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Considerations for Insolvency Practitioners Ahead of an Appointment Over a Company That May Have Environmental Liabilities

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General

There are a number of points to consider ahead of taking an appointment over a company that undertakes work that could carry environmental risk.

Liability and risk for breach of environmental legislation is complex and because liability does not necessarily rest with the landowner or the polluter, an insolvency practitioner should carry out careful due diligence ahead of taking an appointment, to consider whether:

- They can comply with their duties and obligations under the relevant legislation, licence and/or permits under which the company operates
- There is a risk of remediation costs and, if so, who will bear that cost
- There is any risk of personal liability to them
- They can recover their costs for acting as the administrator/liquidator in the event that there are remediation costs and/or fines that the company is liable for

Liability under an environmental licence/permit can also attach to the holder and/or to users depending on the circumstances.

Due Diligence

In assessing whether to take an appointment, consider the following:

Overview

- What does the business do?
- Which activities does the company undertake that may cause environmental risk/damage?
- What environmental licences and permits does the company need to operate its business, and does it have all required licences/permits? Are they up to date and in the right name?
- Are copies of the licence and permits available for inspection?
- Does the company have a good health & safety team/individual in situ?

Compliance/Issues

- Has the business complied with the terms of its licences and permits?
- Is the company subject to any investigation, prosecution or other regulatory action in respect of any environmental risk/liability/breach of the licence/permit?
- If yes, consider:
  - The stage that the investigation/prosecution has reached
  - Have the directors engaged with the appropriate body/regulator?
  - Whether and to what extent you will need to be involved in responding to any investigation/prosecution
  - The consequences of investigation/prosecution for the company and the impact of that on the proposed insolvency strategy and costs

Duties, Costs and Risk

- If the business has breached the terms of any licence/permit, what is the consequence of that? Will you have to take steps to remedy any/all breaches and, if so, at what cost?
- You can be personally liable for remediation costs if the remediation is required as a result of unreasonable actions or omissions. In protecting against that, you will need to understand what duties you have in relation to particular licences/ legislation and/or permits. Failing to deal with a risk (whether that arises during the appointment and even if it existed before your appointment) could result in personal liability if you omit to do something about it.
- If the company is likely to be fined for non compliance, how will that impact the proposed insolvency and strategy?
- Breach of certain licences/permits, including environmental permits (formerly waste management licences), can be a criminal offence. As an office holder, you will wish to be satisfied that there is no risk of being criminally liable, although recent cases support that you will not.
- Even if the terms of the licences and permits have been complied with, the proposed administrator/liquidator will want to know what duties and obligations they have to comply with those licences and permits, including how they will fulfil those duties and what the cost of compliance will be.
- Are there any insurance policies in place that will cover claims/risk? If yes, the insolvency practitioner will wish to see a copy.
- You may also wish to consider whether there is any reputational risk in taking the appointment

Strategy

The above will inform the insolvency practitioner of the appropriate insolvency process and strategy for the company.

Administration

If the business has value and can be sold, it is likely that the company will enter administration (rather than liquidation, which will see the business close down).

Arguably, administrators are exposed to the highest risk because they are responsible for the management decisions of the company. Retaining key health & safety employees is likely to help with managing environmental risk/issues.

An administrator can trade the business under existing permits, but it is more likely that the business will be sold, and relevant permits transferred as soon as possible (perhaps by way of a pre-pack sale) to reduce exposure to risk.

If the business is sold, it can take some time (weeks or months) for permits to transfer, so the administrator will want to ensure that sufficient protections are put in place in the sale agreement to protect against breach.

If permits need to be surrendered or terminated, the administrators will need to understand the costs of this and what works may be required before the regulatory authority agrees to this.

Liquidation

If the business does not have sufficient resources to comply with the conditions of its licences/permits, it is likely that the company will be placed into liquidation.

A liquidator is unlikely to become actively involved in the management or continued trading of a company and, therefore, there is less risk of them being deemed to have acted or omitted to act in such a way as to give rise to potential environmental liabilities.

Liquidators (unlike administrators) have power to disclaim "onerous property" – it may be that the liquidator can disclaim any licences/permits that are considered onerous (so that all rights and obligations are extinguished), but whether they can do this is a grey area.

Costs

It is unlikely that a fine imposed on a company as a consequence of breach of an environmental licence/permit will be payable ahead of the administrators/liquidators' fees following recent case law.

However, Scottish case law has decided that remediation costs payable following a breach of the Environmental Protection Act were payable ahead of the insolvency practitioners' fees.

Although the English courts have not considered the same question, it is possible that an insolvency practitioner may wish to ensure that funding is in place for their fees if they consider that there is a risk they will not be paid.

To do this, having a complete understanding of the picture, identifying any situations that pose a risk and understanding what their duties and obligations are to deal with those in light of the proposed strategy for the company are key.

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