

Directors' liabilities - England & Wales

1. Obligation to file?

- i) Is there an obligation on directors to file for formal insolvency proceedings?

There is no formal statutory obligation on a director of an insolvent company to file for formal insolvency proceedings. However, under section 214 of the Insolvency Act 1986 ('IA 1986) a director of a company that has gone into insolvent liquidation and at some time before the commencement of the winding up of the company, knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation may be made liable to make such a contribution to the company's assets as the court thinks fit. The court will not make such a declaration if it is satisfied that the director in question took every step with a view to minimising the potential loss to the company's creditors. One step further than this, a director may be held liable for fraudulent trading under section 213 of the IA 1986, if it appears he has carried on the business of the company with an intent to defraud its creditors. In addition, a director of a company liable under these sections may be disqualified from acting as a director or being concerned with the management of any company for a period of up to 15 years under the Company Directors Disqualification Act 1986.

1. Who can be held liable?

- i) In addition to directors, which other persons involved in a company's affairs may be held personally liable for their acts, eg, shadow directors, de facto directors, non-executive directors?

Any person who was knowingly a party to the carrying on a business with intent to defraud creditors may be held liable for fraudulent trading under section 213 of the IA 1986. Liability for wrongful trading under section 214 of the IA 1985 is restricted to persons who have been directors and shadow directors of the company. A director includes any person occupying the position of director, by whatever name called. A shadow director, in relation to a company, means a person in accordance with whose directions or instructions the directors of a company are accustomed to act. However, a person is not deemed to be a shadow director by reason only that the directors act on advice given by him in his personal capacity.

2. Sanctions?

- i) What are the possible sanctions/restrictions against directors of insolvent companies?

In addition to the personal liability a director of an insolvent company may face under section 213 and 214 of the IA 1986, a director of a company who is found by the court to be unfit to be concerned in the management of a company which has become insolvent will be disqualified from acting as a director or being concerned with the management of any company for a period of between two and fifteen years.

- ii) Are any of these sanctions/restrictions imposed automatically?

Under section 6 of the Company Directors Disqualification Act 1986 disqualification for a minimum period of two years is mandatory where it is established to the satisfaction of the court that the director is unfit to be concerned in the management of a company.

4. Proceedings against directors?

- i) Who can bring the proceedings against the directors?

Under section 7 of the Company Directors Disqualification Act 1986 the Secretary of State (or the Official Receiver in the case of a company being wound up by the court) may apply to the court to have a director or shadow director of an insolvent company disqualified on the grounds of unfitness. Under the IA 1986 actions against directors personally for fraudulent and wrongful trading may only be brought by the liquidator of the insolvent company. Prior to the IA 1986 an individual creditor or contributory could bring an application for fraudulent trading. However, this was removed as it was thought it may encourage creditors to put improper pressure on directors to settle claims personally.

Marcus Haywood, 3/4 South Square.