

# REVIEW



## Insolvency Issues – A Manx Perspective



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*Following the Carillion liquidation and its aftershocks, Advocate Damian Molyneux of M&P Legal outlines some of the key Manx issues when businesses cease trading.*

The sad fact is that around one in ten businesses fail each year (source: Office of National Statistics Business Demography, UK 2016). The effect of the death of a business is felt most keenly by individuals, whether workers, creditors or suppliers, regardless of the headlines about the political impact in relation to companies like Carillion. The question is what, if anything, can be done about a business death by the people who feel its affects most keenly? The answer to that rather depends on your relationship with the insolvent company.

### Business owners

It is often the case that directors and/or owners see trouble coming. Diligent directors certainly should foresee financial woes. It is important to get appropriate advice as soon as possible if you do. There are strict rules in place enshrined in statute which mean, for example, that directors can be fined, or even imprisoned, in certain circumstances if:

- 1.) They have obtained credit prior to a company going into liquidation; and/or
- 2.) There has been a transfer of an asset out of the company; and/or

- 3.) Any officer fails to deliver company books to a liquidator; and/or
- 4.) The business of the company is continued following an order for its winding up.

There are many other potential pitfalls for business owners/operators and so it is vital that appropriate help is obtained as soon as trouble is on the horizon. This can have a dramatic effect on the course any insolvency is to take in the future and for example might mean that a voluntary winding up is possible without court intervention rather than being subject to a potentially messy application being made for a compulsory winding up by the court.

### Company creditors

Anyone or any business owed money by a defaulting company is of course keen to recover the debt, whether it be a loan which has been made or the cost of goods supplied. Often a liquidation is triggered by a creditor who has not been paid. In the Isle of Man, debt recovery from a non-paying company will often begin with a statutory demand, which is essentially a letter referring to certain statutory provisions which can engage sufficient to present a winding up petition to the court unless the company repays the debt owed within twenty one days. A statutory demand can be sent for debts in a sum as little as £50.

## Insolvency Issues – A Manx Perspective

Creditors need to think carefully however before embarking on the process of forcing the winding up of a company. Unlike England, there is no official receiver here so a creditor will be responsible for the costs of the winding up (for example appointing and paying for the services of a liquidator). Whilst those costs can be defrayed as a first charge against any assets recovered in the course of the winding up, initially the creditor will be responsible. Serious thought needs to be given to the prospects of recovery against any assets from the company.

Creditors also need to consider whether any of the above issues relevant to business owners arise. Has the company borrowed money from the creditor shortly before going into liquidation; has the company transferred assets just before a winding up has commenced etc. If so then these transactions may, in certain circumstances be undone, or action taken for recovery as against the directors of the company. This is a complex area however and it is vital to obtain legal advice.

Of course, the ideal scenario for a creditor is to avoid being a part of a winding up, or if they are, have their debt secured in some way so as to ensure they are treated preferentially if assets are recovered. There are mechanisms which can be put in place in early course to secure debts so that they can be more easily recovered in winding up/default situations. For example, a loan could be guaranteed personally by a director or third party or

secured against some other asset. This is something creditors should explore when loans are made and before difficulties arise.

For suppliers to companies then it is worthwhile examining the contractual documentation pursuant to which you provide goods or services. Getting legal advice on the efficacy of those documents is also something which can make all the difference in a winding up situation. For instance, a retention of title clause in a supplier's terms and conditions might entitle that supplier to retain ownership of goods supplied and therefore prevent it forming part of liquidation assets.

### Employees

Provision is made in statute for the protection of some limited employee rights and payments when a company is wound up but having appropriate employment contracts in place when employees are engaged can help protect the business and the employee if the worst happens.

## Insolvency Issues – A Manx Perspective

### Summary

The law relating to liquidation of companies in the Isle of Man is a minefield with pitfalls at almost every turn to catch out the unwary. There are mechanisms available however to help the various players in the potential death of a company avoid the traps, or at least mitigate loss, before a problem even arises. Obtaining appropriate financial and legal advice will generally save money in the long run should the worst happen. The hope is of course that it does not but by the time it becomes clear that there is trouble then generally it is too late.

*Damian Molyneux is a director of M&P Legal and advises on Manx insolvency situations and debt recovery.*

M&P Legal is an established Manx law firm with highly experienced Advocates and Solicitors who regularly feature as recommended in the Legal 500 and Chambers & Partners legal directories. The practice deals with Isle of Man litigation such as debt recovery, personal injury, employment, contract, injunctions, enforcement of UK judgments, professional negligence; private client matters such as probate and wills, conveyancing; and corporate/commercial, banking, trusts and insolvency. M&P also offers Spanish related legal services.

Please contact the practice manager Honor Beard - [hkb@mplegal.im](mailto:hkb@mplegal.im) with any questions.



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## Profiles

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**Christopher J Murphy**  
Joint Managing Director  
[cjm@mplegal.im](mailto:cjm@mplegal.im)



**John T Aycock**  
Joint Managing Director  
[jta@mplegal.im](mailto:jta@mplegal.im)



**Christopher M Brooks**  
Counsel  
[cmb@mplegal.im](mailto:cmb@mplegal.im)



**Damian P Molyneux**  
Director  
[dpm@mplegal.im](mailto:dpm@mplegal.im)



**Consuelo Suay**  
Counsel  
[csc@mplegal.im](mailto:csc@mplegal.im)



**Amelia J Quinn**  
Trainee Advocate  
[ajq@mplegal.im](mailto:ajq@mplegal.im)



**Carol A Young**  
Conveyancing Manager  
[cay@mplegal.im](mailto:cay@mplegal.im)



**Niall M Prentice**  
Senior Paralegal Assistant  
[nmp@mplegal.im](mailto:nmp@mplegal.im)