Covid-19: Considerations for Business Owners in Returning to Trade

by Brendan O'Donoghue

Following the publication of the Government's Roadmap for Reopening Ireland the gradual phasing out of restrictions commences on 18 May and runs through to 10 August. In conjunction with this roadmap, Government have also introduced a series of financial measures and aids totalling €6.5 billion to assist in the recovery of businesses. Business owners are now in the process of re-opening or planning to re-open their doors. RBK's Restructuring and Insolvency Partner, Brendan O'Donoghue, explores some key considerations for business owners in re-commencing trade.

Gradual Easing of Restrictions

There are 5 separate phases envisaged in the plan which makes it unlikely to return society to a level of activity seen before the crisis in the immediate term. This means that a return to trading at full capacity for businesses in, for example, the retail and hospitality sectors, will not take immediate effect. Indeed, it will likely take a significant period to return to pre-Covid-19 normality.

It is envisaged that over time sectors will gradually come out of lockdown but that the requirement to maintain social distancing and the curtailment of less essential services at current levels will be required.

Irrespective, all business owners will need to implement or maintain measures to ensure the health and safety of both their staff and customers alike.

The National Standards Authority of Ireland has issued practical guidance for business owners in managing business continuity during the Covid-19 pandemic.

The Workplace Contact Unit, a division of the Health and Safety Authority, is also available to advise business owners on occupational health and safety matters.

Employees

Some employers have made the necessary decision to layoff all or a portion of their staff due to the Covid-19 emergency.

Many others have availed of the Covid-19 Temporary Wage Subsidy Scheme (TWSS).

The operation of the scheme has proven quite difficult for some employers, with Revenue having issued numerous updates to its guidance at the time of writing this article.

Separately, it is provided that the subsidy will become taxable in the future, but the method of recovery of the Income Tax due by employees in respect of the subsidiary is unclear.

On 4 May 2020, the scheme moved from the "transitional" to the "operational phase". This means that Revenue will no longer pay the flat rate of €410 per week per employee irrespective of their entitlement, but the subsidy will be based on each individual employee's Average Revenue Net Weekly Pay, subject to the maximum TWSS amounts.

With the 12-week scheme due to expire at the end of June, employers planning on re-opening their businesses must now consider how their payroll costs will be serviced thereafter. They will be cognisant of the recovery of the business itself i.e. is turnover sufficient to meet wages due without the support of the continued TWSS and when staff temporarily laid off return to work?

If not, consideration will have to be given as to whether the business entity can function with a reduced staff level whilst ensuring the viability of the business.

From Lay-Off to Redundancy

In deciding to re-open, business owners are faced with some difficult decisions in relation to employee matters (e.g. redundancies) and should consult their HR advisors to ensure that staff are dealt with in a manner which is in accordance with Irish employment legislation.

An additional consideration for employers is staff redundancies which may be unavoidable where a business is unable to recover. The cost of redundancy is often an onerous burden on many businesses, dependent on the make-up of the work force, their length of service etc.

Risk of Trading Whilst Insolvent

Section 610 of the Companies Act 2014 provides that directors of limited companies can be made personally liable for debts of the company if they allow the company to continue to trade in a manner which is reckless.

Reckless trading includes continuing to trade when a director knows or ought to know that a company is insolvent with the potential of worsening the position of creditors.

In the UK, measures have been introduced to temporarily suspend the comparable "wrongful trading" provisions for a 3-month period from 1 March 2020. In effect, this change gives some breathing space to company directors to continue to trade without the threat of personal liability, where a company has suffered due to business interruptions driven by Covid-19.

In Ireland, no such measures have been introduced. Whilst liquidators will have regard to the particular circumstances surrounding the current crisis, they must satisfy themselves as to the bona fides efforts of company directors to balance the continuation of trade and the preservation of jobs with the exposure faced by creditors of the company implicit in the continuation of its trading activities.

In the absence of such measures in Ireland, it is advisable for directors who are concerned about the potential for insolvent trading to implement risk mitigation measures which may include:

- Increasing the frequency of board meetings,
- Accurately documenting decisions taken by the board,
- Preparation of cash flow projections based on various assumptions underpinning their decision to continue to trade,
- Availing of emergency State supports (e.g. TWSS) to ease cash flow pressure; and
- Taking professional advice from trusted advisors.

Liquidation and Restructuring Options

While the current pandemic may give rise to the decision for an already-unstable business to liquidate, directors should bear in mind that a liquidator will investigate the collapse of the company having regard to the conduct of the directors during their entire tenure.

While the liquidator will assess the impact of Covid-19 on the collapse of the company, the liquidator's investigations will include pre-pandemic periods.

Directors who are concerned should obtain professional advice from their existing legal and financial advisors and Insolvency Practitioners.

Examinership

Examinership is an option to consider where a company is nearing an insolvent position but where there is a prospect of survival. This process affords a business protection from its creditors for a period of up to 100 days to put in place a scheme of arrangement to deal with its liabilities. Upon agreeing a successful scheme, a company can avoid liquidation and emerge as a viable business again.

As this is a Court driven process, there is a significant level of interaction with legal advisors and the Court system. As such, the attendant costs often make Examinership unsuitable for smaller business entities.

Schemes of Arrangement

An under-utilised process to date which may be worthy of consideration by company owners and directors is the Scheme of Arrangement which is governed under Section 450 of the Companies Act 2014. These schemes facilitate an agreement between a company and its creditors to restructure its liabilities over a prescribed period.

The company does not necessarily need to be insolvent and the process can be used for the orderly wind down of a business.

Unlike Examinership, the process does not provide protection for a company from its creditors pending the formulation and approval of the scheme. However, if approved by 75% of its creditors in value, it is legally binding on the remainder.

It can also be a significantly more cost-effective option for smaller companies looking to restructure or wind-down their business.

Conclusion

The situation for companies, both in Ireland and internationally, is changing day-by-day.

It is already clear that the recommencement of trade is not viable for all business owners. This may be due to the accrual of arrears, the loss of key staff and contracts, an inability to observe social distancing measures etc.

The reasons are varied and unique to each business.

While business owners should be encouraged by State supports and creditor forbearance on offer, for some businesses this is will not be enough. Recourse to a formal scheme, as discussed above, is worthy of consideration.

In such uncertain times, all business owners should consider what best suits their individual needs. It is important to conduct early-stage analysis of the options open to businesses and to implement a plan to minimise or mitigate the impacts of the Covid-19 emergency as they recommence to tra

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