

## RISK MANAGEMENT UPDATE

# Justice for tenderers

**In recent years, cases of unsuccessful tenderers being awarded damages for failures by public authorities to comply with the statutory requirements for conducting tender exercises have been few and far between.**

The reluctance on the part of the courts is probably attributable to the concern that readily awarding compensation to unsuccessful tenderers could open a floodgate of litigation and encourage spurious claims from disappointed contractors. However, in the case of *Aquatron Marine v Strathclyde Fire Board* the issue was considered afresh.

Here the Fire Board advertised for tenders for the supply and maintenance of breathing apparatus equipment. The Fire Board required in the tenders "ISO 9001:2000" accreditation and "evidence of quality standards achieved by the workforce". Aquatron duly submitted its ISO certificate along with evidence of the quality standards achieved by its workforce. Following a tender clarification meeting, Aquatron was knocked out on the basis that its bid was non-compliant because its accreditation had been issued by a different accreditation authority to that wanted by the board.



Aquatron commenced proceedings to recover its losses arising from the unsuccessful tender. The court found that there had been a breach of the regulations. It was clear that the committee evaluating the tender did not have the requisite experience to consider the technical aspects and nor did they understand their obligations under the procurement regulations. Furthermore, the specification was insufficiently clear as to the quality assurance material which was required to be submitted in order to proceed to the evaluation stage. In the circumstances, it was unfair to exclude Aquatron at tender compliance stage when they could not properly have known what information the board actually wanted.

The court then came to consider Aquatron's losses. Damages can be awarded for breach under the Regulations but only where it can be proved that the tenderer suffered loss as a result. The claim was made on the basis that, if the tender had been properly considered, Aquatron would have won the contract and it therefore sought by way of compensation the profit which it would otherwise have earned. The court found that Aquatron would have won the contract and awarded just over £122,000 in damages.

Therefore, if a contractor can prove that there was a failure to conduct a tender process properly, it may be possible to claim compensation. However, the court has to be convinced that the compensation sought represents actual loss as a result as opposed simply to compensation for disappointment.

**If you have any queries in relation to tendering, particularly in the construction and engineering sectors, please contact Chris Hoar on 01392 685393 or email [chris.hoar@footanstey.com](mailto:chris.hoar@footanstey.com)**

# What does liquidation mean to you?

**Company insolvency can be a minefield of alien terminology. In this article, we shed some light on the most common terms that are used when companies become insolvent and explain the importance of knowing both your rights and obligations if you are involved in a dispute with a company that becomes insolvent.**

When a company goes into liquidation there are implications for both creditors and debtors. Generally speaking, creditors will be pursuing the company for unpaid debts or for failure to provide goods or services. Debtors will be defending proceedings for the same.

## How does liquidation come about?

There are three different types of liquidation:

- **Members' voluntary liquidation** occurs when the shareholders of a company decide to put it into liquidation whilst there are in fact sufficient assets to pay all the debts of the company. This will usually occur when a company has ceased to serve a specific purpose.
- **Creditors' voluntary liquidation** (or voluntary winding up) occurs when the shareholders of a company place the company into liquidation because there are insufficient assets or funds to pay all the creditors.
- **Compulsory liquidation** (or compulsory winding up) occurs when the court makes an order for the company to be wound up on the hearing of the winding up petition. The petition can be brought before the court by a creditor who is owed money. It is possible for directors of the company to present a winding up petition.

In the current climate it is far more likely that companies will be placed into insolvent liquidation because they are unable to pay their debts and creditors may lose out.

## What happens to your claim?

Once a company is in insolvent liquidation, any court action against the company to recover money is automatically placed 'on hold', or stayed. Creditors are unable to continue and progress their court case without the permission of the court. The court will grant permission to continue only where it is 'right and fair in all the circumstances' to do so. This is entirely in the discretion of the court.

In most circumstances there would be little benefit in continuing to pursue a company which has no means of paying its debts. Once the company is in liquidation every creditor is asked to submit a statement of what they are owed, known as a proof of debt. Whether or not a creditor has obtained judgment against the company, a proof of debt can be submitted for the amount alleged to be owed. The liquidator will either accept or reject that proof. This does not mean that the proof of debt need not be accurate

or detailed; it should. Simply, it need not be backed up by a judgment.

Clearly the matter becomes more complex when proceedings were underway against the now insolvent company for a claim relating to something other than a debt. For example, a breach of contract claim may have been brought against the company but, without having had a trial on the issues, it is not clear whether the claim is properly made out or how much the claim is worth. This is known as a contingent claim. In these circumstances, the liquidator must assign a value to the claim and this is treated as the proof of debt.

## Debtors not off the hook

Clearly the liquidation of a company is not good news for creditors. Debtors of the liquidated company may also question whether they still need to pay what is owed. The answer is straightforward: the liquidator takes on the rights of the company to pursue debts and any court proceedings. Liquidators will almost certainly seek to recover book debts and may, if it is in the interests of creditors, instigate or continue to pursue other court proceedings. Where a debtor can demonstrate that they are also owed money by the insolvent company as well as owing it, it may be possible to set off those sums against each other to reduce the amount of the debt. Debtors should be aware of the possibility of unscrupulous directors of the insolvent company asking for payment to be made to them personally. Debtors should avoid doing this because it does not prevent the liquidator continuing to pursue the debt which was properly due to the company.

## Act swiftly

The liquidation of a company, by and large, means that it will not continue to trade. This inevitably has consequences for you or your business and acting swiftly to protect your position is key. If in doubt about the best way to do this, you should always seek legal advice to determine what can be done to minimise potential losses or to protect yourself from falling foul of the complexities of insolvency legislation.

**Matthew Dunne is a solicitor in our commercial disputes team with experience in insolvency related claims. He can be contacted for further information on 01392 685374 or email [matthew.dunne@footanstey.com](mailto:matthew.dunne@footanstey.com)**

# Getting paid

**Getting money that is owed to you on time may make the difference between life and death for your business. It may be the case that the businesses which owe you money are juggling various creditors and the person who shouts the loudest gets paid first.**

The thought of going to court may seem unattractive as it may jeopardise any future business relationship. However the reality is that you should be taking control of the situation sooner rather than later. On the basis that you decide to take action, there are various options open to you.

The statutory demand is one way of focusing the mind of the debtor and is frequently successful in prompting payment. The difficulty will arise when the debt is disputed and the debtor's solicitor takes you to court to set it aside or to obtain an injunction to prevent you from starting a winding up petition. In that case a costs order may be made against you which could be substantial.

Secondly, if the payment is not received in response to a statutory demand and you issue a winding up petition, you will have incurred significant court costs only to find that you have to wait your turn with existing creditors to receive a few pence in the pound of any money that is left after secured and priority creditors have taken their share.

The alternative is to issue a claim in your local county court for the debt plus interest which has accrued. The Late Payment of Commercial Debt (Interest) Act 1998 gives businesses the right to charge interest on outstanding debts even if you don't have a written contract. The rate currently chargeable is 10%.

When a county court claim is issued, the debtor has 14 days to file a defence or notice of intention to defend. If they fail to do so you can apply for default judgment which means that all the debt plus interest, plus your court fee and a fixed amount of costs is awarded to you. You can then enforce the debt directly against the assets of the company or the individual who owes the money.

At this stage a winding up petition can be issued against a company debtor. There will now be no risk of an injunction, but there is still a risk that other creditors will come out of the woodwork who will take their share of the assets.

If the debtor owns property, another option is to obtain a charging order on the property which will secure the debt. This is recorded at the land registry and effectively becomes 'attached' to the property. A prospective purchaser will want the charging order to be removed before agreeing to buy.

Once you have a charging order you can wait until the debtor decides to sell the property or alternatively apply to the court for an order for sale, thereby realising the asset. In a recession, the value of the property may fall below the amount of the loans secured on the property. It can therefore make sense to wait until property prices increase before seeking to enforce the charging order.

**If you would like to discuss Foot Anstey's debt recovery services please contact Angus McNicol on 01392 685240 or email [angus.mcnicol@footanstey.com](mailto:angus.mcnicol@footanstey.com) who will put you in touch with your nearest Fastdebt lawyer.**



# Service by Facebook

**The infamous social networking site is finding its way into the news for all sorts of reasons and the legal profession is no exception! There is now some precedent to support the view that you can serve legal documents on defendants, who 'go to ground', via Facebook.**

When issuing legal proceedings, it is important to make sure that your claim form and any other court documents are served on the individual or company in question at the right place. Often this is not a problem, as the defendant's address is well known and they are still at this address. If, however, you have reason to believe that the defendant no longer lives, or carries on their business, at the address you have for them, you will need to take reasonable steps to ascertain the address of the defendant's current home or office.

If you have searched for a defendant's address but cannot find one, you must consider whether there is any other way of serving the court documents on them. The court is able to consider any means of service like personal service, fax, post, email or on their solicitors. However, the rules about which methods are allowed, and when, are not particularly straightforward.



A recent Australian case has now made the news when the Judge allowed a default judgment (a CCJ) to be served on the defendants via their Facebook pages. As far as we are aware, this is the first time this method of service has ever been used.

In the Australian case, the defendants' home was being repossessed after they had missed loan payments. The claimant had obtained judgment against the defendants and had tried all the usual methods of attempting to contact the defendants to serve the judgment on them but these had failed.

The claimant's solicitors decided to search Facebook to see if they could trace the couple. They discovered that both the defendants had Facebook pages which they used regularly. They were also 'friends' with each other and their pages gave their dates of birth, email etc. This evidence was enough to persuade the Judge that if the judgment was sent to the defendants at their Facebook pages it was likely to be brought to their attention and the Judge made an order allowing this. The court did however order that the judgment should be served by way of a private message so that the rest of the defendants' friends could not see the contents.

It will be interesting to see whether the English courts will take up this new method of service. Traditional methods will need to be used first but the possibility of using Facebook or some other networking site as a way of service gives claimants another option and should be considered where more traditional attempts to serve documents have failed.

**For further dispute resolution advice please contact Italo Cerullo on 01823 625614 or email [italo.cerullo@footanstey.com](mailto:italo.cerullo@footanstey.com)**

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