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Directors' Duties in the "Zone of Insolvency"

Simon Baskerville

Inga West

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Introduction

Directors need to be mindful of a whole host of laws, regulations and guidance when running UK incorporated companies. These include the terms of the company's constitutional documents (known as "articles of association"), statute law, including the Companies Act 2006 (the "**2006 Act**"), and common law principles (which are principles formulated by the Courts in cases over many years). Companies that are listed on the Official List of the UK Listing Authority, or on AIM (which is the alternative investment market in the UK), are subject to yet more laws and regulations, including: the Listing Rules (for companies listed on the Official List) or the AIM Rules (for companies listed on AIM); the Disclosure and Transparency Rules (in full for listed companies and in part for AIM-listed companies); and the UK Corporate Governance Code (for listed companies but also adhered to voluntarily by some AIM-listed companies). The latter is a code of best practice aimed at facilitating efficient, effective and entrepreneurial management that can deliver shareholder value over the longer term. See the UK chapter for more on all of these.

While a company is trading in the ordinary course, all of these laws and regulations operate to encourage directors to act in the best interests of shareholders. However, this chapter focuses on the duties of directors of companies based in England and Wales when circumstances move outside of the ordinary and the company is in, or is facing, financial difficulties. In these circumstances, there is a significant shift in directors' duties and obligations. It is important that directors are aware of these duties and obligations before the company enters into a formal insolvency process, because:

- their responsibilities are very different from, and (in many ways) more extensive than, those which apply to solvent companies;
- many of them apply when a company is in financial trouble, but before it is insolvent or "unable to pay its debts" in the technical sense;
- directors who have not previously been involved with a company in financial difficulties are likely to be unfamiliar with them; and
- failure to comply with them can lead to personal liability and/or disqualification from acting as a director or being involved in the management of a UK based company going forward.

This chapter will begin by considering the general duties of directors that apply when a company is not in financial difficulties, which are now mostly codified in the 2006 Act. Having set this background, it will then look at the different duties, risks and obligations that directors need to be mindful of when a company is in financial difficulties or (to use a phrase which is commonly adopted to describe this situation) in the "zone of insolvency", including duties to creditors, potential liability for "wrongful trading" and "fraudulent trading" and risks of disqualification as directors. The chapter concludes by suggesting actions that should be taken by directors in order to fulfill their duties and seek to protect themselves from potential liability in these situations.

Directors' Duties – Who do They Apply to?

The duties apply to all directors. Section 250 of the 2006 Act defines a director as "any person occupying the position of a director, by whatever name called". The law imposes duties on all directors, whatever their role and regardless of whether they are executive directors or non-executives. They all owe a duty of care and skill. Many of those duties have been codified by the 2006 Act, but a few remain uncodified as part of the common law. Other statutes and regulations create additional offences (and defences). Some of them impose strict liability.

Codification of Directors' Duties

The seven general duties of directors are codified in sections 171 to 177 of the 2006 Act:

- to act within the powers conferred by the company's constitution;
- to promote the success of the company;
- to exercise independent judgment;
- to exercise reasonable care, skill and diligence;
- to avoid conflicts of interest;
- not to accept benefits from third parties; and
- to declare interests in proposed transactions or arrangements.

The statutory statement of duties does not cover all duties that directors might owe – other duties, such as the important duty to consider creditors' interests in times of threatened insolvency, remain uncodified (see more below).

The codified duties apply to all directors (executive or non-executive), including shadow directors, *de facto* directors and nominee directors. This can sometimes cause difficulties, particularly for shareholder nominee directors, because the likelihood of a conflict arising between the shareholders' requirements and the company's best interests typically increases if the company is facing financial difficulties.

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Directors' Duties in the "Zone of Insolvency"

In normal circumstances, where the company is in good financial health, the 2006 Act provides that the primary duty of directors is to act in a way which would be most likely to promote the success of the company, with reference to the interests of its shareholders as a whole, and having regard to various specified factors (sometimes referred to as "enlightened shareholder values"), including the interests of the company's employees, and the need "to foster the company's business relationships with suppliers, customers and others" (section 172(1) of the 2006 Act). However, this duty is qualified by section 172(3) of the 2006 Act, which makes it subject to "any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company". When a company is insolvent, the directors need to prioritise the interests of the creditors of the company over the interests of its shareholders. This is because, in an insolvency, it is the creditors who have the economic interest in the company, displacing the shareholders in this respect. (***West Mercia Safetywear Ltd (in Liquidation) v Dodd*** [1988] BCLC 250.)

This shift in a director's responsibilities from shareholders to creditors occurs when a company moves into the "zone of insolvency", which is some time before it enters formal insolvency proceedings. This important threshold can, however, be difficult to identify exactly. It is advisable that directors regard the shift as occurring when it appears (or should be apparent to them) that there is, and continues to be, a greater than ordinary business risk of their company failing.

The reference in section 172(3) to "enactment" is a reference to the concepts of wrongful trading and fraudulent trading, pursuant to the provisions of the Insolvency Act 1986 ("**IA 1986**"). When applicable, they qualify a director's duty to promote the success of the company for the benefit of the members, because they impose a heavy duty on the directors to take all steps to minimise the potential loss to creditors or face potential personal liability. Much is made of the personal liability of directors in the event that they continue to permit a company in financial difficulties to trade. However, provided that it can be shown that the director has taken every step which he ought to have taken, with a view to minimising the potential loss to the company's creditors, that personal liability ought not to be triggered.

Questions arise when a company is in trouble as to whether the directors, in considering the interests of creditors, should also continue to have regard to the various "enlightened shareholder values" set out in section 172(1), or whether they are only relevant when the directors are looking to promote the success of the company for the benefit of its members. There has been no guidance on this question to date. Prudence suggests that, whereas priority must be given to the interests of creditors when in the zone of insolvency, to the extent that this duty does not conflict with the enlightened shareholder values, regard should still be given to them.

Directors who sit on the board of more than one group company need to be mindful that their duties are owed to each company individually and not to the group as a whole. Conflicts of interest between group companies are common when in the zone of insolvency where not all group companies' predicament will be the same. Directors need to be particularly aware of the need to put measures in place to ensure they do not place themselves in an unavoidable conflict of interests.

Wrongful Trading (Section 214 IA 1986)

This is probably the most difficult legal problem that a director of a company in financial difficulties might face. Fear of this potential personal liability may lead directors to put a company into formal insolvency proceedings before it becomes strictly necessary.

Wrongful trading liability can only arise if the company goes into insolvent liquidation; however if it does, then liability will be determined based on the directors' conduct in the period leading up to insolvency. For this reason, directors of a company facing financial difficulties need to be mindful of the potential for wrongful trading liability.

The case law relating to wrongful trading demonstrates that the Courts will find directors liable for wrongful trading if "the directors closed their eyes to the reality of the company's position, and carried on trading long after it should have been obvious to them that the company was insolvent and that there was no way out for it" (***Re Continental Assurance Limited*** [2001] BPIR 733). The cases also contain examples of wrongful trading liability arising when directors have caused a company to continue to trade whilst not paying taxes such as VAT and PAYE.

What is the Standard Required of a Director?

The Court will ask the following questions:

(a) during the time that a person was a director, and before the commencement of the winding-up of the company, did he know, or ought he to have known, that there was no reasonable prospect of the company avoiding an insolvent liquidation (section 214(2) IA 1986)? If not, then there is no wrongful trading by that person; and

(b) if yes, following the time he did know (or ought to have known) that there was no reasonable prospect that the company would avoid going into an insolvent liquidation, did he take every step with a view to minimising the potential loss to the company's creditors? If yes, then the Court will not make an order against that person (section 214(3) IA 1986).

Objective and Subjective Tests

Section 214(4) of the IA 1986 states that the facts which a director of a company ought to know or ascertain, the conclusions he ought to reach, and the steps which he ought to take, are those which would have been known, ascertained, reached or taken by a reasonably diligent person having both:

a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company (i.e. an objective test); and

b) the general knowledge, skill and experience that that director has (i.e. a subjective test).

The Court will look at the function carried out by the director in question when deciding these questions.

What Order Can the Court Make?

The Court's discretion in relation to section 214 is very wide. The main consequence of a finding of wrongful trading is that the director may be required to make a personal contribution to the assets of the insolvent company, usually but not always calculated by reference to the amount by which the companies net liabilities have increased as a result of the director's failure to take every step to minimise the loss to creditors. In addition to personal liability, where a director engages in wrongful trading, he may be disqualified from acting as a director or managing a company for a period of between two and 15 years (see below).

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Fraudulent Trading (Section 213 IA 1986)

Under the IA 1986, a liquidator can apply to Court to obtain a contribution from any person (including, but not limited to, a director) who knowingly continues to carry on the company's business with the intention of defrauding creditors with the knowledge that there is no reasonable prospect of the company being able to pay its creditors (fraudulent trading). Fraudulent trading is also a criminal offence pursuant to the 2006 Act.

As fraudulent trading will almost certainly be wrongful trading as well, it is rare that claims will be made for fraudulent trading when a claim for wrongful trading can be made more easily. The primary difference of section 213 is that it can be used against non-directors.

Preferences (Section 239 IA 1986)

Where a company has at a "relevant time" given a preference to a person (being a creditor, surety or guarantor for any of the company's debts or liabilities), a liquidator (or an administrator) may apply to the Court for an order restoring the position to what it would have been had the preference not occurred.

A preference occurs if the company does something to put a surety, creditor or guarantor in a better position than it would have been in the event of the company entering insolvent liquidation. The company must be influenced by a desire to achieve this result (there can be no preference without the desire and, in practice, this is difficult to show).

The transaction must have taken place within six months (or two years in the case of connected persons) before the onset of insolvency, and the company must be insolvent at the time, or become insolvent as a result of the preference. Insolvency for these purposes (and for transactions at an undervalue – see below) means either cashflow insolvency (i.e. illiquidity) or a version of balance sheet insolvency. The desire element is presumed if the preference is given to a connected person.

A typical example of a preference might be where a director has repaid his own director's loan at a time when the company is not paying its other creditors as they fall due.

A director who authorises a preference may be subject to disqualification proceedings under the Company Directors Disqualification Act 1986 ("**CDDA**") and/or may be required to contribute to any shortfall.

Transactions at an Undervalue (Section 238 IA 1986)

A transaction at an undervalue occurs where a company has "at a relevant time" (being two years ending with the "onset of insolvency") made a gift to a person, or entered into a transaction where the company receives no consideration, or the consideration received is significantly less in money or money's worth than the consideration given by the company. A classic example of a transaction at an undervalue would be where a company transfers a property to another group company for less than its full market price, before entering administration or liquidation.

The company must be insolvent at the time, or become insolvent as a result, of the transaction.

The Court may order that the company be put in the position that it would have been in had the transaction not taken place. Often a director will be joined to the proceedings if he or she was guilty of misfeasance in permitting the company to enter into the transaction.

Furthermore, a director who authorises a transaction at an undervalue may be subject to disqualification under the CDDA, in addition to personal liability.

Remedies for Breach of Directors' Duties

If a director is in breach of his fiduciary or statutory duties, this gives rise to a cause of action against him or her which is vested in the company. If the company enters formal insolvency proceedings, the administrator, liquidator or, in some cases, a creditor can bring the action against the defendant director. The proceeds from a successful claim of this sort belong to the company, to be distributed among its creditors in accordance with the statutory regime.

Similarly, a successful action against a director for wrongful or fraudulent trading, or for a preference or a transaction at an undervalue (whether against the directors or against a party to the challenged transaction) results in a contribution to the company's assets rather than compensation payable to an individual creditor.

In summary, therefore, a breach of fiduciary or other duty will not generally, without more, give rise to a direct cause of action by a creditor against the directors for compensation. However, in certain circumstances a creditor can claim directly against a director. One example was where a director misrepresented the company's credit-worthiness to a creditor, inducing the creditor to enter into a contract prior to the company entering insolvency proceedings. These facts gave rise to a successful claim by the creditor directly against the director for deceit (***Contex Drouzhba Limited v Wiseman*** [2007] EWCA Civ 1201).

Disqualification

The CDDA was brought into force in 1986 with a view to raising the standard of director conduct. Pursuant to the CDDA, a director may be disqualified from acting as a director of a company that is established in the UK, whether directly or indirectly, or in any way being concerned, or taking part in, the promotion, formation or management of such a company, unless he has the permission of the Court. Where a person has been a director of a company which has become insolvent (either whilst he was a director or subsequently) and the Court finds that his conduct as a director makes him unfit to be concerned in the management of a company, the Court is obliged to make a disqualification order for between two and 15 years. Disqualification proceedings are the responsibility of the Secretary of State.

A director's conduct will make him or her unfit to be concerned in the management of a company if the Court is satisfied that the director has been guilty of a serious failure, whether deliberately or due to incompetence, to perform his or her duties. The Court will have regard to:

- any misfeasance or breach of duty by the director;
- non-payment of crown debts such as PAYE, National Insurance contributions and VAT;
- the extent of the director's responsibility for the failure by the company to supply goods or services which have been paid for;
- failure to keep proper books of account and/or to make statutory returns;
- misapplication of the company's funds or property;
- trading with a succession of "phoenix" companies and/or using a prohibited name;
- drawing excessive remuneration; and
- the director's responsibility for the company entering into any preferences or transactions at an undervalue.

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The procedure for bringing a disqualification action is time-consuming and expensive. The Secretary of State can, however, accept a disqualification undertaking instead of applying for a disqualification order. A disqualification undertaking will usually be preceded by an agreed statement of facts concerning the director's conduct that has led to the disqualification undertaking. The undertaking must provide that the disqualified director:

- will not be a director of a company, or be in any way concerned or take part in the promotion, formation or management of a company (unless he has the Court's permission); and
- will not act as an insolvency practitioner.

The maximum and minimum periods of a disqualification undertaking are the same as those applicable to disqualification orders. Due to the increased speed and cost efficiency, most disqualifications are today achieved through undertakings rather than orders.

Other Obligations

Section 656 of the 2006 Act provides that directors of public companies should convene a general meeting where the net assets of the company are half or less of its "called-up share capital", within 28 days of one of them becoming aware of the position. A failure to convene such a meeting, where necessary, can leave directors open to a fine.

Although a detailed analysis is outside the scope of this chapter, there are various other obligations relevant to a director of a company in the zone of insolvency, particularly in relation to requirements to make fair and accurate announcements and disclosures to the market that are applicable to directors of listed companies. These include:

- disclosure obligations under the Disclosure and Transparency Rules in relation to inside information which concerns the company, where that information is likely to have a significant effect on the price of its securities;
- disclosure obligations under the Listing Rules concerning the going concern status of their companies; and
- market abuse and misleading statements and practices rules under the Financial Services and Markets Act 2000.

Indemnities and Insurance for Directors

Section 232 of the 2006 Act states that it is not possible to exempt a director from liability for negligence, default, breach of duty or breach of trust. However, it is possible for companies to give directors the benefit of an indemnity against liability that they incur to a person other than the company, or an associated company, so long as it meets the conditions for being a qualifying third party in the indemnity provisions in sections 234 and 235 of the 2006 Act. Broadly, these conditions are that it does not provide any indemnity against fines imposed in criminal proceedings, or by way of regulatory penalties, and also that it does not indemnify the director for any liability where he or she is convicted in criminal proceedings, where judgment is given against him in civil proceedings, or where a Court refuses to grant him relief in certain applications. Companies can, and commonly do, include in their articles of association indemnities for directors to the extent allowed by the 2006 Act, but such an indemnity may be of little value if the company's financial position is such that it is unable to pay.

Shareholders can also ratify conduct by a director by ordinary resolution (unless otherwise stated in the company's articles of association). The votes of the director (if he is also a shareholder) and his connected persons are disregarded in such a resolution.

A company can also purchase directors' and officers' insurance and what liabilities are covered will depend upon the terms of the policy.

Conclusion

It is critical that directors still have regard to corporate governance principles and their duties in times of financial difficulty. Regular board meetings should be held so that commercial decisions are recorded in company minutes. It is also important that directors have up-to-date financial and legal information available to them at board meetings to enable them to make informed decisions. Particular attention should be paid to monitoring compliance with financial covenants in any arrangements with lenders.

In order to satisfy their legal obligations, directors should keep the company's position under constant review when in the zone of insolvency, to ensure that there remains a reasonable prospect of the company avoiding an insolvent liquidation, and that action taken in relation to the company is in the best interests of the creditors. Directors should, therefore, follow the guidelines below:

- hold regular board meetings, as soon as possible, upon becoming aware that the company may be in financial difficulties. Ideally, no other business would be tabled at the meeting, to permit complete focus on the issue of whether the business is viable, and to keep under review the prospect of avoiding insolvent liquidation. Note that for a group of companies, the directors should hold separate board meetings for each affected company, and must be careful only to consider the interests of the relevant company (not its parent or sister companies or the group as whole) at the relevant meeting;
- carefully minute their discussions and conclusions as to why there is a reasonable prospect of the company avoiding an insolvent liquidation and, in particular, as to why the company should continue to trade. The minutes will assist as evidence of whether or not the directors have taken steps to minimise potential loss to creditors for the purpose of avoiding wrongful trading liability;
- hold early discussions with auditors and, in the case of listed companies, sponsors, nominated advisers or brokers as regards potential disclosures;
- make sure that they have available all information necessary to enable them to take an accurate and informed view as to the financial position (including up-to-date cashflows) and prospects of the company. This information should cover not just the immediate future, but also as far into the future as is required to enable an informed assessment of whether or not the company will ultimately survive;
- ensure that there is accurate information as to the make-up of the company's present (and future) creditors;
- ensure that there is a proper distribution of responsibility and delegation within the company;
- keep any new commitments to a minimum and consider ways in which exposure can be reduced;
- take appropriate professional advice on remedial measures, including taking specialist rescue and insolvency advice as soon as practicable;
- consider the position of potential new creditors and whether measures need to be taken to protect them from the company's financial difficulties; and
- consider trading through an administration, or entering some other form of insolvency proceedings.

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