

**THE COVID 19 EFFECT:
ONE DAY THE BUSINESS WAS
THERE – THE NEXT DAY IT WAS
GONE!
WHAT CAN I DO?**



In the current economic climate, many of us will have come across the “disappearing” business.

I have in mind a coffee shop and restaurant on the ground floor of a particular building; they were there one day and gone the next.

What are creditor's rights under these circumstances? This article addresses that issue.

This is one of those situations where the creditor’s rights are fairly clear, but the difficulties arise when it comes to the enforcement of those rights.

So, if the business which has disappeared is a company or close corporation, that company or close corporation (the debtor) remains liable.

A practical step to take would be to appoint a tracing agent and find out if the business has closed down completely, or possibly moved to alternative premises.

Assuming that the debtor business has closed down completely and that its assets have also disappeared, a creditor might wish to hold the directors (if it is a company) or members (if it is a close corporation) personally liable.

This is possible, but the creditor would have to persuade a court that the controlling minds behind the debtor have behaved “unconscionably”. (The language of the previous Company’s Act was similar; the creditor had to show that the controlling minds had behaved recklessly or fraudulently).

In the current economic climate, where money has simply dried up, this is a difficult hurdle for a creditor to overcome.

Where the debt is substantial, the creditor might wish to bring a liquidation application and thereafter hold an enquiry, so as to interrogate the controlling minds behind the debtor. This will only be practical, where the debt is large and if those “controlling minds” are persons or entities of substance, and worth pursuing personally.

This discussion is based on the premise that the creditor does not have any viable suretyships. If suretyships are in place, then the logical and sensible step to take, would be to commence legal proceedings against the sureties, and hope that they are not persons or entities of straw.

What to do if there are no sureties? In practical terms, this is a difficult question to answer. Having a summons served on the debtor at its place of business or registered office, is highly unlikely to result

in payment being made. Indeed, the question arises whether this would amount to throwing good money after bad. What to do? A judgment call needs to be made in respect of each matter.

In some matters, if the view is taken that the business may one day reopen, then to issue a summons and potentially obtain a judgment against the debtor, might be of assistance to the creditor in the future. In other cases, appointing a tracing agent would be useful and in other cases it might be worth suing the directors/members of the debtor entity, or ascertaining a home address of the owner of the debtor business, if it is a sole proprietorship, and then suing that person.

In this regard, we are able to conduct online deeds office and company's office searches so as to obtain valuable and useful information as to whether immovable property is owned and also as regards the registration details and other important information in relation to a debtor which is a company or close corporation.

To conclude: The case of the disappearing business represents a challenge for the creditor and for us as attorneys. By working together however, and via the pro-active advice which we are able to furnish, the appropriate judgment call can be made, with a view to taking further steps where this seems practical and viable, and walking away from those scenarios which might constitute the throwing of good money after bad.

Please feel free to contact the writer for solutions to keep your business alive during this turbulent time.

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