

Recovery Matters

Swelling the coffers

Welcome to the Autumn edition of Recovery Matters. In this issue we look at insolvency litigation.

With the increase in zombie companies and the recession going on longer than anyone thought possible, many unsecured creditors are now wondering ... 'Will I ever get my money back when a company goes pop?', writes Ian Robert, Corporate Recovery Partner at Kingston Smith & Partners LLP.

It is becoming the norm that there simply aren't sufficient assets to repay secured creditors, let alone unsecured... so how can a Liquidator swell the coffers to pay money back?

A growing segment of Insolvency professionals are becoming specialists at investigation and litigation, in order to recover potentially significant funds above and beyond those few remaining assets on the balance sheet when a company goes into Liquidation; but why?

The Insolvency Act 1986 provides tight, stringent, rules and regulations that companies and, more importantly, company directors must abide by when a company starts to have financial troubles. The rules allow Liquidators, where appropriate, to pierce the corporate veil and attack directors. Company directors include de jure directors (those registered at Companies House), together with de facto and shadow directors, who are actually involved in running and controlling the business but may not be registered as directors.

With the recession going on for so long, many companies have seen cash flow struggles become a part of daily life, a constant juggle.

Creditors tend to get paid according to who shouts the loudest, but these situations can potentially lead to serious problems for directors, unless they act in the best interest of all creditors - not just themselves, or those that they hope to continue working with in the future.

It can sometimes take just a few months to rack up some large debts to trade creditors and the Crown, and suddenly you are left in a position of "robbing Peter to pay Paul" - a situation that ultimately leads to Insolvency, but often a long time after the initial problems were conceived.

The main advantage of running a business via a limited company is limited liability; but there are a number of occasions whereby this protection can be pierced, and this is now easier than you may imagine.

So when is it right to bring an action against a director or other party that has caused some impropriety against the company?

Through the Insolvency Act, Liquidators can bring claims against directors, advisors and possibly any third party who has been involved in the management of the company and caused the company loss. These civil actions are brought in the Companies Court, before a Registrar whereby the matter rests on the balance of probabilities. Despite some actions being labelled fraudulent, the basis of who is right remains the same, a much less onerous task than in any criminal court.



So when is it right to bring an action against a director or other party that has caused some impropriety against the company? Before any extensive investigation should be undertaken there are a few simple steps to consider; this is, after all, an attempt to recover funds for creditors. The most important question is: can any target afford to repay monies into the pot?

There are a number of enquiries that can be done to try to establish whether a target can afford to repay the Company. There is no benefit in conducting an enquiry and establishing some impropriety if, after successfully proving the point, the target is unable to pay. These searches include property searches and valuations. More and more information can be identified these days through simple internet research.

Having established whether someone can pay, the next step is to establish whether any impropriety has actually taken place and whether, as Liquidator, there is a claim that can be brought; this usually involves a detailed investigation.

At all times, commerciality is a matter for the Liquidator as there is little point in costs exceeding potential recovery action.

Deciding whether or not to investigate always involves careful consideration of the potential costs involved, but if there are good looking claims, Liquidators are more and more willing to work on Conditional Fee Arrangements - similar to a no win, no fee agreement. Something for nothing, I hear you say; but often it is the only way to proceed. Creditors have already lost so much, and are unsurprisingly not willing to lose more to fund any action going forward.

Kingston Smith & Partners LLP, our investigation team has built up a reputation of running CFA cases on a large number of claims working with the legal profession, so that both solicitor and counsel work on the same basis, with the opportunity of recovering additional funds into the pot to pay out to creditors.

On a positive note, in a world where it is presumed that the bank gets paid first and there will be nothing left for the everyday hardworking creditor, any recovery from the type of actions described above are not caught by usual bank security, and are thus available for the general body of creditors.

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About Kingston Smith & Partners LLP

Kingston Smith & Partners LLP is the Corporate Recovery and Insolvency arm of Kingston Smith LLP, the top 20 accountancy firm. The firm offers a full range of insolvency and corporate recovery services and provides specialist services to the financial community, including viability and security reviews, restructuring and new business opportunities.

Kingston Smith & Partners undertakes a substantial amount of work as office-holders and advisers for government agencies, solicitors, accountants and others. The firm focuses on providing realistic, pragmatic and commercial advice, as well as having the ability to recognise and deal with the sensitivities of any particular situation.

Having set up the Forensic Insolvency & Recovery Service (FIRS) in 1999, the firm is at the forefront of insolvency investigation work carried out on conditional fee agreements, using designated investigation teams working from both its London, Redhill and St Albans locations.

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