

# PURSuing CONTENTIOUS INSOLVENCY CLAIMS?

## REMEMBER THESE 6 TIPS

Claims are just another asset of the insolvency practitioner: to gather in and realise for creditors' benefit. Success in managing insolvency estate claims however, is all about effective risk management. As a speculative contingent asset, the risks involved in handling claims as assets are greater and this risk requires constant evaluation as the claim progresses. Here are 6 issues to have under control throughout.



## 1 RECOVERABILITY – WHERE IS THE MONEY?

No “pot to pursue” = “no point pursuing”. If initial statutory enquiries into the insolvent company reveal possible claims, this is the point at which to address the question: “Is it likely we can get any money back?”. Use various free or relatively inexpensive public sources to get some initial indications of recoverability. Always ask:

- who might have caused the loss, are they insured?
- who benefitted and where might that money have gone?

You don’t have to have definitive information on these issues, it is about the “Go / No-Go” decision on whether to spend time and effort on it.

## 2 ESTABLISH THE STRENGTH OF THE CLAIM

Investing in a claim requires determination of its strengths. What is it going to cost to do so, and are there funds available? You don’t always need cash, the investigation into the strength of the claim can be funded in a variety of ways. If creditors are comfortable spending it, the easy answer is always to use the funds available in the estate (think recoverability indicators). If you don’t have this luxury, it might involve putting in time and line. Establishing a claim as a realisable and recoverable asset is as saleable as any other asset class.

## 3 GET A PROPER HANDLE ON COST

It is critical to understand the level of costs which will be unrecoverable from the defendants even if you win. All those unrecoverable costs will eat into any returns for creditors. Of most significance is the insolvency practitioners and their own team's time and work supporting the claim: these are not recoverable costs in formal court proceedings. Creditors who stand to benefit must be incentivised, so this needs fully analysing for all costs and proportionality to the size of the claim involved. Consider whether AG's Litigation Finance offering: Control, could present an opportunity here.

## 4 RING-FENCE RISK AND RETURNS

The risk to the insolvency practitioners from running insolvency claims unsuccessfully is adverse costs without funds to meet them, leading to potential personal liability. The risk to creditors is similar, but adverse costs and unrecoverable 'own' costs eat into the dividends they might otherwise expect to receive. Ring-fencing structures can help to manage these risks and creditor dividend prospects: from a comprehensive risk mitigation strategy with a lower dividend enhancement on success; or complete self-funding and insurance options from assets available. Getting key stakeholders on board by presenting tailored ranges of risk management and returns is a fundamental part of the strategy for successful pursuit of strong and recoverable claims.

## 5 THE "GO / NO GO" DECISION

The reality is there are "Go / No Go" decisions arising all the way through the management and progress of a claim in an insolvent estate. The claim should be analysed as a journey. Think about whether your strategy enables you to stop the bus and get off if the risks and costs become too great and the likelihood of a return too low. Identify the stages at which that remains an option and where you reach the point of no return.

## 6 TAKE A 360 DEGREE APPROACH AND KEEP IT UNDER CONTROL

All of the key issues identified in points 1-6 are likely to be issues which require consideration at all stages, to some degree, increasing in detail as a claim progresses and each issue changing and developing with the development of the claim. Whereas prospects of recovery at the start might have looked good, is that going to be the case all the way through? Continue to assess the strength of the claim, think about cost and budget and keep asking if sufficient incentive to continue remains. It is key to success to have all issues under control throughout.

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**If you would like a more comprehensive view of what we're seeing in the current environment and what steps you should take to maximise your chances of success, please get in touch.**

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