

# BEXs Knowledge Sharing Initiative



**BESPOKE EXECUTOR SERVICES**  
Customised Fiduciary Solutions

DETERMINING THE  
SOLVENCY OF A  
DECEASED ESTATE!

## Determining Solvency of Estate

After the expiry of the advertised period in which creditors are called upon to lodge their claims, the executor must satisfy himself as to the solvency of the estate.<sup>1</sup> If the estate is found to be insolvent then, or is found to be insolvent at any time before its distribution, the executor must forthwith report the position of the estate to the creditors by notice in writing (a copy of which he must lodge with the Master).<sup>1</sup> The notice must also inform them that unless a majority in number and value of all the creditors instruct him in writing within a period specified in the notice (not being less than fourteen days) to surrender the estate under the Insolvency Act, he will proceed to realise the assets.<sup>1</sup>

A creditor whose claim amounts to less than R1,000 is not reckoned in number.<sup>1</sup> A creditor holding any security which a trustee would under s 83 of the Insolvency Act be authorised to take over if the estate had been sequestrated must, if called upon to do so in writing by the executor, place a value thereon within the period specified by the executor, and is only reckoned in respect of the balance of his claim which is, according to his valuation, unsecured.<sup>1</sup> If he fails within the period given by the executor, to place a value on his security he will not be reckoned as a creditor for the purpose of instructing the executor whether to surrender.<sup>1</sup>

If after the expiry of the period set out in the executor's notice, he has not directed to surrender the estate, he must, after the creditors have been notified in writing, for a period of not less than fourteen days, of the manner and conditions of the intended sale of the assets, sell such assets.<sup>2</sup> Provision is made for any creditor to object to the intended sale.<sup>3</sup>

In order to satisfy himself as to the solvency of the estate the executor will have to compare the assets of the estate with its liabilities. This comparison may not result in a clear-cut conclusion. On the one hand the value of the assets may be uncertain or the amount they will realise on sale may be problematical. On the other hand, claims may have been lodged which the executor may consider of doubtful validity and should be tested under the procedure provided by the Act before being accepted, or which he may consider should be rejected. Such uncertainty or rejection may leave a surplus of assets over liabilities which may be only temporary should the creditors succeed in establishing their claims. Again, in determining the solvency of the estate should the executor take into account only such claims which have been lodged with him or should he take into account claims which are known to him but have not yet been lodged? It is considered that the executor need not take account of claims which have not been lodged. But it is suggested that the executor should, in practice, adopt a common-sense approach to the problem of the estate's solvency. In most cases the issue will be sufficiently clear, but in borderline cases the executor can either continue the administration on the basis that the estate is solvent and should it subsequently become apparent that the estate is insolvent, then proceed to notify the creditors as detailed above, or he can adopt the course of advising the creditors that he is not satisfied as to the solvency of the estate. Under the first alternative no real prejudice is involved, provided the executor takes the precaution of not paying any claims until the account has lain for inspection.<sup>4</sup> Under the second alternative there will also be no real prejudice if it should turn out that the estate is solvent.

Because of possible voidable transactions which can only be set aside under the Insolvency Act or because of the effect of sequestration upon the assets of a surviving spouse under s 21 of the Insolvency Act, the creditors may prefer to have the estate surrendered so that the procedures and benefits of the Insolvency Act can be invoked in full. It is suggested that the report on the position of the estate which s 34 requires the executor to make to the creditors should contain particulars of transactions which, according to the information available to the executor at the time, may be voidable.

- 1 Section 34(1). As to the realisation and the administration of a deceased insolvent estate generally, see chap 17.
- 2 Section 34(2).
- 3 Section 34(3) and see further chap 17 which deals with insolvent deceased estates.
- 4 *Ex parte Hemens* 1921 CPD 749.

**(Extracted from Meyerowitz on Administration of Estates and Their Taxation)**