

Execution against land is completed by seizure, by the appointment of a receiver, or by the making of a charging order under s 20 of the High Court Ordinance (Cap 4): s 269(2)(c).

**[183.07] Effect of the section**

The effect of the section is not quite so drastic as it appears. It has been accepted for many years that s 183 is to be read with ss 181 and 186: *Re Exhall Coal Mining Co* (1864) 4 De G J & Sm 377; *The Constellation* [1965] 3 All ER 873 (arrest and sale of ship equivalent to sequestration and execution); *Daemar v Opeskin* (1985) 10 ACLR 67 (CA NSW). So a landlord will be permitted under these sections to levy distress for rent accrued after the commencement of the winding up where, for example, the liquidator retained possession of the premises to sell the business of the company as a going concern. Sequestration or distress commenced before the presentation of the petition, but not completed when the petition was presented will generally be allowed to proceed. Note that s 269 deals only with execution and attachment. On preferential payments and distress, see s 265(5).

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Subdivision 4

Commencement of Winding Up

*(Replaced 14 of 2016 s 27)*

**184. Commencement of winding up by the court**

- (1) Where before the presentation of a petition for the winding up of a company by the court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.
- (2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.

*[cf 1929 c 23 s 175 UK]*

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**[184.01] History**

The section is derived from s 175 of the Companies Act 1929 (UK) (1948 Act, s 229).

For equivalent sections see the Insolvency Act 1986 (UK), s 129, Corporations Act 2001 (Aust), ss 513A and 513D, Companies Act (Cap 50) (Sing), s 255.

### [184.02] Overview

The commencement of a winding up by the court is backdated to the time of the presentation of the petition or in the case where the company was already in a voluntary winding up to the passing of the resolution to wind up.

The reference to 'the time of' the resolution etc excludes the general rule as to the computation of time in s 71 of the Interpretation and General Clauses Ordinance (Cap 1) where under the day on which an event happens from which a period of time is measured is excluded, so that the effect of s 184 is that if the resolution was passed or the petition presented on 1 January, then 1 January is the relevant date.

For the commencement of a voluntary winding up see s 230, ie the time of the passing of the resolution to wind up.

For the commencement of a voluntary winding up under a special procedure under s 228A see s 228A(3)(a), ie the time of delivery of the statutory declaration to the Registrar of Companies. ☺

Time ceases to run for the purposes of the Limitation Ordinance (Cap 347) from the making of the winding up order, except as against the petitioning creditor, when time ceases to run from the presentation of the petition: *Re Cases of Taffs Well Ltd* [1992] Ch 179.

The commencement of the winding up is relevant, inter alia, to avoidance of disposition of property (s 182), avoidance of attachments (s 183), unfair preferences (s 266), avoidance of floating charges (s 267), preferential payments (s 265) and disclaimer of onerous property (s 268). The fact that s 184(2) has a relation back effect rendering a payment made after the commencement of the winding up void retrospectively under s 182, does not mean that at the time a bank honoured a cheque of the company it was not a valid and duly authorised payment at the time and therefore recoverable by the bank from the payee: see *Bank of East Asia Ltd v Rogerio Sou Fung Lam & Anor* [1988] 1 HKLR 181 (CA). For the effect of winding up of the vendor on a sale and purchase see *Goldlion Properties Ltd v Regent National Enterprises Ltd* [2008] 3 HKLRD 104, [2008] HKCU 398 (CA); and; (2009) 12 HKCFAR 512 (CFA) (the case involved a *force majeure* clause) and see [182.03].

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## Subdivision 5

### Consequences of Winding Up Order

(Replaced 14 of 2016 s 28)

#### **185. Copy of order to be delivered to Registrar**

On the making of a winding up order, a copy of the order shall forthwith be delivered by the company, or otherwise as may be prescribed, to the Registrar for registration.

(Replaced 6 of 1984 s 133)

### [185.01] History

The section is derived from s 176 of the Companies Act 1929 (UK) (1948 Act, s 230). The terms of the section are a modernised version of the original section.

For the equivalent sections see the Insolvency Act 1986 (UK), s 130(1), Corporations Act 2001 (Aust), s 470, Companies Act (Cap 50) (Sing), s 262(1), (2).

### [185.02] Overview

The notice to the Registrar of Companies is in fact given by the Official Receiver: see below.

For the giving of notice of the order to the Official Receiver see Companies (Winding up) Rules, r 34. The notice may be in Forms 12 and 13 of the Forms in the Appendix to the Rules. For the drawing up of the order see r 35(1). For form of order see Form 14 and 9(4) *Atkin's Court Forms* (2nd Edn) (2006 issue) Forms 131 to 135.

The order must contain at its foot a notice stating that it is the duty of the company secretary and any officer of the company who is liable to make out a statement of affairs to attend on the Official Receiver at such time and place as he may appoint and to give him all information he may require: r 35(2).

Three copies of the order sealed with the seal of the court must be sent forthwith by the Registrar of the High Court to the Official Receiver r 36(1)(a). The Official Receiver shall arrange for a sealed copy of the order to be served on the company and shall forward to the Registrar of Companies the copy of the order which by s 185 is directed to be so forwarded by the company: r 36(1)(b). The Official Receiver shall forthwith cause notice of the order to be gazetted: r 36(1)(c). On gazetting, see rr 202, 203 and Forms 103 and 104.

For the form of the notice, see Form 103(1) in the Forms in the Appendix to the Companies (Winding up) Rules. The Official Receiver shall forthwith send notice of the order to such local paper as the court may from time to time direct or in default of such a direction, as he may select: r 36(1)(d). No papers have been directed. Advertisements which are required by any ordinance, rules or regulations or order of a court or tribunal, to be placed in a newspaper, shall (unless otherwise provided) be in the language of that newspaper: High Court of Hong Kong Practice Directions 3.1 Part II para 2.1. Some or all of these provisions also apply to orders for the appointment of a provisional liquidator.

Gazetting and registration in the Companies Registry of the winding up order do not give deemed notice of the winding up to a third party: see *Official Custodian for Charities v Parway Estates Developments Ltd (in liq)* [1985] Ch 151 (CA) (company's landlord held not to have waived right to forfeit lease, the terms of which included the usual right of re-entry on the tenant going into liquidation when the landlord accepted rent in ignorance of winding up order being made).

For costs, see [180.09]. For appeals, see [180.10].

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## 186. Actions stayed on winding up order

When a winding up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose.

[cf 1929 c 23 s 177 UK]

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### [186.01] History

The section is derived from s 177 of the Companies Act 1929 (UK) (1948 Act, s 231).

For equivalent sections, see the Insolvency Act 1986 (UK), s 130(2); Corporations Act 2001 (Aust), s 471B; Companies Act (Cap 50) (Sing), s 262(3).

### [186.02] Overview

The section provides for an automatic stay on a winding up order being made and on the appointment of a provisional liquidator. This automatic stay should be contrasted with the need to apply for a stay under s 181 after the presentation of a petition and before a winding up order has been made. The action or proceeding can only be proceeded with or commenced with the leave of the court. The relevant court is the Companies Court in its winding up jurisdiction.

The purpose of the section is to prevent a company in compulsory liquidation or having a provisional liquidator appointed (under s 193) to have its assets wasted in litigation: *Re David Lloyd & Co* (1877) 6 Ch D 339 at 344 (CA). Moreover, having established a statutory scheme to apply in winding up, the policy is that that scheme should be adhered to, rather than allowing individuals to pursue their own litigation: [169.03]. It is sometimes said that the rationale of the section is to maintain equality amongst creditors, but an unsecured creditor could not improve his priority even if allowed to proceed and being successful: *Re Aro Co Ltd* [1980] 1 Ch 196 (CA) (where leave to proceed under the section was granted because the plaintiff had become a secured creditor upon the issue of the writ in rem against a ship). Also see *Re Keen Lloyd Resources Ltd* [2004] HKLRD (Yrbk) 147, [2004] 2 HKC 33.

For the appointment of a provisional liquidator, see s 193. The section should be read with ss 181 and 183; and *Junestar Investment Corp v Baldwin Construction Co Ltd* [2003] 3 HKLRD 618, [2003] HKCU 1001. Section 186 should be read with ss 181 and 183; see *Re Chit Lee Holdings Ltd* [2000] 2 HKLRD 363, [2000] 2 HKC 481. See [182.02] for anticipatory and retrospective orders. Section 186 is extended to voluntary winding up by s 255(1); see *Penta-Ocean Construction Co Ltd v Treasure Properties Ltd* [2005] HKLRD (Yrbk) 161, [2005] HKCU 260; *Cheung Ying Lun v Legal Way Ltd* [2014] 1 HKLRD 106, [2013] HKCU 2651.

### [186.03] Proceedings

For the meaning of proceeding, see also [181.03]. Distress is a proceeding within s 186: *Halkirk Co Ltd v Carrion Holdings Ltd* [1985] HKLR 21, [1985] HKCU 3 (CA), on appeal from *Re Carrion Holdings Ltd* [1983] 1 HKC 491.

Leave to appeal against the variation of a restraint order under the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) does not require leave, because of the terms of s 17(3) of Cap 405: *Re Bank of Credit and Commerce Hong Kong Ltd* [1992] 2 HKLR 46, [1992] 1 HKC 282; *Re Promail International (HK) Ltd* [2005] HKCU 1068, (unreported, HCCW 373/2002, 10 August 2005). Arbitration is a proceeding: see *Re Vassal Pty Ltd* (1983) 8 ACLR 683 (Qld SC); *Re UDL Contracting Ltd* [2000] 1 HKC 390; *B + B Construction Co Ltd* [2002] HKLRD (Yrbk) 140. A criminal prosecution against a company is a proceeding within s 186: *R v Dickson* (1992) 94 Cr App R 7. An application for an order for possession by a mortgagee exercising its power of sale requires leave: *Re Keen Lloyd Resources Ltd* [2004] HKLRD (Yrbk) 147, [2004] 2 HKC 33 and see *Re Forefront International Ltd* [2005] HKCU 139 (unreported, HCCW 622/2004, 27 January 2005) and [2005] HKCU 194, 4 February 2005).

No leave is required to raise a set-off: *Mersey Steel & Iron Co v Naylor Benzon & Co* (1882) 9 QBD 648 (CA). Leave is required to raise a counterclaim for a larger amount than that claimed: *Langley Constructions (Brixham) Ltd v Wells* [1969] 2 All ER 46 (CA).

On the *locus standi* of a person proceeding without leave, see *Daemar v Opeskin* (1985) 10 ACLR 67 (Sc, NSW).

A summons for leave under s 186 was held not to be a 'proceeding' within the terms of a deed of compromise in *Trident Investment Co Ltd v Axona International Credit & Commerce Ltd* [1985] HKLR 94, [1985] HKCU 11 (CA), reversing Jones J in *Re Axona International Credit & Commerce Ltd* [1985] 2 HKC 675. Leave is required to claim a payment in where the claim is admitted by the liquidators: *Re Precast Piling and Engineering Co Ltd* [2005] 2 HKC 10, [2005] HKLRD (Yrbk) 135.

### [186.04] Application for leave

Leave is sought by an application to a master in chambers (see Practice Direction 3.1 Part II para 1.1(a)) by summons in the winding up proceedings: see *Companies (Winding up) Rules*, r 7(2) and Form 1 in the Forms in the Appendix to the Rules. For precedents, see 9(3) *Atkin's Court Forms* (2nd Edn, 2006) Forms 150–152.

A draft of the proposed statement of claim, etc should be exhibited to the affidavit or affirmation supporting the summons.

The nature of the applicant's claim must be stated with the same particularity as a statement of claim: *Trident Investment Co Ltd v Axona International Credit & Commerce Ltd* [1985] HKLR 94, [1985] HKCU 11. Copies of documents filed at court in winding up proceedings should be served on the Official Receiver within 24 hours of filing: r 23A. The Official Receiver should be heard on the application before the court exercises its discretion.