

STATUTORY REMEDIES

No doubt the informal arrangement for a “workout” is the most cost efficient but there are occasions where it is just not possible or practicable, for example, where certain creditors refuse to participate and continue with proceedings such as to wind up the company or bankrupt the owner. If the business is owned by a company and that company is insolvent, then the directors may be at risk of attracting personal liability by trading on, particularly if the work out is not successful. In such cases it will become necessary to install a liquidator in some form or another to administer the recovery if it is thought possible.

STATUTORY REMEDIES FOR INDIVIDUALS OPERATING BUSINESSES

The most efficient and effective administrations are those available to individuals. The individual who operates a business which finds itself in trouble can make arrangements under Part 10 of the Bankruptcy Act. The individual simply arranges a meeting of creditors and in the process provides them with financial and other information as required by the Act. At the meeting, the owner puts a proposal to the creditors; it may be for a moratorium, or a partial write off by the creditors of their debts or a payment over time or a combination of both. The proposal is put to the

vote and if passed by the required majority then the business owner no longer owes the money to the creditors but has instead an obligation to fulfil the terms of the arrangement approved by the meeting.

Any debt or finance restructuring is a form of relief which may be just as effective as the introduction of fresh capital to the business.

WHERE DOES THE BUSINESS GET THE CASH TO PAY FOR ALL OF THIS
AT A TIME LIKE THIS

The question is often asked: "Where does the firm get the money to pay for all of the expert advice and assistance from accountants, lawyers and other consultants at a time when its fortunes and presumably its cash reserves are at an all-time low?"

Every reconstruction arrangement, whether it be a workout or a formal administration, if it has as its objectives: trading the business out of its difficulties, it must involve at least a moratorium from the creditors and financiers, assuming that the business is (but for its debt load) a profitable business.

The business will be able to accumulate or save its after tax profits (thanks

to the creditors granting the relief in the way of the moratorium) and it is with those savings that the cost of reconstruction can generally be funded. Additionally, funds can be and are often raised from the sale of assets, surplus to the requirements of the business or injection by the proprietors into the business out of their private resources.

Finally, in most instances where the creditors and financiers are convinced that the only prospect of recovery is through a trade on, then the cost of the reconstruction process may be financed by those creditors and/or financiers in that there will be a moratorium in place and more importantly they very often accept much less than 100% of the amount due to them, payable over time.

Generally speaking the costs involved in a reconstruction process, (informal workouts and the formal administrations) are not as expensive as is generally believed. The greatest expense normally involved is in bringing up to date the company's financial records which in many instances have been neglected. If the business records have not been maintained, the proprietor would be well advised to have the internal or external accountants bring them up to date to reduce the costs of the reconstruction processes.

OFFICIAL ADMINISTRATIONS FOR COMPANIES

These are designed to meet a specific need of a company which is insolvent or in financial trouble. These are:

Voluntary Company Administration, **What are they and how they work?**

The primary purpose of the relevant provisions of the Corporations Law is to enable the directors of a company to appoint an Administrator to take over the affairs of the company and hopefully prepare a proposal for its reconstruction and continued trading and to improve the return to creditors which would otherwise have not been possible from a winding up. This form of administration should provide a cost-effective means for a company in financial difficulties to obtain the agreement of its creditors to a reconstruction plan.

During the period of the administration a moratorium is imposed on the rights of unsecured creditors and in certain circumstances, secured creditors.

The Administrator takes control of the company's business, assets, and undertakings, with the power to carry on the business and manage the

company's property as agent of the company. The Administrator may perform any function and exercise any power that the company or any of its officers could have performed or exercised prior to the Administrator's appointment. The Administrator's powers are very wide ranging as he also has the power to remove or appoint a director and to do whatever else is necessary for the purposes of the administration. As the Administrator will be an officer of the company he will have statutory duties to act honestly and with a reasonable degree of care and diligence.

Whilst the Administrator is in control, creditors are prevented from taking or continuing proceedings against the company and the company may only be wound up by an order of the court. In relation to any of its property, creditors are prevented from taking or continuing proceedings against the company, except with the Administrator's consent, or by court order. The court will refuse to grant such an order if it is satisfied that it is in the best interests of the creditors for the administration to continue and the assets of the company be maintained for the duration of the administration.

An Administrator will be personally liable for debts incurred whilst acting as administrator of a company. However, the Administrator will be entitled to be indemnified out of the assets of the company. This right of

indemnity has priority over all of the company's unsecured liabilities and liabilities secured by a floating charge unless the charge holder has enforced the charge prior to the commencement of the administration.

Where under an agreement made before the commencement of the administration, the company is in possession of property owned or leased to it by a third party, the Administrator is liable for so much of the amount payable by the company under that agreement for the period beginning 8 days after the commencement of the administration. However, this does not mean that the Administrator has adopted that agreement. The Administrator may avoid that liability by serving a notice upon the owner or lessor identifying the property and stating that the company does not intend to exercise any rights in respect to it. The Liability of the Administrator also ceases upon the appointment of a receiver, or where a chargee takes possession of the property, or the court excuses the Administrator from personal liability.

A payment by a bank, out of an account kept by the company with the bank, in good faith and in the ordinary course of the bank's business, made after the date of the Administrator's appointment and on or before the date the bank received written notice of the Administrator's appointment is a valid payment.

During the period of the administration a guarantee in respect of the debts of a company cannot be enforced against a director who is a natural person, the spouse, de-facto spouse, or relative of a director, without an order of the court.

The Administrator must investigate the company's business, property affairs and financial circumstances and form an opinion as to whether an arrangement with the company's creditors would be in its best interests or whether the administration should end. Such an investigation and review will form the basis of the Administrator's report to creditors.

If the creditors vote in favour of an arrangement i.e. to pay x cents in the \$ either in one lump sum or over a specified period, then a deed is signed by the company and also by the administrator on behalf of the creditors, which binds all parties to the deal.

Generally speaking, the costs involved in a reconstruction process, (formal and informal workouts and some of the formal administrations) are not as expensive as is generally believed. The greatest expense normally involved is in refabricating or bringing up to date the company's financial records which in many instances have been neglected and the preparation of projections

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THE END