Myerson

Business

What Insolvency Options are Available for Struggling Retail Businesses?

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Welcome

We understand the complexities of modern life and the importance of taking care of your business interests. So it's a deep source of satisfaction that so many businesses choose Myerson as their trusted adviser to advise on company insolvency issues.

Why Myerson?

Our Insolvency and Restructuring Solicitors advise all types of businesses who find themselves in financially difficult situations. We work closely with reputable insolvency practitioners to ensure the best possible outcome can be obtained.

Myerson's Insolvency and Restructuring Team combines an exceptional knowledge of the market with a high level of technical expertise to advise insolvency practitioners (usually as insolvency office-holders), creditors, lenders, businesses and companies, directors, individuals and a range of other relevant stakeholders on all key aspects of pre and post-insolvency scenarios.

We adopt a collaborative approach to ensure a seamless integration of relevant practice areas such as Corporate, Real Estate, Litigation and Employment. This helps us to achieve the best solution for our clients in a timely manner and without unnecessary expense.

We are proud to be ranked as '**Top Tier**' in the prestigious international directory **The Legal 500**, and commended by The Times '**Best Law Firms 2019**'. Therefore you can be reassured you will receive a high quality and truly bespoke service.

Insolvency Options for Struggling Retail Businesses

The retail sector has been facing difficult market conditions recently, with statistics showing that the number of retail insolvencies increased by 19% from 1,843 in 2022/23 to 2,195 in 2023/24 (year-end 31 January).

There are a number of reasons why: cautious spending by consumers given the cost of living crisis, higher interest rates, higher staffing costs due to increases in the national living wage and higher business rates.

Administration

A company facing financial difficulties can be placed into administration.

Whilst a company is in administration, its affairs, business and property are managed by an administrator who must be a licensed insolvency practitioner.

A company can be placed into administration:

- By an order of the court, on application by, amongst others, the company, its directors, one or more creditors, a liquidator (if the company is in liquidation) or its supervisor (if the company is in a company voluntary arrangement); or
- Without a court order, via the appointment of the administrator by the company, its directors or a holder of a qualifying floating charge (out of court appointments are more common than applications to court).

Administration is a procedure designed to give breathing space to a business, with a view to either rescuing or restructuring that business. The appointed administrator must perform their functions with the objective of:

- Rescuing the company as a going concern; or
- Achieving a better result for the company's creditors as a whole than would be likely if the company were placed in liquidation without first entering administration; or
- Realising property in order to make a distribution to one or more secured or preferential creditors.

The administrator acts for all creditors and not just the entity that appointed them.

The administrator's powers are very wide and allow anything to be done that is necessary for the management of the affairs, business and property of the company and that helps to achieve the purpose of the administration. Specific powers include appointing and removing directors, calling meetings of the company's creditors, taking control of and realising the company's property and assets, borrowing money and undertaking litigation.

Once an administrator has been appointed and until the administration comes to an end, the company enjoys statutory protection from its creditors. The statutory moratorium prohibits any steps, actions and processes from being commenced or continued against the company and its property and assets, except with the consent of the administrator or the permission of the court. An interim moratorium (which has the same effect) can also apply prior to the company entering into administration, for example, where a notice of intention to appoint administrators has been filed with the court.

Following appointment, the administrator will (when appropriate) look to sell the business and assets of the company. This may involve the company trading for a short period of time before any sale.Alternatively, a pre-pack sale may be agreed, which involves a sale of the company's business and assets that has been negotiated and agreed with the proposed buyer, any secured creditors and the intended administrator before the company is placed into administration.

.The agreement is then entered into as soon as possible following the appointment of the administrator. A pre-pack sale can only take place when the administrator is satisfied that it will not be possible to achieve the primary objective of rescuing the company as a going concern.

There are several ways in which the administration of a company can come to an end. The starting point is that an administration will automatically end after twelve months unless an extension is sought from the creditors or the court or another exit route is taken. Possible exit routes include placing the company into liquidation, a company voluntary arrangement, a restructuring plan or the early dissolution of the company.

Company Voluntary Arrangement

CVAs can provide a constructive and flexible option for a company dealing with financial problems, involving the company coming to a binding agreement with its creditors over the repayment of its debts, usually with a view to the company's survival and the continuance of its trade.

CVAs tend to involve periodic and reduced pro rata repayment of debts to creditors over an extended period of time (which can be up to five years), capital restructuring or even an orderly disposal of assets.

For retailers who have multiple outlets in their property portfolio, a CVA may be used to terminate lease agreements on poorly performing outlets and/or to reduce rents on remaining sites to ensure the ongoing survival of the business and the company.

The company's directors, an administrator (if the company is in administration) or a liquidator (if the company is in liquidation) can make a proposal to the company and its creditors for a CVA.

CVAs are most commonly proposed by the company's directors. To propose a CVA, the directors must approach a licenced insolvency practitioner to act as a nominee.

The nominee's role is to give an opinion as to whether the CVA proposal has a reasonable prospect of being approved and implemented.

If the nominee agrees that the CVA would meet this test, the nominee files a report with the court with their opinion and the proposal is then forwarded to the creditors of the company.

The insolvency practitioner acting as the nominee will frequently assist with the drafting of the CVA proposal but in the role of advisor to the directors, which is separate to their role as nominee.

The nominee will send to creditors a copy of the CVA proposal and accompanying documents to enable the creditors to vote on whether to approve the CVA proposal.

For the CVA proposal to be approved, more than 75% by value of the creditors need to vote for the approval of the proposal. If this 75% threshold is met, and not more than 50% of the total value of the unconnected creditors vote against the approval of the proposal, the CVA becomes binding on the company and all its unsecured creditors (even those who voted against the proposal).

Secured creditors are only bound by the terms of the CVA if they agree to be bound. On approval of the CVA, the nominee becomes the supervisor of the CVA and has the power to implement its terms.

The supervisor reports the result of the CVA to the court and Companies House.

A CVA comes to an end either when the terms of the CVA have been successfully complied with or if the CVA is terminated where the company does not comply with the terms of the CVA.

A CVA which terminates may lead to the company entering into a subsequent insolvency procedure such as liquidation.

Scheme of Arrangement

Schemes are flexible arrangements which are often used in complex restructurings. Schemes can range from the restructuring of debt to dealing with demergers, acquisitions and reductions of capital. The main benefits of schemes include:

- No need to prove insolvency, so that necessary restructuring actions can be taken early at the first signs of financial distress;
- Companies being able to trade on throughout the process;
- Schemes being less publicised than other insolvency procedures so that the company is less likely to suffer from negative publicity and a loss of reputation;
- Dissenting creditors within a class being able to be crammed down if the scheme is approved by a majority in number representing at least 75% in value of creditors (or shareholders of any class of them) present and voting in person or by proxy;
- The ability to bind secured creditors (unlike CVAs); and
- Foreign companies being subject to a scheme if there is a sufficient connection to the UK.

The main limitation to schemes is the lack of any automatic statutory moratorium protecting the company from action being taken by its creditors. However, the High Court has held that it has the power to stay proceedings at its discretion to allow time for a scheme to be put in place.

Schemes rely on a fair amount of court involvement and several court hearings are likely to be necessary before a scheme is finally approved.This can make the process expensive.

The company will usually engage an insolvency practitioner early on to discuss the future of the company and to act as nominee of the scheme and later to act as its supervisor if it is approved by the relevant creditors, shareholders and the court.

The creditors' meetings are key to approving a scheme and the court will approve the holding and conduct of these meetings. The party applying for the scheme is responsible for assessing and determining the classes of creditors who must vote on the scheme.Creditors belonging to different classes are required to vote on the scheme at separate class meetings of their own.If a class meeting of creditors does not approve the scheme by the requisite majority, the members of that class of creditors are not bound by the scheme.

A scheme does not have an end date. The terms of the scheme may allow for the repayment of debts over a certain period of time, or it may be that it constitutes a "one off" restructuring plan that is fully implemented with a very short period of time.

Restructuring Plans Under Part 26A of the Companies Act 2006

Restructuring plans became available from 26 June 2020 when the Corporate Insolvency and Governance Act 2020 (CIGA 2020) was pushed through by the previous government due to the COVID-19 pandemic. Section 7 and Schedule 9 of CIGA 2020 introduced a new Part 26A of the Companies Act 2006.

There are similarities between schemes and restructuring plans as both involve:

- A compromise or arrangement between a company and its creditors (or any class of them);
- A convening hearing at which the court considers which classes of creditors must vote on the compromise or arrangement;
- One or more class meetings where creditors vote on the compromise or arrangement; and
- A sanction hearing where the court decides whether to exercise its discretion to sanction the compromise or arrangement.

However, restructuring plan provisions differ in three important respects:

- A restructuring plan is available only in order to eliminate, reduce, prevent or mitigate the adverse effect on a company's ability to carry on business as a going concern caused by serious financial difficulties that the company encounters or is likely to encounter;
- The requirement for the approval of a restructuring plan is a 75% majority in value of each voting class of creditor. There is no need for an additional simple majority in the number of creditors in favour, as is required to approve a scheme; and
- Restructuring plans benefit from a "cross-class cram down" provision that allows the court to sanction the plan as binding even if a dissenting group in class of creditors or shareholders results in the plan not being agreed by 75% in value of that class.This provision stops obstructive investors holding the company to ransom but it only applies where those investors will be no worse off under the plan and where another class of investors that would have genuine economic interest in the company even if the plan did not proceed approves the plan.

Restructuring plans can in theory be used by companies of different sizes and turnovers (and the previous government said that restructuring plans should be available to all companies). Whilst there may be circumstances where a smaller company may better effect a rescue via a restructuring plan than by using a CVA, by and large the often significant costs associated with the preparation, approval and implementation of such plans will adversely impact the likelihood of their use by SMEs.

Creditors’ Voluntary Liquidation

As a last resort, a company can be placed in liquidation. This is the process by which the affairs of a company and the company’s existence are brought to an end.

A company will enter into insolvent liquidation when it is unable to pay its debts or its liabilities are greater than its assets. Liquidation may be commenced either by the presentation of a winding up petition to court that results in a winding up order (this is known as compulsory liquidation) or out of court (via a CVL). In this blog, we will focus on CVLs.

The company’s directors take the initial steps to place the company into CVL by deciding to convene a meeting of the company’s shareholders at which a resolution will be considered that the company be wound up voluntarily and that an insolvency practitioner should be nominated to act as liquidator. Should this resolution be passed (which requires a majority of at least 75% in value of shareholders), the directors will deliver a notice to the company’s creditors seeking their decision on the nominated liquidator. The company’s creditors can either ratify the shareholders’ appointment or propose the appointment of a different liquidator.

From the date of the resolution to wind up, the company must cease its business activities except to the extent required for the winding-up.While the company’s directors will remain in office following the appointment of the liquidator, the company’s affairs are removed from their control and pass to the liquidator. The directors have an ongoing duty to co-operate with the liquidator and to provide information to the liquidator concerning the company, its promotion, formation, business, dealings, affairs or property and to meet with the liquidator as and when reasonably required.

Unlike in an administration, there is no statutory moratorium on legal proceedings against a company and its property and assets in a CVL. However, it is possible for the court, upon application by the liquidator, to exercise its power of staying actions and proceedings against the company after a CVL has been commenced.

The liquidator's role in a CVL is to secure and realise the assets of the company and distribute the proceeds to the company's creditors (with any surplus after costs being returned to the company's shareholders) and to investigate the affairs of the company and its directors.

Please note, the liquidator's investigations into the company and its directors and dealings with third parties can lead to claims being brought against the directors personally for any misfeasance or other actionable misconduct or against third parties who have benefitted from antecedent transactions.

The liquidator is also required to report to the Department for Business & Trade on the conduct of the company's directors. Any adverse reporting could lead to director disqualification proceedings being brought by the Secretary of State.

As soon as the company's affairs are wound up, the liquidator prepares a final report showing how the winding-up has been conducted and how the company's assets have been disposed of.

This final report is sent to the company's creditors, shareholders and to Companies House.

Under the Insolvency Act 1986, the company is automatically dissolved three months from the date of the final report being registered with Companies House, unless the court defers this date on the application of either the liquidator or any other interested person.

You’re in safe hands!

If you would like further information about how we can help you with **Insolvency and Restructuring**, or if you have any questions, please don’t hesitate to contact a member of our **Insolvency and Restructuring Team** today.

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