BRI
BUSINESS RECOVERY AND INSOLVENCY

Ignorance is bliss…but it is no defence.

When a company enters into a particular formal insolvency process, there is a requirement for an insolvency office-holder to investigate the reasons why a company has failed and the conduct of all directors.

Misfeasance

A common area considered is whether or not there has been any misfeasance. For an office-holder there are two definitions of 'misfeasance' that need to be considered as part of their investigations.

The first of these definitions of misfeasance is contained within Section 212 Insolvency Act 1986, which provides a 'summary remedy against delinquent directors, liquidators, etc. and permits a liquidator, creditor or contributory to bring a claim against a director if it can be proved that a director has misapplied or retained or become accountable for any money or other property of the company or been guilty of any misfeasance or any breach of fiduciary duty in relation to the company'. Put simply, this is a key weapon in an office-holder's armoury when considering a claim against directors, as the provisions within are something of a 'catch all'.

If found guilty of misfeasance, directors can be found personally liable to contribute to a company for the losses. In some cases, the losses awarded can be significant.

The second definition is how misfeasance under The Companies Act 2006 is summarised - 'where a company director or officer acts illegally or improperly in breach of their fiduciary duties causing harm or loss.' The fiduciary duties of directors are primarily aimed at safeguarding the interests of the company, which in turn protects the interests of its shareholders, creditors and employees.

Misfeasance Claims and How to Avoid Them

Within the last few years, there have been a number of high profile cases, where liquidators have been successful in pursuing claims against directors for misfeasance.

The Responsible Director

"But I'm not the finance director, I didn't see management accounts, I can't be held liable" not so, to repeat the theme of this briefing, ignorance is no defence for a director when it comes to knowing their fiduciary duties.

The fact that a director may not be privy to financial information (whether they want to see it or not) or that they may not be responsible for the day to day running of a company is not a defence to any claim brought by a liquidator or creditor or contributory under Section 212 Insolvency Act.

Therefore, in order for directors to try and protect their position, if not already implemented, the following actions should be considered:

BUSINESS RECOVERY AND INSOLVENCY

- Regular board meetings to discuss the financial performance of a company, with all meetings documented.
- Produce monthly management figures, budgets, etc. and review them. If something doesn't look right, question it.
- If there are any concerns or suspicions with regard to the company's financial performance talk to staff (credit control, accounts payable) – do they share these concerns, i.e. creditors chasing due to late payment, failure to file returns, HMRC not paid up to date.
- Regularly review the company's bank statements - are there any unusual payments?
- Review year end accounts. Has the company made a loss? Is it balance sheet insolvent? If so, question why and consider how the position can be improved.

Although it can be challenging in the circumstances, following the above steps will be even more important when perhaps there has been a breakdown in a relationship between directors.

If you have any clients that are concerned about their personal position as a result of the financial position of a company, please do not hesitate to contact any member of the team at BRI Business Recovery and Insolvency.

Northampton	Banbury	Coventry	Hitchin	Leicester	Milton Keynes	Spalding
100 St.James Road	10 South Bar	1160 Elliott Court	7 Paynes Park	Suite 5	2nd Floor, Elm House	Room 39
Northampton	Banbury	Herald Avenue	Hitchin	18 Warren Park Way	Woodlands Business Park	Welland Workspace
Northamptonshire	Oxfordshire	Coventry Business Park	Hertfordshire	Enderby	Linford Wood West	10 Pinchbeck Road
NN5 5LF	OX16 9AF	Coventry	SG5 1EH	Leicester	Milton Keynes	Spalding
		CV5 6UB		LE19 4SA	MK14 6FG	PE11 1QD
01604 754352	**01295 272121**	**02476 226839**	**01462 429718**	**01163 666666**	**01908 317387**	**01775 741020**

info@briuk.co.uk

www.**briuk**.co.uk