

## **Administration**

Administration is a procedure where an insolvency practitioner is appointed to take control of a company, either with a view to saving the company itself by way of a restructuring, or with a view to saving the business by selling it as a going concern in order to maximise its value to creditors. An administrator has very wide powers when he is put in charge of a company. Administration may be appropriate where there is a sound enterprise which is struggling due to cashflow pressure, or aggressive creditors, or a lack of funding. It may also be the useful where a company is insolvent and heading towards liquidation, but there is still a part of it which can be preserved.

Administration creates a moratorium against actions that can be taken by creditors, including landlords, finance companies and retention of title creditors, and it allows time for proposals to be put to creditors which will result in the best possible return to them. Administration can be initiated by a lender with a debenture over the assets of the company, and also by the directors of the company themselves. In some circumstances a creditor can also start the process off.

If a company simply needed a breathing space, it can be returned to the control of the directors once the administration is over. Otherwise the directors can consider buying the business back from the administrator once he is appointed.

### Benefits of administration for directors

- taking early advice on putting a company into administration provides some protection from claims against directors and from the risk of directors disqualification
- it can provide the company with time to restructure its finances without facing claims from creditors
- the directors can negotiate with the administrator to buy the business (or part of it) as a going concern without the burden of historic debt

### Disadvantages

- directors' powers cease on administration and control of the company passes to the administrator
- an administrator has power to bring claims against directors guilty of misconduct
- an administrator is obliged to report on the directors' conduct and there is a risk of disqualification from acting as a director

SGH can advise directors on a number of issues relating to administration, including whether or not it is appropriate for your company; the benefits of the moratorium; selecting a potential administrator; guiding you through the steps required to start an administration; and buying the business back.

We can also advise creditors who may wish to put a company into administration, and those who find that they have received a letter from an insolvency practitioner saying that he has been appointed as administrator over one of their debtors. We can assist landlords in that situation, creditors with security, creditors with retention of title claims and those who want assistance dealing with the paperwork you will receive.

## **Liquidation**

### **Voluntary Liquidation**

There are two types of voluntary liquidation, a members' voluntary liquidation and a creditors' voluntary liquidation.

#### **Members' Voluntary Liquidation (MVL)**

An MVL enables shareholders to put wind up a solvent company in order to unlock their investment. It can also be used to achieve an orderly winding-up of a dormant company, for example to close down a subsidiary that is no longer required.

The liquidator is appointed by the shareholders, and one or more of the directors must make a statutory declaration of solvency stating that the directors have conducted a full enquiry of company affairs and believe that it can repay its debts, with interest, within 12 months of the winding up. Once the creditors are paid the assets of the company are distributed to the members by the liquidator.

The assets can be distributed to members in specie rather than by converting them to cash. It is also possible to arrange for assets in the company to be exchanged for shares in another company. The liquidator then distributes the shares he receives rather than the assets themselves.

It is extremely important that good tax advice is taken before proceedings with an MVL. Tax is often the driving force behind a decision to go ahead, or not.

#### Benefits of MVL for directors

- it is a useful procedure to break up a single company carrying on distinct businesses into separate legal entities
- it is a good way to 'tidy up' unwieldy group structures

#### Disadvantages

- directors must be certain that the company can pay all of its debts within 12 months or they may face criminal penalties. They must be sure there are no 'hidden' liabilities, such as guarantees given by the company, rent accruing under current and previous leases etc

SGH can assist you in selecting a potential liquidator; in obtaining suitable tax advice; and in preparing all relevant documentation.

#### **Creditors' Voluntary Liquidation**

This is appropriate if a company is insolvent and it cannot pay all of its creditors. The definition of insolvency is that a company's liabilities exceed its assets and/or that it cannot pay its debts when they fall due. Usually the company cannot continue to trade and the directors and shareholders call in an insolvency practitioner to wind up its affairs. A meeting will take place at which the creditors select the choice of liquidator, who is usually (but may not be) the person suggested by the members.

The liquidator's role is to realise the company's assets, including not only its property but also potential claims against the directors if they have been guilty of misconduct leading up to the liquidation. He also has to check and agree the claims of creditors, and in due course will distribute the funds he is holding to those creditors according to the level of their debts. The liquidator is duty bound to achieve the best outcome he can for the creditors.

The liquidator may sell the assets of the company to the directors so that they can carry on the business through a new entity. In that event care needs to be taken not to fall foul of the prohibition on directors using the same or a similar name as that used by the company which has become insolvent. If directors breach the rules on using a prohibited name they can become personally liable for the debts of the new company.

Directors should also be aware of the potential claims that liquidators may look to bring against them. If the company ought to have gone into liquidation at some point before it did, then an allegation may be made of wrongful trading, trading whilst insolvent or even fraudulent trading. If assets of the company have been gifted or sold for less than their true worth the liquidator may allege a transaction at an undervalue. If certain creditors have been paid in priority to others there may be allegations of a preference. All are breaches of the Insolvency Act 1986 that can lead to personal liability. Other matters to be aware of which might be raised by a liquidator and which might give rise to personal liability are allegations of breach of fiduciary duty, misfeasance and receiving unlawful dividends. All can give rise to a monetary claim against directors personally to increase the amount available to pay to creditors.

You do not have to be registered as a director at Companies House for the possible claims against directors to arise. They apply equally to shadow directors (someone who directs or instructs the actual directors how to act) and to de facto directors (those who act as a director even though they may not be formally appointed).

#### Benefits of CVL for directors

- taking early advice on putting a company into liquidation provides some protection from claims against directors and directors disqualification actions
- the directors can negotiate with the liquidator to buy the business (or part of it) without the burden of historic debt

#### Disadvantages

- directors' and employees are dismissed on liquidation
- a liquidator has power to bring claims against directors guilty of misconduct
- a liquidator is obliged to report on the directors' conduct and there is a risk of disqualification from acting as a director
- the rules on directors using a prohibited name apply

Despite the disadvantages, CVL is the most appropriate insolvency procedure in many instances where a company is in financial difficulties. We can assist you in selecting a potential liquidator, who will then guide you through the initial process of liquidation and help you to call the necessary meetings. We can assist the directors in making sure they do not become personally liable for the debts of the new company by using a prohibited name.

We also advise directors and others in defending allegations and claims made and brought against them by liquidators.

### **Compulsory Liquidation**

A compulsory liquidation is a method of winding up a company via an application to court. It is usually used by a creditor, or where there is deadlock between shareholders over the management of a company. The liquidator's job is the same as in a CVL, as are the pitfalls that may arise for directors.

The court must be convinced that the company is insolvent or that it is just and equitable to wind it up.

Immediately on a winding up order being made the Official Receiver takes control of the company. He is a government appointed official and has considerable powers of investigation into the company's affairs. He may decide whether or not an insolvency practitioner should be appointed as liquidator, or the creditors can require him to call a meeting of creditors to appoint a liquidator.

In most instances, it is preferable for the directors to take steps to initiate formal insolvency where it is appropriate, so they can select the best option for the company. Compulsory liquidation is often the most expensive way forward and brings about the worst outcome for creditors.

#### Benefits of compulsory winding up for directors

- other than saving the cost of initiating a CVL, there are no benefits!

#### Disadvantages

- as for CVL, plus the Official Receiver will carry out investigations into the affairs of the company. The directors will have to attend an interview with the Official Receiver
- the company will be disadvantaged as soon as a petition is presented to the court. For example the bank may freeze its accounts; transactions may have to be ratified by the court; the petition will be advertised and other creditors, suppliers and competitors may become aware that the company is in financial difficulty

#### Benefits of compulsory winding up for creditors

- it is an aggressive step to take when you are a creditor and often results in payment
- the court will put an insolvent company into liquidation providing your debt is not disputed
- control of realisation of the company's assets will be taken out of the hands of the directors
- the assets of the company available for distribution to creditors may be increased, for example by the ability of a liquidator to bring certain monetary claims against directors and to set aside some prior transactions

#### Disadvantages

- there is a significant fee to be paid on starting winding up proceedings

- if a company goes into liquidation creditors are unlikely to be paid in full, if at all

SGH can advise directors who find a winding up petition has been threatened or presented against their company. We can assist you if the company's bank account is frozen, or on an application to the court to ratify or validate essential transactions after a petition has been lodged at court.

We can also assist creditors who want to bring winding up proceedings. Once an order has been made we can advise you on getting your choice of liquidator appointed and make sure he investigates directors' conduct and brings all such claims as are appropriate.

### **Company Voluntary Arrangement (CVA)**

A CVA is a process that results in a binding settlement between a company and its creditors. The company sends a written proposal to each of its creditors suggesting a compromise, typically offering payment of a proportion of each creditor's claim over a period of 3 to 5 years. The Company usually offers to make monthly payments to the supervisor of the arrangement, who is an insolvency practitioner appointed to monitor compliance with the terms the CVA, collect the instalments and pay a dividend to creditors in due course.

Creditors are invited to a meeting to consider the proposal and vote as to whether or not they agree to the terms offered to them. Providing a majority of creditors greater than 75% of those voting on the proposal accept the terms offered, the settlement is binding on all of them. That includes those who vote against the arrangement, or do not vote at all or did not receive notice of the meeting. If a CVA is approved creditors can no longer pursue their claims against the company, and their debts are frozen until they receive a payment from the supervisor.

#### Benefits of a CVA for directors

- the directors remain in control of the company at all times
- it is useful where there are minority creditors, who can be forced to accept a compromise providing the 75% majority can be achieved
- the supervisor does not report on the directors' conduct and there is no risk of disqualification from acting as a director

#### Disadvantages

- creditors can generally take action against a company until the CVA is approved. A moratorium can be obtained in limited circumstances, otherwise the company has to go into administration to obtain protection from creditors until the CVA is approved
- creditors can require long term arrangements and minimum dividends, both of which can increase the risk of failure
- often on failure a winding up petition is inevitable

SGH can assist you in appointing an insolvency practitioner to help you prepare a proposal to your creditors, and advise on legal issues arising such as the value of claims of

dissenting or disputed creditors; landlords or other vital suppliers/creditors who might take action pending approval.

### **Fixed Charge Receivership**

A fixed charged receivership is where a secured creditor (usually a bank or other lender) holds a fixed charge usually over land or certain other property. The lender can usually appoint a receiver if there is a default under the terms of the charge, and he or she takes control of the relevant property, usually with a view to achieving a sale.

Benefits of fixed charge receivership for lenders

- the lender is one step removed from the enforcement of its charge
- it avoids the risks involved in becoming mortgagee in possession
- it avoids the direct cost of managing a property with tenants in situ pending a sale

Disadvantages

- the fixed charge must contain a power of sale for a receiver or he cannot sell
- a receiver cannot sell a residential property with vacant possession where there are authorised occupiers. For residential property a possession order is often the only real option

If you are a lender we can carry out a review of security over property and other fixed charge assets and advise as to whether or not the appointment of a fixed charge receiver is an appropriate procedure. We can also assist you in selecting a receiver, who does not need to be an insolvency practitioner.

We can also assist borrowers and advise them on their rights and possible remedies should a fixed charge receiver be appointed over any of your assets.

### **Minimising Risk**

If you are at all concerned as to whether or not your company is insolvent, or is in danger of becoming insolvent, we can advise you on minimising the risks to you as directors of personal claims being made against you should the worst happen.

In such circumstances directors must take appropriate professional advice, and you may think that an accountant should be your first port of call. You are often right to do so. However legal advice is also essential, and will help you to defend any future claims that might be brought by an administrator or liquidator if insolvency cannot be avoided. We can advise you on avoiding wrongful trading claims; misfeasance; transactions at an undervalue; and preferences.

SGH can help you to plan corporate transactions in the face of difficult financial circumstances, and help prepare a suitable structure that will withstand an investigation by any subsequently appointed insolvency practitioner. We can assist you to decide whether or not your company can continue to trade in the face of difficult market conditions to make sure that wrongful trading is not an issue. We can assist you to restructure or refinance

your debts outside of formal insolvency to avoid any concerns as to personal liability you may have.

Showing that you have taken and heeded appropriate advice from specialist insolvency lawyers can also help fight off directors' disqualification proceedings.

If any of the above is relevant to your circumstances please contact us.

### **Prohibited Names**

If you have been a director of a company that has gone into insolvent liquidation it may be unlawful for you to be a director of another company which carries on business using the same or a similar name. It may also be unlawful for you to take part in the promotion formation or management of a company using the same or a similar name, or for you to carry on such a business as a partner or sole trader.

The prohibition applies for a period of 5 years from the date the first company went into insolvent liquidation.

If you breach the rules relating to the use of prohibited names you are liable to imprisonment and/or a fine and in addition you can be made personally liable for all of the debts of the new company. These provisions may therefore create a significant risk to you.

If a company or trading name is important to you and you want to carry on using it after liquidation there are exceptions to the rules on the re-use of prohibited names which SGH can guide you through:

- where you have bought the insolvent company's business back from the liquidator it may be possible to avoid breaching the law by giving notice to creditors
- you can make an application to court for permission to use a prohibited name
- the ongoing company may have used the same or similar name for long enough to avoid the unwanted consequences

SGH can advise you on the exception most appropriate to your circumstances and assist you with giving notice to creditors or an application to court as necessary.

This is an important part of the winding up process which is often overlooked. It can apply after administration (many companies go into liquidation after administration), and legal advice is crucial if you wish to avoid committing an offence and facing potentially large personal claims.

### **Partnerships**

Voluntary arrangements, administration and winding up are available to partnerships in financial difficulty as much as they are available to companies. If you think that the procedures might be beneficial to your partnership, whether it is an LLP or not, please contact us to discuss the options.

We have particular experience in acting for professional partnerships who find themselves in financial difficulties, such as solicitors, accountants, valuers, and architects. We have

specifically dealt with circumstances where unpaid creditors include Her Majesty's Revenue & Customs.

## **Bankruptcy**

Bankruptcy is where the court makes an order declaring you to be bankrupt. You can choose to become bankrupt yourself, or more frequently a creditor will ask the court to make you bankrupt at its request. Your assets will be placed in the hands of the Official Receiver and a trustee, who will be appointed by your creditors.

Bankruptcy can be a very simple of resolving your financial difficulties. You will usually be discharged from bankruptcy after one year, and in most cases all of your debts will be extinguished. Creditors will have no further claims against you.

As a bankrupt you have a duty to assist the trustee in making enquiries relating to your financial conduct before the bankruptcy. The trustee has powers to investigate your affairs and your conduct, and if he finds that you have gifted assets or paid certain creditors he can ask the court to overturn those transactions and recover the value of the assets or payments for the benefit of all of your creditors.

You should also be aware that a trustee has three years in which to apply to court for an order to sell your property. In the first year he can also claim any property which you become entitled to after the bankruptcy order, and he can also require you (whether by agreement or on an application to the court) to pay a part of your income to him. Payments of income to your trustee can last for three years.

In certain circumstances the Official Receiver can obtain a Bankruptcy Restriction Order or Undertaking against you which can last from 2-15 years. That means that you will be subject to the restrictions of bankruptcy for the duration of the Order. In particular, you should be aware that as a bankrupt you cannot act as a director.

### Benefits of bankruptcy for debtors

- it brings certainty that the majority of existing creditors will have no further claim against you
- you are generally discharged from bankruptcy after not more than one year. This compares for up to five yours of contributions in an IVA

### Disadvantages

- your home is at risk and all of your assets will be claimed and may be sold by your trustee
- you may also lose future assets and part of future income
- a trustee has power to bring claims against debtors and others guilty of misconduct
- as bankrupt is automatically disqualified from acting as a director

If you are considering bankruptcy SGH can advise you on your options. If you are bankrupt, or the co-owner of property with a bankrupt, we can help you if you face claims from a trustee. In particular we can advise spouses of bankrupts on their rights if the trustee seeks to repossess your property. We can help you with matters such as asserting

your beneficial interest; equitable accounting to increase the size of your beneficial interest; and negotiating with the trustee to buy his beneficial interest at an appropriate price.

SGH can also advise you if you receive notice from your trustee that he is taking any steps to overturn prior transactions or otherwise recover assets or income for your bankruptcy estate. Similarly we can help those who have acquired assets from a bankrupt and now face claims from a trustee.

## **Annulment**

In some circumstances a person who has been made bankrupt may apply to the court for an order annulling the bankruptcy. After a successful annulment application it is as if the bankruptcy order had never been made.

A bankruptcy order can be made annulled on one of three bases:

- that all the debts and expenses of the bankruptcy have been paid or secured
- that the bankruptcy order should not have been made in the first place
- that the bankrupt has entered into an individual voluntary arrangement with his creditors

Legal advice is required to annul a bankruptcy on any of the above bases, and SGH can advise you on which route is most appropriate way forward for you and assist you with the application to the court.

Benefits of annulment for bankrupts

- it brings all of your assets back under your control
- on a successful annulment application it is as if the bankruptcy order was never made. Your credit history will be 'cleaned up' and you will no longer face the stigma of bankruptcy
- claims which the trustee may have against you (or possibly against members of your family) will disappear
- you can again act as a director

Disadvantages

- the court has a discretion whether or not to make an annulment order. It can refuse your application
- it can be costly if you are paying all of the bankruptcy debts and expenses. You may also have to pay interest on creditor's claims

Despite the disadvantages annulment remains a very good option for many bankrupts, particularly if the debts in the bankruptcy are small and you have a property with sufficient equity in it which can be remortgaged to fund the payments you have to make.

## **Individual Voluntary Arrangements**

An individual voluntary arrangement or IVA is similar to a CVA for companies. It is a binding agreement made between a debtor and his or her creditors, giving the debtor the

chance to review his or her financial affairs to the benefit of all parties. It is a way to overcome a debtor's financial difficulties without the stigma of bankruptcy, and ensures that creditors also get the best possible outcome.

In an IVA you make a proposal to your creditors so you can repay a proportion of your debts over a period of time. It offers you the opportunity to save your home, which might be lost in bankruptcy, and is often an appropriate strategy to allow you to start afresh. You may or may not benefit from an interim order, which creates a moratorium and prevents creditors from taking any action against you whilst your creditors consider a proposal for an IVA.

There is no standard IVA proposal, and the documentation will vary from person to person. However there is a generally accepted standard framework within which an IVA must operate. We can assist you to decide whether or not an IVA is for you and introduce you to an insolvency practitioner who would act as supervisor of the arrangement. The supervisor will then help you to prepare the proposal and notify your creditors of the offer to them, making sure it is viable for you and your creditors. Usually a proposal says that you will pay a part of your income to the arrangement for a fixed period of time, and it may require you to remortgage your property at some point. Providing more than 75% of those creditors who are notified of the meeting to consider your proposal vote in its favour, the proposal is binding on all of them.

You must make a full disclosure to your Nominee of all your assets and liabilities – and the proposal should ensure that your creditors will measurably benefit from the arrangement, receiving a higher return than if you became bankrupt. The proposal is confidential and you will always remain in control of your assets.

It's worth bearing in mind that you can enter into an IVA even if you're already bankrupt or have been presented with a bankruptcy petition – and if you're self-employed and working in a viable business, you can continue to trade.

#### Benefits of an IVA for debtors

- you remain in control of your assets and will usually be able to protect your home
- it is useful where there are minority creditors, who can be forced to accept a compromise providing the 75% majority can be achieved
- you can obtain an order from the court to stop creditors from taking action against you until the IVA is approved
- it avoids the disadvantages and stigma of bankruptcy

#### Disadvantages

- creditors can require long term arrangements and minimum dividends, both of which can increase the risk of failure
- often on failure a bankruptcy petition is inevitable

SGH can assist you in appointing an insolvency practitioner to help you prepare a proposal to your creditors, and advise on legal issues arising such as the value of claims of dissenting or disputed creditors.