FortyTwo Talks:
Winding Up 101

Iris Ferber KC & Alexander Bailey

Iris Ferber KC: Welcome to *FortyTwo Talks.* This latest miniseries covers topics relating to Insolvency, and I am Iris Ferber KC.

Alex Bailey: And I am Alex Bailey, and this episode is 'Winding Up 101'.

Iris Ferber KC: So, Alex what is winding up?

Alex Bailey: Well Iris, people die - companies get wound up.

Now, the process of winding up involves placing a company into liquidation, which basically means someone coming in, an IP - that's an insolvency practitioner, who takes control of the company in place of the directors, and the IP then disposes of all of the company's assets and liabilities so that the company can be closed down.

Iris Ferber KC: So, if you want to kill a company, you wind it up?

Alex Bailey: Yes, absolutely.

Iris Ferber KC: Okay, all righty. I want to kill a company then, Alex, what is the first step I need to take?

Alex Bailey: Drafting a winding up petition is that first step.

Iris Ferber KC: Oh, okay. What is a winding up petition?

Alex Bailey: Put simply - it's a form which starts the court process, it's a bit like a claim form would start the process in civil proceedings.

Iris Ferber KC: That makes sense to me, who can do that?

Who can start a petition?

Alex Bailey: Broadly, there are three types of petitions:

Ones that are drafted by creditors, that's people who are owed money by the company, that's the most common type of petition.

Ones that are drafted by the company itself.

And ones that are drafted by a statutory body like the FCA, or those drafted by an officer of the Magistrate's Court, or those drafted by the government.

Iris Ferber KC: Okay, well let's imagine then that we're looking at a creditor's winding up because as you say, that's the most common type of winding up.

Alex Bailey: Yes absolutely.

Iris Ferber KC: Let's imagine you're a creditor, you've drafted a winding up petition, what do you do with it once you've drafted it?

Alex Bailey: Well, the first step is you present it, and presenting it in this circumstance means sending it to court, it's much like issuing a claim form in civil proceedings.

Iris Ferber KC: Okay, so I'm getting that in the companies' court, in relation to winding up procedures, there are some words that are a bit different from the county court procedures but broadly, there are similarities. Similarities enough that as long as you've got the words right and you know what you're doing, you can work out what you need to do.

Alex Bailey: Yes, absolutely so.

Iris Ferber KC: Okay, so you've drafted and you want to present a winding up petition, presumably you can't just do that against any old company for any reason, there must be some condition for being able to present a winding up petition about a particular company to the court.

Alex Bailey: Yes, absolutely.

Iris Ferber KC: So, what's the condition?

Alex Bailey: The condition is that the company is unable to pay its debts, i.e. the company is insolvent.

Iris Ferber KC: Okay, is that just a phrase without a definition, or does the Insolvency Act contain some definition of unable to pay its debts?

Alex Bailey: There is a definition within the Insolvency Act, and it more or less goes as follows, so, you can either, if you are the petitioner that is, you serve a demand for a debt that you are owed, so long as it's over £750 and that demand isn't paid within three weeks of you serving it.

Iris Ferber KC: Oh, hang on, just stop there for a minute, Alex, so if it's bang on £750 or less than £750, then you can still serve the demand, can't you?

Alex Bailey: Yes.

Iris Ferber KC: But it won't be enough to then wind up the company with.

Alex Bailey: No, absolutely not. It's got to be more than £750. So, it could be £750.01, it just has to be more than £750.

Iris Ferber KC: Okay, got it. So that's one way of being able to prove that a company's unable to pay its debts.

Alex Bailey: Yes.

The second way, this is in no particular order, or the company has failed to pay a judgment debt.

The third way, again in no particular order, or you just say the company is unable to pay its debts as they fall due, and the court hearing the petition then has to decide if that's true.

The fourth way is if the value of the company's assets is less than the value of its liabilities, and sometimes in law we hear this called 'balance sheet insolvency'.

Iris Ferber KC: Okay, so not being able to pay its debts then is kind of, sounds like what it is. It's the company not being able to pay invoices that it's obliged to pay, and that can either be proved by serving a demand for more than £750 that isn't then paid, or that there's a judgment debt that hasn't been paid that in itself would be enough, or you've got to prove to the court in some other way that the company can't pay its debts, or you've got a more, a slightly different thing, which is to say that whether or not the company's actually paying invoices as they're being presented to it, it actually has assets that are worth less than its liabilities.

So that's your four types of insolvency.

Okay, and let's say you're the creditor you've drafted a petition on one of those terms and you've presented it to court, you've issued it in other words, at court. What are the consequences?

What happens next?

Alex Bailey: So, the first thing is the court will endorse a hearing date on the petition, and basically that means the court office put the court seal on the petition, and they are going to add a hearing date on the relevant section of the form.

They're then going to send it back to the petitioner, who is the creditor. The creditor then becomes the petitioner more formally. The petitioner, as the creditor has then become, then has to serve the petition on the company at its registered office.

There is then a small gap of time before the next stage of the process, which is the advertising of the petition, and this is sometimes called 'gazetting' or 'giving notice' but all three are the same thing. That's 'advertising', 'gazetting', and 'giving notice' - those all mean the same thing.

Iris Ferber KC: Okay right, so you've drafted the petition, you've presented it at court, you've received the endorsed sealed copy, you've served it on the company, and now you're waiting for the petition to be advertised in that gap that you've mentioned, Alex.

Alex Bailey: Yes.

Iris Ferber KC: Now, that sounds to me like an important part of the process because presumably until the petition is publicly advertised, no one knows it's happened, but the moment it is publicly advertised, then it is a public piece of information, and everybody can see that that company's in trouble, and that must affect reputation.

Alex Bailey: Yes, absolutely, and this is very important. There are indeed very serious consequences once that petition is advertised, not least all of the company's creditors will become aware of the situation at that point, and so they may seek to call in debts, there may be insolvency clauses within the specific contracts, banks may freeze accounts because all of these creditors, all of these people that the company may owe money to, they're going to want to protect their individual interests, and so they will be taking steps as soon as they see, and some of these companies will be very actively looking in The Gazette to see these notices to see if a company they have an interest in is going to become insolvent or is in difficulties.

So yes, there are very serious consequences, mainly it's that reputational damage and what flows from that reputational damage.

Iris Ferber KC: Okay, so that gap then between the petition being served on the company and the petition being advertised, that must be important, I'm guessing.

Alex Bailey: Very.

Iris Ferber KC: We'll talk about that in a minute, but firstly, how long is that gap in time between service of the petition at the registered office and advertisement?

Alex Bailey: It's only seven business days, and that's at the minimum. Sometimes the advertisement may take longer, but often it doesn't, so the company has to assume that it will be advertised shortly after the seven business day deadline.

So that does allow the company a little bit of time to either pay the debt or negotiate with the creditor so that they withdraw the petition before it's advertised in The Gazette, or if that's not possible and the debt is disputed, then the company can use that time to apply to court for an injunction to restrain advertisement in The Gazette, and again, this is all to stop those consequences that flow from this becoming public knowledge and being in The Gazette.

Iris Ferber KC: Okay, so really the moment a company receives at its registered address a served, endorsed, sealed petition, it's got seven working days to get something done.

Alex Bailey: Yes.

Iris Ferber KC: Or assume after those seven working days that there'll be an advertisement, even if in the end The Gazette is a bit later on doing that, it's possible The Gazette will advertise on time and it really will be just the seven working days.

So, there's a lot to do, in other words, isn't there, for a company that receives a petition at its registered address.

Alex Bailey: There is, a lot to consider.

Iris Ferber KC: Okay, now what if all of those things that you mentioned, Alex, paying the debt, negotiating for withdrawal of the petition, or seeking an injunction to restrain advertisement, if none of that happens, and the petition is advertised, we've used that word, or gazetted or notified. If that happens, the petition is advertised, does that actually mean?

What does it involve?

Alex Bailey: So, in short, it is advertised in The Gazette. That's why it's also called gazetting, the notice in The Gazette has to contain particular things in it, basically it's a pro forma.

Iris Ferber KC: What is The Gazette?

Alex Bailey: Well, The Gazette's own website says this, *"The Gazette was first published in 1665 after Charles II relocated his court to Oxford to escape the Great Plague".* Now, his exiled courtiers were so terrified of the disease that they were unwilling to even touch London newspapers for fear of contagion, and so The Oxford Gazette was born.

With the plague abating and Charles II and his court moving back to London, The Oxford Gazette was renamed The London Gazette in 1666. The Gazette now, unsurprisingly, is online and it is the combination of three publications, that's The London Gazette, The Belfast Gazette, and The Edinburgh Gazette. They make up The Gazette as we now know it.

It is the UK's official journal of record. The Gazette consists largely of hundreds of different types of statutory notices, they mostly relate to corporate and personal insolvency, which we're touching on today, and the estates of deceased persons.

Iris Ferber KC: Fascinating, thank you, Alex.

So, it's a very, very, very ancient, publication - The Gazette.

Alex Bailey: Steeped in history.

Iris Ferber KC: So, the petition has been drafted, presented, issued, served, and now advertised, a hearing date has been endorsed on the petition, so we know when the hearing is going to be.

Now, if I am the creditor, now called the petitioner, what do I need to do to prepare for that first hearing of the petition?

Alex Bailey: As the petitioner, you need to prepare and lodge a particular set of documents with the court. Now, at least five days before the first hearing...

Iris Ferber KC: Now, is that days full stop or business days, Alex?

Alex Bailey: That's business days, and this is very important.

It's five business days before the first hearing, you need to file with the court and serve the demand or unpaid judgment, if there was any, the petition, a certificate of compliance, and this is very, very important.

Iris Ferber KC: And often it's missed

Alex Bailey: And often it is missed.

You need to serve the certificate of compliance, again, this is five business days before the hearing. The official form is actually called a 'Comp 3', and it can be found online, you can get it from the gov.uk website, again it's a pro forma. It must be signed and dated by the petitioner or their solicitor, it must state the date of the presentation of the petition, the date fixed for the hearing, the date on which the petition was served, the date on which it was advertised, it must be filed with it also, and a copy of The Gazette notice itself.

Or if that's not available, a statement of the contents, and another requirement because there's a lot of requirements here, and it's always important to double-check these, and by 4:30pm the day before the hearing, another form called the 'Comp Four', which is notice of persons intending to appear, must be filed with the court.

That put very simply, is a list of everyone you're aware of who intends to come to the hearing. Usually this means any other creditors who have responded to the advertising of a petition by contacting the petitioner themselves.

Iris Ferber KC: Okay, so there's a whole load of things that need to be done before the hearing, and it's right, isn't it, that sometimes, maybe more than sometimes, petitioner's solicitors fail to lodge the certificate of compliance or the Comp Three or the Comp Four notice of persons intending to appear.

Sometimes if the judge is in a good mood and decides that it doesn't matter too much...

Alex Bailey: Maybe if they're in a good mood.

Iris Ferber KC: ...and if no one else has turned up sometimes they waive that requirement. Those are requirements in the insolvency Rules rather than in the Insolvency Act.

Alex Bailey: Yes.

Iris Ferber KC: And there are powers for the court to waive those rights, but quite often, very often, they're not waived, and you may end up with a hearing that is adjourned with no outcome to your application.

Alex Bailey: Yes, it's an adjournment very often.

Iris Ferber KC: So, it really is important to lodge the Comp Three and Comp Four

Alex Bailey: It's imperative to get everything correct, yes.

Iris Ferber KC: If all the documents are in order then, Alex, what happens at the first hearing?

Alex Bailey: So, if those documents are all in order, and very often as we say, it's a big **if**, that's why it's so important to look at these requirements.

If the court is satisfied that the petition was properly served and advertised, and if no one turns up to contest the winding up, the court will put the company into liquidation at that hearing.

Now, if someone does turn up to contest it, then the hearing of the petition will be adjourned usually with directions.

Iris Ferber KC: Well, thank you, Alex, for that very helpful introduction to how to kill a company, or as we've called it 'Winding Up 101'.

We've talked about drafting a petition, presenting it to court, getting it endorsed and sealed, serving it on the company, advertising the petition, and then what to do at the first hearing, and we've also talked about what the criteria are for a successful petition, which essentially involves the company not being able to pay its debts.

So, I think that's probably a good place to end.

Alex Bailey: Yes, I think so and I think an ending note would be to really always bear in mind the requirements of what you need for that first hearing because the last thing you want is an adjournment where it can be avoided.

And so, thank you for tuning into this episode of *FortyTwo Talks*. We hope you've enjoyed it.

Iris Ferber KC: Join us again soon for the next instalment in this weekly series on Insolvency.

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