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UPDATE + NEWS + REVIEW

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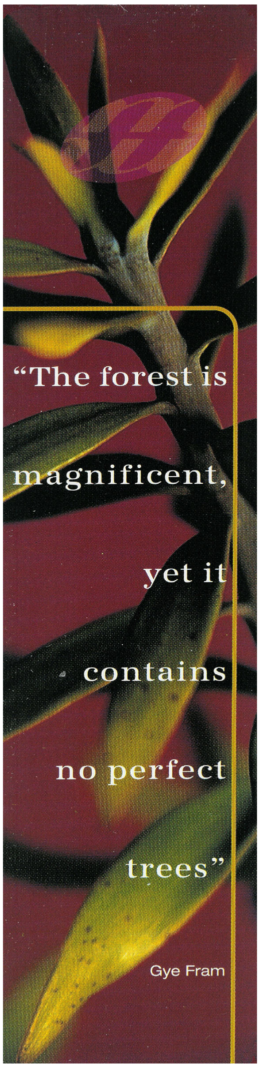

Compromises with Creditors v. Voluntary Administration

Jeff Meltzer

There has been considerable publicity about Voluntary Administrations but are they as effective as the Legislators envisaged?

Compromises with Creditors ("Compromise") have been a part of statute since the Joint Stock Companies Act 1860.

Voluntary Administration ("VA") was introduced as an amendment to the Companies Act 1993 and came into force on 1 November 2007.

Which procedure is better suited for New Zealand companies given that 90 percent of those companies fall into the category of SMEs?

A company considering either a Compromise or a VA is, by definition, in financial difficulty and unable to pay its debts as they fall due. The fundamental principle for both a Compromise and a VA is the potential future viability of the business. The earlier the directors acknowledge a problem and seek professional advice, the greater the opportunity to review the options.

In a Compromise and a VA, PPSR registrations and secured lenders retain their secured status accordingly.

It is possible to determine the viability of a business and the appropriateness of a Compromise or a VA within a matter of days if forecasts and projections are available and can be rigorously tested. However, two major differences between a Compromise and a VA are publicity and the speed of implementation.

A VA is a publicly notified event. The administrator must publicly advertise the Administration immediately upon appointment. An initial creditors meeting is to be held within 8 working days of the appointment with the Watershed meeting held within 28 working days. A company is very vulnerable at this time. Secured lenders (those lenders with a charge over the whole or substantially the whole of the company's property) can appoint a Receiver at any time during the 10 working days after the VA commences. While the company can still trade during this period, there will be much uncertainty and speculation about its future viability.

Of great concern is the potential impact on the trading of the company as competitors try to take advantage by approaching customers and suppliers. Customers may well switch their loyalty to a competitor who can offer certainty.

A Compromise, however, is totally confidential between a company and its creditors. It is not publicly advertised and it does not need Court sanction. Once the viability of a Compromise is established by the directors, it is appropriate to meet with the secured lender(s), IRD and major unsecured creditors to seek their indicative support. This can be done within a matter of days. If all parties give their indicative support, the Compromise can be drafted and circulated to all creditors. A minimum notice period of five working days is given for a meeting of unsecured creditors to consider the Compromise Proposal.

It is possible for a company to enter into a Compromise with its creditors without the company's customers or competitors knowing anything about the Compromise. The same cannot be said of a VA.

Compromises are time and cost efficient. It is quicker to put a Compromise in place than it is to achieve a DOCA in a VA.

It is significantly cheaper to put a Compromise together than a VA. Our experience is the cost of a Compromise is approximately 50 percent less than a VA.

When time and confidentiality are of the essence a Compromise should be thoroughly explored as the documentation is relatively simple to put together in a very short time frame compared to the statutory timetable of a VA.

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Phoenix Companies: It's all in the name

Rachel Mason

Everyone seems to be talking about phoenix companies – what are they, what's wrong with them, and how can they be avoided?

What is a phoenix company?
A phoenix company is a company that is known by a name that is the same or similar to the name of a failed company (one which is unable to pay its debts upon liquidation). *Simply, if it has the same or similar name, then it's a phoenix company.*

Where a person has been a director of a failed company within 12 months prior to its liquidation, that person is restricted from direct or indirect involvement in the promotion, formation, or management of a phoenix company.

What's wrong with a phoenix company?
Phoenix companies generally are thought to be "bad" because they tend to "rise from the ashes" of a failed company, often to the detriment of the creditors of that failed company. A director may take over the assets under a new company, usually using the same or similar name, and often at an under-value. The creditors of the failed company are left with nothing while the director carries on anew. This is an abusive phoenix company.

Where an abusive phoenix company is found to exist, criminal and civil liability may now be imposed on directors who abuse such arrangements to the detriment of creditors. Civil liability makes the director of the failed company liable for debts of the phoenix company, and criminal liability extends to up to 5 years imprisonment, and a maximum $200,000 fine.

How can you avoid having a phoenix company?
Parliament has recognised that people's lives must go on, even if they have been involved in a failed company, and the following exceptions apply:

(1) Where a phoenix company arises as part of a legitimate arrangement for the purchase of assets in an arrangement made by a liquidator, receiver or administrator, it is not an abuse, even if the sale is to former directors or shareholders.
  - Under this exception, directors of the phoenix company must send a Successor Company Notice to all known creditors of company in liquidation which sets out the circumstances, the name/s of the director/s of failed company, and his/her role in the successor company.

(2) Where the Court grants leave to a director to be involved in phoenix company.

(3) Where a company has made a genuine name change to one that is the same or similar to the failed company.

Blue Chip Update

The Blue Chip Liquidators (Jeff Meltzer, Arron Heath and Lloyd Hayward) have commenced investigations into the products marketed by Blue Chip companies and licensees, promotional material produced by Blue Chip in relation to the products and the documents executed by investors when purchasing the products with the aim of determining whether the products breached any New Zealand legislation, in particular, the Securities Act 1978. Counsel's initial view is that there has been an apparent breach of the securities legislation.

Lawyers acting for the Liquidators have therefore applied to the High Court for a direction as to whether or not Blue Chip breached securities legislation in the promotion and sale of its investment products. The application is likely to be heard between May and July 2009.

Between the professional staff at Meltzer Mason Heath there is over 100 years insolvency experience. This means that any problems or uncertainties facing your clients are likely to have been seen by us before. Please call us and as always we will offer you and/or your clients a free one hour consultation.

Jeff Meltzer, Karen Mason, Arron Heath, Mike Lamacraft, Lloyd Hayward, Rachel Mason & Trish McLennan.