

# Costs in Winding-up Petitions

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# Overview

- What is the basic principle governing costs in winding-up petitions?
- How has this principle worked on some of the more notable or frequent edge cases? Will I be able to depart from the usual costs position?
- What is general good practice for getting a favourable costs position?

# General principle

## s. 125(1) of the Insolvency Act 1986

“the court may... make... any other order it sees fit”: an unfettered discretion

***Cannon Screen Entertainment Ltd v Handmade Films (Distributors) Ltd (1988) 5 B.C.C. 207, 209F-H***

“Mr. Price for his part relies on the basic rule that costs follow the event. ... I think that as to that, Mr. Price is right.”

- creditor assumes the risk there is a substantial defence – even if company does relatively little to rebut that notion

## General principle

Creditor assumes the risk there is a substantial defence – why?

- Winding up a company is a very serious matter: the “death” of the company
- Not supposed to be a substitute for debt collection action generally (*Re A Company (No.010656 of 1990)* [1991] B.C.L.C. 464 at 467)
- If the creditor wants to collect a debt, then the creditor can start an action for the debt

**But...**

## General principle

...the boundaries of this principle are vague.

*Cornhill Insurance plc v Improvement Services Ltd* (1986) 2 B.C.C. 98,942 at 98,945

“Rich men and rich companies who did not pay their debts had only themselves to blame if it were thought that they could not pay them.”

- in practice, winding up petitions clearly are part of the debt collection arsenal
- practice and principle are reconciled by the petitioner bearing the risk there is no substantial defence
- incentivises winding up petitions are the weapon of last rather than first resort

# Successful petition

## Insolvency Rules 2016 r.7.108(4)(h)

### Petitioners:

- petitioning creditor awarded costs from the companies' assets...
- as are contributories or creditors who supported the petition.

### The Company:

- Ordinarily the company will be allowed their costs as well...

...but can be a problem: why should unsecured creditors necessarily get less?

## Successful petition

Old way: *Re Bleriot Manufacturing Co Ltd* (1916) 32 TLR 253, then *Re Bathampton Properties Ltd* [1976] 1 W.L.R. 168

Modern way:

***Gamlestaden Plc v Brackland Magazines Ltd* [1993] B.C.C. 194**

“the court has power to make such an order against the director of a company who improperly causes the company and the petitioner to incur costs in connection with a winding-up petition ... Nevertheless the circumstances in which it will be appropriate to make such an order are rare”

***Re a Company (No. 004055 of 1991)* [1991] B.C.L.C. 865**

# Successful petition

***Re North West Holdings plc* [2001] EWCA Civ 67; [2001] 1 BCLC 468\***

(\*petition presented by Secretary of State on grounds of public interest, so use with caution)

“A crucial question is whether the relevant directors (or director) hold a bona fide belief that (i) the company has an arguable defence, and (ii) it is in the interests of the company for them to advance that defence”

***Re Tajik Air Ltd* [1996] 1 BCLC 317**

- Directors entitled to rely on legal advice even where unrealistic or just plain wrong.



## Unsuccessful petition

Company's costs and opposing creditors or contributories: awarded against the petitioner – but on what basis?

**Where the debt is substantially disputed and the petitioner knows this to be the case:**

*Re A Company (No. 0012209 of 1991)* [1992] 1 W.L.R. 351

“I think that it should be made clear that abuse of the petition procedure in these circumstances is a high risk strategy, and consequently I think the appropriate order is that the petitioner H should pay the company's costs on an indemnity basis.”

Abuse of process – strong language! Also note the response to *Cornhill Insurance* elsewhere in the judgment.

# Unsuccessful petition

## When is a debt substantially disputed?

*Argentum Lex Wealth Management Ltd v Giannotti* [2011] EWCA Civ 1341

“in my judgment, [the test is] not very different from the test for granting judicial review applications in the administrative court or granting permission to appeal to this court from a court of first instance, viz that there should be a realistic prospect of success”

## What if I do not believe the debt is substantially disputed, but it is later shown it is after the petition has considerably progressed?

*Re GlaxoSmithKline v UK (AID) Ltd* [2003] EWHC 1383 (Ch) – considerable doubts about genuine nature of documents

*Re Fernforest Ltd* [1991] B.C.C. 680 - proper nature of dispute only clear in reply

*Re Realstar Ltd* [2007] All E.R. (D) 171 – every opportunity given to dispute the debt... but an application for injunction case.

# Unsuccessful petition

## *Re Sykes & Sons Ltd* [2012] EWHC 105 (Ch) – a useful development?

Distinctive facts:

- up until presentation of the petition, effectively only a bare dispute
- after presentation of petition, nature of dispute made clear, but documents of uncertain providence

Result: “I do regard the combination of these circumstances in which the company did not give any meaningful account of its defence prior to the petition and only belatedly produced documents which might, if authentic, be capable of supporting its case, as wholly exceptional ... the most appropriate course to ensure that justice is achieved between the parties is to adjourn the issue of costs to await the outcome of proceedings in which there can be disclosure and cross-examination and (in particular) the issue of the authenticity of the manuscript valuations can be addressed”

# Unsuccessful petition

## Other exceptions

*Re Lanaghan Bros* [1977] 1 All E.R. 265 – distinctive because no shortcut was taken; this was an attempt to enforce a judgment debt. Costs awarded to the petitioner.

*Re McCarthy & Co (Builders) Ltd (No.2)* [1976] 2 All E.R. 338 – the debt was owed by a previous company, but the same people involved with that company created a new one company with the same name. Costs were awarded to the petitioner as the company was considered responsible for the confusion.

*Re Arrow Leeds Ltd* (1986) 2 B.C.C. 98,991 – matter adjourned twice before at the third hearing a majority of the creditors opposed and not through the usual mechanism. Costs were awarded to the petitioner for effectively being lead on by the other creditors.

# Unsuccessful petition

## Costs against directors or liquidators of the petitioners:

Generally: case-law relating to non-party costs orders, but this is rare

What if petition is brought by company in liquidation or administration?

Beware: *Re Pacific Coast Syndicate Limited* [1913] 2 Ch. 26, cited approvingly in *Norglen Ltd (In Liquidation) v Reeds Rains Prudential Ltd* [1999] 2 A.C. 1

Costs of the successful litigant paid first – and this extends to the liquidator having to return any expenses already realised in administering the estate such as liquidator's remuneration.

# Unsuccessful petition

## Costs against solicitors of the petitioners:

*Re A Company (No.006798 of 1995)* [1996] B.C.C. 395 – a non-party costs order made against a solicitor who gave an affidavit that the company was insolvent when there was no reasonable grounds upon which a competent solicitor could reach that view

*Ridehalgh v Horsefield* [1994] B.C.C. 390 - costs may be available against solicitors where they advise a client to proceed with litigation knowing it to be an abuse of process.

## Other cases

### **Petition dismissed because debt is paid**

*Re Nowmost Co Ltd* [1997] B.C.C. 105

If the petitioner's debt is paid after presentation of the petition, the petitioner will normally be regarded as successful and so awarded costs, even though the petition must be dismissed.

Potentially this can be displaced in favour of no order on costs by evidence from the Company.

# Other cases

## Petition withdrawn

### Insolvency Rules 2016, r 7.13

Permission to petitioner to withdraw on such terms as to costs are agreed between the parties if:

- It is at least five days before the first hearing
- Notice of the petition has not been given
- No notices in support or opposition to the petition have been received
- The company consents to an order made under this rule

Restrictions are due to the nature of the winding up petition as a class right.



# Key points

As petitioner:

- Take every care to make sure that the debt is not disputed and be aware of the risk it might turn out to be disputed at a later stage. Is there a more appropriate way to go after the debt?
- Give the company as many chances as possible to respond and ask for them to particularise any dispute.
- Don't necessarily rely on silence

As company:

- Make clear the basis on which the debt is disputed early on
- If possible, make reference to documents on which you might intend to rely
- If the debt is to be paid, sooner is better than later

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