

Tempers flare as

As companies deliberately go to the wall

only to reappear in a new

Picture the scene. You're a freelance organiser who was brought in by an agency for a big summer event. It was a resounding success and you are contentedly waiting for £20,000 to pop itself into your account, clearing some of the debts you've accrued producing said event.

All is well, until the *Event* daily news bulletin pops into your email inbox and tells you the agency that hired you has gone bust. Despair reigns.

But what's this? The company has been bought for a pittance by the very people who ran it into the ground and is now operating again under almost exactly the same name, with the same staff.

You call them, politely pondering whether or not you will receive any of the money you are owed.

"Not likely," they say, in a probably more roundabout way, littered with legalese.

"But you owe me," you say, perturbed.

"Incorrect," they say. "The former company owed you. We owe you nothing."

This leaves you in a tricky situation. You're out of pocket with no way of recouping lost earnings, yet the very people who owe you money are happily operating, penning new contracts and seemingly laughing in your face. At least that's how it feels.

The practice creates significant and understandable ire among those it affects and is known as 'phoenixing', after the mythical bird that spontaneously combusts and regenerates every 500 years. But as annoying as it can certainly be, it's not actually illegal.



"Phoenix companies are lawful, and can be beneficial where the old company has failed with honest directors who have seen their company get into financial difficulties through no fault of their own," says insolvency expert Ken Titchen from solicitor Sprecher Grier Halberstam.

With the economic downturn purging the event industry of some of its weaker

operations, expect phoenixing to rise. Already in the past few months, Salisbury-based Stagecraft and Hertfordshire AV firm Presentation Services Limited (PSL) went through the process, and some PR and marketing agencies serving the sector are known to have 'phoenixed' regularly.

Certainly the high-profile case of PSL demonstrated how contentious phoenixing can be. The firm, which launched an investigation into an alleged defrauding by a financial officer, divided the industry with its choice to phoenix last month.

"We had two options," said director Gary Davis, the focal point of much industry rage over the matter. "We either went down, or we went forward with the

"We had two options. We either went down, or we went forward with the new company and tried to help those who had been affected with new business." Presentation Services Limited director Gary Davis

the phoenix rises

guise, there are steps creditors can take to protect themselves. By David Quainton

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Davis admitted that the problems created, which resulted in some very personal attacks, made him caution anybody against doing it. "The biggest mistake we made was not issuing a statement," he says. "People needed to know what was going on."

Stagecraft was bought by internal directors and reduced from a staff of 16 to eight as part of its phoenixing. As with PSL there were mitigating circumstances, although the company is legally prevented from talking about its previous incarnation.

Not all excuses stand up, though, and that tends to irk.

"Phoenix companies can have a bad reputation because unscrupulous directors might run up large debts deliberately, force their companies into an insolvency process, and buy the business back so they can carry on as before without paying the company's old liabilities," says Titchen.

For companies that have been burnt – pardon the pun – by phoenixing, there are lessons the whole industry can learn.

"We operate much tighter credit control and are more careful about vetting who we work with," says Mobile Promotions MD Robin Carlisle. His company was left £15,000 out of pocket ten years ago by an unscrupulous phoenixer.

"Watch who you work with. It's actually not unreasonable to go to your brand client and ask for guarantees about the agencies they're making you work with," he adds.

Ultimately, you never really know what's happening at a company unless it's your own, so everyone is potentially at risk from phoenixing. In the meantime, it's best to read *Event's* expert advice on the subject, and hope that it doesn't happen to you.

Have you phoenixed or been affected by a company that has risen from the ashes? Email the *Event* team and be part of the Phoenix Watch

Top tips



Ken Titchen
solicitor, Sprecher
Grier Halberstam
Don't get your
fingers burnt –
some essential
advice on how to
protect yourself
against the dreaded
phoenix

What protection exists for suppliers or other creditors?

As an administrator or liquidator has legal obligations to creditors to make sure that any sale of an insolvent business takes place at full value. Directors often agree to buy the business back from the proposed administrator or liquidator before he is appointed, and new guidelines are coming into force on 1 January 2009 to protect creditors in the case of a 'pre-packaged' sale. They set out details of information that an administrator must obtain before any such sale, and which must then be provided to creditors in due course. However, the transfer of the business to the phoenix company will still have taken place before creditors know about it.

As if the directors transfer the business before the old company goes into liquidation, the liquidator can take legal action against them if it has been sold for less than its full value.

Often it is an offence for a director of a company that has gone into liquidation to be a director of a company that has or trades with the same or a similar name. Not only does a director who contravenes the relevant provisions of the Insolvency Act 1986 commit an offence, but he also becomes personally liable for all the debts of the company. A director can only carry on a phoenix business without risk if he

notifies all creditors of the old company that he is going to be involved in the phoenix, or if the court gives him permission.

Directors who have deliberately run up credit and then made their companies insolvent may be disqualified from acting as a director or manager of any other company. Depending on the misconduct, they can be disqualified from acting as a director or managing a company for between two and 15 years.

What can creditors do to protect themselves?

Creditors should monitor their customers when giving credit. Although a phoenix company may have the same name and involve the same people, it will have a different company number and maybe a different VAT number. Checks and references must be carried out and personal guarantees should be taken.

Creditors ought to find out from the administrator or liquidator why the previous business failed. They should get reports from the office holder providing them with information, and will usually be invited to provide relevant information to the liquidator. Suppliers and other creditors can always contact the liquidator for information, and should remember that he or she relies on information from creditors to help them carry out their investigations into the reasons for the failure of the old company. If the liquidator can find wrongdoing he may be able to bring court proceedings against the directors of the old company to increase the amount of money available to be distributed to its creditors.

The identity of directors should be checked at Companies House via its website. A similar online search will show if a director has been disqualified. Anyone who acts as a director when disqualified commits an offence and can be made personally liable for the company's debts. If in doubt, it is always advisable to take legal advice.