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Taking advice from professionals is not a “get out of jail free” card for directors in the event of insolvency

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Directors of a company in financial distress will often turn to their professional advisors to assist in making decisions about the company’s future; whether that be their lawyers, accountants, bank, tax advisors or insolvency professionals.

It is often a period of high pressure, where the right or wrong decision may have far-reaching consequences for an individual director or board later down the line should the company fail. Thoughts of transactions at undervalue, claims of preference and threats of possible misfeasance proceedings loom in the shadows at this time. It is therefore no surprise that directors will (and should) seek advice and guidance from professionals in such troubled times.

But a word of warning! Seeking and relying on such advice does not absolve directors from responsibility if directors do not also consider that advice in the context of their duties under s172 of the Companies Act 2006 “to promote the success of the company” – or, if the company is verging on insolvency, to protect the interests of creditors. Taking advice is one thing, but applying that in the context of what the director knows about the business is another.

Professionals will provide appropriate advice but directors should not rely on that advice carte blanche. It is up to the directors to make final decisions on matters in light of their wider knowledge about the company and its affairs, making sure they take into account their directors’ duties. Following advice without question will not necessarily provide a defence to any subsequent claim by a liquidator or administrator.

The Government’s recent consultation paper on “Insolvency and Corporate Governance” asks whether directors are aware of their duties regarding commissioning and using professional advice. The answer to that is that they ought to be, but at a particularly difficult and fraught time they should be reminded that the final decision rests with them, not their advisors.

Rachael Markham contributed to this post.

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