Preference should not be shown to creditors

BUSINESS MATTERS

Lisa Thomas an insolvency practitioner with Plymouth-based Neville & Co looks at how insolvent companies should take a fair and even-handed approach when it comes to organising the repayment of creditors

One of the first questions that directors of an insolvent business might ask is ‘can they pay back the local small suppliers before they close the business?’ You can understand why – no one wants to let down someone they have dealt with locally.

There are lots of rules and regulations governing how companies should be run financially – especially if they are facing insolvency. A major issue for an insolvent business that is still running is deciding whom to pay? Do you pay whoever shouts the loudest? Or those local suppliers who have become friends? Or perhaps even let the money get paid into the overdrawn bank account that you have personally guaranteed?

All of these issues could create what is known as a preference. That’s where the directors decide to pay (or prefer) one person over another.

We often find that in addition to loans from the bank, the directors may have propped up a company by injecting their own funds to aid with cash flow or will have perhaps gone to a friend or family member and asked to borrow a short term loan. Ordinarily this isn’t a problem as the loans would be repaid by the company if it was continuing in the future. However, a problem may arise if the company is insolvent at the time the loan is repaid and subsequently enters a formal insolvency process such as liquidation or administration.

When we get appointed as liquidator or administrator of a company one of our tasks is to carry out an investigation into the company and check to see whether any unusual transactions, such as preferences, were carried out.

If there have been preferences we can have these reversed. We will contact the preferred person and ask for the money back so that it can go into the company’s funds to distribute to all of the creditors equally.

In fact, creditors of a failed business often ask us to pay special attention to trying to recover these transactions as they are often aware of them. We can look back at preferences made in the last two years if the person preferred was a connected party eg the directors; or just six months for anyone else.

You can start to see the issues and problems facing directors.

The only way that the directors can protect against a claim of a preference arising at a later date is to make sure the creditors including all suppliers, HM Revenue and Customs, employees, loans and banks are all repaid at the same time and proportionately.

Is there a defence?

If it can be proven that the company had to make the payment to keep going then the court will not make an order asking the preferred money to be paid back to the liquidator. However, if the preference was made to a connected party then it is presumed in law that this shows a desire to prefer.

The misconceived defence often put to us if the money was repaid to the directors is that the loaned money was for the benefit of the company to stave off insolvency or to help with cash flow. This does not work as a defence because it is the repayment of the money back to the directors that is the key issue, not the amount, or original purpose of the loan.

Conclusion

It is not unusual for us to get called in by a company at the last minute. However leaving it too late is often where we find that most problems have occurred for the directors.

NEVILLE & CO
BUSINESS RESCUE & RECOVERY

Neville & Co are a firm of licensed insolvency practitioners. If you wish to contact Lisa call 01752 786800.

Foot Anstey advises on £26.8m Islamic finance deal for Kuwaitis

Law firm Foot Anstey has advised on a £26.8million Islamic finance transaction that saw Kuwaiti investors acquire a large site in Stafford.

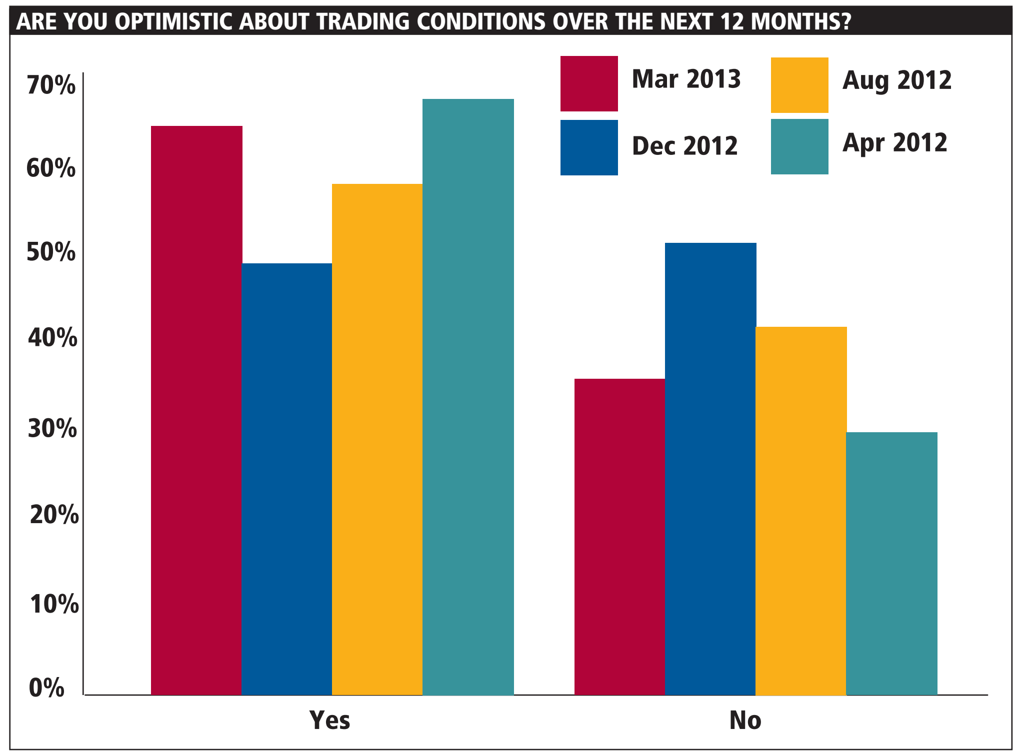
The firm’s team of Islamic finance, banking, real estate and investment structuring specialists have advised the Kuwaiti investors on a shariah compliant investment structure, financing documents and real estate aspects of their acquisition of the Argos National Distribution Centre.

The team have previously advised the same investors on their recent £19 million acquisition of the Bristol office of Everything Everywhere.

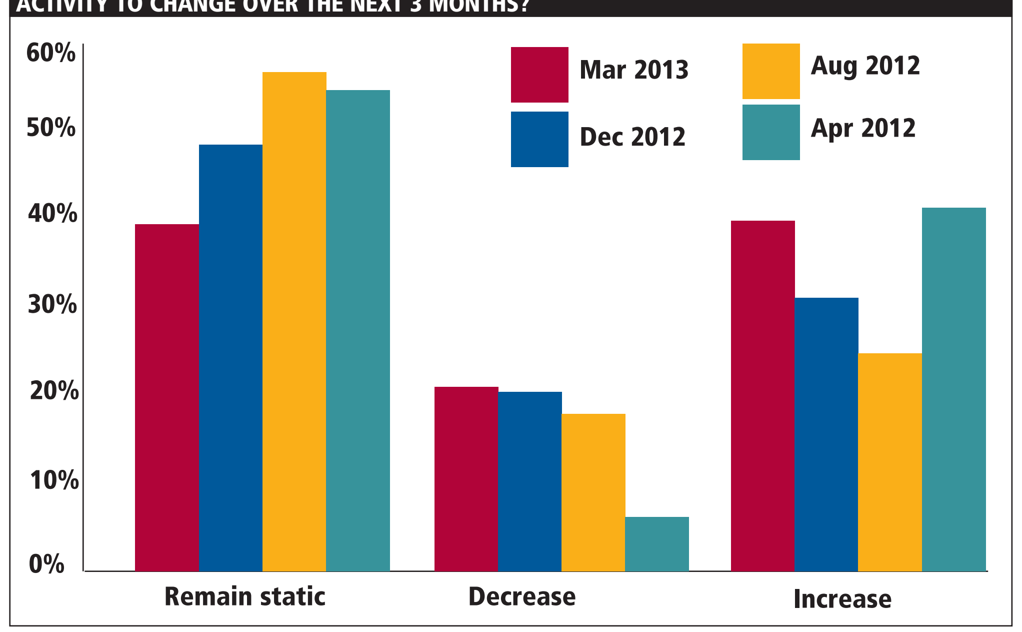
Islamic finance partner Imam Qazi led the Foot Anstey team that included partner Matthew Stoate (private equity) together with solicitors Zahir Nayani (Islamic finance and real estate) and Benjamin Kumordzie (banking). Mr Qazi said: “Both our recent transactions highlight how we work in partnership with Middle Eastern investors and shariah compliant banks. I am delighted with our progress in 2013 and look forward to progressing further deals.”

South West firms are feeling more positive, says survey

ARE YOU OPTIMISTIC ABOUT TRADING CONDITIONS OVER THE NEXT 12 MONTHS?



HOW DO YOU EXPECT YOUR COMPANY'S LEVEL OF BUSINESS ACTIVITY TO CHANGE OVER THE NEXT 3 MONTHS?



A new survey has found increasing levels of optimism in an encouraging sign for the region’s economy reports business editor **Liz Parks**

There is an increased feeling of optimism to be found in the Westcountry’s business base, according to a new survey.

The latest *Western Morning News* Business Barometer, compiled by Exeter law firm Michelmores found that 65% of respondents were optimistic about the outlook for the next 12 months.

This compares to 49% in the previous barometer, which was published in February and showed a slight dip in confidence levels.

Just under 40% of firms said they expected trading levels to pick up over the next three months, with exactly the same amount saying they anticipated business levels remaining the same.

This positivity also transferred to hiring levels with 55% saying their staff numbers would remain the same, 30% saying that they planned to recruit and the remainder saying that their staff levels were likely to drop.

Red tape remains the biggest barrier to business growth 27% saying they saw it as a major challenge. A shortage of skills was cited by 18% of businesses as a problem, with increased labour and material costs a factor for 9% of firms.

Support for Chancellor George Osborne’s austerity programme which was in evidence in the last barometer has continued, with 68% believing that the economy is in safe hands.

But despite this, 51% of firms were indifferent to his latest Budget, in March, and 27% said they were encouraged by its contents.

Help for the housing market was a popular measure, with Martin Lamb, from Savills; Richard Lloyd, from Summerfield Developments; Peter Heather, from Miller Commercial; Philip Muzzlewhite from Whitton & Laing; and Chris Kemp from Brittany Ferries among those in favour of it.

Increased capital spending also proved popular with Bott’s Simon Fry; A&P Falmouth’s Peter Child and Andrew Hosking, from Stratton Creber Commercial citing it as an important measure for the region.

When asked what they would do if they were Chancellor for a day to stimulate growth, respondents came up with a broad suite of suggestions.

David Jeffries, executive chairman of J+S Ltd, said: “Cut employees National Insurance, or better still, abolish it, on employees up to age 24. Introduce tax relief at an accelerated rate for SMEs for export marketing activities – ie mirror the red tax credit with one for export marketing.”

“Put up internet rates, get rid of the debt in one hit from the last four recessions. Low interest rates are just putting off the evil day,” said Martin Lamb, from Savills.

John Lewis staff at the new store in Exeter city centre enjoyed a 17% annual bonus. Above right, infrastructure improvements in South Devon – Secretary of State for Transport Patrick McLoughlin and other dignitaries at the site of the new Kingskerswell bypass

‘UK plc may have turned a corner’ after survey shows more optimism

Stephen Morse, head of the Business Group at Exeter law firm Michelmores, reflects on the increase in optimism found in the latest Business Barometer

The latest *Western Morning News* Business Barometer compiled and analysed by the Business Group at Michelmores shows a marked increase in optimism and some encouragingly positive trends.

Nationally, there are increasing signs that UK plc may have turned a corner. Much to George Osborne’s relief, we narrowly missed the triple dip recession that many had forecast and according to Ernst & Young’s ITEM Club, bank lending and multi-asset funds are set to grow and there are encouraging signs in the life insurance industry. There are still considerable problems in Euroland but the US economy grew by 2.6 % in Q1 and this must be good news for the UK.

In the South West, the Business Barometer showed that around 65% of businesses are optimistic about trading conditions over the next 12 months compared to 49% in the previous survey although the responses to measures announced by the Chancellor in his March Budget showed a degree of disappointment, scepticism and indifference.

So why the renewed optimism? It may be that the resilience of a regional economy dominated by owner/managed businesses and their traditional independence in thought and deed helps to cocoon the South West from UK-wide influence. A tell-tale sign is the increase in concern over skill shortages instead of fuel costs. If businesses are worried about skill shortages, then they have something for people to do and this means job creation.

In fact, there is some very good news around. The ICAEW/Grant Thornton UK Business Confidence Monitor reveals that South West businesses have reported steady growth in both turnover and domestic sales in Q1 this year. Plymouth City Council has established a £20 million Building for Jobs investment fund to invest in the city's economy and help create the right conditions for growth. Businesses can also stake a claim for part of a £3.9 million pot managed by Plymouth University and the *Western Morning News* under the Regional Growth Fund to create new jobs in the region.

In 2012, there were twice the number of jobs in the South West created by foreign direct investment than in the previous year; 300 jobs are promised with the arrival of IKEA in Exeter while things look pretty good for John Lewis and their new store in Exeter city centre where staff enjoyed a 17% annual bonus following rising profits.

Many individual responses to the Business Barometer focussed on reductions to National Insurance Contributions (NIC) as a means of job creation acknowledging the “Employment Allowance” of £2,000 off NIC that the Chancellor announced in March.

Public sector employment appears to have dropped by 14% between December 2009 and September 2012 but an estimated 19% of people in employment in the South West still worked in the public sector at that time. Anecdotal evidence suggests that the private sector job market is improving and there has been a noticeable migration of business people from the South East and elsewhere to ‘set up shop’ in the Westcountry.

The survey also pointed to infrastructure investment and house building as the key to kick starting the economy. In a scheme identified as a priority by the Heart of the South West Local Enterprise Partnership, junction 27 of the M5 is to receive funding to increase capacity required to improve access for the new Tiverton urban extension and Tiverton Parkway station. This, and the forthcoming Kingskerswell bypass will help to create new jobs and although these infrastructure projects are geographically focused, they should have a significant impact on the local and regional supply chain.

In addition, the Government’s Help-to-Buy scheme should trigger an increase in house moves and act as an incentive to developers to start building on the many site they have been sitting on for years. This in turn could trigger a boost to consumer sales in white goods and other domestic fixtures and fittings.

Positive as these signs are, we can’t be sure if they are enough to help the region ‘trade its way’ out of difficult times until the inert forces of austerity fully kick in.

Michelmores
Solicitors