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THIS YEAR SEES 'BUSIEST QUARTER FOR CORPORATE INSOLVENCIES SINCE 2012'

The first quarter of this year was the busiest for corporate insolvencies since 2012, according to the latest figures.

It's feared there may be worse to come because of rising inflation, increased fuel costs, and reduced consumer spending. The increase in interest rates is also likely to have an adverse effect on business viability.

Data from the Insolvency Service show there were 4,896 underlying corporate insolvencies in Q1 2022 – an increase of 6.1% from Q4 2021's figure of 4,615, but a rise of 112% on Q1 2021's figure (2,309).

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There were 32,305 personal insolvencies in Q1 2022 – an increase of 16.8% from Q4 2021's figure of 27,668, and an increase of 14.2% on Q1 2021's figure of 28,298.

Christina Fitzgerald, President of insolvency and restructuring trade body R3, said: "This has been the busiest quarter for corporate insolvencies since 2012 as firms who have struggled with the economic consequences of the pandemic are now having to deal with the sharp rise in inflation.

"These statistics provide further proof that while the Government's COVID support measures prevented an initial sharp rise in corporate insolvencies, the economic damage caused by the pandemic couldn't be mitigated away forever.

"The figures reflect the tough climate businesses have been operating in over the last quarter. At a point where many businesses needed a return to normality, rising fuel and energy costs have put them under additional strain, and the effects of the increased cost of living has prevented the spending boom many were hoping for from happening.

"Businesses have also faced the end of the final set of Covid measures and creditors can once again issue winding-up petitions against companies for debts of £750 or more (with the exception of landlords with Covid rent arrears)."

Businesses are advised to keep a tight rein on credit control and take action quickly to ensure invoices to customers are paid on time to maintain cash flow and prevent debts building up.

INSOLVENCY PETITIONS: A REMINDER OF THE CURRENT RULES

Insolvency procedures felt the impact of Covid-19, like so many aspects of life, and rules and procedures changed significantly over the course of the pandemic. With that in mind, what are the current rules about issuing insolvency petitions?

BANKRUPTCY PETITIONS

A creditor can now issue a Bankruptcy Petition for an undisputed liquidated debt, of £5,000 or more, where a Statutory Demand has been served on the debtor and not satisfied or disputed within 21 days of service.

The Petition debt must not be for protected rent where the Statutory Demand was served on or after 10th November 2021.

WINDING-UP PETITIONS

On 31st March 2022, the Insolvency Service removed the remaining Covid-19 restrictions that had been introduced during the pandemic. This removed a number of hurdles that were put in place during the pandemic, and the minimum petition debt reverted from the temporary increase of £10,000 back to a sum exceeding £750.

Following this change, a Winding-up Petition can be issued against a limited company registered in England & Wales, for an undisputed liquidated debt exceeding £750. The ground most commonly relied on when petitioning for insolvency is that the company is unable to pay its debts under Section 122(1)(f) of the Insolvency Act 1986. It is usual practice to serve a Statutory Demand on the company giving them 21 days' notice that winding-up proceedings will be commenced, unless the debt is paid or secured within that period.

However, it should be noted that there are still restrictions relating to debts concerning commercial rents.

INSOLVENCY – DOES TUPE APPLY?

Buying a business can trigger employment protection and other obligations under TUPE (Transfer of Undertakings (Protection of Employment)), which applies where there is a transfer from one employer to another of an “economic entity”. This is an organised grouping of resources which has the objective of pursuing an economic activity.

The sale of a business, which typically comprises assets such as premises, equipment, customers, staff and goodwill, involves the transfer of an economic entity. If there is an element of continuity in what the business does once the buyer owns it, TUPE is likely to apply.

IMPLICATIONS OF TUPE

If TUPE applies, the normal rules (outside an insolvency context) are that:

- Employees transfer to the buyer
- Employment contracts transfer to the buyer
- Claims and liabilities transfer to the buyer
- There is a duty on the seller and possibly the buyer to give employee representatives information about the transfer and to consult
- Employees dismissed by the seller may have claims against the buyer, even though it has never met them
- Changing terms is difficult unless there is a good business reason for doing so



INSOLVENCY - DOES TUPE APPLY? (CONT.)

HOW DOES TUPE WORK IN AN INSOLVENCY CONTEXT?

Buying a business from an insolvent company is either a different story or a very different story, depending on the type of insolvency process that has been put in place. If TUPE applies (and it won't always, you still need to apply the test above), the way in which it normally works is modified and limits what the buyer takes over. This is intended to encourage the survival of businesses.

But don't get caught out. The changes to how TUPE operates only apply where insolvency proceedings have been commenced and an insolvency practitioner has been formally appointed. They will not apply where, for example, an insolvent company sells its business before the appointment of an administrator – even if the administrator has been acting in a business advisory capacity in the background, as typically happens in a “pre-pack” administration. The ordinary TUPE provisions would apply, with the buyer facing transfer of employees and the full range of liabilities in the normal way.

INFORMATION AND CONSULTATION

Whether an insolvent company faces rescue or wind-up, the normal rules on information and consultation under TUPE apply.

The seller will have an obligation to provide employee representatives with prescribed information on matters such as the transfer, its implications for affected employees and any proposed measures. It must then consult on any measures proposed in connection with the transfer.

The buyer must provide information to the seller about any measures it is proposing to take after the transfer.

Where a seller or buyer fails to comply with the rules on information and consultation, an Employment Tribunal can order a penalty of up to 13 weeks' pay per affected employee. Claims can be brought against just one party or both for failure to inform and consult. The buyer is jointly liable to pay any penalty incurred, whichever party was at fault. Assuming the seller is insolvent and has no assets to meet the liability, the employees will most likely look to the buyer.

If there are “special circumstances” which mean that it is not reasonably practicable to comply with the information and consultation rules in full, and an employer can show it did all that was reasonably practicable, this may provide a defence to claims.



DOUBLE FAULT - WHAT DID BORIS BECKER DO TO DESERVE A TWO-AND-A-HALF YEAR CUSTODIAL SENTENCE?

At Southwark Crown Court on 29th April, former tennis champion Boris Becker was sentenced to two-and-a-half years following his bankruptcy in June 2017 which resulted from a Petition presented by private bank, Arbuthnot Latham & Co. Boris Becker was acquitted of 20 charges but convicted on the following:-

1. Removing property totalling €427,000 euros from his bankruptcy estate;
2. Failure to disclose ownership of a property in Leiman in Germany;
3. Concealing a loan of €825,000 euros from the Bank of Alpinum of Lichtenstein; and
4. Ownership of 75,000 shares in Breaking Data Corp.

Boris Becker also remains bankrupt and has a 12-year bankruptcy restriction undertaking on the public record. Mark Ford, Finbar O'Connell and Gilbert Lemon of Smith & Williamson LLP are the Joint Trustees in Bankruptcy of Mr Becker's estate. Deal Beale, Chief Executive of the Insolvency Service, said:-

"The Court has handed down a prison sentence to Boris Becker today after he was convicted of offences relating to his bankruptcy."

"Boris Becker's sentence clearly demonstrates that concealing assets in bankruptcy is a serious offence which we will prosecute and bring offenders to justice."

Previously, Boris Becker had been handed a two-year suspended sentence in Germany in 2002 for tax evasion and attempted tax evasion worth €1.7 million euros.

Boris Becker's offences revolved around a failure to disclose property and assets, and removal of property contrary to Sections 354(20) and 350(6) of the Insolvency Act 1986. When sentencing, Her Honour Judge Deborah Taylor made an interesting comment that there are no guidelines for Insolvency Act offences, but the principles set out in various Court of Appeal decisions emphasise the importance of adherence to the insolvency regime and, in general, a failure to do so will result in custodial sentences.

In considering the seriousness of the offences, the Judge took into account culpability and harm. There was a suggestion that Boris Becker's actions were merely to make preferential creditors of those he paid, who may well have been paid in any event had the Trustees been given the full information.

In terms of aggravating features, the Judge held that she did not consider that Boris Becker's life was in chaos. Boris Becker did what he could to pay those closest to him; but that was not as a result of sophisticated planning.

DOUBLE FAULT - WHAT DID BORIS BECKER DO TO DESERVE A TWO-AND-A-HALF YEAR CUSTODIAL SENTENCE? (CONT.)

In mitigation, the Judge took into account Boris Becker's fall from grace, loss of his career, reputation and property, but added he'd shown no remorse or acceptance of his guilt when she sentenced him to two years and six months. On the other counts, she imposed a sentence of 18 months to run concurrently with the two-and-a-half years.

No directors' disqualification orders were made, due to the fact that Mr Becker remained an undischarged bankrupt and therefore remained unable to be a Director in any event.

As a result of Boris Becker's actions, he served a lot of time in Court rather than on court!

If you would like to discuss or need help or support on any of the issues above then please contact the Dispute Resolution Team on 01582 514000



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