COLLAS CRILL

A guide to appointing liquidators over a BVI company

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This article by provides a useful summary of the rules and procedures that are to be followed and is likely to be of interest to liquidators, creditors and debtors of insolvent BVI companies.

Generally speaking, appointing liquidators over a company in the British Virgin Islands can be achieved by either:

1. the company's members resolving to appoint a liquidator by way of a qualifying resolution (i.e. passed by 75% of the company's members at a properly constituted meeting or higher if required by the company's Memorandum & Articles);[1] or
2. the Court appointing the Official Receiver or an eligible insolvency practitioner as a liquidator of a BVI company or a foreign company pursuant to an application made under sections 162 or 163 of the Insolvency Act, 2003 (the "**Act**") respectively.

In this note, we provide a high level summary concerning applications to appoint liquidators to a BVI company made pursuant to section 162 of the Act.[2]

The Collas Crill perspective

There may be certain advantages to securing a Court appointed liquidator over a members appointed liquidator, not least because a Court appointed liquidator is likely to be harder to remove (as creditors may only replace a liquidator by making an application under section 187 of the Act) and immediately enjoys all the powers set out in Schedule 2 of the Act (including any other powers that the Court may confer to them).

Conversely, the powers of a members' appointed liquidator are generally limited to collecting in and preserving the company's assets and they are obliged to call a creditors' meeting within 14 days of their appointment, at which time the creditors are entitled to replace them.

For Court appointed liquidators, there is no obligation to call a creditors' meeting if the liquidator deems it unnecessary and the requirement only arises if 10% in value of the company’s creditors give written notice insisting on a meeting.[3]

It's important to stress at the outset however that once an application to appoint a liquidator under the Act has been made, it cannot be withdrawn except with leave of the Court[4] and subject to the conditions specified in the Insolvency Rules, 2005 (the "**Rules**"). For that reason, applicants should be fully prepared to see the matter through to a hearing before deciding whether or not to make an application.

How to make an application under section 162

When making this type of application, an application notice specifying the grounds on which the application is being made, and whether an eligible insolvency practitioner is being proposed, is filed at Court with a supporting affidavit. If one is being proposed, the application must identify who the proposed insolvency practitioner is and the supporting affidavit should (amongst other things) exhibit a notice of eligibility and a consent to act signed by the insolvency practitioner where one is being proposed. [5]

Where an applicant is making an application to appoint liquidators for more than one company, separate affidavits must be filed in support of each application.

Unless the company is the applicant, a sealed copy of the application for the appointment of a liquidator, together with the supporting affidavit, should be served on the company not more than 14 days after the application has been filed (see Rule 157(1)).

Service of the application on the company is verified by filing an affidavit of service at Court as soon as reasonably practicable after service has been effected.[6]

Although not discussed here, there is also a requirement to send copies of the application to various other legal persons under limited circumstances, which are set out ll at Rule 158.

Who can make an application?

Section 162(2) of the Act provides that an application may be made by:

1. the company over itself;
2. a member[7];
3. a creditor;
4. the supervisor of a creditor's arrangement in respect of the company;[8]
5. the Financial Services Commission ("**FSC**");
6. the International Tax Authority ("**ITA**"); and
7. the Attorney General.

Court appointed liquidators: Applicable grounds

Section 162(1) provides that a liquidator may be appointed by an order of the Court where the Court is satisfied that the:

1. the company is insolvent; or
2. there are just and equitable grounds; or
3. there are public interest grounds.

Grounds (a): Insolvency

The fact that a company may be insolvent does not automatically lead to a company's liquidation. Notably, even when the company's insolvency can be established, the Court may still exercise its discretion and refuse to grant an application to appoint liquidators.

Where an application is being made on the grounds of a company's insolvency, an applicant has to demonstrate to the Court that the company is insolvent on either a cash flow, balance sheet or technical basis.

Cash flow insolvency: a company is generally regarded as cashflow insolvent where the company cannot pay its debts as they fall due.[9]

Balance sheet insolvency*:* a company is balance sheet insolvent if the value of the company's liabilities exceeds the value of its assets.[10] A balance sheet insolvency may arise, for example, where the company's assets are highly volatile (like certain crypto assets for example) and could leave the company vulnerable to a winding up application even if the business was generally viable. Applications on these grounds are not made regularly in this jurisdiction as in most cases the true financial position of a BVI company cannot easily be determined.

Technical insolvency*:* a company will be deemed to be technically insolvent regardless of the company's true financial position if it either:

1. fails to comply with the requirements of a valid statutory demand which (as at the date of this note) exceeds the sum of US $2,000; or
2. fails to satisfy (whether wholly or partly) a judgment, decree or other order of the BVI Court made in favour of the company's creditor.

Grounds (b): Just and equitable

The Court has the power to order the appointment of a liquidator on the basis that it is just and equitable that one should be appointed. The Court of Appeal considered in *Wang Zhongyong & Ord v Union Zone Management Limited & Ors* that there are a plethora of circumstances to which equitable considerations may be applied, including where the frustration of a company's purpose can be proved on the facts. In that case, the Court of Appeal held that:

"*A court must look to the common law for the types of circumstances which have been found to give rise to the application of the just and equitable ground when considering the winding up of a company and exercising its discretionary powers and remedies under sections 162 and 167 of the Insolvency Act. However, a court must be cautious to apply equitable principles of fairness to commercial transactions or relations. It is not the role of the court to impose its particular concept of what is fair on the parties and their transactions*."[11]

It's worth noting that where a member seeks a winding up application on these grounds, the BVI Courts may refuse to appoint a liquidator where it considers that the member has another remedy available to it (such as, in some circumstances, an unfair prejudice claim) and that they are acting unreasonably in seeking to have a liquidator appointed.[12]

In practice, members are more likely to apply for relief under the unfair prejudice provisions of the BVI Business Companies Act, 2004 rather than applying for the appointment of a liquidator.

Grounds (c): Public interest

The only persons eligible to rely on these grounds when making an application are the FSC, the ITA and the Attorney General (see section 162(4)).

The FSC can only make an application to appoint liquidators on public interest grounds if:

1. the company or foreign company is, or at any time has been, a regulated person (i.e. holder of a prescribed financial services licence); or
2. the company is carrying on (or has been carrying on) an unlicensed financial services business.[13]

The ITA may only make an application on public interest grounds if the company has been the subject of a determination by the ITA pursuant to:

1. section 10 of the Economic Substance (Companies and Limited Partnerships) Act to the effect that it has been carrying on a relevant activity in breach of the economic substance requirements; or
2. the company has been found to be in breach of the Mutual Legal Assistance (Tax Matters) Act.[14]

Whilst "public interest" is not defined in the Act, in our view necessary steps to protect the public at large or the company's members are likely to be considered as such by the Court.

Mechanics of the application

Advertising requirements

Unless a Court orders otherwise, an application for the appointment of a liquidator must be advertised in order to give the company's creditors sufficient notice of the application (including in the jurisdictions where creditors are likely to be located). If the application is not advertised in accordance with section 165 of the Act, then the Court may dismiss it.[15]

If the company is not the applicant, the application must be advertised not less than 7 days after service of the application on the company and not less than 7 days before the date set for the application to be heard.[16] In this intervening period, the company has an opportunity to apply for an order preventing the advertisement from being published.

However, if the company is the applicant, then it need only advertise not less than 7 days before the date set for the application to be heard.[17]

Timescales and extensions

The application for the appointment of a liquidator must be determined within 6 months after it is filed.[18]

A Court can extend this period for one or more periods not exceeding 3 months each if it is satisfied that there are genuinely special circumstances (supported by evidence) which justify an extension and that an order extending the period is made before the expiry of that period (or, if a previous order has been made under section 168(2) of the Act, that period as extended).[19] For this reason, an application for an extension must be made with sufficient time to allow the Court to

consider the application and grant the Order before the time period expires. It's also important to note that no application for an extension may be made retrospectively.

Time limits are applied strictly which means that if the application to appoint a liquidator is not determined within 6 months and no extensions are granted, then the application is deemed to have been dismissed.[20]

Court's powers on hearing an application

On hearing an application for the appointment of a liquidator, the Court may:

1. appoint a liquidator under section 159(1);
2. dismiss the application (even where a ground has been proved);
3. adjourn the hearing (conditionally or unconditionally); or
4. make any interim order that it considers fit.[21]

Whilst there is a presumption that the Court will appoint a liquidator, the Court will also consider the wishes of all the creditors[22] (including taking into account the number, value and quality of the creditors who favour the proposed order as opposed to those who do not).[23]

Additionally, the Court cannot refuse to appoint a liquidator merely because (1) all the company's assets are subject to a security interest in respect of an amount equal to or greater than the value or amount of the assets; (2) the company has no assets; or (3) because (where the applicant is a member) if the order were made, no assets of the company would be available for distribution among the members.[24]

Finally, a Court must dismiss an application to appoint liquidators if the company is already in liquidation, a liquidator having been appointed by the members under section 159(2) of the Act. [25]

Get in touch

Court appointed liquidations represent one of the many insolvency processes available in the British Virgin Islands. If you'd like to find out more, please contact any member of our Dispute Resolution team.

[1] Section 159(2) and (3) of the Insolvency Act, 2003, but please note that the rules are slightly different for a regulated person (see section 159(5)).

[2] This note should not be taken to be legal advice or relied on as such in any way. Please contact us if you require further information or assistance.

[3] Section 183

[4] Section 164.

[5] Rule 156(6) of the Insolvency Rules.

[6] See Rules 157 and 19 of the Insolvency Rules.

[7] As the appointment of a liquidator is a class right, if the majority of creditors object to the order and the basis of their objection is reasonable, the Court does have a discretion to decline the application to appoint a liquidator.

[8] Please note that a Court may appoint the supervisor of the arrangement as liquidator of the company where the arrangement is still in force (see section 162(8) of the Act)

[9] Please note that the Insolvency Act, 2003 does not define the meaning of a 'debt'. However, an order for costs where the sum due under the order has not yet been determined would qualify as a 'debt', see *Tottenham Hotsour plc v Edennote plc* [1995] 1 BCLC 65. Additionally, where a company is under an obligation to pay an undisputed sum and fails to do so, it may be inferred that the company is unable to do so *Cornhill Insurance plc v Improvement Services Ltd* [1986] 1 W.L.R. 114.

[10] Liability is given a broad meaning under section 10 of the Insolvency Act, 2003 and includes liability under an enactment, in contract, tort or bailment, a liability for breach of trust, a liability to make restitution and includes a debt. Section 10(2) of the Insolvency Act, 2003 provides that a liability may be present or future, certain or contingent, fixed or liquidated, sounding only in damages or capable of being ascertained by fixed rules or as a matter of opinion. However, an illegal or unenforceable liability is deemed not to be a liability (see section 10(3)).

[11] *Wang Zhongyong & Ord v Union Zone Management Limited & Ors* BVIHCMAP 2013/0024

[12] Section 167(3).

[13] Section 162(5).

[14] Section 162(5a).

[15] Section 165(2).

[16] Section 165(1)(b).

[17] Section 165(1)(a).

[18] Section 168(1).

[19] Sections 168(2)(a) and (b).

[20] Sections 168(3) and 168(4).

[21] Section 167(1).

[22] *Bowes v Hope Life Insurance* (1895) 11 HLC 389; *Re P&J MacRae Ltd* [1961] 1 WLR 229

[23] *Re Lowerstoft Traffic Services Ltd* [1986] BCLC 81

[24] Section 167(2).

[25] Section 167(4).

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