

What lies ahead

Shining a light on restructuring options



Introduction

This week marks another critical juncture in the ongoing fight against the economic challenges presented by the COVID-19 crisis. With the jobs retention scheme portal now open for applications since Monday 20 April 2020, many businesses and employers are hoping to receive funds from HMRC promptly in order to fulfil payroll obligations by month end and ease any immediate cash flow concerns.

The practical challenges presented by the Coronavirus Business Interruption Loan Scheme and the Coronavirus Large Business Interruption Loan Scheme have been well documented and there is an expectation that further work is urgently required to ensure that the £330bn bailout package announced by the chancellor Rishi Sunak can be delivered.

Local businesses are facing increasing creditor pressure across a range of sectors with funders and the UK government fiscal stimulus packages endeavouring to provide support to those business where possible. However, the economic impact of the crisis cannot be underestimated and will need to be addressed in a manner that is appropriate to each business that encounters irreversible difficulties.

Insolvency reforms

Legislative reforms in insolvency laws across the UK are imminent and include proposals for a new restructuring plan and related moratorium for companies and a temporary suspension of wrongful trading provisions, which aim to protect company directors against concerns relating to personal liability in the current climate. Whilst those changes have generally been welcomed (albeit pending further specifics), companies, creditors and insolvency practitioners have been carefully considering the manner in which the existing administration regime can be utilised as a pragmatic restructuring tool in a cost effective manner.

Administration as a restructuring tool

A commonly held misconception is that a company entering into administration has entirely collapsed rather than the process being viewed as one that, if used appropriately, can stabilise and restructure a company in a manner that provides a positive outcome for a range of key stakeholders.

One of the starting points in any administration process is to evaluate *whether or not the company can be rescued as a going concern*. There is an expectation that in certain administration appointments relating to COVID-19, which may be imminent, that *this* will be the purpose of the administration process rather than any of the other statutory objectives, which have been more prevalent in recent times.

Up until now, the administration process typically has led to the incumbent management team of the business handing over control of the company's affairs to the appointed insolvency practitioner. The Insolvency Act 1986 and the Insolvency (Northern Ireland) Order 1989 each stipulate that an officer of a company in administration cannot exercise a management power without the consent of the administrator. However, in certain appropriate circumstances an appointed administrator may decide to authorise the existing directors to retain and exercise a certain amount of the management powers held by them prior to the administration taking effect, in what has been dubbed a "light touch" administration. The administrator will not delegate powers to the directors but will instead provide explicit consent to enable the management team to perform certain agreed tasks related to the continued operation of the company. The most recent administration of Debenhams earlier this month is a high profile example of the "light touch" approach being implemented in an effective manner.

Analysing the “light touch” approach

Advantages

- If the objective of rescuing the company in question is the principal driver for the administration process, retaining director involvement and their inherent knowledge of the business coupled with the expert guidance from an appointed insolvency practitioner could provide a favourable result in seeking to achieve that objective.
- The “light touch” approach should assist with keeping costs down in a particularly cost-sensitive environment. Companies are likely to be facing a severe liquidity crisis so the ability to keep the professional costs down by leaving the administrator only to fulfil their essential functions may be viewed as a priority.
- The “light touch” approach would seem to be more suitable to companies with a lower level of debt rather than highly leveraged companies or those that form part of a more complex group structure.

Risks

- From a practical perspective, insolvency practitioners will be conscious of not handing too much power back to directors given the inherent risk of those delegated powers being abused or innocently mishandled.
- The conduct and implementation of the administration process ultimately falls to the appointed insolvency practitioner so they will need to seek to ensure that adequate protections are in place if they commit to directors being entitled to enter into specified arrangements or transactions on their behalf.
- If a company already had a significant level of impaired debt prior to the COVID-19 crisis, the use of a “light touch” approach is unlikely to be appropriate to alleviate that position.

Conclusion

The director general of CBI, Dame Carolyn Fairbairn, spoke last week of the workout for the COVID-19 crisis requiring a three phase response of restarting, reviving and renewing the economy.

A wider implementation of “light touch” administrations in the correct set of circumstances and within the correct parameters may form an integral part of that response. However, the success of the approach will rely heavily on buy in from a company’s funders, other key stakeholders and the value of the skillset of the existing management team in order to navigate successfully the challenges faced.

Eversheds Sutherland Northern Ireland has a unique team of specialist restructuring lawyers who advise clients in both Ireland and the UK on all aspects of corporate recovery and insolvency including administration, company voluntary arrangements, voluntary and court initiated liquidations, personal bankruptcies, individual voluntary arrangements, receiverships and examinership.

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