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STATUTORY INSTRUMENTS

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**2016 No. 1024**

**The Insolvency (England and Wales) Rules 2016**

**PART 6**

**CREDITORS' VOLUNTARY WINDING UP**

**CHAPTER 7**

Litigation expenses and property subject to a floating charge

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

**Interpretation**

**6.44.**—(1) In this Chapter—

“approval” and “authorisation” respectively mean—

- (a) where yet to be incurred, the approval; and
- (b) where already incurred, the authorisation;

of expenses specified in section 176ZA(3)(1);

“the creditor” means—

- (a) a preferential creditor of the company; or
- (b) a holder of a debenture secured by, or a holder of, a floating charge created by the company;

“legal proceedings” means—

- (a) proceedings under sections 212, 213, 214(2), 238, 239, 244 and 423 and any arbitration or other dispute resolution proceedings invoked for purposes corresponding to those to which the sections relate and any other proceedings, including arbitration or other dispute resolution procedures, which a liquidator has power to bring in the liquidator’s own name for the purpose of preserving, realising, or getting in any of the assets of the company;
- (b) legal actions and proceedings, arbitration or any other dispute resolution procedures which a liquidator has power to bring or defend in the name of the company; and
- (c) negotiations intended to lead or leading to a settlement or compromise of any action, proceeding or procedure to which sub-paragraphs (a) or (b) relate;

“litigation expenses” means expenses of a winding up which—

- (a) are properly chargeable or incurred in the preparation or conduct of any legal proceedings; and

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(1) Section 176ZA was inserted by section 1282 of the Companies Act 2006 (c.46).

(2) Section 214(2)(b) and (3) are amended and (6A) is inserted by section 117(3) of the Small Business, Enterprise and Employment Act 2015 (c.26).

- (b) as expenses in the winding up, exceed, or in the opinion of the liquidator are likely to exceed (and only in so far as they exceed or are likely to exceed), in the aggregate £5,000; and

“specified creditor” means a creditor identified under rule 6.45(2).

(2) Litigation expenses will not have the priority provided by section 176ZA over any claims to property comprised in or subject to a floating charge created by the company and must not be paid out of any such property unless and until approved or authorised in accordance with rules 6.45 to 6.48.

### **Requirement for approval or authorisation**

**6.45.**—(1) Subject to rules 6.46 to 6.48, either paragraphs (3) and (4) apply or paragraph (5) applies where, in the course of winding up a company, the liquidator—

- (a) ascertains that property is comprised in or subject to a floating charge;
- (b) has personally instituted or proposes to institute or continue legal proceedings or is in the process of defending or proposes to defend any legal proceeding brought or likely to be brought against the company; and
- (c) before or at any stage in those proceedings, is of the opinion that—
  - (i) the assets of the company available for payment of general creditors are or will be insufficient to pay litigation expenses; and
  - (ii) in order to pay litigation expenses the liquidator will have to have recourse to property comprised in or subject to a floating charge created by the company.

(2) As soon as reasonably practicable after the date on which the liquidator forms the opinion referred to in paragraph (1), the liquidator must identify the creditor who, in the liquidator’s opinion at that time—

- (a) has a claim to property comprised in or subject to a floating charge created by the company; and
- (b) taking into account the value of that claim and any subsisting property then comprised in or secured by such a charge, appears to the liquidator to be the creditor most immediately likely of any persons having such claims to receive some payment in respect of a claim but whose claim would not be paid in full.

(3) The liquidator must request from the specified creditor the approval or authorisation of such amount for litigation expenses as the liquidator thinks fit.

(4) Where the liquidator identifies two or more specified creditors, the liquidator must seek from each of them approval or authorisation of such amount of litigation expenses as the liquidator thinks fit, apportioned between them (“the apportioned amount”) according to the value of the property to the extent covered by their charges.

(5) For so long as the conditions specified in paragraph (1) subsist, the liquidator may, in the course of a winding up, make such further requests to the specified creditor or creditors for approval or authorisation of such further amount for litigation expenses as the liquidator thinks fit to be paid out of property comprised in or subject to a floating charge created by the company, taking into account any amount for litigation expenses previously approved or authorised and the value of the property comprised in or subject to the floating charge.

### **Request for approval or authorisation**

**6.46.**—(1) All requests made by the liquidator for approval or authorisation must include the following—

- (a) a statement describing the nature of the legal proceedings, including, where relevant, the statutory provision under which proceedings are or are to be brought and the grounds upon which the liquidator relies;
  - (b) a statement specifying the amount or apportioned amount of litigation expenses for which approval or authorisation is sought (“the specified amount”);
  - (c) notice that approval or authorisation or other reply to the request must be made in writing within 28 days from the date of its being received (“the specified time limit”); and
  - (d) a statement explaining the consequences of a failure to reply within the specified time limit.
- (2) Where anything in paragraph (1) requires the inclusion of any information, the disclosure of which could be seriously prejudicial to the winding up of the company, the liquidator may—
- (a) exclude such information from any of the above statements or notices if accompanied by a statement to that effect; or
  - (b) include it on terms—
    - (i) that bind the creditor to keep the information confidential; and
    - (ii) that include an undertaking on the part of the liquidator to apply to the court for an order that so much of the information as may be kept in the files of the court is not to be open to public inspection.
- (3) The creditor may within the specified time limit apply to the liquidator in writing for such further particulars as is reasonable and in such a case, the time limit specified in paragraph (1)(c) will apply from the date of the creditor’s receipt of the liquidator’s response to any such request.
- (4) Where the liquidator requires the approval or authorisation of two or more creditors, the liquidator must deliver a request to each creditor, containing the matters listed in paragraph (1) and also giving—
- (a) the number of creditors concerned;
  - (b) the total value of their claims, or if not known, as it is estimated to be by the liquidator immediately before delivering any such request; and
  - (c) to each preferential creditor, notice that approval or authorisation of the specified amount will be taken to be given where a majority in value of those preferential creditors who respond within the specified time limit are in favour of it; or
  - (d) where rule 6.45 applies, notice to the specified creditors that the amount of litigation expenses will be apportioned between them in accordance with that rule and notice of the value of the portion allocated to, and the identity of, the specified creditors affected by that apportionment.

### **Grant of approval or authorisation**

**6.47.**—(1) Where the liquidator fails to include in the liquidator’s request any one of the matters, statements or notices required to be specified by paragraph (1) or paragraphs (1) and (4), of rule 6.46, the request for approval or authorisation will be treated as not having been made.

- (2) Subject to paragraphs (3), (4) and (5), approval or authorisation will be taken to have been given where the specified amount has been requested by the liquidator, and—
- (a) that amount is approved or authorised within the specified time limit; or
  - (b) a different amount is approved or authorised within the specified time limit and the liquidator considers it sufficient.

(3) Where the liquidator requires the approval or authorisation of two or more preferential creditors, approval or authorisation will be taken to be given where a majority in value of those who respond within the specified time limit approve or authorise—

- (a) the specified amount; or
- (b) a different amount which the liquidator considers sufficient.

(4) Where a majority in value of two or more preferential creditors propose an amount other than that specified by the liquidator, they will be taken to have approved or authorised an amount equal to the lowest of the amounts so proposed.

(5) In any case in which there is no response in writing within the specified time limit to the liquidator's request—

- (a) at all, or
- (b) at any time following the liquidator's provision of further particulars under rule 6.46(3), the liquidator's request will be taken to have been approved or authorised from the date of the expiry of that time limit.

#### **Application to the court by the liquidator**

**6.48.**—(1) In the circumstances specified below the court may, on the application of the liquidator, approve or authorise such amount of litigation expenses as it thinks just.

(2) Except where paragraph (3) applies, the liquidator may apply to the court for an order approving or authorising an amount for litigation expenses only where the specified creditor (or, if more than one, any one of them)—

- (a) is or is intended to be a defendant in the legal proceedings in relation to which the litigation expenses have been or are to be incurred; or
- (b) has been requested to approve or authorise the amount specified under rule 6.46(1)(b) and has—
  - (i) declined to approve or authorise, as the case may be, the specified amount;
  - (ii) approved or authorised an amount which is less than the specified amount and which lesser amount the liquidator considers insufficient; or
  - (iii) made such application for further particulars or other response to the liquidator's request as is, in the liquidator's opinion, unreasonable.

(3) Where the liquidator thinks that circumstances are such that the liquidator requires urgent approval or authorisation of litigation expenses, the liquidator may apply to the court for approval or authorisation either—

- (a) without seeking approval or authorisation from the specified creditor; or
- (b) if sought, before the expiry of the specified time limit.

(4) The court may grant such application for approval or authorisation—

- (a) if the liquidator satisfies the court of the urgency of the case; and
- (b) subject to such terms and conditions as the court thinks just.

(5) The liquidator must, at the same time as making any application to the court under this rule, deliver copies of it to the specified creditor, unless the court orders otherwise.

(6) The specified creditor (or, if more than one, any one of them) is entitled to be heard on any such application unless the court orders otherwise.

(7) The court may grant approval or authorisation subject to such terms and conditions as it may think just, including terms and conditions relating to the amount or nature of the litigation expenses and as to any obligation to make further applications to the court under this rule.

(8) The costs of the liquidator's application under this rule, including the costs of any specified creditor appearing or represented on it, are an expense of the winding up unless the court orders otherwise.