

fact sheet

CORPORATE RECOVERY AND INSOLVENCY GROUP

Frequently Asked Questions

1. What is a pre-pack administration?

Where a business needs to be rescued quickly a sale may be arranged to complete immediately after the appointment of the administrator. Such sales are often referred to as "pre-pack" sales. The administrator has the power to complete the proposed sale of the business without the sanction of a creditors' meeting but the decision can be challenged by the creditors.

2. We are a creditor of a company that has gone into administration and its business sold via a pre-pack sale. What information must the administrator provide to us?

On 1 January 2009 new rules were introduced by Statement of Insolvency Practice 16 ("SIP 16") requiring administrators to disclose certain information when carrying out a pre-pack administration. Administrators will now be required to disclose to creditors, inter alia, the source of their initial introduction and the extent of their involvement before their appointment; the alternative courses of action along with the possible financial outcomes of them; the identity of the purchaser; and any connection between the purchaser and the directors, shareholders or creditors of the company. Failure to comply could result in disciplinary or regulatory action.

3. I am not happy about the way in which the administrator is running the business. How can I challenge his conduct?

During an administration, if you are a creditor or member of the company you can apply for a court order that the administrator is acting, has acted or is

proposing to act in a way that unfairly harms your interests as creditor or member. You can also apply to court on the basis that the administrator is not acting as quickly or as efficiently as is reasonably practicable. An allegation of misfeasance may also be made to the court in certain situations. Challenges have been made in the past against pre-packs, although one recent case brought by the HMRC demonstrates how difficult it may be to bring a successful challenge.

4. We are the management team of an insolvent business. Can we buy the business and trade under the old name?

Recent changes to the rules on so-called "phoenix" companies mean that a director may give notice to creditors and so avoid contravening section 216 of the Insolvency Act 1986 ("IA 1986") if the insolvent company's business is acquired from an insolvency practitioner. In certain situations, therefore, you may be able to avoid an application to court, if notice is given before the director becomes involved with management of the successor or before the successor uses a prohibited name.

5. What should I do if my company receives a statutory demand?

Failure to respond within 3 weeks could result in a winding-up petition being presented to the court under section 123(1)(a) of the IA 1986, so a quick response is vital. If the company agrees that the debt is payable, the creditor should be contacted to arrange payment of the debt, possibly by deferred or reduced payment.

If the amount of the debt is disputed, the company should write to the creditor detailing the grounds of dispute and requesting an undertaking from the creditor that it will not present a winding-up petition to the court. A statutory demand cannot be used to pursue a properly disputed debt. If the creditor refuses to withdraw the demand, an application for an injunction to restrain presentation or advertisement of a winding-up petition on the basis of the statutory demand should be made.

6. What should I do if my tenant goes into liquidation?

Speed is essential in this situation: you must make contact with the liquidator as soon as possible and identify his or her intentions. You should not simply wait for the liquidator to disclaim the lease but take active steps to safeguard your interests.

It is not often encountered in practice but liquidators have the power to run down a business and, if they do so, they should pay "liquidation expenses", which would include paying the rent on business premises as it falls due.

In every case, you should agree explicitly with the liquidator as soon as possible that letting boards can be put up and prospective tenants permitted to view the premises. The liquidator should be keen to agree to this proposal, as a new tenant may be prepared to pay a premium for an assignment of the existing lease, which would increase the funds in the liquidation.

If you hold a deposit to cover shortfalls in rent, check carefully the terms on which the money is held. A well-advised landlord

may be entitled to take the entire sum held on deposit immediately in the event of the tenant entering into liquidation.

7. We are a bank based in Europe which lent money to a debtor who has now declared himself bankrupt in England. Can he do this?

Certain insolvency procedures are now mutually recognised in European countries under Council Regulation (EC) No. 1346/2000 of 29 May 2000. As a result, a liquidator or trustee in bankruptcy or his foreign equivalent in another EU country may assume control of assets in the UK; conversely an English office-holder or insolvency practitioner may have control of assets abroad which fall into the UK insolvent estate.

Secure creditors may in practice nevertheless be able to disregard the insolvency proceedings and enforce their security; for example, banks with certain securities over real property.

The main proceedings relating to an insolvency under the Regulation will be located in the debtor's "COMI" - Centre of Main Interest - but the possibility arises of opening "secondary proceedings" to deal with assets located in another EU jurisdiction.

8. Our buyer has gone into administration without paying for our goods. There is a retention of title clause in the contract. Can we get our goods back?

Where a company goes into administration, section 43(3) of Schedule B to the IA 1986 imposes a moratorium on various legal processes, with the result that sellers with retention of title claims cannot repossess their goods without either the consent of the administrator or the permission of the court.

If the retention of title clause is effective, you as seller will remain owner of the goods. If the administrator refuses to return them because they are needed for the purposes of the administration he is still liable to account to you as owner, and your claim to payment will be an expense in the administration ranking in priority to certain other claims including the administrators' own remuneration. However, secured creditors such as banks will usually take priority.

There may also be considerable delay before such expenses are paid out. If you do not wish to wait and the administrator will not agree to release the goods, you as their owner can apply to the court for their repossession, and the court will carry out a balancing exercise between the need to "achieve the purpose of the administration", and the proprietary claims of the owner.

9. Can we put our employees on short working or ask them to accept reduced salaries for the same hours?

You cannot do so unilaterally, but must seek the employees' consent, preferably in writing. This will be the case even if the employment contract contains a clause reserving the employer's right to vary employees' contractual terms, as such clauses are very narrowly construed by the courts. An employer will be in breach of contract, if the employer cannot show that the employee agreed to the change. Depending on the circumstances, an employee can continue working under protest whilst bringing a claim for unlawful deduction of wages. Alternatively, an employee may be able to resign and bring a claim for constructive dismissal and/or breach of contract.

10. When buying a business in administration, do we have to take on all the liabilities for the employees?

Broadly speaking, the Transfer of Undertaking (Protection of Employment) Regulations 2006 (TUPE) distinguish between two types of insolvency proceedings – terminal and non-terminal. In non-terminal proceedings, the employees of the business in administration will transfer to any buyer of the company; although there is greater flexibility to vary the employees' contractual terms than under usual TUPE provisions and certain statutory payments due to the employees are paid by the National Insurance Fund. In the case of terminal proceedings, employees may not transfer and dismissals linked with the transfer will not be automatically unfair.

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For more information, assistance or advice please contact:

David Glass (Partner)

T: +44 (0)20 7650 3822

E: dglass@pe-legal.com

Or

Diana Wright (Partner)

T: +44 (0)20 7650 3917

E: dwright@pe-legal.com

You may also visit our website at:
www.pe-legal.com.