

**book and paper** (簿冊及文據) and **book or paper** (簿冊或文據) include accounts, deeds, writings, and documents;

**certificate of solvency** (有償債能力證明書) means a certificate issued under section 233; (Added 28 of 2003 s 2)

**Commission** (監察委員會) means-

- (a) subject to paragraphs (b) and (c), the Securities and Futures Commission referred to in section 3(1) of the Securities and Futures Ordinance (Cap 571);
- (b) where any relevant transfer order made under section 25 of that Ordinance is in force, the recognized exchange company concerned or both the Securities and Futures Commission and the recognized exchange company concerned, in accordance with the provisions of that order; or
- (c) where any relevant transfer order made under section 68 of that Ordinance is in force, the recognized exchange controller concerned or both the Securities and Futures Commission and the recognized exchange controller concerned, in accordance with the provision of that order. (Replaced 5 of 2002 s 407)

**Companies Register** (公司登記冊) has the meaning given by section 2(1) of the Companies Ordinance (Cap 622); (Added 28 of 2012 ss 912 & 920)

**company** (公司) means

- (a) a company formed and registered under the Companies Ordinance (Cap 622); or
- (b) an existing company; (Replaced 28 of 2012 ss 912 & 920)

**company limited by guarantee** (擔保有限公司) has the meaning given by section 9 of the Companies Ordinance (Cap 622) for the purposes of that Ordinance; (Added 28 of 2012 ss 912 & 920)

**company limited by shares** (股份有限公司) has the meaning given by section 8 of the Companies Ordinance (Cap 622) for the purposes of that Ordinance; (Added 28 of 2012 ss 912 & 920)

**company secretary** (公司秘書) includes any person occupying the position of company secretary (by whatever name called); (Added 28 of 2012 ss 912 & 920)

## PART I

### PRELIMINARY

(Added 14 of 2016 s 4)

#### Division 1

##### Short Title

#### 1. Short title

This Ordinance may be cited as the Companies (Winding-Up and Miscellaneous Provisions) Ordinance.

(Amended 28 of 2012 ss 912 & 920)

#### Division 2

##### Interpretation and Specification of Forms

(Added 14 of 2016 s 5)

#### 2. Interpretation

(1) In this Ordinance, unless the context otherwise requires-

*a resolution for voluntary winding up* (自動清盤決議) has the meaning assigned to it by section 228(2); (Added 6 of 1984 s. 2)

*agent* (代理人) does not include a person's counsel acting as such; (Added 6 of 1984 s 2)

*amend* (修訂) includes delete, add to or vary and the doing of all or any of such things simultaneously; (Added 30 of 2004 s 2)

*articles* (章程細則) in relation to a company, means the articles of association of the company;

**Note-** Please also see section 98 of the Companies Ordinance (Cap 622). A condition of an existing company's memorandum of association is to be regarded as a provision of the company's articles. (Replaced 28 of 2012 ss 912 & 920)

*authorized financial institution* (認可財務機構) means an authorized institution within the meaning of section 2 of the Banking Ordinance (Cap 155); (Added 12 of 1988 s 2. Amended 49 of 1995 s 53)

*book and paper* (簿冊及文據) and *book or paper* (簿冊或文據) include accounts, deeds, writings, and documents;  
*certificate of solvency* (有償債能力證明書) means a certificate issued under section 233; (Added 28 of 2003 s 2)

*Commission* (監察委員會) means-

- (a) subject to paragraphs (b) and (c), the Securities and Futures Commission referred to in section 3(1) of the Securities and Futures Ordinance (Cap 571);
- (b) where any relevant transfer order made under section 25 of that Ordinance is in force, the recognized exchange company concerned or both the Securities and Futures Commission and the recognized exchange company concerned, in accordance with the provisions of that order; or
- (c) where any relevant transfer order made under section 68 of that Ordinance is in force, the recognized exchange controller concerned or both the Securities and Futures Commission and the recognized exchange controller concerned, in accordance with the provision of that order. (Replaced 5 of 2002 s 407)

*Companies Register* (公司登記冊) has the meaning given by section 2(1) of the Companies Ordinance (Cap 622); (Added 28 of 2012 ss 912 & 920)

*company* (公司) means

- (a) a company formed and registered under the Companies Ordinance (Cap 622); or
- (b) an existing company; (Replaced 28 of 2012 ss 912 & 920)

*company limited by guarantee* (擔保有限公司) has the meaning given by section 9 of the Companies Ordinance (Cap 622) for the purposes of that Ordinance; (Added 28 of 2012 ss 912 & 920)

*company limited by shares* (股份有限公司) has the meaning given by section 8 of the Companies Ordinance (Cap 622) for the purposes of that Ordinance; (Added 28 of 2012 ss 912 & 920)

*company secretary* (公司秘書) includes any person occupying the position of company secretary (by whatever name called); (Added 28 of 2012 ss 912 & 920)



**non-Hong Kong company** (非香港公司) means a company incorporated outside Hong Kong that-

- (a) establishes a place of business in Hong Kong on or after the commencement date of Part 16 of the Companies Ordinance (Cap 622); or
- (b) has established a place of business in Hong Kong before that commencement date and continues to have a place of business in Hong Kong at that commencement date; (Replaced 28 of 2012 ss 912 & 920)

**officer** (高級人員), in relation to a body corporate, includes a director, manager or company secretary of the body corporate; (Added 80 of 1974 s 2. Amended 28 of 2012 ss 912 & 920)

**officer who is in default** (失責高級人員) has the meaning assigned to it by section 351(2); (Added 6 of 1984 s 2)

**Official Receiver** (破產管理署署長) means the Official Receiver appointed under the Bankruptcy Ordinance (Cap 6); (Added 30 of 1999 s 2)

**ordinary resolution** (普通決議) has the meaning given by section 563 of the Companies Ordinance (Cap 622); (Added 28 of 2012 ss 912 & 920)

**place of business** (營業地點) in relation to a non-Hong Kong company, has the meaning given by section 774(1) of the Companies Ordinance (Cap. 622); (Added 30 of 2004 s. 2. Amended 28 of 2012 ss. 912 & 920)

**pre-amended Ordinance** (《修訂前的本條例》) means the Companies Ordinance (Cap 32) as in force from time to time before the commencement date# of section 2 of Schedule 9 to the Companies Ordinance (Cap 622); (Added 28 of 2012 ss 912 & 920)

**prescribed** (訂明) means as respects the provisions of this Ordinance relating to the winding-up of companies, prescribed by general rules, and as respects the other provisions of this Ordinance, prescribed by the Chief Executive in Council; (Amended 23 of 1999 s 3)

**printed** (印刷、印製) means produced by ordinary letterpress or lithography; (Added 4 of 1963 s 2. Amended 28 of 2012 ss 912 & 920)

**private company** (私人公司) has the meaning given by section 11 of the Companies Ordinance (Cap 622) for the

purposes of that Ordinance; (Added 6 of 1984 s 2. Amended 28 of 2012 ss 912 & 920)

**prospectus** (招股章程) —

- (a) subject to paragraph (b), means any prospectus, notice, circular, brochure, advertisement, or other document-
  - (i) offering any shares in or debentures of a company (including a company incorporated outside Hong Kong, and whether or not it has established a place of business in Hong Kong) to the public for subscription or purchase for cash or other consideration; or
  - (ii) calculated to invite offers by the public to subscribe for or purchase for cash or other consideration any shares in or debentures of a company (including a company incorporated outside Hong Kong, and whether or not it has established a place of business in Hong Kong);
- (b) does not include any prospectus, notice, circular, brochure, advertisement, or other document-
  - (i) to the extent that it is a publication falling within section 38B(2); or
  - (ii) to the extent that it contains or relates to an offer specified in Part 1 of the Seventeenth Schedule as read with the other Parts of that Schedule; (Replaced 30 of 2004 s 2)

**recognized exchange company** (認可交易所) means a company recognized under section 19(2) of the Securities and Futures Ordinance (Cap 571) as an exchange company for operating a stock market; (Added 5 of 2002 s 407)

**recognized exchange controller** (認可控制人) has the same meaning as in section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap 571); (Added 5 of 2002 s 407)

**recognized stock market** (認可證券市場) has the same meaning as in section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap 571); (Added 5 of 2002 s 407)

**record** (紀錄) includes not only a written record but any record conveying information or instructions by any other means whatsoever; (Added 28 of 2003 s 2)



**registered non-Hong Kong company** (非香港公司) means a non-Hong Kong company that is registered in the Companies Register as a registered non-Hong Kong company; (Added 28 of 2012 ss 912 & 920)

**Registrar** (處長) means the Registrar of Companies appointed under section 21(1) of the Companies Ordinance (Cap 622); (Replaced 6 of 1984 s 2. Amended 28 of 2012 ss 912 & 920)

**shadow director** (影子董事), in relation to a body corporate, means a person in accordance with whose directions or instructions (excluding advice given in a professional capacity) the directors, or a majority of the directors, of the body corporate are accustomed to act; (Replaced 28 of 2012 ss 912 & 920)

**share** (股份) –

- (a) means a share in a company's share capital; and
- (b) if any of the company's shares is converted into stock, includes stock; (Replaced 28 of 2012 ss 912 & 920)

**special resolution** (特別決議) has the meaning given by section 564 of the Companies Ordinance (Cap 622); (Added 28 of 2012 ss 912 & 920)

**specified corporation** (指明法團) means a company or a non-Hong Kong company; (Added 30 of 2004 s 2)

**specified form** (指明格式), in relation to a particular provision of this Ordinance, means the appropriate form specified for the time being under section 2A, for the purposes of that provision; (Added 3 of 1997 s 3)

**structured product** (結構性產品) has the meaning given by section 1A of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap 571); (Added 8 of 2011 s 17)

**the minimum subscription** (最低認購額) has the meaning assigned to it by section 42(2); (Added 6 of 1984 s 2)

**the time of the opening of the subscription lists** (開立認購名單的時間) has the meaning assigned to it by section 44A(1); (Added 6 of 1984 s 2)

**transaction at an undervalue** (遜值交易) —see section 265E; (Added 14 of 2016 s 6)

**unfair preference** (不公平優惠) —see section 266A; (Added 14 of 2016 s 6)

**unlimited company** (無限公司) has the meaning given by

section 10 of the Companies Ordinance (Cap 622) for the purposes of that Ordinance. (Replaced 28 of 2012 ss 912 & 920) (Amended 1 of 1949 s. 22; 10 of 1987 s. 2; 86 of 1992 s 2; 5 of 2002 s. 407; 30 of 2004 s. 2; 28 of 2012 ss. 912 & 920)

(2) (Repealed 28 of 2012 ss 912 & 920)

(3) References in this Ordinance to a body corporate or to a corporation shall be construed as not including a corporation sole but as including a company incorporated outside Hong Kong. (Added 80 of 1974 s 2)

(4) For the purposes of this Ordinance, a company shall, subject to the provisions of subsection (6), be deemed to be a subsidiary of another company, if-

(a) that other company-

(i) controls the composition of the board of directors of the first-mentioned company; or (Amended 6 of 1984 s 2)

(ii) controls more than half of the voting rights of the first-mentioned company; or (Amended 28 of 2012 ss. 912 & 920)

(iii) holds more than half of the issued share capital of the first-mentioned company (excluding any part of it which carries no right to participate beyond a specified amount in a distribution of either profits or capital); or

(b) the first-mentioned company is a subsidiary of any company which is that other company's subsidiary. (Added 80 of 1974 s 2)

(5) For the purposes of subsection (4), the composition of a company's board of directors shall be deemed to be controlled by another company if that other company by the exercise of some power exercisable by it, without the consent of any other person, can appoint or remove all or a majority of the directors, and, for the purposes of this provision, that other company shall be deemed to have power to make such an appointment if- (Amended 12 of 2005 s 2)

(a) a person cannot be appointed as a director without the exercise in his favour by that other company of such a power; or

(b) a person's appointment as a director follows



- necessarily from his being a director or other officer of that other company. (Added 80 of 1974 s 2)
- (6) In determining whether one company is a subsidiary of another company-
- (a) any shares held or power exercisable by that other company in a fiduciary capacity shall be treated as not held or exercisable by it;
  - (b) subject to paragraphs (c) and (d), any shares held or power exercisable-
    - (i) by any person as a nominee for that other company (except where that other company is concerned only in a fiduciary capacity); or
    - (ii) by, or by a nominee for, a subsidiary of that other company, not being a subsidiary which is concerned only in a fiduciary capacity, shall be treated as held or exercisable by that other company;
  - (c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned company or of a trust deed for securing any issue of such debentures shall be disregarded; and
  - (d) any shares held or power exercisable by, or by a nominee for, that other company or its subsidiary (not being held or exercisable as mentioned in paragraph (c)) shall be treated as not held or exercisable by that other company if the ordinary business of that other company or its subsidiary, as the case may be, includes the lending of money and the shares are held or power is exercisable as aforesaid by way of security only for the purposes of a transaction entered into in the ordinary course of that business. (Added 80 of 1974 s 2)
- (7) A reference in this Ordinance to the holding company of a company shall be read as a reference to a company of which that last-mentioned company is a subsidiary. (Added 80 of 1974 s 2)
- (8) In subsections (4), (5), (6) and (7) the expression *company* (公司) includes any body corporate or corporation. (Added 4 of 1976 s 2)
- (8A) (Repealed 28 of 2012 ss 912 & 920)

- (9) For the avoidance of doubt it is declared that a reference, in relation to any purpose of this Ordinance, to any form, matter, particular or information specified by the Registrar means, except where it is provided otherwise, specified by him for the time being for that purpose. (Added 3 of 1997 s 3)
- (10) Any provision of this Ordinance that refers (in whatever words) to-
- (a) the founder members; (Amended 30 of 2004 s 2)
  - (b) the members or shareholders of a company;
  - (c) a majority of members or shareholders of a company; or
  - (d) a specified number or percentage of members or shareholders of a company,
- shall, unless the context otherwise requires, apply with necessary modifications in relation to a company that has only one founder member or that has only one person as a member or shareholder, as the case may be. (Added 28 of 2003 s. 2. Amended 30 of 2004 s. 2)
- (11) Any provision of this Ordinance that refers (in whatever words) to-
- (a) the directors of a company;
  - (b) the board of directors of a company;
  - (c) a majority of the directors of a company; or
  - (d) a specified number or percentage of the directors of a company,
- shall, unless the context otherwise requires, apply with necessary modifications in relation to a private company that has only one director. (Added 28 of 2003 s. 2)
- (12) The reference to a non-Hong Kong company in the definition of *specified corporation* in subsection (1) shall, before the commencement of section 1(1) of Schedule 2 to the Companies (Amendment) Ordinance 2004 (30 of 2004), be deemed to be a reference to an overseas company as is for the time being defined under this Ordinance. (Added 30 of 2004 s. 2 and L.N. 81 of 2005)
- (Amended E.R. 1 of 2014)  
[cf 1929 c 23 s 380 UK]

**Editorial Note:** # Commencement date: 3 March 2014.



**[2.01] History**

The interpretation provisions have been added to on an ad hoc basis over the years although the earliest of these provisions was drawn from s 380 of the Companies Act 1929 (UK). Subsequent additions have been made intermittently. The result of this steady accretion of additions has been an interpretation section which could be better organised than it is. This is because the section is one of the principal devices for determining the meaning of the subsequent provision. For example, the definition of 'company' needs to be understood in the context of many related concepts, defined or referred to later, eg 'existing company', 'non-Hong Kong company', 'private company', 'body corporate', 'corporation', 'holding company' and 'group of companies'. Sometimes these expressions overlap in meaning. It should be noted that a foreign company does not generally fall within the s 2(1) definition of a 'company': *Insurance Company of the State of Pennsylvania v Grand Union Insurance Co Ltd* [1988] 2 HKLR 541, [1988] HKC 200. But various provisions have been applied to non-Hong Kong companies either by the use of the expression 'specified corporation' (added by 30 of 2004 Sch 3 s 2(1)) (and see Cap 32 s 350B) or by specific application as in Cap 622 s 722 (for remedies for protection of companies' or members' interests).

For the definitions in the former Companies Ordinance (Cap 32) repealed by Cap 622, see Cap 622 Sch 9s 3(16). For the substituted definitions in Cap 32 introduced by Cap 622, see Cap 622 Sch 9s 3(1) to (15). For the definitions added to s 2(1) by Cap 622, see Cap 622 Sch 9s 3(17).

The C(WUMP) (Amendment) Ordinance, gazetted on 3 June 2016 (Ord 14 of 2016), amends Cap 32, providing increased protection to creditors, streamlining the winding up process and further enhancing the integrity of the winding up process: see Press Release of the Financial Services and Treasury Bureau, 15 October 2015, at <[fstb.gov.hk/fsb/ppr/press/doc/pr03062016b\\_e.pdf](http://fstb.gov.hk/fsb/ppr/press/doc/pr03062016b_e.pdf)>. The (Amendment) Ordinance came into operation on 13 February 2017: see (Commencement) Notice, gazetted 9 December 2016. Criticism of the Amendment Ordinance has mainly been in relation to its failure to adopt the UNCITRAL Model Law (which criticism is probably justified) and in its failure to bring forward corporate rescue (provisional supervision) and insolvent trading legislation. The latter criticism is not justified, because provisional supervision and insolvent trading have always been topics to be dealt with after the winding up amendments: see [275.03].

**[2.02] Overview**

Section 2 contains a diverse range of interpretative provisions. Probably the most fundamental definitional provision concerns the notion of the 'company' itself which primarily refers to companies formed and registered under the Hong Kong companies legislation. This is intended to exclude companies incorporated outside Hong Kong, unless they are an 'existing company': see generally, *Securities and Futures Commission v MKI Corp Ltd* [1995] 2 HKC 79 at 82–85, but see comment on the MKI case in *Moulin Global Eyecare Holdings Ltd v Lee Sin Mei Olivia* [2009] HKCU 501, [2009] 3 HKLRD 265, para 42; on appeal see [2010] 2 HKLRD 1096, [2010] 3 HKC 599 (CA); (2014) 17 HKCFAR 218, [2014] 3 HKC 323 (CFA). The section distinguishes between various types of companies, which might be better discussed when we come to discuss the incorporation of

companies. The term 'corporation' is not defined, but s 2(3) states that the term includes a company incorporated outside Hong Kong. Reference might also be made in passing to the wide inclusive definition of 'director', and to the definition of a 'shadow director'. Finally, reference should be made to the deeming provisions of ss 2(4), 2(5) and 2(6) which define the circumstances in which a company will be considered to be a subsidiary. In an era of corporate groups, this is an extremely important provision and seeks to cover situations where shares are held on trust or are in the hands of nominees. The concept of 'control' is not directly defined, but s 2(5) deems control to exist in circumstances relating to the composition of the membership of the company's board. On the definition of 'subsidiary' under the UK Companies Act 1985 s 736, see *Farstad Supply A/S v Environco Ltd* [2011] UKSC 16.

Definitions introduced by the Companies (Amendment) Ordinance 2004 (Ord No 30 of 2004), eg 'founder member', 'incorporation form' and 'non-Hong Kong company' came into effect on 11 July 2008: see LN 139 of 2008. Amongst the more interesting definitions introduced in recent years is that of 'manager' introduced by the 2003 Amendment Ordinance.

The amended definition of 'liquidator', as including a provisional liquidator holding office as such by virtue of s 194, was held to be ambiguous in *Re Lehman Brothers Securities Asia Ltd (No 2)* [2010] 1 HKLRD 58, [2010] HKCU 1281 (CA) and should be read as holding office by virtue of s 194(1A). This was followed by Harris J in *Re MF Global Hong Kong Ltd* [2012] 5 HKLRD 486, [2012] HKCU 2039. But on appeal, [2015] 2 HKLRD 325, [2015] HKCU 459 (CA), it was held that the restricted interpretation should no longer be adopted, as the language was apt to include all three types of winding-up provisional liquidators in s 194(1)(a), (1)(aa) and (1A). Further amendments were made to the definition of 'liquidator' by the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance 2016 (Ord 14 of 2016) to confirm the views of the Court of Appeal that liquidator covers all provisional liquidators in s 194(1)(a), (1)(aa) and (1A).

The revised definition of 'contributory' in the (Amendment) Ordinance reflects the revision of s 177 and there are two new definitions added to s 2(1) to reflect the new provisions on transactions at an undervalue and unfair preferences.

**[2.03] The task of interpretation**

The task of interpretation of the meaning of legal terms is one of the most basic of legal skills. This task is not facilitated by the manner in which the interpretation provisions of the Ordinance are organised, largely due to the manner in which the Ordinance has been amended over the years. Although s 2 provides a basic 'dictionary' for the interpretation of the Companies Ordinance, there are also many other definition provisions found elsewhere in the Ordinance. Some of these are referred to in the s 2 definition of particular terms: eg the definition of 'contributory' found in s 171.

However, many definitions are not found or even referred to in s 2, such as the definition of 'receiver and manager' found in s 302A; and the definitions of 'joint stock company' in s 311 and of 'unregistered company' found in s 326. Also see the definitions found in s 79A.



It should also be noted that some terms used in the Ordinance are not defined directly, so that reference must be made to the common law for an understanding of the meaning of the term used; a good example is the term 'creditor'. Because many Hong Kong Ordinance provisions and expressions have close parallels in other jurisdictions, this interpretative problem is much less significant than it might otherwise be.

However, some expressions are not defined at all in s 2; for example, the term 'creditor'. With regard to such expressions one will need to look to the common law for their meanings.

Finally, in approaching the task of interpreting of the Ordinance, the courts may resort to a number of different approaches, such as a literalist approach or a purposive approach. A more purposive approach will be adopted where the legislation is clearly seen to be remedial in character, such as the new disqualification of directors provisions introduced in 1994 as Part IVA. It should also be noted that judges will be inclined to interpret the same words differently depending upon the consequences which flow from a breach or a contravention of a provision. Where a breach of a provision carries with it a criminal penalty, judges are likely to read the section more strictly than they would if it only involved a civil remedy: see further, *Briginshaw v Briginshaw* (1938) 60 CLR 336. Courts may also be influenced by the statements or interpretations made by regulatory bodies. Although such statements or interpretations are not legally binding, they do constitute an opinion of the law given by an agency which has considerable experience of the operation of the legislation: see for an example of this, the views expressed by Sheppard J in *Re Bond Corporation Holdings Ltd v Grace Bros Holdings Ltd* (1983) 1 ACLC 1009 at 1030.

## 2A. Registrar to specify forms

- (1) The Registrar may specify a form, for use in relation to any purpose of this Ordinance—
  - (a) unless it is provided otherwise in this Ordinance; or
  - (b) except where a form for that purpose may be or is prescribed,
 and any such form may contain any particulars ancillary or incidental to that purpose.
- (2) In exercising, as regards any purpose of this Ordinance, the power conferred on him by subsection (1), the Registrar may, if he thinks fit, specify 2 or more different forms to be used in respect of that purpose, in different circumstances.
- (3) (Repealed 28 of 2003 s 3)

(Added 3 of 1997 s 4)

## [2A.01] History

Section 2A was added in 1997 to enable the Registrar to design forms more suited to the Registry's needs. Previously forms were prescribed and set out in the Companies (Forms) Regulations. However, as part of the companies legislation, changes were slow to be effected.

## [2A.02] Overview

The Companies Registry forms are bilingual and the form references used give some indication of the subject of the form. For example, the forms concerning annual reports were denoted AR and since Cap 622 are now NAR. Details of the relevant form can be found in the commentary relating to the relevant provision of the Ordinance and see the Companies Registry website <[www.cr.gov.hk](http://www.cr.gov.hk)> under public forms.

There is no provision in the companies legislation for modification of the specified forms by users (of the position for the prescribed forms under the Companies (Winding Up) Rules r 3 and the Bankruptcy (Forms) Rules r 2(1), where variations as circumstances may require are allowed). Nevertheless, the Registrar of Companies has in the past accepted some modifications, eg the former company charge M1 form was regularly modified, without objection, to include a reference to any negative pledge clause, though such clauses were not included amongst the particulars specified in s 80(1A) of the former Companies Ordinance (Cap 32).

## 2B. Construction of references to parent company, etc.

- (1) A reference in this Ordinance to parent company, parent undertaking or subsidiary undertaking shall be construed in accordance with the Twenty-third Schedule.
- (2) A reference in a provision specified under subsection (3) for the purposes of this subsection—
  - (a) to a holding company shall be deemed to include a parent company;
  - (b) to a subsidiary or subsidiary company shall be deemed to include a subsidiary undertaking; and
  - (c) to shares or an undertaking shall be construed in accordance with the Twenty-third Schedule.
- (3) The provisions specified for the purposes of subsection (2) are the Third Schedule and the Fourth Schedule.
- (4) The Secretary for Financial Services and the Treasury may, by notice published in the Gazette, amend subsection (3).

(Added 12 of 2005 s 3)



**[2B.01] History**

This section was added in 2005 for the purpose of specifying the meaning of the terms 'parent company', 'parent undertaking' and 'subsidiary undertaking' as used in the amendments to the provisions of the ordinance governing group accounts. The Companies (Amendment) Ordinance No 12 of 2005, came into force on 1 December 2005: see LN 163 of 2005. Subsection (3) was amended by the Companies Ordinance (Cap 622) when the main provisions on group accounts in Cap 32 were repealed and re-enacted (with certain modification) in the Companies Ordinance (Cap 622).

**[2B.02] Overview**

This section must be read with the Twenty-third Schedule and the amendments to the provisions governing group accounts. The meaning of the term 'subsidiary' has been modified to make it more closely in alignment with the meaning attached to the term in the International Accounting Standards. The new meaning applies only for the purposes of group accounts and not for any other purposes.

3. (Repealed 6 of 1984 s 3)

4-36. (Repealed 28 of 2012 ss 912 & 920)

**PART II****SHARE CAPITAL AND DEBENTURES****Division 1****Prospectus**

(Replaced 14 of 2016 s 7)

**37. Dating of prospectus**

A prospectus issued by or on behalf of a company shall be dated, and that date shall, unless the contrary is proved, be taken as the date of publication of the prospectus.

(Amended 78 of 1972 s 4)

[cf 1929 c 23 s 34 UK]

**[37.01] History**

This section may be compared with s 34 of the Companies Act 1929 (UK). It was amended in 1972.

**[37.02] Overview**

Part II deals with the raising of share and debt capital. The provisions in this Part concerning prospectuses were all substantially revised by the Companies (Amendment) Ordinance 1972 implementing many of the recommendations made in the First Report of The Companies Law Revision Committee (note: this Committee was an ad hoc committee which preceded the SCCLR) on the Protection of Investors (Chapter 8, Prospectuses). Further substantial revisions were introduced by Schedule 1 of the Companies (Amendment) Ordinance 2004, and came into force on 3 December 2004 (LN 154 of 2004), following the Securities and Futures Commission's 2003 guidelines for reform. These guidelines together with other specific improvements to the prospectus regime were enacted to accommodate current market practices and offering structures.

Section 37 requires, where a prospectus is issued by a company, it be dated and that date will be deemed to be the date of the prospectus, unless the contrary is proved. Further requirements regarding the form and content of prospectuses are set out in s 38.

The Securities and Futures and Companies Legislation (Structured Products Amendment) Ordinance 2011, No 8 of 2011, transfers the regulation of public offers of structured products in the form of shares and debentures from the prospectus regime of the Companies Ordinance to the offers of investments regime of the Securities and Futures Ordinance (Cap 571). Cap 32 Part II will continue to apply to securities other than structured products.



in respect of bankruptcy was accepted (see the Law Reform Commission Report on Bankruptcy, Ch 10) and reflected in the revised s 18(3)(a) of the new bankruptcy legislation (see [169.09]) which was brought into force on 1 April 1998. The Improvement of Corporate Insolvency Law exercise (see [169.09]) does not seem to have considered the issue.

### 190A. Costs and expenses of statement of affairs or supplementary affidavit

- (1) Subject to subsections (2) and (3), a person who makes the statement of affairs of a company, or a supplementary affidavit in relation to that statement, that is required by section 190 is entitled to be paid by the provisional liquidator or liquidator out of the assets of the company the costs and expenses incurred in and about the preparation and making of the statement or affidavit.
- (2) Except by order of the court, the person is not entitled to be paid any of the costs and expenses unless, before the costs and expenses were incurred—
  - (a) the person had—
    - (i) applied to the provisional liquidator or liquidator for sanction of the incurring of the costs and expenses; and
    - (ii) submitted to the provisional liquidator or liquidator a statement of the estimated costs and expenses intended to be incurred; and
  - (b) the provisional liquidator or liquidator had sanctioned the incurring of the costs and expenses.
- (3) For the costs and expenses incurred, the person is entitled to be paid only the amount that the provisional liquidator or liquidator considers reasonable.
- (4) A decision of the provisional liquidator or liquidator under this section relating to the payment of costs and expenses is subject to an appeal to the court.
- (5) In this section, a reference to statement of affairs includes the affidavit verifying the statement as required by section 190(1).

(Added 14 of 2016 s 31)

### [190A.01] History

This section was added by the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance 2016 (14 of 2016). It is derived from former s 190(4) and former r 43 of the Companies (Winding up) Rules.

### [190A.02] Overview

This section deals with payment of the costs and expenses of making a statement of affairs or supplementary affidavit out of the assets of the company. This matter was previously dealt with under s 190(4) and r 43 of the Companies (Winding up) Rules. Those provisions were repealed by Ordinance 14 of 2016 and replaced with s 190A. The introduction of s 190A is not intended to make any major substantive changes to the law but is intended to rationalise former s 190(4) and r 43 by bringing the two provisions together in the one provision in the primary legislation.

Unless the court orders otherwise, a person is not entitled to be paid his costs and expenses out of the company's assets unless he applies to the provisional liquidator or liquidator before the costs and expenses are incurred and unless sanction is given by the provisional liquidator or liquidator for the incurring of the costs and expenses: sub-s (2). The decision of the provisional liquidator or liquidator may be appealed to the court: sub-s (5).

On allowance for expenses see *Re Mekol Developments Pty Ltd (in liq)* [1975] 2 NSWLR 393; *Re Talga Ltd* (1978) ACLC 30 (Sc, NSW) at 114.

### 191. Report by Official Receiver or Liquidator

- (1) In a case where a winding-up order is made, the liquidator shall, as soon as practicable after receipt of the statement to be submitted under section 190, or, in a case where the court orders that no statement shall be submitted, as soon as practicable after the date of the order, submit a preliminary report to the court— (Amended L.N. 378 of 1989; 46 of 2000 s. 21)
  - (a) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities; and
  - (b) if the company has failed, as to the causes of the failure; and
  - (c) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation or failure of the company, or the conduct of the business and affairs thereof. (Amended 14 of 2016 s. 32)
- (2) The Official Receiver or liquidator may also, if he thinks



fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the court.

(3) (Repealed 14 of 2016 s 32(2))

(Amended 6 of 1984 s 138; 46 of 2000 s 21)

[cf 1929 c 23 s 182 UK]

(Subheading repealed 46 of 2000 s. 22)

### [191.01] History

The section is derived from s 182 of the Companies Act 1929 (UK) (1948 Act, s 236). A minor amendment was made to sub-s (2) in 1984 by deleting the words 'director or other' before officer of the company. The section was amended in 2000 to allow a liquidator, other than the Official Receiver, to report to the court. Subsection (1)(c) was amended by the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance 2016 (14 of 2016) to include a reference to 'affairs' of the company. Subsection (3) was repealed by Ord 14 of 2016.

There is no equivalent section under the Insolvency Act 1986 (UK). Reports by the Official Receiver are sent to creditors and contributories and copied to the court; see IR r 4.45. For equivalent provisions, see Corporations Act 2001 (Aust), s 476; Companies Act (Cap 50) (Sing), s 271.

### [191.02] Overview

Where a winding-up order has been made, the liquidator must, as soon as possible, after receipt of the statement of affairs required to be submitted under s 190, or where the statement of affairs has been dispensed with, as soon as practicable after the date of the winding-up order, submit a preliminary report to the court. The report must cover the matters specified in paras (a), (b) and (c), so far as appropriate.

Subsection (2) provides for the Official Receiver or liquidator to make further reports, if he thinks fit, where in his opinion fraud has been committed by any person in the promotion or formation of the company, or by any officer in relation to the company since its formation or where there are other matters which should be brought to the attention of the court. In determining whether or not to make a further report the Official Receiver or liquidator is exercising a quasi-judicial function: *Ex parte Barnes* [1896] AC 146 (HL) at 150.

Under the former sub-s (3), where the Official Receiver or liquidator reports that, in his opinion, fraud has been committed the court may order the public examination of the relevant person under (former) s 222: *Kennedy v Cheng Kelly* (2009) 12 HKCFAR 601, [2009] 6 HKC 454. Subsection (3) was repealed

by Ord 14 of 2016 such that a public examination can be ordered (under s 286A, which replaces former s 222) without the need for the report to state the opinion that fraud has been committed. The repeal is intended to enhance the effectiveness of the public examination procedure by making it easier for the procedure to be triggered: see FSTB, *Improvement of Corporate Insolvency Law Legislative Proposals: Consultation Document* (April 2013) para 6.15.

For an application to the court by the Official Receiver for the making of a disqualification order against a director of a company which is being wound up, see ss 168H, 168I, and 168P(2)(b). For the Official Receiver's control over liquidators see s 204.

### [191.03] Report

For a form of the preliminary report under s 191(1), see *Palmer's Company Precedents (17th End) Part II*, pp 146–147.

A further report under s 191(2) shall state in narrative form the facts and matters which the Official Receiver or liquidator desires to bring to the notice of the court and his opinion as required by the section: Companies (Winding up) Rules, r 49. For forms of further reports, see *Palmer* pp 161, 163–164.

Where the Official Receiver or liquidator wants the court to take some action on a report, such as an order for examination, he will apply to the court to fix a day for consideration of the report and the court will fix a day and time for the consideration of the report: Companies (Winding up) Rules, r 50. The application for an appointment is made by inter partes summons.

The consideration of the report will be before the judge personally (ie not a master) in chambers and the party who made the further report shall, and the Official Receiver or liquidator when he is not the party who made the further report, may personally, or by counsel or solicitor, attend the consideration of the report and give the court any further information or explanation with reference to the matter stated in the report which the court may require: Companies (Winding up) Rules, r 51.

## 192. Power of court to appoint liquidators

For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the court may impose, the court may appoint a liquidator or liquidators provisionally or otherwise in accordance with sections 193 and 194.

(Amended 6 of 1984 s 139; 46 of 2000 s 23)

[cf 1929 c 23 s 183 UK]



**[192.01] History**

The section is derived from s 183 of the Companies Act 1929 (UK) (1948 Act, s 237). Minor amendments have been made in 1984 adding the words 'in accordance with sections 193 and 194' and in 2000 adding the words 'provisionally or otherwise'. Section 193 deals with the appointment and powers of a provisional liquidator. Section 194 deals with the appointment etc of liquidators.

For the appointment of a provisional liquidator under the Insolvency Act, see *ibid* s 135. For the appointment of court appointed liquidator under the Corporations Act 2001 (Aust), see *ibid* s 472. For the equivalent of s 192 under the Singapore Companies Act (Cap 50), see s 263.

**[192.02] Overview**

The section provides the general authority for the court to appoint a liquidator (provisionally or otherwise). More specific provisions are made in ss 193 and 194.

**[192.03] Disqualification for appointment as liquidator**

An undischarged bankrupt may not be a liquidator, nor a body corporate: s 278. This applies to both compulsory and voluntary winding-up.

An appointment of a disqualified person is void and the person appointed is liable to a fine: s 278.

Any person who gives or agrees or offers to give to any member or creditor of a company any valuable consideration with a view to securing his own appointment or nomination, or to securing or preventing the appointment or nomination of some person other than himself, as the company's liquidator shall be liable to a fine: s 278A.

**193. Appointment and powers of provisional liquidator before winding-up order**

(Amended 14 of 2016 s 33)

- (1) Subject to the provisions of this section, the court may appoint a liquidator provisionally at any time after the presentation of a winding-up petition and before the making of a winding-up order in respect of a company. (Replaced 14 of 2016 s 33)
- (2) The court may appoint either the Official Receiver or any other fit person to be the provisional liquidator. (Replaced 14 of 2016 s 33)
- (3) Where a liquidator is provisionally appointed by the court, the court may limit and restrict his powers by the order appointing him.

- (4) A provisional liquidator appointed under this section must perform the duties that may be imposed on the provisional liquidator by the court. (Added 14 of 2016 s 33)
- (5) Where a person other than the Official Receiver is appointed as a provisional liquidator under this section, the court may, by the order appointing the provisional liquidator or on the application of the provisional liquidator, determine how the provisional liquidator is to be remunerated. (Added 14 of 2016 s 33)
- (6) The court may, on cause shown, terminate the appointment of a provisional liquidator appointed under this section on application by any of the following—
  - (a) a provisional liquidator;
  - (b) the Official Receiver;
  - (c) a creditor;
  - (d) a contributory;
  - (e) the petitioner;
  - (f) the company. (Added 14 of 2016 s 33)
- (7) A provisional liquidator appointed under this section may resign and on the application of the provisional liquidator, the court may determine whether or not to accept the resignation, and may give any directions and make any orders that the court thinks necessary. (Added 14 of 2016 s 33)

[cf 1929 c 23 s 184 UK]

**[193.01] History**

The section is derived from s 184 of the Companies Act 1929 (UK) (1948 Act, s 238). Subsections (1) and (2) were replaced by the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance 2016 (14 of 2016) for minor drafting improvements. Subsections (4) to (7) were also added by Ord 14 of 2016.

For equivalent provisions see the Insolvency Act 1986 (UK), s 135(2), (4), Insolvency Rules 1986 (UK), rr 4.30(1) and 4.31(1), Corporations Act 2001 (Aust), s 472(2), Companies Act (Cap 50) (Sing), s 267.

**[193.02] Overview**

The court may appoint a provisional liquidator at any time after the presentation of a winding-up petition and before the making of a winding-up order. The purpose of appointing a provisional liquidator prior to the winding-up order is to preserve the company's assets in the interval between the presentation of the petition and



the making of the winding-up order: see *Re Weihong Petroleum Co Ltd* [2002] 1 HKLRD 541, [2002] HKCU 1425; *Re Legend International Resorts Ltd* [2006] 2 HKLRD 192, [2006] 3 HKC 565.

The appointment will be made on terms: sub-s (3). Subsection (4) (based on Insolvency Act 1986 (UK) s 135(4)) was added by Ord 14 of 2016 to expressly provide that the provisional liquidator must perform the duties imposed by the court.

The terms of appointment may, at the time of appointment or at a later time, include powers to carry out a corporate rescue role: *Re Kevview Technology (BVI) Ltd* [2002] 2 HKLRD 290, [2002] HKCU 616. Such a ground for appointment falls within sub-s (3) and is not an abuse of the process of court so long as it was intended that a winding-up order would be sought in the event that a scheme of arrangement could not be achieved and that it was likely that a winding-up order would be granted if it were sought: *Re Luen Cheong Tai International Holdings Ltd* [2002] 3 HKLRD 610, [2002] HKCU 1091, [2003] 2 HKLRD 719 (CA). But the court should not restrict the powers of the provisional liquidators to work out a rescue operation. These two cases were applied in *Re I-China Holdings Ltd* [2003] 1 HKLRD 629, [2002] HKCU 1488 which similarly concerned a listed company and restructuring as a means to realise some value from its listed status. A provisional liquidator was appointed 'to inject some fresh impetus' into its efforts to restructure. See also *Re Fujian Group Ltd* [2003] 1 HKC 659, [2003] HKLRD (Yrbk) 201; *Re Jinro (HK) International Ltd* [2003] 3 HKLRD 459, [2003] 1 HKC 166 (where the petition had already been heard, but no winding-up order yet made - a provisional liquidator cannot be appointed after a winding-up order has been made: see s 193(2)); *Credit Lyonnais v SK Global Hong Kong Ltd* [2003] 4 HKC 104 (CA) (where doubts were first raised about the jurisdiction); *Re Tai Kam Construction Engineering Co Ltd* [2005] HKCU 429 (unreported, HCMP 177/2005, 8 April 2005).

In *Legend International Resorts Ltd* there appears to be some backtracking on a broad exercise of the discretion to give power to provisional liquidators to seek to effect a corporate rescue: see *Re Legend International Resorts Ltd* [2005] 3 HKLRD 16, [2006] 2 HKLRD 192, [2006] 3 HKC 565 (CA). There is no power to appoint provisional liquidators solely for the purpose of enabling a corporate rescue to take place. The company must be insolvent and its assets in jeopardy if the provisional liquidators are to be given such power: s 203. The *Legend* case was distinguished in *Re Plus Holdings Ltd* [2007] 2 HKLRD 725, [2007] HKCU 892, on the basis that in the earlier case the need for the protection of assets was not made out as there were rehabilitation proceedings going on in the Philippines.

Note that the appointment of a provisional liquidator triggers off various consequences: see, eg s 186 (automatic stay of proceedings) and ss 286B and 286C (private examination).

The restricted interpretation placed on s 2(1) in *Re Lehman Brothers Securities Asia Ltd* [2010] 1 HKLRD 58, [2009] HKCU 1281, para 51 (namely, that where PLs were appointed under s 193 and continued as such after the making of the winding-up order, they were not to be regarded as holding office by virtue of s 194) was no longer to be adopted, as the language was apt to include all three types of winding up provisional liquidators mentioned in s 194(1)(a), 194(1)(aa) and 194(1A): *Re MF Global Hong Kong Ltd* [2015] 2 HKLRD 325, [2015]

HKCU 1295 (CA), reversing *Re MF Global Hong Kong Ltd (No 3)* [2012] 5 HKLRD 486, [2012] HKCU 2039 (realisations by PLs both before and after the winding-up order subject to ad valorem fees). The Court of Appeal interpretation given in *Re MF Global Hong Kong Ltd* (above), was confirmed by amendments made to the definition of liquidator in s 2(1) by Ord 14 of 2016.

A provisional liquidation comes to an end at such time as the provisional liquidators or some other persons are appointed liquidators: *Re Lehman Brothers Securities Asia Ltd (No 2)* (above), para 51; see now *Re MF Global Hong Kong Ltd* (above) (and under s 2 at [2.02]).

### [193.03] The appointee

An accountant who has had a continuing professional relationship with a company should not accept an appointment as liquidator of that company if it is insolvent: see *Re Mount Everest Investments Ltd* [1988] CWU No 249 of 1987 (reversed on appeal on non-disclosure and material misstatement points [1988] 2 HKLR 175; *Re The Sun's Group Ltd* [2005] HKCU 566 (unreported, HCCW 425/2003, 24 May 2004); *Re Orient Power Holdings Ltd* [2008] 2 HKLRD 494, [2008] HKCU 260 (where some of the provisions of the Code of Ethics of Professional Accountants are reviewed); and see [194.02].

The same person should not be liquidator of two companies where they are engaged in litigation against one another: *Re Perak Pioneer Ltd (No 2)* [1985] 2 HKC 430, citing *Re Nickel Mines Ltd* (1978) 3 ACLR 685 (Sc, NSW). However, the conflict of interest may be dealt with by separate legal advice: see *Re Arrows Ltd* [1992] BCC 121.

### [193.04] Principles

The principles upon which the court exercises its discretion in appointing a provisional liquidator are well established. Because an appointment foreshadows a winding-up order being made, the petitioner must satisfy the court that there is a good prima facie case for a winding-up order and that the appointment is appropriate. An appointment will be appropriate where the assets of the company are in danger.

*Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105 is the usual starting point. At 1109 Plowman J said that the provision confers a general power on the court to appoint a provisional liquidator depending on the particular circumstances of each case. He accepted the statement in the *Gore-Browne on Companies* (43rd Edn, 1977) paras 30–31 to the effect that a provisional liquidator may be appointed for a company after the presentation of a petition if the company is in danger or it is alleged that those in control are misappropriating or wasting its assets or any other good cause exists. See also *Re Five Lakes Investment Co Ltd and Multiford Co Ltd* [1985] HKLR 273; *Re Shiu Fook Co Ltd* [1989] 2 HKC 342; *Re Eastern Flower Ltd* [1997] CWU No 631 of 1996; *Securities and Futures Commission v Mandarin Resources Corp Ltd* [1997] 2 HKC 166, [1997] HKLRD 405, [1997] 2 HKC 166 (CA); *Re Grandfield Pacific Hotel Ltd (No 2)* [2001] 3 HKLRD 331; *Australian Securities Commission v Solomon* (1996) 19 ACSR 73; *Re Luen Cheong Tai International Holdings Ltd* [2002] 3 HKLRD 610, [2002] HKCU



1091; on appeal [2003] 2 HKLRD 719 (CA); *Re Baldwin Construction Co Ltd & Ors* [2001] 4 HKC 403 (CA); *Re Luckson Ltd* [2003] HKLRD (Yrbk) 175; *Re Prudential Enterprise Ltd (No 2)* [2003] 3 HKLRD 136, [2003] HKCU 258; *Re Zhuang PP Holdings Ltd* [2004] HKCU 591 (unreported, HCCW 321/2004, 30 April 2004); *Re Surplus Trader Ltd & Anor* [2005] 4 HKLRD 436, [2005] HKCU 657; *Re Uniross Batteries (HK) Ltd* [2009] HKCU 223 (unreported, HCCW 9/2009, 29 January 2009); *Tsoi Kwong Shi v Asia Fortune Media Group Ltd* [2016] HKCU 839 (unreported, CACV 248/2015, 12 April 2016).

The court's approach will be different depending on whether the company is solvent or insolvent. In the former case the appointment of a provisional liquidator is unusual: see *Re Five Lakes Investment Co Ltd* (above); *Re Yick Fung Estates Ltd* [1986] HKLR 240 (CA); *Securities and Futures Commission v Mandarin Resources Corp Ltd*, above; *Re K Vision International Investment (HK) Ltd* [2012] 1 HKLRD D2, [2012] HKCU 93 (unreported, HCCW 282/2011, 28 October 2011); *Re Max Sunny Ltd* [2014] HKCU 1803 (unreported, HCCW 84/2014, 27 June 2014).

The court has the power to appoint a provisional liquidator on a petition for compulsory winding-up where the company is already in voluntary winding-up and a liquidator in the voluntary winding-up has already been appointed: *Re Texxan Industries Ltd (in liq)* [1990] 2 HKLR 489, [1990] 2 HKC 347. Where an insolvent company is already in voluntary liquidation and an application is made for a winding-up by the court, it may be that the private provisional liquidator should be replaced by the Official Receiver: see *Re King's Dyeing & Weaving Factory Ltd* [1986] HKC 382. In this case the company had acted deceptively. The original hearing of the application for the appointment of a provisional liquidator (pending the hearing of the winding-up petition) had been adjourned for the company to file evidence in opposition, but the company immediately wound up voluntarily under s 228A and appointed private provisional liquidators. In *Re Texxan Industries Ltd (in liq)* Jones J accepted that the King's case was an exceptional case and in the *Texxan* case he refused to appoint the Official Receiver as the provisional liquidator in place of the existing private provisional liquidator appointed in the s 228A voluntary winding-up.

It is wrong to make an appointment of a private provisional liquidator under s 193 immediately prior to winding-up to avoid having the Official Receiver as provisional liquidator under s 194(1)(a): *Re Kong Wah Holdings Ltd & Anor* [2001] HKCU 423 (unreported, HCCW 49 & 50/2000, 24 May 2001).

See the following cases for examples where applications for the appointment of provisional liquidators were rejected: *Re Fuliham Investment Ltd* [1985] 2 HKC 202; *Re Rutledge Oilfield Service & Supplies Ltd* [1985] CWU No 71 of 1985; *Re Chynchen Associates Ltd* [1987] 1 HKC 311; *Re Shiu Fook Co Ltd* [1989] 2 HKC 342; *Re Hang Tak Buddhist Hall Association Ltd* [2002] 2 HKLRD 863; *Re Grandfield Pacific Hotel Ltd (No 2)* [2001] 3 HKLRD 331; *Re Prudential Enterprise Ltd* [2003] 3 HKLRD 136, [2003] HKCU 358; *Re Luckson Ltd* [2003] HKLRD (Yrbk) 175; *Re Zhuang PP Holdings Ltd* [2004] HKCU 591 (unreported, HCCW 321/2004, 30 April 2004); *Re K Vision International Investment (HK) Ltd* [2006] HKCU 68 (unreported, HCCW 1277/2004, 11 January 2006); *Re Trable Industries Ltd* [2008] HKCU 532 (unreported, HCCW 485/2007, 24 April

2008); *Re Cassis Ltd* [2009] HKCU 399 (unreported, HCCW 560/2008, 3 March 2009).

### [193.05] The application

The application for the appointment of a provisional liquidator may be made any time after the presentation of the petition. Any creditor or contributory, the petitioner or the company itself may apply: see Companies (Winding up) Rules r 28(1).

The application is made by summons in Form 1 to the Forms in the Appendix to the Companies (Winding up) Rules. For precedent application, see 10 *Atkin's Court Forms* (2nd Ed, 1995) pp 438–439.

In urgent cases the application may be made ex parte. The usual undertakings in damages will be required if the appointment is made ex parte: see *Re N & J International Ltd* [1984] CWU No 29 of 1984; *Re Mount Everest Investment Ltd* [1988] CWU No 249 of 1987 (judgment delivered 25 January 1988). As in that case, if any one is dissatisfied with the ex parte appointment, a summons to set aside the appointment can be issued: [1988] 2 HKLR 175 (CA). Full disclosure must be made in the supporting affidavit, especially in an ex parte application. If full disclosure is not made, any appointment made is at risk of being set aside: *Re N & J International Ltd* [1984] CWU No 29 of 1984; *Re Fuliham Investment Ltd* [1985] 2 HKC 202 (appointment made by Mantell J set aside by Power J); *Re Mount Everest Investment Ltd* [1988] 2 HKLR 175 (CA); *Re Yick Fung Estates Ltd* [1986] HKLR 240 (CA); *Securities and Futures Commission v Mandarin Resources Corp Ltd* [1997] 2 HKC 166, [1997] HKLRD 405 (CA); *Re Hong Kong Pharmaceutical Holdings Ltd* [2006] HKLRD (Yrbk) 179, [2006] HKCU 77 (receiver should not be appointed liquidator).

The application should be supported by an affidavit setting out sufficient grounds for the appointment: r 28(1). For material non-disclosure see *Re Performance Investment Products Corp Ltd* [2007] HKCU 1749 (unreported, HCCW 348/2007, 4 October 2007). Before an appointment is made, the applicant must deposit \$3,500 with the Official Receiver towards the fees and expenses of the Official Receiver in connection with the appointment: r 28(1A) (fee increased by LN 286 of 1997). For notice to the Official Receiver of an application for appointment of a provisional liquidator see ORO Circular for Insolvency Practitioners No 5/2014 (3 March 2014).

The order appointing the provisional liquidator shall bear the number of the petition and shall state the nature and a short description of the property of which the provisional liquidator is ordered to take possession, and then the duties to be performed by the provisional liquidator: r 28(2); Form 9 for the form of the order and 10 *Atkin's Court Forms* (2nd Ed, 1995) pp 439–440. For the costs of a failed application see *Re Prudential Enterprise Ltd* [2003] 3 HKLRD 136, [2003] HKCU 358.

Subject to any order of the court, if the provisional liquidator's appointment lapses because no order for winding-up is made on the petition or if made is rescinded or if all proceedings on the petition are stayed, the provisional liquidator is entitled to be paid, out of the property of the company, all the costs, charges and expenses



properly incurred by him as provisional liquidator, including such sum as is or would be payable under the scale of fees in force for the time being where the Official Receiver is appointed the provisional liquidator and may retain out of such property the amounts of such costs, expenses and fees: r 28(3) and see *Re Peregrine Investments Holdings Ltd* [1998] 2 HKLRD 670.

Where any person other than the Official Receiver has been appointed provisional liquidator and the Official Receiver has taken any steps for the purpose of obtaining a statement of affairs or has performed any other duty prescribed by the Companies (Winding up) Rules, the provisional liquidator shall pay the Official Receiver such sum, if any, as the court directs: r 28(4).

### [193.06] Remuneration

Before amendments made by Ord 16 of 2016, section 193 was silent on the question of remuneration but it was held that the court has power when it appoints private provisional liquidators, to make an order specifying how they are to be remunerated. Even where this is not done, the court has an inherent jurisdiction to allow a liquidator to retain his proper remuneration and expenses out of the assets he administers: *Re Berkeley Applegate* [1989] Ch 32; *Re Peregrine Investments Holdings Ltd* [1998] 2 HKLRD 670 (CA); *Re CA Pacific Finance Ltd (No 4)* [2002] 2 HKLRD 25; *Re Cresvale Far East Nominees Ltd* [2004] HKCU 1449 (unreported, HCMP 3019/2004, 30 November 2004); *Re Fidelity Distributors (Hong Kong) Ltd* [2009] HKCU 1246 (unreported, HCCW 310/2007, 20 August 2009); *Re MF Global HK Ltd* [2012] 2 HKLRD 1, [2012] HKCU 276 (unreported, HCCW 356 & 356A/2011, 15 December 2011); *Re MF Global HK Ltd (No 2)* [2012] 3 HKLRD 56, [2012] 4 HKC 333; *Re Performance Investment Products Corp Ltd* [2014] HKCU 658, (unreported, HCCW 348/2007, 17 March 2014). Subsection (5) (added by Ord 14 of 2016, and based on Insolvency Rules 1986 (UK) r 4.30(1)) confirms the power of the court to determine the remuneration of the provisional liquidator, whether in the original order appointing him or at any time upon application of the provisional liquidator. Section 196(1B) (added by Ord 14 of 2016) also confirms that the basis for remuneration in s 196(2) does not apply for the determination of the remuneration of a provisional liquidator in respect of the period before the making of the winding-up order. However, where the provisional liquidator appointed under s 193 continues to act as provisional liquidator under s 194(1)(aa) upon a winding-up order, the remuneration of the provisional liquidator for the period after the winding-up order is governed by s 196(2): see s 196(1B) (added by Ord 14 of 2016). Section 196(1B) preserves the position previously decided under *Re Lehman Brothers Securities Asia Ltd (No 2)* [2010] 1 HKLRD 58, [2010] HKCU 1281 in respect of the basis for remuneration of the provisional liquidator in the period before winding-up but reverses the decision in respect of the period after winding-up.

If the amount is not agreed, it should be taxed. Time costing may be appropriate in some cases. In other cases a scale or percentage basis may be appropriate: see *Re Millie's Shoes Factory Ltd & Ors (in liq) (No 2)* [1985] 1 HKC 522 and, for the previous background, [1985] 1 HKC 548. The fundamental obligation of provisional liquidators (and other office-holders performing similar tasks) is a duty to account, both for the way in which they exercise their powers and for the property they deal with. Office-holders must give full particulars to justify the

amount of any claim for remuneration; they must keep proper records of what they have done and why they have done it; the test is whether a reasonably prudent man, faced with the same circumstances in relation to his own affairs, would lay out or hazard his own money in doing what the office-holders have done: *Mirror Group Newspapers v Maxwell* [1998] BCC 324. For a useful review of the fiduciary basis for provisional liquidators' fees, see *Re Peregrine Investments Holdings Ltd* [1998] 2 HKLRD 670 (CA); *Ma Po Chim Percy v Lee Tung Hai Leo* (sub nom *Re Chungshan Commercial Association Hong Kong*) [2008] HKCU 525 (unreported, HCMP 3253/2004, 20 June 2007 and 17 September 2007) (HC); *Re Lehman Brothers Securities Asia Ltd (No 1)* [2010] 1 HKLRD 43, [2009] HKCU 1258; *Re Lehman Brothers Securities Asia Ltd (No 2)* [2010] 1 HKLRD 58, [2010] HKCU 1281 (but not to be followed on the non-payment of ad valorem fees: see [193.03]). For the rejection of an application for interim payment pre-taxation see *Re Wing Fai Construction Co Ltd* [2003] 1 HKLRD 80, [2002] HKCU 1353; *Re Prudential Enterprise Ltd (No 3)* [2003] 3 HKLRD 136, [2003] HKCU 358.

For power of the court to assess remuneration claims see *Re Express Builders Co Ltd* [2005] 1 HKLRD 92, [2005] 4 HKC 532. For the trustee basis for the fees of a firm appointed to carry out the functions of a preparatory working committee of an association see *Re Chungshan Commercial Association Hong Kong* [2008] 2 HKLRD 511 (CA).

And see generally [196.05].

### [193.07] Removal of provisional liquidator

Prior to amendments made by Ord 14 of 2016, removal of provisional liquidators appointed under s 193 was covered by s 196(1). Section 193(6) was added by Ord 14 of 2016 (based on Insolvency Rules 1986 (UK) r 4.31(1)) to deal specifically with removal of provisional liquidators appointed under s 193. The provision clarifies the position in relation to persons who have standing to apply to the court for removal of a provisional liquidator. As to the meaning of 'cause shown', see [196.04].

For case law prior to introduction of s 193(6) dealing with applications to discharge the appointment of provisional liquidators, see *Re Grandfield Pacific Hotel Ltd (No 2)* [2001] 3 HKLRD 331 (the provisional liquidators were discharged on a balance of justice and convenience). See also *Securities and Futures Commission v Mandarin Resources Corp Ltd* (above), dealing with an application to discharge and to appoint new provisional liquidators; and *Re N & J International Ltd* (1984) CWU No 29 of 1984 and *Re Philipp and Lion Far East Ltd* [1991] CWU No 130 of 1991, where the appointments of provisional liquidators were made and subsequent application to discharge the appointments rejected.

### [193.08] Resignation of provisional liquidator

Prior to amendments made by Ord 14 of 2016, resignation of provisional liquidators appointed under s 193 was also covered by s 196(1). Section 193(7) was added by Ord 14 of 2016 (based on Insolvency Rules 1986 (UK) r 4.31(1)) to deal specifically with resignation of provisional liquidators appointed under s



193. A provisional liquidator who wishes to resign must apply to the court for the court to determine whether or not to accept the resignation.

#### 194. Appointment, style, etc. of liquidators on making of winding-up order

(Amended 14 of 2016 s 34 (1))

(1) The following provisions have effect on a winding-up order being made— (Amended 3 of 1997 s 41; 14 of 2016 s 34(2))

- (a) subject to paragraph (aa) and subsection (1A), the Official Receiver shall by virtue of his office become the provisional liquidator and shall continue to act as such until he or another person becomes liquidator and is capable of acting as such; (Amended 3 of 1997 s 41; 46 of 2000 s 24)
- (aa) where under section 193 a person other than the Official Receiver is appointed as provisional liquidator, he shall continue to act as the provisional liquidator until he or another person becomes the liquidator and is capable of acting as such; (Added 3 of 1997 s 41)
- (b) the provisional liquidator shall summon separate meetings of the creditors and contributories of the company for the purpose of determining whether or not an application is to be made to the court for appointing a liquidator; (Amended 3 of 1997 s 41; 46 of 2000 s 24)
- (c) \* the court may make any appointment and order required to give effect to any such determination, and, if there is a difference between the determination of the meetings of the creditors and contributories in respect of the matter aforesaid, the court shall decide the difference and make such order thereon as the court may think fit;
- (d) the court may make any appointment and order as it thinks fit if the creditors and contributories of the company do not pass a resolution or do not meet; (Replaced 46 of 2000 s. 24)
- (da) if a vacancy occurs in the office of a provisional liquidator who is holding office by virtue of paragraph (aa) or subsection (1A), the Official

Receiver becomes the provisional liquidator and is taken to be the provisional liquidator of the company holding office by virtue of paragraph (a); (Added 14 of 2016 s. 34)

- (e) the Official Receiver shall by virtue of his office be the liquidator during any vacancy;
- (f) a liquidator shall be described, where a person other than the Official Receiver is liquidator, by the style of the liquidator, and, where the Official Receiver is liquidator, by the style of the Official Receiver and liquidator, of the particular company in respect of which he is appointed, and not by his individual name.

(1A) Where the Official Receiver—

- (a) is the provisional liquidator of the company by virtue of subsection (1)(a); and
- (b) is of the opinion that the property of the company is not likely to exceed in value \$200,000,

he may, at any time, appoint 1 or more persons as provisional liquidator in his place. (Added 46 of 2000 s. 24)

- (2) Where the Official Receiver is the liquidator of the company, he may, at any time, apply to the court for the appointment of a person as a liquidator in his place. (Added 3 of 1997 s 41)
- (3) On an application under subsection (2) the court shall either make an appointment or decline to make one. (Added 3 of 1997 s 41)
- (4) Where a liquidator is appointed by the court under subsection (3), the liquidator shall give notice of his appointment to the company's creditors and contributories in accordance with the directions of the court. (Added 3 of 1997 s 41)
- (5) In a notice under subsection (4), the liquidator shall state his intention to summon meetings of the company's creditors and contributories, in accordance with section 206, for the purpose of determining—
  - (a) whether or not an application is to be made to the court for the appointment of a committee of inspection to act with the liquidator; and
  - (b) who are to be the members of the committee, if appointed. (Added 3 of 1997 s 41)



- (6) To avoid doubt, if a person appointed as a provisional liquidator of a company under section 193 continues to act as the provisional liquidator of the company under subsection (1)(aa) on a winding up order being made, the person is a provisional liquidator holding office by virtue of subsection (1)(aa). (Added 14 of 2016 s 34(4))

[cf 1929 c 23 s 185 UK]

### [194.01] History

The section is derived from s 185 of the Companies Act (UK) (1948 Act, s 239). A minor amendment was made to paragraph (d) in 1984 deleting the introductory words 'in any case'. Subsections (1)(aa), (2), (3), (4) and (5) were added by s 41 of the Companies (Amendment) Ordinance (Ord No 3 of 1997) (with effect from 10 February 1997: LN 57 and LN 58 of 1997). Minor amendments were made to sub-ss (1)(b) and (d) in 1997 substituting provisional liquidator for Official Receiver. Subsection (1)(b) was amended by 46 of 2000 with effect from 1 July 2000 to remove the words 'in the place of the provisional liquidator' as the closing words of the subsection, to replace sub-s (1)(d) and to add sub-s (1A). Subsection (1)(da) was added by the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance (14 of 2016) to clarify that the Official Receiver acts as provisional liquidator at any time where there is a vacancy in the office of provisional liquidator (prior to the appointment of a liquidator proper). Subsection (6) was also added by Ord 14 of 2016 to reverse the decision in *Re Lehman Brothers Securities Asia Ltd (No 2)* [2010] 1 HKLRD 58, [2010] HKCU 1281 that a provisional liquidator appointed under section 193 who continues in office under section 194(1)(aa) is not a person holding office by virtue of section 194.

Equivalent sections are the Insolvency Act 1986 (UK), ss 136 and 163, Companies Act (Cap 50) (Sing), s 263. There is no equivalent under the Australian Corporations Act 2001.

### [194.02] Overview

The section contains various provisions as to the position of the Official Receiver in relation to the office of liquidator and the description of the liquidator in a compulsory winding-up.

On a winding-up order being made, the Official Receiver will be the provisional liquidator until he or some other person becomes liquidator, unless some person other than the Official Receiver was appointed provisional liquidator before the winding-up order was made, in which case that person shall continue to act as provisional liquidator until he or another person becomes the liquidator. Such continuation does not require an application to the court: *Re Peregrine Investment Holdings Ltd (No 3)* [1999] 3 HKC 183.

As indicated previously [188.01], the Official Receiver was the liquidator in most liquidations in Hong Kong. In rare cases a private liquidator was subsequently appointed separately at separate meetings of creditors and contributories. This was

unlikely to happen save in those cases where there will be funds to pay the liquidator's fees and expenses. The amendments introduced with effect from 1 July 2000 make greater provision for their appointment.

Where a winding-up order has been made, the provisional liquidator must summon separate meetings of the creditors and the contributories of the company to determine whether an application is to be made to the court for a private liquidator to be appointed in the place of the provisional liquidator, of the position under the Insolvency Act 1986 (UK) where the liquidator has the discretion whether or not to summon meetings and see [194.05] below. The court may make any appointment and order required to give effect to such determination. If the meetings choose different liquidators, or if they fail to meet or fail to pass a resolution, the court must decide who, if any one, shall be liquidator and make such order thereon as it thinks fit. The court has a wide discretion in this matter; *Re Hung Fung Holdings Ltd* [2001] 3 HKLRD 692, [2002] HKCU 443 (inter alia for the relevance of s 287); *Re Luen Cheong Tai Construction Co Ltd* [2002] HKCU 1354 (unreported, HCCW 190/2002, 14 November 2002); *Re Orient Power Holdings Ltd* [2008] 2 HKLRD 494, [2008] HKCU 200 (only in rare and exceptional cases should the offices of liquidator and receiver be combined in one person); and see [193.04]; *Re A-One Investment Ltd* [2009] HKCU 1588 (unreported, HCCW 448/2008, 11 September 2009); *Re Pan Sino International Holding Ltd* [2010] HKCU 1147 (unreported, HCCW 144/2009, 27 May 2010). For the use of the same liquidator in a company group situation see *Re Yiu Wing Construction Co Ltd* [2003] HKLRD (Yrbk) 193, [2002] HKCU 732 (and see [193.03]); *Re Keen Lloyd Resources Ltd* [2004] HKLRD (Yrbk) 147, [2004] 2 HKC 33. And the court may override the nomination of the first meeting: see *Re Luen Cheong Tai Construction Co Ltd* (above); *Re Luen Yick Water & Drainage Works Ltd* [2003] HKLRD (Yrbk) 192. If a private liquidator has been appointed and a vacancy occurs, for example, if the appointed liquidator dies, the Official Receiver becomes the liquidator.

A private liquidator must be described, for example, for the purposes of any proceedings, by the style of the liquidator of the particular company in respect of which he is appointed and not by his individual name. Similarly, where the Official Receiver is the liquidator he must be described as Official Receiver and liquidator of the company in respect of which he is liquidator.

Where the Official Receiver is the liquidator of a company, he may apply to the court for the appointment of a person in his place. Presumably the Official Receiver will nominate a replacement, having first obtained the views of the creditors or other interested persons: see *Re Five Oceans Supply Services Ltd* [2002] HKLRD (Yrbk) 167 (affirmed on appeal). For the power of the court to appoint a liquidator to fill a vacancy in the office of a liquidator appointed by the court see s 196(3).

### [194.03] Appointment of private liquidator

A private liquidator may be appointed by the court after a determination has been made at separate meetings of creditors and contributories. If the meetings chose different persons, or if they fail to meet or fail to pass a resolution the matter will be resolved by the court: see *Re Akai Holdings Ltd* [2001] 2 HKLRD 411, [2002] HKCU 1323. In an insolvent liquidation the court will have regard to the wishes of the major creditors as against those of the contributories: s 287.



If there has been no provisional liquidator appointed prior to the making of the winding-up order, the Official Receiver will become the provisional liquidator on the making of the order: ss 194(1)(a) and (aa). In appropriate circumstances it may be more convenient to leave the Official Receiver to become liquidator pursuant to s 194(1)(d), but have the creditors' nominee appointed as special manager under s 216: *Re WF Fearman Ltd (No 2)* (1988) 4 BCC 141. If the Official Receiver is, by virtue of sub-s (1)(a), the provisional liquidator and he is of the opinion that the property of the company is not likely to exceed \$200,000 he may appoint one or more persons as provisional liquidator in his place: sub-s (1A). For the tender scheme for outsourcing small liquidations to the private sector see *Re Good Success Catering Group Ltd* [2005] HKCU 21 (unreported, HCCW 542/2004, 24 September 2004); *Re Bondfield International Ltd & Anor* [2005] HKCU 1457 (unreported, HCCW 99/2002 and HCCW 711/2002, 20-23 October, 15 November 2003 and 27 January 2005), paras 10 *et seq.* For the powers of a provisional liquidator appointed under sub-s (1A) see s 199(5).

#### [194.04] Status of the liquidator

For the status of a liquidator see [196.06].

#### [194.05] First meetings of creditors and contributories

Unless the court directs otherwise, the meetings of creditors and contributories under s 194 (the first meetings of creditors and contributories) must be held within three months after the date of the winding-up order: Companies (Winding up) Rules r 106. The dates of such meetings shall be fixed and they shall be summoned by the provisional liquidator: [194.02].

The provisional liquidator shall forthwith (ie as soon as possible after the winding-up order has been made) give notice of the dates fixed by him for the first meetings of creditors and contributories by advertisement in the Gazette: r 107. The appropriate form of such advertisement is set out in Form 103(2) in the Appendix to the Rules. It also appears that advertisement in one or more local newspapers is required under r 114(1) (see Form 75). As to variations to the Forms, see r 3.

The first meetings must be summoned as set out in Companies (Winding up) Rules rr 108–111. Notices of first meetings may be in Form 18 (creditors) and Form 19 (contributories) and the notices to creditors must state a time within which the creditors must lodge their proofs in order to entitle them to vote at the first meeting: r 109. Forms of proof and of general and special proxies must be enclosed with the notices. The notices must state the date and time by which the proxies must be lodged with the provisional liquidator. The notice must state whether or not the statement of affairs (see [190.02]) has been lodged. If it has, a summary of the statement and any supplementary affidavit in relation to that statement must be enclosed with the notice. A note to the notice informs the creditors and contributories that they may, at their separate meetings, amongst other things, by resolution, determine whether or not an application is to be made to the court to appoint a liquidator in place of the provisional liquidator and by resolution, determine whether or not an application is to be made to the court for the appointment of a committee of inspection, ie a committee of creditors or

contributories (see ss 206 and 207), to act with the liquidator and who are to be the members of the committee if appointed. For committees of inspection, see ss 206–208.

Notice of the first meetings must also be given by the provisional liquidator to the directors and other officers of the company who in the provisional liquidator's opinion ought to attend: r 110 and Form 20 for the form of notice. It is the duty of every director or officer who receives notice of such meeting to attend and any failure to do so shall be reported by the provisional liquidator to the court: r 110. There is no specific penalty for failure to attend; cf s 190(5) (see [190.06]). Presumably the court would make an order to attend and, on the director or officer failure to do so, commit him or her for contempt.

The liquidator or provisional liquidator must, as soon as practicable, send to each creditor mentioned in the statement of affairs or a supplementary affidavit in relation to that statement and each person appearing from the company's books or otherwise to be a contributory, a summary of the statement of affairs and any supplementary affidavit, including the causes of the company's failure, and any observations thereon which the provisional liquidator may think fit to make: r 111(1). This assumes that the statement of affairs has been submitted. The proceedings of the first meeting are not invalidated by reason of any such summary or any notice required by the rules not having been sent or received before the meeting: r 111(1).

Where the company has been in voluntary winding-up prior to the winding-up order, the Official Receiver may in his discretion send to the creditors and contributories or any of them an account of such voluntary winding-up: r 111(2). The first meetings will determine whether or not the applications mentioned above or either of them shall be made to the court and such other matters as appropriate.

The first meetings will determine whether or not the applications mentioned above or either of them shall be made to the court and such other matters as appropriate. The court may override the decision of the meeting: *Re Luen Cheong Tai Construction Co Ltd* [2002] HKCU 1354 (unreported, HCCW 190/2002, 14 November 2002).

In the case of a first meeting of creditors or of an adjournment thereof a person shall not be entitled to vote as a creditor unless he has duly lodged with the liquidator not later than the time mentioned for that purpose in the notice convening the meeting or adjourned meeting a proof of the debt which he claims to be due to him from the company: r 124(1).

Where there is no committee of inspection appointed, the functions of such committee which devolve on the court by virtue of s 208 may be exercised by the Official Receiver: r 198. As soon as possible after the first meetings have been held, the Official Receiver, or the chairman of the meeting, shall report the result of each meeting to the court: r 45(1). The form of the report of result of the meeting is set out in Form 24. The form reports on the number attending and the amount of the creditors' claims admitted for voting or the contributories' shareholdings, the matters put to the meeting and the majorities carrying the resolute, set out in tabular form.

If each of the meetings passes the same resolution or the resolutions passed are



subsection (6) commits an offence and is liable on conviction to a fine.

### [296E.01] History

This section was added by the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance, Ord 14 of 2016, s 105.

### [296E.02] Overview

This section enables a person, who has received a document or information by electronic means or who has received notification that a document or information is made available on a website, may request the provisional liquidator or liquidator for a hard copy.

## PART VI

### RECEIVERS AND MANAGERS

#### 297. Disqualification for appointment as receiver

- (1) A body corporate shall not be qualified for appointment as receiver of the property of a company.
- (2) Any body corporate which acts as receiver as aforesaid shall be liable to a fine. (Amended 22 of 1950 Schedule; 6 of 1984 s. 259; 7 of 1990 s. 2)

[cf 1929 c 23 s 306 UK]

#### [297.01] History

The section is derived from s 306 of the Companies Act 1929 (1948 Act s 366).

There has been some criticism of this restriction but it was supported by the Cork Committee in its Report at para 744.

The amendments in 1950 and 1984 increased the fine. The 1990 amendment put the quantum of the fine into the Twelfth Schedule.

For equivalent sections, see Insolvency Act 1986 (UK) s 30, Companies Act (Sing) s 217(1)(a). In Australia, see Corporations Act (Aust) s 418(1), 418(3).

#### [297.02] Overview

Only a natural person can be a receiver of the property of a company. Any body corporate which acts as such receiver shall be liable to a fine.

For body corporate, see s 2(3).

The appointment of a body corporate as receiver is absolutely void: see *Portman Building Society v Gallwey* [1955] 1 All ER 227. Any act done by such receiver will be ineffective and the appointment of such receiver will be ineffective to make a floating charge crystallise.

Persons disqualified under Part IVA (s 168C *et seq*) may be disqualified from acting as receiver or manager: see s 168D.

#### 297A. Disqualification of undischarged bankrupts

No person being an undischarged bankrupt shall be qualified for appointment as receiver or manager of the property of a company on behalf of debenture holders, and if such person acts as such receiver or manager, he shall be guilty of an offence and liable to imprisonment and a fine.



(Added 6 of 1984 s 209. Amended 7 of 1990 s 2)  
[cf 1948 c 38 s 367 UK]

### [297A.01] History

The section is derived from s 367 of the Companies Act 1948.

The section was added in 1984 following a recommendation of the Companies Law Revision Committee in its Second Report 1973, para 9.2. The Committee also recommended, following a similar recommendation in the Jenkins Committee Report that the disqualification should apply without exception. Section 367 permitted the court to appoint an undischarged bankrupt as receiver. The wording of s 367, as amended, was adopted for s 297A.

The 1990 amendment put the quantum of the fine into the Twelfth Schedule.

For equivalent sections, see Insolvency Act 1986 (UK) s 31 and Companies Act (Sing) s 217(1)(b). There is no equivalent section in Corporations Act (Aust).

### [297A.02] Overview

The appointment of an undischarged bankrupt as receiver is absolutely void: see s 297A above.

## 297B. Inducement affecting appointment etc. as receiver or manager

- (1) A person who gives, or agrees or offers to give, to any other person valuable consideration with a view to-
  - (a) securing his or her own appointment or nomination as the receiver or manager of the property of a company; or
  - (b) securing or preventing the appointment or nomination of some person other than himself or herself as the receiver or manager of the property of a company,
 commits an offence and is liable on conviction to a fine.
- (2) Subsection (1) does not apply-
  - (a) if-
    - (i) the person who gives, or agrees or offers to give, the valuable consideration is a practice unit;

- (ii) the person who is given, or agreed or offered to be given, the valuable consideration is an employee of the practice unit; and
  - (iii) under an arrangement between the practice unit and the employee, the employee's remuneration is based in whole or in part on introductions obtained for the practice unit through the employee's efforts; or
- (b) if the appointment or nomination of a person as the receiver or manager of the property of a company is the result of-
- (i) a transfer or sale of the business, or a part of the business, of a practice unit; or
  - (ii) a change in composition of a practice unit within the meaning of section 32I(1) of the Professional Accountants Ordinance (Cap. 50).

(3) In this section-

*practice unit* (執業單位) has the meaning given by section 2(1) of the Professional Accountants Ordinance (Cap. 50).

(Added 14 of 2016 s 106)

### [297B.01] History

This section was added by the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance, Ord 14 of 2016, s 106.

### [297B.02] Overview

The purpose of the section is to discourage touting for appointment as receiver or manager of the assets of a company. Subsection (2) provides exceptions for the situations set out in s 500.65 of the Hong Kong Institute of Certified Public Accountants' Professional Ethics in Liquidation and Insolvency.

See s 278A under para [278A.02].

## 298. Power to appoint Official Receiver as receiver for debenture holders or creditors

Where an application is made to the court to appoint a receiver on behalf of the debenture holders or other creditors of a company which is being wound up by the court, the Official Receiver may be so appointed.



[cf 1929 c 23 s 307 UK]

**[298.01] History**

The section is derived from s 307 of the 1929 Act (1948 Act s 368).

For equivalent section, see Insolvency Act 1986 (UK) s 32. There is no equivalent in Corporations Act (Aust). In Singapore, see Companies Act (Sing) s 217(1)(d).

**[298.02] Overview**

Where the company is being wound by the court, occasionally in the past application was made by the debenture holders or other creditors for the appointment of a receiver, in which case this section permits the Official Receiver to be appointed: see *British Linen Co v South American and Mexican Co* [1894] 1 Ch 108 (CA).

For debentures, see Companies Ordinance (Cap 622) ss 308 to 332.

The appointment of a receiver is one of the remedies of debenture holders.

The application should be made by summons in the winding-up: Companies (Winding up) Rules rr 5(3), 7(2).

For the receiver's register of transfers and transmission, see Rules of High Court O 87.

**298A. Receivers and managers appointed out of court**

- (1) A receiver or manager of the property of a company appointed under the powers contained in any instrument, or a holder of debentures of the company, may apply to the court for directions in relation to any particular matter arising in connexion with the performance of the functions of such receiver or manager, and on any such application the court may give such directions, or may make such order declaring the rights of persons before the court or otherwise, as the court thinks just.
- (2) A receiver or manager of the property of a company appointed as aforesaid shall, to the same extent as if he had been appointed by order of a court, be personally liable on any contract entered into by him in the performance of his functions, except in so far as the contract otherwise provides, and entitled in respect of that liability to indemnity out of the assets; but nothing in this subsection shall be taken as limiting any right to indemnity

which he would have apart from this subsection, or as limiting his liability on contracts entered into without authority or as conferring any right to indemnity in respect of that liability.

- (3) This section shall apply whether the receiver or manager was appointed before or after the commencement# of the Companies (Amendment) Ordinance 1984 (6 of 1984) but subsection (2) shall not apply to contracts entered into before the commencement of that Ordinance.

(Added 6 of 1984 s 210)

[cf 1948 c 38 s 320 UK]

**Editorial Note:**

# Commencement date: 31 August 1984.

**[298A.01] History**

The section was added in 1984. It is derived from s 87 of the Companies Act 1947 (1948 Act s 369).

The addition was recommended by the Companies Law Revision Committee in its Second Report 1973, paras 9.3 to 9.5. As the Cohen Committee had noted, unlike receivers appointed by the court there was no right for a receiver appointed out of court to apply to the court for directions. Secondly, whereas a receiver appointed by the court to manage a business had a right to indemnity out of the assets in respect of contracts he made as receiver, but was personally responsible in respect of orders given by him unless the contract otherwise provided, a receiver appointed out of court was as a rule the agent of the company and not personally responsible unless he pledged his own credit. In some cases, they said, receivers appointed out of court had ordered goods and not paid for them, but the proceeds of realisation had been applied for the benefit of the debenture holders, the seller of the goods being left to sue the company, which had no assets. The Cohen Committee's recommendations to rectify these defects were incorporated in s 369 of the Companies Act, 1948. The extension of s 369(1) to debenture holders was recommended by the Jenkins Committee and this was made in the Insolvency Act 1986 s 35(1) giving 'the persons by whom or on whose behalf a receiver or manager has been appointed' the right to apply for directions.

The Jenkins Committee further recommended that the court should be empowered to relieve a receiver appointed under an invalid charge or in circumstances that do not justify such appointment, wholly or in part, from any liability he may incur in respect of anything done or omitted to be done by him while purporting to act as receiver, so long as the act or omission would have been proper had his appointment been valid; the court should be empowered to hold the person making the appointment liable to the extent that the receiver is relieved from liability by the court. The Companies Law Revision Committee recommended this addition. This was not taken up in 1984 nor in the United Kingdom until Insolvency Act 1985: see now Insolvency Act 1986 s 35.



For equivalent sections, see Insolvency Act 1986 (UK) ss 35, 37, Corporations Act (Aust) ss 419, 424, Companies Act (Sing) s 218(3), 218(4).

There is no definition of either 'receiver' or the type of 'manager' referred to in s 298A in s 2. For construction of references to receivers and managers, see s 302A.

### [298A.02] Overview

The subsection (1) applies to receivers and managers of property of a company appointed out of court enabling them to apply to the court (ie the Court of First Instance: s 2(1)). Holders of debentures may also apply for directions.

Subsection (2) deals with the personal liability of a receiver in respect of contracts made by him.

### [298A.03] Appointment out of court

The power to appoint a receiver or manager will be contained in a debenture or charge or in the case of a mortgage of land power to appoint a receiver will be implied under s 50 of the Conveyancing and Property Ordinance (Cap 219), unless excluded. For annotations of the receiver provisions of the Conveyancing and Property Ordinance, see Nield, *The Hong Kong Conveyancing and Property Ordinance*, Butterworths 1988.

The appointment of a receiver out of court is one of the remedies available to a secured creditor. Generally, upon default, the creditor is entitled to take possession of the mortgaged property but this can give rise to liabilities. Since a receiver is invariably deemed to be the agent of the borrower (see [298A.07]), by appointment of a receiver the creditor can avoid such liabilities.

The fundamental role of a receiver, in its basic form, is to receive, ie to collect, the income of the mortgaged property, so that such income may be used towards satisfaction of the mortgage debt and interest thereon, if any. In practice, much wider powers will be given to the receiver, eg powers to sell the security or parts of the mortgaged property and, in the case of a charge over the whole undertaking of a business, to carry on the business. In the latter context, the receiver requires business and financial skills which the receiver may not have. But unless given the power to manage, a receiver cannot do so. The receiver's role in its basic form is passive.

If a more active role is required, eg in the case of a business, it will be necessary to appoint a manager and the security documentation should provide for the appointment of a receiver and manager or receiver or manager. The same person may be appointed receiver and manager. Alternatively, separate appointments may be made. In practice in the case of businesses many appointments are of two or more partners in a firm of accountants.

On the differences between receivers and managers, see *Re Manchester and Milford Rly Co* (1880) 14 Ch D 645 at 653; *AIDC v Co-operative Farmers & Graziers Direct Meat Supply Ltd* [1978] VR 633; *Marshall v Cottingham* [1982] Ch 82; *Li Lai-fun & Ors v Centro-Sound Ltd* [1986] HKC 541.

Many, but not all, receiverships end in the liquidation of the debtor company. The more profitable parts of a business might be 'hived off' into a new company which could be sold, leaving the shell of the old company to be wound up. Alternatively, loss-making parts of a business might be sold off to pay the debts, leaving a viable core business. So receivership may in some cases be a 'rescue' procedure. It was the potential of receivership to save companies that led the Cork Committee to propose a somewhat similar procedure not dependent on being expressed or implied in security documentation, ie the administration order procedure. The receiver is sometimes called the company doctor as compared to the liquidator who is sometimes called the company undertaker.

For the impact of the Protection of Wages on Insolvency Ordinance on work outs, see [178.01].

### [298A.04] When appointment out of court made

The appointment must be made according to the terms of the document containing the power of appointment. First, it must be checked that the document containing the power of appointment is itself valid; if it is not, the power falls with it. For example, where the power is contained in a mortgage or charge which was given for an unauthorised purpose and the lack of authority was known to the lender: *see Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 (CA).

A power is exercisable only in the events specified in the document containing the power or in the case of the statutory implied power under the Conveyancing and Property Ordinance in the events specified in s 50(1). A premature appointment will be invalid.

There is no implied power to appoint a receiver out of court of the ground that the security is in jeopardy: *Cryne v Barclays Bank plc* [1987] BCLC 548 (CA).

An injunction may be obtained restraining an intended appointment or restraining a receiver from acting under a purported appointment. The court may require payment into court of money due or an undertaking in damages as a condition of granting the injunction.

The power must be exercised in the manner specified in the document containing the power or in the case of the statutory implied power in the manner specified in s 50(1) of the Conveyancing and Property Ordinance.

An invalid appointment will make the receiver and the appointor liable in damages for any loss caused to the debtor: *Cryne v Barclays Bank plc*, above, and *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295 (PC).

The power of appointment is exercisable under s 50(1) of the Conveyancing and Property Ordinance when the mortgage money has become due. Express or extended statutory powers will specify 'events of default' upon the happening of which the power is exercisable, ie they 'trigger' the exercise of power of appointment.

But sometimes, depending on the construction of the mortgage, some prior declaration/demand/notice may be required: see *Dao Heng Bank Ltd v Lam Ying Bor Investment Co Ltd* [1987] 1 HKC 217, on appeal [1987] 3 HKC 103.



If the debt is payable on demand, demand must be made and the debtor given a reasonable time to implement the mechanics of payment: see *Bank of Baroda v Panessar* [1987] Ch 335; *Sheppard & Cooper Ltd v TSB Bank plc* [1996] 2 All ER 654.

An error in the demand does not invalidate the demand and the subsequent appointment is not invalidated because of the error in the demand: *NRG Vision Ltd v Churchfield Leasing Ltd* [1988] BCLC 624.

Even if the event of default on which the appointor has relied has not in fact occurred, the appointment may be upheld on the basis that some other event of default has occurred: *Byblos Bank SA v Al-Khudhairi* [1988] BCLC 322 (CA). But this may not be possible if the appointment particularised the non-occurring event, ie it may be safer not to be too specific in the terms of the appointment.

The lender may take advantage of even technical breaches to trigger the appointment: *Canberra Advance Bank Ltd v Benny* (1993) 11 ACLC 148 (Fed Ct Full Ct).

If an event of default has occurred, the lender is under no duty to refrain from making an appointment on the ground that it will inevitably damage the company, if only in its reputation: *Re Potters Oils (No 2)* [1986] 1 All ER 890, *Shamji v Johnson Matthey Bankers Ltd* [1986] BCLC 278;; [1991] BCLC 36 (CA).

An appointment may not be made for an improper purpose (abuse of power), see *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295 (CA).

#### [298A.05] Form of appointment of receiver out of court

The appointment will generally be made in writing: see Conveyancing and Property Ordinance (Cap 219) s 50(1) and *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 375.

Since a receiver may have to execute deeds as attorney on behalf of the debtor, it is safer to make the appointment under seal. But in *Phoenix Properties Ltd v Wimpole Street Nominees Ltd* [1992] BCLC 563, where there was power of attorney to the receiver in the security documentation and an appointment under hand, it was held that the receiver could execute deeds; also see *Man Kou-tan v Timewin Development Ltd* [1987] 3 HKC 504.

The appointment must be within the terms of the power of appointment. If the power refers to the appointment of a receiver, only one receiver may be appointed (but see s 15(c) of the Conveyancing and Property Ordinance where that section applies, ie to any instrument affecting land). For multiple appointments, see (1995/96) 2 The Receivers, Administrators & Liquidators Quarterly (RALQ) 261 (Picarda), citing, inter alia, *DFC Financial Services Ltd v Samuels* [1990] 2 NZLR 156 (NZCA); *NEC Information Systems Australia Pty Ltd v Lockhart* (1991) ACLR 658; *Kendle v Melsom* (1998) 193 CLR 46; and see (*Aitken*) [1991] Co & SecsLJ 187;; (1994) 1 RALQ 255 (Tyler).

#### [298A.06] When appointment made out of court takes effect

The appointment takes effect when the document of appointment is received and accepted by the receiver: *Cripps (Pharmaceutical) Ltd v Wickenden* [1973] 2 All ER 606; *NZI Securities Australia Ltd v Poignand* (1994) 12 ACLC 550, 555.

In the United Kingdom, the time from which the appointment is effective is now provided for in the Insolvency Act 1986 (UK) s 33.

#### [298A.07] Effect of appointment out of court

A receiver appointed out of court is usually expressed to be the agent of the borrower by the security documentation and see Conveyancing and Property Ordinance s 50(2) for similar effect for appointments made under that Ordinance.

Otherwise the receiver will be the agent of the appointor: see *Gosling v Gaskell* [1897] AC 575 (HL) and see [1986] 1 QB 669 (CA); *Re B Johnson & Co (Builders) Ltd* [1955] Ch 634 (CA); *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295 (CA), (1991) 9 C&SLJ 395; (Adenwala).

The receiver ceases to be the agent of a borrower company when the company is wound up but the receiver does not automatically become the agent of the appointor. The liquidation of the company does not affect the receiver's right to hold the mortgaged property and (where he has power) to dispose of it and s 182 of the Companies Ordinance (invalid disposition) does not apply: see *Sowman v David Samuel Trust Ltd* [1978] 1 All ER 616; *Re Corona Corduroy Factory Ltd* [1987] 1 HKC 385.

The security documentation usually provides that the receiver is to be the attorney of the borrower for the purpose of sale, etc but the absence of such power of attorney does not prevent the receiver assigning in the name of the debtor by affixing his own seal on behalf of the debtor: see *Man Kou-tan v Timewin Development Ltd* [1987] 3 HKC 504. On the interaction of winding-up and receivership, see (1979) 53 ALJ 264 (O'Donovan).

Where a receiver under the Conveyancing and Property Ordinance is selling s 53 (1) (sale) and s 52 (protection of purchaser) of that Ordinance apply.

As a general rule, a receiver cannot sue in his own name, but there may be exceptional cases where he could do so where a cause of action is vested in him: *Liu Yiu Keung v Keen Lloyd Resources Ltd* [2006] 3 HKLRD 280.

One important effect of the appointment of a receiver, whether out of court or by the court is to crystallise a floating charge. Notice of the receiver's appointment is not necessary to crystallise the charge: *Alberta Paper Co Ltd v Metropolitan Graphics Ltd* (1983) 49 CBR (NS) 63. Even though the floating charge may have crystallised and become a fixed charge, nevertheless it may not be as effective as a charge originally created as a fixed charge. By virtue of s 79 of the Companies Ordinance (Insolvency Act 1986 (UK) ss 40 and 196), debts which would be preferential debts on winding-up (see s 265) are payable out of assets in the hands of the receiver in priority to principal and interest due under the charge. And under s 265(3B) (Insolvency Act 1986 (UK) s 175(2)), on winding-up, where the assets



are insufficient to pay preferential debts, they shall be paid out of the property comprised in the charge.

For the personal liability of receiver to pay these debts, see *IRC v Goldblatt* [1972] 1 Ch 498.

The effect of these provisions may be avoided by taking a combined fixed and floating charge and appointing the receiver under both. For deeds of priority or postponement, see *Cheah Theam Swee v Equiticorp Finance Group Ltd* [1992] 1 AC 472 (PC) and for the effect of such deeds on s 79, see *Re Portbase Clothing Ltd* [1993] Ch 388.

Section 79 applies, subject to any effective variation of the order of priority by deed of priority or postponement, under whichever of several charges the receiver is appointed: *Re H&K (Medway) Ltd* [1997] 2 All ER 321, not following *Griffiths v Yorkshire Bank plc* [1994] 1 WLR 1427.

On the appointment of a receiver out of court, the powers of the directors are suspended. The court order on the appointment of a receiver by the court may provide for a similar effect. But the directors may be able to contest the appointment of the receiver (see *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] QB 814, doubted in *Tudor Grange Holdings Ltd v Citibank NA* [1992] Ch 53, (1996) 17 Co Lawyer 131) and their statutory duties remain: see (1996) 17 Co Lawyer 131. For the problems of the non-recognition of receivers, especially those appointed out of court, by PRC courts see *McDonald v Golden Dynasty Enterprises Ltd* [2008] 5 HKLRD 569, [2008] HKCU 1574.

#### [298A.08] Duty of care of receiver appointed out of court

The receiver's primary duty is to protect the interests of the mortgagee in recovering the monies due under the mortgage, even though this may be disadvantageous to the borrower (and consequently to subsequent mortgagees, other creditors and guarantors). But the receiver must act in good faith in so doing. For a comparison of the respective duties of a mortgagee and a receiver see *Silven Properties Ltd v Royal Bank of Scotland* [2000] 4 All ER 484, CA, Eng).

This duty is an equitable one, not a duty in tort: see *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295 (PC).

Failure by a receiver to trigger rent review procedures, thereby causing loss to the borrower, will make the receiver liable to the borrower: *Knight v Lawrence* [1993] BCLC 215.

A selling receiver owes the same duty on sale as a selling mortgagee. So a receiver may choose his own time to sell: *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536 (PC).

The appointor will not be also liable for breach of the receiver's duty unless it has interfered in or directed the receiver's activities: *American Express International Banking Corp v Hurley* [1985] 3 All ER 564.

For possible limitation or exclusion of liability, see *Bishop v Bonham* [1988] 1 WLR 742 (CA).

Note the effect of the Transfer of Businesses (Protection of Creditors) Ordinance for this Ordinance on a sale by a receiver. This Ordinance makes a transferee of a business liable for the debts of the transferor unless notice of the transfer has been given in the Gazette, two Chinese language newspapers and one English language newspaper not more than four months and not less one month before the completion of the transfer: see ss 3, 4 and 5. section 5(2) deals specifically with the form of the notice where the transfer is by way of sale under a charge.

The predecessor of this Ordinance, the Fraudulent Transfers of Businesses Ordinance (1923), indicates the purpose behind the legislation. But it affects genuine transactions as well. The current Ordinance was enacted in 1980 to replace the earlier Ordinance. The definition of transferor was amended (see now s 2 'transferor' para (a)) to get around the decision in *Emsworth Ltd v Burdett* [1978] HKLR 506, which had held that a chargor could not be a transferor where the sale was by a receiver not appointed by the chargor, even though such receiver was deemed to be the agent of the transferor.

For the resolution of a long standing issue on the limitation of time for institution of proceedings under the Ordinance see *OTC International AG v Perfect Recovery Ltd* [2009] 3 HKLRD 13.

The Ordinance does not apply to a transferee where the transfer is effected by a person selling under a charge which has been registered for not less than a year when the transfer takes effect: s 10(4). Registration may be under the Land Registration Ordinance (Cap 128), the Companies Ordinance or the Bills of Sale Ordinance (Cap 20): see s 2 'registered charge'.

#### [298A.09] Appointment of receiver by the court

Generally, a receiver is appointed out of court under the terms of the relevant document, usually a mortgage or charge. Appointments by the court are expensive and take time to effect. An application for a court appointed receiver should only be made in extreme cases where no other remedy is available to preserve the assets: see *Bond Brewing Holdings Ltd v National Australia Bank Ltd* (1990) 8 ACLC 330 (and on the application for leave to appeal *National Australia Bank Ltd v Bond Brewing Holdings Ltd* (1990) 169 CLR 271, where the necessity for an undertaking in damages was stressed); *Guo Jing Jing v Artmaster Investment Ltd* [2009] HKCU 1992 (unreported, HCA 1008/2009, 11 December 2009 (receiver may be appointed on interlocutory application); and *Re Zealot & Co Ltd* [2008] 1 HKLRD 386, [2007] HKCU 1123 (interim receiver); *Top One International (China) Property Group Co Ltd v Top One Property Group Ltd* [2009] HKCU 1627, 16 October 2009, HCA 1244/2009; *Macau First Universal International Ltd v Ding Xiaohong* [2011] 3 HKLRD 27; *Lu Jun v Yu Qi* [2013] HKCU 1776 (unreported, HCCW 282/2910, 2 August 2013; *Compania Sud Americana De Vapores v Hin-Pro International Logistics Ltd* [2014] HKCU 1675 (unreported, HCMP 1449/2014, 17 July 2014, on appeal [2015] 2 HKLRD 458, [2015] 2 HKC 436 (CA) (appeal dismissed); leave to appeal to CFA granted [2016] HKCU 246 (unreported, FAMV 33/2015, 2 February 2016).

The founding principle is that the court may appoint a receiver to protect the property of a company where disputes between members of the governing body prevent its affairs from being carried out properly: *Featherstone v Cook* (1873)



LR 16 Eq 298, followed in *W v W & Anor* [1998] 2 HKLRD 77. Such a power, being discretionary, is flexible and should be exercised on a similar basis to that of an interlocutory injunction: *Chinese United Establishments Ltd v Cheung Siu Ki* [1997] 2 HKC 212, followed in *W v W & Anor* (above); *Upplan Co Ltd v Li Ho Ming* [2010] HKCU 1788, HCA 1915/2009 26 June 2009, 20 August 2010.

See further on interim receiver *Achieve Goal Holdings Ltd v Zhong Xin Ore-Material Holdings Ltd* HCA 1987/2005 and [2008] HKCU 1826 Unreported, CACV 324/2008, 1 September 2014; *Macau First Universal International Ltd v Ding Xiaohong* [2011] 2 HKLRD 27, [2011] HKCU 498 and (No 2) [2012] 2 HKLRD 494, [2012] HKCU 552; *Chan Ching v Beijing Rui He Ltd* [2013] HKCU 1376 (unreported, HCMP 1359/2012, 14 June 2013. For partial receiver (eg, in *Mareva* cases) see *Akai Holdings Ltd v Ho Wing On Christopher* [2009] HKCU 1308 (unreported, HCCL 37 and 40/2005, 1 September 2009); *Pioneer Iron and Steel Group Co Ltd (in liq) v Chen Ningning* [2013] HKCU 2149, HCMP 1827/2013, 31 July 2013 (note comments on RHC O 59 r 14 (3B)); *Tiong King Sing v Sam Boon Peng Yee* [2013] HKCU 421 (unreported, HCA 1517/2011, 22 February 2013).

A receiver may be appointed even though there is no default under the charge or other event of default has occurred: *Re Victoria Steamboats Ltd, Smith v Wilkinson* [1897] 1 Ch 158.

It is usual to also seek accounts and inquiries and other relief.

For the power of the court to appoint a receiver or manager under Companies Ordinance (Cap 622) s 725, see that section.

Application for a court appointed receiver may be made notwithstanding a receiver has been appointed out of court.

The jurisdiction of the High Court in relation to the appointment of receivers by the court is set out in s 21L of the High Court Ordinance (Cap 4). The procedure is contained in Rules of the High Court O 30. Application is by summons or motion: O 30 r 1(1). Application may be made *ex parte* on affidavit: O 30 r 1(3) and see the *Bond* case, above. For details of Rules of the High Court O 30, see Clarke, *Hong Kong Civil Court Practice*, LexisNexis Butterworths and for the similar order in England and Wales, O 30, the latest *White Book*.

The receiver may have to give security; but see *McIntyre v Perks* (1987) 15 NSWLR 417.

The court may make an immediate appointment of a named person or merely direct that a receiver be appointed.

Such receiver is an officer of the court and not the agent of any party, see *McDonald v Golden Dynasty Enterprises Ltd* [2008] 5 HKLRD 569, [2008] HKCU 1174.

Interference with such receiver will amount to contempt of court and/or liability for additional costs incurred by the receiver: *McIntyre v Perks*, above.

On the supervisory role of the court over a receiver or manager appointed by it, see *Duffy v Super Centre Development Corp Ltd* [1967] 1 NSW 382.

For application for discharge of receiver see *Re Birmingham International Holdings Ltd* [2015] HKCU 2019 (unreported, HCMP 395/2015, 28 August 2015).

On receivers generally, see Ho, *Security for Credit*, Butterworths 1992.

### [298A.10] Application for directions

Application is made by originating summons: Rules of the High Court O 5 r 3, O 102 r 2(1). The originating summons shall be in Form No 10 of the forms in the Appendix to the Rules of the High Court: O 102 r 2(2).

For the title of the proceedings, see O 102 r 6.

If the company is also in liquidation, leave of the court will be required, eg where the receiver seeks possession of assets in the hands of the liquidator, and the proceedings will be by way of summons in the winding-up, with the debenture holder as the applicant: *Re Wan Hin & Co Ltd (in liquidation)* (unreported, MP No 750 of 1998), relying on *Re Henry Pound, Son & Hutchins* (1889) 42 Ch D 402 (CA). See also *Hill v O'Driscoll* [1998] 2 HKLRD 994.

### [298A.11] Forms

The best precedents for applications under this section and other sections in this group are to be found in *Butterworths Company Precedents* (2nd ed) Vol 3 p 350 *et seq*. Some precedents can be adopted from the Receivers section of 33(1) *Atkin's Court Form* (2nd edn) (2011 issue).

### [298A.12] Personal liability of receiver

A receiver appointed out of court is personally liable on the contracts made by him as receiver, subject to his right to be indemnified out of the property subject to the debenture or charge: s 298A(2). For the background to this subsection, see [298A.01].

A receiver may, and usually does, exclude this personal liability: *Re Ernest Hawkins & Co Ltd* (1915) 31 TLR 247.

The appointment of a receiver by the court usually operates as a dismissal of the company's employees and the employees do not become the receiver's employees: *Parsons v Sovereign Bank of Canada* [1913] AC 160 (PC); *International Harvester Export Co Ltd v International Harvester Australia Pty Ltd* (1982) 7 ACLR 391 (SC Vic); *Nicoll v Cutts* [1985] BCLC 322, 325 (CA);

*Sipad Holdings ddpo v Popovic* (1996) 19 ACLR 108 (1995/96) 2 RALQ 267 (Fed Ct), noted in (1995/1996) 2 RALQ 267. Since the appointment terminates the employees' contracts of employment there can be no question of the receiver adopting the employees' contracts, as may happen where the receiver is appointed out of court: *Nicoll v Cutts*, above. On the problems in this regard met with in the United Kingdom, see *Powdrill v Watson* [1995] 2 All ER 65 (HL).

But the receiver, whether appointed by the court or out of court, will be liable on contracts made by him; in the case of an out of court appointment the company



will also be liable, if the receiver is agent of the company.

Pre-receivership contracts other than contracts of employment continue until terminated by the receiver, but he will not be personally liable on such contracts unless he assumes personal liability. But a receiver may be liable to specific performance in respect of a pre-receivership contract.

The receiver appointed out of court in occupation of rented premises under the receivership does not need to pay the rent because it is due under a pre-receivership contract, but because the landlord has his remedy of re-entry or forfeiture for non-payment of rent, in practice the receiver will need to pay the rent in order to retain the occupation of the premises. The same applies in the case of a receiver appointed by the court.

### [298A.13] Receiver's indemnity

A receiver who is made personally liable in the course of his duties carried out in good faith is entitled to be indemnified out of the assets over which he is receiver: *Re British Power Traction and Lighting Co Ltd* [1910] 2 Ch 470. Where a receiver is appointed out of court he should negotiate an indemnity from the debenture holders or mortgagee before accepting the appointment. In the United Kingdom, there is now a statutory right of indemnity: Insolvency Act 1986 (UK), s 37(3).

A receiver is not a person to whom Cap 622 ss 902-904 (power of court to grant relief) apply; cf Corporations Act (Aust), s 1318 (power to grant relief) includes court appointed receivers.

## 299. Notification that receiver or manager appointed

- (1) Where a receiver or manager of the property of a company has been appointed, every invoice, order for goods or business letter issued by or on behalf of the company or the receiver or manager or the liquidator of the company, being a document on or in which the name of the company appears, shall contain a statement that a receiver or manager has been appointed.
- (2) If default is made in complying with the requirements of this section, the company and any of the following persons who knowingly and wilfully authorizes or permits the default, namely, any officer of the company, any liquidator of the company and any receiver or manager, shall be liable to a fine. (Replaced 6 of 1984 s. 211. Amended 7 of 1990 s. 2)

[cf 1929 c 23 s 308 UK]

### [299.01] History

The section is derived from s 308 of the Companies Act 1929 (1948 Acts 370).

For equivalent sections, see Insolvency Act 1986 (UK) s 39, Corporations Act (Aust) s 428, Companies Act (Sing) s 222.

### [299.02] Overview

The fact that the company is in receivership or under a manager must appear in all the relevant company documents. Failure to do this may result in a fine. But the section does not affect the validity of any contracts made pursuant to documents not disclosing the appointment.

The conventional manner of disclosing the appointment is to add after the company's name '(in receivership)' or '(receiver and manager appointed)' or '(manager appointed)'.

### [299.03] Notice of appointment pursuant to Cap 622 s 348(1)

Cap 622 s 348(1) requires notice of the appointment of a receiver or manager to be given by the appointor to the Registrar of Companies within seven days of the appointment: see Cap 622 s 348(1). The specified form is NM5.

The Companies Registry practice for notification of appointment is contained in two circulars/letters to the Secretary of the Law Society dated 20 February 1984 and 26 November 1984 relevant parts of which are extracted below:

20 February 1984

s 348(1) of the Companies Ordinance (Cap 622)

Registration of Enforcement of Security

The purpose of this circular is to explain a change in the Companies Registry's policy regarding s 87 of the Companies Ordinance, Cap 32.

Up to now, the Registry's policy has been as follows:

- (a) Where an appointment has been obtained for a manager or receiver from the court, the Registry has filed a sealed copy of the order together with the Notice of Appointment. The Companies Registry has accepted the notice signed by either the person making the appointment or by his professional advisers.
- (b) However, where an appointment of a receiver or manager has been made under an instrument where the courts have not been involved, the Registry has only been willing to accept a Notice signed by the appointor and has been reluctant to accept a signature by professional advisers on behalf of the appointor.

The reason for the difference in treatment referred to in paras (a) and (b) above is that where an appointment of a receiver or manager has been made by the courts,



the validity of the appointment is beyond question as the facts appear in the body of the order. However, where an appointment has been made under an instrument and the courts have not been involved, the Registry has tried to insist on the appointor signing the Notice of Appointment personally because the Registry does not wish to be involved in subsequent arguments over whether the appointor really made the appointment. It is always possible that an appointor's professional advisers might have misconstrued the situation and filed the Notice without proper authority. Instances of such confusion have occurred.

This policy regarding the appointment of receivers and managers other than through the courts has, however, met with the objection that there does not appear to be a statutory form, which makes it clear that in such circumstances a Notice of Appointment must be signed by the appointor. The purpose of this circular is to advise your members that in future the Notice of Appointment may be signed by professional advisers provided that at the same time a document from the appointor authorising the professional advisers to sign the Notice of Appointment on his behalf is also sent to the Registrar of Companies.

There is a further point which I wish to draw to your members' attention. Although there is no statutory form of Notice of Appointment, the Companies Registry has suggested the use of a form based on the UK's Form 19-4 of the *Encyclopaedia of Precedents*, Vol 6 p 1366. This form has now been updated as Form No 53 of the Companies (Forms) Regulations 1979. It is re-printed in *Buckley on the Companies Acts*, Vol 2, 14th Ed, p 1873.

I would be grateful if you would draw the attention of your members to this circular.

(P Murphy)

p Registrar General

(Registrar of Companies)

26 November 1984

Section 87 of the Companies Ordinance (Cap 32)

(as amended by the Companies Amendment) Ordinance 1984)

Notice to Registrar of appointment of receiver or manager or of mortgagee taking possession

I refer to the circular dated the 20th February 1984, a copy of which is enclosed, in respect of the Companies Registry's policy regarding Section 87 of the Companies Ordinance Cap 32.

As you are aware the Companies (Amendment) Ordinance 1984 repealed and replaced Section 87 with effect from the 30th November 1984.

The purpose of this circular is to confirm that the policy as set out in the circular dated 20th February 1984 -

- (1) remains unchanged with regard to notice given by a receiver or manager appointed either by order of the Court or under the powers contained in any instrument; and
- (2) applies, in so far as it is applicable, to notice given by a mortgagee entering into possession. Thus a Notice of Mortgagee entering into possession should be signed by such person or his professional advisers, provided that in the latter case at the same time a document from the Mortgagee authorising the professional advisers to sign the said Notice on his behalf is also sent to the Registrar of Companies.

I would be grateful if you would draw the attention of your members to this circular.

(PF Grindey)

p Registrar General

(Registrar of Companies)

### 360 Power of court to fix remuneration on application of liquidator

- (1) The court may, on an application made to the court by the liquidator of a company, by order fix the amount to be paid by way of remuneration to any person who, under the powers contained in any instrument, has been appointed as receiver or manager of the property of the company, and may from time to time, on an application made either by the liquidator, or by the receiver or manager, vary or amend any order so made. (Amended 6 of 1984 s 212)
- (2) The power of the court under subsection (1) shall, where no previous order has been made with respect thereto under that subsection, -
  - (a) extend to fixing the remuneration for any period before the making of the order or the application therefor; and
  - (b) be exercisable notwithstanding that the receiver or manager has died or ceased to act before the making of the order or the application therefor; and
  - (c) where the receiver or manager has been paid or has retained for his remuneration for any period before the making of the order any amount in excess of that so fixed for that period, extend to requiring him or his personal representatives to