

ARTICLE FOR SOUTHAMPTON CHAMBER MAGAZINE

VATman and Robbin'

Ever thought it would be a cunning plan to delay paying VAT to HM Revenue and Customs to free up some working capital when times are hard? Think again...

A recent case involved the liquidators of a company alleging that a former director, in breach of his fiduciary duties to the company, caused the company not to pay VAT in the months before it went into liquidation.

Provisions in the Insolvency Act 1986 allow parties other than an insolvent company itself to litigate certain claims of the insolvent company against its officers or former officers and any person who has been concerned, or has taken part, in the promotion, formation or management of the company, including claims for breach of fiduciary or other duties to the company. Only loss sustained by the insolvent company may be recovered.

The director argued that any loss that resulted from any breach of duty on his part was a loss to the company's creditors (and, in particular, HM Revenue and Customs) and not a loss to the company itself.

The High Court found that, by not paying VAT, the company carried on trade that it could not have undertaken otherwise. That trading increased the overall net deficit on the company's balance sheet. The increase in that net deficit could, in principle, represent a loss to the company and be (wholly or partly) recoverable from the director under the Insolvency Act. The failure to pay VAT was a breach of fiduciary duty, so it was possible for the liquidator to obtain a court order requiring the director to contribute personally in compensation for the breach.

If you are tempted to delay paying tax to free up working capital, don't - you could be personally liable if trading whilst insolvent.

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