



DISPUTE RESOLUTION FOR BUSINESSES

Application for an injunction to prevent the presentation or advertisement of a winding up petition

If your company has received a statutory demand demanding payment of monies by a creditor, it is important that you do not delay in dealing with it. A statutory demand can be one of the first steps in a creditor commencing winding up proceedings against a company.

If a company who owes more than £750 fails to repay the debt within the 21-day period set out in the demand, then the creditor is then in a position to commence winding up proceedings against that company.

Whilst there is no obligation on a creditor to commence winding up proceedings against the debtor if they have served a statutory demand, due to the relatively straightforward process of serving the statutory demand, most creditors will serve a statutory demand before commencing winding up proceedings against a corporate debtor.

Statutory demands should only be served where the debt is not disputed. If the debt is disputed, then the debtor may seek to issue application to for an injunction to restrain the presentation or advertisement of a winding up petition.

It is likely that a statutory demand will have been served at the company's office, but it can also be served at a trading address if it is not a limited company. Alternatively, it may be served at the address of a director, secretary or manager of that company.

Once received, a debtor should make a note of the date the statutory demand was received and by what method, as it is important that any application for an injunction is made within the specified time limits and it is therefore vital that you know when such time commences.

PAYING THE DEMAND

If your company has received a statutory demand, you should not delay in responding to it, as there is only a short period of time to act, failing which you could find yourself on the end of winding up proceedings. The company only has 21 days from the date it was served with the statutory demand to pay the debt set out in the statutory demand.

If the company does pay the debt in full, they should request that the creditor formally withdraws the

statutory demand. There is no formal process for this, but ideally you should ask the creditor to confirm in writing that the statutory demand is withdrawn. If the debtor cannot pay all of the debt, then they should seek to pay part of the debt, so that it reduces the sums owed to the creditor to below the winding up threshold of £750 for a company, so that the creditor will not be able to proceed with a winding up petition.

If you are unable to pay the debt, you may still wish to contact the creditor in order to agree a payment arrangement.

If your company however disputes the debt, then you will only have 18 days in which to make an application for an injunction to restrain the presentation of a winding up petition.

APPLICATION FOR AN INJUNCTION TO PREVENT THE ISSUING OR ADVERTISEMENT OF A WINDING UP PETITION

As a company cannot seek to set aside a statutory demand, they have to instead seek to restrain the presentation or advertisement of a winding up petition.

Once a winding up petition is issued by the Court, it can have devastating effects on a company, as often the bank and other creditors will find out that a petition has been issued.

Not less than seven business days after the petition has been issued, the creditor will be in a position to formally advertise the petition in the London Gazette, so if creditors were not aware of the petition when it was issued, then the formal advertisement is likely to put them on notice of the same.

A company's bank account will often be frozen by the bank, meaning they may not be able to pay staff, unless they are able to obtain a validation order from the Court allowing them to use company monies to carry out certain tasks (such as paying wages).

As such, it is therefore very important to a company that the winding up petition is not even issued, but as a minimum, not advertised.

If you have time to do so, it is often worth corresponding with the creditor or their solicitors prior to making any application for an injunction to see if they will provide an undertaking not to present a winding up petition for a period of time to allow the company to resolve matters. This may provide a debtor with some cost protection if they do have to make an application.

In any event, an application for an injunction to restrain the presentation of a winding up petition should be made promptly.

A Court may grant the injunction if it can be shown that the company is solvent and one of the following applies:

- The company has a cross claim or right of set off which exceeds the amount claimed in the statutory demand.
- The company has a reasonable excuse for not paying the debt.
- The debt is genuinely disputed on substantial grounds.
- It is an abuse of process if a winding up petition was allowed to be presented.

The procedure for an application to restrain the presentation of a winding up petition is set out in Rules 12.6 to 12.13 of the Insolvency Rules 2016 and the Practice Direction on Insolvency Procedure (PDIP).

The debtor will need to provide a witness statement and exhibits setting out why the winding up petition should not be presented and why one (or more) of the above reasons applies. The witness statement should also provide evidence of the company's solvency (i.e. its ability to pay its debts as and when they fall due). This may mean obtaining a separate statement from the company's accountant or

exhibiting copies of the latest accounts and/or balance sheet of the company.

The application should be filed at a Court that has jurisdiction to deal with the winding up petition, which normally means it will be allocated to the Rolls Building in London. A fee is payable with the application and once issued, the Court will list a hearing date for the injunction application to be heard.

The costs of the application will be at the Court's discretion, although normally the successful party's legal costs will be paid by the unsuccessful party on an indemnity basis, unless it can be shown that there was unreasonable conduct on behalf of the successful party.

If successful, the Court will grant the injunction, which then prevents the creditor from presenting or advertising the winding up petition. The injunction may set a specified time limit or may be a complete bar on them presenting a petition. As such, if the matter cannot be resolved amicably, the creditor will need to issue County Court or High Court proceedings to recover the monies they believed are owed to them, which provides the debtor with the opportunity to defend the claim without the fear of winding up proceedings hanging over the company.

GET IN TOUCH



Mark Ovenell

PARTNER

Dispute Resolution

E: mark.ovenell@bindmans.com

T: +44 20 7833 4433



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.

CHAMBERS AND PARTNERS 2022

BINDMANS LLP

236 Gray's Inn Road | London | WC1X 8HB

T: +44 20 7833 4433 | E: info@bindmans.com | W: bindmans.com