



INSOL
INTERNATIONAL



Official liquidation (investigations and legal claims; inspectorships and controllerships)

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Aims and Objectives

This module aims to provide an:

- (i) overview of OL's investigatory powers, bringing proceedings in the name and on behalf of the company and other powers to facilitate the orderly winding up of a company in OL;
- (ii) an understanding as to the relevant law and procedural rules which provide these powers and the ways in which OLs can seek to exercise them; and
- (iii) a summary of inspectorships and controllerships

Objective: to facilitate learning on this module in order to answer self-assessment questions and questions relating to this part of the Corporate Liquidation assessment.

Official Liquidators' Powers

Powers prescribed by the Companies Act (As Revised) Sch 3 Parts I and II

Schedule 3 Part II powers – *exercisable without sanction of the court.*

On reviewing the exercise of a Part II power the court will only interfere if the OL is not acting *bona fide* or if the decision is one which no reasonable liquidator could take in the circumstances of the case (see *Re ICP Strategic Credit Income Fund Limited* and *ICP Strategic Credit Income Master Fund Limited* citing English case of *Re Greenhaven Motors Ltd*)

Official Liquidators' Powers (cont)

Schedule 3 Part I powers – *require sanction of the court*

- the court will not give “blanket authority”
- OL must demonstrate that the specific powers sought are necessary in the particular circumstances of the case and there must be evidence in support

See UCF Fund Limited; Re Jian Ying Ourgame High Growth Investment Fund; GTI Holdings

Investigative powers – s.101 Notice

- OL may require some or all of persons listed in 101(3) to submit a statement as to the affairs of the company.
- s.101(3): persons who are / have been directors or officers, PSPs, employees during the period of 1 year preceding relevant date.
- s.101(6)(b) “relevant date” - commencement of the winding up – many cases presentation of the petition. However, this is subject to s.100(1), which provides for an earlier date in certain circumstances.
- PSP – only “those who were involved in the company’s promotion or management”. Auditors – not included.

Investigative Powers – s.102

s.102(1):

“Where a winding up order is made by the Court, the liquidator shall be empowered to investigate –

(a) if the company has failed, the causes of the failure; and

(b) Generally, the promotion, business, dealings and affairs of the company,

and to make such report, if any, to the Court as that person thinks fit.”

ss.(2) empowers assistance being provided to CIMA, RCIPS and institution and conduct of criminal prosecutions of persons listed in s.101(3)

Investigative Powers – s.103

- Order for “relevant person” to be examined or deliver up of company’s documents or property
- Broader in scope than relevant persons for purposes of ss.101 and 102 - also includes anyone who has acted as controller, advisor or liquidator, or receiver or manager of company’s property; or has been concerned or taken part in the promotion or management of the company.
- PSP – no auditors!
- Purpose - the liquidation and fulfilment of OL’s statutory duties and only: see *Primeo Fund* [2016 (2) CILR 386]

Types of Claims

Statutory claims

- (i) Anti - avoidance - s.99 Companies Act
- (ii) Claw back – ss.145, 146 and 147 Companies Act
- (iii) Fraudulent Dispositions Act (1996 Revisions)

Other claims

- (i) Breach of duty (fiduciary / care) by officers and directors
- (ii) Breach of contract / tortious duties by third parties

Avoidance of dispositions after winding up - s.99

“Any disposition of the company’s property and any transfer of shares or alteration in the status of the company’s members made after the commencement of the winding up is void, unless the Court orders otherwise”.

- If avoided, OL can apply for appropriate relief – return of asset
- This section will not apply if a validation order is obtained prospectively or retrospectively approving the transaction.
- Prospects of obtaining order validation order: insolvent vs solvent (solvency was a clear distinguishing factor pre-2020, see *Fortuna Development Corp; Re Cybervest Fund*)

Validation Order – legal test

- 2020: CICA considered the test in *Tianrui v China Shanshui* – at p45:
“those seeking a VO must be able to satisfy the court that what is proposed will not undermine the avoidance function of s.99, that it will not impede or frustrate the unwinding of transactions after the presentation of the petition but will maintain the status quo. That is so whether the company is solvent or insolvent, and whether the proposal is made in the ordinary course of business or not.”
- Followed in *Jian Ying Ourgame High Growth Investment Fund v International Holdings Limited*; summarized in *Adenium Energy Capital Ltd*

Claw back – voidable preferences s.145

For a payment / disposition to constitute a voidable preference, it must have:

- (i) occurred within the 6 months before the deemed commencement of the liquidation; AND
- (ii) when the company was unable to pay its debts; AND
- (iii) shows a dominant intention to prefer a particular creditor

means: putting that creditor in a better position than it otherwise have been (*Re Weaving* [2019] UKPC 36), which may be inferred from evidence and where disposition made to a related party.

Claw back – dispositions at undervalue s.146

Must establish:

- (i) Property was disposed of at an undervalue; AND
 - (ii) There was an intention to willfully defeat an obligation owed to a creditor.
- Application to set aside must be brought within 6 years of disposal
 - BoP is on party seeking to have the disposition set aside (can be a creditor)

Claw back – fraudulent trading s.147

“If the business of the company was carried out with the intend to defraud creditor, or for any fraudulent purpose, a liquidator may apply for an order requiring any persons who were knowingly parties to such conduct to make such contributions to the company’s assets as the court things proper”

When reading ss.147 and 146 together – they are “*aimed at different aspects of the same kind of mischief*” and s.147 (like s.146) has extra-territorial effect (*Re ICP Feeder Fund & ICP Master Fund*; unreported 15 May 2014)

Fraudulent Dispositions Act - section 4

- Disposition must be (i) made with an intend to defraud **and** (ii) at an undervalue
- At the instance of a creditor who bears BoP, the disposition is voidable
- Proceedings must be commenced within 6 years of disposition.

Note – s.4 is subject to saving of rights of transferees and beneficiaries, where the court is satisfied, they have not acted in bad faith

See *Raiffeisen International Bank AG v Scully Royalty & 7 Others*

Other claims

Breach of duty' claims against directors and officers

- **fiduciary duty** to act bona fide in what they consider to be the best interests of the company prior to the commencement of any winding up (see *Prospect Properties v McNeill* [1990-91 CILR 171 and *BTI v Sequana* [2022] UKSC 25)
- **common law duty** to exercise care, skill and diligence, independent judgment.
- **Claims against TPs** – contractual / tort - PSP (e.g., lawyers, auditors)

Tests for granting sanction

- **Commencement of proceedings** – if there is a reasonable prospect of success and proceedings are in the best interests of the company's creditors (*Re Greenhaven Motors Ltd* [1999] 1 BCLC 635; *Re ICP Strategic Credit Income Fund and Re ICP Strategic Credit Master Fund Limited* [2014 (1) CILR 314])
- **Compromising claim** – if no suggestion of lack of good faith and liquidator believes the settlement is in the best interests; in the event of a challenge by creditor, Court will consider correctness of the decision

Prospective sanction applications looked upon more favourably

Procedure and s.97 leave

Procedure:

- Evidence in support – why pursuit is in the best interests of stakeholders and prospects of success
- Costs – usually paid out of the assets of the company O.24 r.9

Section 97 leave:

- *BDO Cayman Ltd and BDO Trinity v Ardent Harmony Fund Inc* summarized the principles which govern s.97 and the correct approach for the court to take when exercising its discretion
- followed and applied in recent case of *Re Adenium, unreported 26 April 2022*.

Controllerships

- Appointment by CIMA under regulatory laws where serious concerns re solvency or lawfulness
- Considerations:
 - Seriousness of breaches of regulatory laws
 - Extent of loss/prejudice
 - Management attitude
 - Contagion risk
 - Financial circumstance and solvency

Controllerships

- Powers & responsibilities of controller
 - Control to exclusion of directors, shareholders and others
 - Internal power v as against 'world at large' – subject to declaratory relief
 - Report to CIMA
- Conclusion of controllership: Winding up or provisional liquidation having regard to:
 - Interests of creditors
 - Recommendations of controller
 - Public interest
 - Facts of the case (e.g. conduct of licensee and wider impact)

Inspectorships

- Section 64 of the Companies Act
- Threshold:
 - Banking company: $\frac{1}{3}$ of shares
 - Other companies: $\frac{1}{5}$ of shares (20%)
- Following appointment of inspectors by Court:
 - Examination of books and documents and/or on oath
 - Board powers remain unaffected
 - Report submitted to Court