

Practical tips for directors of UK companies facing financial difficulties

November 28, 2023 Michael Mulligan

PRACTICES Restructuring

With the latest data from the Insolvency Service showing the highest level of insolvencies in the UK since 2009, it is a clear indication that the combination of high interest rates, stagnant inflation, lack of consumer confidence and lower levels of spending is beginning to bite.

With the economic outlook remaining uncertain and directors of businesses of all sizes facing mounting challenges, Michael provides some tips for directors on how to protect their businesses from collapse and avoid personal liability for misfeasance, wrongful and fraudulent trading if the worst does happen.

Directors' duties

When a company is on the verge of insolvency, the so-called 'twilight zone', it is vital that directors err on the side of caution and direct their paramount concerns to the interests of the company's creditors.

If a director acts in breach of their duty to protect the interests of creditors, they may be pursued by a subsequently appointed administrator or liquidator and ordered to repay, restore or account for the money or property of the company which was improperly paid out or disposed of and/or contribute a sum to the company's assets by way of compensation. The director could also potentially face disqualification.

Keep clear financial records and monitor estimates closely

The board must have an up-to-date picture of the company's trading, financial and cash flow position as well as financial forecasts. If necessary this should be checked daily. A realistic estimate of what might be realised from the company's assets upon liquidation should be prepared and kept under review.

Detailed and accurate financial records must be readily available to any future insolvency officeholder.

Keep a tight hold on borrowing

Further credit may worsen the situation for creditors as a whole and could be viewed as improper conduct. Directors should try to reduce expenditure and always consider the effects of their decision making on current creditors. Any spending decision or additional funding should be carefully analysed (with professional advisers) and directors should not enter into any transactions which potentially prefer one creditor over another.

Engage openly with creditors

Creditors' interests should be at the forefront of directors' minds when facing insolvency and creditors should be provided with clear and accurate information and lines of communication kept open so trust is gained and time to pay arrangements may be better negotiated. Crucially, all possible action should be taken to minimise losses to creditors.

Maintain written records

Directors should carefully document all meetings, conversations and advice, particularly with creditors and their professional advisers. Board meetings should be held regularly and all decisions fully documented. Good paperwork will help to support directors' actions should the company enter formal insolvency.

Review contracts

It is important for directors to check contracts with lenders and suppliers, including key payment dates, termination provisions and insolvency clauses.

Protect company assets

Assets must be secured and insured so their value is protected.

Seek professional advice and consider rescue strategies

Above all, directors should not stick their heads in the sand and resignation should be a last option. A director who resigns is arguably not taking every step to protect the interests of the company's creditors and resignation will not absolve a director from liability for past misconduct. As soon as a director becomes aware of financial difficulties they should inform the board and seek urgent advice from an insolvency practitioner to maximise the prospects of a successful turnaround through a restructuring or enter a formal insolvency process at an early stage to minimise loss to creditors. Also, early advice may help a director to avoid an accusation of trading whilst insolvent.

Our highly experienced Restructuring & Insolvency team provides clear, pragmatic and practical legal advice to businesses in the UK and the US facing financial difficulty. Please do not hesitate to contact [Michael Mulligan](#) or one of the team.