


Company Insolvency and Claims for Personal Injuries

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 Administration; Company voluntary arrangements; Corporate insolvency; Limitation periods; Liquidation; Personal injury claims; Register of Companies; Winding-up

Abstract

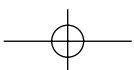
This article gives a brief outline of the main types of insolvency regime for companies in England and Wales (company voluntary arrangement (CVA), administration and liquidation or winding-up), discusses their procedural impact on claims for personal injuries where the defendant is an insolvent company, and considers changes to the procedure for restoring companies to the register from October 1, 2009 and related limitation issues.

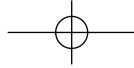
Claims against insolvent companies

Where a potential defendant to a claim for personal injuries is an insolvent company, the would-be claimant may decide that it is not worth pursuing the claim. In some circumstances, however, it may be appropriate to start legal proceedings, or to continue to prosecute proceedings which have already started when the company becomes insolvent. This is particularly likely to be the case where there is or may be a valid policy of liability insurance in respect of the claim, as the claimant will first need to establish the liability of the insured company in order to make a direct claim against the insurer under the Third Parties (Rights Against Insurers) Act 1930 (the 1930 Act).² There are different procedural steps which may need to be taken according to the type of insolvency, and according to whether the company is still in existence, or has been struck off the register or has been dissolved. These are considered below.

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²For further information, see A. Padfield, *Insurance Claims*, 2nd edn, (Tottel Publishing, 2007), paras 2.17–2.24.





Types of insolvency regime

There are, broadly, three main types of insolvency regime for companies in England and Wales. These are: company voluntary arrangement, administration and liquidation (or winding up).³

A company voluntary arrangement (CVA) involves the company writing to all its creditors to try to agree a mutually acceptable arrangement for payment, usually of a proportion of its debts. In some circumstances, more money may be available to creditors (broadly, those with claims against a company) under a CVA than under a compulsory liquidation. For a CVA to be put in place, the directors need to apply to the court, with the assistance of an authorised insolvency practitioner.⁴ The insolvency practitioner will then act as the supervisor of the CVA, get in the assets of the company and pay creditors in accordance with the agreement. A CVA can be put in place with the agreement of a majority of the company's members (shareholders) and creditors at formal meetings convened for these purposes. All creditors are then bound by the CVA, including any who were not given notice of the creditors' meeting but would have been entitled to vote if they had been given notice. A similar arrangement may also be agreed informally with creditors without the involvement of the court, but for this to work all creditors must agree to be bound by its terms.

Administration is an insolvency procedure which gives a company protection from its creditors for a period. This may enable the company to survive, in whole or in part, and continue to run its pre-administration business; it may allow sufficient time for a CVA to be organised; or it may enable more of the assets to be got in than would be possible if the company went into liquidation. In 2003, the procedure for administration was simplified, and in many cases a company can now go into administration without a court order being made.

Liquidation is a process in which the affairs of a company are "wound up" by a liquidator. This involves the liquidator identifying and getting in the company's assets, and then distributing them to creditors. Liquidation may be compulsory, following presentation of a petition to the court, normally by a creditor, stating that the company owes a sum of money and cannot pay it. Liquidation may also be voluntary.⁵ In a compulsory winding up, the official receiver (a civil servant within the Insolvency Service) becomes liquidator when the winding up order is made. If the company has significant assets, an authorised insolvency practitioner will usually be appointed to take over conduct of the liquidation from the official receiver. The company is usually dissolved three months after the liquidator has completed the winding up process. On dissolution, the company ceases to exist as a legal person. This has consequences for anyone wishing to bring a claim against the company. These are explored below.

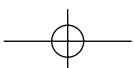
The procedural impact of company insolvency on claims for personal injuries

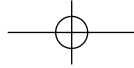
A CVA will usually provide that creditors may not bring legal proceedings against the company in respect of debts or claims which are the subject of the CVA. If there is no

³Administrative receivership is not considered in this article. Administrative receivers are appointed by holders of "floating charges" over the company's assets. The Enterprise Act 2002 imposed restrictions on the right to appoint an administrative receiver, and administrative receivership is now relatively uncommon. Administrative receivership does not restrict the right of creditors to take legal action against the company.

⁴Authorisation is required pursuant to the Insolvency Act 1986. Authorised insolvency practitioners are usually accountants or solicitors.

⁵A company in voluntary liquidation may be solvent.





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express provision, a term to this effect may be implied.⁶ The CVA binds every person who was entitled to vote at the creditors' meeting, and also those who would have been entitled to vote had they had notice of the meeting. A personal injury claimant who wishes to bring proceedings against the company for the purposes of claiming against the company's liability insurers under the 1930 Act will wish to avoid being bound by the CVA, including any term (express or implied) which restricts his or her right to bring legal proceedings against the company. There are two ways to achieve this. The first is to agree with the CVA supervisor, if the terms of the CVA allow this, that the claim is not subject to the CVA. Alternatively, an application may be made to the court under s.6 of the Insolvency Act 1986 on the grounds that the CVA "unfairly prejudices" the interests of the personal injury claimant. The basis for such an application is that the effect of the CVA is (or may be, depending on the terms of the CVA, including any implied terms as set out above) that the claimant is unable to proceed to judgment for the full amount of any claim that he or she may have against the company,⁷ and thus that he or she may not be able to recover in respect of that claim against the company's liability insurer under the 1930 Act, notwithstanding the availability of insurance, pursuant to a statutory scheme, for that very purpose in the case of the company's insolvency.⁸ If the unfair prejudice application succeeds, the court may revoke or suspend the CVA or give a direction for the summoning of further meetings to consider revised proposals.⁹

It is important to note that the time limits for bringing making an unfair prejudice application are very short: 28 days from the date on which the result of the creditors' meeting is reported to the court, or, in the case of a person who was not given notice of the creditors' meeting, 28 days after he or she becomes aware that the meeting has taken place.¹⁰

In the case of a company in administration, no legal proceedings may be instituted or continued against the company except with the consent of the administrator or with the permission of the court.¹¹ Permission may be granted on terms.¹²

After presentation of a winding-up petition and before a winding-up order has been made, the court may stay proceedings, but this requires an application.¹³ There is no automatic stay, and the permission of the court is therefore not required in order to continue or to commence proceedings during this period.

When a winding up order has been made or a provisional liquidator appointed, any proceedings against the company are automatically stayed, and the permission of the court is required to continue those proceedings or to start new proceedings against the company.¹⁴

⁶See *Sea Voyager Maritime Inc v Bielecki (t/a Hughes Hooker & Co)* [1999] 1 All E.R. 628; [1999] B.C.C. 924 Ch D at 644 (Richard McCombe QC sitting as a Deputy Judge of the High Court).

⁷See *Sea Voyager Maritime* [1999] 1 All E.R. 628; [1999] B.C.C. 924 Ch D at 645 and 647 (Richard McCombe QC sitting as a Deputy Judge of the High Court).

⁸See *Sea Voyager Maritime* [1999] 1 All E.R. 628; [1999] B.C.C. 924 Ch D at 647.

⁹Section 6(4) of the Insolvency Act 1986.

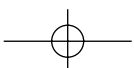
¹⁰Section 6(3) of the Insolvency Act 1986.

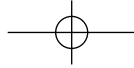
¹¹Schedule B1 para.43(6) of the Insolvency Act 1986.

¹²Schedule B1 para.43(7) of the Insolvency Act 1986.

¹³Section 126(1) of the Insolvency Act 1986.

¹⁴Section 130(2) of the Insolvency Act 1986. It is unclear whether permission to commence proceedings may be granted retrospectively under s.130(2): see *Saunders (A Bankrupt), Re* [1997] Ch. 60; [1996] 3 W.L.R. 473 Ch D (claimants discovered after proceedings were issued that the defendants had been made bankrupt before issue; permission was granted retrospectively), not followed in *Taylor (A Bankrupt), Re* [2006] EWHC 3029 (Ch); [2007] Ch. 150 (proceedings against a debtor by a creditor in respect of a debt provable in bankruptcy are void and cannot be validated retrospectively); *Taylor, Re* was impliedly approved in a different context (and apparently without consideration of *Saunders, Re*) in *Adorian v Commissioner of Police of the Metropolis* [2009] EWCA Civ 18; [2009] 1 W.L.R. 1859 at [33] (*Saunders, Re* and *Taylor, Re* are decisions in respect of s.285 of the Insolvency Act 1986 but the same principles apply to s.130: see *Saunders, Re* [1997] Ch. 60 at 65; [1996] 3 W.L.R. 473 Ch D at 475).





Again, permission may be granted subject to conditions.¹⁵ In the case of a voluntary liquidation, no winding up order is made, and there is no automatic stay. The liquidator can however apply for proceedings against the company to be stayed.¹⁶

Where a company has liability insurance which will respond to a claim if the company's liability is established, an administrator is likely to consent to proceedings being brought or continued against the company, and similarly a court is likely to give permission in respect of a company in compulsory liquidation. In either case, depending on the circumstances, the consent or permission may be subject to a condition that the claimant undertakes not to make any claim against the funds available for distribution to creditors.

Restoring a company to the register after October 1, 2009

Once a company has been wound up, its name will be struck off the register of companies. When the company is struck off, the registrar publishes a notice in the Gazette to this effect, and on publication of the notice, the company is dissolved.

It may subsequently become necessary to apply to have a company restored to the register so that it can bring or defend legal proceedings. Clearly, there is no point in bringing proceedings against a company with no assets, and an application to restore a company to the register is usually made by a potential claimant only where there is a policy of liability insurance which seems likely to cover the claim if successful. The statutory transfer to the third party claimant of the right to an indemnity from the insurance company under the 1930 Act takes effect only when the liability of the company has been established and the quantum of the claim ascertained, whether by judgment, arbitral award or agreement.¹⁷ Although attempts have been made to reform the law to allow a direct right of action against the insurer where the insured is a defunct company,¹⁸ the position remains that it is necessary to restore a company to the register in order for a claimant to bring proceedings against it.¹⁹

On October 1, 2009, the provisions of the Companies Act 2006 (the 2006 Act) in relation to restoration of companies to the register came into force. There are now two methods of restoring a company to the register: administrative restoration, which is a new procedure introduced in the 2006 Act, and restoration to the register by the court.

An application for administrative restoration is a new procedure, introduced by the 2006 Act, which does not require a court order. The application is made to the registrar of companies and may be made whether or not the company has been dissolved.²⁰ However, this procedure is likely to be of only limited interest to claimants as an application may be made only by a former director or former member (shareholder) of the company.²¹

¹⁵Section 130(2) of the Insolvency Act 1986.

¹⁶Under s.112 of the Insolvency Act 1986.

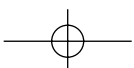
¹⁷*Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 Q.B. 363; [1967] 2 W.L.R. 709 CA (Civ Div). Following the decision of the Court of Appeal in *OT Computers Ltd (In Administration), Re* [2004] EWCA Civ 653; [2004] Ch. 317, the claimant's right to information under s.2(1) of the Third Parties (Rights Against Insurers) Act 1930 is not dependent on liability being established and quantum ascertained, but is triggered by the insolvency event.

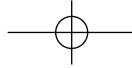
¹⁸For example, by an amendment to the Companies Bill in 1989 (subsequently withdrawn): Hansard, HC Debate, col.107 (October 26, 1989); and by the Law Commission in 2001; a Bill is currently progressing through Parliament (the Third Parties (Rights Against Insurers) Bill).

¹⁹*Bradley v Eagle Star Insurance Co Ltd* [1989] A.C. 957; [1989] 2 W.L.R. 568 HL.

²⁰Section 1024(2) of the Companies Act 2006.

²¹Section 1024(1), (3) of the Companies Act 2006.





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The application must be made within six years from the date of dissolution of the company.²²

An application may be made to the court to restore to the register a company which has been struck off, whether or not it has also been dissolved.²³ Those entitled to make such an application include any person with a potential legal claim against the company.²⁴

Limitation periods

There are no time limits for making the *application* for the purpose of bringing proceedings against the company for damages for personal injury.²⁵ For these purposes, “personal injury” includes any disease and any impairment of a person’s physical or mental condition, and references to damages for personal injury include claims under s.1(2)(c) of the Law Reform (Miscellaneous Provisions) Act 1934 and damages under the Fatal Accidents Act 1976.²⁶ Issues may arise, however, in relation to the time limits applicable to the claim itself. If a claim is not statute-barred at the time of a winding up, it does not become barred by the passage of further time thereafter.²⁷ It is unclear whether the same principle applies in relation to a CVA. If the CVA includes an express term that creditors may not bring legal proceedings against the company in respect of debts or claims which are the subject of the CVA or if a term to that effect is to be implied,²⁸ it may be that a term will be implied (on the basis of obviousness or necessity)²⁹ to the effect that time does not run against the creditor in respect of the claim for the duration of the CVA.

In the case of a company which has been dissolved or struck-off the register, the court may order the restoration of the company to the register if it considers it just to do so.³⁰ This will involve consideration of the applicable limitation periods. This is because the general

²²Section 1024(4) of the Companies Act 2006. As with restoration to the register by the court, the general effect of administrative restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register: s.1028(1) of the Companies Act 2006. Consequential directions (for example, in relation to limitation periods: see below in relation to restoration to the register by the court) may be given only by the court: s.1028(3) of the Companies Act 2006. Any such application must be made within three years of restoration to the register: see s.1028(4) of the Companies Act 2006.

²³Section 1029(1) of the Companies Act 2006.

²⁴Section 1029(2)(f) of the Companies Act 2006. In addition to a series of identified persons or classes of person, there is a sweep-up provision allowing an application to be made by “any other person appearing to the court to have an interest in the matter”: s.1029(2) of the Companies Act 2006.

²⁵Section 1030(1) of the Companies Act 2006. Where the company had been dissolved, the period was two years under s.651 of the Companies Act 1985 as originally enacted; the time limit was removed by amendment in 1989 following the decision of the House of Lords in *Bradley v Eagle Star Insurance Co Ltd* [1989] A.C. 957; [1989] 2 W.L.R. 568 HL (an amendment made by the Insolvency Act 1985 to increase the general time limit from 2 to 12 years never came into force). The time limit for an alternative procedure under s.653 of the Companies Act 1985 (which also required an application to the court, and was available only where a company had been struck-off the register but not dissolved) was 20 years, with no special dispensation for claims for damages for personal injury.

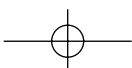
²⁶Section 1030(6) of the Companies Act 2006.

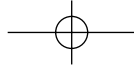
²⁷*Financial Services Compensation Scheme Ltd v Lamell (Insurances) Ltd (In Liquidation)* [2005] EWCA Civ 1408, [2006] Q.B. 808.

²⁸See pp.60–61 above.

²⁹The test of obviousness is also known as the “officious bystander” test: see *Southern Foundries (1926) Ltd v Shirlaw* [1939] 2 K.B. 206; [1939] 2 All E.R. 113 CA at 227 per MacKinnon L.J. The test of necessity is whether the implication of the term is necessary for business efficacy (not whether it would have been a reasonable term for the parties to have included, although in order to be necessary, a term must also be reasonable): see *Liverpool City Council v Irwin* [1977] A.C. 239; [1976] 2 W.L.R. 562 HL.

³⁰Section 1030(1) of the Companies Act 2006.





effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register.³¹ The court may however give such directions and make such provision as seems just for placing the company and all other persons “in the same position (as nearly as may be)” as if the company had not been dissolved or struck off the register.³² No order shall be made on such an application if it appears to the court that the proceedings would fail by virtue of any enactment as to the time within which proceedings must be brought.³³ Under the 2006 Act, this is subject to a provision which states that, in making that decision, the court must have regard to its power³⁴ to direct that the period between the dissolution (or striking-off) of the company and the making of the order is not to count for the purposes of any such enactment.

In the context of a prospective claim for damages for personal injuries, it is necessary for the court to consider, in deciding whether to direct that the period between dissolution or striking off and the making of the order should not count for limitation purposes, the application of s.33 of the Limitation Act 1980 (the 1980 Act). In *Smith v White Knight Laundry Ltd*,³⁵ the Court of Appeal said that such a direction should not normally be given unless, (a) notice of the application has first been given to all those parties who might be expected to oppose the making of such an application, including the company’s liability insurers, and (b) the court is satisfied (i) that it has before it all the evidence which the parties would wish to adduce on an application by the prospective claimant under s.33 of the 1980 Act, and (ii) that an application under s.33 would be bound to succeed.³⁶ If those conditions are not met, the usual position should be that the company be restored to the register without such a direction being made, with the applicant being left to seek relief under s.33 in the normal way.³⁷

³¹Section 1032(1) of the Companies Act 2006. If the court orders restoration of the company to the register, the restoration takes effect on a copy of the court’s order being delivered to the registrar: s.1031(2) of the Companies Act 2006.

³²Section 1032(3) of the Companies Act 2006.

³³Section 1030(2) of the Companies Act 2006.

³⁴This is the power to give consequential directions etc under s.1032(3) of the Companies Act 2006.

³⁵*Smith v White Knight Laundry Ltd* [2001] EWCA Civ 660; [2002] 1 W.L.R. 616. This was a decision in relation to s.651 of the Companies Act 1985 (as amended), but the same principles would apply to an application under the equivalent provisions of the Companies Act 2006.

³⁶*White Knight Laundry* [2001] EWCA Civ 660; [2002] 1 W.L.R. 616; *Workvale Ltd (No.2)*, *Re* [1992] 1 W.L.R. 416; [1992] 2 All E.R. 627 CA.

³⁷*White Knight Laundry* [2001] EWCA Civ 660; [2002] 1 W.L.R. 616; *Workvale Ltd (No.2)*, *Re* [1992] 1 W.L.R. 416; [1992] 2 All E.R. 627 CA.

