Association of Business Recovery Professionals

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Energy Ombudsman
3300 Daresbury Park
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Dear Sirs,

Energy accounts of companies in liquidation

I am writing you to on behalf of R3 members to raise concerns that have been reported to me about the difficulties members have experienced with **Pozitive Energy Ltd** ('Pozitive'). These concerns relate to companies in liquidation and to the liquidators' often difficult and time-consuming communications with Pozitive.

Introduction

R3 is the trade association for the UK's insolvency, restructuring, advisory, and turnaround professionals. We represent licensed insolvency practitioners, lawyers, turnaround and restructuring experts, students, and others in the profession. Our members work across the spectrum of the profession, from global legal and accountancy firms through to smaller, local practices.

The insolvency, restructuring and turnaround profession is a vital part of the UK economy. The profession rescues businesses and jobs, creates the confidence to trade and lend by returning money fairly to creditors after insolvencies, investigates and disrupts fraud, and helps indebted individuals get back on their feet. Our members have direct experience of insolvencies and their impact on the UK economy and insolvent companies' stakeholders.

Overview

According to R3 members, Pozitive's approach to dealing with a company in liquidation appears to be as follows -

- unilaterally changing the name of the company account into the name of the liquidator of the company (without the liquidator's consent),
- pursuing the liquidator for payment of charges for both the pre- and post-appointment liability (which Pozitive is not legally entitled to do – see below), and
- issuing legal proceedings for non-payment of the account against the liquidator personally (again, which does not accord with UK insolvency law – see below).

The approach Pozitive is taking is contributing to significant costs being incurred by liquidators to the detriment of the company's creditors as liquidators have no option than to deal with the matter, which they would not normally expect them to do.

Despite R3 members writing to Pozitive to explain why their approach conflicts with the statutory position of a liquidator of a company *(Appendix 1)*, they have continued with the above-mentioned approach. Please find below a selection of quotes from members –

"Any insolvency where they were the supplier they have changed the name on the account to me and then start sending debt collection emails and letters. These are for premises which were vacated prior to the insolvencies and at no point have I taken up beneficial occupancy."

"Despite a ridiculous amount of letters, calls and emails, we still receive monthly invoices to the Liquidator. We attempted to escalate this as a complaint within Pozitive Energy but ultimately got nowhere with it."

"They are UTTERLY incompetent and call on a regular basis. Those who call have zero understanding of the concept of insolvency."

I enclose at ***Appendix 2*** *redacted* communications from members to support the above.

Practical implications

Prior to the formal liquidation process, the advising licensed Insolvency Practitioner will collect details of amounts owed to the company including references and make enquiries as to any premises that the company occupies – freehold and leasehold. It is extremely unusual for a company to trade in liquidation and the process is more likely to be an immediate shutdown and wind-up of the company with any premises vacated before or immediately following appointment. In this scenario, the liquidator would be able to provide an energy supplier with details of the landlord or more likely, the landlord's solicitors and, if available, the meter reading(s). If, however, the company remains in occupation post appointment to facilitate the sale of a property or assets within a property, meter readings would be taken, and the energy supplier would be contacted to discuss any requirement for ongoing supply. In either scenario, the insolvency office holder acts as an agent of the company in liquidation, not as principal, and the account remains in the company's name; the pre-appointment debt are subject to the insolvency moratorium and are an unsecured claim in the liquidation.

When a liquidator is appointed, they will write to creditors advising them of the liquidation process and ask for claims to be submitted. This does not mean that an energy supplier has the right to change any account name to the liquidator's name. An energy supplier cannot chase the liquidator personally for accrued pre-appointment debt.

Furthermore, it should be noted that an office holder, in their capacity as liquidator, is an agent of the company and is not personally responsible for energy charges unless they have provided a personal guarantee to the energy supplier.

Conclusion

It is our view that Pozitive's current policy is contributing to significant costs being incurred by the liquidator to the detriment of the company's creditors. Attempts by our members to engage with and 'educate' Pozitive on how UK insolvency law works have so far been ignored. We would therefore request that, to the extent you have the power as regulator, you investigate the approach being taken by Pozitive, in particular we ask that Pozitive be instructed to refrain from:

- changing the name of the company account into the name of the liquidator of the company and maintain the account in the company's name.

- pursuing the liquidator for payment of charges for the pre- and post-appointment periods and issuing legal proceedings for non-payment of the account against the liquidator personally.

If you would like to virtually meet or if you have any other queries, please contact me at ben.luxford@r3.org.uk or on 020 7566 4218.

I look forward to your reply.

Yours faithfully,

Ben Luxford
Head of Technical
R3, The Insolvency and Restructuring Trade Body

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Appendix 1

Statutory position

Liabilities arising under a contract can be either expenses of an insolvency or provable debts depending on when they were incurred and in what circumstances. Debts due to utility providers for gas or electricity supplied to premises after an insolvent company has ceased to trade do not as a general rule have priority over creditors but they are provable debts. The relevant legislation is as follows:

Rule 14.1 of the Insolvency (England and Wales) Rules 2016 ('IR16') which applies to administration, winding up and bankruptcy proceedings sets out at 14.1 (3) the definition of 'debt.' In terms of the winding up of a company it means any of the following:

a) *any debt or liability to which the company is subject at the relevant date (see below)*

b) *any debt or liability to which the company may become subject after that date by reason of any obligation incurred before that date; and*

c) *any interest provable.*

"Relevant date" for corporate insolvency procedures means:

a) *in the case of an administration which was not immediately preceded by a winding up, the date on which the company entered administration,*

b) *in the case of an administration which was immediately preceded by a winding up, the date on which the company went into liquidation,*

c) *in the case of a winding up which was not immediately preceded by an administration, the date on which the company went into liquidation,*

d) *in the case of a winding up which was immediately preceded by an administration, the date on which the company entered administration.*

Finally, Rule 14.2 (1) of IR16 sets out what a provable debt is: All claims by creditors except as provided in this rule, are provable as debts against the company, whether they are present or future, certain or contingent, ascertained or sounding only in damages.

A creditor would need to submit details of claim to the office holder as set out in Rule 14.3 of IR16 which provides that where a company is being wound up, a person claiming to be a creditor and wishing to recover their debt in whole or in part must, subject to any order of the court, submit their claim in writing (which includes in electronic form), to the liquidator or where applicable to the official receiver.

In summary, debts that have arisen before the insolvency (relevant date) will be a provable debt and rank pari passu in the insolvency of the company with other unsecured creditors.

An energy supplier has the right to terminate the supply contract arises after the relevant insolvency procedure begins (e.g., for non-payment of goods or services supplied during the insolvency procedure). Furthermore, an energy supplier is able to exercise this right (subject to the statutory provisions for administration and CVA procedures).