

# News with Clout

Restructuring Insolvency and Turnarounds

## **PHOENIX? PREPACKS? LEGITIMATE TRANSFERS FOR VALUE? INDEPENDENCE?**

Over a number of years there has been much debate around the issues concerning the transfer of businesses to a second company and then the collapsing of the first company into liquidation.

Why do such a thing? Is it wrong? What are the implications? What goes on in other jurisdictions?

In the UK this kind of transaction has legislative and court sanction, with the early and indeed pre involvement of an insolvency practitioner who even negotiates the deal. They then go to court for the appointment and on the same day sign the deal. Antagonists of this system argue that creditors are shut out of the decisions when it is their money that is being dealt with. In addition they argue the insolvency practitioner is devoid of independence. In our view these are both valid arguments.

The protagonists argue that this pre pack procedure is more likely to preserve value for all stakeholders. Where goodwill of suppliers or customers is critical to the survival of the business this would certainly be the case. There are other options.

It is arguable in this country that commercially the option of transferring the business may have merit. There is no reason to involve the insolvency practitioner in the process until the time comes to put the old company down. Just as long as fair value has been obtained for the transfer, the liquidator is independent and clearly acting for the creditors and can investigate and assess the validity of the transaction. If necessary take the appropriate legal action to amend any inappropriate situation, providing funds are available in the liquidation to fund such legal action and there is sufficient to be gained on the successful outcome of the litigation. Realistically such transfers are not an option available for all businesses that have struggled.

The company has gotten into trouble somehow. Therefore the key question needs to be asked. WHY? Then you need to know has the problem been fixed? Can it be self funding or with third party contributions if the old debt is removed. Are the financiers up for it as well and is it really worth saving because such actions are not without costs.

Tick all those boxes then ask one last question. Is there another way? Yes what about voluntary administration, wasn't it meant to save entities or at the least businesses? It does but it is not cheap and as argued earlier there can be certain circumstances where a significant loss of goodwill may prejudice the survival of the entity or business. We have seen creditor trusts used in this instance but they are not popular with the authorities.

We have still not answered the question, is it wrong. There is the question of phoenix which whilst frowned upon there does not appear to be an express legislated sanction against it. There are remedies sure but strictly speaking such action is not an offence. There is the ability of ASIC to ban people from being directors for periods of time as a consequence of multiple failures. There is the commercial remedy of an uncommercial transaction under Section 588FB of the Corporations Act or indeed unreasonable director related transactions under Section 588FDA of the Act. If fair value is given and paid the commercial sanctions are taken out. Treat all creditors equally and act in their interests will take Section 181 of the Act out of the play. This provision is about acting in the interests of the company, which in an insolvency means acting in the creditors interests. Breach this provision and the specter of personal liability looms.

As ever we welcome all your enquiries on restructuring, insolvency and turnarounds!



# NEWS WITH CLOUT

Offering Corporate & Personal Solvency Solutions

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***The partners and staff wish to advise that the Mid North Coast office has a new postal address being:***

PO Box 4453

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**Apart from Formal Insolvency Services at Clouts we also Offer:-**

Orchestrating Informal Arrangements with Creditors

Monitoring Businesses in Workout Situations

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Forensic Accounting Assignments

Business Valuations

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