INSOLVENCY UPDATE

MESTON REID & Co
CHARTERED ACCOUNTANTS

Introduction

The first two months of 2022 are already in the rear view mirror and, from an insolvency perspective, the situation does not appear to have changed much compared with 2021. A flow of work remains from the effects of IR35 in terms of solvent liquidations rippling through the system, whilst the number of bankruptcies and trust deeds appears to have changed little in the last 18 months or so : about 600 and 200 per quarter respectively.

Of course, the change in legislation for sequestrations in order to deal with Covid-19 meant that a creditor could not present a sequestration petition unless the debt was more than £10,000, which may explain why the most recent accountant in bankruptcy report reflected more than 97% of bankruptcy petitions being presented by the individual facing debt problems rather than a creditor.

Similarly, the number of liquidations appears low which is mildly surprising given the economic challenges faced by many businesses and the fact that the bounce-back and CIBLS loans are falling due for repayment. Again, partly because of the fact that a creditor cannot liquidate a company unless the debt is more than £10,000 and certain other criteria have been met, the vast majority of liquidations in recent months are instigated by company directors. This may explain why the creditors voluntary liquidation route is far more popular than presenting a petition to court.

As with most insolvency service providers, the Meston Reid & Co team are beginning to see an increase in general "what if" enquiries. Time will tell how 2022 evolves.

Bounce-back loan abuse

Two Yorkshire-based businessmen were banned from acting as directors for a total of 21 years in January for abusing the bounce-back loan scheme. They applied for a bounce-back loan for their company in May 2020 and declared annual company turnover of £200,000. The liquidation review showed that annual turnover was about £7,800 which meant that the £8,000 minimum annual turnover threshold was not met in terms of eligibility for the loan scheme. When operational, the loan scheme provided a cash sum of 25% of declared annual turnover. The company claimed £50,000. The liquidator's enquiries revealed that the cash was used to pay four individuals (one of which was a former director) without evidence that the payments were genuine business expenses. At the same time, one of the directors acted for another entity which also submitted a fraudulent application form for a bounce-back loan of £50,000 when it would have been entitled to no more than £9,900.

Although one of the directors repaid monies to the liquidated estate, this did not stop the Director Disqualification Unit "DDU" from taking action.

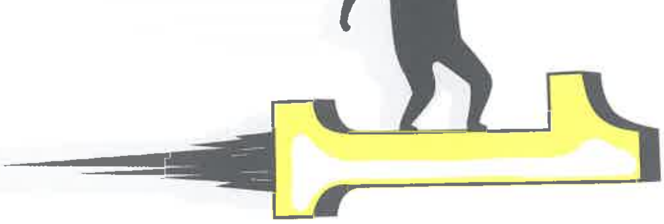
These disqualifications demonstrate that the DDU is maintaining a close eye on bounce-back loan abuse and it is a matter which liquidators will review when looking at a company's financial affairs and providing the statutory report to the DDU. A salutary warning.

Redundancy as a result of an administration process

If a company is considering formal insolvency and anticipates redundancies, current legislation requires an employer to give thirty days' notice if twenty or more employees are proposed to be made redundant, or 45 days' notice if the number of proposed employees to be made redundant is one hundred or more.

In a recent case heard in North Derbyshire Magistrates Court, the administrator was accused of conniving with the directors to ignore the law because the notice to employees was dated one day after the administrator had been appointed. The administrator's letter advised of an intention to consult within the legal timeframe but fifteen minutes after receiving the letter, all employees were handed a further letter dismissing them with immediate effect.

It appears that the court thought that the administrator should have forced the directors to issue an appropriate letter as soon as the insolvency practitioner was approached and invited to act as administrator but, somewhat perversely, the judgement also recognised that a prospective administrator has no standing to submit the appropriate form to The Redundancy Payments Service until date of appointment.



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On the face of it, it seems unfair that the proposed administrator might be held liable for breaching legislation that he could not follow until date of appointment and it will be interesting to see how case law develops in this area, because the possibility exists that a licensed insolvency practitioner will decline to act as administrator unless there is evidence that the legislation has been followed by the board prior to his appointment.

Another point to add to the pre-appointment checklist for an administrator.

Protecting ones identity

As readers will be aware, the accountant in bankruptcy "aib" maintains a free to access public Register of Insolvencies "RI" together with a Debtor Arrangement Scheme Register "DASR" at (www.aib.gov.uk).

Information included on both the RI and DASR includes the individual's full name and address but there have been cases where making such information publicly available creates the potential for a real or specific threat to the person so named. The aib has always taken the view that the full name should be shown but clearly, there are certain circumstances where an address should be withheld e.g. :

- if the individual has witnessed a crime and withholding the address would prevent the prospect of reprisals against either the individual or his/her family.
- where an individual may have been subject to abuse and, having moved house, is concerned that the new address could be accessed by the abuser.

The aib issued updated guidance last month clarifying when it is appropriate to withhold an address and the evidence required before agreeing to do so. In such cases, the RI and DASR will simply reflect an individual's address as c/o their trustee. The trustee will be advised why this has happened and hence, take steps to ensure confidentiality of the existing/new address.

A sad indictment of the times in which we live perhaps, but a necessary step in order to protect vulnerable individuals.

Is the insolvency profession about to be nationalised?

In December 2021 The Insolvency Service published a consultation document entitled "The future of insolvency regulation".

A key proposal seems to be that the existing bodies who authorise/regulate insolvency practitioners e.g. The Institute of Chartered Accountants of Scotland, will lose such status in favour of an independent regulator. It appears that the independent regulator may be a State department and thus, for "independence" one might reasonably use the term "government controlled".

Part of the problem perceived by the UK government is that existing regulation by Institutes is weak and there is no specific mechanism for dealing effectively with complaints by those who feel aggrieved by the effects upon them of an insolvency process. Also, there has been a growing tendency for firms to be seen as the insolvency practitioner rather than individuals and the government suggests that the public interest is not being sufficiently protected. Regrettably, the call for evidence does not appear to make it clear what mischiefs have been perpetrated that require a change to the status quo, but it is clear that the government wishes to seize control of monitoring insolvency practitioners, whilst introducing a system of compensation (without making it clear if the insolvency practitioner would have to pay or the entity subject to the formal insolvency process).

Comments regarding the consultation document refer to a perceived i.e. rather than actual, conflict of interest within the insolvency profession and of course, the Scottish dimension cannot be ignored because personal insolvency matters are devolved and it is not yet clear whether the Scottish government and/or the aib support the consultation process.

The consultation closes on 25 March 2022 after which responses from all interested parties will be available for review. Interesting times.

GDPR

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Conclusion

This Update is provided for general interest purposes and does not purport to offer definitive advice. 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