

INSOLVENCY MORATORIUM

Effect of Insolvency Proceedings

The purpose of insolvency proceedings is to ensure that the assets of a company are available to its creditors for the purpose of proportionate distribution to them, according to their respective entitlements. For this reason, legal action and enforcement of court orders against a company is suspended upon commencement of insolvency proceedings. Each creditor should claim in the insolvency proceedings only. In some cases, legal proceedings may proceed with court consent, where the liability is not yet agreed or ascertained.

Secured creditors may rely on their security. Their rights take effect outside of the insolvency proceedings because the security grants property rights. See our chapter on the effects of insolvency on secured creditors.

The moratorium in administration is more comprehensive than in the case of liquidation. See our separate chapter on relation to the administration moratorium.

General Rights to Enforce Restricted

Prior to insolvency, creditors and claimants are entitled to take legal action against the company in order to obtain a court order or “judgment” (which, in this context, have much the same meaning). Once the creditor or claimant holds a judgement, it can be enforced against all to the assets of the debtor company. Landlords are usually entitled to enforce the terms of a lease by taking goods from property through Court approved agent. Certain types of security can be enforced without court action.

Without the insolvency moratorium, the creditors who are first to enforce could claim all of the debtor company’s assets. The moratorium and requirement for equality in the

treatment of creditors is designed to prevent a race of creditors, who seek to enforce first against the debtor's assets.

After a winding up order is made in a court liquidation, no enforcement action or legal proceedings can be commenced against the company or its assets without leave of the Court. The appointment of a provisional liquidator by court also triggers this restriction. In the case of a creditors' voluntary liquidation, legal proceedings can be commenced and continued. However, the liquidator is entitled to apply to Court to have proceedings stopped.

"Execution" or "Enforcement" of a judgment refers to a creditor, who has obtained a court order, using legal enforcement mechanisms to obtain payment of a debt or enforce another legal obligation. Enforcement usually occurs by way of seizure of goods, making charging order, attachment of a debt, appointing a receiver over income and other methods.

Enforcement Mid-Stream

Any attachment or execution of a court order after commencement of liquidation is of no effect. If a creditor had completed execution prior to commencement of liquidation he may keep the benefits already received. If execution has not been completed he may not retain any assets and the liquidator may require them to be handed over. The Court can vary the position on an application.

Where notice is served on a Sheriff that a liquidator or provisional liquidator has been appointed or a winding up order has been made, the Sheriff must deliver goods and monies seized to the liquidator. The cost of enforcement are charged on the goods. These provisions apply to both Court and creditors liquidations.

Where execution is levied for judgement of £500.00 or more, the Sheriff must retain the proceeds for 14 days. If the Sheriff is notified of the presentation or petition to wind up in this period, he must pay the proceeds to the liquidator.

Distress, now known modernised under the commercial rent arrears recovery procedure is the Landlord's right to recover unpaid rent by seizing assets without intervention of Court. It now only applies to commercial property. Landlords may not put distress into effect for goods after commencement of winding up.

Where goods have been taken in the three months prior to winding up, the goods are charged for the benefit of the company's preferential debts/creditors to the extent the company's property is insufficient to meet these debts. Therefore landlords and others who seize goods for rental arrears in this three months period may be required to surrender the benefit of distress. This creates a second class of preferential creditors below the general body of preferential creditors but above unsecured creditors.

In the case of other enforcement, insolvency of its nature removes assets from the company's ownership and vests it in the liquidator for the purpose of realisation and distribution. This puts the assets beyond the reach of charging and attachment orders.

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.