

The importance of correct and timely action by Directors of struggling companies



Terry Playle, Chairman of ARP Associates, has held a lifetime's career at the very top of many public and private companies. Here he describes the importance of correct behaviour by company directors when their business is struggling, and the substantial legal and personal implications should they not.

When I left English Electric Guided Weapons Division in 1961 as a senior manager, I was well versed in company law, accountancy and industrial psychology to start my own company, TIL Terminal Insulators Limited. Nine years later, I sold TIL into a Stock Exchange listed company, Bonachord plc, in a reverse takeover, becoming its Chairman and Chief Executive for worldwide operations. In the intervening years I had learned a great deal about financial control and keeping the company within the Companies Act, the Insolvency Act and Finance Acts. In those times credit from your suppliers was considered a privilege, not a right, and director owners generally only had to worry about preferential creditors, Purchase Tax and the Banks.

Today things are quite different – so beware – you don't get a second chance! Directors can quite easily find themselves in serious trouble without even realising they have put a foot wrong.

Let us examine the strengthening of company and insolvency laws over the last 20 years, and in particular the last two to five years.

When a company nears a state of insolvency, legally the directors' fiduciary duties change; their duties become owed primarily to the creditors of the company, rather than its shareholders. It only needs one creditor in an insolvency situation to appoint a forensic investigator who subsequently proves the directors were trading in an insolvent situation for severe problems to arise for those directors. In such circumstances, the company's limited liability can be removed, and creditors seek redress from the directors' personal estates. It can be several months or even years after the event that malpractice can be investigated and the directors brought to book.

On the other hand, the Enterprise Act, which for companies became effective on 15th September 2003, has put in place all the required instruments to protect directors and senior officers of a company provided they act quickly enough if things begin to go wrong. The onus is on the directors to act as soon as the warning signs appear. Sadly, very few seek advice in good time, even though most corporate recovery and insolvency advisors do not charge for an initial 'company health check'. This year, we have already seen several companies fail, with potentially serious consequences for the directors, despite the provisions of the Enterprise Act that could have been used to save the business. Simple advice when the company first started to experience trouble could have resulted in a much more successful outcome.

ARP Associates provide a free initial consultation and 'company health check' for directors who may be concerned with their position. Our multi-disciplinary team has a very wide range of experience in corporate turnaround and company rescue. We work in partnership with legal firms specialising in corporate, insolvency and finance law, and leading accountancy practices. This joint approach provides a comprehensive resource, highly effective for both very successful organisations and those facing uncertain futures. The substantial contacts base promotes identification of innovative solutions and a wide variety of financing options.

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