Machins SOLICITORS

INSOLVENCY NEWS

MAY 2023

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CORPORATE INSOLVENCIES CONTINUE TO SOAR AMID FINANCIAL TURMOIL

Corporate insolvencies soared last year as businesses struggled to cope with increasing financial turmoil, most of it outside of their control.

Figures from the Insolvency Service show there were a total of 1,964 corporate insolvencies in December. That was 31.9% higher than December 2021 and 75.5% higher than the same month in 2019, before the Covid pandemic.

The figures reflect the pressures companies are facing from high inflation, high interest rates, increasing cost of energy and raw materials, all combined with a reduction in consumer demand caused by the cost-of-living crisis.

Many firms are also now having to cope with repayments on government loans provided during the pandemic. Protections against creditor action have also been lifted, adding yet more pressure on struggling businesses and fuelling the increase in compulsory liquidations.

Christina Fitzgerald, President of R3, the insolvency and restructuring trade body, said the increase in insolvencies is due to creditors chasing unpaid debts following changes in legislation, as both ends of the supply chain remain squeezed by ongoing issues around consumer confidence, rising costs, and requests for increased wages.

She said: "December and January are critical periods for many firms, and these issues, combined with strikes, bad weather and the economic challenges the UK has faced over the last three years may have dealt a further blow to businesses and business owners.
"These challenges aren't going to go away overnight – and directors are very concerned about the effects of energy and staff costs, as well as fears about how the cost of living crisis will impact on their income this year."

Please contact us if you would like help with debt collection, credit control and insolvency issues.

DIRECTORS RE-USING COMPANY NAME FOLLOWING INSOLVENCY

Creditors have complained in the past that Directors have failed companies but continued trading with the same name. This is actually prohibited, in principle, pursuant to Section 216 of the Insolvency Act which states that "The same or similar name is not to be used by a Director of an insolvent company with a new company". There are, however, three exceptions:-

·Firstly, if the new company purchases the insolvent company and gives the prescribed notice to the company's creditors.
·The second exception is where a Court application has been made for permission to act as a Director of the company.
·The final exception is where the company known by the prohibited name has been known by that name for a year before the company went into Liquidation and has been trading during that period.

If a Director is in breach of this, a Creditor of the new company using the prohibited name can bring an action against the management of that company. The Director is also liable for offences under Section 217 of the Insolvency Act for criminal offences.

CORPORATE INSOLVENCY SUMMARY

The definition of 'Insolvency' has two meanings, often referred to as the 'Balance Sheet' test' and/or the 'Cash Flow' test. The Balance Sheet test for insolvency is that your assets are less than your liabilities, and the Cash Flow test is that you are unable to pay your debts as they fall due. A company may be placed into a number of formal insolvencies. Voluntary insolvency, such as Members' Voluntary Liquidation and Creditors' Voluntary Liquidation; Compulsory Liquidations include Compulsory Winding-up by the Court; Administration may be voluntary or imposed upon you and a company can also enter into a Creditors' Voluntary Arrangement if proposals are accepted by 75% in value of the Creditors.

Voluntary Liquidations

There are two types of Voluntary Liquidation: where the company's insolvent, a Creditors' Voluntary Liquidation; and where the company's solvent, a Members' Voluntary Liquidation.

These are often referred to as a CVL or MVL.

Compulsory Liquidations

This is where the Court has made an Order that the company be placed into Liquidation by way of a Liquidation Order. This would normally follow a Creditor issuing a Winding-up Petition.

In all Liquidations, a Liquidator is appointed to realise the company's assets. The Liquidator has duties to act in good faith and with reasonable skill. The Liquidator takes over the role of the Directors and inherits the Directors' powers. The Liquidator can allow Directors to retain some of their powers in Voluntary Liquidation. A Liquidator can:-

1.Disclaim onerous property;
2.Bring or defend legal proceedings;
3.Carry on business for limited purposes;
4.Sell the Company's property; and
5.Pursue, commonly Directors', assets that have been transferred out of the company.

Administration

Administration is a procedure which allows the realisation of the company's assets but provides the company a Moratorium preventing Creditors from taking action against the company. In Administration, the Administrator can reorganise or realise the assets. The Administrator takes over the control of the company and its assets when appointed.

The purpose of the Administration is for the company to be rescued and to achieve a better realisation of the company's affairs than it would do if not being placed into Administration. A company can enter into Administration either by a Court Order or by the company (or its Directors) or a charge holder (qualifying charge only) filing the appropriate papers at Court.

Administrative Receiverships

Administrative Receiverships were effectively abolished as a remedy for floating charges created after September 2003.

Law of Property Act Receiver

A person holding a fixed charge over a property can appoint a Receiver once a secured debt has become due. An LPA Receiver has the powers set out under the Law of Property Act 1925 but these can be extended in the security document. Normally the LPA Receiver appointed with a view to selling the property or collecting income.

Creditors Voluntary Arrangement (CVA)

A CVA is a procedure that allows a company to settle its debts with an agreed percentage of the debt to creditors. The company's creditors are required by at least 75% (by value) of the creditors to agree to the proposal. Historically, and up to June 2020, if a company were opposed to a CVA they could obtain a Moratorium to protect the company. This initial Moratorium is no longer available. Once the company is placed into Creditors Voluntary Arrangement, the company has to comply with the proposal otherwise the independent Supervisor of the proposal may apply for the company's Liquidation.

HIGH COURT APPROVES RESTRUCTURING PLAN FOR INSOLVENT COMPANY

The High Court has approved a restructuring plan for an insolvent company despite opposition from one class of creditors.

The case involved NGI Systems and Solutions Ltd v The Good Box Co Labs Ltd (In Administration).

Good Box supplied technology that allowed donors to make contactless donations to charities.

NGI was one of its shareholders as well as one of its suppliers and its main creditor.
In 2022, Good Box went into administration, owing its creditors over £10 million.

NGI provided funding, secured by a debenture, to enable the company to continue trading during the administration. It proposed a restructuring plan and asked the court to sanction it.

The joint administrators said their primary aim was to rescue the business as a going concern, either through the sale of its business and assets, or through a restructuring plan.

If the company's business and assets were to be sold, the proceeds were only likely to cover NGI's secured administration claim, meaning there would be no return for any other creditors.

The restructuring plan involved an £800,000 injection of funding from a consortium of investors led by NGI.

Trade creditors and creditors with claims in the administration which would rank as administration expenses (administration creditors) would be paid in full following an adjudication process.

A further class of creditors (the convertible loan holders) would receive a new allotment of shares and would hold up to 14% of the company's issued share capital.

In all the class meetings save for that of the convertible loan holders, the required majorities voted in favour of the restructuring plan.

The joint administrators did not actively oppose the plan. However, they would not consent to it on the company's behalf without a court order.

The court granted the application.

It held that the fact that a particular class meeting did not result in the required majority vote in favour of a proposed restructuring plan did not necessarily mean that the court could not sanction it.

The court was satisfied that none of the members of the dissenting class would be any worse off under the plan than they would be if the plan were not sanctioned.

Without the plan, the company would go into liquidation and the convertible loan holders would get nothing.

Under the plan, they would obtain an equity stake in the company, which would achieve value if the company traded successfully.

Good Box Co Labs Ltd (In Administration), Re
Also known as: NGI Systems and Solutions Ltd v The Good Box Co Labs Ltd (In Administration)
Chancery Division
14 February 2023
[2023] EWHC 274 (Ch)
Judge Davis-White KC

Please contact us if you would like more information about the issues raised in this article or any aspect of company law.

If you would like to discuss or need any help or support on any of the issues above then please contact the Insolvency Team on 01582 514 000.

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