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## SCOTTISH STATUTORY INSTRUMENTS

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### 2018 No. 347

## The Insolvency (Scotland) (Receivership and Winding up) Rules 2018

### PART 5

#### WINDING UP BY THE COURT

##### CHAPTER 1

##### Application of Part

#### Application of Part 5

**5.1.** This Part applies to winding up by the court.

##### CHAPTER 2

The statutory demand (sections 123(1)(a) and 222(1)(a))

#### Interpretation

**5.2.** A demand served by a creditor on a company under section 123(1)(a) (registered companies) or 222(1)(a) (unregistered companies) is referred to in this Part as “a statutory demand”.

#### The statutory demand

**5.3.—**(1) A statutory demand must be headed either “Statutory Demand under section 123(1)(a) of the Insolvency Act 1986” or “Statutory Demand under section 222(1)(a) of the Insolvency Act 1986” (as applicable) and must contain—

- (a) identification details for the company;
- (b) the registered office of the company (if any);
- (c) the name and address of the creditor;
- (d) either a statement that the demand is made under section 123(1)(a) or a statement that it is made under section 222(1)(a);
- (e) the amount of the debt and the consideration for it (or, if there is no consideration, the way in which it arises);
- (f) if the demand is founded on a decree or order of a court, details of the decree or order;
- (g) if the creditor is entitled to the debt by way of assignment, details of the original creditor and any intermediate assignees;
- (h) a statement that the company must pay the debt claimed in the demand within 21 days of service of the demand on the company after which the creditor may present a winding up petition unless the company offers security for the debt and the creditor agrees to accept security or the company compounds the debt with the creditor's agreement;

- (i) the name of an individual with whom an officer or representative of the company may communicate with a view to securing or compounding the debt to the creditor's satisfaction;
  - (j) the named individual's address, electronic address and telephone number (if any);
  - (k) a statement that if the company disputes the demand in whole or in part it should contact the individual mentioned in sub-paragraph (i) immediately.
- (2) The following must be separately identified in the demand (if claimed) with the amount or rate of the charge and the grounds on which payment is claimed—
- (a) any charge by way of interest of which notice had not previously been delivered to the company as included in its liability; and
  - (b) any other charge accruing from time to time.
- (3) The amount claimed for such charges must be limited to that which has accrued due at the date of the demand.
- (4) The demand must be dated, and authenticated either by the creditor, or a person authorised to make the demand on the creditor's behalf.
- (5) A demand which is authenticated by a person other than the creditor must state that the person is authorised to make the demand on the creditor's behalf and state the person's relationship to the creditor.

### CHAPTER 3

#### Provisional liquidator

[Note: a document required by the Act or these Rules must also contain the standard contents required as set out in Part 1.]

#### Application for appointment of provisional liquidator (section 135)

**5.4.—**(1) An application to the court for the appointment of a provisional liquidator under section 135 may be made by—

- (a) the petitioner;
- (b) a creditor of the company;
- (c) a contributory;
- (d) the company;
- (e) the directors of the company;
- (f) the Secretary of State; <sup>F1</sup>or]
- <sup>F2</sup>(g) .....
- <sup>F3</sup>(h) .....
- (i) any person who under any enactment would be entitled to present a petition for the winding up of the company.

(2) The court must not make the appointment unless and until the person being appointed provisional liquidator has lodged in court a statement to the effect that that person is qualified to act as an insolvency practitioner in relation to the company and consents to act as provisional liquidator.

**F1** Word in rule 5.4(1)(f) inserted (31.12.2020) by [S.I. 2019/146, Sch. para. 137E\(a\)](#) (as inserted by [The Insolvency \(Amendment\) \(EU Exit\) \(No. 2\) Regulations 2019 \(S.I. 2019/1459\), reg. 1\(2\), Sch. para. 6; 2020 c. 1, Sch. 5 para. 1\(1\)](#))

- F2** Rule 5.4(1)(g) omitted (31.12.2020) by virtue of S.I. 2019/146, **Sch. para. 137E(b)** (as inserted by The Insolvency (Amendment) (EU Exit) (No. 2) Regulations 2019 (S.I. 2019/1459), reg. 1(2), **Sch. para. 6**; 2020 c. 1, **Sch. 5 para. 1(1)**)
- F3** Rule 5.4(1)(h) omitted (31.12.2020) by virtue of S.I. 2019/146, **Sch. para. 137E(c)** (as inserted by The Insolvency (Amendment) (EU Exit) (No. 2) Regulations 2019 (S.I. 2019/1459), reg. 1(2), **Sch. para. 6**; 2020 c. 1, **Sch. 5 para. 1(1)**)

### Order of appointment of provisional liquidator – delivery of copy

**5.5.** The provisional liquidator must as soon as reasonably practicable after receipt of the copy of the order appointing the provisional liquidator deliver a copy of the order to—

- (a) the registrar of companies;
- (b) AiB;
- [<sup>F4</sup>(ba) where a moratorium under Part A1 of the Act is in force for the company, the monitor.]
- (c) the company (or the liquidator, if a liquidator was appointed for the company's voluntary winding up); and
- (d) any receiver of the whole or any part of the company's property.

- F4** Rule 5.5(ba) inserted (1.10.2021) by The Insolvency (Scotland) (Receivership and Winding up) (Amendment) Rules 2021 (S.I. 2021/1025), rules 1, **9(2)** (with rules 4, 5)

### Delivery of copy order of appointment of provisional liquidator – notice

[Note: for notice to accompany delivery of a copy of the order of appointment to (a) the registrar of companies and (b) the Accountant in Bankruptcy see Chapter 7 of Part 1.]

**5.6.—(1)** This rule applies where under rule 5.5 the provisional liquidator delivers a copy of the order of appointment to—

- (a) the company (or if a liquidator was appointed for the company's voluntary winding up, the liquidator);
  - (b) any receiver of the whole or any part of the company's property.
- (2) The provisional liquidator must deliver with the copy of the order a notice.

### Notice of appointment of provisional liquidator

**5.7.—(1)** The provisional liquidator must as soon as reasonably practicable after receipt of the copy of the order of appointment give notice of appointment unless the court directs otherwise.

- (2) The notice—
  - (a) must be gazetted; and
  - (b) may be advertised in such other manner as the provisional liquidator thinks fit.
- (3) The notice must state—
  - (a) that a provisional liquidator has been appointed; and
  - (b) the date of the appointment.

## Caution

**5.8.**—(1) The cost of providing the caution required under the Act must be paid in the first instance by the provisional liquidator, however—

- (a) if a winding-up order is not made, the person appointed is entitled to be reimbursed out of the property of the company, and the court may make an order on the company accordingly; and
- (b) if a winding-up order is made, the person appointed is entitled to be reimbursed as an expense of the liquidation.

(2) If the provisional liquidator fails to give or keep up the required caution, the court may remove the provisional liquidator, and make such order as to expenses as it thinks just.

(3) If an order is made under this rule removing the provisional liquidator, or discharging the order appointing the provisional liquidator, the court must give directions as to whether any, and if so what, steps should be taken for the appointment of another person in the place of the removed or discharged provisional liquidator.

## Remuneration

**5.9.**—(1) The remuneration of the provisional liquidator is to be fixed by the court from time to time on the application of the provisional liquidator.

(2) The basis for fixing the amount of the remuneration payable to the provisional liquidator may be a commission calculated by reference to the value of the company's assets with which the provisional liquidator has had to deal.

(3) But there is in any event to be taken into account—

- (a) the work which, having regard to that value, was reasonably undertaken by the provisional liquidator;
- (b) the extent of the provisional liquidator's responsibilities in administering the company's assets.

(4) Without prejudice to any order the court may make as to expenses, the remuneration of the provisional liquidator must be paid to the provisional liquidator, and the amount of any expenses incurred by the provisional liquidator (including the remuneration and expenses of any special manager appointed under section 177) reimbursed—

- (a) if a winding-up order is not made, out of the property of the company; and
- (b) if a winding-up order is made, as an expense of the liquidation.

(5) Unless the court otherwise directs, where a winding up order is not made, the provisional liquidator may retain out of the company's property such sums or property as are or may be required for meeting the remuneration and expenses of the provisional liquidator.

### Modifications etc. (not altering text)

- C1** Rule 5.9(4) applied by [S.I. 1999/2979, reg. 14\(5\)\(a\)\(ii\)](#) (as amended (23.4.2019) by [The Financial Services and Markets \(Insolvency\) \(Amendment of Miscellaneous Enactments\) Regulations 2019 \(S.I. 2019/755\)](#), regs. 1, [2\(2\)\(b\)](#))

## Termination of appointment

**5.10.**—(1) Subject to paragraph (2), the appointment of the provisional liquidator may be terminated by the court on the application of the provisional liquidator, or a person specified in rule 5.4(1).

(2) In relation to a winding-up petition under section 124A (petition by Secretary of State for winding up on grounds of public interest) the appointment of the provisional liquidator may be terminated by the court on the application of the provisional liquidator or the Secretary of State.

(3) If the provisional liquidator's appointment terminates, in consequence of the dismissal of the winding-up petition or otherwise, the court may give such directions as it thinks just relating to—

- (a) the accounts of the provisional liquidator's administration;
- (b) the expenses properly incurred by the provisional liquidator; or
- (c) any other matters which it thinks appropriate.

(4) The provisional liquidator must give notice of termination of the appointment as provisional liquidator, unless the termination is on the making of a winding-up order or the court directs otherwise.

(5) The notice referred to in paragraph (4) must be delivered as soon as reasonably practicable to—

- (a) the registrar of companies;
  - [<sup>F5</sup>(aa) if a moratorium under Part A1 of the Act is in force for the company, the monitor;]
  - (b) AiB;
  - (c) the company (or the liquidator, if a liquidator was appointed for the company's voluntary winding up); and
  - (d) any receiver of the whole or any part of the company's property.
- (6) The notice under paragraph (4) must state—
- (a) that the appointment as provisional liquidator has been terminated;
  - (b) the date of that termination; and
  - (c) that the appointment terminated otherwise than on the making of a winding-up order.

**F5** Rule 5.10(5)(aa) inserted (1.10.2021) by [The Insolvency \(Scotland\) \(Receivership and Winding up\) \(Amendment\) Rules 2021 \(S.I. 2021/1025\)](#), rules 1, **10(2)** (with rules 4, 5)

## CHAPTER 4

### Statement of affairs and other information

[Note: a document required by the Act or these Rules must also contain the standard contents required as set out in Part 1.]

### Interpretation

**5.11.** In this Chapter—

- “liquidator” includes “provisional liquidator”;
- “nominated person” means a relevant person who has been required by the liquidator to make out and deliver to the liquidator a statement of affairs; and
- “relevant person” means a person mentioned in section 131(3).

### Notice requiring statement of affairs (section 131)

**5.12.—**(1) Where, under section 131, the liquidator requires a nominated person to provide the liquidator with a statement of the affairs of the company, the liquidator must deliver a notice to that person.

- (2) The notice must be headed “Notice requiring statement of affairs” and must—
- (a) identify the company immediately below the heading;
  - (b) identify the liquidator;
  - (c) state the name of the nominated person;
  - (d) require the nominated person to prepare and submit to the liquidator a statement of affairs of the company on a date which is specified, being—
    - (i) the date of the winding-up order, or
    - (ii) a date directed by the liquidator;
  - (e) inform the nominated person—
    - (i) of the names and addresses of any other nominated person to whom such a notice has been delivered, and
    - (ii) of the date by which the statement must be delivered; and
  - (f) state the effect of section 131(7) (penalty for non-compliance) and section 235 (duty to co-operate) as it applies to the liquidator.
- (3) The liquidator must inform the nominated person that a document for the preparation of the statement of affairs capable of completion in compliance with rule 5.13 can be supplied by the liquidator if requested.

#### **Statement of affairs: contents and delivery**

**5.13.—**(1) The statement of affairs must be headed “Statement of affairs” and must contain [<sup>F6</sup>the following, and where paragraph (1B) applies, the information specified in that paragraph]—

- (a) identification details for the company;
- (b) a statement that it is a statement of the affairs of the company on a date which is specified, being—
  - (i) the date of the winding-up order, or
  - (ii) the date directed by the liquidator;
- (c) a list of the company's shareholders with the following information about each one—
  - (i) name and postal address,
  - (ii) the type of shares held,
  - (iii) the nominal amount of the shares held,
  - (iv) the number of shares held,
  - (v) the amount per share called up, and
  - (vi) the total amount called up;
- (d) the total amount of shares called up held by all shareholders;
- (e) a summary of the assets of the company, setting out the book value and estimated realisable value of—
  - (i) any assets specifically secured,
  - (ii) any assets subject to a floating charge,
  - (iii) any assets not secured, and
  - (iv) the total value of all the assets available for preferential creditors;
- (f) a summary of the liabilities of the company, setting out—
  - (i) the amount of preferential debts,

- (ii) an estimate of the deficiency with respect to preferential debts or the surplus available after paying the preferential debts,
- (iii) an estimate of the prescribed part, if applicable,
- (iv) an estimate of the total assets available to pay debts secured by floating charges,
- (v) the amount of debts secured by floating charges;
- (vi) an estimate of the deficiency with respect to debts secured by floating charges or the surplus available after paying the debts secured by fixed securities or floating charges;
- (vii) the amount of unsecured debts (excluding preferential debts);
- (viii) an estimate of the deficiency with respect to unsecured debts or the surplus available after paying unsecured debts;
- (ix) any issued and called-up capital, and
- (x) an estimate of the deficiency with respect to, or surplus available to, members of the company;
- (g) a list of the company's creditors (as required by section 131(2)) with the following particulars required by paragraph (2) indicating—
  - (i) any creditors under hire-purchase or conditional sale agreements,
  - (ii) any creditors who are consumers claiming amounts paid in advance of the supply of goods or services, and
  - (iii) any creditors claiming retention of title over property in the company's possession.

[<sup>F7</sup>(1A) Paragraph (1B) applies if a moratorium under Part A1 of the Act is or has been in force for the company at any time within the period of 12 weeks ending with the day on which the winding up petition is presented.

(1B) Where this paragraph applies the statement of affairs must contain the following—

- (a) the matters specified in paragraph (1)(a) to (e) and (g); and
- (b) the information specified in paragraph (1)(f) but with the effect specified in paragraph (1C).

(1C) Where paragraph (1B) applies—

- (a) the summary of the liabilities of the company must, in addition, set out which of the debts owed by the company are—
  - (i) moratorium debts; or
  - (ii) priority pre-moratorium debts

within the meaning given by section 174A; and

- (b) sub-paragraph 1(e)(iv) has effect as if the reference to preferential creditors included references to moratorium debts and priority pre-moratorium debts within the meaning given by section 174A.
- (c) paragraph (1)(f)(i), (ii) and (vii) has effect as if the reference to preferential debts included references to moratorium debts and priority pre-moratorium debts within the meaning given by section 174A.]

(2) The particulars required by this paragraph relating to each creditor are as follows and must be given in this order—

- (i) the name and postal address,
- (ii) the amount of the debt owed to the creditor,

- (iii) details of any security held by the creditor,
- (iv) the date the security was given, and
- (v) the value of the security.

(3) Paragraph (4) applies where the particulars required by paragraph (2) relate to creditors who are either—

- (a) employees or former employees of the company; or
- (b) consumers claiming amounts paid in advance for the supply of goods or services.

(4) Where this paragraph applies—

- (a) the statement of affairs itself must state separately for each of paragraph (3)(a) and (b) the number of such creditors and the total of the debts owed to them; and
- (b) the particulars required by paragraph (2) in respect of those creditors must be set out in separate schedules to the statement of affairs for each of paragraph (3)(a) and (b).

(5) The statutory declaration required by section 131(2A) <sup>M1</sup> must be a statutory declaration that the information provided in the statement of affairs is, to the best of the nominated person's knowledge and belief, accurate and complete.

(6) The nominated person who makes the statutory declaration required by section 131(2A) and paragraph (5) (or one of them, if more than one) must deliver the statement of affairs to the liquidator.

- F6** Words in [rule 5.13\(1\)](#) inserted (1.10.2021) by [The Insolvency \(Scotland\) \(Receivership and Winding up\) \(Amendment\) Rules 2021 \(S.I. 2021/1025\)](#), rules 1, [11\(2\)](#) (with rules 4, 5)
- F7** [Rules 5.13\(1A\)-\(1C\)](#) inserted (1.10.2021) by [The Insolvency \(Scotland\) \(Receivership and Winding up\) \(Amendment\) Rules 2021 \(S.I. 2021/1025\)](#), rules 1, [11\(3\)](#) (with rules 4, 5)

#### Marginal Citations

- M1** [Section 131\(2A\)](#) was inserted by [S.I. 2010/18](#) and prospectively amended for Scotland by [S.S.I. 2016/141](#), [article 10](#).

### Statement of affairs: statement of concurrence

**5.14.—(1)** The liquidator may require a relevant person to deliver to the liquidator a statement of concurrence.

(2) A statement of concurrence is a statement that the relevant person concurs in the statement of affairs submitted by a nominated person.

(3) The liquidator must inform the nominated person who has been required to submit a statement of affairs that the relevant person has been required to deliver a statement of concurrence.

(4) The nominated person must deliver a copy of the statement of affairs to every relevant person who has been required to submit a statement of concurrence.

(5) A statement of concurrence—

- (a) must identify the company; and
- (b) may be qualified in relation to matters dealt with in the statement of affairs where the relevant person—
  - (i) is not in agreement with the statement of affairs;
  - (ii) considers the statement of affairs to be erroneous or misleading; or
  - (iii) is without the direct knowledge necessary for concurring in it.



(6) A statement of concurrence must contain a statutory declaration by the relevant person required to submit it that the information provided in the statement of concurrence is, to the best of the relevant person's knowledge and belief, accurate and complete.

(7) The relevant person must deliver the required statement of concurrence to the liquidator before the end of the period of 5 business days (or such other period as the liquidator may agree) beginning with the day on which the relevant person receives the statement of affairs.

### **Statement of affairs: expenses**

**5.15.**—(1) If a nominated person cannot personally prepare a proper statement of affairs, the liquidator may, as an expense of the liquidation, employ a person or firm to assist in the preparation of the statement.

(2) At the request of a nominated person, made on the grounds that the nominated person cannot personally prepare a proper statement of affairs, the liquidator may authorise an allowance, payable as an expense of the liquidation, of all or part of the expenses to be incurred by the nominated person in employing a person or firm to assist the nominated person in preparing it.

(3) Any such request by the nominated person must be accompanied by an estimate of the expenses involved; and the liquidator must only authorise the employment of a named person or a named firm, approved by the liquidator.

(4) An authorisation given by the liquidator under this rule must be subject to such conditions (if any) as the liquidator thinks fit to impose relating to the manner in which any person may obtain access to relevant documents and other records.

(5) Nothing in this rule relieves a nominated person from any obligation relating to the preparation, verification and submission of the statement of affairs, or to the provision of information to the liquidator.

(6) The liquidator must deliver a notice to the relevant person advising whether the liquidator grants or refuses the relevant person's request for an allowance under paragraph (2) and where such request is refused the relevant person may appeal to the court not later than 14 days from the date of delivery of the notice to the relevant person.

(7) Paragraphs (2) to (6) of this rule may be applied, on application to the liquidator by any relevant person, in relation to the making of a statement of concurrence.

### **Limited disclosure**

**5.16.**—(1) This rule applies where the liquidator thinks that disclosure of the whole or part of a statement of affairs or a statement of concurrence would be likely to prejudice the conduct of the winding up or might reasonably be expected to lead to violence against any person.

(2) The liquidator may apply to the court for an order of limited disclosure in respect of the whole or any specified part of the—

- (a) statement of affairs; or
- (b) the statement of concurrence.

(3) The court may order that the whole or any specified part of the statement of affairs or the statement of concurrence must not be entered in the sederunt book.

(4) The court's order of limited disclosure may include directions regarding the disclosure of information in the statement of affairs or statement of concurrence to other persons.

(5) A creditor who seeks disclosure of the statement of affairs or statement of concurrence or a specified part of it in relation to which an order has been made under this rule may apply to the court for an order that the liquidator disclose that statement of affairs or statement of concurrence or specified part of it.

(6) The court may attach to an order for disclosure any conditions as to confidentiality, duration and scope of the order in any material change of circumstances, and other matters as it sees fit.

(7) If there is a material change in circumstances rendering the limit on disclosure unnecessary, the liquidator must, as soon as reasonably practicable after the change, apply to the court for the order to be discharged or varied.

### **Delivery of accounts to liquidator**

**5.17.—**(1) Any of the persons specified in section 235(3) must, at the request of the liquidator, deliver to the liquidator accounts of the company of such nature, as at such date, and for such period, as the liquidator may specify.

(2) The period specified may begin from a date up to 3 years before the date of the presentation of the winding-up petition, or from an earlier date to which audited accounts of the company were last prepared.

(3) The court may, on the liquidator's application, require accounts for any earlier period.

(4) Rule 5.15 applies (with the necessary modifications) in relation to accounts to be delivered under this rule as it applies in relation to the statement of affairs.

(5) The accounts must—

- (a) if the liquidator so requires, contain a statutory declaration by the person required to deliver them that the accounts are, to the best of the relevant person's knowledge and belief, accurate and complete; and
- (b) (whether or not they contain a statutory declaration) be delivered to the liquidator within 21 days of the request under paragraph (1), or such longer period as the liquidator may allow.

### **Expenses of assistance in preparing accounts**

**5.18.—**(1) Where the liquidator requires a person to deliver accounts under rule 5.17, the liquidator may, with the approval of the liquidation committee (if there is one) and as an expense of the liquidation, employ a person or firm to assist that person in the preparation of the accounts.

(2) The person who is required to deliver accounts may request an allowance of all or part of the expenses to be incurred in employing a person or firm to assist in preparing the accounts.

(3) A request for an allowance must be accompanied by an estimate of the expenses involved.

(4) The liquidator must only authorise the employment of a named person or a named firm approved by the liquidator.

(5) The liquidator may, with the approval of the liquidation committee (if there is one), authorise such an allowance, payable as an expense of the liquidation.

### **Further disclosure**

**5.19.—**(1) The liquidator may at any time require a nominated person to deliver (in writing) further information amplifying, modifying or explaining any matter contained in the statement of affairs, or in accounts delivered under the Act or these Rules.

(2) The information must—

- (a) if the liquidator so directs, contain a statutory declaration by the person required to deliver the information that the information is, to the best of the relevant person's knowledge and belief, accurate and complete; and
- (b) (whether or not it contains a statutory declaration) be delivered to the liquidator within 21 days of the requirement under paragraph (1), or such longer period as the liquidator may allow.

## CHAPTER 5

### Further information where winding up follows administration

#### Further information where winding up follows administration

**5.20.**—(1) This rule applies where an administrator is appointed by the court under section 140 as the company's liquidator and becomes aware of creditors not formerly known to that person as administrator.

(2) The liquidator must deliver to those creditors a copy of any statement previously sent by the administrator to creditors in accordance with paragraph 49(4) <sup>M2</sup> of schedule B1 and rule 3.35 of the CVA and Administration Rules.

#### Marginal Citations

**M2** Paragraph 49(4) is prospectively amended by paragraph 10(2) of schedule 9 to the [Small Business, Enterprise and Employment Act 2015 \(c.26\)](#) (“the 2015 Act”).

## CHAPTER 6

### The liquidator

[Note: a document required by the Act or these Rules must also contain the standard contents required as set out in Part 1.]

#### Appointment of liquidator under section 138(1) (interim liquidator)

**5.21.**—(1) This rule applies to the appointment of a liquidator by the court under section 138(1) (such a liquidator being referred to in section 138, this rule and rules 5.22 (choosing a person to be liquidator) and 8.21 (chair at meetings) as an “interim liquidator”).

(2) The court must not make the appointment unless and until the person being appointed interim liquidator has lodged in court a statement to the effect that that person is qualified to act as an insolvency practitioner in relation to the company and consents to act as liquidator.

(3) The interim liquidator's appointment is effective from the date of the order of appointment.

(4) The interim liquidator must—

- (a) within 7 days beginning with the day the interim liquidator receives the copy order of appointment deliver notice of it to AiB; and
- (b) within 28 days beginning with the day the interim liquidator receives the copy order of appointment—
  - (i) deliver notice of it to the creditors and contributories; or
  - (ii) if the court permits and in accordance with the directions of the court either—
    - (aa) gazette the notice; or
    - (bb) otherwise advertise the notice,

or both gazette the notice and otherwise advertise the notice.

(5) Where the interim liquidator gives notice under paragraph (4)(b)(i) the liquidator may, in addition—

- (a) gazette the notice; or
- (b) otherwise advertise the notice in such manner as the liquidator thinks fit,

or both gazette the notice and otherwise advertise the notice in such manner as the liquidator thinks fit.

- (6) Any notice under this rule must state—
- (a) that an interim liquidator has been appointed; and
  - (b) the date of the appointment.

### Choosing a person to be liquidator

**5.22.—**(1) This rule applies where nominations are sought by the interim liquidator from the company's creditors and contributories under section 138(3) for the purpose of choosing a person to be liquidator of the company in place of the interim liquidator <sup>M3</sup>.

(2) The interim liquidator must deliver to the creditors and contributories a notice inviting proposals for a liquidator.

(3) The notice inviting proposals for a liquidator must explain that the liquidator is not obliged to seek the creditors' or contributories' views on any proposals that do not meet the requirements of paragraphs (4) and (5).

(4) A proposal must state the name and contact details of the proposed liquidator, and contain a statement that the proposed liquidator is qualified to act as an insolvency practitioner in relation to the company and has consented to act as liquidator of the company.

(5) A proposal must be received by the interim liquidator within 5 business days of the date of the notice under paragraph (2).

(6) Following the end of the period for inviting proposals under paragraph (2), where any proposals are received the interim liquidator must seek a decision on the proposals for nomination of a liquidator from the creditors (on any proposals received from creditors) and from the contributories (on any proposals received from contributories) by—

- (a) a decision procedure; or
- (b) the deemed consent procedure.

(7) Where a decision is sought under paragraph (6), the decision date must be not more than 60 days from the date of the winding-up order.

(8) The notice to be issued under rule 8.7 (deemed consent) (where the interim liquidator seeks a decision under paragraph (6) by the deemed consent procedure) or rule 8.8 (notices to creditors of decision procedure) (where the interim liquidator seeks a decision under paragraph (6) by a decision procedure) must also—

- (a) identify any liquidator proposed to be nominated by a creditor (in the case of a notice to creditors) or by a contributory (in the case of a notice to contributories) in accordance with this rule; and
- (b) contain a statement explaining the effect of section 138(5) (duty of interim liquidator to report to court where no person is appointed or nominated to be liquidator).

(9) The decision date in the notice referred to in paragraph (8) must be no later than 21 days after the date for receiving proposals has passed.

(10) The creditors and contributories must be given at least 14 days' notice of the decision date.

### Marginal Citations

**M3** Section 138(3) to (5) is prospectively amended by paragraph 33(1) to (4) of schedule 9 of the 2015 Act.

### **Appointment of liquidator by creditors or contributories**

**5.23.**—(1) This rule applies where a person is appointed as liquidator by the creditors or contributories.

(2) The convener of the decision procedure or deemed consent procedure, or the chair in the case of a meeting, must certify the appointment, but not unless and until the appointee has provided to the convener or the chair a statement to the effect that the appointee is an insolvency practitioner qualified under the Act to be the liquidator and consents to act.

(3) The certificate must be authenticated and dated by the convener or chair and must—

- (a) identify the company;
- (b) identify and provide contact details for the person appointed as liquidator;
- (c) state the date on which the liquidator was appointed;
- (d) state that the appointee—
  - (i) has provided a statement of being qualified to act as an insolvency practitioner in relation to the company,
  - (ii) has consented to act, and
  - (iii) was appointed as liquidator of the company.

(4) Where 2 or more liquidators are appointed the certificate must also specify (as required by section 231) whether any act required or authorised under any enactment to be done by the liquidator is to be done by all or any one or more of them.

(5) The liquidator's appointment is effective from the date on which the appointment is certified, that date to be endorsed on the certificate.

(6) The convener or chair must deliver the certificate to the liquidator appointed.

(7) The liquidator must—

- (a) within 7 days beginning with the day the liquidator receives the certificate of appointment deliver notice of it to—
  - (i) the court; and
  - (ii) AiB; and
- (b) within 28 days beginning with the day the liquidator receives the order of appointment—
  - (i) gazette the notice; or
  - (ii) otherwise advertise the notice in such manner as the liquidator thinks fit, or both gazette the notice and otherwise advertise the notice in such manner as the liquidator thinks fit.

(8) Any notice under this rule must state—

- (a) that a liquidator has been appointed; and
- (b) the date of the appointment.

### **Decision on nomination**

**5.24.**—(1) In the case of a decision on the nomination of a liquidator—

- (a) if on any vote there are 2 nominees, the person who obtains the most support is appointed;
- (b) if there are 3 or more nominees, and one of them has a clear majority over both or all the others together, that one is appointed; and

- (c) in any other case, the convener or chair must continue to take votes (disregarding at each vote any nominee who has withdrawn and, if no nominee has withdrawn, the nominee who obtained the least support last time) until a clear majority is obtained for any one nominee.
- (2) The convener or chair may at any time put to the meeting a resolution for the joint nomination of any 2 or more nominees.

### **Invitation to creditors and contributories to form a liquidation committee**

**5.25.**—(1) Where a decision is sought from the company's creditors and contributories on the appointment of a liquidator, the convener of the decision procedure must at the same time deliver to the creditors and contributories a notice inviting them to decide whether a liquidation committee should be established if sufficient creditors are willing to be members of the committee.

(2) The notice must also invite nominations for membership of the committee, such nominations to be received by a date specified in the notice.

(3) The notice must—

- (a) state that nominations must be delivered to the convener by the specified date;
- (b) state, in the case of creditors, that nominations can only be accepted if the convener is satisfied as to the creditors' eligibility under rule 10.4 (eligibility for membership of creditors' or liquidation committee); and
- (c) explain the effect of section 142(2) and (3) <sup>M4</sup> on whether a committee is to be established under Part 10 (creditors and liquidation committees).

#### **Marginal Citations**

**M4** [Section 141\(2\)](#) and (3) are prospectively substituted by paragraph 36 of schedule 9 to the [Small Business, Enterprise and Employment Act 2015 \(c.26\)](#) ("the 2015 Act").

### **Appointment by the court (section 138(5), section 139(4) and section 140)**

**5.26.**—(1) This rule applies where the liquidator is appointed by the court under section 138(5) (no person nominated or appointed by creditors and contributories), 139(4) (different persons nominated by creditors and contributories) or section 140 <sup>M5</sup> (winding up following administration or CVA).

(2) The court must not make the appointment unless and until the person being appointed liquidator has lodged in court a statement to the effect that that person is qualified to act as an insolvency practitioner in relation to the company and consents to act as liquidator.

(3) The liquidator's appointment is effective from the date of the order of appointment.

(4) The liquidator must—

- (a) within 7 days beginning with the day the liquidator receives the copy order of appointment deliver notice of it to AiB; and
- (b) within 28 days beginning with the day the liquidator receives the copy order of appointment—
  - (i) deliver notice of it to the creditors and contributories; or
  - (ii) if the court permits and in accordance with the directions of the court either—
    - (aa) gazette the notice; or
    - (bb) otherwise advertise the notice,

or both gazette the notice and otherwise advertise the notice.

- (5) Where the liquidator gives notice under paragraph (4)(b)(i) the liquidator may, in addition—
- (a) gazette the notice; or
  - (b) otherwise advertise the notice in such manner as the liquidator thinks fit,
- or both gazette the notice and otherwise advertise the notice.
- (6) Any notice under this rule must—
- (a) state that a liquidator has been appointed;
  - (b) state the date of the appointment;
  - (c) state whether the liquidator proposes to seek decisions from creditors and contributories for the purpose of establishing a liquidation committee, or proposes only to seek a decision from creditors for that purpose; and
  - (d) if the liquidator does not propose to seek any such decision, set out the powers of the creditors under the Act to require the liquidator to seek one.

#### Marginal Citations

**M5** Section 140(3) is prospectively amended by paragraph 35 of schedule 9 to the 2015 Act.

### Liquidator's resignation

- 5.27.—**(1) A liquidator may resign only—
- (a) on grounds of ill health;
  - (b) because of the intention to cease to practise as an insolvency practitioner;
  - (c) because the further discharge of the duties of liquidator is prevented or made impracticable by—
    - (i) a conflict of interest; or
    - (ii) a change of personal circumstances;
  - (d) where 2 or more persons are acting as liquidator jointly, and it is the opinion of both or all of them that it is no longer expedient that there should continue to be that number of joint liquidators.
- (2) Before resigning, the liquidator must deliver a notice to creditors, and invite the creditors by a decision procedure, or by deemed consent procedure, to consider whether a replacement should be appointed, except where the resignation is under sub-paragraph (1)(d).
- (3) The notice must—
- (a) state the liquidator's intention to resign;
  - (b) state that under rule 5.27(8) of these Rules the liquidator will be released 21 days after the date of delivery of the notice of resignation to the court under section 172(6), unless the court orders otherwise; and
  - (c) comply with rule 8.7 (deemed consent) or 8.8 (notices to creditors of decision procedure) so far as applicable.
- (4) The notice may suggest the name of a replacement liquidator.
- (5) The notice must be accompanied by a summary of the liquidator's receipts and payments.
- (6) The decision date must be not more than 5 business days before the date on which the liquidator intends to give notice of resignation under section 172(6) (notice of resignation to the court).

(7) The resigning liquidator must deliver a copy of the notice of resignation under section 172(6) to AiB.

(8) The resigning liquidator's release is effective 21 days after the date on which the notice of resignation under section 172(6) is delivered to the court, unless the court orders otherwise.

### Decision of creditors to remove liquidator

[Note: in relation to release of the liquidator following removal from office by a decision of the company's creditors, see: where the company's creditors have not decided against the liquidator's release, section 174(4)(a)(i); and where the company's creditors have decided against release, section 174(4)(b)(i) <sup>M6</sup>.]

#### Marginal Citations

**M6** Section 174(4)(a)(i) and (b)(i) are prospectively substituted by paragraph 45 of schedule 9 of the 2015 Act.

#### Marginal Citations

**M6** Section 174(4)(a)(i) and (b)(i) are prospectively substituted by paragraph 45 of schedule 9 of the 2015 Act.

**5.28.—**(1) This rule applies where a decision is made, using a decision procedure, to remove the liquidator.

(2) The convener of the decision procedure or chair of the meeting (as the case may be) must within 3 business days of the decision to remove the liquidator—

- (a) deliver the certificate of the liquidator's removal to the court;
- (b) deliver a copy of that certificate to AiB; and
- (c) if the convener or chair is a person other than the liquidator removed, deliver a copy of the certificate to the liquidator removed.

(3) If the creditors decided to appoint a new liquidator, the certificate of the new liquidator's appointment must also be delivered to the new liquidator within that time; and the certificate must comply with the requirements in rule 5.23.

(4) The certificate of the liquidator's removal must—

- (a) identify the company;
- (b) identify and provide contact details for the removed liquidator;
- (c) state that the creditors of the company decided on the date specified in the certificate that the liquidator specified in the certificate be removed from office as liquidator of the company;
- (d) state the decision procedure used, and the decision date;
- (e) state that the creditors either—
  - (i) did not decide against the liquidator being released, or
  - (ii) decided that the liquidator should not be released; and
- (f) be authenticated and dated by the convener or chair.

(5) The liquidator's removal is effective from the date of the certificate of removal.



## Removal of liquidator by the court (section 172(2))

[Note: in relation to release of the liquidator following removal from office by the court see section 174(4)(b)(ii).]

**5.29.**—(1) This rule applies where an application is made to the court under section 172(2) <sup>M7</sup> for the removal of the liquidator, or for an order directing the liquidator to initiate a decision procedure of creditors for the purpose of removing the liquidator.

(2) The court may require the applicant to make a deposit or find caution for the expenses to be incurred by the liquidator on the application.

(3) The applicant must, at least 14 days before the hearing, deliver to the liquidator—

- (a) a notice of the hearing stating the venue;
- (b) a copy of the application; and
- (c) a copy of any evidence on which the applicant intends to rely.

(4) The expenses of the application are not payable as an expense of the liquidation unless the court orders otherwise.

(5) Where the court removes the liquidator the order of removal may include such provision as the court thinks fit with respect to matters arising in connection with the removal.

(6) The person removed must as soon as reasonably practicable after receiving a copy of the order of removal deliver a copy of the order of removal to AiB.

(7) If the court appoints a new liquidator, rule 5.26 applies.

### Marginal Citations

**M7** [Section 172\(2\)](#) is prospectively amended by paragraph 43(2) of schedule 9 to the 2015 Act.

## Deceased liquidator

[Note: in relation to release of the liquidator following death see section 174(4)(a)(ii) <sup>M8</sup>.]

### Marginal Citations

**M8** [Section 174](#) is prospectively amended by paragraph 45 of schedule 9 of the 2015 Act.

### Marginal Citations

**M8** [Section 174](#) is prospectively amended by paragraph 45 of schedule 9 of the 2015 Act.

**5.30.**—(1) If the liquidator dies a notice of the fact and date of death must be delivered as soon as reasonably practicable to—

- (a) the court; and
- (b) AiB.

(2) The notice must be delivered by one of the following:—

- (a) a surviving joint liquidator;

- (b) a member of the deceased liquidator's firm (if the deceased was a member or employee of a firm);
- (c) an officer of the deceased liquidator's company (if the deceased was an officer or employee of a company);
- (d) an executor of the deceased liquidator.

(3) If such notice has not been delivered within the 21 days following the liquidator's death then any other person may deliver the notice.

### **Loss of qualification as insolvency practitioner**

[Note: in relation to release of the liquidator where the liquidator vacates office on ceasing to be a person qualified to act as an insolvency practitioner in relation to the company (section 172(5)) see section 174(4)(b)(iii).]

**5.31.**—(1) This rule applies where the liquidator vacates office on ceasing to be qualified to act as an insolvency practitioner in relation to the company.

- (2) A notice of the fact must be delivered as soon as reasonably practicable to—
  - (a) the court; and
  - (b) AiB.
- (3) The notice must be delivered by one of the following—
  - (a) the liquidator who has vacated office;
  - (b) a continuing joint liquidator;
  - (c) the recognised professional body which was the source of the vacating liquidator's authorisation to act (immediately before the liquidator vacated office).
- (4) The notice must be authenticated and dated by the person delivering the notice.

### **Application by liquidator for release (section 174(4)(b) or (d))**

**5.32.**—(1) An application by a former liquidator to the Accountant of Court for release under section 174(4)(b) or (d) must contain—

- (a) identification details for the insolvency proceedings;
  - (b) identification and contact details for the former liquidator;
  - (c) a statement that the former liquidator is applying to the Accountant of Court to grant the former liquidator a certificate of the former liquidator's release as liquidator as a result of the circumstances specified in the application;
  - (d) details of the circumstances referred to in sub-paragraph (c) under which the former liquidator has ceased to act as liquidator.
- (2) The application must be authenticated and dated by the former liquidator.
- (3) When the Accountant of Court gives a release, the Accountant of Court must deliver—
- (a) a certificate of the release to the former liquidator; and
  - (b) a notice of the release to AiB.
- (4) Release is effective from the date of the certificate or such other date as the certificate specifies.

### Final account prior to dissolution (section 146)

**5.33.**—(1) The final account which the liquidator is required to make up under section 146(2) <sup>M9</sup> and deliver to creditors must comply with the requirements of rule 7.9.

(2) When the account is delivered to the creditors it must be accompanied by a notice which states—

- (a) that the company's affairs are fully wound up;
- (b) that a creditor may object to the release of the liquidator by giving notice in writing to the liquidator before the end of the prescribed period;
- (c) that the prescribed period is the period ending 28 days after delivery of the notice;
- (d) that the liquidator will vacate office under section 172(8) <sup>M10</sup> as soon as the liquidator has complied with section 146(4) by filing with the court and delivering to the registrar of companies and AiB the final account and notice containing the statement required by section 146(4)(b) of whether any creditors have objected to the liquidator's release; and
- (e) that the liquidator will be released under section 174(4)(d)(ii) <sup>M11</sup> at the same time as vacating office unless any of the creditors objected to the release.

(3) The liquidator must deliver a copy of the notice under section 146(4) to the Accountant of Court.

#### Marginal Citations

**M9** Section 146 is prospectively substituted by paragraph 38 of schedule 9 of the [Small Business, Enterprise and Employment Act 2015 \(c.26\)](#) (“the 2015 Act”).

**M10** A new subsection (8) is prospectively substituted by paragraph 43(4) of schedule 9 of the 2015 Act.

**M11** A new subsection (4)(d)(ii) is prospectively substituted by paragraph 45(4) of schedule 9 of the 2015 Act.

### Relief from, or variation of, duty to report

**5.34.**—(1) The court may, on the application of the liquidator, relieve the liquidator of any duty imposed on the liquidator by rule 5.33, or authorise the liquidator to carry out the duty in a way other than required by that rule.

(2) In considering whether to act under this rule, the court must have regard to the cost of carrying out the duty, to the amount of the assets available, and to the extent of the interest of creditors or contributories, or any particular class of them.

### Liquidator's duties on vacating office

**5.35.**—(1) This rule applies where a person appointed as liquidator (“the succeeding liquidator”) succeeds a previous liquidator (“the former liquidator”) as the liquidator.

(2) When the succeeding liquidator's appointment takes effect the former liquidator must as soon as reasonably practicable deliver to the succeeding liquidator—

- (a) the assets (after deduction of any expenses properly incurred, and distributions made, by the former liquidator);
- (b) the records of the winding up, including correspondence, statements of claim, evidence of debts and other documents relating to the winding up; and
- (c) the company's documents and other records.

(3) In doing so, the former liquidator must hand over—

- (a) such information relating to the affairs of the company and the course of the winding up as the succeeding liquidator considers reasonably required for the effective discharge of the succeeding liquidator's duties as liquidator; and
- (b) all records and documents in the former liquidator's possession relating to the affairs of the company and its winding up.

### **Taking possession and realisation of the company's assets**

#### **5.36.—(1) The liquidator must—**

- (a) as soon as reasonably practicable after the liquidator's appointment take possession of—
    - (i) the whole assets of the company; and
    - (ii) any property, books, papers or records in the possession or control of the company or to which the company appears to be entitled; and
  - (b) make up and maintain an inventory and valuation of the assets of the company.
- (2) The liquidator is entitled to have access to, and to make copies of, all documents or records relating to the assets, property, business or financial affairs of the company—
- (a) sent by or on behalf of the company to a third party; and
  - (b) in that third party's hands.
- (3) If a person obstructs the liquidator in the liquidator's exercise, or attempted exercise, of a power conferred by paragraph (2), the court may, on the liquidator's application, order the person to cease obstructing the liquidator.
- (4) The liquidator may require delivery to the liquidator of any title deed or other document of the company, even if a right of lien is claimed over it.
- (5) Paragraph (4) is without prejudice to any preference of the holder of the lien.

### **Realisation of the company's heritable property**

**5.37.—(1)** This rule applies to the sale of any part of the company's heritable property over which a heritable security is held by a creditor or creditors if the rights of the secured creditor are preferable to those of the liquidator.

(2) The liquidator may sell that part only with the concurrence of every such creditor unless the liquidator obtains a sufficiently high price to discharge every such security.

(3) Subject to paragraph (4), the following acts are precluded—

- (a) the taking of steps by a creditor to enforce the creditor's security over that part after the liquidator has intimated to the creditor an intention to sell it;
- (b) the commencement by the liquidator of the procedure for the sale of that part after a creditor has intimated to the liquidator that the creditor intends to commence the procedure for its sale.

(4) Where the liquidator or a creditor has given intimation under paragraph (3) but has unduly delayed in proceeding with the sale, then, if authorised by the court in the case of—

- (a) paragraph (3)(a), any creditor to whom intimation has been given may enforce the creditor's security;
- (b) paragraph (3)(b), the liquidator may sell that part.

(5) The validity of the title of any purchaser is not challengeable on the ground that there has been a failure to comply with a requirement of this rule.

### **Power of court to set aside certain transactions**

**5.38.**—(1) If in the course of the liquidation the liquidator enters into any transaction with a person who is an associate of the liquidator, the court may, on the application of any interested person, set the transaction aside and order the liquidator to compensate the company for any loss suffered in consequence of it.

(2) This does not apply if either—

- (a) the transaction was entered into with the prior consent of the court; or
- (b) it is shown to the court's satisfaction that the transaction was for value, and that it was entered into by the liquidator without knowing, or having any reason to suppose, that the person concerned was an associate.

(3) Nothing in this rule is to be taken as prejudicing the operation of any rule of law relating to a trustee's dealings with trust property, or the fiduciary obligations of any person.

### **Rule against improper solicitation**

**5.39.**—(1) Where the court is satisfied that any improper solicitation has been used by or on behalf of the liquidator in obtaining proxies or procuring the liquidator's appointment, it may order that no remuneration be allowed as an expense of the liquidation to any person by whom, or on whose behalf, the solicitation was exercised.

(2) An order of the court under this rule overrides any resolution of the liquidation committee or the creditors, or any other provision of these Rules relating to the liquidator's remuneration.

## **CHAPTER 7**

### **Special manager**

[Note: a document required by the Act or these Rules must also contain the standard contents required as set out in Part 1.]

### **Application of this Chapter and interpretation**

**5.40.** This Chapter applies to applications for the appointment of a special manager by a liquidator and by a provisional liquidator (where one has been appointed), and so references to the liquidator are to be read as including a provisional liquidator.

### **Appointment and remuneration of special manager (section 177)**

**5.41.**—(1) An application by the liquidator under section 177 for the appointment of a special manager must be supported by a report setting out the reasons for the application.

(2) The report must include the liquidator's estimate of the value of the business or property in relation to which the special manager is to be appointed.

(3) The court's order appointing the special manager must specify the duration of the special manager's appointment being one of the following—

- (a) for a fixed period stated in the order;
- (b) until the occurrence of a specified event; or
- (c) until the court makes a further order.

(4) The appointment of a special manager may be renewed by order of the court.

(5) The special manager's remuneration will be fixed from time to time by the court.

(6) The acts of the special manager are valid notwithstanding any defect in the special manager's appointment or qualifications.

## Caution

**5.42.—**(1) The appointment of the special manager does not take effect until the person appointed has found (or, if the court allows, undertaken to find) caution for the appointment to be given to the applicant.

(2) A person appointed as special manager may find caution either specifically for a particular winding up, or generally for any winding up in relation to which that person may be appointed as special manager.

(3) The amount of the caution must be not less than the value of the business or property in relation to which the special manager is appointed, as estimated in the applicant's report under rule 5.41 which accompanied the application for appointment.

(4) When the special manager has found caution for the appointment to be given to the applicant that person must lodge with the court a certificate as to the adequacy of the caution.

(5) The cost of finding the caution must be paid in the first instance by the special manager; but—

- (a) where a winding-up order is not made, the special manager is entitled to be reimbursed out of the property of the company, and the court may order accordingly; and
- (b) where a winding-up order is made, the special manager is entitled to be reimbursed as an expense of the liquidation.

## Failure to give or keep up caution

**5.43.—**(1) If the special manager fails to find the required caution within the time allowed for that purpose by the order of appointment, or any extension of that time that may be allowed, the liquidator must report the failure to the court, which may discharge the order appointing the special manager.

(2) If the special manager fails to keep up the caution, the liquidator must report the failure to the court, which may remove the special manager, and make such order as to expenses as it thinks just.

(3) If the court discharges the order appointing the special manager, or makes an order removing the special manager, the court must give directions as to whether any, and if so what, steps should be taken for the appointment of another special manager.

## Accounting

**5.44.—**(1) The special manager must produce accounts, containing details of the special manager's receipts and payments, for the approval of the liquidator.

(2) The accounts must be for—

- (a) each 3 month period for the duration of the special manager's appointment; and
- (b) any shorter period ending with the termination of the special manager's appointment.

(3) When the accounts have been approved, the special manager's receipts and payments must be added to those of the liquidator.

## Termination of appointment

**5.45.—**(1) The special manager's appointment terminates—

- (a) if the winding-up petition is dismissed; or
- (b) in a case where a provisional liquidator was appointed under section 135, if the appointment is discharged without a winding-up order having been made.

(2) If the liquidator is of the opinion that the appointment of the special manager is no longer necessary or beneficial for the company, the liquidator must apply to the court for directions, and the court may order the special manager's appointment to be terminated.

(3) The liquidator must make the same application if the creditors decide that the appointment should be terminated.

## CHAPTER 8

### Public examination of company officers and others (section 133)

[Note: a document required by the Act or these Rules must also contain the standard contents required as set out in Part 1.]

#### **Request by a creditor for a public examination (section 133(2))**

**5.46.**—(1) A request made under section 133(2) by a creditor to the liquidator for the public examination of a person must contain—

- (a) identification details for the company;
  - (b) the name and postal address of the creditor;
  - (c) the name and postal address of the proposed examinee;
  - (d) a description of the relationship which the proposed examinee has, or has had, with the company;
  - (e) a request by the creditor to the liquidator to apply to the court for a public examination of the proposed examinee under section 133(2);
  - (f) the amount of the creditor's claim in the winding up;
  - (g) a statement that the total amount of the creditor's and any concurring creditors' claims is believed to represent not less than  $\frac{1}{2}$  in value of the debts of the company;
  - (h) a statement that the creditor understands the requirement to deposit with the liquidator such sum as the liquidator may determine to be appropriate by way of caution for the expenses of holding a public examination; and
  - (i) a statement that the creditor believes that a public examination is required for the reason stated in the request.
- (2) The request must be authenticated and dated by the creditor.
- (3) The request must be accompanied by—
- (a) a list of the creditors concurring with the request and the amounts of their respective claims in the winding up, with their respective values; and
  - (b) from each concurring creditor, confirmation of the creditor's concurrence.

#### **Request by a contributory for a public examination (section 133(2))**

**5.47.**—(1) A request made under section 133(2) by a contributory to the liquidator for the public examination of a person must contain—

- (a) identification details for the company;
- (b) the name and postal address of the contributory;
- (c) the name and postal address of the proposed examinee;
- (d) a description of the relationship which the proposed examinee has, or has had, with the company;
- (e) a request by the contributory to the liquidator to apply to the court for a public examination of the proposed examinee under section 133(2);
- (f) the number of shares held in the company by the contributory;
- (g) the number of votes to which the contributory is entitled;

- (h) a statement that the total amount of the contributory's and any concurring contributories' shares and votes is believed to represent not less than  $\frac{3}{4}$  in value of the company's contributories;
  - (i) a statement that the contributory understands the requirement to deposit with the liquidator such sum as the liquidator may determine to be appropriate by way of caution for the expenses of holding a public examination; and
  - (j) a statement that the contributory believes that a public examination is required for the reason specified in the request.
- (2) The request must be authenticated and dated by the contributory.
- (3) The request must be accompanied by—
- (a) a list of the contributories concurring with the request and the number of shares and votes each holds in the company; and
  - (b) from each concurring contributory, confirmation of the concurrence and of the number of shares and votes held in the company.

#### **Further provisions about requests by a creditor or contributory for a public examination**

**5.48.**—(1) A request by a creditor or contributory for a public examination does not require the support of concurring creditors or contributories if the requisitioning creditor's debt or, as the case may be, requisitioning contributory's shares, is sufficient alone under section 133(2).

(2) Before the liquidator makes the requested application, the creditor or contributory requesting the examination must deposit with the liquidator such sum (if any) as the liquidator determines is appropriate as caution for the expenses of the public examination (if ordered).

- (3) The liquidator must make the application for the examination—
- (a) within 28 days of receiving the creditor's or contributory's request (if no caution is required under paragraph (2)); or
  - (b) within 28 days of the creditor or contributory (as the case may be) depositing the required caution.

(4) However if the liquidator thinks the request is unreasonable, the liquidator may apply to the court for an order to be relieved from making the application.

(5) If the application for an order under paragraph (4) is made without notice to any other party and the court makes such an order then the liquidator must deliver a notice of the order as soon as reasonably practicable to the creditors or contributories who requested the examination.

(6) If the court dismisses the liquidator's application under paragraph (4), the liquidator must make the application under section 133(2) as soon as reasonably practicable.

#### **Notice of the public examination**

**5.49.**—(1) Where the court orders the public examination of any person under section 133(1) then, unless the court orders otherwise, the liquidator—

- (a) must give at least 14 days' notice of the examination to—
  - (i) the special manager (if a special manager has been appointed); and
  - (ii) the creditors and all the contributories of the company who are known to the liquidator (subject to any contrary direction of the court); and
- (b) may, in addition, at least 14 days before the date fixed for the examination—
  - (i) gazette the notice;
  - (ii) advertise the notice in such other manner as the liquidator thinks fit; or



- (iii) both gazette the notice and advertise it in such other manner as the liquidator thinks fit.
- (2) The notice must state—
  - (a) the purpose of the public examination; and
  - (b) the venue.
- (3) Unless the court directs otherwise, notice under paragraph (1)(b) must not be given until at least 5 business days have elapsed since the examinee was served with the order.

#### **Examinee unfit for examination**

**5.50.**—(1) Where the examinee is a person who lacks capacity within the meaning of the Adults with Incapacity (Scotland) Act 2000 <sup>M12</sup> (“the 2000 Act”) or is unfit to undergo or attend for public examination, the court may—

- (a) sist the order for the examinee's public examination; or
- (b) order that it is to be conducted in such manner and at such place as it thinks just.
- (2) The applicant for an order under paragraph (1) must be—
  - (a) a person who has been appointed by a court in the United Kingdom or elsewhere to manage the affairs of, or to represent, the examinee; or
  - (b) a person who appears to the court to be a suitable person to make the application.
- (3) The application must, unless the examinee is a person who lacks capacity within the meaning of the 2000 Act, be supported by the affidavit of a registered medical practitioner as to the examinee's mental and physical condition.
- (4) At least 5 business days' notice of the application must be given to the liquidator.

#### **Marginal Citations**

**M12** 2000 asp 4.

#### **Expenses of examination**

**5.51.** Where public examination of the examinee has been ordered by the court on a request by a creditor under rule 5.46 or by a contributory under rule 5.47, the court may order that some or all of the expenses of the examination are to be paid out of the deposit required under those rules, instead of as an expense of the liquidation.

### **CHAPTER 9**

#### **Distribution of company's assets by the liquidator**

#### **Winding up commencing as voluntary**

**5.52.** In any winding up by the court which follows immediately on a voluntary winding up (whether members' voluntary or creditors' voluntary), such outlays and remuneration of the voluntary liquidator as the court may allow have the same priority as the outlays mentioned in rule 7.28(3)(a).

#### **Saving for powers of the court (section 156)**

**5.53.**—(1) The priority laid down by rule 7.27 is subject to the power of the court to make orders under section 156, where the assets are insufficient to satisfy the liabilities.

(2) Nothing in those rules—

- (a) applies to or affects the power of any court, in proceedings by or against the company, to order expenses to be paid by the company, or the liquidator; or
- (b) affects the rights of any person to whom such expenses are ordered to be paid.

## CHAPTER 10

### MISCELLANEOUS

[Note: a document required by the Act or these Rules must also contain the standard contents required as set out in Part 1.]

#### *Limitation*

##### **Limitation of actions**

**5.54.**—(1) The following bar the effect of any enactment or rule of law relating to the limitation of actions:—

- (a) the presentation of a petition for winding up;
- (b) the submission of a claim under rule 7.16.

(2) Reference to any of a creditor's acts mentioned in sub-paragraphs (a) and (b) of paragraph (1) barring the effect of any enactment or rule of law relating to the limitation of actions is to be construed as a reference to that act having the same effect, for the purposes of that enactment or rule of law, as an effective acknowledgement of the creditor's claim.

(3) Reference in paragraph (1) or (2) to an enactment does not include a reference to an enactment which implements or gives effect to any international agreement or obligation.

#### *Dissolution after winding up*

##### **Dissolution after winding up**

[Note: on release of the liquidator where an order is made under section 204 for early dissolution of the company and the liquidator vacates office when dissolution takes effect in accordance with that section (section 172(7)), see section 174(4)(b)(iii) and rule 5.32.]

**5.55.** Where the court makes an order under section 204(5) <sup>M13</sup> or 205(5) <sup>M14</sup>, the person on whose application the order was made must deliver to the registrar of companies and AiB a copy of the order.

##### **Marginal Citations**

**M13** Section 204 is prospectively amended by S.S.I. 2016/141, [article 11](#).

**M14** Section 205 is prospectively amended by paragraph 51 of schedule 9 of the [Small Business, Enterprise and Employment Act 2015](#) (c.26).

**Changes to legislation:**

There are currently no known outstanding effects for the The Insolvency (Scotland) (Receivership and Winding up) Rules 2018, PART 5.