

Compulsory liquidation – Scotland

a guide for unsecured creditors

Compulsory liquidation occurs when a company is wound up by an order of the court.

A compulsory liquidation is more commonly known as a court liquidation in Scotland.

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

A compulsory liquidation occurs when a company is wound up by an order of the court. The purpose of the winding-up order 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.

When does a company find itself in compulsory liquidation?

The most common circumstances are when a petition is presented to the court on the grounds that the company is unable to pay its debts, or it is proved to the court that the company's liabilities are greater than its assets.

Who can present a petition to wind up the company?

Amongst others, a creditor, the company itself, or the Directors can present a petition to the court to wind up the company.

A petitioning creditor may feel that the company's assets might be in jeopardy in the period after presentation of the petition. If so, he may apply to the court for an order to appoint a provisional liquidator whose function is to ensure the security of the company's assets between the petition date and the hearing.

Who deals with the company's affairs?

Once a winding-up order is made, a licensed insolvency practitioner becomes the liquidator.

What are the consequences of a winding-up order?

After the liquidation has commenced, any legal action against the company cannot proceed except with leave of the court. In addition, no new legal proceedings may be brought against the company without leave of the court.

What are the powers of the 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 (or if none the DTI) or the court.

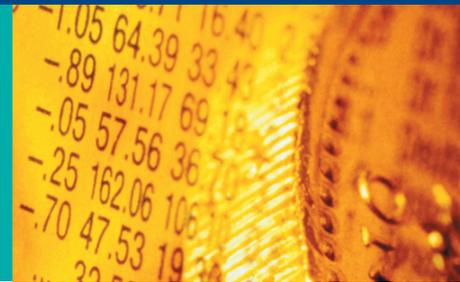
Does the liquidator pay unsecured creditors the money owed to them?

Secured and preferential creditors are generally 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 debenture). 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 incurred.

When all 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 the debt in your accounts you can claim VAT Bad Debt Relief from HM Revenue and Customs for 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 their claims. You should submit your claim to the liquidator in writing within the specified time limit. You should also send enough 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. The liquidator will not necessarily acknowledge receipt of your claim, but will advise you when he has adjudicated your claim. Any costs incurred in submitting your claim will not be reimbursed.

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.

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.

How will the liquidator adjudicate my claim?

The liquidator will consider your claim and any supporting information. He will compare your claim to the company's records and any other available information, and 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.

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 ranks 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?

The Official Receiver will have sent a report to creditors. If you would like information on progress at any time, you should contact the liquidator. Meetings of creditors are convened annually. Creditors may demand a meeting of creditors if they constitute 10% in value of the creditors as a whole.

How can I help the liquidator to achieve the best possible outcome for creditors?

The unsecured creditors can form a liquidation committee to help the liquidator (see below). You should also tell the liquidator if you believe that the company has assets, income or business interests that the directors have not disclosed, or if you think you may have any information that might be useful to the liquidator.

Can the unsecured creditors form a liquidation committee?

Yes. A liquidation committee may be appointed at a meeting of creditors and must consist of at least three and not more than five 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.

How is the liquidator's fee determined?

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

- 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.

The liquidator will call a final meeting of creditors 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 contact the liquidator to try to resolve the problem. If you are still not satisfied you may be able to make an application to 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.

This and other Creditors Guides are produced by R3, the Association of Business Recovery Professionals, 8th Floor, 120 Aldersgate Street, London EC1A 4JQ. Tel 020 7566 4200 Fax 020 7566 4224 email association@r3.org.uk

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Association of Business Recovery Professionals

8th Floor
 120 Aldersgate Street
 London EC1A 4JQ
 Tel 020 7566 4200
 Fax 020 7566 4224
 email association@r3.org.uk www.r3.org.uk