



## **New Guidelines will affect current practice**

Now you are going to have to bear with me here as I am going to be talking about something on the periphery of my core area of expertise, namely striking off. Not something I would usually, given the choice, care to discuss with any degree of either enthusiasm or certainty. But needs must when the devil drives and, in this case, it is likely to have a significant impact on existing practice, as the following will divulge.....

But first a brief reminder on the wonderful process that is a:

### **Members' Voluntary Liquidation**

This process requires all the directors, or if more than two, the majority of them, to swear a Statutory Declaration to the effect that the company will be able to pay all its debts, with interest, within a period of not more than twelve months. An extraordinary general meeting of shareholders is then held at which at least 75% of the shareholders voting must vote in favour of a resolution placing the company into Liquidation and appointing a Liquidator. The Liquidator then realises the assets, pays the creditors (if any) and distributes the balance to the shareholders.

Yes, it is that simple.

For as many years as I can remember, an alternative to Members' Voluntary Liquidation has been the accountants favourite:

### **Striking off**

This has long been a practical solution where share capital is low, a distribution being paid prior to the company notifying the Registrar that it has no assets and liabilities other than its share capital and requesting that it be struck off.

What could possibly go wrong?

Try this.

After striking off any property of the company becomes bona vacantia and vests in the crown. Such property may consist of assets such as inter-company loans or uncalled capital which the shareholders are happy not to collect because they would effectively be chasing themselves with a view to repaying, yes, themselves. However, the Treasury Solicitor is entitled to lay claim to these assets and, where he does so, to obtain a payout shareholders would have to apply to court for the restoration of the company and a Liquidation would have to follow. The application for restoration is not straightforward as the Registrar of Companies must be joined into the action and he may request that the court order should stipulate that accounts and returns be brought up to date. Late filing penalties would then be payable.

The Treasury Solicitor will not pursue assets validly disposed of prior to the striking off. However capital distributions to members are illegal unless Companies Act procedures involving the swearing of a declaration of solvency and the obtaining of a court order are implemented (Sections 135-141 Companies Act 1985(3)). It is most unlikely that this option will be cheaper than a Members' Voluntary Liquidation.



In practice, the Treasury Solicitor has not pursued such distributions, however the indications are that this may soon change (see below).

A company that has been dissolved following Liquidation is only at risk of being restored for a two year period (except in the case of personal injury claims). A company that has been struck off may be restored for up to twenty years after the event.

Striking off does not release a director, managing officer or member from any liability they have in relation to the company, whereas dissolution following Liquidation may do so, subject to restoration within the two year span.

If a capital distribution is to be made, then before embarking on the route of striking off, tax clearance must be obtained from the Inland Revenue, together with Revenue approval of the course of action being adopted.

Striking off is not therefore generally to be recommended where either the issued share capital is of any significant amount or there may be contingent or actual creditors of any description.

### **ESC C16 and Bona Vacantia: new guidelines**

When a company is struck off owning property (which term includes rights of any kind), that property vests in the Crown as "bona vacantia".

From time to time the question surfaces how this affects companies that have been struck off following distribution of assets pursuant to Extra-Statutory Concession C16.

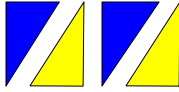
The Treasury Solicitor has apparently confirmed (and will, I understand, be publishing in due course appropriate guidelines on its website [www.bonavacantia.gov.uk](http://www.bonavacantia.gov.uk)) that a limited concession does operate in this area. Where a company has been struck off under s652 or s652A of the Companies Act 1985 and the shareholders have taken advantage of ESC C16, the Treasury Solicitor will waive the right to recover any unauthorised capital distribution provided the amount of the unauthorised distribution is less than £4,000. While this distribution limit is new, the only change to existing practice is that it appears the regulations will now be enforced.

It would therefore follow that where the amount of capital (which would include share capital, share premium and any non-distributable reserves) exceeds £4,000, then to avoid bona vacantia difficulties:

1. Appoint a Liquidator under a formal winding-up.
2. Or keep the amount of the capital distribution below £4,000, if necessary by leaving property in the company. Obviously one will want to do this only if the value of assets sacrificed in this way is less than the cost of engaging a Liquidator.

It is not clear at this stage when such guidelines are likely to be provided or whether they will be retrospective. The position is therefore far from clear and a Members' Voluntary Liquidation may well be the safest option if any capital distribution exceeds £4,000.

Stephen Goderski



### **Who are we?**

*The firm was formed in 1983 by Geoffrey Martin, who was until then a partner with Arthur Andersen. It now operates from offices in Leeds and London which collectively employ 5 partners and 30 staff.*

*We are business recovery professionals (the new term for what used to be called insolvency practitioners). We have no audit or corporate finance arms or associations and are solely dedicated to assisting companies, partnerships or individuals with financial or cash flow difficulties.*

*We would welcome the opportunity of working alongside you to provide bespoke solutions to the needs of your clients. These would not necessarily be formal insolvency procedures.*

*For further information, please contact:*

*Geoffrey Martin  
Stephen Hull  
John Twizell*

*Stephen Goderski  
James Sleight*

*Geoffrey Martin & Co  
4<sup>th</sup> Floor, St Andrew House  
119-121 The Headrow  
Leeds  
LS1 5JW*

*Geoffrey Martin & Co  
7-8 Conduit Street  
London  
W1S 2XF*

*Telephone 0113 244 5141*

*Telephone: 020 7495 1100*

*Fax: 0113 242 3851*

*Fax: 020 7495 1144*

*[www.geoffreymartin.co.uk](http://www.geoffreymartin.co.uk)*

*[www.geoffreymartin.co.uk](http://www.geoffreymartin.co.uk)*