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Recovery Matters

Pre-packs & employment transfer

You may recall that in the Spring edition of Recovery Matters we looked at the issue of whether Pre-packs (the pre arranged sale of a business out of Administration) were good for business. We stated that one of the plus points for Pre packs was the fact that, more often than not, existing employees were transferred over to Newco, thus preserving their employment and any built up rights under TUPE.

However, in a recent case, "Oakland v Wellswood (Yorkshire) Limited (UKEAT/0395/08/DM)", the Employment Appeal Tribunal has held that a sale of a business by Administrators through a Pre pack deal did not result in an automatic transfer under TUPE. TUPE provides that the normal provisions on transfer do not apply where the transferor is the subject of insolvency proceedings which have been instigated with a view to the liquidation of the assets of the transferor. In this case, the Pre pack deal was agreed prior to Administration and the Administrators had concluded that the business could not be traded in Administration because of anticipated losses and they expected that the company would in time move into liquidation.

'...the Employment Appeal Tribunal has held that a sale of a business by Administrators through a Pre pack deal did not result in an automatic transfer under TUPE.'

This decision appears to be at variance with the guidance issued by the Redundancy Payments Directorate on the operation of TUPE although this is not legally binding. Certainly, we believe that this case has been wrongly decided as the main intention of the parties was to achieve a transfer of the business for the purposes of continuation of trade by the purchaser through the administration process. In these circumstances, there should have been an automatic transfer of the existing employees and their rights under TUPE. It is understood that Application has been made for leave to appeal.

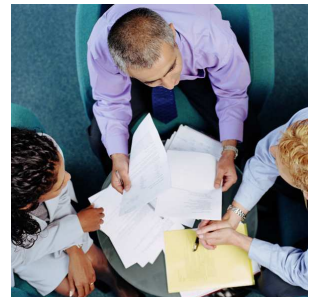
Debt Relief Orders – the latest alternative to bankruptcy

Debt Relief Orders, which came into effect from 6 April 2009, will allow someone who does not own his or her own home, has little or no surplus income or assets and owes less than £15,000 to creditors to ask the Official Receiver to write off their debts. There is no need to involve the Court, applications are simply made to the Insolvency Service via an approved debt adviser.

An order will last 12 months and in that time creditors named in the order will be unable to take action to recover their debt unless they obtain authority from the Court. If the debtor's circumstances remain unchanged through to the end of the 12 month period, the debts included in the order are cancelled and the debtor is discharged.

To apply for a debt relief order, you must:

- Be unable to pay your debts
- Owe less than £15,000 to your creditors
- Have total assets, excluding certain excluded assets as prescribed, of £300 or less
- Have monthly disposable income, after tax, nic and household expenses, of not more than £50
- Must live, or some time in the last 3 years have been living or carrying on a business, in England or Wales
- Must not have been the subject of another DRO within the last 6 years nor be involved in another formal insolvency procedure at the time of application



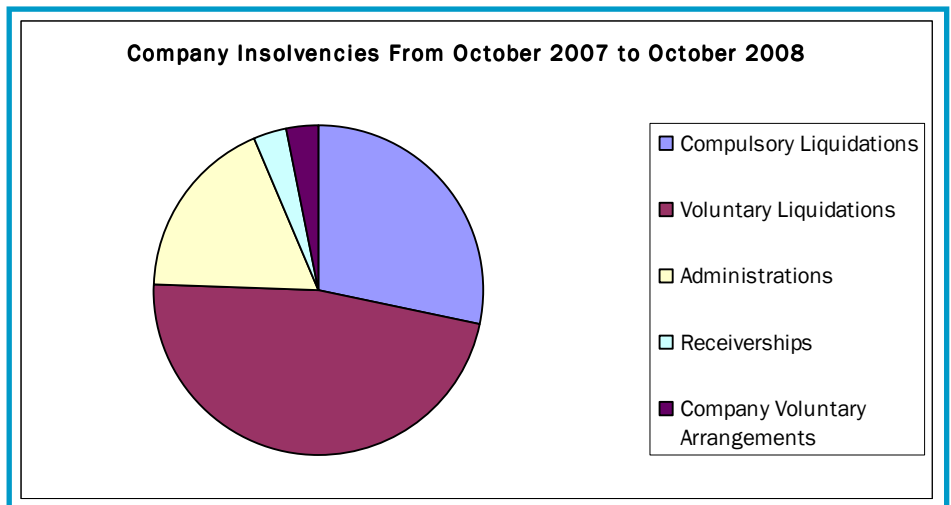
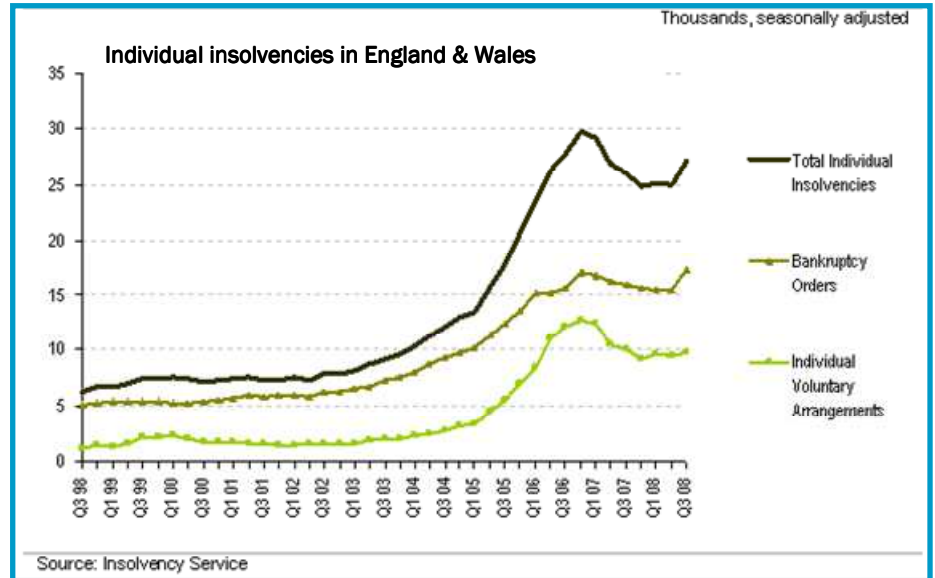
We broadly welcome this new initiative which will offer a simplified procedure for those meeting the criteria, although we doubt that the numbers genuinely meeting the criteria will be significant and, therefore, pressure on the courts is unlikely to be reduced by much. Further, there is a risk that as there is no Court involvement the initiative may be abused by serial debtors taking advantage of untrained debt advisers. Also, on the basis of present insolvency statistics, creditors could face having to write off as much as £1 billion in the first year of operation.

The cynic in me could suggest this is a blatant attempt by the government to reduce the worrying increases in bankruptcy statistics.

Statistics

The most recent personal insolvency statistics show large rises as expected. Will these fall as individuals opt for Debt Relief Orders?

For good measure, I attach the most recently available corporate insolvency figures which show liquidations accounting for over 75% of all insolvency procedures.



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