies

The dissolution here results where the Registrar has a reasonable cause to believe that a company is not carrying on business or is not in operation. This jurisdiction, which has been with us for many years, is currently to be found in s 1000 of the 2006 Act. The Registrar may act because, for example:

(a) he has not received documents from the company which should have been sent to him; or
(b) correspondence sent to the company's registered office by the Registrar has been returned undelivered.

The Registrar will enquire if the company is still in business or operation. If he is satisfied that it is not, he will publish a notice in the *London Gazette* of his intention to strike the company off the register. The Company Law Official Notifications Supplement to the *London*

Gazette publishes weekly notices in microfiche form. A copy notice is placed on the company's public record.

The Registrar will take into account representations from the company and other interested parties, such as members and creditors, but unless cause to the contrary is shown, the Registrar will strike the company off not less than three months after the date of the notice. The company is, in fact, dissolved on publication of a further notice to that effect in the *London Gazette*. It will be seen, therefore, that if the company is to remain in business, it is important for the company to reply promptly to any formal letter of inquiry from the Registrar and to deliver any outstanding documents. Failure to deliver the documents required may result in the directors being prosecuted.

Assets of dissolved company

From the date of dissolution any assets held by a dissolved company will be *bona vacantia* (property without an owner). This means that they belong to the Crown. The main source of enquiry in regard to *bona vacantia* property is the Treasury Solicitor (BV), One Kemble Street, London WC2B 4TS. See http://www.bonavacantia.gov.uk. If the company's registered office is in Lancashire, enquiries should be addressed to the Solicitor to the Duchy of Lancaster, 66 Lincoln's Inn Fields, London WC2A 3LH. Where the registered office is in Cornwall or the Isles of Scilly, enquiries should be made to the Solicitor to the Duchy of Cornwall, 10 Buckingham Gate, London SW1E 6LA.

Applications for striking off

A private company which is not trading but which is sending relevant documents and returns to the Registrar may apply to the Registrar to be struck off the register. The procedure is useful, for example, for companies formed to pursue what was thought to be a good project but which has failed. Nevertheless, the directors may be in a position to deal with its assets and liabilities and ensure that the company's affairs are brought to a conclusion without the cost of employing an insolvency practitioner as liquidator. Until the company is struck off the register, though, the directors are burdened with duties under the Companies Acts, such as filing accounts and annual returns. Accordingly, the Deregulation and Contracting Out Act 1994, s 13 and Sch 5 introduce new ss 652A–652F into the Companies Act 1985 to provide for the application procedure. These sections are now contained in ss 1000–1011 of the Companies Act 2006.

Application is made by the directors or a majority of them under s 1003 of the CA 2006. The application is returned to the Registrar and copies must be sent to notifiable parties (see below). In general terms, the company should have concluded its affairs, though even after making application it can conclude its outstanding affairs where necessary or expedient to make or proceed with an application, e.g. paying the costs of running office premises while concluding its affairs and disposing of the office.

It is important to note that in the previous *three months* the company must not have:

- changed its name;
- traded or carried on its business;
- made a disposal for value of property that it held immediately prior to ceasing to trade, for the purpose of disposal for gain in the normal course of business or otherwise carrying on business; or

- engaged in any other activity except for the purposes of making the application, concluding the affairs of the company complying with any statutory requirement or as specified by the Secretary of State by order for the purpose of s 1004(1); furthermore
- any property which has not been transferred out of the company will be regarded as *bona vacantia* (goods without an owner) and will become the property of the Crown. There should therefore be no assets or liabilities at the time of dissolution. The potential liability of the directors to members and creditors remains.

A company cannot apply to be struck off if it is the subject, or proposed subject of:

- any insolvency proceedings such as liquidation and including a situation where a petition has been presented but has not yet been dealt with; or
- a scheme under Part 26 of the 2006 Act (section 895), i.e. a compromise or arrangement between the company and its creditors or members.

However, a company can apply for strike off if it has settled trading or business debts in the previous three months. Further circumstances in which an application cannot be made can be found in ss 1004 and 1005 of the Companies Act 2006.

When the company meets all of the above criteria for striking off, an application (DS01) can be completed, signed by the majority of directors and submitted with a £10 fee to Companies House. The form must be signed and dated by:

- the sole director, if there is only one;
- by both, if there are two; or
- by all, or the majority of directors, if there are more than 2.

Notifiable persons

A copy of the application must be sent within seven days of making the application to:

- members, usually the shareholders;
- creditors, including all contingent (existing) and prospective (likely) creditors such as banks, suppliers, former employees if the company owes them money, landlords, tenants (for example, where a bond is refundable), guarantors and personal injury claimants;.
- employees;
- managers or trustees of an employees' pension fund; and
- any directors who have not signed the form (see s 1006(1)).

These notifiable persons can object to the court against the striking off for up to 20 years after the publication by the Registrar of the striking off in the *London Gazette*. Such an objection might be raised because a notifiable person was owed money by the company and is taking action in court to recover it or because the conditions for application for striking off have been breached.

In addition to persons notifiable under s 1006, other interested parties should be informed such as the local authority where there have been planning disputes and health and safety issues. HMRC should be informed in advance of an application to strike off. HMRC is the main objector in the striking-off process and can hold up the procedure for some time. It is better therefore to clear matters with HMRC and other interested parties before making the application. Consideration must also be given to notifying the Department of Work and Pensions if there are outstanding, contingent or prospective liabilities that would be of concern to this agency.

Safeguards exist for those who are likely to be affected by a company's dissolution. Loose ends, such as closing the company's bank account, the transfer of any domain names should all be taken care of before applying for voluntary wind up. In addition to notifying HMRC, a company may want to notify local authorities, especially if the company is under any obligation involving planning permission or health and safety issues, training and enterprise councils and government agencies.

Finally it should be noted that from the date of dissolution, any assets of a dissolved company will belong to the Crown. The company's bank account will be frozen and any credit balance in the account will pass to the Crown.

The company's directors must also send a copy of the application to any person who, after the application has been made, becomes a director, member, creditor or employee of the company, or a manager or trustee of any employee pension fund of the company. This must be done within seven days of the person becoming one of these. They must also send a copy of the application to any person who becomes one of the above at any time after the day the company made the application for voluntary strike off. This obligation continues until the dissolution of the company or the withdrawal of the application.

A copy of the 'Striking off application by a company' Form DS01 can be left at the last known address (if an individual) or the principal/registered office (if a company or other body). It is also permissible to make a creditor of the company aware of the application by leaving a copy of it at, or posting a copy of it to, the place of business with which the company has had dealings in relation to the current debts, for example, the branch from where goods were ordered or invoiced. However, if there is more than one such place of business, Companies House advises that a copy of the application be delivered to each of those places. They also suggest that it is advisable to keep proof of delivery or posting.

Companies House will examine the form and if it is acceptable will register the information and put it on the company's public record. If the Registrar has already started dissolution action under s 1000 (power to strike off company not carrying on business or in operation), Companies House will not accept the application. However, if the application is acceptable Companies House will send an acknowledgement to the address shown on the form and will also notify the company at its registered office address to enable it to object if the application is bogus.

The Registrar will publish notice of the proposed striking off in the *London Gazette* to allow interested parties the opportunity to object. A copy of this notice will be placed on the company's public record. If there is no reason to delay the Registrar will strike the company off the register not less than three months after the date of the notice. The company will be dissolved on publication of a further notice stating this in the relevant *London Gazette*.

Restoration to the register by court order

Unless a company is administratively restored to the register, the Registrar can only restore a company if he receives a court order. Any company which is restored to the register is deemed to have continued in existence as if it had not been struck off and dissolved. Companies struck off under s 1000 and the new application arrangements can be restored to the register for up to 20 years after dissolution (see above). A court order is necessary and application to the court can be made by interested parties such as creditors, particularly those who did not receive a copy of the company's application for striking off.

An interested party may also sometimes be a person who wishes to bring a personal injury claim against the company. The company will normally have been insured against such claims, but unless a judgment is obtained against the company, the liability of the insurer to meet the claim does not arise. The Secretary of State may also restore a company to the register if he considers this to be in the public interest. An application for restoration may be made by any of the following:

- any former director, member, creditor or liquidator;
- any person who had a contractual relationship with the company or who had a potential legal claim against the company;
- any person who had an interest in land or property in which the company also had an interest, right or obligation;
- any manager or trustee of the company's former employees' pension fund; or
- any other person who appears to the court to have an interest in the matter.

Except in cases of personal injury, an application for restoration must be made within six years of the date of dissolution. In the case of bringing a claim for damages for personal injury, an application for restoration may be made at any time, but the court may not make an order for restoration where it appears that the claim would fail due to legal time limits placed on it.

It was thought that interested parties who may apply for restoration to the register must, 'feel aggrieved' at the strike off *at the time of strike off*. It followed, therefore, that a director who had agreed with the board's decision to apply for strike off and who had been instrumental in bringing about the company's dissolution could not successfully ask the court to restore the company to the register (see ***Conti* v *Ueberseebank AG*** also cited ***Conti*, *Petitioner*** [1998] 11 CL 581).

This decision was reversed on appeal (see ***Conti* v *Ueberseebank AG*** [2000] 4 CL 698) where it was held that a member applying for restoration did not have to show that he had been aggrieved at the date of striking off so long as he could establish *a grievance at the time of his application* to restore the company, such as the possibility of a legal claim.

Outline procedure

Restoration to the register is a matter for the Companies Court, local district registries and county courts that have jurisdiction to wind up companies. The Registrar of Companies must also consent and applications for restoration must be served on him at least 10 days before the court hearing. In this connection, it is important to note that it is the normal practice of the Registrar to require delivery of outstanding accounts, annual returns and any other documents in acceptable form before the hearing, before giving his consent to the application. These documents must be delivered to the Registrar at least five working days before the hearing. A member of the company must be joined in the application to give any undertakings required by the Registrar and to be responsible for his costs of the application. If the company to be restored was registered in England or Wales, one must apply by completing a Part 8 claim form (this is the standard form that starts proceedings). The Registrar of the Companies Court in London usually hears restoration cases in chambers once a week on Friday afternoons. Cases are also heard at the District Registries. Alternatively, you can make an application to a County Court that has the authority to wind up the company.

Delay in application to restore to register

Where there is an application to restore a company to the register so that a claim can be brought against it the claimant should bear in mind that delay in regard to the making of a petition to the court for restoration may mean that the Limitation Act 1980 has applied so that the claim is statute-barred and restoration will not be granted. The period from the company's dissolution until the bringing of the restoration proceedings is taken into account by the court in deciding this issue (see ***Whitbread (Hotels) Ltd Petitioners*** 2002 SLT 178).

Offences and penalties

The application provisions must not be used to defraud creditors or for any other wrongful purpose. Most offences under the new provisions attract a fine of up to £5,000 on conviction before magistrates and an unlimited fine in the Crown Court. If directors deliberately conceal the application from interested parties, they are liable not only to a fine but up to seven years' imprisonment. There may also be disqualification from being a director, the maximum period being 15 years.

Name of restored company

The registrar will normally restore a company with the name it had before it was struck off and dissolved. However, if at the date of restoration the company's former name is the same as another name on the Registrar's index of company names, the register cannot restore the company with its former name. If the name is no longer available, the court order may state another name by which the company is to be restored. As an alternative, the company may be restored to the register as if its registered company number is also its name. The company then has 14 days from the date of restoration to pass a resolution to change the name of the company. It is an offence if the company does not change its name within 14 days of being restored with the number as its name.

When a company has been restored, the general effect is that a company is deemed to have continued in existence as if it had not been dissolved or struck off the register. The court may give directions or make provision to put the company and all other persons in the same position as they were before the company was dissolved and struck off. A notice must also be placed in the *London Gazette*.

Administrative Restoration

This is when, under certain conditions, where a company was dissolved because it appeared to be no longer carrying on business or in operation, a former director or member may apply to the Registrar to have the company restored. If the Registrar restores the company it is deemed to have continued in existence as if it had not been dissolved and struck off the register. Section 1025 of the 2006 Act gives details of the requirements relating to Administrative Restoration.

Administrative Restoration is available where the company was struck off under: s 652 of the 1985 Act; s 603 of the Companies Consolidation (Consequential Provisions) (Northern Ireland) Order 1986 (SI 1986/1035 (NI 9); or ss 1000 and 1001 of the 2006 Act. Only a former director or former member of the company, who was a director or member at the time the

company was dissolved, can apply. To be eligible for administrative restoration, the company must have been struck off the register under the above sections cited and dissolved for no more than six years as of the date the application for restoration has been received by the Registrar.

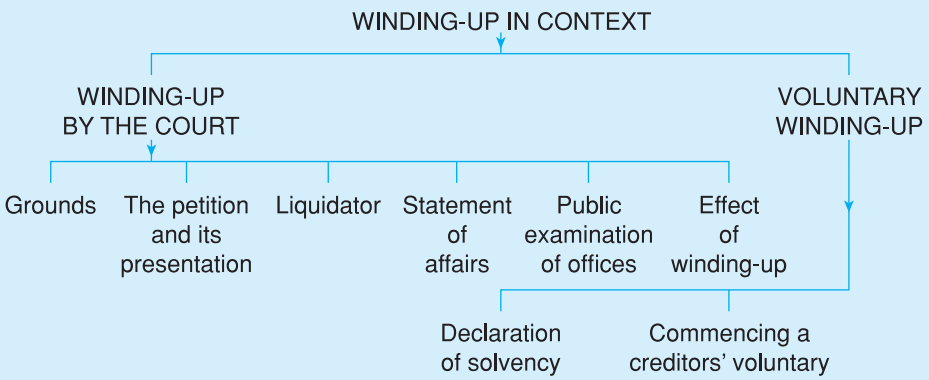
If a company meets the above criteria, an application for restoration may be made if it meets the following conditions:

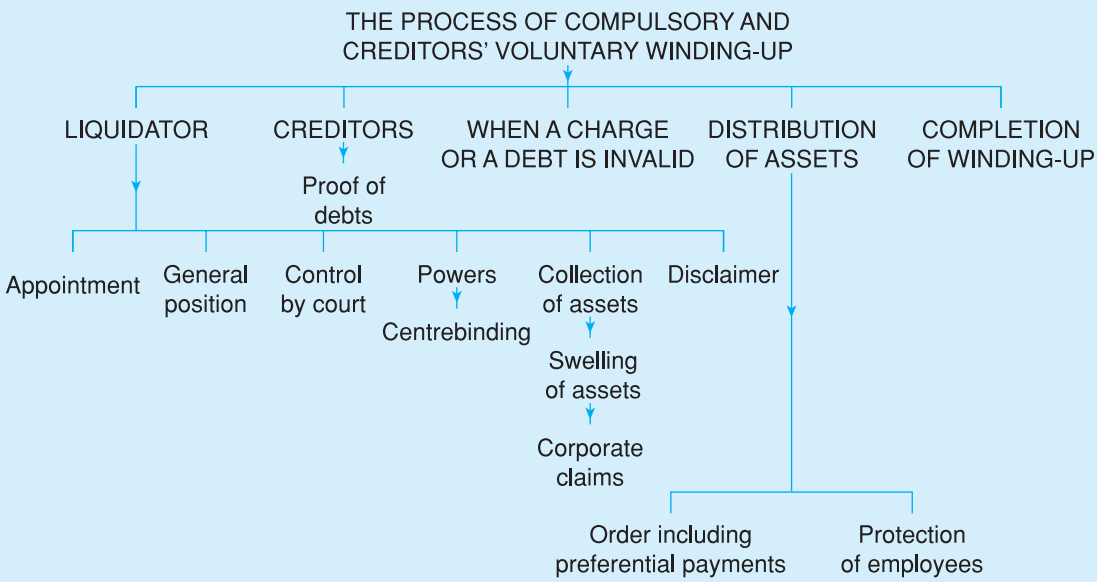
- it must have been carrying on business or in operation at the time it was struck off; and
- if any property or rights belonging to the company became *bona vacantia*, the applicant must provide the Registrar with a statement in writing from the relevant Crown Representative giving consent to the company's restoration.

If the Registrar decides to restore the company, the restoration will take effect from the date the Registrar sends the notice. The notice will include the company's registered number and the name of the company. If the company is restored under a different name or with the company number as its name, both that name and the former name shall appear on the notice.

Author's note. Questions on winding-up can be found at the end of Chapter 27, on p. 612.

27 Corporate insolvency – winding-up in context





Having outlined the methods of winding-up in terms of a broad overview, we now consider in this chapter the likely course of a winding-up.

Let us assume that we are dealing with a small manufacturing company which has suffered from a recession in trade and is now in difficulties in terms that its creditors are pressing for payment which it cannot make. In addition, let us consider the problem from the point of view of the unsecured or trade creditors who do not wish to appoint an administrator.

Two courses are open to them as follows:

1 To initiate a winding-up by the court. This is slow and expensive.
2 To convince the directors that the company cannot continue in business and that it would be advantageous to initiate a creditors' voluntary winding-up.

Both procedures will be considered in turn. Section references are to the Insolvency Act 1986 unless otherwise stated.

Winding-up by the court

Grounds

The grounds for compulsory winding-up under s 122 are as follows:

(a) a special resolution by the members to wind up;
(b) failure to start business within one year of incorporation or suspension of business for a whole year;
(c) if the number of members falls below two, though not in the case of a single-member company;
(d) if the company is unable to pay its debts;
(e) if it is just and equitable that the company be wound up.

In addition, a newly incorporated public company may be wound up if it does not obtain a certificate under CA 2006, s 761 within one year of incorporation. The petition may be presented by the Secretary of State. We have already considered the more important cases under (e) above (see Chapter 16 See p. 312).

It is only the fourth ground (which is the commonest and most important) that will be dealt with in any detail here.

A company's inability to pay its debts is defined by s 123 as follows:

(a) If a creditor to whom the company is indebted in a sum *exceeding £750* has served a demand in writing for payment and within three weeks the company has failed to pay the sum due (or given a security or entered into a compromise acceptable to the creditor). A statutory demand cannot be based on a statute-barred debt, e.g. a contract debt that is more than six years old, so an action cannot be brought upon it (***Re a Debtor (No 50A SD/95)*** [1997] 2 All ER 789). A statutory demand cannot be based upon a contingent debt as where a contract debt is unlikely to be paid but has not yet become due under the contractual provisions for payment (see ***JSF Finance & Currency Exchange Co Ltd*** v ***Akma Solutions Inc*** [2001] 2 BCLC 307).

Note that it is not merely the failure to pay the debt which gives the ground for winding-up. Thus, if a company can satisfy the court that it has a defence to the claim a

winding-up order will not be made. In consequence it is advisable for a creditor to sue the company to judgment before serving a demand for payment of the judgment debt, though this is not a legal requirement.

(b) If a judgment creditor has tried to enforce his judgment by execution on the company's property and the execution has failed to satisfy the debt.

(c) If the court is satisfied that the company is unable to pay its debts. The following case provides an example.

Taylors Industrial Flooring Ltd* v *M & H Plant Hire (Manchester) Ltd
[1990] BCLC 216

M & H supplied plant to Taylors, who were building contractors, in December 1988. M & H invoiced Taylors in mid-January 1989 but by 14 April 1989 the invoice had not been paid, nor had the second invoice which was issued in February 1989. M & H petitioned for the compulsory winding-up of Taylors on 14 April. The Court of Appeal *held* that the petition could proceed. Section 123 was satisfied. Taylors had no grounds to dispute the debt, and the fact that they might not wish to pay it was no defence.

Comment

This is a useful decision in modern times when companies have collapsed so quickly that the wait of three weeks for the statutory demand to trigger has seen the company's assets dissipated.

Petitioners

For our purposes, six classes of persons can present a petition as follows:

1 the company itself;
2 the Official Receiver who can present a petition even after the commencement of a voluntary winding-up;
3 the Department for Business, Innovation and Skill (BIS), following an investigation;
4 a contributory;
5 a creditor;
6 the Secretary of State for BIS (Secretary of State) where a public company does not obtain a s 762 (CA 2006) certificate in time.

Only a petition by a contributory or creditor will be considered in any detail here.

(a) Contributory

The following points should be noted:

(i) A contributory is defined as meaning everyone who is liable to contribute to the assets of the company should it be wound up.

(ii) Although at first sight the term would appear to cover only shareholders whose shares are partly paid, it applies also to holders of fully paid shares since all members are liable to contribute subject to any limits on their liability provided for by s 74 of the Insolvency Act 1986 (***Re Anglesey Colliery Co*** (1886) 1 Ch App 555). The section provides that a person who has fully paid shares is not liable to contribute but nevertheless he is within

the definition of a contributory. So 'contributory' is merely another name for 'member' under s 124.

(iii) Under s 124 a contributory cannot petition unless (a) the number of members is reduced below two, but not in the case of a single-member company; or (b) he took his shares as an original allottee; or (c) by transmission from a deceased shareholder; or (d) he had held the shares for six out of the last 18 months. This is presumably a precaution to prevent the purchase of shares with a view to an immediate wrecking operation on the company.

(iv) Finally, a contributory cannot petition unless he has an interest in the process, e.g. it must be likely that there will be surplus assets. Thus, if a company is insolvent, a contributory cannot petition, though he can and has an interest if, because of the potential liability for the company's debts in a multi-member company, the membership is below the statutory minimum of two.

(b) Creditors

The following points should be noted:

(i) The creditor is the most usual petitioner. A creditor is a person who is owed money by the company and who could enforce his claim by an action in debt.

An unliquidated (or unascertained) claim in contract or tort is not enough. Thus it is better for the creditor petitioner to have the debt made precise as to amount by suing the company to judgment before winding-up. Then on petition the company cannot, by reason of the judgment, deny that it owes the money, or that it is an unliquidated sum.

(ii) The debt owed to the creditor to be *at least* £750. If it is not, he will no doubt find other creditors to make a joint petition with him so that the total debt is at least £750.

The figure of £750 has been adopted by the judiciary from the amount specified in s 123 of the Insolvency Act 1986 though that section does say: 'exceeding £750'.

(iii) Even if the debt on which the petition is based is not disputed, but there are some creditors who think that their best chance of recovering their money lies in the company continuing business, then the court may, in its discretion, refuse a winding-up order. Section 195 gives the court power to have regard to the wishes of the creditors, which in practice usually means the wishes of the majority in value.

Thus, in ***Re ABC Coupler & Engineering Ltd*** [1961] 1 All ER 354 a judgment creditor for £17,540 petitioned as his debt was not paid. He was opposed by various creditors whose debts were slightly more, namely £18,328. The company had extensive goodwill, orders worth £110,000 and its assets were worth almost £700,000 more than its liabilities. The court found that the wishes of the majority for the company to continue were reasonable.

Presentation of the petition

As soon as a petition is presented, the court may under s 135 take charge of the company's affairs by appointing a provisional liquidator. This is usually the Official Receiver.

It is a somewhat drastic measure to appoint a liquidator before the court has made a winding-up order, but if the company's assets are at risk of being dissipated by the directors it may be done. The role of the Official Receiver as provisional liquidator is to take possession of the assets and accounting records until the hearing of the petition. Normally the directors will also be relieved of the company's cheque books.

Avoiding property dispositions in compulsory winding-up

If a winding-up order is made on a petition for compulsory winding-up the commencement of the winding-up is deemed to be the date of presentation of the petition under what is known as the principle of 'relation back'. If there have been dispositions of the company's property during that period the liquidator may ask the court for an order restoring the property to the company. The directors may have made such dispositions after the petition but before the making of the order. These dispositions are void under s 127, Insolvency Act 1986 whether the recipient of the property is aware of the presentation of the petition or not. Those who are aware of it and wish genuinely to deal with the company should ask the court for a validating order which if given will make the relevant transaction legally enforceable and the property irrecoverable. In ***Oxford Pharmaceuticals Ltd, Re*** [2009] EWHC 1753 (Ch); [2009] 2 BCLC 485, the court concluded that a breach of s 127 is likely to constitute misfeasance on the part of a company director. Nonetheless, this point must be explicitly alleged otherwise a failure to do that will preclude a remedy under s 127 against a director unless the director was the beneficiary of the disposition.

Liquidator

Under s 136 the Official Receiver becomes the liquidator of any company ordered to be wound up by the court. Section 136 prescribes the steps to be taken to secure the Official Receiver's replacement as liquidator by an insolvency practitioner. For this purpose he may summon meetings of the company's creditors and members to choose a person to replace him and, under s 141, to decide whether to establish a liquidation committee to supervise the performance by the liquidator of his functions in the winding-up. Alternatively, the Official Receiver may ask the Secretary of State to make an appointment of a liquidator. If one-quarter in value of the company's creditors request him at any time to call the meetings of creditors and members referred to above the Official Receiver must do so.

Under s 139, if the members and creditors nominate different persons to be liquidators, the creditors' nominee becomes liquidator. Where a winding-up order follows immediately upon the discharge of an administration order, the court may under s 140 appoint the former administrator to be liquidator.

Statement of affairs

Under s 131, where the court has made a winding-up order or appointed a provisional liquidator, the Official Receiver may require the submission of a statement of affairs of the company giving, e.g. particulars of its assets and liabilities and details of its creditors.

The persons who will most usually be called upon to make the statement are the directors or other officers of the company. However, the 1986 Act empowers the Official Receiver to require other persons connected with the company to produce or assist in the production of the statement, e.g. employees or those employed within the last 12 months.

Investigation by the Official Receiver

Section 132 places a duty on the Official Receiver to investigate the affairs of the company and the reasons for its failure and to make such report, if any, to the court as he thinks fit.

Public examination of officers

Under s 133 the court has power on the application of the Official Receiver to require the public examination of persons connected with the company, e.g. its officers or an administrator. Those who without reasonable excuse fail to attend the examination may be arrested and books or papers in their possession seized.

Effect of winding-up

This is as follows:

(a) Immediately an order is made all actions for debt against the company are stopped (s 130). Actions in tort, e.g. for personal injury from negligence, continue.
(b) The company ceases to carry on business except with a view to a beneficial winding-up. For example, it may be necessary to carry on the company's business for a while in order to realise its assets at a better price, as by completing work in progress, but realisation must not be long delayed.
(c) The powers of the directors cease (***Fowler* v *Broads Patent Night Light Co*** [1893] 1 Ch 724).
(d) Employees are automatically dismissed (***Chapman's Case*** (1866) LR 1 Eq 346), though the liquidator may have to re-employ some of them until the winding-up is completed.

The EC Regulation on Insolvency Proceedings

The EC Regulation on Insolvency Proceedings came into force on 31 May 2002. It is directly applicable in the UK but a number of amendments were required to UK law to accommodate it. These appear below.

Before the coming into force of the Regulation it was possible to wind up a foreign company with assets in the UK in a UK court. Now *the main proceedings* are to be conducted where the company has its centre of main interests. In most cases this will be where the registered office is. Courts of other member states can open proceedings called *territorial proceedings* where the company carries on a non-transitory economic activity with human means or goods. These proceedings are restricted to assets situated in that member state. The proceedings affected are winding-up by the court, voluntary winding-up (with confirmation of the court), administration and voluntary arrangements.

Comment

(i) When an insolvency relates only to a person or entity with all of his or its assets in the same jurisdiction, the Regulation will have no application. In other cases the Regulation effects a most significant change to insolvency practice and merits careful study.
(ii) Although, under the above rules, courts throughout the EU (except Denmark) will be forced to recognise and assist insolvency practitioners from other countries, there are some difficulties, as follows:
- The rules do not apply to the insolvencies of a group of companies. Since this is the most common way in which international businesses are structured where there are operations in different countries, the regulations may not come into effect that often.
- There will also be arguments over whether the company has its 'centre of main operations' in a particular country.

- The provisions do not apply to insolvency practitioners appointed out of court – such as administrative receivers – and although these appointments are to be phased out under the Enterprise Act 2002, that Act does carry provisions under which an administrator may be appointed out of court, e.g. by the directors, and these appointments may not be covered.

The regulations seem to require a court involvement before proceedings are covered.

UK regulations to ensure compatibility

The UK regulations made to ensure the compatibility of the EC Regulation with UK law are: the Insolvency Act 1986 (Amendment) (No 2) Regulations 2002 (SI 2002/1240) and the Insolvency (Amendment) Rules 2002 (SI 2002/1307).

The regulations: an illustration

If the debtor (corporate or individual) has all the business interests in, say, Chester, proceedings will be commenced in the Chester County Court, or the High Court in the case of a corporate debtor with a share capital in excess of £120,000. These will be *main proceedings*. If, however, the debtor has main interests in, say, Paris, with some assets in Chester, the proceedings will be commenced as above but they will be *territorial proceedings* and confined to Chester assets.

The regulations: case law

The High Court has ruled that it could make an administration order against a company incorporated outside the European Union under the above-mentioned regulations if the centre of the company's main interests was in England (see ***In Re Brac Rent-A-Car International Inc*** [2003] EWHC 128 (CH), [2003] All ER (D) 98 (Feb)). Certain judgment creditors challenged the jurisdiction of the court on the grounds that the company (which was the petitioner for administration) was incorporated in Delaware and had its registered address in the USA. The court accepted that there was no specific reference to companies outside the EU but since the jurisdiction was defined only in terms of where the petitioner's main interest lay the court had jurisdiction. The company's operations were conducted almost entirely in England and its trading contracts were governed by English law. Its employees worked in England and their contracts were governed by English law.

Comment

(i) It would appear that a UK court will, conversely, be denied its traditional jurisdiction to proceed to total winding-up where the company's centre of interest is not in the UK and be restricted to territorial proceedings confined to local assets.

(ii) Case law is still somewhat confusing on the interpretation to be put on the expression 'centre of main interests'. In the ***Brac Rent-a-Car*** case the court seems to have laid stress on where the employees were based and where trading took place and operations were put into effect, i.e. England. More recently the High Court has reached a conclusion that would have given the English court jurisdiction because key personnel, e.g. chairman, CEO, chief financial officer and chief operating officer, were based in London. The headquarters function played less of a role in the ***Brac Rent-A-Car*** case. A future case will hopefully sort

out whether high level decision making or lower administration or back office functions are most important (see ***King* v *Crown Energy Trading*** [2003] EWHC 163 (Comm), [2003] All ER (D) 133 (Feb) which favoured high level decision making).

Byers* v *Yacht Bull Corp [2010] EWHC 133 (Ch); [2010] BCC 368 held that a claim asserted by joint liquidators to the ownership of an asset did not fall within the insolvency exception in the Judgments Regulation (44/2001) (see Art 1(2)(b)) and as such, the French courts had jurisdiction over this claim. Nonetheless, a secondary transactional avoidance claim that relied entirely on provisions contained in the Insolvency Act 1986 did with the end result that the English courts enjoyed jurisdiction over this transactional avoidance claim by virtue of the EC Regulation on Insolvency Proceedings (1346/2000) even though this jurisdiction could not be exercised until the French courts had determined the primary ownership issue. This position is consistent with the European Court of Justice ruling in ***Seagon* v *Deko Marty Belgium NV (C-339/07)*** [2009] BCC 347; [2009] 1 WLR 2168.

Voluntary winding-up

This is a more common method of winding-up. If in our situation the directors can be persuaded to take the view that the company has no future and agree it would be best if its existence came to an end, then a voluntary winding-up would be a cheaper method of achieving this purpose.

What sort of voluntary winding-up is applicable?

If we want a members' voluntary winding-up the directors would, as we have seen, have to make a *statutory declaration of solvency*, as it is called, in the five weeks before the special resolution for winding-up was passed, or on that date but before the resolution was passed (s 89). In the declaration they would have to say that in their opinion the company will be able to pay its debts in full plus interest within a stated period of time which must not be longer than 12 months, and a statement of assets and liabilities must be attached. Since the directors and the members control the process in a members' voluntary winding-up, there is a strong temptation for the directors to make a declaration, even if it is not fully justified.

The rate of interest is the rate, if any, in the contract with a creditor, or the interest paid on unpaid judgments under the Judgments Act 1838, which is currently 8 per cent. This rate has been in force since 1 April 1993 (see SI 1993/564). The interest is payable from the commencement of the winding-up until payment and can only be paid if all creditors have been paid the principal sum of their debt in full – in other words, it is payable from surplus assets which would normally belong to shareholders. If the contract provides for interest, this, along with the principal sum, will be proved for in the liquidation in the ordinary way.

False declarations – what are the penalties?

Under s 89, if the declaration is made without reasonable grounds the directors are liable to imprisonment and/or an unlimited fine; *and* if the debts are not in fact paid within the stated period it is *presumed* that the directors did not have reasonable grounds so that they will have to prove that they did, which is not an easy matter.

However, this does not apply to debts which are not fully ascertained. Commonly HMRC has not completed its assessments and cannot be paid. Nevertheless, if funds are available to pay such debts when ascertained, the members' winding-up continues and there is no need to convert to a creditors', nor are the directors liable for a false declaration.

However, if during a members' voluntary winding-up the liquidator is of the opinion that the company will not be able to pay its ascertained debts although a declaration of solvency has been given, s 95 provides that he must summon a meeting of creditors within 28 days of that opinion and put before it a statement of assets and liabilities.

As from the date when the liquidator calls the meeting of creditors, the company is deemed to be in a creditors' voluntary, and that meeting may exercise the same powers as a creditors' meeting at the beginning of a liquidation which is initiated as a creditors' winding-up, including appointing their nominee as liquidator and a liquidation committee.

If he does not follow this procedure, the liquidator is liable to a fine; and if he does, then the directors are liable to penalties for making a declaration of solvency without reasonable grounds.

The liquidator who has been nominated by the company on the basis that there would be a members' voluntary winding-up can, between the date of summoning the meeting and the meeting taking place, act only with the sanction of the court, except for taking all property under his control to which the company appears entitled. He may also dispose of perishable goods and do all such other things as may be necessary for the protection of the company's assets but no more.

Filing the declaration of solvency

The declaration must be filed with the Registrar before the expiry of the period of 15 days immediately following the date on which the resolution for winding up the company is passed. The company must give the usual 21 days' notice to its members of the extraordinary general meeting to consider the special resolution to wind up voluntarily.

If the statutory declaration is not delivered within the 15-day period, the liquidation remains a members' voluntary liquidation but the company and its officers are liable to a default fine under s 89.

Can we use a members' voluntary winding-up?

Unfortunately, our directors are only too well aware that the company will not be able to pay its debts within 12 months, so we shall have to have a creditors' voluntary winding-up and proceed as follows under s 84:

(a) Summon an extraordinary general meeting.
(b) Pass an extraordinary resolution that the company cannot by reason of its liabilities continue in business.
(c) It is the resolution which marks the start of a voluntary winding-up.
(d) The liquidator is appointed by the company if it is a members' voluntary winding-up; in a creditors' voluntary winding-up, though the members may by ordinary resolution have nominated their choice, the creditors have powers to override and appoint their own nominee, subject to the right of any member or creditor to appeal to the court within seven days.

However, even though the members may appoint their choice of liquidator he has only very limited powers until such time as the creditors have met and confirmed him in office or not. He can take the company's property under his control and dispose of perishable goods and generally protect the company's assets but *no more*.

If the company nominates five persons for what is called the liquidation committee, both in a voluntary winding-up and also in a compulsory winding-up, the creditors can now nominate five more and veto the company's nominees, subject again to a right of appeal to the court.

Purpose of liquidation committee

The purpose of such a committee is to provide a small representative body to help the liquidator. Moreover, if there is a major creditor, who regards the assets of the company as virtually his own, the committee may provide him with a useful safety valve. The liquidator becomes involved in many kinds of businesses but a major creditor, with his knowledge of the trade, can control the committee, and supervise the winding-up, and see that the run-down of the company is carried out to the best advantage. Since a liquidation committee can exercise certain powers, such as, for example, approving payment to any class of creditors, it will save the liquidator the necessity of calling a full meeting of creditors, whose approval would otherwise be necessary.

From now on we will combine consideration of the compulsory and voluntary winding-up process.

The duties of a liquidator

Appointment

The following points should be noted:

(a) If it is a compulsory winding-up, the Official Receiver, who automatically became provisional liquidator on the winding-up order (if not earlier on the presentation of the petition), will commonly continue as the liquidator.

(b) In the case of a voluntary winding-up, a person, other than a corporate body or a bankrupt, can be appointed, provided he is a qualified insolvency practitioner (see further Chapter 26). The liquidator is usually an experienced accountant.

See p. 578

(c) In a voluntary winding-up, the liquidator will have to notify his appointment to the Registrar of Companies and publish it in the *London Gazette*, both within 14 days.

General position of the liquidator

Section 143 states that the functions of the liquidator of a company *which is being wound up by the court* shall be to ensure that the assets of the company are got in, realised and distributed to the company's creditors, and, if there is a surplus, to the persons entitled to it.

Beyond this there is no clear definition of his role; it is a mixture of common law and statutory duties and obligations. He partakes partly of the nature of a trustee, partly of an agent of the company and partly of an officer of the company.