

Henderson
Loggie 

Directors Guide to

PFI/PPP SPV Insolvency

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Welcome

Even the most experienced PFI and PPP directors can find themselves in unfamiliar territory when a project encounters serious difficulties. A long-running dispute, significant claims, or the service of an early termination notice can rapidly shift the landscape.

Suddenly, discussions move from routine governance into insolvency concepts that many directors will not have had to deal with. The shift in responsibility from shareholders to creditors, combined with new terminology and legal duties, can feel like a step into a different world.

This guide has been prepared to help directors understand the key issues, the decisions that may lie ahead, and the steps they should take to protect themselves and the company. It does not assume prior insolvency knowledge; instead, it aims to provide clarity, reassurance and practical guidance at a time when decisions may need to be taken quickly and with confidence.

The guide is divided into seven sections to help directors understand the issues that arise when a PFI project faces financial distress or early termination.



Introduction

Section 1:

Explains what insolvency risk means in the context of PFI project companies and how directors can identify early warning signs.

Section 2:

Summarises directors' duties when a company is in financial difficulty, including the shift in responsibilities towards creditors.

Section 3:

Addresses conflicts of interest, which are common in PFI structures where directors are often appointed by shareholders, lenders, asset managers or contractors.

Section 4:

Provides an overview of the formal insolvency processes that may apply to project companies, such as administration and liquidation, and the circumstances in which they are used.

Section 5:

Answers the key concerns directors typically have – personal liability, reputation, credit rating, and conduct reviews.

Section 6:

Sets out a practical steps checklist, giving directors clear actions to take to protect themselves and ensure decisions are made appropriately during periods of financial distress.

Section 7:

Includes a Board Minute Aide-Mémoire intended to guide directors on the key decisions and supporting rationale that should be documented in the minutes.

Summary

When there is a risk of insolvency, directors have a critical role in ensuring that decisions are taken appropriately. The focus shifts from the interests of the company to that of its creditors. Directors should:

- Ensure financial information is current and reliable;
- Hold regular board meetings to review the company's solvency position;
- Obtain appropriate professional advice (legal, financial, insolvency);
- Document the basis for decisions and the options considered; and
- Avoid taking actions that could prejudice creditors or worsen their position.

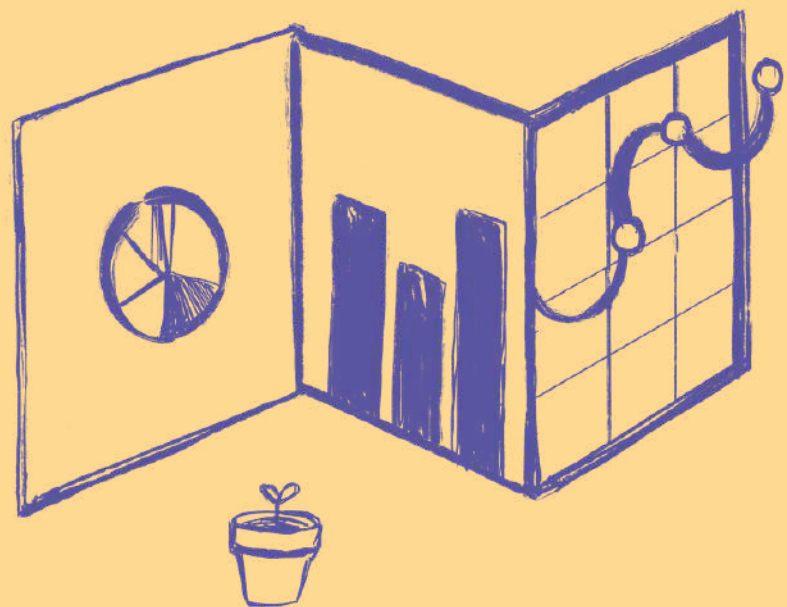
Early engagement with advisers helps ensure directors meet their duties and can maximise outcomes for stakeholders.

It is important to emphasise that insolvency is not inevitable, but directors must understand the company's position and respond responsibly. The purpose of this guide is to support directors in navigating a challenging situation confidently, clearly and lawfully. It is hoped that directors find the guide useful and that it provides a practical reference point at a time when clarity is needed most.

This guide provides high-level information to help directors identify issues and ask the right questions. It is not legal advice and should not be relied on as a substitute for advice on the company's specific facts and circumstances.

Section 1:

What Does Insolvency Risk Mean and How to Identify It?



Why are we discussing insolvency now?

In the PFI context, disputes and performance-related deductions are often expected to be resolved through contractual mechanisms. Where this does not happen, the ongoing build-up of claims and reduced revenues can place increasing strain on the project company and may ultimately result in an insolvency risk.

In contrast, early termination of the PFI contract by the authority is more likely to trigger immediate solvency concerns, given the loss of contracted revenues and the potential exposure to significant termination and financing liabilities.

Directors have legal duties to consider the financial position of the company and the interests of creditors if there is a risk that the company may become insolvent. Considering insolvency options early helps ensure that:

- Directors comply with their duties;
- Creditors are treated fairly; and
- Value is preserved where possible.

Considering insolvency does not mean it is inevitable, but it is prudent to understand the options.



What does “insolvency” actually mean?

A company may be insolvent if:

- it cannot pay its debts as they fall due (Cash-flow test), or
- its liabilities exceed its assets (balance sheet test).

In the context of PFI projects, insolvency may arise where:

- termination payments are insufficient to repay project debt;
- disputes cause deductions, denying the project company of critical revenue;
- ongoing liabilities continue after termination.



How do we know if there is a risk of insolvency?

Identifying insolvency risk is not always straightforward, particularly in PFI projects where disputes, claims, termination negotiations and cash movements can evolve quickly. Different stakeholders may also hold different pieces of information, making it difficult for directors to see the full picture in real time. That is why directors must rely on clear, objective indicators rather than assumptions or optimism.

A company may be at risk of insolvency if either of the statutory tests is close to being breached:

Test	What it Means	Practical Considerations for Directors
1. Cash flow test	Whether the company can pay its debts as they fall due.	<ul style="list-style-type: none"> Requires realistic short and medium-term cashflow forecasting, not best-case assumptions. Monitor: upcoming liabilities, debt service, contractor payments, legal costs, and the timing and uncertainty of any termination payments.
2. Balance sheet test	Whether the value of the company's liabilities exceeds the value of its assets.	<ul style="list-style-type: none"> Assess assets on a realistic basis, including expected value of claims, disputes and termination compensation. Over-optimistic valuations can hide emerging insolvency risk.

Because circumstances can change quickly, especially during disputes or early termination, a company can move into the "zone of insolvency" faster than directors expect. Regularly updating cashflow forecasts, stress-testing assumptions, and holding frequent board reviews helps directors stay ahead of emerging risks. Termination payment uncertainty is one of the biggest practical risks in PFI insolvency.

If there is any uncertainty, directors should assume the company may be at risk and seek professional advice early. It is safer to identify and manage risk early rather than only recognising issues once obligations cannot be met.

Section 2:

Directors' Duties



What are our duties as directors if the company may be insolvent?

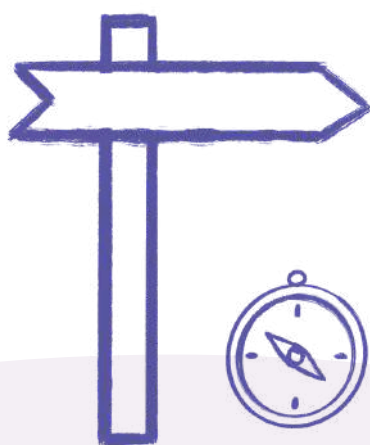
When insolvency is probable, not only imminent, duties shift towards creditors' interests. Directors must:

- Monitor the company's financial position closely;
- Take professional advice where appropriate;
- Consider the interests of creditors as a whole (not only shareholders);
- Avoid actions that increase losses to creditors.

Directors should ensure that:

- Board decisions are properly documented;
- Proper financial records continue to be kept;
- Financial information is up to date; and
- Major decisions are taken with appropriate professional advice.

Directors may still authorise reasonable and necessary ongoing expenditure (including accounting, legal and SPV management costs), so long as this is done transparently, on appropriate advice, and with counterparties aware of the heightened insolvency risk.



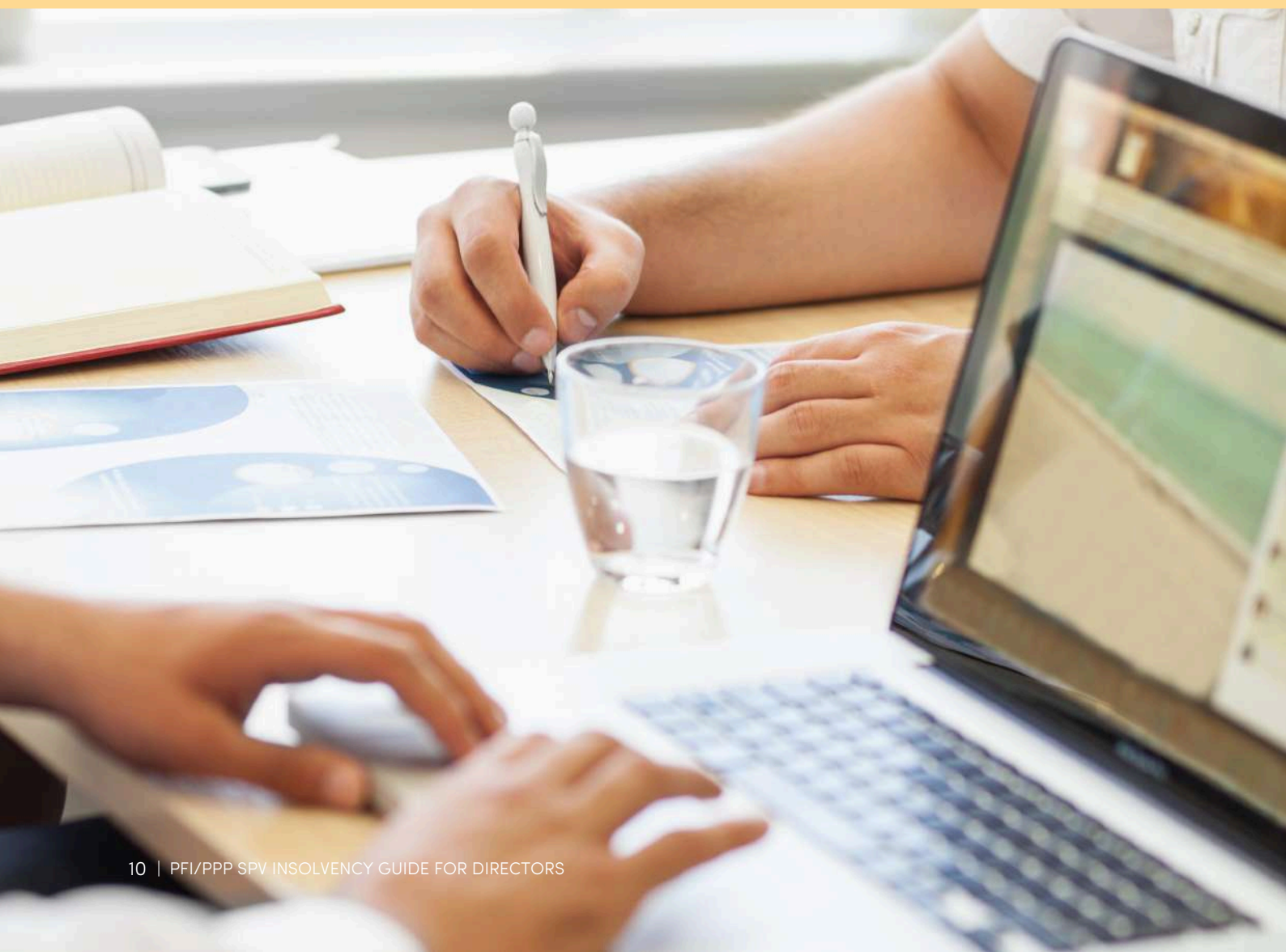
Do we need a communications protocol during financial distress or dispute escalation?



When a project is facing financial difficulty, disputes, or potential insolvency, it is important that communications with stakeholders are coordinated, accurate and consistent.

Directors should consider adopting a simple communications protocol to manage:

- Who is authorised to speak with lenders, shareholders, advisers and the contracting authority?
- What can be shared, and what should not be shared without advice;
- How sensitive information (e.g. cashflow issues, dispute strategy, creditor positions) is controlled; and
- How board decisions and rationales are communicated internally.



Can I resign?

Directors often ask whether they can resign when a project becomes distressed. Resignation is possible, but it must be approached carefully.

Resigning does not remove your responsibilities for decisions made while you were a director, and stepping down at the wrong time can increase personal risk – particularly if it leaves the company without sufficient oversight.

Directors should not resign simply to distance themselves from a difficult situation. Remaining in office is often the safest option, as the company still requires proper governance and informed decision-making.

Resignation may be appropriate only where:

- Remaining on the board would put you in breach of duty,
- You are prevented from acting properly (for example, because of conflicts that cannot be managed), or
- Independent professional advice recommends it.



If you are considering resignation, you should:

- Take legal advice before doing so;
- Ensure the board is not without a quorum or incapable of managing the company;
- Ensure all matters are properly handed over; and
- Make sure your concerns (if any) are recorded in board minutes before stepping down.

In most cases, it is preferable for directors to remain in place, act responsibly, take advice, and help manage the company through the period of financial difficulty.



Section 3:

Conflicts



What should I do if I have a conflict of interest?

Directors of project companies are often appointed by shareholders, lenders, asset managers or contractors. It is therefore common for directors to have roles or employment relationships with other stakeholders in the project.

However, when acting as a director, your primary duty is to the company.

If a conflict arises between the interests of the company and the interests of another organisation you are connected with, you must:

- Identify the conflict early;
- Declare it to the board in accordance with the company's articles and company law;
- Consider whether you should abstain from discussions or decisions on the relevant matter; and
- Ensure the conflict is properly recorded in board minutes.

Where the company may be insolvent or close to insolvency, directors must also take into account the interests of creditors as a whole.



What if I am employed by an asset manager, shareholder or lender that is also a creditor?

This situation is common in project companies.

For example, a director may:

- Be employed by an asset manager acting for investors;
- Work for a shareholder group; or
- Have connections with lenders or service providers.

Where that organisation is also a creditor of the company, there may be situations where its interests diverge from those of the company or other creditors.

In these cases, directors should:

- Remember that their duty as a director is to the company, not the organisation that nominated them;
- Declare the conflict to the board;
- Avoid participating in decisions where the conflict is material; and
- Consider whether independent advice is appropriate.

Managing these conflicts transparently helps protect both the director and the integrity of the decision-making process.



What other types of conflicts might arise in a PFI project company?

PFI structures involve multiple stakeholders, and conflicts can arise in a number of situations, including where directors are connected to:

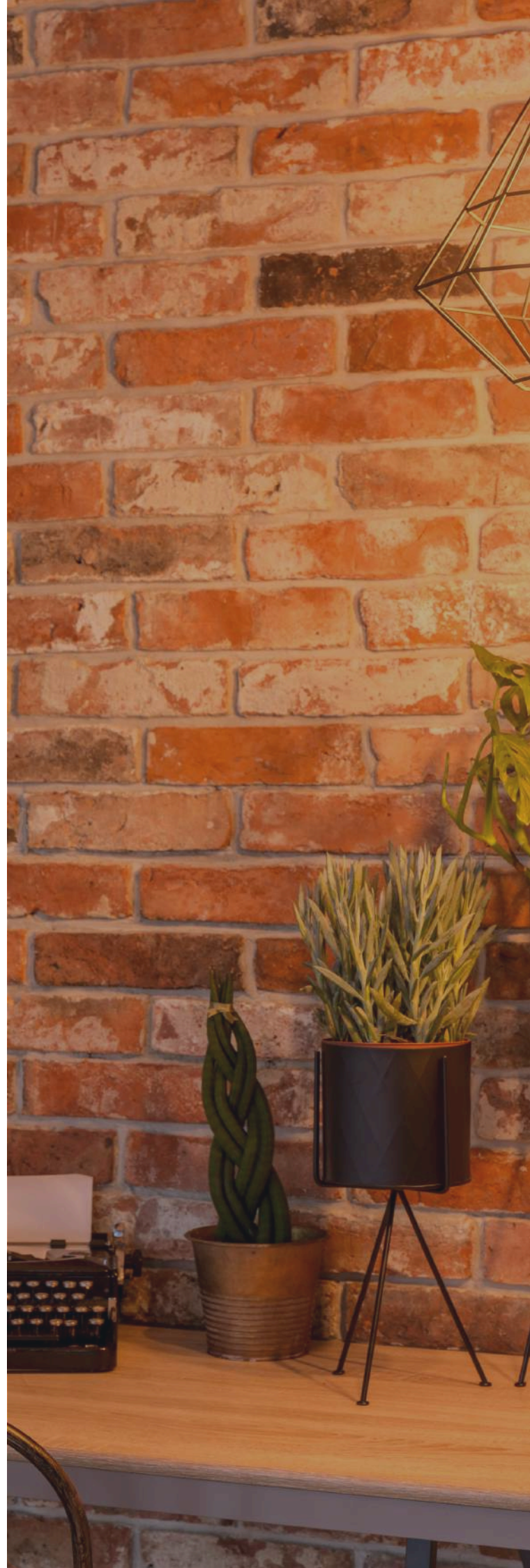
Stakeholders	Potential Conflict Scenario
<p>Shareholders</p>	<p>Directors appointed by investors may face conflicts where:</p> <ul style="list-style-type: none"> • shareholders wish to limit further funding; • shareholder interests diverge from those of creditors once the company becomes financially distressed.
<p>Lenders</p>	<p>Lenders may hold security rights or enforcement options that affect the company. Directors connected with lenders may face conflicts when decisions impact lender recoveries or enforcement positions.</p>
<p>Asset managers / fund managers</p>	<p>Where an asset manager oversees multiple investments, conflicts may arise if decisions affecting the project company have implications for other funds or projects under the same management.</p>
<p>Contractors / service providers</p>	<p>Directors connected to:</p> <ul style="list-style-type: none"> • O&M contractors; • construction contractors; • management service providers; <p>may face conflicts where there are payment disputes, termination issues or claims between the company and those entities.</p>
<p>The public authority</p>	<p>Where disputes arise with the contracting authority (e.g., termination payment disagreements), directors with relationships to organisations involved in negotiations may need to consider whether a conflict exists. This could include, for example, a director who is also a director, employee or adviser of the authority, a funder, a subcontractor, or another party engaged in the dispute, or where a director has been seconded from, or has a continuing commercial relationship with, such an organisation.</p>

What should we do if conflicts affect the board's ability to make decisions?

If a number of directors are conflicted on a particular matter, the board may consider:

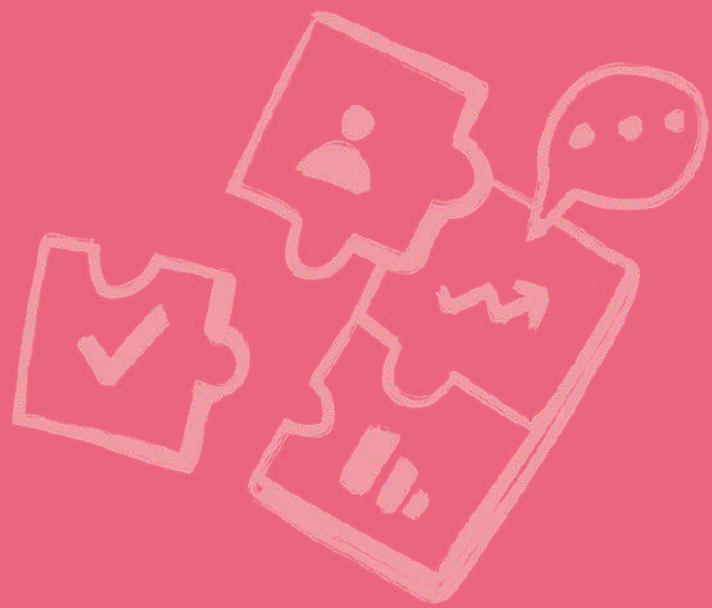
- relying on unconflicted directors to make the decision;
- appointing additional independent directors; or
- obtaining independent professional advice.

Ensuring decisions are taken by directors who are able to act in the interests of the company is particularly important where the company may be approaching insolvency.



Section 4:

Formal Insolvency Process



What insolvency processes might apply to a PFI project company?

Depending on the circumstances, the two most common insolvency processes are administration and liquidation.

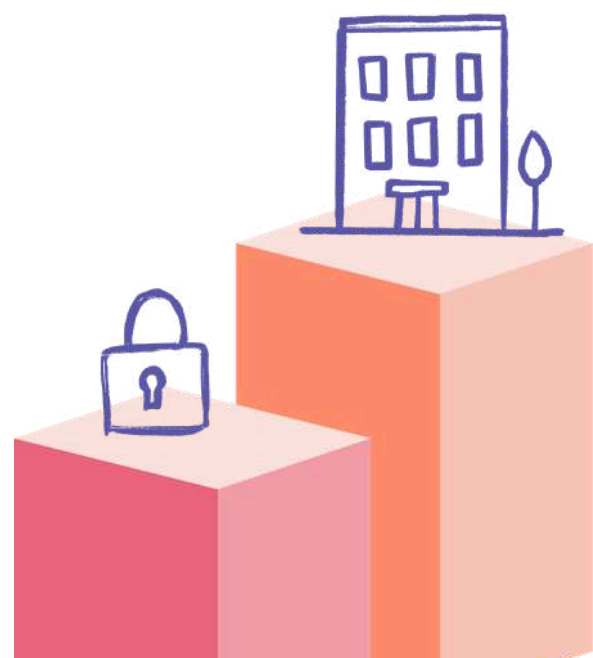
Administration

Administration aims either to rescue the company or achieve a better return for creditors than liquidation. An administrator (a licensed insolvency practitioner) takes control of the company's affairs. It is typically used where disputes over termination payments exist, assets or claims still have value, or lenders wish to protect their position.

Liquidation

Liquidation winds up the company and distributes assets to creditors. A liquidator is appointed to realise assets, investigate the company's affairs, and make distributions. It is usually used where the company's purpose has ended and no viable business remains.

In both cases, control passes to an insolvency practitioner, but the purpose differs: administration is generally used to preserve or realise value, while liquidation is a final wind-down.



Will directors automatically lose control of the company?

In an insolvency process:

- Administration: control transfers to the administrator.
- Liquidation: control transfers to the liquidator.

However, directors typically still:

- Assist with information;
- Answer questions about the company's affairs; and
- Cooperate with the insolvency practitioner.

Directors are not expected to manage the insolvency themselves.

What happens to the company's debts?

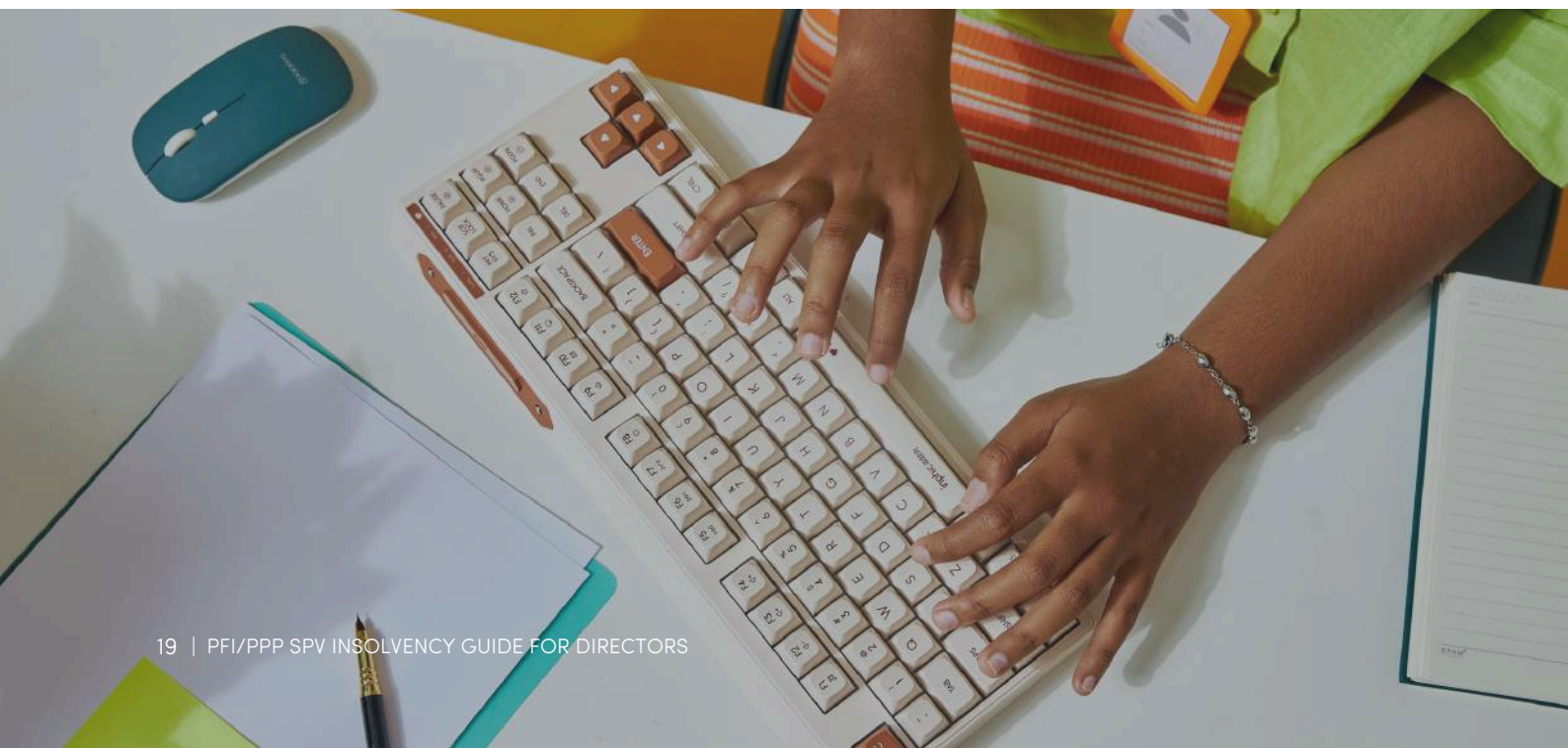
What happens to the company's debts?

- Creditors submit claims for amounts owed;
- Funds are distributed according to the statutory order of priority.

Typically, the order includes:

1. Secured creditors (e.g., lenders with security)
2. Costs of the insolvency process
3. Certain employee claims
4. Unsecured creditors
5. Shareholders (if anything remains)

The contractual security and intercreditor arrangements may affect recoveries as between creditor groups. In many insolvencies, shareholders receive no distribution.



What happens to disputes with the authority?

If there are outstanding disputes regarding termination payments or compensation, these may continue during an insolvency process

An administrator or liquidator may:

- Pursue claims on behalf of the company;
- Negotiate settlements; or
- Assign claims to creditors.

In the PFI context, assignation could involve transferring claims for termination payments, compensation or disputed deductions under the project agreement to funders or other creditors, enabling them to pursue recoveries direct. These claims can sometimes represent a significant asset of the company.

Will directors be investigated?

Insolvency practitioners are required to review the conduct of directors in the period leading up to insolvency.

This is a standard statutory process and does not mean wrongdoing is suspected.



Directors may be asked to:

- provide information;
- attend interviews; and
- explain key decisions.

Where directors have acted reasonably and taken advice, this process is usually straightforward.

What information might we need to provide?

Directors may need to assist with:

- Financial statements;
- Details of creditors;
- Board minutes and decisions;
- Contracts and financing documents;
- Explanations of major transactions.

Good records and documentation make this process much easier.

Who appoints the insolvency practitioner?

Depending on the circumstances, an insolvency practitioner may be appointed by:

- The company's directors;
- Secured lenders (under financing documents); or
- The court.

In PFI structures, lenders often play a significant role due to their security over the project company, if they have not been repaid.

How long does an insolvency process take?

Timeframes vary depending on:

- The complexity of the company's affairs;
- Whether there are disputes or litigation; and
- The number of creditors involved.

Some straightforward cases may complete within 1–2 years, but cases involving disputed termination sums or litigation can take significantly longer.

Will my conduct as a director be reported to any authorities?

In an insolvency process, the insolvency practitioner is required to review the conduct of directors and submit a report to the relevant government authority.

This is a routine statutory requirement and occurs in every corporate insolvency.

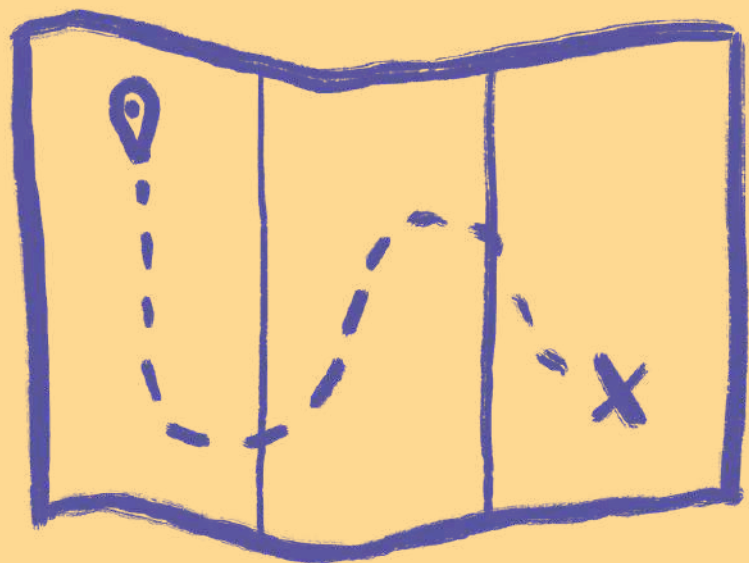
Most reports do not result in further action, particularly where directors have:

- Acted in good faith;
- Kept appropriate records; and
- Taken professional advice when financial difficulties arose.



Section 5:

Key Concerns (Liability,
Reputation, Credit, etc.)



Can directors be personally liable if the company becomes insolvent?

Directors are not automatically personally liable simply because a company enters insolvency. In most cases, a limited company is a separate legal entity and its debts remain its own. However, personal liability can arise in certain circumstances, for example where a director:

- Has given a personal guarantee;
- Has engaged in wrongful or fraudulent trading (continuing to trade when there was no reasonable prospect of avoiding insolvency);
- Has committed misfeasance or breached their duties;
- Has caused the company to give preferences to certain creditors; or
- Has entered into transactions at an undervalue or otherwise transferred assets improperly.

Misfeasance can include the misuse of company assets or a failure to act in the company's interests, for example by making payments to connected parties, approving transactions that benefit shareholders over creditors, or using company funds for purposes unrelated to preserving or maximising value.

Acting in good faith, taking timely professional advice, monitoring solvency closely and documenting decisions carefully all help to minimise the risk of personal liability.



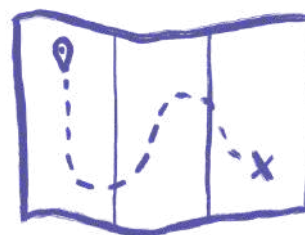
What is wrongful trading and how can we avoid it?

Wrongful trading occurs if directors continue trading when they knew, or ought reasonably to have concluded, that there was no reasonable prospect of avoiding insolvency, and they fail to take steps to minimise losses to creditors.

Directors can reduce risk by:

- Monitoring the company's financial position closely;
- Holding regular board meetings;
- keeping clear records of decisions;
- obtaining professional advice early; and
- Taking steps to protect creditors' interests.

Taking appropriate advice and documenting decisions is one of the most effective ways to demonstrate that directors acted responsibly.



Will insolvency affect directors' ability to act as directors in future?

Insolvency does not automatically prevent someone from acting as a director in the future.

However, where serious misconduct is identified, regulators may consider director disqualification proceedings.

Where directors have acted properly, this is generally not an issue.

Many directors are concerned about reputational impact, but it is important to note that companies become insolvent for many commercial reasons, including contractual disputes, project termination, or external market factors.

Company insolvencies are a matter of public record and may be visible on company filings and in searches, but this is not in itself an indicator of misconduct.

Being a director of a company that enters insolvency does not automatically reflect negatively on the director.

Where directors have acted responsibly and taken advice, insolvency is generally regarded as a commercial outcome rather than a personal failing.

Will an insolvency affect my personal credit rating?

A director's personal credit file is separate from that of the company. It would typically only be affected if:

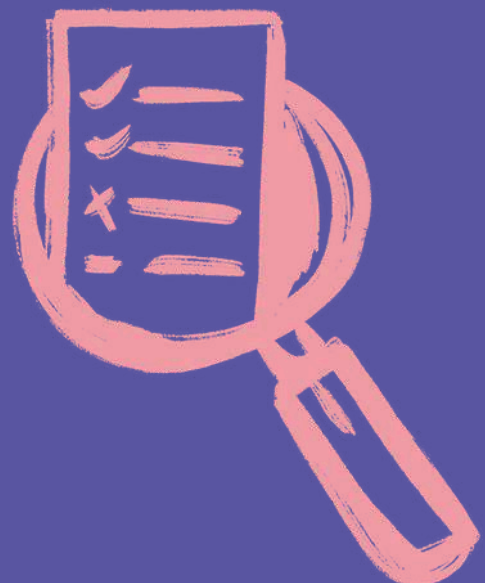
- The director has provided a personal guarantee for company borrowing that is not paid; or
- The director becomes personally bankrupt (which is rare in this context).

For most directors of project companies, corporate insolvency alone does not impact personal credit scores.



Section 6:

Directors' Checklist – Managing Insolvency Risk



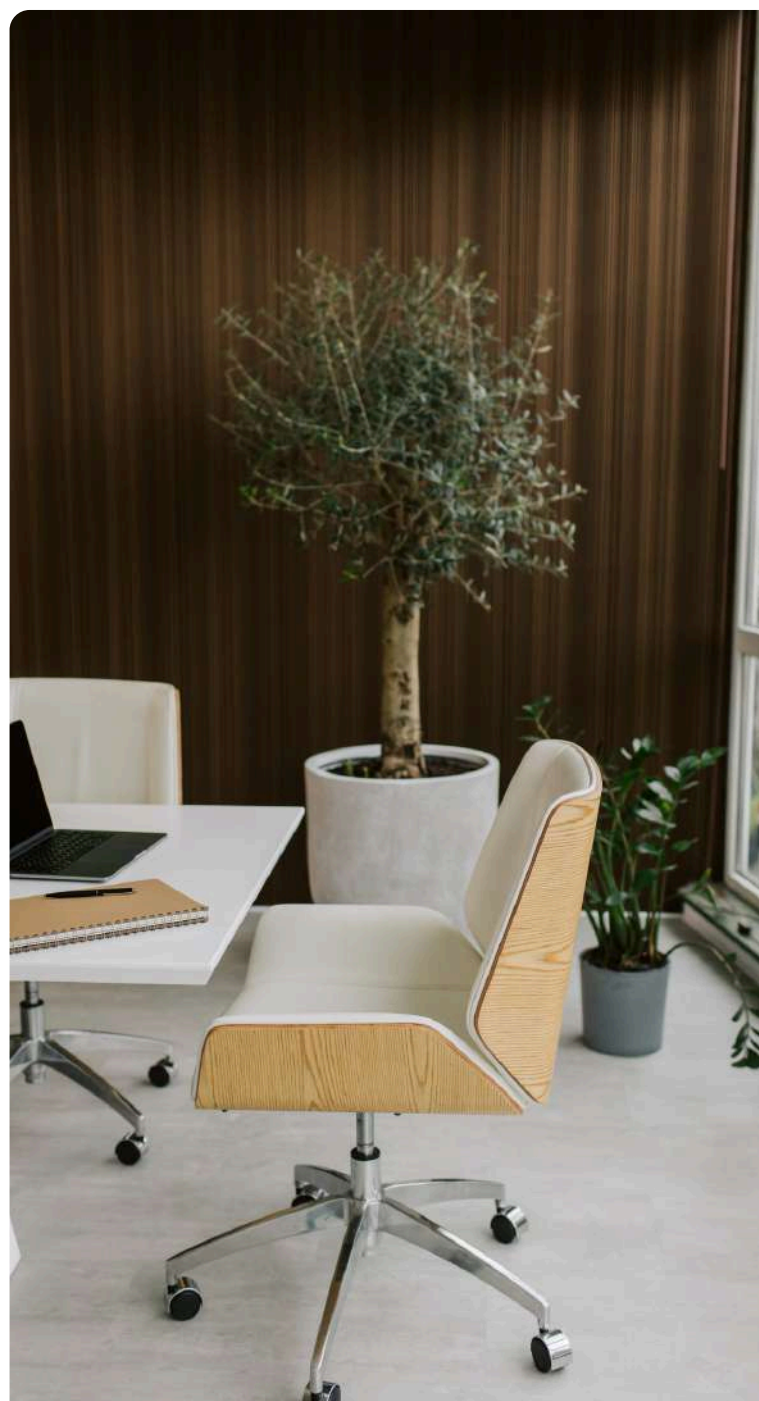


These red flags should be used alongside the checklist to help directors identify when enhanced governance, documentation and professional advice are required.

Common Red Flags

Directors should be alert to situations that may indicate the company is entering the zone of insolvency. When these arise, decisions should be carefully documented, and external advice should be taken where necessary. Common red flags include:

- Pressure from stakeholders – shareholders, lenders, contractors or authorities pushing for urgent action, selective payments, or decisions that favour their position.
- Selective payment requests – pressure to pay particular creditors ahead of others, or to delay payments without a clear rationale.
- Funding requests or shortfalls – unexpected requests for additional shareholder distributions or signs that existing facilities may not cover upcoming liabilities.
- Lender enforcement activity – discussions around step-in rights, reservation of rights letters, covenant breaches, or other indicators of lender concern. This is particularly relevant for highly leveraged PFI companies.
- Termination-related disputes or notices – the issuance of a voluntary termination (VT) notice may itself be an early warning sign, even before any dispute over termination payments arises. Subsequent uncertainty around termination mechanics, timing and recoverability of sums can materially affect cashflow.



Directors' Checklist – Managing Insolvency Risk

Checklist Area	Key Actions
1. Understand the Financial Position	<ul style="list-style-type: none"> • Ensure up-to-date financial information is available. • Review cashflow forecasts and liabilities. • Understand potential termination payments or disputes.
2. Hold Regular Board Meetings	<ul style="list-style-type: none"> • Discuss solvency regularly. • Record decisions and reasoning. • Ensure minutes are detailed. • Keep meeting cadence under review.
3. Consider the Interests of Creditors	<p>Where insolvency risk exists:</p> <ul style="list-style-type: none"> • Avoid actions that worsen creditor losses; • Ensure decisions are taken in the interests of creditors as a whole.
4. Manage Conflicts of Interest	<ul style="list-style-type: none"> • Identify conflicts early. • Declare them to the board. • Consider abstaining from decisions where appropriate.
5. Avoid Risky Transactions	<p>Be cautious about:</p> <ul style="list-style-type: none"> • Paying some creditors ahead of others; • Transferring assets; • Entering new obligations. <p>These actions may later be challenged in an insolvency.</p>
6. Take Professional Advice Early	<p>Directors should consider advice from:</p> <ul style="list-style-type: none"> • legal advisers; • insolvency practitioners. <p>Early advice helps protect directors and stakeholders.</p>

<p>7. Maintain Proper Records</p>	<p>Ensure the company maintains:</p> <ul style="list-style-type: none"> • Financial records; • Board minutes; • Key correspondence; • Contracts. <p>These will be important if an insolvency occurs.</p>
<p>8. Cooperate With Stakeholders</p>	<p>This may include:</p> <ul style="list-style-type: none"> • lenders; • shareholders; • advisers; • the contracting authority. <p>Consider implementing a communications protocol. Transparency supports effective management.</p>

Do I need advice from a legal advisor or an insolvency practitioner?

An insolvency practitioner is a licensed professional who specialises in companies experiencing financial distress. They assess whether a company is insolvent, advise directors on their duties when a business cannot pay its debts, and can run formal procedures such as administration, liquidation, or a company voluntary arrangement (CVA). Their focus is primarily financial and commercial and helps to determine whether the business can be rescued, restructured, or must enter a formal insolvency process.

A legal adviser focuses on the legal side of the situation. They interpret contracts, shareholder agreements, financing documents, and project agreements, and advise on director duties, liabilities, and potential disputes or litigation. In the case of a PFI SPV, lawyers may be needed to analyse complex project agreements, lender rights, or contractual obligations with the public authority or other parties.

In many situations, directors will speak to an insolvency practitioner first, as they can quickly assess the financial position and often provide an initial consultation at little or no cost. If legal issues arise, the IP will usually involve or recommend a specialist lawyer. Starting with an experienced IP can therefore be a practical and sometimes cheaper way to understand the situation before incurring significant legal fees, although complex cases often require input from both professionals.

Directors should:

- Ensure financial information is current;
- Hold regular board meetings to review solvency;
- Obtain appropriate professional advice (legal, financial, insolvency);
- Document the basis for decisions;
- Avoid taking actions that could prejudice creditors.

Early engagement with advisers can help protect directors and maximise outcomes for stakeholders.

Section 7:

Board Minute Aide-Mémoire



Step by Step

1. Purpose of Meeting

Brief description of why the meeting has been called (e.g., review of solvency, consideration of termination notice, discussion of dispute developments).

2. Financial Position

The minutes should record what financial information the board considered. At a minimum, this should include the latest cashflow forecast, key assumptions, and any changes in liabilities or expected receipts (such as termination sums).

The minutes should note whether the company is solvent or insolvent. The board should document why its decisions are reasonable based on information available at the time.

3. Key Issues

Any material issues such as disputes with the authority, contractor claims, lender communications, or termination-related uncertainties should be summarised.

4. Options Considered

Record the different courses of action the board considered (e.g., continuing trading, holding payments, obtaining funding, settlement vs litigation) and note briefly why certain options were rejected.

5. Professional Advice

Minutes should note any legal or insolvency advice received, who provided it, and the core points that were relied upon. If further advice is needed, this should also be captured.

6. Conflicts of Interest

Conflicts declared should be noted together with steps taken to manage them, such as abstaining from decisions or seeking independent input.

7. Decisions

The decision taken should be recorded along with the board's reasoning, particularly how the decision aligns with the interests of creditors if insolvency risk is present

8. Action Points and Further Information

Clearly record the actions agreed, who is responsible for each, and expected timescales. Note any areas where further information or analysis is required, and who is responsible for obtaining it.

9. Next Meeting

The Board should consider the appropriate frequency of meetings given the current position and note reasons.

We hope you have found this PFI/PPP SPV for directors' guide helpful. If you have any further questions or require any Business Recovery & Insolvency support, please don't hesitate to contact us directly.

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