Guernsey companies: voluntary and compulsory winding up

Briefing Summary: This briefing note provides an outline of the different processes of voluntary and compulsory winding up under the Companies (Guernsey) Law, 2008 (as amended) (the "Law"). The Law was materially updated by the Companies (Guernsey) Law 2008 (Insolvency) (Amendment) Ordinance 2020 and the Company Insolvency (Guernsey) Rules 2022, both of which came into force on 1 January 2023.

Service Area: Corporate, Dispute Resolution and Litigation, Commercial Litigation, Restructuring and Insolvency

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This note does not cover striking off companies or the specific provisions on winding up of protected cell companies and incorporate cell companies. Further information on the effect of the Law on the winding up of these company structures can be found in our separate briefing note of those subjects.

The mechanics of a voluntary winding up

A company's memorandum or articles of incorporation ("Memorandum and Articles") may provide that a company will be wound up voluntarily at the expiry of a certain period or upon the occurrence of a certain event. In such cases, the company may voluntarily wind itself up by passing an ordinary resolution to that effect. However, if nothing is specified in its Memorandum and Articles, a company may pass a special resolution to be wound up. Such resolutions must be filed with the Registrar of Companies (the "Registrar") within 30 days of being passed. A copy of the winding up resolution should also be delivered to the Guernsey Financial Services Commission (the "GFSC") within 30 days of being passed if the company is supervised by the GFSC.

The winding up commences upon the passing of the resolution. Unlike a compulsory winding up, a voluntary winding up is an out of court process and may be used for either solvent or insolvent companies. The company must cease carrying on business from the commencement of the winding up except in so far as it may be expedient for the beneficial winding up of the company, or it will be guilty of an offence. In all other respects, the company's corporate state and powers will continue until the company is officially dissolved.

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The company must by ordinary resolution appoint a liquidator to wind up the company's affairs and to realise and distribute its assets. The ordinary resolution must also fix the liquidator's remuneration. Once a liquidator has been appointed, all powers of the directors cease, except to the extent that the company, by ordinary resolution, or the liquidator sanctions their continuance. It is important to note that any director who continues to act when his powers have ceased will be guilty of an offence.

The 2023 reforms now draw a distinction between solvent and insolvent voluntary liquidations. In a solvent voluntary liquidation, the directors may make a declaration of solvency confirming that the company satisfies the statutory solvency test. Where such a declaration is made, the liquidation may proceed on a more streamlined basis. If the directors do not make a declaration of solvency, an independent liquidator must be appointed and additional requirements apply. In particular, the liquidator will generally be required to hold at least one creditors' meeting within one month of the appointment, subject to any dispensation available under the Company Insolvency (Guernsey) Rules 2022, and there are additional obligations on the liquidator to consider and file reports on directors' conduct with the Registrar and, in the case of regulated companies, the GFSC.

It is possible for a member to apply to the Court for directions concerning any aspect of the winding up or to have a liquidator appointed if the company fails to appoint one. Further, a company may, by special resolution, delegate to its creditors or a committee of creditors, the power to appoint a liquidator and to enter into any arrangements regarding the powers of the liquidator and how they are to be exercised.

The liquidator can be released by the members of a company by ordinary resolution, and he must notify the Registrar. Alternatively, the liquidator can apply to the Court for release. Where a liquidator is granted release, he is discharged from all liability in respect of his acts and omissions in the winding up and otherwise in relation to his conduct as liquidator, other than liability arising from his own fraud, recklessness or gross negligence or except to the extent that he has acted in bad faith.

The liquidator must realise the company's assets and discharge the company's liabilities and if there is any surplus, distribute such surplus amongst the members according to their respective entitlements pursuant to the Law. All costs, charges and expenses incurred by the liquidator in winding up the company will be settled from the company's assets in priority to any other claims.

The liquidator must call a general meeting of the company at the expiration of one year from the date of the commencement of the winding up and if the winding up is ongoing, thereafter, annually. At the meeting, the liquidator must present an account of his acts and dealings and of the conduct of the winding up during that year. However, the liquidator may call additional meetings as he wishes at any other time.

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Once the winding up is completed, the liquidator must call a general meeting where he presents an account of the winding up, giving details of the conduct of the liquidation and the disposal of the company's property. Following the meeting, the liquidator must notify the Registrar that the meeting has been held. The Registrar publishes the fact that the final meeting has occurred and that the company is to be dissolved. The company is deemed dissolved three months after the filing of such notice.

The mechanics of a compulsory winding up

Compulsory winding up is a court process. An application may be made to the Court for the compulsory winding up of a company by the company itself, any of its directors, members or creditors, or by any other interested party provided that the company is notified of the date, time and place of the application. In addition, if it is an application for the winding up of a company supervised by the GFSC or a company engaged in a financial services business, a copy of the application must be served not less than seven days (or such other period as the Court may at its discretion direct) before the day of the hearing. At the hearing of the application, the GFSC may make representations to the Court which shall be taken into account.

The Court may make an order for the compulsory winding up of a company on a number of statutory grounds, including the following:

- the company has passed a special resolution resolving that the company be wound up by the Court;
- the company does not commence business within one year of being incorporated;
- the company suspends business for a whole year;
- the company has no members (other than the company itself where it holds its own shares as treasury shares);
- the company is unable to pay its debts including where (i) a creditor owed more than £750 has served a demand through H.M. Sergeant and the debt remains unpaid for 21 days., or (ii) it is otherwise proved to the satisfaction of the Court that the company fails to satisfy the statutory solvency test;
- the company has failed to comply with a direction of the Registrar to change its name;
- the company has failed to hold a general meeting of its members (unless it is an incorporated cell or has waived this requirement by passing a waiver resolution) in which case the Court may either order a winding up or that the company holds a meeting;
- the company has failed to send its members a copy of its accounts or reports in which case the Court may either order a winding up or that copies of the accounts or reports are sent out; or
- the Court is of the opinion that it is just and equitable that the company should be wound up.

In addition:

- pursuant to section 418B of the Law, the Court has power to wind up a non-Guernsey company where, among other things, the company has ceased to carry on business, is unable to pay its debts, or where it is just and equitable to do so; and
- on an application made to the Court by the States of Guernsey Committee for Economic Development or by the GFSC, the Court may wind up the company if the Court is of the opinion that it is desirable that the company should be wound up for the protection of the public or the reputation of the Bailiwick of Guernsey.

The Court may, at its discretion, decide whether or not to make an order to wind up the company. Where it decides to compulsorily wind up a company, the Court will impose any such terms and conditions as it sees fit, appoint a liquidator (which may be nominated by the applicant) and set his fees.

Within seven days of being appointed, the liquidator must send a copy of the compulsory winding up order to the Registrar. The Registrar is responsible for publishing that the company is being wound up.

Once the liquidator has been appointed, all powers of the directors cease, except to the extent that the Court or the liquidator sanctions their continuance. For this reason, it is important that the directors should not simply resign at this point. However directors should be aware that if they purport to carry on acting as a director when such powers have ceased they may be guilty of an offence. In all other respects, the company's corporate state and powers continue until dissolution.

There is no statutory moratorium on creditors' claims upon the making of a compulsory winding up order. However, once an application for compulsory winding up has been made, a creditor may apply to the Court for an order restraining any action or proceeding pending against the company.

The conclusion of a compulsory winding up

Once the liquidator has realised the company's assets, he must apply to the Court for the appointment of a Commissioner of the Court to examine his accounts and to distribute the funds derived from the company's assets.

The Commissioner must arrange a creditors' meeting to examine and verify the financial statements and creditors' claims and preferences. The Commissioner must also fix a date for distribution of the company's assets. If any claim is disputed, the Commissioner refers it to the Court for a decision. A notice of the date of the creditors' meeting or the distribution must be published in La Gazette Officielle on two occasions falling in successive weeks. The creditors' meeting or distribution cannot occur before the expiry of fourteen days after the publication of the second notice. Subject to the foregoing, the liquidator may distribute such part of the company's assets as he thinks fit in relation to any claim.

The liquidator must state in his accounts if it appears that any officer or participator in the company has appropriated or misapplied any company assets. He must also set out if it appears that any such person has become personally liable for any of the company's debts or liabilities or if it appears that they are otherwise guilty of any misfeasance or breach of fiduciary duty in relation to the company. Similarly, a liquidator must state in his accounts (a) if it appears that any business of the company has been carried on with the intent to defraud creditors or for any fraudulent purpose, and (b) if any instances of wrongful trading appear to have occurred and have come to the liquidator's attention.

The liquidator may pay all charges and expenses incurred during the winding up including his remuneration. Thereafter, the priority rules in the Law as to distribution of a company's property apply. The company's assets are realised and applied in satisfaction of such claims pari passu. Any surplus is then distributed amongst the members according to their respective rights and interests in the company. Within fifteen days of distributing the company's assets, the liquidator must apply to the Court for an order declaring the company to be dissolved.

As a general point, the Court may grant the release of the liquidator from certain liabilities.

General provisions

Upon dissolution, a company may not undertake business or contract debts or obligations and any member of a company who permits or causes the company to undertake such obligations will be personally liable for any such debt or obligation.

Any transfers of shares made following the commencement of a winding up are void unless sanctioned by the liquidator. The 2023 reforms introduced a statutory power for a liquidator to disclaim certain onerous property of the company. A disclaimer brings to an end, from the dates of the disclaimer, the company's rights, interests and liabilities in respect of the property, although it does not affect the rights or liabilities of the other persons except so far as necessary to release the company from liability. Certain property is excluded from this regime, most notably real property situated in the Bailiwick of Guernsey.

In terms of clawback provisions, a liquidator may apply to the Court for an order if, within the six months immediately preceding the application for a compulsory winding up or the passing of a resolution for voluntary winding up, the company has given a preference to any person. A preference involves doing anything that improves the position in the company's liquidation of a creditor or a surety or guarantor for any of the company's debts or other liabilities. The Court may set aside any such arrangement if the company was insolvent at the time of the transaction or became insolvent as a result of it, and if the Court is satisfied that the company was influence by a desire to prefer the relevant creditor. Note that any preference accorded to a person "connected" with the company may be challenged if given within the two years immediately preceding the application for a compulsory winding up or the passing of a resolution for voluntary winding up. In such a case, the company is presumed, unless the contrary is shown, to have been influenced by the requisite desire to prefer that connected person.

The 2023 reforms also introduced a statutory regime for transactions at an undervalue. A liquidator, and in some cases and administrator, may apply to the Court where the company entered into a transaction at an undervalue at a relevant time before the commencement of insolvency proceedings. This includes gifts, transactions for no consideration, or transactions where the value received by the company is significantly less than the value provided by it. The transaction is vulnerable if the company was insolvent as a result of it. As with preferences, the usual look-back period is six months, extended to two years where the counterparty is a connected person. The Court has broad powers to restore the position, including by vesting property back in the company or releasing security granted as part of the transaction.

It is a defence if the Court is satisfied that the transaction was entered into in good faith for the purposed of carrying on the company's business and that, at the time, there were reasonable grounds for believing that the transaction would benefit the company.

For the purpose of the preference and transaction at an undervalue provisions, a person is "connected" with the company if the company knew or ought to have known at the time that (a) that person had any significant direct or indirect proprietary, financial or other interest in or connection with the company (other than as a creditor, surety or guarantor), or (b) another person had any such interest in or connection with both that person and the company.

Directors may also be liable for misfeasance, breach of fiduciary duties or wrongful and fraudulent trading, which all incur personal liability.