



INSOL
INTERNATIONAL



The psychology of business rescue

Stefan Smyth (Kroll, Cape Town)

1) Do we 'buy in to' the Psychology of BR

- Introductory thoughts

- We have a Q&A session at the end of this lecture so as we go through this Chapter, please write down notes of thoughts, questions, views to the contrary that we can spend some time debating.
- Are you a believer or non-believer – is BR just a process or does the human aspect really matter.
- I will share with you real examples from the Rescues I have run as BRP, those I have been an advisor on and others that I know of. Think of them as;
 - War stories
 - Anecdotes
 - Reference points
 - Food for thought.....but not “rules, certainties or absolutes”

2) “Context” is everything

- Acknowledging that BR is a process, nonetheless we recognise that from a people perspective it is a complex melting pot;
 - Multi-stakeholders (ranging from no BR knowledge to ‘I’ve been there before’)
 - This creates the first indications that no two people are likely to react to business rescue in the same way;
 - Preconceptions and bias (both conscious and unconscious)
 - Humans are more likely to share negative experiences than positive ones
 - What can BRPs do to counter this
 - They can provide ‘context’ to the BR – how to frame that given the company’s circumstances the best process to be in BR is because.....
 - Independent – Framework – Mechanisms – Equality – Transparency

Be careful as BRPs not to oversell or promise what you can’t (or shouldn’t) deliver – manage perception and communicate transparently to mitigate risks

3) The BR Stakeholder landscape

It is diverse, emotional and unpredictable gathering

Firstly, the list below is not exhaustive nor are any of these mutually exclusive - adding to the complexity

- The Board, Executives, Management, Staff and Contractors;
- Creditors and Shareholders;
- Clients and Customers;
- Unions and Bargaining Councils
- Legal Representatives and/or professional advisors (of any of the parties listed here)
- The Business Rescue team and the Business Rescue Practitioner(s)

Let's explore how we think each of these groups and clusters might react to the Business Rescue

4) The BRP – skills, traits & attributes

Statute sets experience/powers but a BRPs characteristics, skills and knowledge make the ultimate difference

The basics - non negotiables

- Independent - a golden thread that must run throughout the Business Rescue
- Technically competent - with high EQ
- Leadership - the BRP has to lead, drive & control the process from day 1 to substantial implementation
- Situational experience
- Convener/Motivator/Negotiator
- Ethical and credible

5) Independence – ‘holding the line’

noun. the state or quality of being independent. freedom from the control, influence, support, aid, or the like, of others.

At 35,000 ft the above definition would seem easy enough for BRPs to comply with but at ground level the test becomes harder;

- For BRPs not to be controlled or sway to being influenced is (relatively speaking) easier than when it comes to ‘support and aid’
 - Take Post Commencement Finance for example, does it come with ‘conditionality and strings’ attached – do they undermine BRP independence
 - Where a trade creditor provides assistance – are they expecting something in return
 - In running a bidding process, does the BRP risk preferring one bidder over another at the point of selection
- It is key for a BRP to explore and test these thresholds regularly – with their team, with their legal advisors and with “their conscience”

6) Setting Boundaries as BRP

“You are in charge – it is a Leadership role through and through”

Let us go back to “context” - Business Rescue is a process, but being a BRP is a leadership position and as with all such roles comes with duties, powers but above all responsibility. Whilst many Business Rescues have a team working with and for the BRP, ultimately final and difficult decisions and strategies are the sole responsibility of the BRP.

I have long believed that ‘servant leadership’ is the leadership trait that does the most-good for the majority - in many ways this is what being a BRP is about - there is an end goal, however with often limited resources and time plus further restrictions both in terms of powers, availability of capital and so the list goes on.

- This is where the psychology of Business Rescue can be a powerful force to harness
- It is important to be able to build trust rapidly but also not to promise what you cannot deliver or know
- With the Executive it is key to rapidly develop allies but set boundaries that will curtail the ‘mavericks’
- There is a place for maverick behaviour in BR but it is often (solely) the domain of the BRP when you just need to get something done where you use your powers or veto to get a particular outcome.

Because of the (sometimes lonely) role of the BRP per the above, my best description of Business Rescue is like my favourite definition of management - ‘the ability to disappoint your staff (stakeholders in BR context) at a rate at which they can accept - this sounds like a negative statement but what I mean in using that analogy is that barring a few Business Rescue unicorns, a Business Rescue’s goal is to avoid a liquidation and value destruction - quite how much you save and for whom is a varied road to be travelled on each matter.

7) Dealing with Boards and Directors

“This follows naturally from the slide before on boundaries and leadership”

The first variable is whether it was a voluntary or Court driven process to file for Business Rescue

1. In a voluntary filing, hopefully you had time to do a 'pre-assessment' meaning you met the Board and were able to begin to establish trust and rapport plus had some insight into the workings of the business and how they operate and act individually ;
2. In a Court driven process, some other 'affected person' decided that the Company was in Financial Distress (a supposedly binary test per the wording of Chapter 6)
 - In the former you will seek to empower the board through delegation of your powers and duties as much or as little as you see fit based on the situation - as with all 'super-powers' this is to be exercise with caution but tends to be progressive as it is easier to extend powers than it is to manage curtailing them;
 - In a Court driven filing, the BRP is foisted on to a board and will have to be much more agile in finding allies and pockets of opportunity where you are aligned to build trust rapidly. The three "C's" of building trust (at speed) are Competence, Character and Consistency

This is a 'shark tank' moment where you will need to evaluate rapidly every new situation, build a game plan dynamically and be prepared to change tack in order to stay ahead of the situation. These moments should convince you beyond any doubt that the Psychology of Business Rescue is a real paradigm where you will be tested and need to use all of your experience, knowledge and powers.

8) Managing stakeholder groups

“The Act refers to Affected Persons” as Employees, Creditors and Shareholders (noting that these are not mutually exclusive)

Noteworthy, the list above is not exhaustive - some additional 'stakeholders' are detailed below - it is important to know (that at the BRPs discretion but without Regulators, sub-contractors;

Creditors Committees - this is an evolving situation whereby in addition to creditors being able (having the right) to form a committee we have seen the advent of a Chairperson of the Committee (not per the Act) but a natural evolution - these forums can be highly emotive but most importantly their powers are only to 'convene' to interact but importantly cannot 'direct' the BRP. From experience this is an area to be managed very carefully and using governance can avoid them becoming distracting and at worst destructive.

This should not be seen as a negative statement around the Committee but more as an opportunity if harnessed and managed carefully, objectively and for BRPs to lead and direct them to provide positive outputs and act as a 'fulcrum' to drive emotions, consultation and objectives aligned to the successful Business Rescue.

Beyond the legislated definition of "affected persons" there are normally a host of other stakeholders to manage and leverage towards the goal of a successful Business Rescue plan to be voted on and implemented (the ultimate goal of Business Rescue)

- Community groups;
- Unions and Bargaining Councils
- Regulators and sub-contractors
- Legal Representatives and/or professional advisors (of any of the Affected Persons listed above)

BRPs will need to be calm and collected in dealing with these forums - they (particularly in the early stages of the BR) have the potential to become a forum where creditors seek to vent on their frustrations of the

9) Corporate Dishonesty

The balance between commercial optimism and self interest

The starting point for guidance in this regard is to caution BRPs not to fall into the trap of judging the Board's or Managements decisions with the benefit of hindsight - this is an unfair threshold and approach - BRPs are advised to note how they feel when creditors criticise their decisions but do not recognise their successes.

That said, the BRP is duty bound to review the conduct and actions of the Company and its Board and Directors - the first such test is typically whether directors filed for Business Rescue based on the Act's definition of Financial Distress (being broadly a test of solvency and liquidity for a forecast 6 month outlook) - very often one will find that directors have continued trading long after this period.

We refer to this colloquially as 'the Twilight' zone and must be somewhat circumspect that any supporting financial forecast can easily be manipulated to either pass or fail that test. The BRP must look back and question how directors navigated this and particularly whether there was individual or collective gain in so doing.

This is often only possible to tell a few months into the Rescue when you see other indications of good or bad fiduciary behaviour or decision making - as both an Advisor to Creditors in Business Rescue and a BRP appointment taker it is good to evaluate this in a balanced fashion and notably about whether harm or detriment was caused or not. The twilight zone referred to is by definition complex - recent discussions around this test for Financial Distress have coined a term of 'Remediable Financial Distress' which at its best can be used to show Directors intentions were based on a genuine belief that the situation could be restored noting that blindly filing for Business Rescue on one version of a forecast of financial distress could be highly value destructive and noting that Rescue can bring about dramatic downturns in liquidity (eg the loss of trade credit terms).

10) In summary – the Psychology of BR

“So what do you think ? Are you a believer ?”

This is in reality, less about being right or wrong, believing in the psychology of BR or not but about being aware and open to the complexities in a Business Rescue resulting from people centric and emotive matters and issues. Summary points are;

- **Context** - be mindful that how BRPs see things may/will differ greatly from the view of others
- **Stakeholders** - are in reality a much wider group than just the obvious Affected Persons and the Company
- **BRP skills & attributes** - commerciality, pragmatism and consultative approaches
- **Independence** of the BRP is sacrosanct but equally objectivity counts heavily
- **Strong leadership and experience** are critical attributes of any BRP (plus access to a network of BRPs)

Questions and Discussion (open session)

“Regardless of your views, please let us not see this as being about “soft skills” – from experience the science of the mind counts heavily and is one of the key determinants of successful Business Rescue outcomes.

The counterfactual observation is that excess ‘emotion’ needs to be managed – for example a fixation of the legal entity living on misses the point, a 40 year old business can be saved in BR by the economic redistribution of assets – BR is not about saving Companies but rather saving Economic Value (especially employment) and in the context of SA Inc. this could not be any more important and of Socio-Economic relevance.