

# Top ten questions from creditors of troubled companies

A Guest Article by Julian Charles  
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### What creditors want to know

Below are the ten questions most frequently asked by creditors of companies in financial difficulties, together with the answers.

#### 1. I believe a customer is about to go bust. How can I check?

The Companies Court (tel: 090 6754 0043) will tell you:

- If there is an outstanding winding-up petition against the company anywhere in the country (meaning that the company is at risk of entering compulsory liquidation).

Unless the court dismisses the petition, the petitioner will advertise the petition in the *London Gazette* in due course. You can search the last ten days of entries in the *London Gazette* for free via its website ([www.london-gazette.co.uk](http://www.london-gazette.co.uk)).

- If there is an outstanding administration application (either a court application or an out of court application) in London. The Companies Court in London does not track any applications made in courts outside London.

If the answer in either case is yes, keep checking whether the company has actually gone into insolvency – see question 2.

There is no public searchable register of:

- Administration applications issued outside London. You can try telephoning the Chancery section of the court nearest to the registered office or head office of the company in question, to ask if that court has received an administration application in respect of the company. Bear in mind, though, that companies sometimes issue administration applications in courts in places with which they have no connection, to avoid creditors learning of the impending administration.
- Statutory demands issued against a company.
- Company resolutions to go into creditors' voluntary liquidation. If the company in question owes you money, it should send you notice of a meeting of creditors to consider the company's choice of liquidator.

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- Proposals for company voluntary arrangements (CVAs). However, if a company owes you money and wants to propose a CVA, it should send you its CVA proposals directly.

If rumours like this are flying, the company may well have financial difficulties, even if it does not face formal insolvency. Look to see if there are any other warning signs that might indicate that the company is in financial trouble – for example, erratic payments or the departure of employees responsible for the company's finances.

### 2. How can I find out if a company has actually gone into insolvency?

- **Telephone the company.**

Often, the quickest way to find out if a company has gone into a formal insolvency process is to telephone the company in question. If it continues to trade while in an insolvency process, the staff answering the telephones are usually told to disclose the fact that the company has had insolvency practitioners appointed to manage its affairs. If it has ceased to trade, expect a recorded phone message to that effect.

- **Check all email and other correspondence, invoices, order forms and the company's website.**

Insolvency practitioners must make sure that all communication with third parties discloses their appointment.

- **Monitor the press (national and local).**

The press may carry the story soon after the company enters a formal insolvency process. (Frequently, insolvency practitioners issue press releases upon their appointment.) Putting the company's name into an internet search engine often reveals press stories of this kind.

- **Check Companies House and the *London Gazette*.**

Insolvency practitioners must advertise their appointments in the *London Gazette* and register them at Companies House. Notices do not appear in either source immediately.

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### **3. I'm told that the company has gone into administration, but the directors have bought the business using a new company that they own and are trading it as normal. Is this legal, and can I recover my debt from the new company?**

It is legal for directors to set up a new company and buy an insolvent company's business and assets as a going concern, in a deal negotiated before the administrator's appointment and concluded immediately when (or shortly after) the administrator takes office. This is called a pre-pack sale.

You cannot recover your debt from the new company. The new company only acquires the business and assets, not the debts of the old company. The administrator uses the sale proceeds to distribute to creditors on a *pari passu* basis.

If the new company needs to contract with you, you may be able to agree improved trading terms that allow you to claw back some of your losses.

### **4. My terms and conditions contain a "retention of title" clause. Can I rely on it now that the company has entered a formal insolvency process?**

Yes, to the extent that it is enforceable. Your contractual and proprietary rights against an insolvent company survive its entry into a formal insolvency process.

An insolvency practitioner will require you to prove your claim to have title to the company's assets.

You need to show that:

- your contract with the insolvent company incorporates the retention of title clause
- the retention of title clause covers the debt that you claim from the insolvent company.

You also need to identify the specific goods that you say you have retained title to.

Be aware that the commercial value of retention of title provisions in an insolvency context is often limited. For example, it is often difficult to identify "your" goods (either because they have been moved onsite or because they have been incorporated into a manufactured product).

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### **5. Will I get any money back and, if so, when?**

Unless you have a valid charge over some (or all) of the insolvent company's assets, statistically it is unlikely that you will receive a significant repayment of the money that the insolvent company owes you.

The amount of time that it takes for the insolvency practitioner to realise the insolvent company's assets and pay them out to creditors varies from case to case. Usually, it is a matter of months.

### **6. Do I need to tell anyone that I am a creditor?**

#### **Administration**

As soon as he can after taking office, an administrator gives notice of his appointment to all the creditors of which he is aware.

If you do not receive anything from the administrator within a week or so of his appointment, you should submit your claim, in writing, to the company's registered office. You need to lodge a written statement of the money that you claim from the insolvent company before you can vote at any creditors' meeting or receive any return on your debt.

#### **Liquidation**

A liquidator must, within 28 days of taking office, notify all the creditors of which he is aware of his appointment.

If you do not receive anything from the liquidator, you should submit your claim, in writing, to the company's registered office. You need to lodge a written statement of the money that you claim from the insolvent company before you can vote at any creditors' meeting or receive any return on your debt.

If the liquidation follows an administration, any claim that you submitted to the administrator is valid for the liquidation.

#### **Administrative receivership**

An administrative receiver must, within 28 days of taking office, give notice of his appointment to all the creditors of which he is aware.

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### **CVA**

An insolvency practitioner that a company puts forward to supervise a proposed CVA must notify all creditors of which he is aware of the company's CVA proposals and summon them to attend a meeting to consider whether to approve the CVA.

If you become aware that one of your debtors is putting forward a CVA and you have not received a notification, make sure you contact the company for a copy of the proposals. Even if you do not receive a copy of the proposals, the CVA will still bind you if the rest of the creditors approve it.

### **7. I am the landlord of a company that has entered an insolvency process. Can I forfeit the lease?**

#### **Administration**

In administration, the insolvent company has the benefit of a moratorium that, from the date of issue of the application for an administration order, prevents you from forfeiting the lease without leave from the court or the consent of the administrator.

The moratorium also stops you distraining against the company's assets for unpaid rent.

#### **Liquidation**

You can forfeit a lease in the run-up to a liquidation.

In the case of a compulsory liquidation, any distress against the company's assets carried out after the presentation of the winding-up petition is void if the company goes into liquidation. That is not the case in a creditors' voluntary liquidation, without an order from the court.

#### **Receivership**

The appointment of receivers to a company's undertaking or certain of its assets does not affect a landlord's rights.

### **CVA**

Small companies that propose a CVA have the option of moratorium protection, but a company proposing a CVA does not automatically get the

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benefit of a moratorium. If a small company does avail itself of the optional moratorium, the scope of that moratorium is the same as for companies in administration.

### **8. The company is using assets that it leases from me. Will it pay me rent?**

If, while in an insolvency process, the company continues to occupy premises rented from you or use other assets leased from you, you should ask the insolvency practitioner to agree that the rent will rank as an expense of the insolvent estate. Insolvency expenses get paid in full.

#### **Administration**

There is no express obligation on a company in administration to pay rent to a landlord or the owner of leased assets.

An insolvency practitioner sometimes agrees to pay rent as an expense of the insolvency estate, to avoid the risk that the owner of the assets in question applies to court for an order allowing forfeiture of the lease or repossession of leased assets.

If the administrator does not agree to pay rent as an expense, you could apply to court for an order requiring the company to hand back your assets. The court will balance your interests against those of the company's creditors and can allow you to take back your assets, order that they rank as an expense, or allow the company in administration to continue to use them rent free.

#### **Liquidation**

In a liquidation, rent is an expense in respect of assets retained by the liquidator:

- with a view to the sale of the company's leasehold interest
- to assist in getting a better price for the rest of the company's assets.

#### **Receivership**

There is no concept of an "expense" in receivership, but a receiver is personally liable for the liabilities that arise under contracts that he causes the insolvent company to enter into.

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### CVA

In a CVA that is not coupled with another insolvency process, rent is paid by the company in the ordinary way, although rent arrears fall within the CVA. Where the CVA is coupled with another insolvency process, the rules applicable to that process determine the extent to which rent is paid.

### 9. The insolvent company wants me to keep supplying. Will it pay me for it?

Yes.

There is a clear line between obligations of an insolvent company incurred before the appointment of an insolvency practitioner and obligations incurred afterwards. If an insolvency practitioner causes the insolvent company to contract with you, the payment obligations rank as an expense of an administration or liquidation and as the personal liability of a receiver. Insolvency practitioners ensure that they have the resources to pay for any goods or services that they order in the course of their appointment.

### 10. I'm unhappy with the way I've been treated. What can I do?

You can complain about a pre-pack administration or any other corporate insolvency process to the Insolvency Service hotline (0845 601 3546).

You can also think about suing the insolvency practitioner or the directors, but be warned that litigation of this kind is often an efficient way of throwing good money after bad.

An insolvency practitioner does not owe any duty to individual creditors, but if he breaches his duty to act in the best interests of the creditors as a whole, you can take action. However, the courts tend to take the view that insolvency practitioners have difficult jobs to do and are therefore reluctant to find against them.

You can sue anyone involved in the company if you can show that they were knowingly involved in operating the business fraudulently. The burden of proof in fraud cases is high and there are few examples of successful actions of this kind.

If, before it goes into an insolvency process, a company transfers assets out to third parties for less than their true value, and does so with the intention of putting those assets out of your reach as a creditor, you may apply to court for an order undoing that transfer. A successful action of this kind

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requires you to satisfy the high burden of proof that the company intended to put its assets out of your reach.

An insolvency practitioner (and, especially, a liquidator) has much wider powers, to pursue former directors and transactions entered into in the run-up to a formal insolvency.

As an unsecured creditor, you can request that the insolvency practitioner investigates and takes appropriate recovery action in respect of transactions entered into before insolvency or the director's conduct. The insolvency practitioner is not bound to accede to that request and will not do so where, for example, there are insufficient funds available.

This information is correct to the best of our knowledge and belief at the time it is submitted by us. It is, however, written as a general guide, and is not intended to apply to specific circumstances. The content should not, therefore, be regarded as constituting legal advice and should not be relied on as such. Accordingly, we recommend that specific professional advice is sought before any action is taken.

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If you would like more information on any of the points covered in this Guest Article, please contact **TCii** on **020 7099 2621**.