

INSOLVENT TRADING AND DIRECTORS

The tph Difference

tph takes a commercially pragmatic approach to insolvent trading. In essence, if the creditors are not prepared to indemnify us to take the action or they do not want us to use the funds in the 'kitty' and there is no litigation funding group willing to indemnify tph, then we are reluctant to take on the risk of litigation. Its slightly more complex than that, however that is our underpinning approach. In more detail however we look at:

- the size of the claim;
- whether the directors may have assets sufficient to pursue a claim;
- what funds a Liquidator has in the 'kitty' to undertake the legal action;
- If we have funds in the Liquidation, we determine whether it would be better to use the 'kitty' to repay creditors or take the legal action and risk their return. In fact, we ask creditors for their views on this issue;
- If we are unfunded we ask creditors to fund us;
- Under certain circumstances we may look to litigation funders, but claims usually have to be greater than \$300k;
- We are also obliged to consider any party who may wish to buy the right the Liquidator has to take the insolvent trading action, however it is a very complex and difficult outcome to achieve;
- Also, should the shareholders also be substantial creditors, we weigh up if it is worthwhile to commence the action against directors (who maybe the

shareholders) as they would end up recovering a significant dividend from the recoveries and it would not make sense to go through the exercise.

- When we meet directors, we will be transparent on this issue and all issues arising in the liquidation as it should assist in them making an informed decision.

Common Alternative Approaches adopted by Insolvency Firms

It is difficult to summarise how the rest of the industry addresses insolvent trading, but based on the number of cases that find their ways to the courts one could suspect there are few who make it all the way through the litigation process.

This may in fact be the case, but there are many liquidators who prepare and serve demands on directors without many of the tph criteria being met and some argue that it is simply a bargaining tactic to secure funds from directors even though there was never any intention to pursue the action.



The tph Smart Solution

tph does not adopt that approach and we would like to see the whole industry adopt the tph approach, however we feel that is a long way away. Firms that jump in and serve demands on directors without first applying the tph criteria can create an environment that lacks transparency and therefore making it challenging for the directors to exercise informed decisions.