BRI
BUSINESS RECOVERY AND INSOLVENCY

Directors in the dock

A firm specialising in defending directors from disqualification recently posted that "Directors often place companies into liquidation 'blind', without proper or necessary thought having been given by them (or those advising them), pre-liquidation".

We describe these situations as "gotcha" liquidations. The advising IP saw an opportunity for two bites at the cherry – the first being to undertake the liquidation for a modest fee, a sprat to catch a mackerel (often paid by directors personally) and the second to pursue the directors for various reasons "because the creditors want us to" – a further (larger) fee opportunity.

Common reasons for pursuit cited include:

- Wrongful trading
- Selling assets for less than market value
- Preferring creditors
- Misfeasance
- Overdrawn Directors Loan Account
- Illegal dividends
- Use of prohibited name

An insolvency practitioner should be transparent about their duties to investigate the insolvent company's financial information and the directors' conduct once formally appointed. Our approach is always to discuss these potential issues with directors at the outset to enable them to be in a position to make an informed decision on how best to proceed.

On that note, it is also very important for directors to be totally transparent as we are only able to carry out very limited investigations prior to our formal appointment.

At BRI, when advising a new client, we ask a lot of questions during the initial stages and this is to ensure that we have covered off all areas that could lead to a possible claim against a director.

If an IP is not asking questions and implying that a director has nothing to worry about, be very aware and get a second opinion.

Furthermore, we are sometimes asked to review the work of other IPs and, in most cases, we refer such matters to insolvency solicitors rather than enter into arguments with IPs having similar qualifications, if not the same ethics.

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It ain't over, even when it's over – strike off

The Ratings (Coronavirus) and Directors Disqualification (Dissolved Companies) Bill will prevent directors closing a company via a dissolution process without being investigated for any wrongdoing or malpractice. The new measures will grant the Insolvency Service power to investigate the conduct of directors of dissolved companies and will hopefully stop directors, who may have acted fraudulently in relation to any of the Government backed Coronavirus business loans, misusing the strike off process.

The government has identified two types of fraud:

1. **'Soft' fraud** – which is described as borrowers who exaggerate otherwise legitimate claims, such as overstating turnover in order to receive a larger loan.

2. **'Hard' fraud** – which is the deliberate deceit of the scheme by criminal organisations or others, on a much larger scale.

   This might include:

   - the impersonation of legitimate businesses or individuals;
   - fraudulently adopting a company established before the 1 March 2020 scheme cut-off;
   - use of 'money mules' to take out loans, who then immediately file for bankruptcy; and
   - making multiple applications across a number of different lenders.

The introduction of the new measures may, in part, be a direct result of the dissolution process being used to avoid repaying funds which may have been either utilised incorrectly or fraudulently obtained.

To date, no guidance has been issued on what the consequences are for the types of fraud noted above. Watch this space!

Best advice

We want to build relationships and to be your trusted advisors. Call any of the BRI offices and speak with one of the management team for a free, no obligation discussion. Based on this information we will explain the options available irrespective of the fee outcome for ourselves.

Important note: This briefing has been prepared as background information for the general professional adviser and is not a comprehensive statement of the law – we recommend that expert advice be taken on specific issues arising in practice.