

Unlimited liability - a director's guide

A brief guide to help you navigate some of the hidden pitfalls of trading with the benefit of limited liability.

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Introduction

Most business people will be aware that the decision to become a director of a limited liability company is not to be made lightly. Many will have read one of any number of published guides warning of the responsibilities directors assume as a trade off for the privilege of doing business 'free' from personal liability for business debts. But how many directors recognise the full range of situations in which that privilege can be stripped away following the insolvency of their company for having taken what some might fairly regard as entirely innocent commercial decisions?

The purpose of this guide is not to seek to summarise every area in which a director may incur personal liability for company debts (for which please see first of all our client guide entitled company directors – a guide to their responsibilities), nor is it to alarm the reader into seeking advice before voting at every board meeting. Rather, this guide is intended merely to pass on to our clients some of the benefit of the considerable experience which has built up within our Insolvency and Business Recovery team of dealing with the fallout where a company – often through no particular fault of its directors – runs into financial difficulty. In this way, we hope to help our clients avoid some of the less obvious pitfalls and to identify when professional advice is either necessary or desirable to manage the risks, as well as what sort of advice should be sought.

This guide is not intended to examine the circumstances in which a director consensually assumes a personal liability in respect of the company's affairs, such as when the director gives a personal guarantee or grants security over his assets for the company's debts or liabilities. Instead, this guide is designed to bring to your attention ways in which a director can unwittingly become personally liable by operation of law.

In order to benefit from the protection afforded by a limited liability company the law requires that a director must act responsibly. If a director (or any other person involved in the management of a company) does not, then in certain circumstances a court will examine his/her conduct. It may then order that a personal contribution be made towards the company's debts, that the director be disqualified for a period, or in extreme cases criminal sanctions (including imprisonment and fines).

The principal events and circumstances that trigger liability are outlined in the following sections.

Executive summary

If you read nothing else in this guide, we suggest that you read this!

Do

- Consult the company's board (or, as appropriate, the company's shareholders) before making significant decisions or entering into significant transactions
- Instruct solicitors to advise on and draft documentation for: (i) any loans to or by the company; (ii) the granting of any security over the company; (iii) the terms governing the sale of the company's goods and/or services
- Familiarise yourself with the duties of a director (see our guide entitled 'Company directors – a guide to their responsibilities')
- Seek professional advice if you wish to create a 'phoenix' company with the same or a similar name to your previous company

Don't

- Sell the company's assets for less than market value
- Dispose of any company asset with a view to putting the recipient in a better position than the company's other creditors in the event that the company goes into liquidation
- Continue to trade if there is a risk that the company is insolvent
- Become involved in the management of a limited company if you have been disqualified as a director or have had a bankruptcy order made against you

Above all, do...

...remember that insolvency practitioners and insolvency solicitors are the most qualified people to help you if you suspect that your company is in financial difficulties. These professionals specialise in business recovery and turnaround and the earlier that they are consulted, the more likely it is that your business can be rescued as a going concern and you can avoid becoming personally liable for your company's debts or liabilities.

Transactions prior to insolvency

Personal liability is most often incurred in relation to the trading of a company after the point at which a formal insolvency procedure was, or should have been, invoked. However, individual transactions dating from before this time may also be examined and overturned by a court, if entered into within certain 'prescribed periods' prior to insolvency.

3.1 Transactions at an undervalue

This covers the situation where during the two years prior to the commencement of an administration or liquidation of a company, a director or more than one director cause the company to dispose of company property for considerably less than its true worth. An outright gift will invariably fall under this heading, but less obviously so can any transfer below market value.

In practice it is not difficult to avoid making a transaction at an undervalue. If a significant asset of a company in difficulty is to be transferred, the directors should ensure that (i) they obtain one or more suitable valuations prior to transfer and (ii) that the approved transfer is at market value.

In the event that a qualifying transaction is made, there is a defence of 'good faith'. If it can be shown that a company entered into a transaction in the reasonable belief that it would benefit the company, then that transaction is unlikely to be overturned, and the directors would be unlikely to have to reimburse the company in the event that the property could not be restored. However, actually **proving** after the event that the company held this belief, and that it was a reasonable belief in the circumstances, may require the company to be able to produce at least a corresponding board minute and, ideally, a letter of professional advice (see section seven below).

3.2 Preferences

A preference is deemed to be given where within six months (or sometimes two years) prior to insolvency a creditor, surety or guarantor of a company is paid ahead of others so that they are put in a better position than they would otherwise be upon the insolvent liquidation of the paying company. A director can be held to account for 'preferring' him or herself.

There are various aspects that must be considered in determining whether a transaction was a preference or not, and if it was, whether this will result in liability for debts falling upon one or more directors personally.

It is not always obvious that a particular transaction falls under the above criteria. For example, repaying an unsecured overdraft with the intention of reducing liability under a personal guarantee can be a preference in favour of the person giving the guarantee. This scenario can of course often implicate directors.

There are many pitfalls in this area and again it is best practice to seek professional advice before any potential preference transaction is made (see section seven below).

3.3 Transactions to avoid payment of debts

The courts also have the power to review any transaction involving the company that was designed to defeat the valid claims of company creditors. The company in question need not be insolvent (ie unable to pay its debts as they fall due) for a court application to be made, nor does the transaction complained of need to have happened at a time when the company was insolvent. Moreover, the application can be made by any 'victim' of the transaction, including a creditor.

Before a court makes any order in relation to a transaction designed to avoid the repayment of debts, it must be satisfied that the director(s) on behalf of the company entered into the transaction with the **intention** of putting assets out of the reach of creditors, or of prejudicing creditors generally.

Although this is a much higher standard of proof than for other transactions occurring prior to insolvency, this area of the law can present very real difficulties for companies and their directors. It is therefore good practice to seek professional advice before any substantial asset transaction is entered into, so as to ensure that the transaction has a clear commercial benefit and does not give rise to serious scrutiny (see section seven below).

3.4 Extortionate credit transactions

An extortionate credit transaction is one that is grossly exorbitant or otherwise severely contravenes the principles of everyday fair-dealing. The court may set aside such a transaction on the application of an office-holder (ie liquidator, administrator, etc) following the company's insolvency, if it was made within the three years prior to the onset of insolvency. Whilst this is unlikely to directly result in a personal liability upon a director, it may be very relevant to a director who has lent money to the company, or who has personally guaranteed the company's debts or liabilities.

3.5 Avoidance of floating charges

Where the company has granted a floating charge over company property within 12 months (or sometimes two years) prior to the onset of a company's insolvency, the charge will generally be deemed invalid. There are certain exceptions to this rule, and professional advice taken at the appropriate time can often ensure that the charge does not fall foul of these provisions. Again, whether a secured creditor is deprived of that security can often affect a director/guarantor's position in the event of insolvency.

3.6 Retention of title

Retention of title 'clauses' are commonly used in supply of goods contracts where a seller wishes to retain legal ownership of the goods supplied until full payment is received from the purchaser. In this way, in the event of the purchaser's liquidation, an unpaid seller can attempt to ensure that its losses are minimised.

In practice, however, it can often be profoundly difficult to demonstrate that the retention clause was properly incorporated into the contract and that particular items stored on a purchaser's property are those described under the clause. Experience and best practice suggest that early attendance at the insolvent company's premises to take an inventory of goods held at the

premises can reap dividends. It is therefore essential, so far as possible, to keep up to date with a debtor company's fortunes and precisely what insolvency procedures it faces.

Again, whilst retention of title clauses typically do not impact upon directors' personal liabilities, they do interfere with an office-holder's ability to realise assets and therefore the size of any shortfall to which s/he may ask a director to contribute.

Professional advice in the drafting of contractual documents, maintaining a full paper trail and early communication with office-holders can reduce these difficulties and deflect scrutiny from the directors.

Directors' conduct

Under the Insolvency Act 1986, personal liability can be imposed on directors and other individuals involved in the management of a company (whether or not they are registered as directors) for trading on when the company should have shut up shop. The definition of a director for these purposes is extremely wide, and professional advice should be sought if in any doubt.

4.1 Misfeasance (breach of duty)

'Misfeasance' is a general term used to describe the actions of a director which constitute a breach of fiduciary or other duty to the company. The Companies Act 2006, parts of which have only recently come into force and other parts of which have yet to take effect, contains a list of directors' duties. This list is not intended to be exhaustive and so the duties established over the years by the courts still stand. We strongly recommend that directors read the guide entitled 'Company directors – a guide to their responsibilities', which can be found on our website. This guide attempts to remind directors of their duties under the companies legislation and common law.

If the court determines that a director is in breach of his duty to the company, and that as a result of the breach the company suffered loss, then it may order the repayment or restoration of money or property by the director to the company including interest. An order will only be made following the liquidation of a company, and only upon the application of the official receiver or other liquidator subsequently appointed.

It should be remembered that a director's primary duty in normal circumstances is to his company, for the benefit of the shareholders. However, when a company nears insolvency or becomes insolvent, and thereby risks inflicting losses on its creditors, directors are under an additional duty to have regard to the interests of those creditors.

A director's changing duties – an example

The director of two companies - a parent and its subsidiary, authorised the subsidiary to pay £4,000 (of a total £30,000 owing) to its parent. This payment was made at a time when the subsidiary was insolvent, and as a result caused the subsidiary to enter liquidation. The liquidator sought to recover the £4,000 from the director on the basis that in authorising the payment, he had breached his duty to the creditors of the subsidiary company. This argument was upheld and the director was found to be personally liable for the £4,000.¹

In practice, misfeasance is rarely claimed on its own. More often it is combined with one or more other claims such as preference or transaction at undervalue claims (see above). Misfeasance can catch a wide range of breaches of duty and is a useful tool in an officer-holder's armoury against the directors.

¹ West Mercia Safetywear Ltd –v– Dodd [1988] BCLC 250

4.2 Fraudulent trading

If in the course of a liquidation it is discovered that the business of the company has been carried on with intent to defraud creditors, or for any other fraudulent purpose, the court may order that any director (or other involved person) who was knowingly party to the fraudulent trading should make a contribution to the company's assets. A director may also incur criminal liability for fraudulent trading.

Actions for fraudulent trading are very rare. This is largely due to the requirement that intention to defraud be proved, and therefore fraudulent trading cases are usually only pursued against persons involved in criminal conduct. Liquidators prefer to found claims in 'wrongful trading'.

4.3 Wrongful trading

Directors who have allowed a company to continue trading when they knew or ought to have known that there was no reasonable prospect of the company avoiding insolvent liquidation may be required by the court to pay to the company an amount equivalent to the losses it has suffered as a result of the continued trading. The standard that a director's action will be compared against is that of a reasonable director in the same position. The court will therefore consider the director's own knowledge and skill but will ultimately look at whether the director **ought** to have reached the conclusion that there was no reasonable prospect of avoiding insolvent liquidation, not whether he **actually** came to that view.

Knowledge and skill – an example

A company was refused further supplies by a supplier to which it owed money due to lack of payment. The inexperienced directors were aware of this but did not introduce any financial controls or take any steps to seek professional advice; had they done so it would have shown that liquidation of the company was unavoidable. The directors were held liable for wrongful trading from the date of the credit refusal. The fact that their own standard of knowledge and skill was inadequate was no defence. They had to pay an amount equal to the trade debts incurred from that point, as well as the costs incurred in the liquidation.²

The court is unlikely to make an order against a director if, upon the realisation that the company might be in financial difficulty, he took every reasonable step with a view to minimising the potential loss to the company's creditors. Therefore if he wishes to avoid personal liability, a director who becomes concerned about the financial viability of the company should immediately raise this with all other directors, and insist that the company take professional advice. Further, the company should not be allowed to incur substantial credit pending that advice and the directors should ensure at all times that they act in the best interests of the creditors. Up to date financial information should also be available at all times and there should be regular meetings, with all decisions and the reasons behind them carefully recorded in the board minutes.

It may be that continuing to trade is the best option to minimise potential losses to creditors (for

² DKG Contractors Limited [1990] BCC 903

example if there is potential to sell the company or business as a going concern or there are one or more contracts nearing completion which will result in substantial payment for little further outlay), but this is a course which should only be followed with the benefit of corresponding professional advice.

If the directors conclude that the business cannot continue to trade, they should invoke one of the various insolvency procedures available. Choosing the appropriate procedure is again likely to require professional advice. Over the years there has been a change in the culture of insolvency law. The emphasis is now on rescue and turnaround, which is in the interests of creditors and the company alike. The earlier a formal rescue procedure such as administration is invoked the more likely it is to succeed which in turn minimises the prospect of a director facing personal liability. If in doubt, early professional advice is the best defence.

If a director believes that the company cannot avoid insolvent liquidation but cannot persuade the board to take or follow advice, he is left with no practical option but to resign as a director if he wishes to avoid, or minimise, his personal liability. Legal advice taken in connection with such a resignation can also ensure that the reasons are properly recorded and that the resignation is registered promptly with Companies House. These records will be there for any liquidator to see before he contemplates any action against the individual.

Disqualification of directors

Another potential cause of concern is the ability of the Secretary of State to apply for a disqualification order. If a company goes into administrative receivership, administration or insolvent liquidation, the insolvency practitioner (or, in the case of a company in compulsory liquidation, the official receiver) must file a report with the Department of Trade and Industry on the conduct of the directors.

If this report contains any information which may suggest misconduct on the part of a director, the Department of Trade and Industry may carry out a more detailed investigation. If satisfied that the director knowingly or negligently abused limited liability it may apply to the court for an order disqualifying that person from acting as a company director or being involved in the promotion, formation or management of a company.

Where a court makes a disqualification order it will, for a period of time specified in the order, be unlawful for that person to be involved in the management of any limited company in any way. If a disqualified director ignores this order, they face personal liability for any company debts incurred during the period for which they continue to manage the company whilst disqualified. Similarly, any director or other person involved in the management of the company who acts on the instructions of a disqualified director will also face a personal liability.

In non-criminal cases, orders made against an unfit director of an insolvent company will be for a minimum period of disqualification of two years, and a maximum period of 15 years. The period of disqualification will depend on the seriousness and type of the misconduct.

5.1 Reasons for disqualification: bankruptcy

Directors are frequently adjudged bankrupt based on personal liabilities arising out of the insolvency of a limited company. It is a criminal offence for an undischarged bankrupt to act as a director, or be involved in, the 'promotion, formation or management' of a company, unless the court first gives permission so to act. The same applies to a person with a bankruptcy restriction order (BRO) in force against them following discharge from bankruptcy.

Anyone who is involved with a limited company and who is served with a personal statutory demand or bankruptcy petition should seek immediate legal advice as a matter of course. Advice is particularly vital here because he or she would be committing an offence if they did not resign immediately a bankruptcy order was made, and the individual and the company must consider the implications of that resignation for the survival of the company and (if it fails) further post-bankruptcy liabilities falling on the former director.

5.2 Reasons for disqualification: conviction

If a person is convicted of an indictable offence in connection with the 'promotion, formation, management or liquidation of a company', or with the receivership or management of a company's property, a disqualification order may be made. The maximum period of disqualification is 15 years in the most serious cases.

5.3 Reasons for disqualification: persistent breach of companies legislation

It is also worth noting that a disqualification order can be made as a result of persistent breaches of company legislation, even where a company is not insolvent. The classic example of this is where a director repeatedly fails to file statutory documents on time and is prosecuted by the Registrar of Companies. The Cardiff Magistrates Court will frequently impose a two-year disqualification order for such a failure. For our general comments on breaches of company legislation, see further above.

5.4 Reasons for disqualification: fraud (etc) in a winding-up

If a director deliberately attempts to conceal what has happened during the insolvency of a company, any such fraud or misconduct can be taken into account when determining whether or not he is fit to hold office. It will also affect the length of any resulting disqualification order made.

5.5 Reasons for disqualification: unfitness

Disqualifications under this head are the most common in practice. The basic question asked is whether the 'common standard of commercial morality' has been breached by the actions of the director. This has been held to include failure to keep proper records and accounts, inappropriate remuneration for directors and trading whilst insolvent.

Certain actions may count in a director's favour however, for example if appropriate professional advice was sought and followed prior to insolvency, if personal funds of the director had been committed to the company or if regular budgets were carried out. These factors would go to suggest that a director was attempting to do everything reasonably expected of someone in his position and that therefore he was not unfit to act.

Disqualification for incompetence

The director was the sole director of a company which went into insolvent liquidation. The landlord forfeited the lease of the company's premises for non-payment of rent. The company records had been kept in the basement along with stock and records of other companies. The director claimed he could not get access to the premises but a representative of the liquidator had been allowed to do so. Eventually the landlord threw the records in a skip. The court said that the reason for disqualifying a director was to protect the public from the activities of persons who were either dishonest or naïve or incompetent. In this case they found the director careless to the point of incompetence in the way he dealt with the records and he was disqualified.³

5.6 Disqualification undertakings

As an alternative to facing a court order, a director may offer an undertaking to the Secretary of State. The undertaking states that he will not act as a director of a company, or in any other way (directly or indirectly) be involved in a company's management. Before accepting the

³ R –v– Victory (Kevin) [1999] 2 Cr App R (S) 102

undertaking, the Secretary of State will usually require that the director acknowledge for this purpose that his conduct fell within the relevant category of unfitness. Breach of a disqualification undertaking is for all practical purposes the same as breach of an order.

The practice of disqualification undertakings is still developing, having only begun in its current form in 2001. Directors who take professional advice before giving an undertaking can ensure not only that the period of disqualification is fair, but also that the undertaking cannot later be used inappropriately against the director.

5.7 Personal liability

If an individual acts in a prohibited manner whilst a disqualification order remains effective against him, and/or if another person acts on their instructions with knowledge of the disqualification, then they will be jointly and severally liable for company debts incurred during the period of disqualification.

5.8 Criminal sanction and permission to act

Breach of disqualification is a criminal offence. The offence is one of strict liability (ie the prosecution does not have to prove the defendant intended to do it), and it is punishable by a period of imprisonment of up to two years, a fine or both.

The only way to continue acting as a director without criminal liability following a disqualification order is to act within the confines of a court order giving the individual permission. These court applications are rare and often difficult, but may be the best option if, for example, the individual is the sole director of two companies, one of which fails, and the other desperately needs his or her continuing management in order to survive.

If it allows permission to act, the court will require a raft of safeguards (invariably including the new appointment of a professional director with security of tenure) to ensure that the public is adequately protected from the individual whose conduct merited disqualification. The precise nature of the safeguards will depend on the reasons for the disqualification. Legal advice and input from an accountant will almost always be necessary in order to succeed in an application for permission to act.

Compulsory examination of directors

A director of a limited company has a statutory duty to co-operate with the official receiver and any other insolvency practitioner appointed over the Company. One consequence of this is that where a company is wound-up by court order and a director declines to give every co-operation voluntarily, the official receiver may apply to the court for the public examination of that director and any other person who assumed the functions of director or who was at some point involved in its promotion, formation or management. The court may then determine that the individual should appear at court on a prescribed date and be examined in relation to the insolvency of the company, before a judge. An individual so ordered who fails to attend the hearing will be in contempt of court.

A parallel power exists whereby any office-holder may apply for a **private** examination of any person whom the court thinks capable of giving information concerning the company's affairs or property. Normally the office-holder will first invite the individual to an interview, which may or may not be recorded and may or may not involve legal representation. It will always be best if a director so invited attends that interview to answer questioning rather than wait to be summoned to court and risk having a large costs order laid at his or her door. A person in breach of an order to attend for examination can be arrested under warrant and presented to the court for examination.

Notwithstanding that public and private examinations are compulsory, evidence obtained during the course of an examination or interview can generally be employed, if appropriate, against a director in subsequent proceedings. The human rights implications of this have been examined by the courts, but to date no decision has called these powers into serious doubt.

If there is any question over the extent to which a director should co-operate, or whether he should have legal representation at interview, immediate legal advice should be sought. Sometimes the best way to avoid suspicion of liability will be for the director to offer to attend the insolvency practitioner's offices for interview even without being asked.

Phoenix' companies and similar names

It is an offence for a director or other person involved (during the year before the onset of insolvency) in the management of a company, to become involved in any other company or business carried on under a 'prohibited name' within the five years following the liquidation of the original company. For these purposes a 'prohibited name' is one that the liquidated company was known by during the year prior to liquidation, or any other very similar name that could suggest an association or connection.

The individual may apply to court for permission to use a prohibited name, although such applications are rare. An individual who has not been granted permission by the court will incur personal liability for company debts incurred during any such involvement with the other company. There are other ways in which it may be possible to use a prohibited name, such as the giving of notice of an intention to use a prohibited name, but this is subject to strict statutory guidelines. Our advice to any director wishing to use a prohibited name is to take professional advice at an early stage and before the original company is wound up.

Therefore directors should be careful not to fall foul of this provision and should seek professional advice as to the actions that can and cannot be undertaken following the liquidation of a company with which they were involved. This advice is likely to be necessary where the liquidated company is part of a group of companies carrying similar names. There are various exemptions to the prohibitions and advisors with the right experience can help to ensure that personal liability does not arise.

The role of professional advice

If it does nothing else, we hope this guide illustrates that liabilities falling on directors or others involved in the workings of limited liability companies can be minimised by taking (and following) appropriate advice at the appropriate time. Having decided to take professional advice, what advice should be sought?

8.1 Legal advice

As a rule of thumb, you can always approach a lawyer first. If what you really need is input from an accountant / insolvency practitioner, the lawyer should be able to identify this quickly and, if appropriate, point you in the right direction.

Specialist commercial insolvency lawyers are best placed to support directors and advise them on the best commercial solution. These lawyers are used to working with accountants, insolvency practitioners and other professionals to achieve a desired goal. Legal advice should always be the first port of call where proceedings / notices have been issued / served, or the directors need to understand the implications of a particular document or commercial decision which they are contemplating.

The Insolvency and Business Recovery team (IBRT) at Blake Laphorn has a wealth of experience in this area of work. This experience allows us to match an appropriate team (including, if not already instructed, an insolvency practitioner) to best manage any given situation. This team will be formulated according to our client's needs, whether they be a director, creditor, insolvency practitioner or other individual affected by insolvency, or of course the company itself.

8.2 Accountants / insolvency practitioners

Suitably experienced accountants and qualified insolvency practitioners will be able to take an objective view of a company's finances (often at surprisingly little cost) and provide advice and guidance to the company. A written advice in the company's records dated before the relevant action or decision is taken can be the best defence to future personal liabilities.

Members of Blake Laphorn' Insolvency and Business Recovery team are personally acquainted with most leading insolvency practitioners in the South, in London and beyond. Should you require such services, we would be more than happy to make a recommendation and, if appropriate, effect an introduction to ensure that you have the right legal and financial team on your case.

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For any enquiries concerning either the contents of this guide, or with a view to obtaining further advice, please contact any of the following:

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