Browne Jacobson

Insolvency and directors' duties

We have seen an increase in our education clients seeking advice around potential insolvency, therefore we thought it would help to highlight our previous podcast, which outlines some prudent steps that trustees should be taking to minimise their risk of being personally liable in an insolvency situation.

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The Covid-19 pandemic has had a considerable impact on the already financially stretched education sector and we have seen an increase in our education clients seeking advice around potential insolvency. We therefore thought it would help to highlight our previous podcast from June 2018, which outlines some prudent steps that trustees should be taking to minimise their risk of being personally liable in an insolvency situation.

It is important to note that the UK Government has now reintroduced the temporary suspension of wrongful trading measures from 26 November 2020 until 30 April 2021, pursuant to the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020. The suspension was originally introduced in March 2020 under section 12 of the Corporate Insolvency and Governance Act 2020 but expired on 30 September 2020.

Wrongful trading is where directors can be personally liable to make a contribution to the company's assets or liabilities incurred, if they continue to trade when they knew or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation or administration. Even if a finding of wrongful trading could be made out, the protection offered to directors is that they are not expected to personally contribute for any worsening of financial condition of the company within the relevant periods.

Whilst some comfort can be taken from the reintroduced suspension of wrongful trading (removing one threat of personal liability which directors may face), the actions of directors could still be subject to scrutiny if, ultimately, insolvency proceedings are later entered into. Therefore, directors must continue to adhere to their other statutory duties whilst continuing to trade the business. There has been no relaxation of directors' fiduciary and statutory duties, nor of the rules on fraudulent trading, and so directors are well advised to continue taking all of the usual precautions. Incurring debts in the full knowledge money will run out, with no reasonable prospect of a solvent solution, may still mean directors could face consequences for breaching their statutory duties or indeed for fraudulent trading, if the circumstances merited such.

If you have any questions or concerns about your arrangements with any of your suppliers, please get in contact with Chloe Poskitt on 0115 934 2058 or by email at chloe.poskitt@brownejacobson.com.

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