

**A comparison of the powers and liabilities of a provisional supervisor
and a liquidator and the requirements to be fulfilled before their appointment**

| <u>Liquidator in Creditors' Voluntary Liquidation</u> | <u>Liquidator in Compulsory Liquidation</u> | <u>Provisional Supervisor</u> |
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| Status | | |
| <p>Not an officer of the court but still subject to the rule in Ex parte James – requires officer of the court to behave honestly and fairly and to do the fullest equity and in particular cases to refrain from taking full advantage of accrued legal rights where it would be unfair to do so and expected to observe the same high standard.</p> | <p>Officer of the court.</p> | <p>Not an officer of the court but likely also subject to the rule in Ex parte James.</p> |
| <p>Officer of the company.</p> | <p>[As per the first column]</p> | <p>[As per the first column] Likely to be regarded as an officer of the company.</p> |
| <p>A fiduciary agent of the company (must therefore act bona fide and reasonably and exercise his powers for their proper purposes only; must exercise reasonable care and skill in the performance of his duties).</p> <ul style="list-style-type: none"> • Not a normal agent as he himself controls the action of his principal i.e. the company. • Duties as agent of the company are subject to his overriding statutory duties as set out in the law. | <p>[As per the first column]</p> | <p>[As per the first column]</p> |

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| <p>A trustee as he has duties to the creditors and the contributories to administer the funds of the company which are said to be impressed with a trust for these parties, but</p> <ul style="list-style-type: none"> • the duty is owed to company and creditors as a body and not to individual creditors • the person injured cannot claim for breach of trust but breach of duty • the property does not vest in liquidator | [As per the first column] | <p>[As per the first column]</p> <ul style="list-style-type: none"> • the property does not vest in the PS |
| Powers | | |
| <p><u>Statutory powers</u> under S.251 of C.O.</p> <ul style="list-style-type: none"> • Apart from the following which can be exercised only with sanction of the CI or meeting of creditors <ul style="list-style-type: none"> (i) to pay any class of creditors in full (ii) to make compromise with creditors (iii) to compromise calls and debts between the company and contributory | <p><u>Statutory powers</u> under S.199 of C.O.</p> <p>Group I (under S.199(1) – exercisable without the need of any sanction)</p> <p>Group II (under S.199(2) – exercisable with sanction of the court or CI)</p> <p>And other delegated powers under S.266 of C.O.</p> | <p><u>Statutory powers</u> under Schedule 4, Part 2 of the Bill including the power to remove and appoint directors.</p> |

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| a liquidator in creditors' voluntary winding-up has all the other powers exercisable by a liquidator in compulsory winding-up under S.199 and other sections of the C.O. | | |
| <u>Additional powers</u> | <u>Additional powers</u> | <u>Additional powers</u> |
| <ul style="list-style-type: none"> • Power to apply to court for directions under S.255 of C.O. | <ul style="list-style-type: none"> • Power to apply to court for directions under S.200 of C.O. | <ul style="list-style-type: none"> • Power to apply to court for directions under S.10(7) of the Bill |
| <ul style="list-style-type: none"> • Power to demand of company's property records etc. | [As per the first column] | [As per the first column] |
| <ul style="list-style-type: none"> • Power to obtain information. | [As per the first column] | [As per the first column] |
| <ul style="list-style-type: none"> • Power to disclaim onerous property. | [As per the first column] | [As per the first column] |
| <ul style="list-style-type: none"> • Power to have voidable transactions set aside | [As per the first column] | <ul style="list-style-type: none"> • Power only to investigate voidable transactions but not to set aside. |
| <ul style="list-style-type: none"> • Power to apply to court for an order of compensation for fraudulent trading (and also the newly proposed insolvent trading) | [As per the first column] | <ul style="list-style-type: none"> • Power only to investigate fraudulent trading but not to make application for compensation order. |
| Duties | | |
| Basic duty: to realise the assets to the best advantage of the winding-up and distribute the | [As per the first column] | Basic duty: to take under control all property of the company; to decide whether any of the |

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| proceeds, after payment of costs, among the creditors and shareholders according to their rights. | | relevant purposes are capable of being achieved and, if yes, to prepare the proposal for approval of the relevant meeting of creditors; and such other duties as set out in Schedule 4 Part 1 of the Bill. |
| <ul style="list-style-type: none"> • Take all reasonable steps to identify, and obtain control of all available assets. | [As per the first column] | [As per the first column] |
| <ul style="list-style-type: none"> • Give notice to all persons who might have claims against the company and admits only those claims that are legally enforceable. | [As per the first column] | [As per the first column] |
| <ul style="list-style-type: none"> • To make all statutory returns required by law. | [As per the first column] | [As per the first column] |
| <ul style="list-style-type: none"> • Duty to settle list of contributories. | [As per the first column] | No such requirement. |
| <ul style="list-style-type: none"> • Duty to maintain liquidator's record, keep accounts, books and papers. | [As per the first column] | Not specifically provided for but a PS has impliedly the duty to maintain records and to keep accounts. |
| <ul style="list-style-type: none"> • Duty to examine conduct of officers and make report to OR for disqualification purpose. | [As per the first column] | [As per the first column] (New S.168I of the C.O. will impose on a PS of a company such a duty) |
| <ul style="list-style-type: none"> • Duty to make payment into Companies Liquidation Account. | [As per the first column] | No such requirement. |

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| <ul style="list-style-type: none"> Duty to submit accounts for audit by OR | [As per the first column] | No such requirement. |
| <ul style="list-style-type: none"> To complete the winding-up as expeditiously as is reasonable. | [As per the first column] | To complete the PSN as expeditiously is reasonable. |
| <ul style="list-style-type: none"> To convene annual and final meetings of company and directors | No such requirement. | No such requirement. |
| <ul style="list-style-type: none"> Duty to dissolve the company. | [As per the first column] | No such requirement. |
| <ul style="list-style-type: none"> To exercise the care and skill expected of a person of his professional standing. | [As per the first column] | [As per the first column] |
| <ul style="list-style-type: none"> To act impartially. | [As per the first column] | [As per the first column] |
| Liabilities | | |
| <u>Contracts (including employment contracts)</u> <ul style="list-style-type: none"> May become personally liable unless he makes it clear that he enters the contract as liquidator of the company concerned and not in his personal capacity. | [As per the first column] | <u>Non-employment contracts</u> PS will personally be liable unless the contract expressly states otherwise. <u>Employment contracts</u> PS will personally be liable for all employment contracts he adopted or entered into after the commencement of the PSN. He cannot contract out of personal liability, but is indemnified out of the assets of the company. |

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| <ul style="list-style-type: none"> • May be liable for any loss or damages arising from his failure to perform statutory duties, whether the default is the result of wilful neglect of duty or otherwise. | [As per the first column] | [As per the first column] |
| <ul style="list-style-type: none"> • May be liable to the company for negligence. | [As per the first column] | [As per the first column] |
| <ul style="list-style-type: none"> • May be liable for misfeasance or personal misconduct and not protected by S.60 of the Trustee Ordinance Cap. 29. | [As per the first column] | [As per the first column] |
| Preliminaries to appointment | | |
| <p>(Not under S.228A of the C.O.)</p> <ul style="list-style-type: none"> • Summoning of members' meeting at which the voluntary winding-up resolution is to be proposed. • Summoning of meeting of creditors for either the same day or the day following the meeting of the members' meeting. | <ul style="list-style-type: none"> • Presentation of winding-up petition against the company. • Making of a winding-up order against the company. | <ul style="list-style-type: none"> • A PS in PSN can be appointed by the directors of the company by means of a resolution passed by the majority of them; or by the members of the company by means of an ordinary resolution passed at a meeting of the company. • A PS in PSN can also be appointed by the provisional liquidator or liquidator of the company who has the approval of the court. |

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| <ul style="list-style-type: none"> • Advertise notice of meeting of creditors. • Convene the two meetings for the purpose of passing the resolution to voluntary winding-up: <ul style="list-style-type: none"> – Directors must present a full statement of affairs to the meeting together with a list of all the creditors and the estimated amount of their claims. – Both the creditors and the member may appoint a liquidator at their respective meetings. If different persons are nominated by each meeting, the liquidator nominated by the creditors will be appointed. | <ul style="list-style-type: none"> • After the making of the winding-up order, the OR will by virtue of S.194(1)(a) become the provisional liquidator of the company. • Where the OR is the provisional liquidator of the company by virtue of S.194(1)(a) and is of the opinion that the property of the company is not likely to exceed \$200,000, he may appoint another person as provisional liquidator in his place under S.194(1A). | <ul style="list-style-type: none"> • The effective date of the appointment is the filing of the last document by the person making the appointment. This in effect means that <ul style="list-style-type: none"> (i) there must be reasons for the appointment (ii) the company must have paid all its employees' claims or has made full provision therefor in a trust bank account. |

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| <ul style="list-style-type: none"> • Acceptance of appointment – the prospective liquidator must satisfy himself that the relevant preliminary steps have been properly taken. Otherwise, he should refuse to accept his appointment. | <ul style="list-style-type: none"> • In cases where the property of the company is not likely to exceed \$200,000, a summary procedure order under S.227F may be applied. If the court grants the order, the OR or the provisional liquidator will become the liquidator. • In cases where the property is likely to exceed \$200,000, a meeting of the creditors and a meeting of the contributories will be summoned by the provisional liquidator. • Both the creditors and the contributories may nominate a liquidator at their respective meetings. If different persons are nominated, the court will determine the difference. • The nomination of the liquidator will have to be confirmed by the court (R.45(2) in order to take effect. • The liquidator has to notify his appointment to the Registrar of Companies and give security to the satisfaction of the OR (S.195). | |

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| Qualification requirements for appointment | | |
| There is no specific requirement as to the qualification of the liquidator. | There is no express requirement as to the qualification of the liquidator. He must however be accepted by the court as a fit person to be so appointed. | To be a PS in PSN, the person must meet the eligible criteria set out in sections 4 and 5 of the Bill including the provision of security. |

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