

Winding up petitions

If a company has failed to respond to a statutory demand or failed to pay the sums it owes to the creditor as set out in the statutory demand, the creditor will be in a position to issue a winding up petition against that company.

Issuing a winding up petition should be seen as a last resort for a creditor. Once the company is wound up, it will no longer exist. An insolvency practitioner will be appointed to gather in any assets of the company and distribute them amongst its creditors. However, as an unsecured creditor, you are very unlikely to recover all of the monies that are owed to you, as other creditors (and the insolvency practitioner) will be paid first. Usually, the reason a company is wound up is because it is unable to pay its debts as and when they fall due, and is essentially insolvent.

A company may be able to make other arrangements with an insolvency practitioner whereby they are able to save their business or pay creditors a certain percentage of what they owe to them. As a creditor, being repaid some of the monies owed to you may be preferable to not receiving any monies, which is a distinct possibility if the company is wound up.

WHAT DO YOU DO BEFORE ISSUING A WINDING UP PETITION?

- Check if there are any existing petitions against the debtor company

If an existing petition already exists, the correct approach is for the creditor to support the original petition. They should make enquiries regarding the existing petitioner or their solicitors to check on the status of the petition and when any hearings may be taking place.

If they issue their own petition, they may be penalised by the Court for costs for doing so.

To check for any existing petitions, you should contact the Central Registry of Winding Up Petitions at the High Court. You should also carry out a search at Companies House to see if the company is in any other insolvency process, such as administration or a CVA. It is also advisable to check the London Gazette to see if any notices have been advertised against the company.

- Check if the debtor company disputes the debt or has a counterclaim

If the debt is genuinely disputed on substantial grounds, it is likely that a Court will dismiss the winding up petition. Similarly, if a Court determines that the debtor has a cross claim or set off that equals or exceeds the amount of the debt as set out in the petition, the Court is likely to dismiss the petition.

As such, before the petition is issued, the creditor should check that there is no such dispute by the debtor. Usually, a creditor will have served a statutory demand and the debtor would have had an opportunity to raise such a dispute in any applications for an injunction to restrain the presentation of a petition. If a creditor knows about a dispute, but proceeds to issue a petition anyway, then a Court is likely to penalise the creditor in relation to costs either at the application for an injunction to restrain the advertisement of the petition, or at any hearing where the petition is dismissed.

- Serve a statutory demand

Whilst it is not a pre-requisite to serve a statutory demand (and wait 21 days for it to expire) in order to issue a winding up petition, most creditors tend to follow this route. This is because if a company served with a statutory demand for a sum in excess of £750 fails to comply with the demand, then it is deemed unable to pay its debts. This is a ground upon which a Court may make a winding up order. As such, creditors usually follow this route so that they can easily show the Court that the debtor is unable to pay its debts.

DRAFTING A WINDING UP PETITION

There is no standard form for a winding up petition. However, to be a valid petition, it needs to contain certain information as set out in rule 7.5 of the Insolvency Rules 2016. Due to this, the government have produced a form of petition that can be used. Briefly speaking, the petition, amongst other things, needs to include the following information:

- Name and address of the creditor (known as the 'petitioner')
- Details of the company, including name, registered office, registered number, date of incorporation, which Companies Act it was incorporated under, number of issued shares, total value of those shares, amount of paid up capital and details of its business if known
- Name of the Court where you are submitting the petition
- Grounds upon which the petition is sought
- Details of the statutory demand and how it was served
- Name and address of the petitioner's solicitor
- Statements that it is just and equitable for the company to be wound up and that the petitioner is applying for an order to wind them up

If the petition is based on a statutory demand that has expired, and it is more than four months since the expiry of the statutory demand, you also need to include a statement in the petition as to why there has been a delay in issuing a petition.

The majority of the above information can be obtained free of charge from the Companies House website, by reviewing the shareholding information and incorporation documents.

The petition needs to be verified by a Statement of Truth confirming that the information within the petition is true and accurate to the best of the petitioner's knowledge.

ISSUING A WINDING UP PETITION

Most winding up petitions are issued in the High Court, Business and Property Courts. Some County Courts do have jurisdiction to hear winding up petitions, but certain criteria need to be fulfilled for the County Court to be used. If in doubt, it is best to issue at the High Court.

In order to issue the petition, you will need to send the original petition (plus copies for the Court – one copy for each person on whom the petition will be served) and a copy of the verification of the petition, to the High Court. If the petition is based on a statutory demand, it is also advisable to attach a copy of the statutory demand and statement of service of the statutory demand to the petition too. You will also have to pay the Court fees for the petition. As of December 2022, these are as follows:

- £302 Issue fee
- £2,600 Official Receivers deposit

If you are filing the petition at the Rolls Building in London (being the Court where most petitions are heard), you will need to use the Courts Electronic Filing System (known as CE-File). This is quicker than sending the documents by post.

SERVING THE WINDING UP PETITION

Once a winding up petition is issued by the Court, the Court will issue the petition with a claim number and will set a date for a hearing of the petition. This is usually around six to eight weeks after the petition was issued, depending on how busy the Courts are.

The petition then needs to be served on the debtor company.

The petition should be served at the company's registered office and should be handed to someone who acknowledges being a director, officer or employee of the company, or who to the best of the knowledge of the process server is a director, officer or employee of the company, or someone who confirms they are authorised to accept service of documents on behalf of the company.

If service in the above method is not possible, the process server should leave the petition at the registered office in a place where it is likely to come to the attention of anyone who attends the office.

Whichever method of service is used, the person serving the petition will then need to provide a statement of service, confirming how the petition has been served. This statement of service will need to be provided to the Court prior to the winding up petition hearing in order to prove it has been validly served and has come to the attention of the debtor company.

ADVERTISING OF THE PETITION

The winding up petition needs to be advertised in the London Gazette. This is to enable other creditors to become aware of the petition, so that they can either support or oppose it at the hearing. However, the true effect of advertising the petition is that it is highly likely the company's bank will become aware of the petition (if they have not already done so) and will look to freeze the company's bank account.

For this reason, some creditors decide to wait until the last possible day before advertising a petition, as once it is advertised and the bank become aware of the petition, it becomes very difficult for the company to pay the debt owed.

Winding up petitions cannot be advertised until at least seven business days have expired after the petition was issued and must be advertised at least seven business days before the hearing date set out in the petition. As such, there is only a limited period in which to advertise the petition.

If the petition is not advertised during this time, the Court will usually allow one adjournment of the hearing to allow the petitioner further time to advertise – this is often the case where upon receipt of the petition, the debtor company enters into negotiations with the creditor to see if they can agree a repayment plan.

If, however, by the time of any adjourned hearing the petition has still not been advertised, the Court are going to need a good reason why a further adjournment should be given, or otherwise they are likely to dismiss the petition.

The London Gazette advertisement needs to set out certain information in order to notify other creditors about the petition and allow them to contact the petitioner to let them know if they wish to support or oppose the petition.

If another creditor wishes to support or oppose the petition, they need to give notice to the petitioner (or their solicitors) by 4pm on the business day before the hearing is due to take place. This then allows the petitioner to inform the Court that there are supporting/opposing creditors, and provides those creditors with an opportunity to address the Court at the hearing if they wish to do so.

There is a fee to pay for the London Gazette advertisement and it is worth checking with them as to the level of this fee. It is advisable not to leave the advertisement of the petition until the final day, as the London Gazette often requires a couple of days' notice to put the advert in the Gazette or on their website.

A copy of the London Gazette advert also needs to be provided to the Court as soon as it has been advertised, but in any event, no less than five business days before the hearing.

PRIOR TO THE HEARING

As well as providing a copy of the statement of service of the petition and a copy of the London Gazette advert to the Court, at least five business days before the hearing, the petitioner needs to file a Certificate of Compliance confirming they have complied with the Insolvency Rules and have properly served and advertised the petition. It is usual that a copy of the Gazette notice is attached to the Certificate of Compliance.

After 4pm on the day before the hearing, the petitioner should also provide the Court with a List of Appearances, setting out the details of those creditors who have contacted the petitioner and confirmation of whether they support or oppose the petition. If it is not possible to send this to the Court after 4pm, then a copy can be provided to the judge at the hearing itself.

You may also want to check with the Court whether they have copies of all the relevant documents before the hearing. If not, it assists the Court if they are provided with copies of all relevant documents in one bundle.

HEARING THE WINDING UP PETITION

Petitioning creditors will often instruct a barrister to attend the winding up petition on their behalf, and to request the company is wound up. If the petition is opposed, then a representative of the debtor company (or their legal representatives) will be allowed to make their submissions.

In practice, there are often over 100 winding up petitions being heard in the same Court list, which usually takes place in the Rolls Building at 10:30am on Wednesdays. If there is opposition to a petition, the Court may adjourn the hearing until later in the day, so that it can deal with unopposed petitions quickly. If it appears that further time is going to be required on a particular petition, the Court will usually grant an adjournment to a later date, when more time can be allocated to the legal submissions.

The Court will either grant a winding up order, dismiss the petition or adjourn the petition, although it does have power to make any other order it sees fit.

If a debtor pays the debt owed, but the petition is supported by another creditor, the Court may allow the other creditor to be substituted in place of the original petitioner, and they will then need to re-advertise the petition and obtain a new hearing date.

If a winding up order is made, the petitioning creditor will normally seek to recover their legal costs of the petition. However, these are usually paid out of any assets of the company and will be determined by the insolvency practitioner appointed on the company's behalf to manage its assets and pay creditors.

If the winding up petition is dismissed, the debtor company will seek to recover their costs from the petitioner and the Court will usually order that the petitioner pays them. However, the Court has a general discretion to make whatever costs order it sees fit.

AFTER THE HEARING

Whilst it is possible for companies to rescind winding up orders, the process can be difficult and you need to act within five business days of the winding up order being made. You will need to provide good reasons as to why the order should not have been made and will often have to pay the sums owed in respect of the petition (and costs), and show why the circumstances of the company are materially different from when the Court made the original winding up order, before the Court allow any rescission of the winding up order. You will also need the support of a creditor before the Court will entertain such an application.

If the company is wound up, it ceases to exist. The Official Receiver will be appointed as liquidator for the company and will gather in any assets or monies owed to the company in order to then sell them and distribute amongst any creditors of the company.

The liquidator also has the power to investigate other matters, such as the behaviour of the directors and other officers of the company and if they believe there has been some wrongdoing, they have the ability to bring personal claims against those individuals.

GET IN TOUCH



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The lawyers have incomparable client service skills. They are very clear and always make sure they understand the picture, even if it is a complicated one.

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