

What is winding up?

Winding up is also known as compulsory liquidation. It is action taken by creditors of the company which (if successful) will result in the company ceasing to trade and being closed down.

The process is governed by statute which is mainly the Insolvency Act 1986 (IA 86) and the Insolvency Rules (England and Wales) 2016 (IR 2016). The IA 86 and the IR 2016 set out the steps that **MUST** be followed when a winding up petition (WUP) is issued at Court. If the supporting evidence is accepted by the Court a winding up order will be made. The company will be placed into compulsory liquidation. A liquidator will be appointed, who will either be the Official Receiver ("OR") or an independent insolvency practitioner ("Liquidator").

The Liquidator will gather in and realise the assets of the company before distributing any proceeds to the company's creditors in a prescribed order, having considered the validity of claims being made by creditors. Once that process has been completed the company will be dissolved and will cease to exist.

Is winding up appropriate?

A creditor may choose to issue a winding up petition if it has been unsuccessful in recovering an undisputed debt of at least £750 and it can prove that the company is unable to pay its debts as and when they fall due, or that the company is balance sheet insolvent.

Winding up proceedings should only be commenced if the debt can be proven and there is no dispute as to whether it is due. If the debt is genuinely disputed, or the company has a genuine cross-claim or right of set-off, winding up proceedings are not appropriate. The Court will dismiss any petition that is issued when the debt is genuinely disputed and the issuer will generally have to pay the company's costs of responding to the proceedings - on the basis that they should not have been issued in the first place.

While the threat or issuing a winding up petition may put pressure on a company to pay an outstanding debt, winding up proceedings should not be seen as a debt collection process for individual creditors. Winding up is a mechanism for putting an insolvent debtor into a form of insolvency proceedings for the benefit of all creditors.

When can a creditor apply to have a company wound up?

Section 123 of the IA 86 sets out the grounds on which a company may be wound up by the court.

The Court will generally accept that a company is unable to pay its debts where it is shown that:

1. A statutory demand has been served for an undisputed sum exceeding £750 and the company has failed to pay the sum due within three weeks; or
2. The company is unable to pay its debts as they fall due; or
3. The value of the company's assets is less than the amount of its liabilities.



Advantages and disadvantages of winding up proceedings

The advantages and disadvantages of winding up proceedings should be considered before a decision is made.

Advantages may include:

- the threat of winding up proceedings can often be enough to result in a debt being paid quickly;
- the basic procedure of obtaining a winding up order is relatively quick and inexpensive; and
- if a winding up order is granted a Liquidator will take control of all of the company's assets, investigate the affairs of the company and also take action to maximise recovery of assets available for distribution to creditors.

Disadvantages may include:

- winding up will not be appropriate if the debt is properly disputed or there is a genuine counterclaim / a right of set-off;
- once a petition has been presented any other creditor may support the petition and seek to have the company wound up - even if the company pays the original debt;
- it is unlikely that the whole debt would be recovered, often creditors will only recover a small percentage of the debt owed to them and sometimes nothing at all; and
- even if the company has enough assets to settle its liabilities there may be a delay between the realisation of the assets and payment of a dividend.

Generally a creditor will make multiple attempts to recover the debt from the company, or to reach a compromise, before taking steps to issue a winding up petition.

Serving a statutory demand

Service of a statutory demand is very often the first step in the winding up process. This is a formal demand for payment which, if it remains unpaid for more than three weeks, can be used to support a winding up petition.

A statutory demand is not necessary if other evidence is available to illustrate the company's inability to pay its debts, for example evidence that the company has failed to pay other claims, or it has an outstanding judgment, or if the accounts show that the company is insolvent (its liabilities exceed the value of its assets). However, a statutory demand is a straightforward way of showing a sum is outstanding and (if there is no reply) that it is undisputed.

Often receipt of a statutory demand will be enough to prompt payment by a company. The company may be aware that a statutory demand is a pre-cursor to winding up proceedings.

Issuing a creditor's winding up petition

If the debt remains unpaid the next step will be to issue a winding up petition. The procedure is governed by the stringent rules set out in the IA 86 and IR 2016. The key steps include:

- drafting the petition, containing all information required by the IR 2016. This will include details of the Court and the petitioner, the identity of the company, its share capital, a statement of the company's business and the grounds upon which the winding-up order is sought. Where a statutory demand has been served on the company, the...



petition must also include a statement confirming that fact, the date of service, the fact the demand remains outstanding and that the company is insolvent and unable to pay its debts;

- paying the appropriate Court fee to issue the petition and an additional sum as the 'petition deposit'. The deposit (if the petition is successful) will be passed to the OR to manage the initial stages of the winding-up process. If there are sufficient realisations in the liquidation, the petition deposit will be paid out as a priority expense back to the petitioning creditor;
- serve the petition on the company. It should be handed to a director or other officer or employee of the company at the registered office or to someone who is authorised to accept service on the company's behalf. If that is not possible, an alternative method may be allowed;
- file a certificate of service, confirming the manner in which service was effected, at Court as soon as reasonably practicable after service; and
- give notice of the petition by advertising it in the London Gazette. This ensures other interested parties are aware of the petition, the date fixed for the hearing and it provides them with the details they need if they want to support or oppose the petition.
- File a certificate of compliance, confirming that notice of the petition has been given, at Court not less than five business days before the hearing.

Notice of the petition must appear in the Gazette not less than seven business days after service of the petition and not less than seven business days before the day of the hearing. Advertising the petition will potentially notify other creditors that a petition has been issued and when it is to be heard. If the petition is not advertised as required the Court can dismiss it.

This is a critical step in the process. If a petition is advertised in the Gazette this can have devastating consequences for the company. Banks monitor the Gazette closely and as soon as a petition is advertised the company will typically have its accounts frozen and will no longer have access to any funds. In circumstances where the company considers it inappropriate for a petition to have been presented, it can take steps to prevent advertisement of the petition in the Gazette.

The hearing

At the hearing the Court will consider the petition and all evidence in support.

If the company is opposing the petition the Court will also review any evidence in opposition. This should be included in a statement served on the creditor at least five days before the hearing. If the petition is opposed the Court will generally give directions for service of further evidence and the petition will be listed for a longer hearing at a later date.

Any other creditor or contributory wishing to appear at the winding-up hearing must give notice to the petitioning creditor. The notice must contain (among other things) the contact details of the person intending to appear, details of the debt claimed and whether or not the petition is supported.

The petitioner must file a list of other creditors intending to appear in support of the petition, or confirm no one else is attending.



Winding up order

The Court will make a winding-up order if it is satisfied that one of the grounds for doing so is made out and all the formal requirements have been complied with.

The costs of the petitioning creditor will generally be ordered to be paid out of the assets of the company. They will be paid as an expense of the liquidation, after the costs and expenses of the OR and Liquidator have been paid.

There are a number of automatic consequences that will follow a winding up order being made:

- as soon as a winding up order is made the court will notify the OR, who becomes the liquidator of the company. The company's creditors may be able to nominate a Liquidator to replace the OR if they wish to do so or the OR may nominate to do so in accordance with the prescribed rules;
- the Liquidator will take control of the company's assets and the directors cease to have any power to bind the company;
- only the Liquidator can dispose of the company's property from that point;
- proceedings cannot be issued against the company unless the Court gives permission for that to happen;
- all company papers and websites must clearly state that the company is in liquidation and being wound up;
- all employees' contracts will be terminated and they will be dismissed; and
- the Liquidator must act in accordance with his statutory duties, which include acting in the best interests of all creditors of the company - not just the petitioning creditor.

Things to remember

- The initial process for winding up a company can be quite straight-forward the actual recovery of all sums owed will not be as quick and easy.
- Companies in liquidation will often have debts that exceed their assets and the liquidation process itself will often require significant funds which may come from any assets realised, thereby reducing the potential level of recovery for the creditors.
- The process from start to finish can be long and complicated depending on the facts and the likelihood that creditors will receive what is owing to them in full at the end of the process will vary.
- It may be better to try and negotiate settlement of a debt by another means - choosing the winding up route should be a measure of last resort.
- If the winding up route is chosen make sure all procedural steps are followed.

How can we help?

We can help you secure the best, most cost effective trading environment for your business in the short and/or long term.

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