



BURTON
SWEET

CORPORATE RECOVERY

Autumn 2009

Insolvency & Recovery Review

INSOLVENCIES – THE CALM BEFORE THE STORM?

The official statistics for corporate and individual insolvencies, published by the Insolvency Service, for the second quarter of 2009 show that the overall number of insolvencies has continued to rise, albeit at a much slower rate than in the recent past.

Corporate insolvencies (compulsory liquidations and creditors' voluntary liquidations) rose by 2.9% compared to the first quarter, but 39.1% higher than the same quarter in 2008.

Individual insolvencies (bankruptcies, debt relief orders and individual voluntary arrangements) were up 9.3% on the previous quarter, 27.4% more than in the corresponding quarter last year. Personal insolvencies are now running at record levels.

At first sight, therefore, the insolvency figures may have reached something of a plateau. However, the experience of the early 1990's is that insolvencies did not peak until something like two years after the worst of the recession had passed. Also, the second quarter of the year has historically shown a dip in insolvency numbers.

Pressure from the Government has resulted in banks holding off foreclosing on customers up to now. Additionally, the HMRC "time to pay" scheme has deferred some £3 billion in VAT and PAYE payments, which arguably has encouraged businesses to trade whilst insolvent. In many cases, all this has simply delayed the inevitable. Our concern is that many businesses, which may be salvageable if action is taken early enough, are actually being run beyond the point of no return, and beyond any possible rescue.

Directors and other stakeholders really do need to recognise their predicament at an early stage, and seek help. Our advice to businesses, therefore, is to work with their accountants and other professional advisers to plan and monitor profitability and cash flow obsessively, and engage with creditors as soon as they can.

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REDUNDANCY PAY LIMIT INCREASES

As foreshadowed in the Chancellor's Budget in April, the weekly limit for calculating redundancy pay and various other claims will increase from £350 to £380

on 1 October 2009. Increases normally apply in February each year, but the 2010 updating has been brought forward.

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CALL FOR GREATER PROTECTION FOR CONSUMERS

When a business fails, deposits or prepayments made by the public rank only as unsecured claims. Consumers have no greater protection or priority than suppliers or other trade creditors.

The most high profile recent example of this was the collapse of Farepak, the Christmas hamper company, in 2006, when some £38 million of consumers' money was largely lost. It's estimated, however, that 1.8 million people who have made prepayments in the last two years did not receive the goods they ordered, with insolvency stated as the reason in about 1 in 5 of these cases.

With the growth in online sales, more and more transactions involve paying for goods in advance, and so the issue is likely to gain an ever-increasing profile. Now Consumer Focus, a consumer rights pressure group, has published a report entitled Pay Now, Pay Later which argues for greater rights for consumers in insolvency situations.

Their recommendations include:

- Promoting consumers to the rank of preferential creditors in cases of insolvency;
- Harmonising the redress afforded by section 75 of the Consumer Credit Act 1974 to those paying by credit card (credit card issuers are jointly liable with suppliers where the price of the purchase is over £100) to all types of payment card;
- Enhance duties on directors to ensure that consumer prepayments should not be used for purposes unrelated to those for which it was originally paid;
- Introducing powers for the Secretary of State to require businesses carrying on specified activities to establish payment protection schemes, with targeted interventions in the furniture, electrical goods and travel sectors.

The Government has committed itself to reviewing the regulatory framework for consumer prepayments in its recent white paper A Better Deal for Consumers, Delivering Real Help Now and Change for the Future. There is no doubt in our view that consumers need greater protection, and whilst we have reservations about some of the proposals in the Consumer Focus report, particularly those that would place a greater regulatory and bureaucratic burden on small or medium-sized enterprises, it is a valuable contribution to debate.



OFT WARNS CONSUMERS ABOUT DEBT SALE SCAMS

The Office of Fair Trading ("OFT") has warned consumers not to be taken in by companies offering to free them from their debts by buying their liabilities from them.

The warning follows an increase in internet and press advertising by debt and claims management companies stating that they can take over or write off debts by purchasing consumers' credit agreements.

People with serious debt problems can become extremely desperate and vulnerable, and it is little wonder that some might fall foul of what is, to most of us, an obvious scam. Debts cannot, of course, be sold without the creditor's consent, and borrowers will still be liable for the debts – and subject to debt collection procedures – notwithstanding any purported sale.

Graham Down, director of Burton Sweet Corporate Recovery, commented: "This is just an example of unscrupulous operators trying to take advantage of individuals' distress. Like many scams, it looks too good to be true, and it certainly is. People with debt problems should take advice from properly qualified and regulated professionals."

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LESSONS FROM DOWN UNDER

We wanted to mention Australia just as an excuse to gloat over the Ashes victory this summer, but finding a link between insolvency and our antipodean cousins was less than easy. Happily, their Supreme Court recently came up with an interesting decision on the Aussie equivalent of wrongful trading.

The Australian Corporations Act states that “a person is solvent if, and only if, the person is able to pay all the person’s debts, as and when they become due and payable”. It goes on to say that “a person who is not solvent is insolvent”. In other words, the definition is broadly similar to that in section 123 of our own Insolvency Act, albeit somewhat more tightly drawn.

It is established law Down Under that the cash flow test for insolvency is the principal yardstick, with only subsidiary relevance attaching to the balance sheet assessment.

The Court noted that the emphasis must be on the extent of cash and other liquid assets versus total debts payable immediately and in the near future. Insufficiency of cash or liquid assets which is more than temporary is determinative of insolvency.

In the case of *Sutherland (as Joint Liquidator of Australian Coal Technology) v Hanson Construction Materials Pty Ltd* the Supreme Court found that, over a three month period preceding its liquidation, Australian Coal Technology (“ACT”) showed a continuing increase in liabilities coupled with a decrease

in receivables and a deteriorating relationship with suppliers. It found that ACT’s cash and other liquid assets were insufficient to meet debts due and payable and to become due and payable in the near future. The insufficiency was deep-seated and endemic.

Australian decisions are, of course, not particularly relevant to English jurisprudence, but we thought it was an interesting case and one which carries a warning to directors of companies in England who adopt a “rose-tinted glasses” approach to future cash flows.

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PROVISIONAL LIQUIDATOR APPOINTED TO CHELTENHAM CHARTERED ACCOUNTANTS

The Secretary of State for Business, Innovation & Skills has presented petitions in the High Court to wind up Classic Financial Solutions LLP, and eight companies operated by it, in the public interest.

Classic Financial Solutions LLP is a chartered accountancy practice based in Cheltenham. As part of its services it operates UK companies on behalf of overseas beneficiaries. Other companies act as corporate officers for a number of the UK companies operated by Classic Financial Solutions LLP.

The petitions to wind up the companies were presented following an investigation carried out by Companies Investigation Branch under section 447 of the Companies Act 1985 (as amended). The Official Receiver has been appointed provisional liquidator of all nine companies.

The role of the provisional liquidator is to protect assets in the possession or under the control of the company pending the determination of the petition. The provisional liquidator also has the power to investigate the affairs of the company insofar as it is necessary to protect the assets including any third party or trust monies or assets in the possession of or under the control of the company.

The adjourned petitions are expected to be heard in the High Court on 28 October 2009.

WALKING TO CURE DIABETES

Members of the Burton Sweet Corporate Recovery teams in Bristol and Bournemouth have been raising money to help research into diabetes in children.

Diabetes afflicts some 25,000 children in the UK, and the Juvenile Diabetes Research Foundation exists to promote research into this dreadful, debilitating disease. On 13 September the team took part in the Walk to Cure Diabetes. If you'd like to support this fantastic cause, you can still donate by logging on to www.justgiving.com/BSCR.

CONGRATULATIONS!



Congratulations to Alan Hands, Senior Administrator in our Shrewsbury office.

Alan has recently passed the examinations to obtain his Certificate of Proficiency in Insolvency. All of us at BSCR are absolutely thrilled for Alan.

IMPORTANT NOTE: This newsletter is intended for general information only. It is not a substitute for specific advice which should be sought for specific cases. We cannot accept responsibility for any action (or decision not to take action) made in reliance on the content of this publication.

Burton Sweet Corporate Recovery is a leading firm of specialist insolvency practitioners with offices in nine locations:

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