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Collas Crill explains... Court-ordered creditors' winding up of a Jersey company

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Jersey is a popular place to establish an asset-holding company. It is well-regulated, creditor-friendly, and the **Companies Law** is modern, flexible and modelled on English companies legislation.

But what happens when things go wrong and a company becomes **insolvent**?

This guide looks at the key things you need to know about liquidating an **insolvent** company using a **Court**-ordered creditors' winding up.

Words in bold text are defined at the end of this guide.

What is a creditors' winding up?

A creditors' winding up is either a **Court**-ordered or shareholder-initiated insolvency procedure that is used to liquidate an **insolvent** company.

The purpose of a creditors' winding up is to facilitate the orderly and fair distribution of the company's assets by treating the claims of all unsecured creditors equally and rateably.

Amendments to the **Companies Law** in 2022 significantly bolstered a creditor's armoury, and creditors of a Jersey company can now apply directly to **Court** to wind up the company. Furthermore, a creditor can rely on a **statutory demand** served on a company, which has not been paid or disputed, as evidence of the company's insolvency. This can then form the basis of a winding up application before the **Court** with relative ease and speed.

Other insolvency procedures

There are three other procedures that may be used to liquidate an **insolvent** company: *désastre* proceedings under the **Bankruptcy Law**; a winding up on just and equitable grounds; and a shareholder-initiated winding up, achieved by means of a **special resolution** of the company.

Please see our related guides on these topics:

- Shareholder initiated creditors' winding up of a Jersey company
- Désastre proceedings for a Jersey company; and

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- Winding up a Jersey company on a just and equitable grounds.

The Jersey insolvency regime does not yet include reconstructive procedures like:

- administration under the UK Insolvency Act 1986; or
- Chapter 11 proceedings under the US Bankruptcy Code.

However, where a Jersey company holds assets located in the UK and encounters financial difficulty or becomes insolvent, the company may be placed into administration under the **UK Insolvency Act**. Our guide *Placing a Jersey company into UK administration* explains how this may be achieved.

The **Court** can recognise the appointment of foreign office holders in a number of scenarios. This is achieved in response to a request received from the competent court of the jurisdiction where the foreign office holder is appointed. This is useful in a number of scenarios, for example when a foreign company owns assets in Jersey that need to be dealt with in an administration, or a foreign liquidator needs to investigate matters in Jersey, or be involved in legal proceedings. Obtaining recognition in this way saves the need for separate insolvency proceedings to be initiated in Jersey. Please see our guide *Getting a foreign insolvency officeholder recognised in Jersey* for an explanation of the process

Although not strictly speaking an insolvency procedure, the **Companies Law** also enables a company to enter into a scheme of arrangement with its creditors or any class of them.

When is a company insolvent?

Under the **Companies Law**, a company is regarded as being **insolvent** if it is unable to pay its debts as they fall due. This is generally described as "cash flow" insolvency.

Unlike other jurisdictions, Jersey does not adopt a test based on the company's balance sheet. What this means, is that for a Jersey company to be **insolvent**, it is not necessary that the value of the company's liabilities exceeds its assets.

Eligibility of company

A company may only be placed into a creditors' winding up if its assets have not been declared *en désastre* (a **declaration**) under the **Bankruptcy Law**.

Eligibility of creditor

A creditor may make an **application** to the **Court** for an order to commence a creditors' winding up if:

- the creditor has a claim against the company for not less than £3,000; and

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- the company is unable to pay its debts, the creditor has evidence of the company's insolvency; or the creditor has the consent of the company.

What evidence must a creditor provide with the application?

Where the **application** is not being brought with the company's consent, the creditor must provide evidence that:

- the creditor has a claim against the company for not less than £3,000; and
- the company is unable to pay its debts; or
- the company is insolvent.

Unanswered statutory demand as evidence of a company's inability to pay its debts

The vast majority of creditor winding up applications are brought following the service of a **statutory demand** on the company.

A company will, subject to the **Court**'s consideration, be deemed to be unable to pay its debts if:

- the creditor has served a **statutory demand** on the company requiring it to pay the sum claimed; and
- the company has, for 21 days after service, failed to pay or otherwise dispute the debt due, to the reasonable satisfaction of the creditor.

The **statutory demand** must be made in the form prescribed by statute. The creditor will need to provide evidence in relation to the response, if any, to the **statutory demand** as part of their **application** to wind up the company.

The **statutory demand** must be personally served on the company, which means that it must be served through the Viscount's office.

Notice to the company of the application

Except in exceptional circumstances, a creditor making an **application** to wind up a company must give the company at least 48 hours' notice.

There is no guidance as to what might constitute exceptional circumstances. However, an example might be where the creditor becomes aware that there is likely to be an imminent and significant transfer of value out of the company, or that such a transfer is likely to be made if the company is given notice of the **application**. In circumstances like this, the **Court** might be open to dispensing with the 48 hour notice requirement.

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When an application cannot be made

A creditor must not make an **application** to wind up the company:

- if the creditor has agreed with the company that it will not do so; or
- if the creditor's only claim is for repossession of goods. The creditor should take direct action in respect of the goods themselves, rather than seek to wind up the whole company.

What form does the Court application take?

The **application** is made in a prescribed form, and must be accompanied by a sworn affidavit containing the evidence on which the **application** relies.

What orders can the Court make?

After considering the **application** and evidence in support, the **Court** may order that the creditors' winding up commences from the date the **application** is made, or from a date selected by the **Court**.

If the winding up order is made, the **Court** will appoint a liquidator, either as nominated by the creditor or as selected by the **Court**.

Alternatively, the **Court** could:

- dismiss the **application** with such orders as it sees fit (e.g. a costs order against the applicant creditor);
- adjourn the hearing to another date;
- require the applicant creditor to provide further information; or
- order additional parties to be joined to the **application**.

Who pays for the application?

The creditor making the **application** will be primarily liable for meeting the upfront costs of the process, including any **Court** fees and legal advice that they take.

However, once the **application** has been determined, the **Court** will decide whether to make a costs order in favour of any party. It is not uncommon for a successful applicant's costs to be made an expense of the winding up and paid in priority to other creditors of the company.

Creditor's liability for an application against a solvent company

If a creditor's **application** is successful, and it is later discovered that the company was not insolvent as at the date of the **application**, the company has a right to recover damages against the creditor applicant, to

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compensate it for any loss sustained as a consequence of the **Court's** order. If the company wishes to bring this type of action, it must do so within 12 months of the date of the **application** by the creditor to wind up the company.

A creditor can resist any such application by the company, if it can establish that, in making the **application**, it acted reasonably and in good faith.

When does a creditors' winding up start?

The **Court** may make an order that the winding up commenced when the **application** is made or an alternative date.

Can a company stop a liquidation?

A company may, at any time during the course of the **Court**-ordered creditors' winding up, apply to the **Court** for an order terminating the winding up.

In considering any such application, the **Court** must have regard to the interests of those creditors who have filed a proof of debt; those who have notified the liquidators that their claims will be filed within the prescribed time; and the company.

The **Court** must refuse an **application** made by the company to terminate the winding up if it is not satisfied that the property of the company is, at the time of the application, sufficient to pay in full claims filed with the liquidator, or claims that the liquidator is expecting within the prescribed timeline.

If the **Court** grants the company's application, then the creditors' winding up terminates from the date of the order unless the **Court** orders otherwise. The order does not prejudice the validity of any act of the liquidator up until that date.

Appointment of provisional liquidator

The **Court** may appoint a provisional liquidator where the creditor applicant can show that it is likely that the winding up order will be granted, and a provisional liquidator is required in order to preserve the company's assets, its books and/or records.

The provisional liquidator must carry out the liquidator's functions (as may be modified by order of **Court**).

Permanent liquidator

The provisional liquidator's appointment can be confirmed as permanent by the **Court**. Alternatively, an alternative liquidator can take over.

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It is common that two liquidators are jointly appointed to wind up the company.

The liquidator's role

The liquidator (including any provisional liquidator) takes control of the company in order to realise its assets for the benefit of its creditors.

Notice of appointment by liquidator

Within 14 days of the liquidator's appointment, the liquidator must:

- give notice of the appointment to the registrar of companies, the Viscount and the directors and creditors of the company (to the extent known to the liquidator); and
- send a copy of the relevant Act of **Court** that has been issued by the **Court** following the hearing of the application, to the registrar.

Within 14 days of the Act of **Court**, the liquidator must publish a notice in the Jersey Gazette stating that the company has been placed into a creditors' winding up.

First meeting of creditors

Within 7 days after their appointment, the liquidator must give written notice to the company's creditors (that are known to the liquidator) calling a meeting of creditors. The meeting must be held in Jersey 21 days after the date of the **Court** order.

The liquidators must also give no less than 10 days' notice of the creditors meeting, in the Jersey Gazette.

The liquidator must provide creditors with any information that they have concerning the company's affairs that the creditors reasonably require ahead of the meeting, free of charge.

The liquidator appointed by the **Court** must preside over the creditors' meeting. At the creditors' meeting, the directors must present a statement of the company's affairs prepared by them, which must be verified by an affidavit sworn by some or all of them.

Appointment of liquidation committee

The creditors may appoint a liquidation committee to represent their interests in certain statutory decisions if they wish. The shareholders may also appoint members to the committee if the creditors have formed one, subject to the creditors' refusal. See *Liquidation Committee* below.

Challenging the liquidator's appointment

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Where a liquidator has been appointed by the **Court**, a creditor may, within 7 days of the creditors' meeting, apply to the **Court** for an order appointing some other person to be the liquidator.

What are the consequences of a creditors' winding up?

The main consequences of a company being placed into creditors' winding up are as follows.

Stop carrying on business

The corporate state and capacity of the company continue until it is dissolved, but from the start of the creditors' winding up, it must stop carrying on its business except as may be necessary for its beneficial winding up.

Unlike *désastre* proceedings, the company retains ownership of its assets and they do not vest in the liquidator. The liquidator may, however, apply to the **Court** for an order requiring any person who has possession or control of any asset to which the company appears to be entitled, to deliver, surrender or transfer the asset to the liquidator.

Powers of directors

On the appointment of a liquidator, the powers of the directors cease except to the extent the **Court** or liquidator sanction their continuance.

During any period after the winding up has begun, but before a liquidator is appointed, the powers of the directors may only be exercised:

- with the approval of the **Court**;
- to satisfy the company's obligation to call and hold the meeting of creditors; or
- to protect the company's assets.

This scenario will only arise where no provisional liquidator has been appointed (as addressed above).

Prohibited actions

From the date the creditors' winding up starts:

- except as noted under How are secured creditors affected? below, the only remedy of a creditor against the company is to prove its debt in the winding up;
- a creditor cannot start any action or legal proceedings against the company or continue any action or legal proceedings to recover its debt unless permission is obtained from the **Court**; and
- except as noted under *How are secured creditors affected?* below:

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- any transfers of shares in the company made without the approval of the liquidator; and
- any changes in the status of the shareholders made after the start of the creditors' winding up,

are void.

Invoices, letters, etc.

Every invoice, order for goods or services or business letter issued by or on behalf of the company or a liquidator of the company must state that the company is in liquidation.

Recovery actions

If the liquidator believes there are grounds to do so, the liquidator may seek to try and increase the distribution to creditors by:

- challenging transactions entered into by the company (such as a transaction at an undervalue, a preference or an extortionate credit transaction);
- disclaiming onerous property (e.g. unprofitable contracts or unsaleable property);
- taking action against the company's directors (e.g. for breach of duty or wrongful trading); or
- taking action against the company's shareholders (e.g. to make a call or reclaim an unlawful distribution).

For more information on the potential recovery actions the liquidator may make, see our guide *Potential insolvency challenges under Jersey law*

How are secured creditors affected?

The effect on secured creditors of a company being placed into a creditors' winding up is as follows:

Jersey real estate

As noted in *Prohibited actions* above, if the company has been placed into a creditors' winding up, a creditor who has security over Jersey real estate owned by a Jersey company may only enforce its security by bringing an action against the company with the permission of the **Court**. Ordinarily, the liquidator will sell the secured real estate and pay the sale proceeds (after deducting the sale costs and the liquidator’s fee) to the secured creditor.

If the value of the secured creditor's debt exceeds the sale proceeds, the secured creditor may prove for the balance of its debt as an unsecured claim in the company's creditors' winding up.

Jersey intangible movable assets

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In a typical financing transaction, the Jersey intangible movable assets over which security is taken include things like shares, debt securities, bank accounts and contractual rights.

Under the **Companies Law,** where a creditor has taken security over:

- any Jersey intangible movable assets of the company, the creditor may exercise any power of enforcement conferred by the **Security Law** without the consent of the liquidator or the leave of the **Court**;
- the company's shares, the creditor may transfer the shares pursuant to the exercise of any power of enforcement conferred by the **Security Law** without the consent of the liquidator.

In addition, where the company has created a security interest over any Jersey intangible movable assets, the **Security Law**, states that the power of the secured creditor to enforce its security interest is not affected by the company

- becoming **insolvent**; or
- any of its assets becoming subject to insolvency proceedings in Jersey or elsewhere,

as long as the security interest was perfected before the company became **insolvent**.

If the liquidator sells any Jersey intangible movable assets that are subject to a valid and perfected security interest, the sale proceeds will be applied (after payment of the liquidator's fees and reasonable expenses) in payment of the secured debt.

Foreign assets

A Jersey company may own assets that are (or, under Jersey conflicts of law principles, taken to be) located outside Jersey.

Any security interest granted over a foreign asset may be subject to the requirements of the law of the jurisdiction where the asset is situated, even if the security documentation says otherwise. In these circumstances, the liquidator will need to seek foreign law advice to determine whether the security is enforceable, or how competing security interests should be treated.

How does a creditor make a claim?

If an unsecured creditor of a company wants to recover its debt in a creditors' winding up, it must make a claim (known as proof of a debt) in accordance with the **Companies Law**.

A creditor that has made proof of a debt may examine the proofs of debt of the other creditors at a time set by the liquidator.

The liquidator will publish a notice in the Jersey Gazette, and in any other publication the liquidator thinks necessary, advising the company's creditors to file their claims by a set date.

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What debts are admissible?

All present, future or contingent debts and liabilities to which a company:

- is subject at the start of the creditors' winding up; or
- becomes subject before payment of the final distribution, by reason of any obligation incurred before the start of the creditors' winding up,

are provable in the creditors' winding up.

Interest

Where an unsecured debt accrues interest, any interest accrued to the date of the start of the creditors' winding up is provable as part of the debt.

Where a secured debt accrues interest, any interest accrued to the date of payment of the debt is provable and payable from the sale proceeds of the secured assets to the extent that they are sufficient to pay the interest.

Contingent debts

Where a debt is contingent or does not have a certain value, the creditor must make an estimate of its value.

Admitting or rejecting proofs of debt

The liquidator may:

- admit or reject (in whole or part) proof of any debt; or
- reject (in whole or part) any claim for interest, if the liquidator considers the rate of interest to be extortionate.

Before the liquidator admits or rejects proof of a debt, the liquidator may require evidence that supports or opposes the debt being admitted.

Liquidation committee

Appointment

If the creditors want to do so, at the first meeting of creditors they may appoint a liquidation committee, with up to five members.

The shareholders may also appoint up to five members of the liquidation committee. The creditors may block the appointment to the liquidation committee of any person nominated by the shareholders, although the

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shareholders have a right to appeal to the **Court**.

Powers

The power of the liquidation committee is limited to:

- authorising the liquidator's remuneration;
- authorising the liquidator to pay out to a class of creditors in full;
- compromising any claim by or against the company; and
- deciding how the records of the company and liquidator are to be destroyed once the creditors' winding up is complete.

Who may be appointed liquidator?

A person is only eligible to be appointed as a liquidator if the person is the Viscount or is registered as an approved liquidator and entered on the Register of Approved Liquidators. A person is not qualified to be registered as an approved liquidator and entered on the Register of Approved Liquidators unless the person:

- is ordinarily resident in Jersey (subject to the below);
- is an individual who has the level of experience determined by the **Viscount** in writing and:
- is licensed in the United Kingdom to act as an insolvency practitioner by one of the recognised professional bodies; or
- is a member of the Institute of Chartered Accountants in England and Wales, the Institute of Chartered Accounts in Scotland, the Chartered Accountants of Ireland or the Association of Chartered Certified Accountants; and
- has in place a general bond of £250,000 plus a specific bond of between £5,000 and £5,000,000 for each appointment.

An individual who is not ordinarily resident in Jersey, but otherwise meets the criteria set out above, may be registered as a non-Jersey resident liquidator in the Register of Approved Liquidators and appointed jointly with a Jersey resident liquidator of a Jersey company who is also in the Register of Approved Liquidators.

A person is disqualified for appointment as a liquidator if:

- they are not a natural person;
- they are a secretary, officer or servant of the company, or a partner or employee of such a person; or
- they are subject to a disqualification order under the **Companies Law**.

The **Court** may remove a liquidator at any time and may appoint another.

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Liquidator’s duties

General duties

The general duties of the liquidator are to:

- take possession or control of, protect and sell, the company's assets;
- distribute the company's assets (or proceeds of their sale) to its creditors in accordance with the **Companies Law**; and
- if, after paying the liquidator's fees and expenses and all debts proven in the creditors' winding up, there are any surplus assets or sale proceeds, distribute them among the company's shareholders in accordance with the **Companies Law.**

The liquidator's functions will also be subject to any special provision set out in the **Court** order appointing them.

Duty to report wrongdoing

If, during the course of the creditors' winding up, the liquidator forms the opinion that:

- the company or any other person has committed a criminal offence; or
- as a result of the conduct of any director of the company, a disqualification order should be made against that director under the **Companies Law**,

the liquidator must report the matter to the Attorney General and provide the Attorney General with any information or document the Attorney General requires.

Liquidator’s powers

General powers

The **Companies Law** gives a liquidator wide-ranging powers to carry out a creditors' winding up. Except as noted below, the liquidator may (without the approval of any person) exercise any power of a company that is required to carry out a creditors' winding up of the company.

However, the liquidator may only:

- pay a class of creditors in full; or
- compromise any claim by or against the company,

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with the approval of the **Court** or the liquidation committee (or, if there is no liquidation committee, a meeting of the creditors).

Investigative powers

The liquidator may require (among others) any current or former director or secretary of the company, employee or person who was an employee in the 12 months before the start of the creditors' winding up to:

- give the liquidator any information about the company and its business, dealings, affairs or assets that the liquidator reasonably requires; or
- meet with the liquidator at any reasonable time on being given reasonable notice.

In addition, the liquidator may apply to the **Court** for an order requiring any person who has possession or control of any asset or record to which the company appears to be entitled, to pay, deliver, surrender or transfer the asset or record to the liquidator.

Power to seek directions

The liquidator may apply to the **Court** for:

- an order regarding any question arising in the creditors' winding up; or
- the **Court** to exercise any of its powers relating to the creditors' winding up.

The **Court** may make an order on any terms it thinks fit if it is satisfied that it just and beneficial to do so.

Costs of creditors' winding up and liquidator's remuneration

All costs, charges and expenses properly incurred in a creditors' winding up, including the remuneration and expenses of the liquidator, are payable out of the company's assets in priority to all other claims.

A liquidator appointed in a creditors' winding up ordered by the **Court** is entitled to receive such remuneration as is fixed by the **Court**.

Distribution of sale proceeds

Pari passu principle

In common with many other jurisdictions, the **Companies Law** applies the *pari passu* principle. Under this principle, all unsecured creditors of an **insolvent** company share equally and rateably in the unsecured assets of a company remaining after the payment of the liquidator's fees and expenses and the claims of any preferential creditors.

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Payment waterfall

The liquidator must distribute the sale proceeds of the company's assets in the following order:

- the liquidator's fees and expenses;
- where the company is a bank, amounts payable to the Jersey Bank Depositors Compensation Board;
- amounts due to the company's employees for up to six months' wages, holiday pay and bonuses (subject to set maximum amounts);
- amounts due in respect of Jersey taxes, rent and parochial rates;
- all other debts proved in the creditors' winding up;
- interest on any provable debts which accrued interest before the creditors winding up in respect of the period during which they have been outstanding since the start of the creditors' winding up, at the normal contractual rate; and
- any balance is paid to the company's shareholders according to their rights and interests in the company.

Potential liabilities of shareholders

Liability to contribute

Where a company is placed into a creditors' winding up, holders of limited shares will only be liable to contribute amounts unpaid on their shares, or amounts they undertook to contribute in the event of a winding up.

Those contributions may be required to pay the company's liabilities, the expenses of the winding up, or to adjust the rights of the contributories amongst themselves.

Past holders of limited shares are not liable to contribute unless it appears to the **Court** that the present shareholders are unable to satisfy the contributions required from them. Any liability would be restricted to the amount paid on their shares. However, they will not be required to contribute:

- if they ceased to be a shareholder 12 months or more before the winding up began; or
- in respect of liabilities incurred after the shareholder ceased to be a shareholder.

Other provisions apply to past or present holders of unlimited shares or guarantor members.

Liability for share buyback or redemption

If the company unlawfully made a payment to buy or redeem shares in the 12 months leading up to the creditors' winding up, then the liquidator may apply to the **Court** to claw back the payment from the exiting

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shareholder to pay liabilities or expenses that cannot be covered by the company's assets or contributions of shareholders.

This does not apply to open-ended investment companies.

The **Court** will not order the person to contribute to the assets of the company unless the **Court** is satisfied that, when the person received the unlawful payment, the person knew, or ought to have concluded from facts known to the person, that, immediately after the unlawful payment was made:

- the company would be unable to discharge its liabilities as they fall due (i.e. the company is insolvent); and
- the realisable value of the company's assets would be less than its aggregate liabilities.

Set off and subordination

Where there are any mutual credits, mutual debts or other mutual dealings between a company and a creditor, the **Companies Law** requires the debts to be automatically set off on the date on which the creditors' winding up started.

The terms of any agreement relating to set-off, close-out netting or contractual subordination of debts are generally enforceable despite:

- the insolvency of any party to the agreement or any other person; or
- any lack of mutuality of obligations.

The liquidator must therefore give effect to any such agreement terms applicable to the company.

Termination

At any stage during a creditors' winding up, a liquidator may apply to the **Court** for an order terminating the creditors' winding up on the basis that the company can discharge its liabilities in full as they fall due.

Additional meetings

If a creditors' winding up continues for more than 12 months, the liquidator must call meetings of shareholders and creditors to be held within three months of the end of:

- that 12 month period; and
- each successive 12 month period.

The liquidator must prepare an account of their acts and dealings, and how the creditors' winding up was carried out in the relevant 12 month period, and present it at meetings of shareholders and creditors.

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Final meetings

Once the affairs of the company have been fully wound up, the liquidator must prepare an account of the winding up and how the company's assets were distributed, and present it in a meeting of members and a meeting of creditors.

Dissolution

Within seven days of the final meetings of the members and creditors being held (or, if they are held on separate dates, the date of the later meeting) the liquidator must file with the registrar of companies:

- a return for each meeting; and
- (in the case of a public company) a copy of the liquidator's account.

The registrar will register the return and (if applicable) the liquidator's account and the company is taken to be dissolved three months after the registration date.

Disposal of records

Once the creditors' winding up has been completed, the liquidation committee or (if no liquidation committee was appointed) the company's creditors may decide how the records of the company and the liquidator are to be destroyed.

However, since the limitation period for a contractual claim under Jersey law is 10 years, it is prudent to keep a company's records for 10 years after it has been dissolved.

Terms used

application means an application by a creditor to wind up the company pursuant to Article 157A of the Companies Law.
Bankruptcy Law means the Bankruptcy (*Désastre*)(Jersey) Law 1990.
Companies Law means the Companies (Jersey) Law 1991.
Court means the Royal Court of Jersey.
declaration means the declaration by the Court that the assets of a company are *en désastre.*
insolvent is defined in the paragraph headed *When is a company insolvent?*
Security Law means the Security Interests (Jersey) Law 2012.
special resolution means a resolution that is required to be passed as a special resolution by a majority of two thirds (or any higher majority specified in the company's articles of association) of shareholders who (being entitled to do so) vote at a meeting of the company of which not less than 14 days' notice has been given.
statutory demand means a statutory demand for payment of a debt, which must be drafted using the prescribed form, and personally served on the company.

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UK Insolvency Act means the Insolvency Act 1986, as applicable in the UK.
Viscount means the head of the executive arm of the courts of Jersey.

About this guide

This guide gives a general overview of this topic. It is not legal advice and you may not rely on it. If you would like legal advice on this topic, please get in touch with one of the authors or your usual Collas Crill contacts.

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