



They think it's all over...

Just as the World Cup was drawing to an end, we had the interesting phenomenon of an increase in what I would call “pre-insolvency” queries. Typically, someone would get in touch to say that the pressure from HMRC or the bank was becoming intolerable, and could they have a chat?

I tend to have a fairly standard checklist for these sort of discussions:

- Is there a business that is rescuable, or are both the company and the business too far gone?
- What personal guarantees are in play?
- What are the chances of some sort of “rescue package”?

In any business failure, cash is usually king. The chances are that the existing business is cash starved, and it can't really make sense to lurch from one problem to another – so the business going forward has to have access to sufficient cash. If you get over that hurdle, in my experience, there is a chance of survival.

There is often a risk, though, that the well intentioned provisions of the Insolvency Act 1986 may result in the plug being pulled on too many otherwise-viable businesses. Lots of attention is focused on the Company Directors Disqualification Act (whose aim, broadly, is to stop “cowboys” from acting as directors of companies) but I don't think that fear has any significant impact on what most cowboys actually do. That's because they assume it is never going to happen to them. No, it's the Wrongful Trading provisions of Section 214 of the Insolvency Act 1986 that can cause the problems.

Those provisions say that if somebody is a director of a company that has gone into insolvent liquidation, and at some time before that liquidation that director knew or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation, then the director may be rendered personally liable for some or all of the company's debts. That “threat” is subject to the caveat that if, when the “trigger point” is reached, the director then follows such steps as he ought to have done to minimise the loss to creditors, then there will be no personal liability.

The intention here is pretty clear: A director is at risk if he or she continues to allow a company that is obviously insolvent to trade, incurring more and more credit. So far, so good. The difficulty is that too many directors get advice that make them “shut up shop” when they needn't. Those directors are understandably concerned about their own circumstances, but in shutting up shop too soon, businesses that could otherwise be rescued won't be – and that results in employees losing their jobs, creditors losing customers and so on.

The moral of this story, therefore, is that in these difficult trading times, directors should (yes) be alert to the potential risks but should hold their nerve. Get relevant and **experienced** advice before any decisions are made – and in particular before a final decision is made.

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