INSOLVENCY UPDATE

Introduction

A recent press article suggested that more businesses failed in the North East than any other part of Scotland in the last year. One can only assume that this relates to corporate failure because of the information publically available at companies house. The formal failure of a sole trader business or partnership is dealt with through the accountant in bankruptcy where specific statistics are not readily available. Of course, one has to be careful about quoting statistics because, for example, if House of Fraser is deemed to be one failure and creates a loss of many jobs, it is unfair to compare it statistically to the demise of a single-person company operating from home.

Countering the bad news is the recent Aberdeen Chamber of Commerce business tracker which reported £8 billion worth of projects to be delivered in the coming years, with Aberdeen being among the top ten cities in the UK to live and work. There remains plenty about which one can be positive for the North East.

Indeed, looking around the Aberdeen economy one can see pockets of optimism and there seems to be a consensus that if oil prices remain above $70/$75 for a sustained period of time, some of the wealth lost to Aberdeen in the last four years may return. Here's hoping.

Environmental costs are an expense of liquidation

In August 2018, the joint liquidators of Doonin Plant Limited sought directions from court because the liquidated estate held about £635,000 before payment of liquidation expenses, yet the cost of complying with environmental notices served by SEPA were estimated at nearly £4 million.

The joint liquidators asked for clarity about whether the costs of environmental compliance fell to be treated as an expense of the liquidation because, if that was the case, there would be no dividend payable to creditors.

Lord Docherty considered the Environmental Protection Act 1990 and concluded that, on the basis the polluter is responsible for doing whatever is possible to return land to its original condition, Doonin Plant Limited should pay the costs insofar as funds were available to do so i.e. it was not a debt due by the company similar to any other creditor claim, but an expense of the liquidation. The joint liquidators heaved a sigh of relief when Lord Docherty recognised that the polluting activity had occurred before their appointment and hence, no personal liability fell on them for compliance and further, an Order was granted directing that the joint liquidators' fees could be paid in priority to all other expenses of the process....including complying with the SEPA notices.

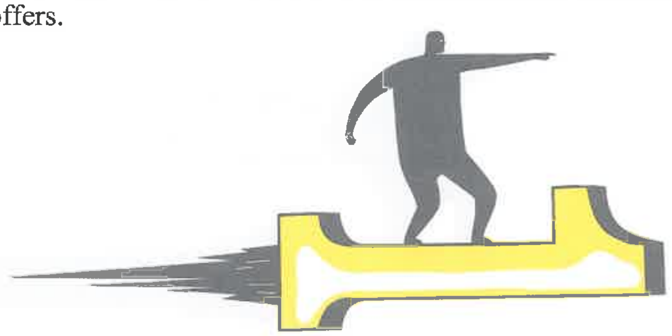
The lesson for creditors is clearly that if they are dealing with a company that might be guilty of polluting the immediate environment e.g. a local filing station, car repair business or farm, if there are indications that the land is not being looked after properly, it would be inadvisable for credit to be given to such customer without good cause.

Never too clever to learn

As part of the accountant in bankruptcy's approach to those who encounter sequestration proceedings, the trustee handling the case can recommend that an individual undergoes a course of financial training/awareness before a sequestration discharge is granted. The intention is simply to provide support to individuals who have experienced financial difficulty such that a similar situation does not arise again.

Budgeting and financial planning is the most commonly used module for mandatory financial education when the accountant in bankruptcy becomes involved and a recent survey by Money Advice Scotland showed that 92% of users rated the module as excellent/very good, with 89% of users confirming an increase in their ability to keep track of their money. Further, everyone who had used the module said that they planned to change their approach to managing their finances, whilst nearly 80% said that they were more confident in dealing with financial matters.

Given the personal misery which can arise when someone experiences financial difficulty, the e-learning modules could perhaps be made available to everyone. Indeed, it is understood that Money Advice Scotland are happy to provide this service. On the basis that financial education is so important to life's journey, it may be fair to suggest that a child in his/her last few years of school might benefit from using the e-learning modules as part of the task of becoming ready for whatever financial challenges adult life offers.



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Why not visit www.moneyadvicescotland.org.uk and see for yourself how user-friendly and appropriate the e-learning modules are.

HMRC and disguised remuneration

As many readers will know, HMRC have been challenging a myriad of schemes which have sought to route cash to scheme participators without the normal tax charges that apply when money is received by way of salary. These are generally referred to as disguised remuneration loans e.g. an EBT. Any such loans which have been made since 6 April 1999 and remain outstanding as at 5 April 2019 will see HMRC raising a charge on every participator. The recent HMRC publication, Spotlight 44, clarified the schemes which are affected and how to settle the liability in order to avoid triggering the charge. HMRC say that they expect to raise about £3.2 billion in respect of around 50,000 taxpayers.

There are some perfectly legitimate ways to avoid the loan charge e.g. repay the loan or enter into a settlement agreement with HMRC. Interestingly, HMRC have tended to allow overdue tax debts to be repaid within twelve months but the disguised remuneration loan guidance suggests that a period of at least five years is available to repay the debt, subject to conditions. Relevant taxpayers will need to liaise with HMRC sooner rather than later (if not already done so). The Meston Reid & Co insolvency department has already held discussions with individuals who availed themselves of a failed tax avoidance scheme but do not have the cash to repay either the loan or the loan charge.

Whether or not HMRC pressure creates an increase in sequestrations remains to be seen because many of the taxpayers who utilised the facility still have assets which they may wish to protect if possible. Seek advice.

The worried director

Meston Reid & Co have published an insolvency related article in the Press & Journal Business Supplement for the last four years or so. Some articles create more feedback than others and it seems that October and November ones created wide interest as a result of the questions asked :

1. Will I be made bankrupt if my company is liquidated?
2. Can I be a director of another limited liability company in future?
3. Will I lose my pension entitlement within the company scheme if liquidation occurs?
4. I admit that the company has not paid HMRC for a considerable period of time. Is this a criminal offence if my company is liquidated?
5. My company has been liquidated. Will I be responsible for any PAYE/NIC arrears?
6. Do I have to attend the first meeting of creditors. Some of my company's creditors might be quite angry.
7. Do you act in accordance with my wishes if you are appointed liquidator?

If you want to know the answers to these questions please feel free to connect to Michael Reid's LinkedIn profile, or contact this office.

HMRC : back to the head of the queue

The UK budget in October announced the proposal of returning part of the HMRC preferential status that was held a number of years ago. From April 2020 it is proposed that HMRC will receive preferential creditor status i.e. paid ahead of banks and other suppliers.

This is designed to apply to PAYE, NIC and VAT i.e. tax which has been collected by a business on behalf of HMRC. Typically such monies are used to fund business activities rather than be held in a separate trust account for payment to HMRC on the normal due date. Some commentators have voiced the opinion that HMRC could abuse this power to push a company into liquidation when it might otherwise be saved, thus preserving employment etc. Equally, others take the view that a company acts as trustee for PAYE/NIC deductions and VAT collected from customers, and should not use such cash to fund operating activities because it does not belong to the business.

It remains to be seen if a change in preferential status makes any difference to how directors run a company and, for example, experience both before and after the Enterprise Act 2002 came into force in 2003 (which removed the HMRC preference) suggests that directors are trying to save a business in any event no matter how the pecking order is created in terms of dividend payments.

GDPR

The names and addresses contained on our Insolvency Update database are used only used for this communication. If any reader wishes to be removed from such database, please e-mail ryriel@mestonreid.com .

Conclusion

This Update is provided for general interest purposes and does not purport to offer definitive advice. Please contact either Michael J M Reid (reidm@mestonreid.com or Michelle Byrne (byrnem@mestonreid.com) if you wish to discuss anything raised herein.

Thank you for taking the time to read this Update and feel free to pass it to anyone who you think might be interested in reading it.

Meston Reid & Co

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