COLLAS CRILL

Collas Crill explains... A guide to compulsory winding-up in Guernsey

JUNE 2021

This is part of a series of guides in which we examine areas of law that frequently arise in practice. Further guides will be released weekly; click here to subscribe to receive Collas Crill news and insights by email.

Introduction

Companies are wound up by the Royal Court of Guernsey (Court) pursuant to Part XXIII of the Companies (**Guernsey**) Law, 2008 (as amended) (**Law**). A winding-up by the Court is known as a 'compulsory winding-up' in distinction from a winding-up on the vote of members, which is a voluntary winding-up and is dealt with under Part XXII of the Law.

When can an application for compulsory winding-up be made?

A company **may** be compulsorily wound up for a number of reasons, the most common being where the company is unable to pay its debts (as described at paragraph 4 below).

Who can make an application for compulsory winding-up?

An application to the Court for compulsory winding-up may be made by:

- the company itself;
- any of its directors, members or creditors; or
- by any other "interested party".

There is Court authority that suggests that an "interested party" is quite a broad concept and may encompass, for example, quasi or indirect members or creditors.

Irrespective of who makes the application, the order made by the Court will operate for the benefit of the company's creditors in the same way.

It should be noted that the Guernsey Financial Services Commission (**Commission**) also has its own special standing to make a public interest winding-up application (whether or not the Company is supervised by the Commission), for the protection of the public or the reputation of the Bailiwick.

The solvency test and 'unable to pay debts'

For the purposes of the Law, a company satisfies the solvency test if:

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

- the company is able to pay its debts as they become due;
- the value of the company's assets is greater than the value of its liabilities; and
- in the case of a supervised company, the company satisfies any solvency requirement imposed by applicable regulation.

A company shall be deemed to be unable to pay its debts if:

- it does not pay an owed sum exceeding £750 for 21 days following the date of service of a written demand by HM Sergeant (a statutory demand); or
- it is proved to the satisfaction of the Court that it fails to satisfy the solvency test.

It should be noted that although failure to pay a statutory demand does lead to the Court deeming that it is insolvent, this is rebuttable and the Court always retains a discretion to place the company into liquidation.

There is no express provision made for setting aside a statutory demand and there are no pre-hearing advertising or filing requirements, beyond the usual Court filing and formal notice to the Company and, for regulated entities, the Commission.

Appointing a liquidator

On the making of a compulsory winding-up order, the Court will appoint the liquidator nominated by the applicant for the winding-up. There is no 'liquidator of last resort' in Guernsey. In practice, an applicant will reach a commercial arrangement with their proposed liquidator in order to obtain their consent to act.

The Court must approve the identity of the appointee at the hearing of the application. Most often, the liquidator will be one of a number of experienced Guernsey-based insolvency professionals who are known to the Court. However joint appointments are possible and it is common in cross-border matters to have joint appointees based in whichever jurisdiction the company operated or has assets.

Within seven days of appointment, the liquidator shall send a copy of the compulsory winding-up order to the Registrar of Companies in Guernsey (Registrar). The Registrar will then publish a notice of the winding-up on its website.

On appointment, a liquidator has the following express powers:

- to bring or defend civil actions in the name of and on behalf of the company;
- to carry on the business of the company, only to the extent expedient for the beneficial winding-up of the company;
- to make calls on capital;
- to sign all receipts and other documents in the name of and on behalf of the company, and do any other act relating to the winding-up; and
- to do any act authorised by the Court.

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

Once a liquidator has been appointed, all powers of the directors will cease (unless the Court has sanctioned their continuance) and any director who does not comply with this will be guilty of an offence.

The company shall also cease to carry on any business, save for anything that may assist with the beneficial winding-up of the company.

The liquidator only has very basic express powers under the Law, however as a matter of practice the Court will in appropriate circumstances grant additional express powers either at the time of appointment, or subsequently.

During the course of a compulsory liquidation, liquidators often encounter issues in respect of the assets of the company upon which they need guidance of the Court. The Law gives liquidators, as officers of the Court, the ability to apply to the Court for directions on any matter arising during the course of the liquidation.

Next steps

The commissioner and creditors' meeting

Once the liquidator has realised the company's assets, they shall apply to the Court for the appointment of a Commissioner (usually a Royal Court Jurat) to examine the accounts, verify claims and approve the distribution of the funds realised by the liquidator.

The Commissioner must also fix a date for distribution of the company's assets and if this is not disputed, the liquidator can distribute the assets as they think fit. If a claim is disputed, the Commissioner shall refer the dispute to the Court.

Notice of the date of the Commissioner's meeting must be published in La Gazette Officielle on two occasions in successive weeks. The meeting date cannot be less than 14 days after the publication of the second notice.

Liquidator's report to the Court

In addition to details of their receipts, payments and claims, a liquidator must set out in their accounts if:

- they believe any officer of the company has appropriated or misapplied any company assets;
- it appears any person has become personally liable for the company's debts or liabilities;
- it appears any person is guilty of any misfeasance or breach of fiduciary duty in relation to the company;
- the business appears to have been carried on with the intent to defraud creditors or for any fraudulent purpose; or
- any instances of wrongful trading appear to have occurred and come to the liquidator's attention.

Payment waterfall

The order of priority for the distribution of assets on winding-up follows the below chain:

- secured creditors;

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

- liquidator's costs and expenses;
- preferred creditors;
- unsecured creditors; and
- if any assets remain, the balance will be distributed either pari passu (or as otherwise agreed) among the members of the company.

Compulsory liquidation enables creditors and others to bring the affairs of a company to an end and put in place independent persons to get in the assets of the company, investigate any claims and distribute the assets fairly to creditors and members in accordance with their respective entitlements.

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.

About Collas Crill

We are a leading offshore law firm. We are easy to do business with and give practical advice to overcome tough challenges. Through our network of offices, we practise British Virgin Islands, Cayman Islands, Guernsey and Jersey law.

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

COLLAS CRILL

For more information please contact:

Michael Adkins

Partner (Advocate) | Guernsey

t: +44 (0) 1481 734 231 | **e:** michael.adkins@collascrill.com

James Tee

Partner (Advocate) | Guernsey

t: +44 (0) 1481 734284 | **e:** james.tee@collascrill.com

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.