

Creditors' voluntary liquidation – Scotland

a guide for unsecured creditors

Creditors' voluntary liquidation occurs where the shareholders, usually at the directors' request, decide to put a company into liquidation because it is insolvent.

A licensed insolvency practitioner has given you this because you, or your business, may be owed money by a company that is in creditors' voluntary liquidation.

This guide aims to help you understand your rights as a creditor and to describe how best these rights can be exercised. It is intended to relate only to Scotland. It is not an exhaustive statement of the relevant law or a substitute for specific professional or legal advice.

We have made every effort to ensure that the guide is accurate, but R3 cannot accept responsibility for the consequences of any action you take in reliance on its contents. If, having read the guide, you remain in any doubt about your rights, you should consult a licensed insolvency practitioner or a solicitor.

Depending on the circumstances of the case, creditors who play an active role in an insolvency can make a significant difference to how much the insolvency practitioner will be able to recover for them. We hope that you will read this guide carefully and consider whether taking an active role as a creditor in this case could benefit you or your business.

What is a creditors' voluntary liquidation (CVL)?

This occurs where the shareholders, usually at the directors' request, decide to put a company into liquidation because it is insolvent. Either the company cannot pay its debts as they fall due or it has more liabilities than assets.

The purpose of the liquidation is to appoint a responsible person who has a duty to collect the company's assets and distribute them to its creditors in accordance with the law. That person is the liquidator, who must be a licensed insolvency practitioner.

When is a company placed into CVL?

The most common circumstances are where the directors recognise that the company cannot continue to trade and there is no appropriate rescue procedure available; or, following another insolvency process (for example an administrative receivership or administration), there are funds available for distribution to unsecured creditors.

What involvement do creditors have in putting a company into CVL?

A meeting of creditors must be held within 14 days of the shareholders' meeting (it is normally held on the same day) at a venue convenient for the majority of creditors. Notice of the creditors' meeting will be sent to all known creditors at least 7 days before the meeting, which will also be advertised publicly. Creditors are entitled to inspect a list of names and addresses of the company's creditors prior to the meeting.

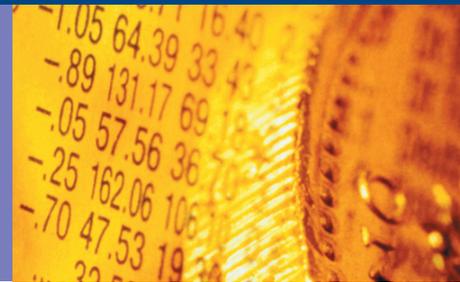
One or more of the directors will swear a Statement of Affairs of the company, which summarises the assets and liabilities (including details of creditors' claims) at a date not more than 14 days prior to the date of liquidation. Copies or a summary of the Statement of Affairs will be made available to creditors at the meeting. The insolvency practitioner whom the shareholders nominated as liquidator will assist the chairman of the meeting, who must be a director. A report of the company's history up to liquidation will be presented, giving an explanation of the reasons for the insolvency, and creditors will be invited to question the directors.

The creditors then vote to appoint a liquidator. The votes are based on the values of creditors' claims. To be entitled to vote, creditors (other than those present in a personal capacity) must have lodged a form of proxy by the time and at the place stated in the notice of the meeting. (You may send your proxy by fax). Statements of claim may be lodged at any time before voting.

Should the creditors' choice of liquidator be different from that of the shareholders, the creditors' choice prevails. A report of the meeting of creditors will be sent to all known creditors within 28 days.

What are the powers of a liquidator?

A liquidator's powers are wide and include powers to sell the company's assets, to bring and defend legal proceedings and to pay dividends to the company's creditors. Some of the liquidator's powers can only be exercised with the agreement of the liquidation committee, the creditors or the court.



Can the unsecured creditors form a liquidation committee?

Yes. A liquidation committee may be appointed at a creditors' meeting and must consist of at least three creditors.

The liquidation committee receives reports from the liquidator and may meet periodically. It assists the liquidator, approves his remuneration and sanctions the exercise of some of his powers.

Liquidation committee members are not paid, but will receive their reasonable travelling expenses as a cost of the liquidation.

Does the liquidator pay unsecured creditors the money owed to them?

Secured and preferential creditors are paid before unsecured creditors. Secured creditors are those that have some form of security over a company's property (for instance a bank with a Standard Security and floating charge). Secured creditors are entitled to be repaid their debt out of the proceeds of sale of the secured assets in priority to ordinary unsecured creditors.

Preferential creditors are a special category of unsecured creditor. They consist mainly of certain debts due to employees and the Redundancy Payments Service and are paid in priority to all other unsecured creditors.

The liquidator will pay a dividend to unsecured creditors if enough funds have been realised from the company's assets after paying costs, secured creditors and preferential creditors.

If you believe that you own something in the company's possession, you should contact the liquidator as soon as possible with full proof of ownership and be prepared to identify what you are claiming. The liquidator will examine your claim carefully before deciding whether to release the goods in question, pay you for them, or otherwise.

When all the claims have been adjudicated or provided for, the liquidator will declare a dividend. The dividend will be a percentage (pence in the pound) of each creditor's total admitted claim, based on the cash available for distribution to the creditors and the total of all creditors' claims. All unsecured creditors are treated equally.

Six months after writing off a debt in your accounts, you can claim VAT Bad Debt Relief from HM Customs and Excise for the VAT you have paid.

How do I make a claim in the liquidation?

The liquidator will write to all known creditors asking them to submit claims. You must submit your claim to the liquidator in writing, providing sufficient supporting evidence of your claim, e.g. copy statements, invoices, correspondence etc. to allow the liquidator to decide whether or not your claim is valid. Any costs incurred in submitting your claim will not be reimbursed. Your claim does not need to be on a specific form.

You may claim interest on your outstanding debt up to the date of liquidation if it bore interest, if it was payable at a previous date under a written instrument, or if you had previously demanded it in writing with notice that you would claim interest. You will not get interest on your claim accruing after liquidation, unless all creditors are paid in full.

How will the liquidator adjudicate my claim?

The liquidator will compare your claim to the company's records and any other available information, and he may discuss the claim with the directors. The liquidator may ask you for additional information or evidence if he thinks you have not sufficiently proved your claim. For example, if you have supplied goods to the company, the liquidator may ask you to provide copies of signed delivery notes. The liquidator may agree your claim in full or in part, or he may reject your claim if he does not think it is valid.

What can I do if I believe the liquidator has unfairly rejected my claim?

It is best to contact the liquidator in the first instance to discuss any amounts under dispute. If you cannot reach agreement you can, within 21 days of rejection, appeal to court. After 21 days, if you do not apply to court, the adjudication is final.

Does the appointment of a liquidator prevent a creditor taking legal action against the company?

No. Creditors may still pursue actions against the company, although this might lead only to more unsecured claims in the liquidation as creditors are not entitled to enforce recovery. The liquidator may apply to court to stay any proceedings.

It is only in certain specific instances (for example if the company has insurance cover in place that may be used to pay your claim or you claim ownership of specific assets) that it may be appropriate to commence legal action against the company. You should always take legal advice before commencing any action against a company in liquidation.

Is the liquidator bound by contracts entered into by the company prior to his appointment?

No. The liquidator may refuse to perform or formally disclaim any onerous or unprofitable contract entered into by the company prior to liquidation. The other party will then have a claim for breach of contract which will rank as an unsecured claim.

Is the liquidator liable for sums due under contracts entered into by the company subsequent to his appointment?

The liquidator can cause the company to enter into new contracts, in which event the associated liabilities of the company rank as an expense of the liquidation.

As an unsecured creditor, what information am I entitled to?

Within three months after the end of the first year and of each succeeding year and on conclusion of the liquidation, the liquidator must summon a meeting of creditors. As well as sending a notice of the meeting to creditors, it is usual for a liquidator to send a receipts and payments account for the period and a report setting out his conduct of the liquidation, which contains all the information that will be available at the meeting.

How is the liquidator's fee determined?

The liquidation committee (if there is one) or the creditors agree the liquidator's fee, which is based on the time properly spent by the liquidator and his staff, failing which it will be determined with or fixed by the court. Although the fee can be fixed as a percentage of the assets realised or distributed (or both), it is normally based on the following factors:

- the time properly spent by the liquidator and his staff;
- the complexity of the case;
- any exceptional responsibility borne by the liquidator;
- the effectiveness with which the liquidator carries out his duties; and
- the value and nature of the company's assets.

R3 has produced a separate guide explaining insolvency office holders' remuneration, which is available from the person who gave you this guide.

When is the liquidation complete?

The liquidation is complete when all the assets have been realised, all creditors' claims have been adjudicated (where there are sufficient funds) and net realisations after expenses of the liquidation have been distributed to the creditors.

To conclude the liquidation, the liquidator will call final meetings of creditors and shareholders and present his final receipts and payments account, together with a report showing how the liquidation has been conducted.

What should I do if I am dissatisfied with the liquidator's handling of the case?

You should first contact the liquidator to try to resolve the problem. If you are still not satisfied, you may be able to make an application to the court.

If you believe that the liquidator is guilty of professional misconduct, you should contact his regulatory body.

R3 is the UK's leading trade association for licensed insolvency practitioners and business recovery professionals. R3 does not license or discipline its members; this is the responsibility of the practitioner's regulatory body. The regulatory bodies are:

The Association of Chartered Certified Accountants

Tel: 020 7396 7000 www.accaglobal.com

The Institute of Chartered Accountants in England and Wales

Tel: 020 7920 8100 www.icaew.co.uk

The Institute of Chartered Accountants in Ireland

Tel: 00 353 1 637 7200 www.icaei.ie

The Institute of Chartered Accountants of Scotland

Tel: 0131 347 0100 www.icas.org.uk

The Insolvency Practitioners Association

Tel: 020 7623 5108 www.ipa.uk.com

The Law Society of England and Wales

Tel: 020 7242 1222 www.lawsoc.org.uk

The Law Society of Northern Ireland

Tel: 028 9023 1614 www.lawsoc-ni.org

The Law Society of Scotland

Tel: 0131 226 7411 www.lawscot.org.uk

The Insolvency Service

Tel: 020 7291 6895 www.insolvency.gov.uk

Further advice and information for creditors of failing businesses is contained in R3's *Ostrich's Guide to Business Survival*, which can be downloaded from the R3 website www.r3.org.uk free of charge.

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