

MORATORIUM, REALISATION AND DISTRIBUTION

Moratorium

During administration, a moratorium operates to prevent secured and other creditors from exercising enforcement rights without leave of the administrator or the Court. The purpose is to allow time and space to develop a rescue proposal. The moratorium comes into force once the administration procedure is initiated or once certain papers are filed with the court, in the case of an out of court appointment.

No winding up resolution can be passed nor application to Court may be made for winding up during the moratorium. Any existing receiver other than administrator receivers must vacate office, if the administrator requires. Any existing receiver must vacate office. Creditors may not take steps to enforce security. No execution of Court Orders may be instituted.

Steps may not be taken to repossess goods under hire purchase, conditional sales, leasing agreements or retention of title. Landlords may not institute proceedings for distress against property nor exercise a right of forfeiture by peaceable re-entry.

No legal proceedings may be instituted or continued without the consent of the administrator or permission of Court. Security holders are only allowed to enforce their security with the consent of the administrator or Court. Creditors with security and equivalent rights, may take or continue enforcement action if the Court or administrator allows.

The administrator is an officer of the Court. Therefore, when a creditor applies for leave to enforce, the administrator should act speedily, responsibly and not use the moratorium as a bargaining tool. He must give reasons for his decisions. In the case of an application to court, the Court has a broad discretion. Leave would normally be granted if it is unlikely to impede the achievement of one of the statutory purposes. If it would impede one of the purposes, the Court must carry out a balancing exercise between the legitimate interests of the applicant and the interests of the creditors generally.

The interest of secured creditors is of great importance. The administration should not be conducted for the benefit of unsecured creditors at the expense of those who have secured rights. If a significant loss would be caused by refusal of leave, it would normally be granted. If greater loss would be caused to others by granting the leave which is out of all proportion to the loss to the applicant, leave may be refused. A compromise may be achievable.

Dealing with Secured Assets

The administrator may dispose of floating charge assets as if they were not subject to the charge. The charge holder will have the same priority in respect of acquired property as he has in respect of disposed of property.

The administrator may apply to Court for an Order to enable him dispose of fixed charge property. It must be a condition that the charge holder receives the net proceeds of sale and is paid any additional money so as to ensure that he receives the amount determined by the Court to be the net market value. The administrator has similar powers in respect of goods held under hire purchase, conditional sale, leasing or retention of title. The disposal must be likely to promote the purpose of the administration.

Entitlement to Proceeds

See our separate chapter in relation to the implications of insolvency for fixed charge holders. They retain priority, subject only to the costs of realisation and preservation.

In the case of floating assets, the entitlement to the proceeds of sale is as follows:-

- the costs of preserving and realising the assets;
- liabilities for wages, salaries and contracts of employment adapted by the administrator (they are adapted if they are not terminated within 14 days of administration);
- liabilities and contracts entered by the administrator;
- administrator's general remuneration costs and expenses;

- preferential creditors;
- in the case of floating charges created after 15th September 2003 the "prescribed part" is available to the unsecured creditors;
- floating chargeholder and
- any surplus is paid to the unsecured creditors

Since 15th September 2003, the following are preferential creditors:-

- contributions to pension schemes;
- remuneration for the four months prior to commencement, restricted to £800 per employee;
- holiday pay;
- redundancy payments to the extent that they have met employee claims.

The Crown / Government is no longer a preferential creditor.

Since September 2003 part of the net property is available to unsecured creditors. Unsecured creditors do not include floating charge holders. The net property is that which would have been available to the floating charge holders. The relevant portion of these assets available to the unsecured creditors is 50% of the first £10,000 plus 20% of the balance up to a maximum part of £600,000.

These rules apply unless the net property is under £10,000 and the receiver, administrator or liquidator believes the cost of making the distribution outweigh the benefit. The rule may also be disapplied where the net property is more than £10,000 but the receiver applies to Court and an order is made that the costs of making the distribution outweigh the benefits.

This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.