Company Rescue

FREE

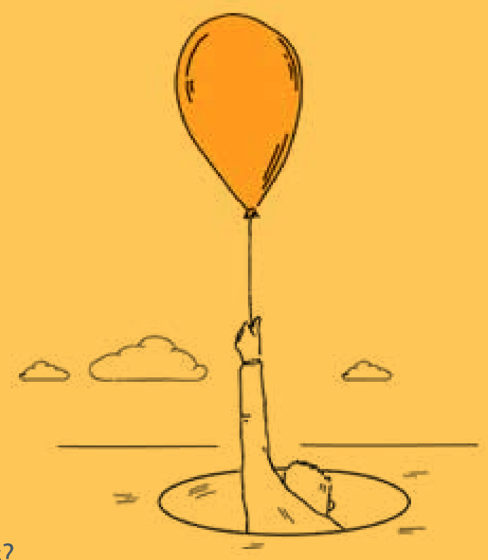
Expert Impartial advice for worried directors of companies or LLPs

Contents

Foreword - The Ultimate Guide For Worried Directors*

*Or designated members of limited liability partnerships

If you do not worry about:



- Poor cashflow?
- What does a personal guarantee mean for you?
- When will your customers pay your company?
- How to pay HMRC?
- How to win new work?
- How to pay wages on pay day?
- Wrongful trading?
- Personal liability for company debts?
- Suffering from stress?
- Losing your property because of a badly performing business?

then you needn't read any further and well done!
But if you do, or even think you might begin to worry, then read on!

We take thousands of calls every year from directors of distressed businesses and, every time, they say they are worried about business. So we decided to write the definitive guide to all the worries that directors can and will have and help explain what the position is, any personal implications and what you can do about it!

We answer every question a worried director might have about their business, cashflow problems and the impact of the turnaround and insolvency processes.

Please feel free to call us at any time if you have a specific question: 0800 9700539

Introduction

and our service to you and your company

For 15 years now, professional advisors at KSA Group have been helping worried company directors. We have helped one-man band companies (a single director, who is the only employee, the chief cook, bottle washer, accountant and salesman all rolled into one) through to boards of directors of plc companies owing hundreds of £millions to creditors.

All have similar issues - just in differing scales and complexity.

Introducing Keith Steven

Keith Steven has been helping companies with problems since 1994. Now as part of our own company's 15th birthday celebrations we are delighted to provide free of charge, this Experts Guide to all of the things that might worry you as a director of the company (or as a designated member of a limited liability partnership (LLP). We hope you find it useful.

"It sure is a risky business running a business nowadays, isn't it?"

Well in truth it always has been, since the introduction of the first Companies' Act called the Joint Stock Companies Act 1844 which was soon followed by the Limited Liability Act 1855 . This introduced the process that led to the concept of directors, members and officers of the company having LIMITED LIABILITY

Company legislation is tedious stuff and I'm not going to go into too much detail in this guide. However, every company director must be aware of what it means to actually be a director or officer of the company. You don't need to know the thousands of pages of text of the legal acts and case law and so forth, but what you MUST know are the basics. All of it is basically common sense: if it seems right it probably is right – but if it seems wrong then it probably IS wrong. But often when things go badly wrong for a company there are lots of grey areas.

Our aim

Our aim here is to provide all company directors with a handy, easy to access, and read, guide to their obligations, the duties, what happens when things go wrong in the company and to answer the questions commonly posed to us. We are experts in this field ; we just do turnaround, recovery and insolvency work all day every day – there are nearly 30 of us at KSA Group and we've been doing it since 2001.

Our Guide

We hope this guide answers all of your questions and concerns. But we know that running a business creates new problems and unusual issues on a regular basis therefore we are happy to provide, readers of this guide, a free support line service. This is open five days a week from 9 AM to 5 PM. Just call 0800 9700539

We also offer a premium service where one of our 11 directors or managers can be available to answer questions about any of the topics in this guide on the telephone or conference call or face-to-face. The only cost to the premium service is that you register with KSA Group as a premium customer, agree to receive our update emails, and we determine we can help the business on an initial call[1].

So please do read this guide - we are very proud of the online service that we provide to thousands of companies every week in the United Kingdom. We don't talk to most of those people, but we do know that we provide a service that they find helpful, useful and accurate.

You can find further detailed information on all of the topics within this guide on our website at www.companyrescue.co.uk.

Keith Steven. 2016

[1]Other charges may apply for travel to face to face meetings, but no time costs are charged for initial meetings. So we even provide great face to face advice free if you qualify!

A full Independent Business Review?

As a director you might be worried about the future of your business but not actually thinking that it is about to become insolvent. However, you feel that there might be a chance that it could if certain things occur such as

- **Loss of sales/contracts**
- **Loss of court case**
- **Unexpected competition**
- **Directors/shareholders dispute**
- **Theft from the company or fraud**
- **Rising costs etc.**

Author: Keith Steven

As insolvency and turnaround practitioners we have seen the circumstances that can lead to insolvency and also we talk to many company directors that think their business will go insolvent but doesn't.

We are therefore in a good position to "reality check" your business. So what does this actually involve?

If you can provide us with as much financial information as possible we can stress tests management's business plans against real commercial, operational, and financial challenges, and evaluates the risks of meeting forecasts and potential upsides. Key focus areas will be, cash burn rates, payables and receivables, working capital, funding and corporate structures, product profitability, management financial skills, and processes.
We can also do "what if" scenario planning following on from sensitivity analysis on the business and processes.

The review will help the business manage any risks and allow it to plan for any upset. Almost all of our clients say " I wish we had spoken to you earlier!" It is also worth remembering that if there are problems then being able to move quickly when required greatly increases the chances of a solution and lowers any costs.

Call us on 020 7887 2667 if you are worried about your businesses future and think that your business could do with a reality check and an independent business review.

1 Being a company director

What does being a company director really mean for you?

If you are a director of a limited company, or a designated member of a limited liability partnership, you are an officer of the incorporated vehicle[2]. So what does that mean in English?

What it means is that if you act reasonably and responsibly then you as a director have limited liability if the company enters into insolvency or fails.

Providing you act properly - we will help you with this guide!

We lose track of the times where people speak to us and say "my debt", "my creditors" and "my customers".

What they really mean to say is the "company's debts" the "company's creditors" and the "company's customers"! Although it may sound like I am being pedantic most small company directors need to stop merging the company and themselves together in their minds. This is plain wrong. You as a human being, when acting as a director, are NOT the company! As a designated member you are not a limited liability partnership either.

So, it is vital to recognise that there are four parts or "constituencies", to every limited company[3].

It is important to separate these constituencies:

1. the company
2. the business
3. the directors
4. the shareholders or members

The COMPANY is a legally recognised entity that you can set up to run your BUSINESS. It is responsible in its own right for everything it does and its finances are separate to the DIRECTORS OR SHAREHOLDERS personal finances.

Any profit it makes is owned by the company, NOT BY THE DIRECTORS but after it pays corporation tax. The company can then share its profits with the SHAREHOLDERS/MEMBERS. This is not the same as directors' wages or salary.

Any profit the company makes is NOT YOURS as a director or employee.

So four different parts. Still not convinced?

Look at it another way. I liken it to a car. We all know what a car is, it can be the best car in the universe but it needs a driver (at least up to 2016!) to drive it – just like a director does for a company.

Now I could drive your car, but you own it. Thus large company directors seldom OWN the car, they act as drivers for the owners.

So please stop calling the company "you", "me" and talking about "my debt", "my creditors" and "my customers"!

The BUSINESS can happen in one car or in another car – this could happen in a sale of the business, or insolvency sale

Legal Responsibilities For Directors

There are many legal responsibilities involved with being a director and running a limited company. We won't cover them all in this guide but we will look at ALL directors' responsibilities if things are going wrong with the company and the business.

for example. The BUSINESS doesn't have to be in the same car (COMPANY). In simple terms the COMPANY is not the BUSINESS it is a vehicle to carry the business and to protect its occupants (DIRECTORS and MEMBERS).

But what if I am both? Being both DIRECTOR and MEMBER.....

Every limited company has 'members' - the people or organisations who own shares in the company. These are commonly known as shareholders. That could also be you - as most small companies have common DIRECTORS and MEMBERS.

Directors are responsible for running the company. Directors often own shares, but they don't have to.

[2]Designated members of limited liability partnerships may face differing tax issues, we do not offer tax advice on those

[3]If you are a designated member of a LLP please take any further references to directors to mean you too. Almost everything that applies to directors in a limited company insolvency or turnaround situation, applies in the same way to you. We will show you any differences a little later on

What Types of Company Can You Have?

Most limited companies are 'limited by shares'. This means that the shareholders' responsibilities for the company's financial liabilities are limited to the value of shares that they own, but haven't paid for.

So, if the company's shareholding total is 100 times £1 shares (therefore it has £100 of share capital), but the MEMBERS haven't yet actually paid for those shares, then the MOST the MEMBERS can lose if the company fails is £100. If that company fails, then the directors have NO financial risk if they have acted properly and if they haven't personally guaranteed the COMPANY debts.

But and it is a big BUT that goes to the core of this guide.... they can have personal liability for the company debts if they acted irresponsibly, WRONGFULLY or FRAUDULENTLY.

Or they may be held liable for the debts from the time they knew (or ought to have known) the company was insolvent and yet they failed to act properly. This is a huge area of uncertainty, which this guide seeks to help you understand and address.

In summary then: company directors aren't personally responsible for debts the company/business can't pay if it goes wrong, as long as they haven't broken the law.

2 Borrowing money & insolvency

Company borrowing money – Securities and giving Personal Guarantees

Most companies borrow money to grow, to build their business, to employ MORE people and to take on premises, for example. That money may come from you originally, your credit cards, your family, the high street banks, asset based lenders or your peers via online platforms like Funding Circle etc.

When companies borrow money, the lender usually wants it back! So how does it make sure it will, as a lender, get its money back? Often the lender will require that the company gives some legal assurance that it will pay back the money and it will back that up by granting security over assets, or over the company itself.

I think all company directors, as people, would understand the concept of borrowing money to buy a house? Well, the mortgage is a form of "security". This stipulates that the borrower cannot sell the house without the lender's permission AND without the lender being repaid in full.

Companies can also grant securities, under the decisions of the directors. Typically these called are debentures[5].

But what if the security is not enough to satisfy the bank's or lenders' risk assessment?

Then they will often ask the directors to personally stand behind the security and offer to PERSONALLY GUARANTEE the SHORTFALL on the bank's lending - if the company is put into insolvency such as liquidation[6], receivership[7] or administration[8].

So directors can be at risk of the company failing and be personally liable for the company's debts?

Yes and no. Having acted properly and responsibly, they can only be liable for the part of the company's debts that they guaranteed. They can't be liable for all the other debts UNLESS they acted wrongfully, fraudulently or plain stupidly – see later under the "veil of incorporation" and personal liability.

[5] A form of security over company assets in exchange for a loan
[6] See page 26
[7] See page 27
[8] See page 28

Is my company insolvent and how do I tell?

There are three key tests for insolvency of a UK company or a LLP

The cashflow test for insolvency

Simply - can the company pay its debts when they fall due?

For example, if your company is not paying the deductions from employees for NIC and PAYE tax across to HMRC on the 19th of the month following the month they were deducted, then the company could be insolvent. This has of course now changed as a result of RTI in that PAYE is paid across to HMRC in real time. However, the company may have built up arrears in the past.

If your company's trade creditors sell to the company on 30 days terms and the company regularly pays on 90+ days, then this could mean the company is insolvent.

A director has a legal requirement to understand this issue. If they believe that the company has insufficient cash to pay its liabilities on time, then they must take advice/action.

We strongly suggest running at least weekly, or better, daily cashflows to ensure the directors know where the business is going. KSA can provide a free daily cashflow that is simple to use, call now for your copy on 0800 9700 539.

The balance sheet test for insolvency

Simply – does your company owe more than it owns as a company, or are the company's assets exceeded by its liabilities? If yes, then the company could be insolvent.

It is important to point out that this test should include contingent or prospective liabilities. These might be where a court is yet to make a decision on how much the company owes, as a result of a court action, or dilapidations, on a building that your business is due to vacate. (If you need advice on these issues email us at help@ksagroup.co.uk).

Many directors tell us that on a balance sheet test the company is not insolvent therefore they do not need to act. However, under the cashflow test to the left the company may still be insolvent. So you must act properly if it is.

In our experience, an apparently solvent balance sheet may include items that are overstated, such as obsolete or low realisation value stock and work in progress, or debtors that are not really collectable. After deducting these items many balance sheets become insolvent. So be prudent - you are legally required to present accounts to show a true and fair picture of the business.

The legal action test for insolvency

If a creditor has obtained a County Court Judgment, this may demonstrate the company's insolvency and the creditor may petition to wind up the company. (See compulsory liquidation).

If a creditor has obtained a statutory demand for greater than £5000 (from 1st October 2015) and it remains unpaid for more than 21 days, then the creditor may petition to wind up the company. But in truth any debt over £750, that your company does not dispute, is fair game for issuing a winding up petition over and the creditor doesn't need to issue a statutory demand.

If you believe that any of the above tests indicate your business is insolvent, it is vital that you and the board of directors take action to address the position. However, don't panic. Look carefully at all pertinent issues and consider the rest of this guide.

Remember, if the company is insolvent, you must as directors act to maximise creditors' interests. Failing to act could mean the directors are accused of wrongful trading.
The tests for insolvency are covered under section 123 of the Insolvency Act 1986 http://www.companyrescue.co.uk/company-rescue/guides/insolvency-test

So, if the company is insolvent you must act to MAXIMISE CREDITORS INTERESTS. Failure to do so could lead to personal liability for the directors. Call now if you have questions – 0800 9700 539 or 020 7887 2667.

WHO GETS PAID
WHEN A COMPANY GOES BUST?
By KSA Group, Licensed Insolvency Practitioners
When a company goes into administration or liquidation, it can be a very stressful time for employees, creditors and customers. Below is an illustration of the order of priority and who ranks above whom when money is owed.
BANK
INSOLVENCY PRACTITIONER
Fees for overseeing the process.
SECURED CREDITORS
Lenders to whom the company granted security. This usually includes banks, asset based lenders, finance and agreement providers.
PREFERENTIAL CREDITORS
Employee claims (but subject to limits set by the government).
CV
HM Revenue & Customs
UNSECURED CREDITORS
All remaining creditors, such as: Taxman (HMRC), suppliers, contractors, landlords, customers (deposits, giftcard holders, pre-orders).
SHAREHOLDERS
Will only get paid if all the above creditors are paid in full.

I am a worried director; So what is wrongful trading?

We are often asked what this means because directors have talked to their accountants, advisors, insolvency practitioners or a man in the pub. They may have said "be careful if your company is insolvent then you will be guilty of wrongful trading"! Often this is simply not true, it is based on poor and incomplete knowledge and is just scaremongering! The simple explanation is this:

Is the company insolvent? If yes, then the directors must act properly and responsibly. If they do not act properly or the way any reasonable person would have acted, then this could possibly be seen as acting wrongfully or trading whilst insolvent.

If wrongful trading is proven, then the directors can be made personally liable for the company's debts from the time they knew the company was insolvent. BUT it is generally a high burden of proof for a liquidator, or the Insolvency Service, to take action for wrongful trading.

The tests for wrongful trading actions include:

1. Not filing annual returns for the company at Companies House.
2. Not filing annual or audited accounts at Companies House.
3. Not operating the PAYE scheme correctly, failing to pay PAYE and NIC when due, building up arrears. (see below).
4. Not operating the VAT scheme correctly, building up arrears (see below).
5. Taking excessive salaries when the company cannot afford them.
6. Taking credit from suppliers where there was no "reasonable prospect" of paying the creditor on time.
7. Willfully piling up debt.
8. Using deposits from customers to pay off historic debts when there is no prospect of the goods being delivered.

Please note you don't have to tick all of the above tests to be at risk of wrongful trading! Although being guilty of points 7 and 8 are the most risky.

Formal insolvency procedures

Wrongful trading can only apply in terminal insolvency and can only be commenced after a formal insolvency event. A formal insolvency event is, for example, Creditors Voluntary Liquidation, Administration, Administrative Receivership or Compulsory Liquidation.

Wrongful trading does not apply in company voluntary arrangements, trading out or refinancing.

What if there is no insolvency event?

These actions may occur even though the company does not enter any formal insolvency. If that happens, then be very careful.

ALWAYS keep records of why returns were not filed on time and write careful minutes of board meetings and shareholders' meetings. Keep everything filed and ready to refer to. In future they may help protect you as a director, when being interviewed by an insolvency practitioner or the Official Receiver 9. The common sense answer to avoid accusations of wrongful trading is this - if your company is insolvent and you know it, don't ignore it and make the situation worse. Take turnaround or legal advice immediately.

What does failing to operate the PAYE/VAT scheme actually mean?

Not paid the deductions of PAYE and NIC across to HM Revenue & Customs? Well, as you will now know that is something they do not like! Basically, it is tax payer's money and the collectors are there to collect it.

HMRC's database can spot slow payments or missed payments quickly, especially through the Real Time Information system.
If your company is not paying PAYE & NIC on time, it is most likely insolvent. Non payment of tax is a failure to comply with the tax legislation and also signifies publicly (loud and clear to HMRC) that the company is potentially insolvent. So, you need to act properly and deal with this serious threat to your company.

What are the available options?

Prevent wrongful trading by looking at the following options:

1. "Time to pay" deal with HMRC – debt is paid back over affordable instalments up to a year.
2. Trading out - this can avoid formal approaches like Voluntary Liquidation, CVA, Compulsory Liquidation and Administration. Cut costs, raise finance or restructure the business to solve cash flow problems.

Top tips

1. Don't wait until legal actions have been taken against the company to ask for a "time to pay" deal with HMRC.
2. Try to plan the cash flow of the business well in advance - you have a legal obligation to be able to meet cash flow requirements! If the directors do not think the company has sufficient cash to trade, they should consider their obligations and options and plan a way forward.
3. Don't be too ambitious in planning repayment; you will have bad months as well as good, so be careful with the cash flow forecasts.
4. Be realistic about your expectations. Ask for 18 months to pay back PAYE, knowing that you will probably get 9 months at most.
5. Ask for 6 months to pay back VAT.
6. If your cash flow forecast shows the company cannot afford to repay tax that quickly, consider a company voluntary arrangement (CVA). We think that, if the company is viable but insolvent, this is the most powerful way of dealing with a serious cash flow problem and tax arrears.
7. HMRC supports well proposed CVAs.
8. In a CVA, the company does not have to pay back all of the debt and directors remain in control.

[9]An official receiver manages at least the first stage of bankruptcies and companies wound up by a court.

What is Fraudulent Trading?

Put simply, fraudulent trading is the continuation of trading with no reasonable prospect of repaying debts and with the intentions of defrauding creditors.

Trading this way can lead to steep fines, disqualification and even imprisonment. Fraudulent trading is considered as more of a serious offence than wrongful trading, however both should be avoided at all costs to prevent harm to the business.

Transactions defrauding creditors (s423 Insolvency Act 1986)

A company does not have to be insolvent to be found guilty of this. Examples of transaction defrauding creditors include:

- Assets are purposely put beyond the reach of creditors (intention must be proved).
- The transaction is a gift or at an under value.

Different from other provisions in the Act, there is no statutory time limit set on the occurrence of the transaction and its recovery.

Antecedent transactions (s238-239)

Antecedent means ‘going before’. In this case, any transactions done before a company is insolvent could be considered as an antecedent transaction. A recovery could be made if, for example, one creditor is paid more than another in the lead up to the company’s insolvency.

This is known as a ‘preference’ under s239 of the Insolvency Act 1986 (see below) and would be referred to as an antecedent transaction.

Preference

A potential preference occurs when a company pays a specific creditor or group of creditors(s) before going into a formal insolvency like administration or liquidation. This makes that creditor “better off” than the majority of other creditors. However, the second important test to prove preference is there must be a “desire” to make that particular creditor better off.

This is an area of insolvency law that is commonly misunderstood, but can cause many problems for those who create the preference. If the preference is proven, it can lead to action against the beneficiary, the directors, lifting of the “veil of incorporation”, personal liability and if wrongful trading proven, disqualification under other provisions of the insolvency legislation.

So how does preference happen in a real-life scenario?

Here is a fictional case study:

Acme Nuts and Bolts Company Ltd has been trading for many years and has seen a steady decline in sales and profits over recent times. Mr Bolt, the managing director, sits down with Mr Washer, the FD, and they read the accounts, look at the cashflow and decide that the company is insolvent. It is likely that the company will breach the bank overdraft if all creditors' demands for payment are met.

The PAYE is already 2 months behind and the most recent VAT quarter has not yet been paid.

Mr Bolt thinks that a smaller leaner workforce, operating in a much smaller property would be a viable business but the company's long term employees would be too expensive to pay off. Redundancy costs alone would be £100,000. They cannot see how to pay this and decide to slowly wind the company down before starting again.

One of the suppliers to Acme is a company owned by Mr Bolt's brother. It is owed £12,000 for supplies and has always been paid on time by Acme. Another supplier is owed £16,000 and it has a smaller factory property available, that Mr Bolt would very much like to use to start the new company.

Mr Bolt tells Mr Washer to pay both these amounts as soon as possible and then he decides that they will talk to an insolvency practitioner about the options for "dumping the company". Some eight weeks later the company enters liquidation and the liquidator begins to examine the conduct of the company in the period leading up to the liquidation.

He discovers that Mr Bolt's brother was paid £12,000 and the other supplier was paid £16,000, just before the company decided to cease trading and go down the liquidation path. VAT, PAYE and over £500,000 worth of other creditors' debts were not paid.

Under s239 of the Insolvency Act, the payment to Mr Bolt's brother is a clear breach of the Act as the company paid the debt when not paying PAYE/VAT and other creditors. But was there a desire to create a preference?

Because the brother was a 'connected creditor' or associate through blood, the law automatically assumes that Mr Bolt wanted to make his brother better off. The liquidator demanded the money back from Mr Bolt's brother and the court agreed. On first inspection by the liquidator, the other payment to the company with the spare property was less clear cut. Was a payment made? Yes. Was it paid when other creditors were not paid? Yes. Was a desire to create a preference in place? Possibly, but not conclusively.

However, after a few weeks the liquidator noted that Mr Bolt had started a new company and the address was the same as the paid customer of Acme, so he took action to recover that money too. Interestingly, some of the company's assets appeared to have mysteriously found their way to that property too!

The 'desire to create a preference' test is much more difficult to prove in other cases. Often the threat of the liquidator taking action sees a deal being done where some of the debt is repaid, to the liquidator, for the benefit of other creditors. This is a difficult subject matter but a vitally important one for every director to consider when reviewing the company's insolvency and how they have acted.

This is a path that requires professional advice, common sense and full discussion by the board, and proper documentation of decisions to pay suppliers taken at board and management levels.

Clearly, paying friends and family is risky. Paying back directors' loans is a preference if the company subsequently enters liquidation. Finally, remember preferences are only crystallised by a formal insolvency like administration and liquidation.

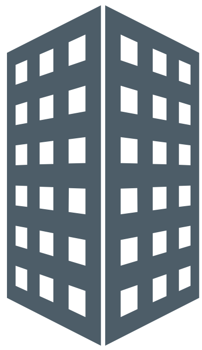
How do we avoid creating a preference?

Common sense dictates that if the decision to pay someone seems 'off', it usually is!

The safest route is to ensure that all creditors are treated 'equally'. If that is not possible, then ensure there is a very strong commercial reason for one creditor being paid faster than others. For example, you may wish to pass a board resolution to pay XZY Ltd, as it maximises the interest of creditors to pay XZY Ltd, as they're the only supplier of something essential to the business.

By paying XZY, operations can continue to generate debtors. YOU MUST get rescue and insolvency advice at the same time.

Typical examples of company assets?



- Company Cars
- Computer hardware
- Office Furniture
- Machinery
- Office Buildings

Directors have asked us in the past if a company's assets can be sold to another company so the insolvent company can be knocked over. This area of insolvency is very complex and can lead to trouble for the average director, if handled the wrong way.

Directors must first be aware of 'Transaction at an undervalue', s238 of the Insolvency Act 1986.

If the company is no longer viable and the directors believe the company has no future, it may be tempting to 'move' or sell some of the assets across to another trading company or partnership.

Think carefully before doing this! If the company has assets that actually belong to say a bank or hire purchase company, then these assets must not be sold or transferred without their explicit written approval. However, even if the assets are unencumbered and are then sold below their proper value, or moved for no payment (consideration), then there is a possible breach of s238 Insolvency Act 1986 - transaction at an undervalue.

This applies in the case of a company where the company enters administration or liquidation.

Where the company has, at a relevant time (typically two years if a connected party, and six months if an unconnected party) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section.

The court shall make such order as it thinks fit; usually this means it will make an order to restore the company to its previous position before that transaction. Thus the court has the power to reverse that sale or movement of assets.

This could also lead to an investigation into the directors actions, any breach of fiduciary duties and possibly even wrongful trading.

How can assets be moved or sold correctly?

If there is a plan to sell any asset, then the safest policy is to get the asset(s) independently valued and make sure the valuation has going concern and forced sale values. Typically, you should use a business valuation expert, an accountant, or RICS qualified valuer to perform this task.

We suggest the assets are sold at or above forced sale values and the consideration banked to maximise the interests of the company's creditors. Keep careful records of these transactions.

It's also best if a board meeting records the transactions as being formally approved by the board.

We can arrange a business asset sale for the company, please do contact us to discuss how we will ensure the sale is legally compliant.

Can't afford to buy assets?

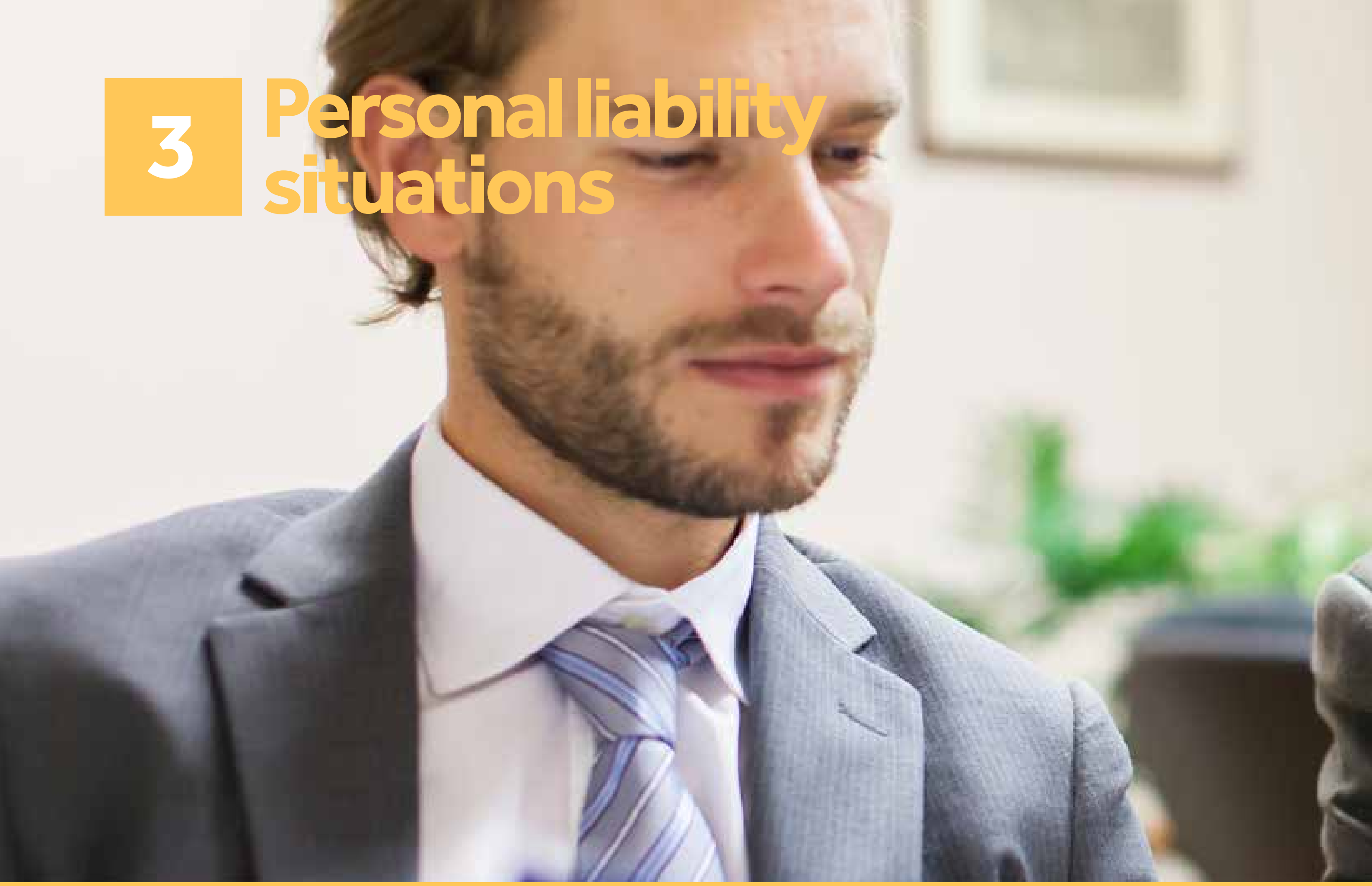
We suggest that you initiate the liquidation of the company and then offer to buy the assets over time (deferred consideration) from the liquidator. DO NOT remove the COMPANY'S assets thinking there is no harm. Remember, they are not YOUR assets!

Remember, directors may be made personally liable for the company debts, if there is evidence of improper actions.

Can assets or the business be hived up, or across to another company?

This is a complex area of law, however the basic principles above apply. Hive across assets ONLY after seeking proper legal advice, ensuring values have been established and a consideration paid by the other company.

Again KSA Group are experts in this process, call 0800 9700539 to discuss how we can lead this innovative process.



3 Personal liability situations

What is an Overdrawn Directors Current Account (ODCA)?

NB: THIS MEANS YOU OWE THE COMPANY MONEY AS A DEBTOR!

In more than 75% of our enquiries from directors of struggling companies, we find that this is a major problem. So what is an "overdrawn director's current or loan account"?

Well, usually the company is making profits and accountants advise directors to "save tax" by paying directors a small salary. Directors then take drawings every month from the reserves of profits made in the past and current year.

Then at the end of each month, quarter or year the board can vote to pay dividends to the shareholders. This way the drawings are canceled out and the dividends voted through to cover the drawings. But this is NOT SALARY, it is a payment of dividends to shareholders.

Saving a small amount of tax (notionally) can create a large amount of problems for the directors if the business is not profitable. If the business starts to perform badly, directors can end up with serious personal liability problems.

Technical issues

All accounts filed at Companies House should refer to any overdrawn current accounts as loans to the director concerned. You must try to get these paid back or reversed in subsequent periods as HMRC will tax YOU PERSONALLY if you do not.

FACT: If the company has no distributable reserves (usually profits), it cannot pay dividends.

So, if your company's balance sheet starts a year with nil or negative reserves, then, if you make no profit, you MUST STOP taking dividends as soon as you are aware of this. You should not take drawings that cannot be covered by non-existent dividends as, essentially, you are taking the company's money AND THEREFORE YOU OWE IT BACK TO THE COMPANY AS A DEBTOR.

In difficult times, we suggest it is much better to pay yourselves through PAYE and pay the tax/NIC. If the company cannot afford to pay you GROSS, then it is likely to be insolvent AND perhaps not even viable?

Basically, if you are or were to be paid through PAYE at a competitive rate and the company cannot make a profit, then it probably isn't a viable business?

ODCA case study

Mr Jones and Mr Smith set up a limited liability company based in London. It is a design and marketing company.

Sales built up quite quickly based upon their contacts in the marketing sector and the company grew to £1.2m sales. Their accountant told them the company had made £80,000 net profit in year one and this would be taxed for corporation tax purposes at roughly 20%.

The accountant advised them to leave their PAYE salaries at a lower level each month in year two and take dividends from the reserves and future profits. They did this for a number of years and paid themselves quite well as the company was profitable each year.

Then something happened. Their biggest debtor went bust owing the company c. £158,000. Silly to let that debtor take as much credit in our view, but their view was 'after all, the company was a well known big name customer and we never thought it would fail'. It had been good regular business for them so we understand why it got to be such a big debtor.

The customer's failure led to a situation that was clearly not planned for. In 2010, the company had a bad trading year on top of the customer's insolvency, and so had to write the bad debt off. This made a huge loss for the year of £250,000. As a result, the balance sheet became negative and they saw the first flashes of a cash flow crisis looming.

So no further dividends could be taken AND the directors now had overdrawn directors' current accounts to the tune of £50,000 in that accounting year, that had to be paid back somehow.

Our advice in this situation would be to set out your objectives, look at the viability of the company and then make a decision to ACT.

What can be done if the company goes into any form of insolvency?

Options include:

- Repaying the loans you personally owe to the company.
- Offsetting any loans the directors have made TO the company (this is called set off).
- Taking your full salary but reduce the cash you take out of the business to gradually offset the account. So pay yourself £4,000 per month but take £1,000. Remember to pay tax on the £4,000.
- Making lots of profits in future periods to allow dividends to be paid.
- Use a company voluntary arrangement (CVA) to restructure the company (see more information on this rescue method further down in this guide). You will still have to repay the loan within 6-36 months.

What happens in liquidation if there are overdrawn loan accounts?

The liquidator can demand that directors repay their overdrawn director's current account to the company for the benefit of the creditors. **Legal action can be taken to make directors pay this which could even lead to personal bankruptcy.**

Insolvency options and ODCAs

Referring back to the case study, if the company entered a formal terminal insolvency like Administration, Receivership, Voluntary Liquidation or Compulsory Liquidation, then the insolvency practitioner/liquidator could have demanded that the directors repay the £50,000 back to the company for the benefit of creditors.

The key test of any business in trouble is viability. One bad year and a huge bad debt did not equate to a bad business - far from it. The business in the case study showed dedicated directors and staff.

In a case like this, we would recommend a CVA would be the best solution. The directors' drawings for the current financial year were treated as being net pay through the PAYE scheme in that year because there were no distributable profits, therefore dividends could not be paid. The prior year overdrawn directors' account was repaid to the company in six months (a standard HMRC requirement) by the directors.

This of course generates a slightly larger PAYE and NIC liability. But using the CVA, the debt would be bound by the process. Along with a reduction in employees and managers (the lost contract meant that they had too many people), the company was forecasting a modest profit at best, or just below break-even at worst.

Creditors would benefit as they get a deal paying 55% of their old debt back over 5 years, and they kept their customer. The benefits for the company are a downsized business, lower costs, long term survival, no lost contracts. We removed cashflow pressures whilst keeping the bank happy.

Directors would be able to avoid:

- Personal liability
- Business failure
- Bank personal guarantees being called upon

Plus, as owners of the company, they would have long term employment and a valuable future business.

Personal guarantees

This is the biggest single director's worry that we discuss every day with callers and our clients.

We often are asked what happens with a personal guarantee. Obviously it is a stressful time when a business is in difficulty and people hope for the best but fear the worse. However, the thorny problem of personal guarantees (PGs) does frequently loom large.

Basically, you simply cannot just "get out" of a personal guarantee. The only way is either to renegotiate the contract, so that your lender no longer insists on a PG, or if it is called in, then pay it, or come to some sort of agreement to pay it, or in the worst case go into an IVA or personal bankruptcy.

Some insurers offer personal guarantee insurance which may go a little way to covering costs should the worst happen. The cost of this insurance will depend on the level of cover or the risk involved. Insurers will also look at cash flow forecasts, any previous defaults in payment and the type of industry the company is in.

So who asks for personal guarantees?

It is standard practice for lenders (and indeed some trade suppliers) to request that, as a director of a limited company, you sign a personal guarantee (PG) to act as security for company borrowing.

By doing this, the creditor will have recourse to the director, personally, in the event the company defaults or closes down. PGs are not used for sole traders or partnerships (except LLPs) as any debt is already deemed as a personal liability of the business owner(s) and so an official PG is not required.

If you have been asked to sign a PG, you should always seek independent legal advice before signing anything, as the terms can vary (it is not uncommon for the banks to request a legal charge over your home at the same time). The best advice is...

"if you do not understand what the personal guarantee will mean in the event of failure of the borrower (e.g. the company), then get independent advice from a solicitor".

It is also worth noting that most banks will keep a PG on file indefinitely, even once the borrowing has been repaid. If you are in doubt write to the bank to cancel the PG.

Next steps

In the event that a PG is called upon, the next steps can vary depending on the creditor and the amount being called on. The usual routes are:

1. The creditor will write to you at home, stating that the borrower (the company) has defaulted on the loan or borrowing. This letter will put you on notice that the lender will want you to pay the money back, if it doesn't received any money from the borrowing company (recovery).
2. Often the lender will issue a Statutory Demand (providing that the debt is over £5,000). This will give you 21 days to either settle the debt or reach an agreement to pay. If this is not possible, the creditor can start bankruptcy proceedings (again, providing the debt is over £5,000). Previously it was £750, however new rulings enforced from 1st October 2015 increased the threshold.
3. The creditor can apply for a County Court[12] or High Court[13] Judgement. They can then get a Warrant of Execution and get the bailiffs into your home to seize goods[14] or belongings.
4. The lender, can for larger amount, seek a Charging Order[15] to secure the debt against your home.
5. If a PG is called upon, the first route you must take is to get legal advice to ensure it is valid.
6. If it has not been drawn up and/or executed correctly, it could well be invalid.
7. The second route is to talk to the creditor (if you haven't already). Legal action can be a lengthy and costly affair and most creditors would entertain a negotiated settlement as long as there is a strong commercial case for them to do so.
8. The best way to protect yourself would be to seek professional help prior to the default event which causes a PG to be called upon. The earlier the professionals get involved, the more tools they have at their disposal to help you. Call KSA on this if you need advice now on 0800 9700539
9. If you have a PG that is being called upon, do remember there is still help at hand, but the available options are somewhat reduced.

Some words of warning:

A personal guarantee is personal. It may be to secure company borrowing but the person providing the PG is liable if the company does not repay the debt upon request.

A lender may be able to take a charge over your home, so that they can recover the debt in the event that you cannot pay and they have had to go to court. Also, be aware that the company deciding to pay creditors who have also taken PGs - before creditors that have not - may be considered as paying a preference[16].

Landlords do often ask for personal guarantees for rent and the liabilities under the lease. It should be remembered that landlords do try and call these in. If your company is building up arrears with the rent, then you must take advice. Lease obligations can be bound in a CVA[17] and the power of a CVA enables your company to vacate premises if necessary. It may be possible to assign the lease to another operator, to ensure that you are not on the hook for the remainder of the rent.

Personal liability

Many people believe that having a company entering insolvency automatically means they are liable for the company debt, but this could not be more wrong!

If your company uses a company voluntary arrangement (CVA), goes into administration or liquidation, it's important to remember the company's debt belongs to the company (unless you've acted wrongfully or fraudulently). There are instances where directors can be made personally liable for National insurance contributions:

Personal liability notices

Who can issue them and what can be done about them?

Section 121C, Social Security Administration Act 1992 gives HMRC the power to issue a notice to an individual officer of the company to be personally liable for national insurance contributions (NIC). This power arises where, in the opinion of HMRC, there has been fraud or serious neglect by the company to pay national insurance contributions (NIC).

The legislation allowing HMRC to issue and enforce PLNs only applies to National Insurance Contributions and late payment interest and penalties arising from them. PLNs do not apply to income tax. An officer of the company is not just the director. Senior managers and shadow directors can be liable as well.

HMRC do not want to penalise directors of struggling companies, so generally HMRC may consider a case to involve more serious neglect where it can be established that, whilst not paying NIC, the company was making significant and/or regular payments to:

- Other creditors
- Themselves as directors
- Connected companies

HMRC will also only issue a PLN if they think there is a good chance of recovering the debt. As such, they are not used very often.

What happens during the personal liability notice investigation?

An Inspector from HMRC will:

- Examine the company books and records.
- Invite representations from the officers of the company.
- Determine the reasons for the company's failure to pay the National Insurance Contributions.
- Consider the extent of the negligence or fraud.
- Respond to representations by the persons named in the notice.

The burden of proof is on HMRC to show wrongdoing.

Obviously the best way to avoid personal liability is by paying the NIC or appealing to the Tax Tribunal.

Veil of incorporation

As a director you are protected from the consequence of a failed company by the 'veil of incorporation', provided you acted reasonably, responsibly and within the law. Failure to do so can make directors personally liable for the company's debts. The 'veil of incorporation' is lifted and the directors lose protection and may even be disqualified.

The key point to remember is if your company is insolvent, the directors have to take care. Under UK law, trading whilst insolvent can breach several provisions of the Insolvency Act 1986, already mentioned above like transaction at an under value and creating a preference.

[12] A court with jurisdiction over one or more counties. This type of court deals with civil (non-criminal) matters.
[13] Her Majesty's High Court of Justice is based in Westminster and is senior to a County Court.
[14] The Enforcement Officer takes away and sells goods to pay off debt owed.
[15] Secures the debt against a property so if it is sold, the creditor can take what they're owed from proceeds.
[16] This is complex law, please call for advice.
[17] See CVA guide www.companyrescue.co.uk/cva-company-voluntary-arrangement

What can be done about personal liability?

The main thing to realise is this is not necessarily a disaster, personally, as there are options if PGs are called upon. You have the option of going into an individual voluntary arrangement (IVA) which is much the same as a CVA in that you do a deal to pay the debt, over a period of time. This is usually preferable to the creditor than making you bankrupt.

Obviously, if you have substantial personal assets, such as equity in a house, then this will be called upon, but often people can keep their house. There are complex rules about residential rights and personal insolvency so you need to consult our experts on this.

Personal credit rating when my company fails

Can your personal credit rating be affected if your limited company is insolvent?

The simple answer is generally no! The debt belongs to the company, not you, therefore your credit rating will remain unaffected.

How does being in a partnership affect your personal credit rating?

The partnership structure is completely different to that of a limited company. If you trade as a partnership, the business's debt becomes your debt and you are personally liable if the business gets into financial trouble. By having to pay off the debt from your own savings and investments, your own financial situation and credit rating will be harmed. In some cases, individuals have had to declare bankruptcy because they are unable to afford the partnership's debts.
It may be worth considering changing the business to a limited company to avoid this risk in the future.

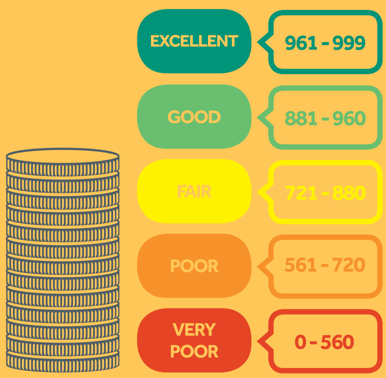
Your company's credit rating

If any business falls into financial difficulties, the company's credit rating will undoubtedly suffer. If there have been County Court Judgements, debt and general cash flow problems, credit agencies will pick up on this. Of course, if things improve, so will the company's credit rating.

A company's credit rating in a company voluntary arrangement (CVA)

A company in a CVA will have no credit rating. This is not the same as having a low credit rating – the company is simply not rated. This seems strange as prior to a CVA the company is very likely to have an adverse rating and will be on the brink of collapse under its debts. Following a successful proposal the creditors have agreed to write off some of their debts and hence improve the company's balance sheet.

Some contracts may need to be re-tendered.



4 Re-using the company name

Re-using the company name (s216 Insolvency Act 1986)

If you have been director of a liquidated company and you decide to set up a new company, it cannot have the same or a similar name to the old company. This is to avoid possible confusion for the creditors of the old company. This is called passing off and under section 216 Insolvency Act 1986, it can lead to criminal action against the directors. The directors can also be held liable for all of the debts of the new company should it go into liquidation in future.

It is possible to buy the name through Administration, or the liquidator can agree to sell the name and a court application can support this. However, any court application will need to show why the rules of section 216 should not apply to you - not always easy. It should be borne in mind that, if you were to buy the business, you will need to pay a fair price and this will have been valued by a chartered surveyor or asset valuer.
The other problem of setting up a new company with a similar name is that it can result in bad feelings between creditors and the company. People may believe that the directors are being disingenuous by using the same or similar name even if it is all done by leave of the court.
In essence, there is nothing to stop you setting up a new company just because a previous one under your control has gone into liquidation. However, if this was not the first time that one of your companies has gone into liquidation, and HMRC were a large creditor, then they may insist on a VAT or PAYE deposit to protect their position.

Section 216 Insolvency Act 1986

This section applies to a person where a company (the liquidating company) has gone into insolvent liquidation on or after the appointed day and he/she was a director or shadow director of the company at any time in the period of 12 months ending with the day before it went into liquidation.
For the purposes of this section, a name is a prohibited name in relation to such a person if -

(a) It is a name by which the liquidating company was known at any time in that period of 12 months, or

(b) It is a name which is so similar to a name falling within paragraph (c) as to suggest an association with that company.

Except with leave of the court or in such circumstances as may be prescribed, a person to whom this section applies shall not at any time in the period of 5 years beginning with the day on which the liquidating company went into liquidation:

(a) Be a director of any other company that is known by a prohibited name, or

(b) In any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of any such company, or

(c) In any way, whether directly or indirectly, be concerned or take part in the carrying on of a business carried on (otherwise than by a company) under a prohibited name.

(d) If a person acts in contravention of this section, he/she is liable to imprisonment or a fine, or both.
The court means any court having jurisdiction to wind up companies; and on an application for leave under that subsection, the Secretary of State or the official receiver may appear and call the attention of the court to any matters which seem to him to be relevant.

Shareholders, directors and ownership

In law, if a company is insolvent then the directors have a duty to the creditors, not themselves or the shareholders. As such, the first thing to do is establish whether the company is insolvent.

If your business is insolvent, then you must act to ensure that you do not make the creditors' situation worse. Some directors are guilty of willfully piling up debt with no hope of paying back creditors - by doing this they are risking an action for wrongful trading that can lead to disqualification and personal liability for the company's debts.

Another trap that directors often fall into is assuming that the assets and monies in the company's bank account belong to them personally. Even if a director has funded the business by putting his/her own money into the company this does not mean that assets belong to them. THEY BELONG TO THE COMPANY and the company owes them as a creditor.

If the company goes into a formal insolvency process they would be classed as a creditor and may receive some of the money back. But this is not guaranteed. Ultimately our advice is not to fund a company personally without any sort of security for the debt.

Obtain proper advice from specialist turnaround practitioners to ensure you are acting in the best interest of the creditors

What should you do to ensure you are compliant with your duties as a director? Try these tests below and see where you might be.

The 'magic wand' test!

If you feel you could continue your business profitably - if only you could sort the debt that is hanging over your company as a result of a bad trading year or one big creditor - then perhaps a company voluntary arrangement or a Pre-pack may be the solution.

The "I need to stop" test!

If the business has no future and is unlikely to be able to continue, then a Creditors Voluntary Liquidation (CVL) may be the answer. This is preferable to having your business wound up in the Court which is a long and drawn out affair and the Court's official receiver has a statutory duty to investigate your conduct as a director. A CVL ensures that the business is closed down in a legally correct and orderly way. The creditors can be handled by the liquidator who will remove the creditor pressure for you.

The other options are really just a variation on the above. If you have a buyer for the business then a pre pack could be an option but these are becoming less used these days and need careful consideration. Administration is a powerful tool to protect your business from all creditors, including the bank, but it means that you lose control of the business and it can be costly and damaging to the business going forward.

Warning signs for shareholders to look out for

Is the company insolvent? Look out for those following signs:

1. Your board fail to communicate financial information to you.
2. The directors cannot agree to the best policy and/ or appear to be at war with each other.
3. High staff and management turnover.
4. Late management accounts, audited accounts and or annual returns.
5. Autocratic leadership - is one person making all the decisions?
6. Different answers to the same questions to different directors.
7. Targets/ budgets are regularly not met.
8. The board regularly asks for new investment.
9. You have to introduce new directors or advisors.
10. The bank wants to introduce investigating accountants.

The basic fiduciary duty of the directors is to inform the members at all appropriate times as to the company's performance. However, few directors realise that when a business becomes insolvent, then the duty of care shifts from a duty to act on behalf of the shareholders to the body of creditors as a whole.

Professional regulators and Insolvent Companies

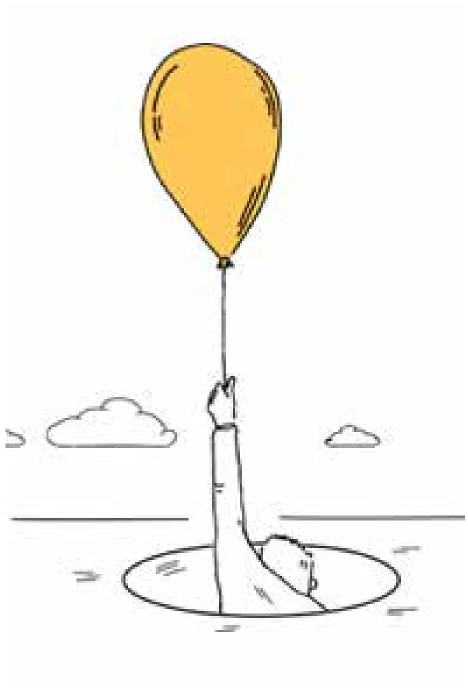
Many directors worry about the impact of any financial difficulties might have on their ability to continue to practice in their chosen profession. The Solicitors Regulatory Authority (SRA), for instance, is mainly concerned with any reputational damage to the profession and the protection of client's monies.

They and many other regulators accept that financial problems are inevitable in business, so they do not strike off people just because their company got into difficulty. However, they do want to see full disclosure and cooperation as the price for their support. Having read this part I suspect you will know if you are likely to be struck off – Do not use client money to plug financial gaps!

We are experts at dealing with all professional regulators and advising company directors on the best options and the right course of action for them as individuals. We have worked with firms of solicitors, Independent Financial Advisors, Chartered Surveyors, Chartered and Certified Accountants, Barristers, Dentists, Doctors and so on.

"And their regulators all want the same thing a grown up approach, open dialogue, honesty and good communications on the plans and the issues with professional advisors to assist the company or LLP".

Call KSA Group now on 0800 9700539



"The Various Options; CVA, Administration, Liquidation – what do they mean to me"?

Below, we've included everything you need to know about cashflow and insolvency rescue methods and more formal insolvency procedures like liquidation.

Time to Pay Arrangement (TTP) with HMRC

If your company can't pay VAT or PAYE on time, we would suggest that you contact HMRC first. Have a look at the Business Payment Support Service pages and ask for a time to pay arrangement. A time to pay deal allows your company to pay back affordable instalments to HMRC over a year.

What are the criteria for HMRC to accept a Time to Pay Arrangement?

Simply, HMRC will give the company time to pay its taxes provided they are happy that you will stick to this arrangement and repay all the taxes in full in a period to be agreed.
So you will need to convince them that this can be done. The company will need to put forward reasonable proposals that set out exactly what you wish to pay and back it up with evidence that these payments can be met.

This may take the form of cashflow forecasts and forecasting sales, evidence that you are able to cut costs and a general determination to pay the company's taxes. As a guide, HMRC will generally ask for around 6-12 months for you to pay back the taxes your company owes, but in some cases it can be longer. It is very important that you do not offer to pay back more than your company can afford as otherwise HMRC may well reject it – leaving the company in a worse situation.

From 3rd August 2015, customers have had to pay HMRC time to pay arrangements in instalments by direct debit only. HMRC will make this method mandatory to ensure the process runs more smoothly for both the customer (your company) and HMRC. **Direct debits will also provide guarantees to protect the customer.**

If your company can't pay corporation tax that is due from the previous year then this can also be included in a time to pay arrangement. This situation is more common for those that are contractors/consultants in industries such IT/banking.

Avoid being rejected

Poor compliance with the rules and regulations surrounding your tax affairs i.e. fines and late filing of paperwork. HMRC will also take into consideration your line of business and their history of meeting TTP arrangements. It only makes sense really that they are going to be less likely to affectively 'lend' to business that are deemed high risk.

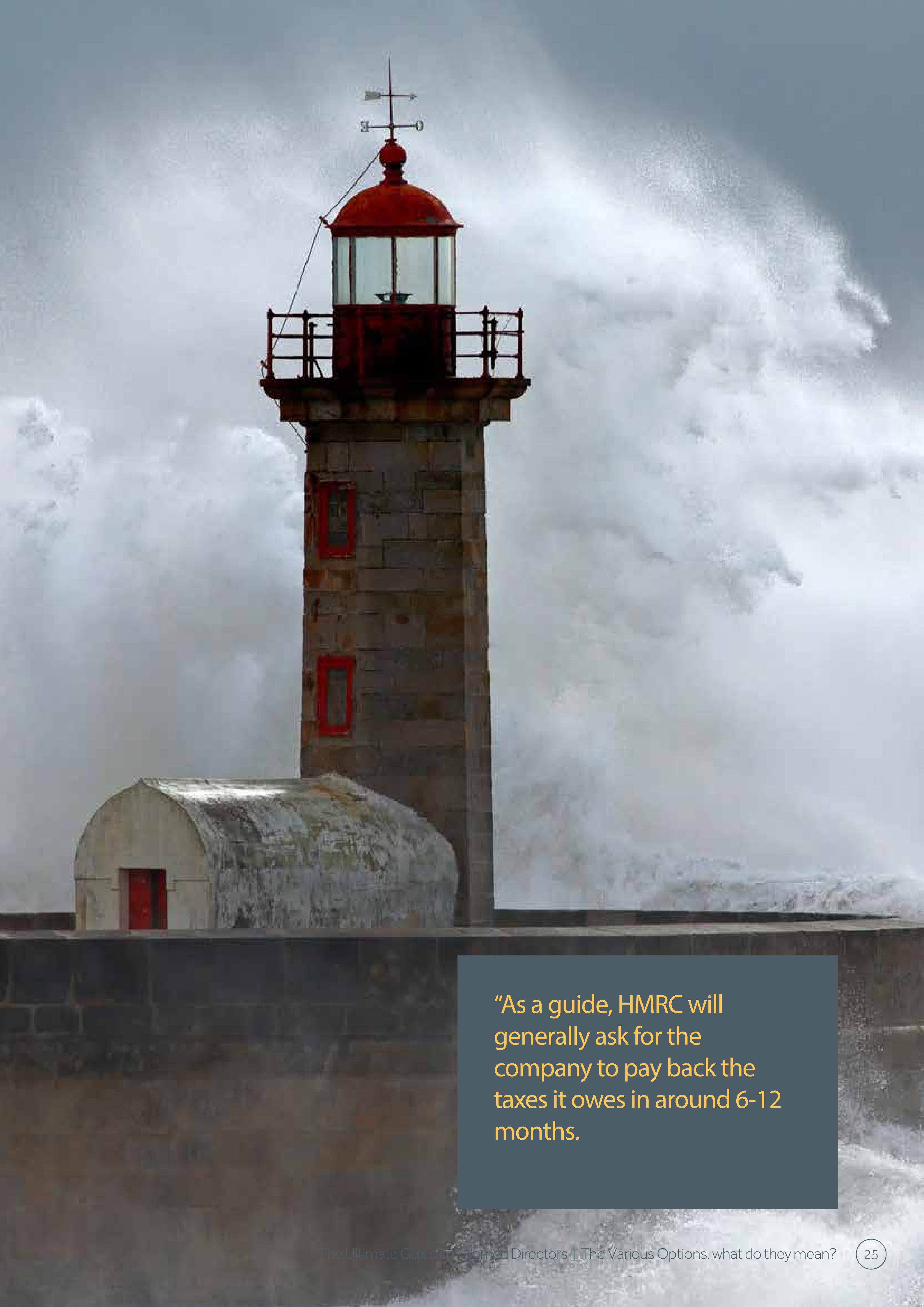
If your company has had a TTP in the past, HMRC will still consider another TTP. However it is common knowledge that the HMRC are looking to scale back the level of the TTP scheme as it does not look particularly fair to be cutting public services but not collecting tax owed.
If HMRC does not accept a time to pay deal, we would suggest that you contact us or a similar advisor to see if you can get a suitable deal in place. This would require some work on a statement of affairs and a financial forecast. It is possible that this may be acceptable to HMRC – because the directors have taken external professional advice will show that the board and the advisors think the business is viable and can afford to repay the debts over a comfortable period.

We call this our **Plan A plan**. Effectively if the business is able to pay off the debts over a year say and the HMRC accept this then that is all well and good.

However, if the company is still viable but HMRC doesn't accept any TTP offers then a company voluntary arrangement (CVA) is the best option[18]. Sometimes even the threat of insolvency is enough to persuade them to agree.

Although a formal insolvency tool, a CVA is a powerful way to restructure the business, the debts and buy a breathing space to recover from the cashflow shock.

[18] See CVA guide www.companyrescue.co.uk/cva-company-voluntary-arrangement



"As a guide, HMRC will generally ask for the company to pay back the taxes it owes in around 6-12 months.

Company Voluntary Arrangement (CVA)

A CVA is a deal between the company and its unsecured, trade and tax creditors, to repay them from future profits. Alternatively a deal may be written to sell assets and pay back creditors from the proceeds.

The arrangement is based on preserving the company, protecting cashflow, rebuilding sales and profits and then paying debts back over an agreed period. Directors remain in control of the company, personal guarantees don't usually get called in and your business is given a fighting chance to survive.

The vital components of a successful CVA are:

- A viable business that can return to profitability.
- A commercially structured deal - where the company does not pay too much too soon.
- The introduction of appropriate levels of working capital in addition to the restructuring of debt.
- A management that accepts that there has to be change in the company.
- Determination and hard work is essential, plus a bit of luck helps.
- Directors need to use expert CVA advisors to build the deal. Always ask advisors claiming to do turnarounds - just how many CVAs they've had approved!!
- Don't expect life in CVA to be easy! Focus on cautious forecasts.

If your company can be viable in future, but current pressure is mounting, this could be a good solution. Remember if your company is insolvent, the directors must aim to maximise creditors' interests - by continuing to trade, your company will maximise their interests with a CVA.

After the directors have considered the long-term viability of the company, it is essential to take appropriate advice from experienced turnaround or insolvency practitioners. We believe that it is vital to have commercially pragmatic and creative specialists involved, from as early a stage as possible.

If the CVA does work, then the company will be profitable and valuable for the shareholders.

Who can propose a CVA?

A CVA may be proposed by the directors of the company. When the company is either in liquidation or administration, the liquidator or administrator can propose a CVA. A CVA can only be proposed if a company is insolvent or contingently insolvent. How long does it take? Below is a time-bar summary of the CVA process: in practice it often takes 7-10 weeks although the summary below is possible if all of the required information is available from the outset.

The Company Voluntary Arrangement Time Bar (approximate).

Day 1.
Board Resolution passed

CVA Reviewed by Nominee.
Filed at Court. Post to Creditors.

Creditors meeting held.
Local to Company.

Between 5 and 30 working days

Minimum 17 days. Usually 21 days.

After KSA Report received, board appoints us to act.

CVA preparation. 4 Main Tasks:
- Forecast/ Business plan.
- Deal/ narrative.
-Statement of Affairs.
- Creditor management / Liaison
CVA final draft ready for Nominated Supervisor of CVA. All managed by KSA Group.

Company now enters CVA.

1. The directors appoint advisors, such as turnaround practitioners or an insolvency practitioner (IP) to assist in the construction of the proposal. During this 'hiatus' period, the company should not materially increase or decrease debts to any creditor, suppliers should be paid for supplies made (not always easy!) and activity of the company continues.

2. A review of the company, its people, markets and systems must be undertaken. This is an important part of the process. Typically the CVA will include a detailed 3-5 years worth of financial forecasts to help the creditors to make their decision to support the deal or not.

3. Once the draft proposal is ready, the directors will typically review and refine it and agree that the proposal is appropriate, achievable, and maximises creditors' interests. If the directors do not believe that it is sensibly structured, or that the process has highlighted weakness in the business, then it may be advisable to close the business.

4. Once the final CVA drafting has been completed, the directors should then discuss the position with the company's secured creditors. Experience tells us that the ability to deliver a quality draft proposal at this stage is preferable to verbal assurances that a CVA will be written and the bank told what the contents are when it's ready! We find that the banks are very keen to get involved and assist where they see a viable company. Often they will want to see how the company will repay the bank's debts. This should be included in the outline of the document. The bank may not agree with the suggested secured debt structure but will usually be open to negotiation with the directors and their advisors.

5. During the CVA production or hiatus period, current assets such as WIP and debtors are collected and turned into cash, which should improve liquidity. This can be used to fund the difficult period between appointment of CVA advisors and the filing of the document at the Court.

6. The CVA proposal are then filed at court, only to ensure that the proposal is ratified and carries a legal originating number. It is then printed and the proposal is distributed to all creditors. The court does not have an active part to play in this process, but the CVA proposal sent to creditors must be a true signed copy of the document filed at court.

After the proposal is completed:

1. The proposal must then be sent to all creditors, who then consider it for the minimum notice period as above before the creditor's meeting can be held. This is usually held at an independent venue (theoretically at the convenience of creditors). We find that the HMRC team, called the Voluntary Arrangement Service, prefers to have up to 3 weeks to consider the proposals, so we always allow more than the statutory 14 day minimum period for consideration.

2. The meeting will be chaired by the advisor or an insolvency practitioner (IP). Creditors are often represented by technical professionals from other insolvency firms. The aim of the meeting is to allow the creditors to question the director's proposals; however it is NOT a place for settling disputes.

3. At the meeting, the creditors vote on the proposal and the proposal will be approved if a majority vote of 75% by value of the total value of creditors at the meeting (whether in person or by proxy) vote in favour. A second vote, excluding connected creditors, is taken and provided that not more than 50% of creditors vote against the proposal, it is approved.

4. In our experience, the voting at meetings is an area that concerns many directors. However, if the work has been done thoroughly before the CVA is filed at court, the worry should be reduced. In our CVAs, the Voluntary Arrangement Service, (VAS) which represents HMRC will always support viable proposals that are well built and show proper care and attention to detail. Given that the VAS often represents the largest votes, then we ensure that they are comfortable with the CVA process very early in the cycle of events. Proper communication with creditors is a vital part of KSA's strategy for helping you build a CVA deal.

5. The chairman controls the ability to vote, and provided creditors have been asked to consider a sensibly structured deal, almost all proposals are accepted by creditors. The creditors may wish to modify the proposal - once again, the modifications need to be approved by the majority votes (see above). This often done by HMRC to ensure future debts are paid on time and future filing of tax returns is done correctly. Occasionally, other creditors may ask for a modification to the proposal.

6. At the same time as the creditors meeting, the members (shareholders) meeting is held. Members decide whether to accept the proposal as made or modified and a vote of 50% in favour is required.

7. If both meetings approve the proposal, the meetings close. The chairman must then issue a chairman's report, within 4 days, to all creditors and the court, stating what happened, who voted and how they voted.

8. Once approved, all notified and included creditors are legally bound for the debt "frozen" in the proposal. No further legal action (except by leave of court) can be taken against the debtor company, and the creditors will receive dividends from the supervisor as described in the proposal.

9. After the approval, the company must make the agreed contributions to the trust account administered by the supervisor. Failure to keep up with contributions is deemed a default and the company voluntary arrangement can be "aborted". This usually leads to liquidation.

10. In our opinion, the best way to avoid this is to structure the deal on the following basis. Prudent forecasts of directors should be further scaled back and modest forecast profits should be used as the basis for contributions BUT

i. No more than 50% of profits after tax and debt repayments over the deal period should be contributed.

ii. Contributions should be stepped to match profits achieved.

iii. Any lump sum contributions during the currency of the CVA should be avoided where possible.

iv. The use of a profits ratchet allows higher repayments if modestly forecasts profits are exceeded.

Even if the approach outlined here leads to small repayment levels of 20-50% to unsecured creditors, the creditors usually prefer sensible contributions to hopelessly optimistic forecasts.

Provided the company conforms to the CVA proposal and makes its contributions, then the CVA continues for the agreed period. The supervisor is generally not involved in the business and the directors remain in control. If the company is not performing well and yet it would still appear to be viable, then it is theoretically possible to reconvene the creditors meeting at any time to ask the creditors to consider amendments.

If the Supervisor has concerns, he can also ask the court for directions. In most cases, the directors should inform the supervisor if there are any material changes to the company or its business.

What happens at the end of the CVA period?

Once the agreed period is completed and the supervisor has issued a completion certificate, then the company leaves the CVA state.

Any remaining unsecured debts (where partial repayment was approved) are written off and the directors continue to run the business for the shareholders.

"What does the company entering into a CVA mean for me (personally) as a director, shareholder, lender and provider of a personal guarantee"?

If your company enters into A CVA what does this mean for you as a director of the company, a provider of personal guarantees, or as a shareholder? What about your credit rating?

As a director, it makes little difference to you, save for the fact that it may be difficult to obtain personal borrowing. For example, for a mortgage or remortgage, given that your main source of income is from a company that is insolvent. Lenders will require detailed financial knowledge of your affairs, given the company is your main source of income. It will usually have no effect generally on your credit rating, per se.

The fact that the company is in a CVA will be registered at Companies House. When making applications for insurance products you will be asked (often) whether you have been a director of an insolvent company. You will have to provide details of the company and CVA.

With regards to your shareholding situation, no dividends can be paid to shareholders as the company is in a CVA. Given that most CVA deals last between three and five years long then you will not receive any dividends, as a shareholder, until it is satisfactorily completed.

If you have provided personal guarantees to the company's creditors then these guarantees may be called in if the company enters into CVA BUT only if the lender has not taken security over the company. So, if the bank has lent money to the company but hasn't taken any charges against the company, but it HAS taken a personal guarantee against you - then this money will be repayable by you. This is a complex area, please talk to KSA about personal guarantees and company voluntary arrangements for your company.

If you provided loans to the company (and these are unsecured loans) then you are regarded as a connected creditor by HMRC. Generally, HMRC will require that your loans are not repaid and are written off during the course of the CVA. As one of the largest creditors in CVAs then our advice would be to agree this modification. There are solutions to this requirement of HMRC including conversion of the debt into other forms such as preference shares or even ordinary equity.

You may also wish to write the debt off personally, as this demonstrates your faith in the CVA plan.

Generally a CVA leaves you in control as a director or directors and allows you to drive and grow the business. It is the best insolvency solution in the UK.

Administration and Pre Pack Administration

Administration is a very powerful process when a company is insolvent and facing serious threats from creditors. The Court may appoint a licensed insolvency practitioner as administrator. This places a moratorium around the company and stops all legal actions. The administration must have a purpose and the Government encourages the use of company rescue mechanisms after administration. Under the administration option, it is possible for the company and its directors (or a creditor like the bank) to apply to the court to put the company into administration through a streamlined process, by applying to the High Court.

However, the law requires that any finance provider (like a bank or lender), with the appropriate security, is contacted and the aims of the administration be discussed and approved. The finance provider must have a fixed and floating charge (usually under a debenture) and the charge holder will need to give permission for the process to go ahead. Five days clear notice is required.

Pre-pack Administration

In the UK, a pre pack administration sale is a powerful, legal way of selling the business on to a trade buyer, third party or to the existing directors operating under a new company (or 'newco') if the business is facing serious problems and creditor threats. If a winding up petition is threatened, this can be a powerful solution. Don't wait until a winding up petition is issued though, because pre-pack is not permitted after it has been issued.

The main advantage of Pre-pack Administration is the continuity of the 'business'. When the plan is ready and a contract of purchase is drawn up, the company is quickly protected by the Court Order - allowing the administrator to sell the 'business and assets'. This gets rid of debts, unwanted or onerous contracts and possibly some employees (although in most circumstances there could be issues that need to be addressed). There is usually no interruption to the BUSINESS, which in itself can destroy value.

Another big advantage is that the cost of the process is lower than a trading administration, as the administrators do not need to find funding to trade the business. The process, including the preliminary marketing, professional valuation work and discussions with creditors, can be very quick and done in a few days if necessary. If the business is to be sold to a connected party, i.e. the former directors, they will need to be able to fund the acquisition of the assets. The business and the assets will need to be independently valued to avoid problems of under valuing assets. Of course, a Pre-pack can generate negative publicity if the former directors are seen to be shedding liabilities. However, it should be remembered that the business was already insolvent prior to any appointment and a protracted process ending in liquidation could have been the alternative - possibly with the loss of many more jobs.

Insolvency practitioners are subject to strict codes of practice to avoid abuse - this is called SIP 16[19]. In 2015 this form of insolvency procedure was further regulated with restrictions on sales of assets to connected parties. These have to be approved by a pre pack "pool" of experts. Over time this may make pre packs less viable as likely delays will lead to more erosion of value.

Next steps

If the plan is to sell the business (not the company) to a 'newco' then a business plan for the newco must be drawn up. We recommend that this includes detailed profit and loss forecasts, cashflow forecasts and balance sheet forecasts.

Compliance issues

Under insolvency practitioners guidelines (known as SIPs), the IP must market the business. Often this requires sending sales memos to a database of potential buyers, or the IP may place an advert on their website and/or a local or national newspaper. If they get no interest or no indication of interest they can then sell to the 'newco' or third party. If there is a lot of interest and several offers, beware your business could fall into a competitor's hands! You may still be able to buy the business back, but the outcome is not under your control.

The IP will also have to get formal valuations of the assets, intellectual property and or goodwill of the insolvent company by RICS qualified surveyors. Generally, any offer needs to be commensurate with such valuations. If your company reaches this stage and you and your colleagues are planning to buy the business, you must be careful with regards to your personal position. As directors of the dying company, you have a fiduciary duty of care to the company's creditors. Starting 'newco' can put you at risk of 'conflict of interest'. It's likely that you will need separate legal advice on both companies. It's best to talk to lawyers with insolvency and pre-pack experience. The IP will take advice from his lawyers as to compliance and risk. He may require this advice to be paid for along with his disbursements. Strictly speaking he cannot charge time costs in advance for the pre-pack work but he will charge for consultancy and fees.

Warning: Ensure that the pre pack process can be carried out under your current client contracts, and your connections to the bank. The current stand point of several clearing banks is they won't support pre packing to the incumbent directors/shareholders. Will your landlord(s) allow a new company to occupy their property? Are your suppliers prepared to supply a newco? Will your creditors be angry about this approach?

Finance

You will need finance to fund the acquisition of the assets and business. There are many specialist lenders who can provide: factoring, asset based lending, loans and bank facilities. Some venture capital companies or angels may help fund the pre-pack as part of a 'buy and build' strategy. Financing a pre-pack is likely to be very difficult and will probably require personal guarantees from the directors for SMEs. Larger companies may find that the private equity and venture capital buyer removes the directors as part of the Pre-pack conditions.

Sale

Assuming that your "newco" has raised the finance, the proposed administrator has satisfied their compliance requirements and the board of 'newco' believe they can fund the acquisition, then it's all systems go. A contract is likely to be drawn up that appoints the proposed administrator formally. They will then initiate the pre-pack administration by contacting any floating charge holders like banks or lenders with security. If they have no objections (and often they are involved in funding newco) then they can proceed. Beware some banks will NOT allow a pre-pack to a related party. Obviously, speaking to the bank is essential before finalising plans.

Assuming all is approved, the administrator makes an application to Court stating the proposals. Almost immediately after that the business is sold to a newco or third party. This can be done on a Friday night and by the following Monday the business is trading virtually uninterrupted. Having bought the company name, the "oldco" sees its name changed to something else, often abbreviated (but not kept exactly the same).

TUPE

TUPE is the acronym for Transfer of Undertakings (Protection of Employment) Regulations. The idea of TUPE is to ensure that if a business is sold to a new owner, then the employees are protected and their contracts are honoured by the new owner. In theory the newco will need to take over all the employment contracts which might make cost cutting difficult. However, the law is quite fluid on this point and we would advise that you take legal advice on this aspect before considering on this course of action.

5 Administration? Meaning for me?

"What does the company entering into Administration mean for me (personally) as a director, shareholder and provider of a personal guarantee"?

Being a director of a company that enters into administration is a challenging time. Usually what happens is the administrator takes over the management of the company and the business (for a short while) and the directors' duties cease although responsibilities have not yet ended.

If you are also a director of the Newco or purchasing company then you have to be very careful to keep both companies matters and affairs separate. It's worth taking legal advice from an insolvency solicitor on this point.

Given the purpose of administration generally is to sell the BUSINESS (not the company) then if you have provided personal guarantees to lenders to the company, it is highly likely that these guarantees will be called in. Please see the section above on personal guarantees. So you may be fighting with the administrator on the deal, setting up newco and looking for funding, arguing with lenders on personal guarantees meanwhile, still trying planning to run the business! As you can see this is likley to be a very stressful time. Your powers as a director of oldco are effectively removed.

As a shareholder, the outcome is generally nothing for shareholders as most creditors are not paid in full. Given the ranking of shareholders is at the foot of the table of (who gets paid when a company becomes insolvent then shareholders will receive nothing. The powers of prepack administration or a trading administration cannot be underestimated but it requires a licensed insolvency practitioner(s) who are officers of the court, to maintain and run the company whilst the administration process is underway. It is possible to extricate the business from the company very quickly, but you and/or a trade buyer will have to pay for that. With regards to your activities of the director there will be a formal investigation into these by the administrator.

Typically at the end of the administration process the company is placed into creditors voluntary liquidation (see guide below). This will require a full statutory investigation into all of the actions and activities of the directors and officers of the company, including shadow directors. This looks back three years from the onset of insolvency

If you have acted reasonably and responsibly and taken legal advice and insolvency advice then there should be little to worry about. However, if you haven't then there are lots of tripwires to affect you personally. So, our advice throughout this guide, please take advice from KSA Group as soon as possible when your company is facing insolvency.

But, if personal guaramtees are called in we can provide expert advice, lead creditor negotiations and support to ex directors.

Creditors Voluntary Liquidation (CVL)

What is voluntary liquidation? What is compulsory liquidation?

Creditors voluntary liquidation (CVL) or compulsory liquidation means the end of the company's life and its assets are then sold and turned into cash for the creditors, if possible. Creditors voluntary liquidation is the most common form of liquidation in use in the UK. Around 7-10,000 companies will be closed this way per year.

Usually, the company has run out of cash, the directors do not think it is viable, they know the company cannot pay its debts on time and the directors are concerned that the business may build up more debts. They are also worried about wrongful trading.

A CVL can bring a quick end to the worry, if you act soon enough and have acted properly as directors. Yes, you can be a director of another company after a liquidation, but it is important to note that there are strict controls over the re-use of a company name (mentioned earlier in this guide). Remember, it is potentially a criminal offence to use a same or similar sounding name.

Next steps

The directors of an insolvent company elect to call an extraordinary general meeting of the company. At this shareholders (members) meeting, the directors will report that the company is insolvent, and there is no reasonable prospect of paying existing creditors. They must explain that they believe it would be wrong to take further credit and advise the shareholders that the company should voluntarily enter liquidation.

At this general meeting the members (shareholders) will generally pass a resolution to cease trading and elect to nominate a liquidator. This liquidator then conducts a relatively quick investigation into the statement of affairs of the company, and calls the creditors to a meeting. He/she will ass details of any company assets over to the proposed agent or valuers may get these valued. This will independently set the value of the assets for going to auction, or you may wish to buy them.

if cashflow is challenging and failure looks likely make sure you take notes of any major decisions, write down important dates and the board's actions. Always write to creditors and banks, that way you will create a written record of the issues. Have regular meetings of the board, shareholders, management and if it's just you, make sure you write everything down!

Who does the company owe money to? You'll need to provide all company information, books and records.
A company director will need to 'chair the meeting of creditors'. In actual fact, the liquidator will run the meeting but you or one of your directors must attend it by law. The meeting of creditors is usually a short meeting with no one attending. The liquidator must place an advert in the London Gazette calling this meeting and then write to all known creditors inviting them to submit a claim for their debts. The liquidator is then appointed by the creditors at a creditors meeting (s98 Insolvency Act 1986).

If required, the creditors can elect to form a creditor's committee, to monitor the activities of the liquidator during the course of the liquidation. This may be to monitor fees, or the sale of assets or investigation into the director's conduct. A creditors' committee must have between 3 and 5 members.

The liquidator has four main tasks:

1. To convert the assets of the business into cash (hence liquidation)

2. To adjudicate the claims of the creditors (work out how much is owed by the company)

3. To investigate and report upon the conduct of the officers of the company (directors and shadow directors)

4. To make payments (where dividends are available) to creditors in order of priority

Very often, the directors will have tried many other avenues to save the company and the remaining unfettered assets will be modest (unfettered means the assets have no outside owners like the bank or HP companies).

In many other cases, the liquidator is asked to sell the assets of the business to another party. This can include the former directors or shareholders. This process is commonly known as a "phoenix". Phoenixism is legal - provided the rules are observed and the liquidator maximises the interests of creditors, the business assets can be sold to a 'connected party'.

In this event the liquidator must;

1. Obtain the best possible value for the assets. Having typically advertised the assets for sale in the media and or on the internet.

2. Ensure the creditors interests are not compromised, by investigating the conduct of the directors prior to the liquidation.

3. Confirm that the trading name of the new company is not the same or similar to the liquidated company. (Although this restriction on re-use of a trade name can be lifted if the court agrees).

Often a phoenix company will require new cash (in the form of investment) to get the company going. This can sometimes be a stumbling block too, as can the fact that the new company may have to take on the employees' rights from the old company (TUPE).

Typically, if the company is very distressed and the board decides to cease trading, the normal liquidation process starts but the directors or shareholders or both buy some of the assets from the liquidator. The new company starts to trade, often under a similar name. - This can be a legal minefield so make sure you get good advice if you wish to set up a phoenix company.

What are the main advantages of a CVL?

The directors may avoid the risk of "wrongful trading", they draw a line in the sand - and crystallise the situation (often this is a very important benefit because it brings to an end the period of worry and terrible uncertainty).
In addition to this, the creditors' interests are hopefully maximised.

The benefits to creditors are that the directors' conduct will be investigated by a liquidator (or ultimately the DBIS), and that their position is crystallised and not worsened. Because it is the creditors who appoint the liquidator, alongside a creditors' committee they can be sure that the company issues are dealt with correctly.

What are the main disadvantages of a CVL?

Any tax losses built up prior to the liquidation are lost. Goodwill is lost (even if there is a phoenix). The director's conduct will be carefully investigated and it is a costly exercise. In virtually all cases there is no return for the shareholders and very low recoveries for the creditors.

From a creditor's perspective, a CVL can be a negative step because assets tend to be sold for very much less than book value and creditors' claims can be much higher (for example claims from employees, landlords and secured creditors), there is often no prospect of continued trade. Coupled with the actual cost of doing the insolvency work, the return to creditors in liquidation is usually very low.

Compulsory Liquidation

When a company ends up in compulsory liquidation, it is usually a sign that a creditor has given up trying to recover money from the company, or it indicates that a Crown or Government agency has wound up the company, using a winding up petition under the public interest. Clearly, this is a very serious action for creditors to take (not least because of the cost) and if the company is subject to this process it can severely curtail the ability to conduct business. It is possible to stop compulsory liquidation, but you have to act quickly if the company has been 'served a winding up petition'.

The costs of compulsory liquidation are not insubstantial and a creditor has to decide whether the debtor is likely to pay up. A debt of over £750 must be undisputed and the creditor must have notified the debtor of its intent to collect the debt. This often involves issuing a statutory demand first. If the debtor fails to pay the statutory demand in 21 days and does not dispute the debt, then the creditor may issue a winding up petition.

The costs vary between solicitors but a typical cost of the action will be £250-£500 for a statutory demand, and £1,000-£2,000 for a winding up petition (includes Court costs). Despite this for larger debts it is a very effective way of collecting larger debts when the creditor believes that there is sufficient resource to pay it. Many larger companies use established debt collection law firms to collect their debts this way.

The application for a petition will be granted in cases where it can be proven to the Courts satisfaction that the debt is undisputed, attempts to recover have been undertaken and the debtor is not compliant. A petition will be issued and a court hearing date granted. The date is usually well in the future because of court time pressures. Once the petition is correctly served upon the company, it has a period to pay the debt or to defend the action. This is expensive as the action is always in a High Court and requires a barrister to attend. The costs of such defence are high. If the case is found the company is wound up by the Court.

Note: even if the debt is paid (always with full costs) the fact that a petition is issued means that a winding up hearing MUST be held. Between the date of the payment and hearing it is possible (and often happens) that another creditor learns of the petition and 'substitutes' their debt for the paid debt (thus 'piggy-backing' the action in order to get ahead of other creditors and get paid).

Problems Caused by a Winding Up Petition

Once a company has been served a winding up petition there are some serious problems to consider. The best lesson we can give is this DO NOT LET A CREDITOR TAKE THE ACTION IN THE FIRST PLACE. Once the petition has been issued and served it must be HEARD, this means the Court has to consider the petition even if the debt is paid before the hearing. This means the company can't:

- Dispose of or sell assets
- Sell the business
- Secure new loans
- Issue a notice of intention to appoint administrators
- Nominate a liquidator
- Pay suppliers as the bank account may well be frozen*
- Pay wages for the same reason*

*We can arrange for a validation order to allow the bank account to be used, but this can be an expensive process.


Home All notices Awards & Accreditation Insolvency Wills and Probate Publications Data Validation Shop Register Si

THE GAZETTE
OFFICIAL PUBLIC RECORD

Published by Authority | Est

All insolvency notices News Resources Legal lounge

Notice details

Type:
Corporate Insolvency
> Petitions to Wind Up (Companies)

Publication date:
18 December 2015, 0:10

Edition:
The London Gazette

Notice timeline for BOLTON WANDERERS FOOTBALL & ATHLETIC COMPANY LIMITED (THE) (00043026)

Petitions to Wind Up (Companies) 18/12/2015

Dismissal of Winding Up Petition 08/04/2016

Actions

Save notice to My Gaze
Download PDF of this is
Print notice
Share this notice
Linked data view
Provenance trail

Advertisement of the Petition

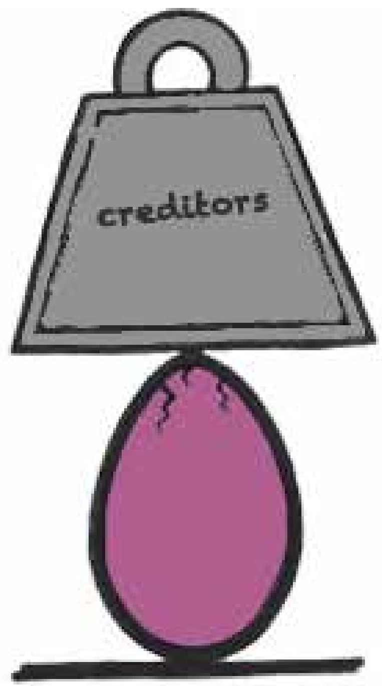
A minimum of 15 days before the hearing, the petition can be 'advertised' in the London Gazette. Of course, all high street banks and lenders monitor this very carefully because if a customer is involved in such an action they usually freeze the bank account immediately - thus stopping any trading. The purpose of this is to stop assets being sold, or other transactions, that may worsen the creditors' position being carried out. This is to stop disposition of assets under s127 Insolvency Act 1986.

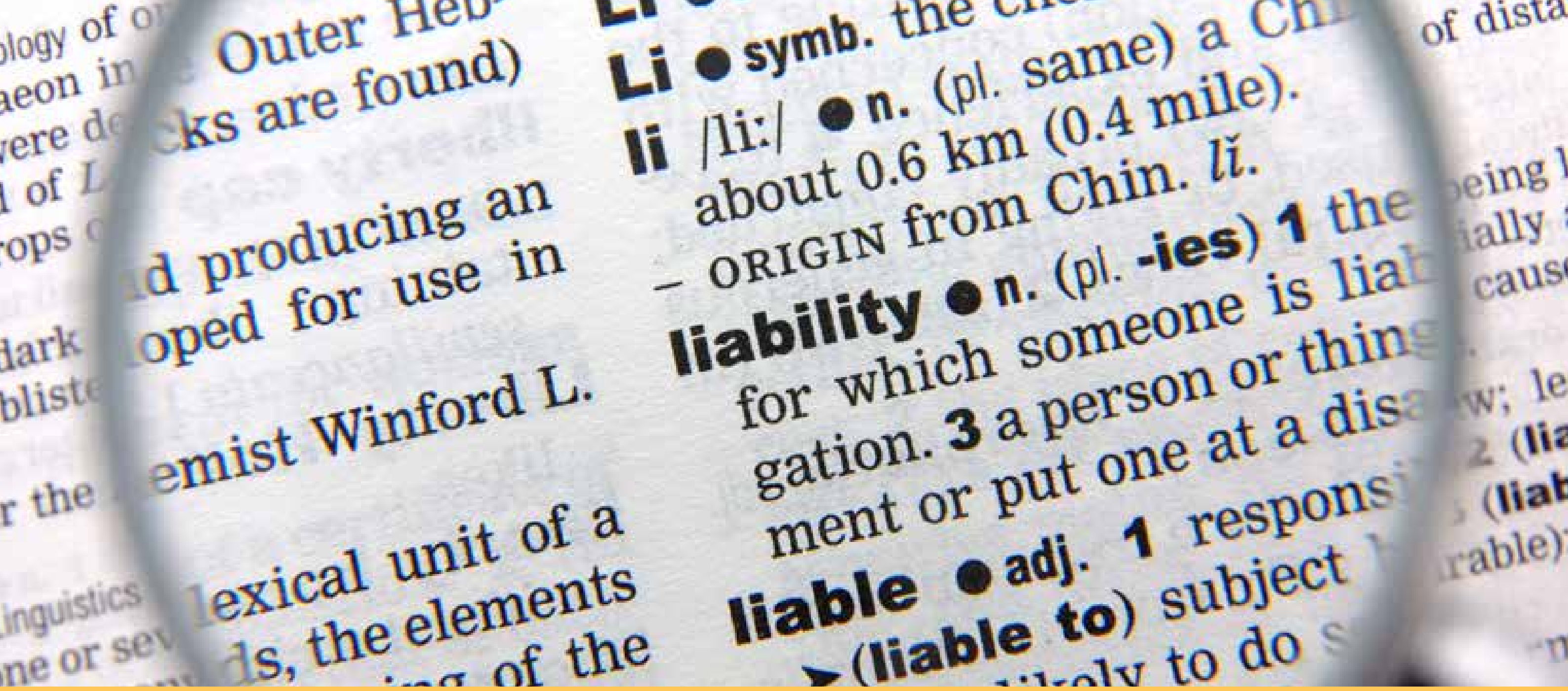
This mechanism is used mostly by HM Revenue & Customs. Over 60% of all petitions are issued by the Crown agencies.

HMRC is an 'involuntary' creditor. Because the company is trading and employing people, the debt to the crown increases over time. If you have tried to do deals to repay outstanding PAYE and or VAT and still fail to make payments, the Crown debt will also be rising. So HMRC decides to wind the company up. The company will then pay up, enter a CVA or administration, or simply cease trading.

Government petitions: if the Crown (either tax agencies or the DBIS) believes that a company is contravening legislation, such as the Trading Standards legislation or is acting against the public or government interest, it is possible for the company to be liquidated compulsorily.

This is very serious action to take, and is not used very often. In such cases criminal and or disqualification proceedings are quite common.





What does the company entering into Liquidation mean for me (personally) as a director, shareholder and provider of a personal guarantee?

If the company enters into liquidation (whether it is compulsory liquidation or creditors voluntary liquidation) you, as a director will have to conform with the rules and the liquidators requests for information. Failure to do so is potentially a criminal offence.

As a director you will have to fill out a detailed questionnaire explaining what happened to the company, why the directors decided not to pay certain creditors such as HMRC, when the company became insolvent? And so forth and so on. This is typically a 30-40 page questionnaire and after completion you will be interviewed by the liquidator or their members of staff.

Directors must provide the books and records of the company to the liquidator upon appointment. The liquidator will then investigate these books and records and must store them for up to 12 years.

If you provide a personal guarantee to the lender to the company, then the liquidation is a default event and may lead to the lender asking providers of personal guarantees to repay whatever shortfall they have from the company going into liquidation. We can assist you with this situation. Please call KSA Group to discuss how we can help with personal guarantees and negotiation of settlement.

As a shareholder you will receive nothing and you may be required to pay your share capital if you have not already done so to the company's liquidator.

If you have provided loans to the company you will be an ordinary creditor. And you may be eligible for a dividend if there are any funds to distribute by the liquidator.

If you have an overdrawn director's current-account (or directors' loan account,) then you will be required to repay this to the liquidator - please see the section on overdrawn directors current-account above.

The fact that the company has failed will also be registered at Companies House and your name as a director will be shown by credit reference agencies as having been a director of an insolvent company. You may be asked questions by future insurance providers or contractors as to whether you have been a director of a limited company that has entered into insolvency, you must disclose the name of this company that has failed.

However your personal credit rating is unlikely to be affected. What it really means is that if you set up a new company then a cautious supplier may well check your history as a director and indeed a lender who you are asking to fund a new business venture will also be interested. It may affect you personally, if you are going to be working in a sensitive industry such as banking, finance, insurance or defence.

"Yes you can be a director of another company or form more companies after a company has been liquidated. You are not automatically "banned" just because of the liquidation".

6 Free Directors Toolkit

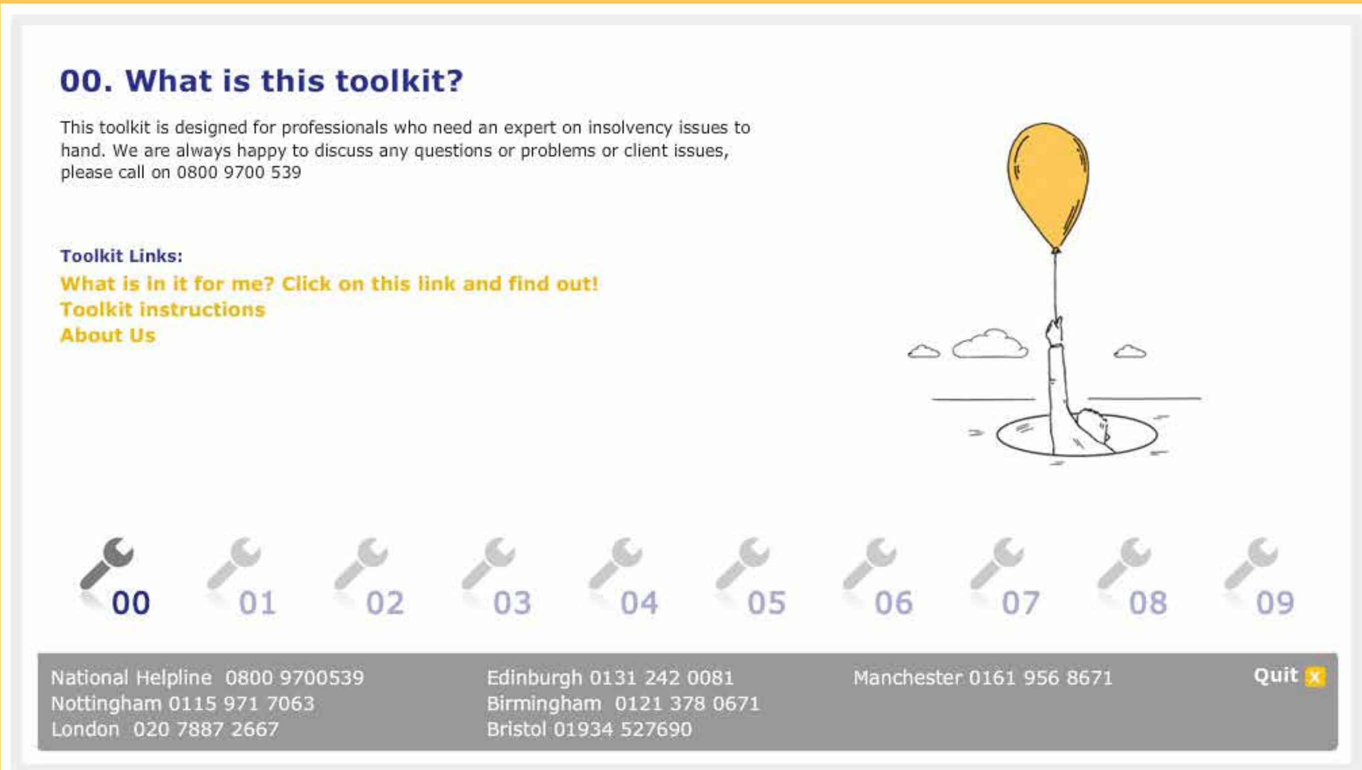
Insolvency Toolkit for Directors

This toolkit is available as a USB device. You do not need to be connected to the internet to read all the guides to your options.

What does it cover?

- The tests for insolvency
- Establishing if your business is viable.
- How to ask for time to pay your debts to HMRC
- Extensive guides on pre pack administrations, liquidation, company voluntary arrangements.
- A guide to all the legal actions that creditors might take and the issue of personal liability.
- What is an overdrawn directors account and why does it matter?
- How to raise finance to ease cashflow pressure.
- Your duties as a director of an insolvent company.

Just plug in the drive and you can easily navigate to all the menus.



7 Summary

We hope you found this guide useful. If you have read through it all, by now you will understand there are very many factors affecting individuals when a company, LLP or partnership becomes insolvent or challenged.

The common theme that you will have seen running through this guide is - you should take advice as soon as possible, when a company looks like it may become insolvent.

As directors we all have a duty under the Companies Act legislation to act in the best interests of the shareholders normally. But when a company is, or looks likely to become, insolvent - you as directors must act in the best interests of the creditors.

In the "twilight zone in between" there are lots of grey areas and our advice as always is speak to us (which is free of charge!) to ask any questions that you may have. What have you got to lose - it is free?

You will get a sympathetic hearing, we will ask you questions about the business and what it does and what the issues are. Then we will ask what you WANT to do and what the company's objectives are. Then we will give you options, intially free.

You don't have to disclose the name of the business but we do need to have basic information to give you general advice, on your options as a director of a limited company which is facing cashflow and insolvency problems.

Just like having an illness, the quicker you go to the doctor the better generally! Having a company with these problems is a sign that something is wrong with the company. You should therefore take advice from experts who, like doctors, spend all day looking after companies that have distress, insolvency or turnaround issues.

Remember, you ARE NOT AN EXPERT in insolvency or turnaround just because you are a director, get advice from experts now.

Don't forget we also offer a premium service where one of our 11 directors or managers can be available to answer questions about any of the topics in this guide on the telephone or conference call or face-to-face. The only cost to the premium service is that you register with KSA Group as a premium customer, agree to receive our update emails, and we determine we can help the business on an initial call[1].

8 Top tips

Finally, as a director of a limited company, here are the key things to remember - the top ten rules!

1. The company's debts are not your debts.
2. You are not the company.
3. You are a director of the company (or designated member of a limited liability partnership) and if you have acted reasonably, then the debts will not fall at your doorstep.
4. If you provided a personal guarantee to lenders to the company and the company can't repay it all - then you will have to repay some or all of the borrowing! Get advice
5. If you've acted reasonably and responsibly and you have not provided any personal guarantees to support the company's borrowing, then entering into insolvency such as CVA, administration or liquidation should not have any major bearing on you.
6. If you have been advised by your accountant to take c. £10,000 a year through PAYE and draw the rest of the money you need to live, out in advance of paying dividends to shareholders, then this advice is not good advice if the company is fragile. If the company becomes insolvent you will have to pay these borrowings back to the company.
7. NO you will not lose your house if the company becomes insolvent.
8. After a company goes into liquidation you can be a director of as many companies as you like. Providing and always providing you have not been disqualified as a director or been made bankrupt.
9. Corporate insolvency is complex! When a company becomes insolvent the rules change so get advice early!
10. Please contact our free helpline on 0800 9700 539 for friendly and accurate advice. We hope you found this guide useful and please do send it to any of your colleagues as a PDF.

9 Glossary

Unfortunately, the insolvency business is full of jargon, as are many others, so we've put together a glossary of terms used in this guide.

Administration
When a company goes into administration, it is usually because it has fallen into financial difficulties, so an administrator is called in to run the company to see whether the company can continue, or be sold so that new owners can turn the company around. If it can't, then the company will be closed down and the assets sold to cover its financial responsibilities.

Administrator
A person who acts as a controller of the company when a firm goes into administration. All company actions must go through the administrator and the administrator has overriding control over the whole business. He is appointed by the Court.

AGM
An Annual General Meeting where the shareholders voice any issues and directors give information of the past year and forecasts for the future, they also vote on any changes that are eligible to be made within the meeting, i.e. change of auditors and directors. this MUST be held every year. Does your company do this?

Arrears
A term used when you have not paid invoices/made payments on debts and has built up and needs to be paid, if you do not pay the debt holder may take action to claim the money back. Asset An asset is something which you own that holds value should you come to sell it, i.e. a house or stock etc.

Bankruptcy
An option that can be used if an individual cannot pay their debts as and when they fall due, or they owe more than they own. This causes you to lose control of your assets and cannot be a company director for the period of the bankruptcy ban period. Bankruptcy also adversely affects your credit rating.

CCJ
A County Court Judgment or court action where a company/person will take you to court because you have not paid a debt. The court will order you to pay the debt within an allotted time and if you don't the company will be able to take further action.

Charging Order
If a creditor can't retrieve monies owed through a CCJ, they can apply for a charging order. This secures the debt against a property so if it is sold, the creditor gets their money from the proceeds.

Companies House
This is where ALL Ltd and PLCs are registered, they store all information and make this info available to the public i.e. accounts, directors. Companies House also act to incorporate and dissolve companies.

County Court
A court with jurisdiction over one or more counties. This type of court deals with civil (non-criminal) matters. Businesses usually go through the County Court to recover money they are owed.

Credit Rating
A tool that banks and financial service providers use to assess how likely you are to be able to honour your debt, if you have a good rating you will have access to more funds than if you have a poor rating. Your rating is assessed on whether you have defaulted before or have any court judgements.

Creditors
A company or persons who owe money to another company for services provided. Creditors are classed as liabilities as it is money outstanding.

Creditors petition (bankruptcy)
Creditors can petition for a debtor to be made bankrupt if an individual creditor is owed more than £750. Alternatively, creditors can join together to meet the £750 requirement. Proceedings normally take place at the debtors local county court with bankruptcy jurisdiction. Creditors can only ask for someone to be made bankrupt if: the debt is unsecured; and for a fixed sum which the debtor appears unable to pay.

CVA
A company voluntary arrangement: Where a company is in an insolvent position a CVA may be used in order to set up a deal where a percentage of the debt is paid over a period time in order to ease the current cash flow problems and pressure on the directors. This allows the directors to focus on improving the business.

CVL
Creditors Voluntary Liquidation: The liquidation of a company means to cease trading, sell all the assets and terminate all contracts. It is initiated by the shareholders of the company and done by an insolvency practitioner (see below). Debtors A company or persons who owe you money for services you have provided, but not yet paid for. Classed as a current asset.

DBIS - Department of Business, Innovation and Skills:
This has replaced the DTI. It is a Government agency which acts in the interests of all and aspire for higher productivity in all industries by promoting enterprise innovation and creativity. The DeBIS also aid in employment issues such as redundancy. The DeBIS runs the Insolvency Service in England & Wales.

Debenture
A form of security over assets of a company in exchange for a loan.

Debtors petition (bankruptcy)
Where a debtor decides they want to make themselves bankrupt, in order to do this the debtor must petition to the county court. See bankruptcy above.

Directors
The decision makers of the company. The directors control the business and are responsible for its successful running and management. They're protected from personal risk by limited liability, but generally only if they act correctly!

Directors Disqualification
If a person is declared bankrupt or has committed certain insolvency offences then he or she can be barred from acting as a director by the DTI. It becomes illegal for that person to be a director or manager of a company for the period of disqualification.

Dissolution
A process that legally breaks up a company that no longer wishes to trade. In order to start the dissolution process the company must have ceased trading for 3 months.

Distraint
A popular tool for landlords where rent or other payments are not made. If the landlord has agreed a payment deal and the company is not keeping to it the landlord has various powers. Distraint means that an agent of the landlord can effect entry to remove goods or assets for sale to pay for the debt due. He /she does not need to wait for a long period for this to happen. In theory 1 week after a rent payment is due they can distrain. Nor does he/she need a judgment.

Domino effect
If a partner as an individual has an insolvency problem (perhaps from overspending/borrowing, gambling or drinking (or all of these) and is being pursued by a creditor(s) this can lead to problems. It is even possible for the spouse of a partner to become insolvent, thus leading to the loss of the matrimonial home which, for example, may underpin security granted to a bank.

Factoring
A service provided by financial institutions such as banks and lenders who pay the company for unpaid invoices and help collect the remaining funds for a fee and they charge for lending the company money for a period until the debt is repaid.

Fixed and Floating Charge
A mortgage, debenture or other security documentation, is likely to create charges over particular assets as security for borrowings or other indebtedness. There are essentially two types of charge, floating and fixed. A floating charge is appropriate to assets and material which is subject to change on a day to day basis, such as stock. Individual items move into and out of the charge as they are bought and sold in the ordinary course of events. The floating charge crystallises if there is a default or similar event. A floating charge is not as effective as a fixed charge but is more flexible.

Fraudulent trading
Put simply fraudulent trading is the continuation of trading with no reasonable prospect of repaying debts and with the intentions of defrauding creditors.

Going Concern
Where the company is continuing to trade for the current period and can cover its costs and make some money.

High Court
This is known as Her Majesty's High Court of Justice, is based in Westminster and is a senior to a County Court. It is the third highest court in the country. Cases made already in lower courts can be appealed here.

HMRC
Her Majesty's Revenue and Customs: the government body which collects and regulates PAYE, NIC VAT etc

Insolvency practitioner
A professional who specialises in insolvency and is licensed by the DTI. Insolvency practitioners often act to close a company in the best possible way for all parties involved. Only IPs can be a liquidator or Administrator.

Insolvent
A term that is used when a company/person cannot pay or cover their debts with the assets or funds they have as liabilities exceed assets.

Insolvent company
A company that cannot pay its debts as and when they fall due. The company will suffer from major cash flow problems and cannot pay what it owes thus it is insolvent.

Interim order
When someone is applying for an IVA (see below) they can ask the court to protect them from legal or bankruptcy actions by someone they owe money to.

Investigating accountants
Accountants who look at the business you run for the bank that is lending it money, they check accounts, forecasts, marketplace and management. The real reason the banks appoints them is to find out how secure debt is that the company holds! See a guide to investigating accountants.

IVA
An Individual Voluntary Arrangement: Very similar to a company voluntary arrangement. However the IVA is for individuals as opposed to companies and removes the burden of personal debt to make a fresh start and improve their lives.

Joint Several Liability
Joint and Several Liability implies that all members are liable for the partnership debts in full or in part individually, dependent usually on their ability to pay. Thus a creditor(s) / liquidator can "go after" the member with the most assets to satisfy debts then the next and so on until all debts are satisfied or until all partners made bankrupt.

Liability
A Liability is something that you owe to somebody, i.e. a mortgage, loan payment credit/store cards.

Limited Company
A business that legally sets itself as a separate person so that its directors and shareholders are not liable for any of its (proper) actions. The businesses are usually privately owned.

Limited Liability
A mechanism that allows Limited company and PLC shareholders to limit there responsibilities if the business falls into difficulties, where shareholders will lose no more than there investment in the business should it default.

Liquidation
When a company dies. Once the process starts the company is administered by a liquidator who disposes of all assets, and distributes the proceeds to creditors and any remainder to shareholders. The company is then struck off from the companies register once this process is complete.

Liquidator
A liquidator is a person responsible for dealing with the winding up of a company and he/she must be an insolvency practitioner.

Moratorium
A period of time during which a certain activity is not allowed or required. Usually a moratorium is put in place to protect a person, business or company

No fault bankruptcy
Under the Enterprise Act 2002 the UK Government significantly relaxed the rules regarding bankruptcy. From April 2004 the sole trader or partner in a partnership, who has a failed business (where there are no issues of fraud, misfeasance, recklessness etc) is able to file for bankruptcy (see process above) and be discharged from that bankruptcy within say 12 months.

Nominee
A nominee is a licensed insolvency practitioner who helps propose a deal with their creditors under a proposal of a CVA/IVA and deals with legal issues and compliance such as chairing the creditors meetings, checking management accounts and forecasts.

Official Receiver
The Official Receiver is a civil servant in The Insolvency Service and an officer of the court. He (or she) will be notified by the court of the bankruptcy or winding-up order. He will then be responsible through his staff for administering the initial stage. This stage includes collecting and protecting any assets and investigating the causes of the bankruptcy or winding up.

Partnership
Similar to a sole trader, however there is more than one owner and there can be several different people that own different amounts of the business.

PAYE
Pay As You Earn: A government scheme where your tax is deducted from your monthly wage and paid for you by your employer so that you do not have to calculate your own tax and National Insurance payments. The employer is responsible for collecting this tax and paying to the government. Failure to do so on time is a sign of insolvency.

Phoenixism
An insolvent company is closed down and the business is moved to a new company to avoid paying debt.

Pension Fund
This is a pot of money into which contributions are made to build a fund to pay retirement pensions and funds that are drawn on to pay these pensions to ex-employees who were eligible for a pension.

Personal Guarantee
A personal guarantee is a tool which financial service providers can use to guarantee their debt by requesting the director or partner in a business to personally guarantee the debt regardless of whether the debt is used by the company or not. Should the debt default, then the bank will call on this personal guarantee and the guarantor may/will have to pay the remaining debt.

PLC
A Company that trades shares of its business on the stock exchange which can be owned by anyone. The company has limited liability and are generally quite large firms and have to disclose all actions. The minimum share capital level is 50,000 and it must file annual accounts within 6 months of the year end.

PVA
A Partnership Voluntary Arrangement: The same process as a CVA however this is used for a company that is a partnership as the proprietors are joint and severally liable. The PVA has the same benefits as the CVA.

Receiver
A receiver is appointed by a bank normally to collect and administer a company's assets. The receiver then has a duty to collect the bank's debts only by selling the assets; he/she is not generally concerned with the other unsecured creditors or shareholders exposure.

Receivership
When a company defaults on a loan or payment the debt holder can call on a receiver to go into the company to sell the companies assets in order to pay back some or all of the debt. The company in receivership will lose control of the business while the receivers sell the assets and the company will usually be liquidated, the business may be sold and there is usually a loss of jobs.

Redundancy
A reason for dismissal, redundancy involves the closure (either temporary or permanent) of the business as a whole or closure of a particular department this could suggest that the business has no further use for the department you are working in, are downsizing or could be facing difficulties.

SFLGS
Small Firms Loan Guarantee Scheme: By providing a government guarantee against default by borrowers, the Scheme enables high street banks and other financial bodies to lend between £5,000 and £250,000 to new and existing businesses. The DTI underwrites 75% of the loan. So if the company failed the bank will be able to claim up to 75% back form the DTI.

Shareholders
Owners of the business, someone who has bought shares on the open market if it is a quoted PLC. Or owns a stake in a limited company. They have a say in how the business is run and earn a share of the profits as a dividend.

Seize goods
The Enforcement Officer takes away and sells goods to pay off debt owed.

Simultaneous Voluntary Arrangements
Basically as the title suggest the mechanism is to link together a number of simultaneous individual voluntary arrangements to protect the partnership and the individual debtors. It allows the partnership arrangement to deal with partnership debts and individual arrangements to deal with any individual debts. It also protects the individual partners from the "fallout" of the partnership debts to the individual.

SIP 16
This stands for Statement of Insolvency Practice 16 and refers to pre-pack administration. Insolvency practitioners must adhere to these regulations and ensure this type of administration is not misused and all relevant disclosures are made to creditors.

SOFA
Statement Of Affairs: A statement of what you own, what assets you have and your liabilities and cost of living to summarise your financial affairs.

Sole Trader
An owner of a business who is wholly responsible for the day to day running of the business and its debts. They are generally small firms with few employees.

Statutory Demand
Usually this action is taken after a creditor has obtained a Judgment. It is a formal demand for payment of an undisputed debt (over £5000 from 1st October 2015) - the debt must be paid within 21 days of the demand being issued. Failure to pay a statutory demand can lead to a winding up petition or bankruptcy being issued. In any event, the creditor has to pay to issue this document/action and therefore he/she/it is now becoming much more serious.

Supervisor
The Supervisor collects payment of CVA/IVA contributions and ensures that contributions are kept up to date; failure to keep up to date can cause the supervisor to default and abort the CVA/IVA leading to liquidation/bankruptcy.

Trading
Out working through problems, this phrase is used where you continue to trade through tough times in order to rectify your problems and improve your company's health.

Trustee in bankruptcy
A Person who holds property in trust for another. In bankruptcies the IP holds the property of the bankrupt in trust for creditors and is referred to as the trustee.

Turnaround practitioner
An advisor who specialises in helping ailing companies solve their problems and get back on their feet, a simple analogy of this would be to describe a turnaround practitioner as a company doctor.

Turnover
The money that a business takes in over a period of time through its activities is known as turnover. It is not all PROFIT!

Unique Selling Proposition (USP)
Why do your customers buy from you what is it about your product and/or service that distinguishes your from your competition)? You may have more then one for different product/service lines or segments of your business.

VAT
Value Added Tax: A duty that is paid on qualifying goods of 17.5% above the company's selling price less any VAT paid for goods the company has bought in the same period. . This is collected by companies for the HM Revenue & Customs.

Walking Possession
A bailiff (for the County Court) or Sheriff (for the High Court) has visited your premises and obtained entry. He /she has asked for payment of the proven debt. If you have not paid this plus the court and his costs he can "take possession" of the goods, equipment, fixtures, stock etc on the premises. Effectively if you do not reach a deal or pay in full he can remove and sell the assets in 5 days. To sell the assets after they are covered in this way is a criminal offence. If the bailiff has obtained a walking possession he can force entry to recover the goods after the 5 day period.

Warrants
In law, a warrant can mean any authorisation. Often in statute the warrant of a particular person is required before certain administrative actions can take place. As the creditor has not been paid under the judgment the creditor can apply to the court for a warrant of execution. If the debtor is in another area the court can forward this to the local court. A notice of warrant will be issued to the debtor. If payment is not made a bailiff of the court can be sent to collect payment or seize goods.

Wrongful trading
A Director may be held liable for wrongful trading if they allowed the company to continue in business when they knew or ought to have known that there was no prospect of meeting the company liabilities as they fell due. Put simply lying about the current state of the company and hiding from reality.

WUP
Winding Up Petition: A tool that can be used should a debtor continuously refuses to pay its debts so the company presents its petition to the court to have the company closed down.

10 Disclaimer

The Guide is intended solely to provide general guidance on matters of interest for the personal use of the reader, who accepts full responsibility for its use. The application and impact of laws can vary widely based on the specific facts involved. Given the continually changing nature of laws, rules and regulations, there may be Guide errors, omissions or inaccuracies. The Guide is provided with the understanding that the authors and publishers are not engaged in rendering professional advice or services.

The Guide cannot be a substitute for consultation with professional and competent advisors. Before making any decision or taking any action, readers should consult a professional advisor.

KSA Group is not responsible for any Guide errors, omissions, or inaccuracies. The Guide information is provided with no guarantee of, or warranty as to its completeness, accuracy, or timeliness.

Nothing herein shall to any extent substitute for the reader's independent investigations and business judgment. In no event will KSA Group Ltd, or its directors, employees or agents, be liable for any decision made or action taken consequent to the Guide or for any consequential, special or similar damages, even if advised of the possibility of such damages.

11 Contact Details

"Every business is different and every situation is unique."

If you give us a call we can advise you on which course of action suits your particular circumstances. We have years of experience with HMRC, banks, creditors, suppliers, shareholders, lenders and investors and we know their likely impact on your business. In many cases, you may not be the best person to judge your business's viability as you are too close to it. Reality check the situation with us and we can advise further and follow up with a free meeting for peace of mind. Take a health warning about advice from friends and family!

Below are the offices we currently have across the UK.

London
1st Floor, 99 Bishopsgate
City of London
EC2M 3XD
Tel: 020 7887 2667

Manchester
Chancery Place
50 Brown Street
Manchester
M2 2JG
Tel: 0161 956 8671

Edinburgh
66 Albion Road
Edinburgh
Scotland
EH7 5QZ
Tel: 0131 242 0081

Nottingham
35 Park Row
Nottingham
NG1 6EE
Tel: 0115 971 7063

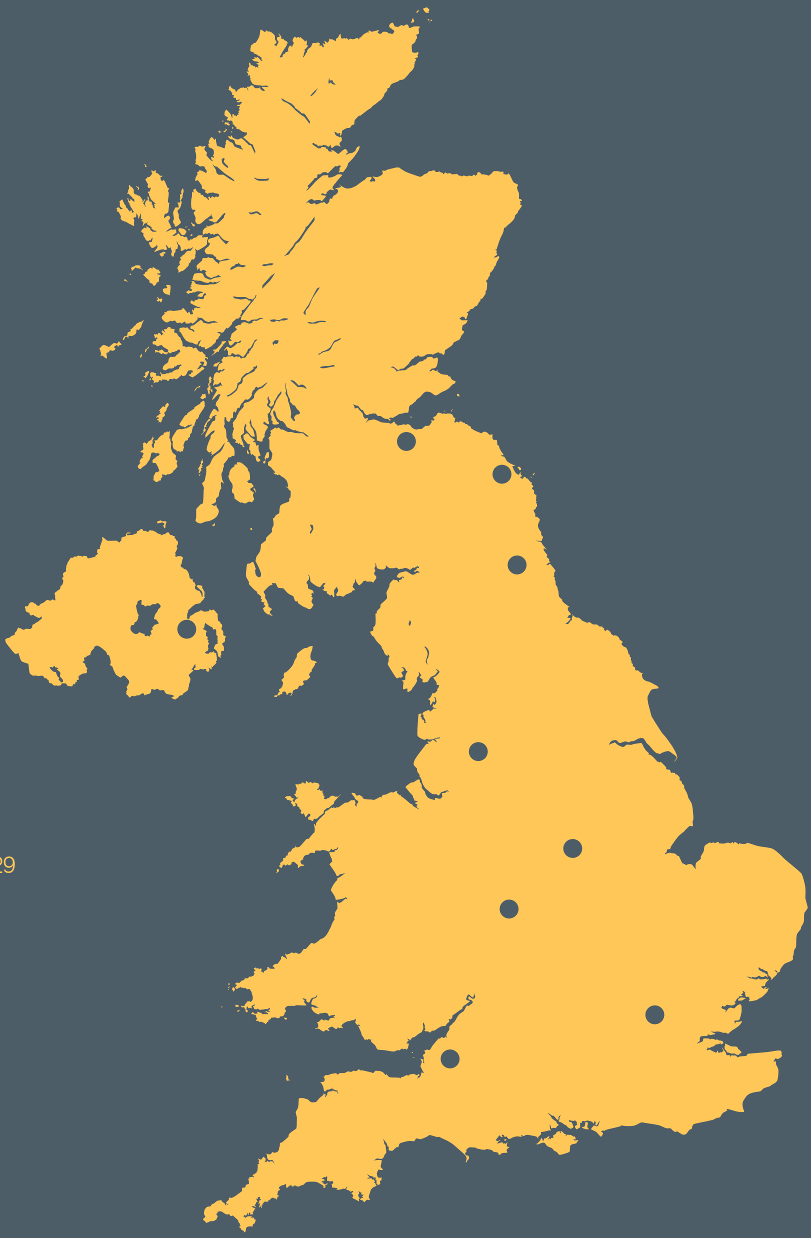
Belfast
Midtown Business Centre
25 Talbot Street,
Cathedral Quarter
Belfast
BT1 2LD
Tel: 02890 160 467

Birmingham
2 Snow Hill
Birmingham,
B4 6GA
Tel: 0121 378 0671

Bristol
179 Whiteladies Road
Bristol
BS8 2AG
Tel: 0800 9700539

Gateshead
C12 Marquis Court,
Team Valley
Gateshead
NE11 0RU
Tel: 0191 482 3343

Berwick
Units 7 & 8,
The Chandlery
Berwick Upon Tweed
Berwick
TD15 1HE
Tel: 01289 309 431
Facsimile: 01289 309 429



Company Rescue