

WILLIAM EVANS

VANNIN CAPITAL

The search for hidden treasures

When seeking assets, existing claims are often overlooked. William Evans considers the value of litigation funding for IPs looking at hidden value

In an instance where a practitioner concludes there is no hope of keeping a company going, they will inevitably look to identify the realisable assets.

If it is a fundamentally sound business with too much debt, then a new owner, without that burden, may well be able to continue it. If that is not an option, individual assets that may be capable of being realised will have to be considered.

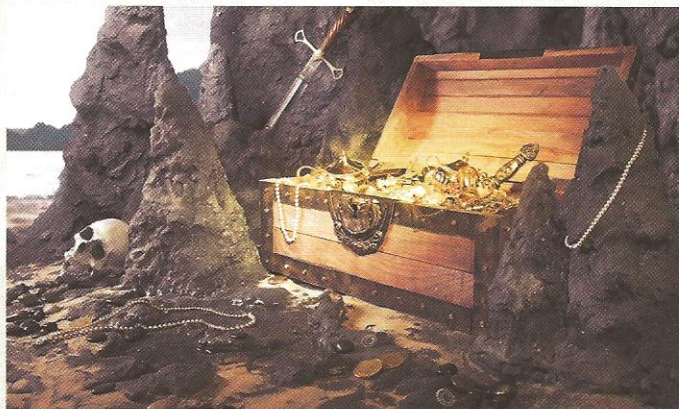
The goodwill, stock or work in progress may well be the first that come to mind. Real property owned by the company will also be an obvious target. Other assets may appear to have relatively easily realisable value, such as intellectual property rights. The emphasis will be on the ease of realisation. Creditors will usually be mostly interested in obtaining at least some money as quickly as possible and, of course, fees have to be paid in order to contemplate winding the company up at all.

One asset often overlooked is a claim that may already exist or arise from the collapse of the company. The company may already have a claim arising from a dispute with another company or there may be a dormant claim which has either not been recognised or was not pursued because of lack of interest or funds.

It is understandable that the directors of a company fighting for survival will concentrate on the core business rather than litigation.

There is then the possibility of a claim against the directors under sections 213 and 214 of the Insolvency Act 1986. If they have engaged in fraudulent or wrongful trading, there will be a claim against them.

THE DIRECTORS OF A COMPANY FIGHTING FOR SURVIVAL WILL CONCENTRATE ON THE CORE BUSINESS RATHER THAN LITIGATION



Evidence of assets

For such claims to be an asset, they must satisfy two conditions. First, they must have reasonable prospects of success – that requires a good claim in law, supported by admissible evidence that there is a realistic prospect of putting before a court.

The more the facts are supported by documents, the better, because contemporaneously created documents are usually good evidence of their content. If the evidence is to be oral, then the credibility of the witnesses may be an issue. The evidence must support the case on liability, but also on the value of the claim.

Second, the defendant must be able to pay the amount of the judgment – there is no point in pursuing a claim against a defendant

who can't. A claim against the directors of the company will not be much of an asset if they have limited resources, but where the funds are there, the claims are certainly dormant assets.

There are two possible reasons why claims have not been pursued. One is that there is usually a need of fairly substantial resources, which may well not be available unless the creditors are willing to pay more.

It is frequently not possible to persuade creditors to throw good money after bad, as they may perceive it. The other is that the liquidators and creditors may consider that the length of time it will take for a court case to come to fruition is too long.

Neither should be an impediment to realising the asset value of a claim in an

insolvency. The cost of pursuing the claim through litigation can be funded by obtaining third party funding.

If waiting for a case to go to a trial in the litigation is not an attractive prospect, then the claim itself can be sold to realise the value immediately. A litigation funder will provide the funds to pay for lawyers and any necessary expert evidence to allow the claim to be pursued. The funder will do so on a non-recourse basis for a return payable out of the proceeds.

The return is relatively high but the funder takes the risk of failure, it being removed entirely from the creditors and liquidator. Typically it will be between 20% and 40% of the value of the damages awarded. When compared to the value actually realised from physical assets, recovering perhaps 80% compares very well.

If the creditors prefer to have money immediately, with certainty, then a sale of the claim will meet that objective. The return will be less because the creditors are obtaining a certain return and the funder is taking all the risk, but may nevertheless be attractive to the creditors.

Insolvency practitioners that do not actively consider the potential for claims existing within the company and claims arising from the circumstances of the insolvency are doing the creditors a disservice.

Litigation funders are available to remove the risk from realising those assets and if the claims have good prospects and are against defendants with resources, then realising the asset in many cases will be successful.

William Evans is a barrister with third-party funders Vannin Capital