



Guide to Winding Up of Solvent and Insolvent Jersey Companies

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PREFACE

The purpose of this guide is to outline the procedures to wind up Jersey registered companies, the circumstances in which transactions entered into by an insolvent company may be set aside, and the circumstances in which a company's officers and managers may incur civil or criminal liability.

Voluntary winding up where a company is solvent is a straightforward procedure which can be completed quickly if the company's affairs are uncomplicated. If the company's affairs are complicated or it is insolvent, the winding up will necessarily be more complex and time consuming.

A company registered in Jersey may be wound up as follows:

Voluntarily

- in a summary winding up (where the company is solvent);
- in a creditors' winding up (where the company is insolvent);

Compulsorily

following a declaration that the company's property is "en désastre" (where the company is insolvent);

- on the expiry of its period of duration;
- by order of the Court.

In addition the Registrar of Companies has power to strike a defunct company off the register.

It is recognised that this Guide will not completely answer detailed questions which clients and their advisers may have. It is intended to provide a sketch of the subject matter covered. The Guide is, therefore, designed as a starting-point for a more detailed and comprehensive discussion of the issues.

Appleby
St Helier, Jersey
November 2008

1. SUMMARY WINDING UP

The first step in a summary winding up is that the company directors must sign a statement that each of them has made full enquiry into the company's affairs and is satisfied that, as the case may be:

- (a) the company has no assets and no liabilities;
- (b) the company has assets and no liabilities;
- (c) the company will be able to discharge its liabilities in full within six months of the commencement of winding up;
- (d) the company has liabilities that will fall due more than 6 months after the commencement of the winding up that it will be able to discharge in full as they fall due;
- (e) sub-paragraphs (c) and (d) apply to the company.

Within 28 days of the directors signing this statement of solvency, the members must resolve by special resolution (that is, by a two thirds majority) that the company be summarily wound up. A printed copy of the special resolution together with the directors' statement of solvency must be delivered to the Registrar of Companies within 21 days of its having been passed. The winding up commences upon delivery of the special resolution and the company must then cease to carry on business. The company may (but is not obliged to) appoint a liquidator at any stage during the winding up. Appointment is by special resolution and only an individual qualified to act may be appointed. Once a liquidator has been appointed, the directors must cease to act unless the company authorises them to do so by special resolution.

If the directors' statement of solvency shows that the company has no assets or liabilities, the company will be dissolved on registration of the statement. In any other case, following the discharge of any liabilities and the distribution of all remaining assets, each of the directors, or the liquidator if one has been appointed, must sign and deliver to the Registrar of Companies a statement that having made full enquiry into the company's affairs, he or she is satisfied that the company has no assets and no liabilities. The company will be dissolved on registration of this further statement.

2. CREDITORS' WINDING UP

A creditors' winding up is commenced by special resolution of the members. The company must cease to carry on business except in so far as may be necessary for its beneficial winding up with effect from the passing of the resolution. The shareholders' meeting at which the special resolution is passed must immediately be followed by a creditors' meeting (called by the company on not less than 14 days' notice) at which the creditors may nominate a liquidator. If the creditors fail to do so, the person nominated as liquidator by the company in the notice calling the creditors' meeting will be deemed to have been appointed. Only an individual qualified to act may be appointed as liquidator. The creditors may also appoint a liquidation committee. If they do so, the company may propose up to five members of the committee.

Following the commencement of a creditors' winding up, no change in the status of the members of the company is permitted. Any transfer of shares made without the liquidator's approval will be void. Proceedings (other than an application for a declaration that the company's property is "en désastre") may only be taken against the company with the Court's consent.

Once a liquidator has been appointed, the directors must cease to act unless the liquidation committee or the creditors authorise them to do so. The liquidator may exercise all the powers of the company required for its

beneficial winding up except that the compromise of any claim by or against the company and the payment of any class of creditors in full require the sanction of the Court, the liquidation committee or a meeting of creditors. Any arrangement entered into between the company and its creditors (including an arrangement entered into immediately before the winding up commenced) will be binding on the company only if approved by a special resolution, and on creditors only if acceded to by three quarters of them in number and value. Any member or creditor may appeal to the Court for an order varying an arrangement within three weeks of it being entered into. Costs incurred by the liquidator in a creditors' winding up are payable out of the company's assets in priority to all other claims. Detailed rules govern the rights of secured and unsecured creditors, the proving of debts and their order of payment, the setting off of debts and interest payable.

If a creditors' winding up continues for more than twelve months, the liquidator must call a general meeting of the company and a meeting of creditors. Such meetings must be held within three months of each anniversary of the commencement of winding up. As soon as the company's affairs have been wound up, the liquidator must prepare an account of the winding up and lay the account before a general meeting of the company and a meeting of creditors. Once such meetings have been held, the liquidator must make a return to the Registrar of Companies which in the case of a public company must be accompanied by a copy of the accounts. The company is deemed to be dissolved on the expiry of three months from the date the liquidator's return was registered, unless the Court, on the application of the liquidator or any other interested party, makes an order deferring the date of dissolution.

3. BANKRUPTCY

A compulsory winding up commences on the making of a declaration by the Court that the company's property is "en désastre". An application for a declaration may be made either by a creditor with a claim against the company of not less than £3,000 or by the company itself. The application must state that the company is insolvent and that it has or is believed to have realisable assets. If the company is solvent at the date of the declaration, it can claim damages from the applicant in respect of any loss sustained as a consequence of the declaration, unless the applicant acted reasonably and in good faith. On the making of the declaration, all the company's property vests in an official of the Court known as the Viscount. The company may apply to the Court for an order recalling the declaration at any time during the course of the désastre, but the Court must refuse such an application unless it is satisfied that the property of the company vested in the Viscount is sufficient to pay all claims in full.

The Viscount has wide powers in the winding up of the company's affairs including:

- carrying on the company's business as far as is necessary or expedient for the beneficial disposal of the business;
- borrowing money in the company's name and charging the company's property;
- making any compromise or arrangement with the company's creditors which he or she considers expedient;
- making any compromise or arrangement with the company's debtors which he or she considers expedient;
- disclaiming onerous property;
- appointing an agent to act for him or her in respect of any particular property.

Detailed rules govern the rights of secured and unsecured creditors, the proving of debts and their order of payment, setting off of debts and interest payable.

When the Viscount has realised all the company's property or as much as can be realised without, in his or her opinion, needlessly protracting the *désastre*, the Viscount must supply all creditors and the Judicial Greffier with a report and accounts relating to the *désastre* and pay the creditors whatever final dividend is due. The Viscount must notify the Registrar of Companies of the date on which the final dividend is paid. The company will be dissolved on this date, unless the Attorney General has notified the Registrar that criminal proceedings have been instituted or are pending against the company.

4. END OF PERIOD OF DURATION

A company, whose memorandum of association provides that the company will only continue in existence either until the happening of a specified event or until whichever is the earlier of the happening of a specified event and a specified date, is referred to as a limited life company. A limited life company is deemed to pass a special resolution for its winding up on the occurrence of the relevant event or, if earlier, the specified date. If a statement of solvency is made within 28 days of the specified event or date and is delivered to the Registrar of Companies within 21 days after it is made, the company will be wound up summarily. Otherwise, the company must be wound up in a creditors' winding up.

Where a company's memorandum of association provides that the company will only continue in existence until a specified date, the company must give notice to the Registrar of Companies within 21 days after the relevant date has passed. If it fails to do so, any director, member or creditor can give the requisite notice at any time or the Registrar may strike the company off the register. Where the company gives notice to the Registrar, if a statement of solvency made within 28 days beforehand is delivered with the notice, the company will be wound up summarily. Otherwise, the company must be wound up in a creditors' winding up. Where the company fails to give notice and a director, member or creditor does so, if a statement of solvency is delivered to the Registrar within 28 days after the notice is delivered, the company will be wound up summarily. Otherwise, it must be wound up in a creditors' winding up.

5. ORDER OF THE COURT

The Court may order that a company be wound up or dissolved if, following an application by:

- the company itself, or by a director or any member of the company, or by the Minister for Economic Development, or the Jersey Financial Services Commission or by a supervisory body within the meaning of the Proceeds of Crime Supervisory Bodies (Jersey) Law 2008, the Court considers that it is just and equitable to do so;
- the Minister for Economic Development or the Jersey Financial Services Commission, the Court considers that it is expedient in the public interest to do so;
- a member or by the Minister for Economic Development in theory, at least, on the grounds of unfair prejudice.

The Court may also order that the winding up or dissolution on sanctioning a compromise or arrangement proposed between the company and all or any class of its creditors or members in connection with a scheme for reconstruction or amalgamation under which all or part of the company's property is to be transferred to another company.

On the application of any interested party the Court can, at any time within ten years of the date of the dissolution of a company, make an order declaring the dissolution to have been void. Where such an order is made and the company's assets are insufficient to discharge its liabilities, any person to whom assets were distributed and any director or liquidator who, without reasonable grounds, signed a statement that the company had no liabilities, will be liable to contribute to the company's assets in an amount equal to the full amount distributed. Any director or liquidator who signed a statement of solvency without having reasonable grounds will also be guilty of an offence.

6. TRADING WHILST INSOLVENT

If a company trades whilst insolvent, this may result not only in transactions which have been entered into being set aside, but also in personal liability for its officers and managers. The following provisions apply on a creditors' winding up and bankruptcy:

6.1 Transactions at an Undervalue and Preferences

A company is deemed to enter into a transaction at an undervalue if it makes a gift to any person or enters into a transaction with a person on terms for which either there is no "cause" or the value, in money or monies worth, of the "cause" given by the other party is significantly less than the value, in money or monies worth, of the "cause" provided by the company. ("Cause" is somewhat wider than the English concept of consideration, but in this context the meaning is probably clear enough).

A company gives a preference if it does anything or allows anything to be done which has the effect of putting one of its creditors or a surety or guarantor for any of its debts or other liabilities into a position which, if the company goes into creditors' winding up or *désastre*, would be better than the position such person would otherwise have been in, and the company was influenced by a desire to produce this effect.

If a company:

- has entered into a transaction at an undervalue during the five years immediately preceding the date of the winding up, and at that time the company was either insolvent when it entered into the transaction or it became insolvent as a consequence of the transaction; or
- has given a preference to any person during the twelve months immediately preceding the date of the winding up, and at the time the preference was given the company was insolvent when it entered into the transaction or it became insolvent as a consequence of the preference;

then the Viscount (where the company is *en désastre*) or liquidator (where the company is in creditors' winding up) may apply to the Court for an order restoring the position to that which it would have been had the company not entered into the transaction or given the preference.

Where the transaction at undervalue was entered into or the preference was given by a person connected or associated with the company, certain presumptions as to the intentions of the company and its financial status are made, unless proved otherwise.

6.2 Wrongful Trading

If before the commencement of winding up, a director of the company knew that there was no reasonable prospect that the company would avoid insolvent winding up, or was reckless as to whether it would do so and failed to take reasonable steps with a view to minimising the potential loss to the company's creditors, the Viscount or the liquidator may apply to the Court for an order that such person (whether or not he or she is still a director of the company) should be personally responsible for all or any of the debts or other liabilities of the company arising after the relevant time.

6.3 Fraudulent Trading

If, on an insolvent winding up, it appears to the Court that any business of the company has been carried on with intent to defraud creditors of the company or of any other person, or for a fraudulent purpose, the Court may on the application of the Viscount or the liquidator order that any persons who were knowingly party to the carrying on of the business in that manner should be liable to make contribution to the company's assets.

7. EXTORTIONATE CREDIT TRANSACTIONS

The Court may, on the application of the liquidator in a creditors' winding up, set aside or vary an extortionate credit transaction entered into within 3 years of the commencement of the winding up or order a party to the transaction to make payment to the liquidator or surrender property to him. A credit transaction is deemed to be extortionate unless it can be proved that its terms were not such as to require grossly exorbitant payments to be made in respect of the provision of the credit and that it did not otherwise grossly contravene ordinary principles of fair dealing.

8. CRIMINAL OFFENCES

The officers or managers of a company may become criminally liable in the following circumstances.

- The promoters, officers and employees of the company (and the officers and employees of any other company who were officers of the company within one year of the commencement of winding up) are under a duty to cooperate with the liquidator of the company in a creditors' winding up. Failure to do so without reasonable excuse is an offence punishable by a fine and/or imprisonment for up to six months.
- A company whose property is *en désastre* must supply the Viscount with such information and do everything possible to assist the Viscount in the realisation of its property and the distribution of the proceeds amongst its creditors. Failure to comply is a criminal offence and the company and any officer or manager of the company to whom the failure is attributable will be liable to a fine and/or six months imprisonment.
- Where a company is *en désastre*, it is an offence:
 - a. to fail to keep proper accounts in respect of any business carried on by the company for the two years prior to the commencement of winding up;
 - b. to fail to appear before the Viscount on a summons;

- c. to obtain credit in excess of £250 without disclosing to the intending creditor the fact that the company is en désastre.

9. DISQUALIFICATION OF DIRECTORS

The Attorney General and the Minister for Economic Development have power to apply to the Court for an order that any company director be disqualified from acting as a director if his or her conduct in relation to the company makes that director unfit to be concerned in managing a company. Disqualification may be for up to fifteen years. A person who acts as a director while disqualified is guilty of an offence punishable by imprisonment for up to 2 years and/or a fine and may be declared personally responsible for the debts of any company of which he acts as a director while disqualified.

10. EXTENDED JURISDICTION OF THE COURT

Under the Bankruptcy (Désastre) (Jersey) Law 1990, the Court must assist the courts of the United Kingdom, the Isle of Man, Guernsey and Australia in all matters relating to the insolvency of any person. The Court has power, on receiving a request from such a country for assistance, to exercise any jurisdiction which either it or the requesting court could exercise if the matters in respect of which assistance is requested fall within its jurisdiction.

For other jurisdictions, the Jersey courts may assist under their inherent jurisdiction and under principles of comity.

For more specific advice on Winding Up Companies in Jersey, we invite you to contact one of the following:

Mark Lewis
Jersey Practice Group Head: Corporate & Commercial
+44 (0)1534 818 042
mlewis@applebyglobal.com

Wendy Benjamin
Local Team Leader: Banking & Asset Finance
Telecommunications, Technology & Intellectual Property
+44 (0)1534 818 057
wbenjamin@applebyglobal.com

Andrew Weaver
Jersey Team Leader: Funds and Investment Services
+44 (0)1534 818 230
aweaver@applebyglobal.com

James Gaudin
Partner: Corporate & Commercial
+44 (0)1534 818 337
jgaudin@applebyglobal.com

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