INSOLVENCY UPDATE

MESTON REID & Co
CHARTERED ACCOUNTANTS

Introduction

Whilst our media continues to fixate upon Brexit, the leaders of various UK political parties and the vagaries of the internal geopolitical landscape, the usual framework of business activity continues and, so it seems, provides a fertile ground for employment opportunities. That includes the North East economy, particularly the oil and gas industry which is showing some evidence that a sustained recovery is in its infancy. Good news for many business sectors in the North East and evidenced by the diversity of winners at the Elevator Business Awards dinner on 27 June.

Improving times for the North East one hopes.

Keeping an eye on the builder

People often remark that it is hard to find a builder who will concentrate on one job at a time and return promptly when snagging is required. Part of a builder's challenge is the difficulty in scheduling every task within a construction contract to dovetail neatly and, of course, the builder wants to keep all jobs bubbling along in order to reach milestones that provide payment opportunities.

When invited to review a business operating in the building industry, questions inevitably arise in the insolvency practitioner's mind when considering the viability of a company, or group of companies. For example, the focus of initial enquiries might include :

1. Do all employees turn up for work on a regular basis, or are there signs of less labour on site?
2. Has building work on various contracts slowed substantially, and is there any evidence that plant and equipment has been removed from sites to be used elsewhere?
3. Are subcontractors such as electricians, joiners and plumbers being paid regularly, or are they often absent because they are working for someone else who is paying regularly?
4. Are there signs that work billed as complete is suffering from an increasing number of defects e.g. corners being cut in order to reach payment milestones more quickly?
5. Has the builder asked for advance payments, retentions to be released, or for customers to pay suppliers direct?
6. Does the contractor have a track record of submitting unjustified claims, or regularly seeks to renegotiate contract terms?
7. What do the statutory accounts of the builder show at companies house and, for example, are they late, do they show losses or reflect cashflow problems?
8. Has the contractor, or any related companies, been the subject of court action or local rumour about slow/non payment?

If everything goes sadly wrong and the builder fails, dealing with the administrator/liquidator is likely to prove both frustrating and time-consuming. The chances of a contract being completed as anticipated is unlikely.

It is always better to keep an eye on any situation that does not appear wholly normal such that corrective action can be taken as quickly as possible. Don't leave it too late.

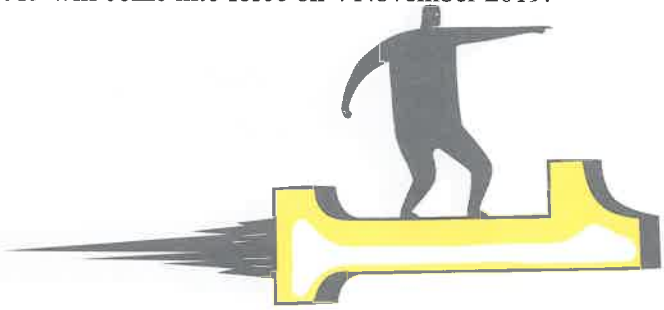
Disqualified for eleven years

Recently, the director of a company called Clarity Diamonds Limited agreed to a disqualification period of eleven years. He was found guilty of falsifying jewellery sales invoices worth over £1 million. His fellow director was banned for nine years.

Clarify Diamonds Limited was liquidated in June 2017 when it could not pay its debts. Readers may be interested to note that disqualification proceedings took almost two years from date of liquidation, which serves to demonstrate that directors can face a stressful experience over a number of years after the company has been liquidated. In other words, simply liquidating the company and walking away with the insolvency practitioner picking up the pieces is often not the outcome if there has been inappropriate conduct and directors should be reminded that in every liquidation process, the liquidator has a statutory duty to submit a report to the director disqualification unit of The Insolvency Service : often the start of an uncomfortable period as far as the former director is concerned.

New personal insolvency regulations

Following a period of consultation at the instance of the office of the accountant in bankruptcy, The Debt Arrangement Scheme (Scotland) Amendment Regulations 2019 will come into force on 4 November 2019.



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Such regulations are designed to enhance the DAS process by offering increased flexibility for debtors who find that their monthly repayment amount requires to be varied e.g. temporary loss of employment. Also, the regulations offer the opportunity for more licensed insolvency practitioners to become involved as payment distributors i.e. collecting the monthly sum from the debtor and distributing cash to all known creditors on a pro-rata basis to claims.

Similar to the new rules for corporate insolvency there is recognition that whilst it is helpful to involve creditors at all stages, the reality is that many creditors do not wish to engage, but simply register an interest and wait for a dividend. Perhaps this is because, for larger creditors in particular, occasional losses are seen as inevitable e.g. a cost of doing business that is built into any lending decision. Thus, as long as the overall level of recoveries from those individuals subject to personal insolvency proceedings falls within acceptable parameters, many credit providers are content to leave matters in the hands of the professionals.

Clearly, introducing flexibility to a system e.g. liaising with creditors, and organising a break in regular payments should the debtor be unable to meet the initial obligation, means that administration costs tend to increase. That is why a systemised process is preferred. The downside however is that a human interaction can be lost in a systemised approach which depersonalises a situation at a time when debtors want help. It can also make it harder for individual creditors who wish to discuss aspects of a DAS to understand a situation more fully before reaching a decision about whether or not to support the DAS.

Not everyone wishes to be declared bankrupt or sign a trust deed because many people recognise that although they have reached a position where their liabilities cannot be settled as quickly as possible, they wish to honour the obligation to each creditor if possible.

The overall purpose of a DAS is to provide an opportunity for a person to settle all debts over an agreed period of time without the continuing imposition of interest. If the new regulations help DAS become even more popular, the consultation exercise will have been worthwhile.

If you don't settle I will sue

Any insolvency practitioner will tell you that litigation is risky, expensive and best avoided if a negotiated settlement can be reached. Indeed, one is often faced with circumstances where there is pressure to raise legal proceedings and a properly detailed assessment which explores all options is vital before a decision is taken. Frequently the case will have little cash with which to fund legal action but there are a number of companies who are prepared to assist on a no-win/no-fee basis if their assessment reflects good prospects of recovery. Accordingly, insolvency practitioners face pressure by creditors to undertake a detailed review and it would only be if the advice from all sources suggests no realistic prospect of a successful outcome that the matter is not pursued. Two recent reported cases in England : LF2 Limited v Supperstone and Brewer v Iqbal, highlight the risk/downside of the insolvency practitioner failing to view matters in depth and consider whether proper value has been obtained. For example, in the second case quoted above, the court found the insolvency practitioner guilty of failing to take specialist advice, failing to advertise assets for sale properly and failing to expose the assets to the wide market for a reasonable period of time. This arose as a result of a pre-pack sale and the result was that the insolvency practitioner was fined and ordered to pay costs : a timely reminder to remain mindful of the interests of all stakeholder groups rather than focus upon any one party who happens to be either shouting loudest or waiving a cheque in front of the insolvency practitioner's eyes as an inducement to an early sale.

Maximising value for assets is an issue fraught with subjectivity and numerous factors will be relevant in the decision about when to sell and for how much.

Always mindful of legal action, insolvency practitioners will wish to act, and be seen to act, correctly which will inevitably increase the costs of the insolvency process with the unfortunate consequence that compliance costs can often decrease the amount remaining for distribution to creditors.

GDPR

The names and addresses contained on our Insolvency Update database are used only 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.

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