

## Directors & Officers Liability – Claims Examples

One of the most complex problems facing business today is the liability of corporate directors and officers. In performing their duties the individual directors and officers face personal and professional risks with every decision they make. These decisions are subject to significant scrutiny from shareholders, financial partners, stakeholders, customers, employees and even their competition. This coupled with the complex web of UK legislation and the ever-increasing burden of European Union directives.

Good corporate governance can mitigate the risks but can never eliminate their potential liability. It must always be remembered that although a company's liability may be limited its directors and officers are not.

It is plain to see that directors and officers have a complex and challenging job. This job has been made even more difficult in the following ways:-

- The range of those falling within the scope of the term directors and officers is widening.
- The continuing legislative environment and the fine tuning of the Companies Act 1989 and other such statutes.
- The development of the 'whistle blower' culture which has been confirmed by the Public Interest Disclosure Act 1999.
- And finally the tendency when financial or physical disaster strikes for the injured parties to seek not only damages but personal scapegoats has grown. Public attitudes continue to harden toward errant individuals.

Even in the face of these grim facts many directors and officers think they will never become target of a claim. With this in mind just look at the following examples:-

### Creditors

- A Company went into liquidation shortly after one of its directors ran up a bill with a vehicle repairer for the cost of repairs carried out to a company vehicle. The cost was incurred on behalf of the company. The vehicle repairer brought an action for the outstanding invoices and there was a suggestion that the director was liable personally in view of the provisions of the Insolvency Act.
- A Director who signed a company cheque whilst the company was in receivership, found that the cheque was dishonoured and he was held personally liable to the payee.
- An affidavit given by a director contained a statement that the company had sufficient resources to meet a solicitors' fee in respect of an action being brought against the company. Before the fee was paid, the company went into liquidation. The solicitors are seeking some £300,000 from the director personally.
- A director made a speech at a conference stating that his company was making a bid for another company and that his company's merchant bankers had disclosed details of the bid to another bidding company. A claim was brought by the bankers refuting that they acted as described.
- A bank has taken action against the directors of a retail company for failure to disclose material facts when they entered into a financing agreement worth £8.5M with the bank. The projected cash flow for the subsidiary showed that the loan was un-sustainable. The bank accused the directors of providing misleading information

### Competitors

- A former director of a company was sued for alleged misappropriation of trade secrets which he obtained from the company.
- A company is suing the directors of one of its competitors for allegedly breaching trade practices.

## Contractors

- Directors of a construction company were successfully sued for losses incurred by an architect who relied on a director's repeated assurances that a contract performance bond had been arranged.

## Customers

- A director who accepted an order at a trade fair but couldn't recollect the details the following morning found himself being sued by his customer for breach of contract.

## Employee

- An action for breach of trust was brought against a director following the release of an employee's medical records.
- A director's service agreement was terminated by his employers (the insured) after alleging sexually harassment. The director successfully sued the company for wrongful dismissal and libel.
- An employee is seeking damages of between £200k and £250k for an alleged error in a notice of termination of service agreement.
- A director found himself defending an action, brought under sex discrimination legislation, following the dismissal of a pregnant employee.

## Government / Regulatory

- A director is being prosecuted in Europe for claiming an export subsidy on meat which was allegedly being exported to South Africa. The meat, in fact, was being exported elsewhere where no subsidy was available.
- The manager of a bank which operated a discretionary currency portfolio started to roll forward unprofitable deals, which, when "closed", lost the bank in excess of £21m. The Bank of England threatened to take away the bank's licence and disciplinary proceedings commenced against the directors. The disciplinary body has the power to debar the directors from holding office within the banking field. Legal costs, estimated to be a six figure sum are being incurred in representing directors before the disciplinary body of the Bank of England.
- The Company Secretary (as licensee) for all the bars owned by a leisure group was prosecuted for short measure being served at one of the bars.
- The directors of a company which failed to comply with the time limit for delivery of accounts to the Registrar of Companies and then did not disclose certain directors' appointments were prosecuted under the Companies Act.
- Directors were prosecuted after their failure to identify the company correctly on the company notepaper and invoices in breach of the Companies Act.
- The chairman of a company was investigated by FIMBRA for employing someone of "dubious character" and then failing to exercise proper control over him. He was acquitted and is now seeking the costs for his defence from FIMBRA.
- The bar staff of a company were allegedly paid without deductions for tax (apparently without the knowledge of the directors). The Inland Revenue are considering bringing proceedings against the directors.

## Liquidators / Receivers

- Two directors of a company which was in liquidation, with a total deficit of £216,000, were held jointly for £75,000 damages (plus interest and costs) arising from wrongful trading whilst the company was insolvent.

## Other Third Parties

- Two directors signed a confidentiality agreement for receipt of papers from a company which was potentially the target of a bid by a third party. The papers were allegedly released and the target company are intimating that the sale price was affected.
- After a disaster at sea a director accused a firm of solicitors of "ambulance chasing" at a press conference. The solicitors brought an action for defamation and defence costs were paid.
- A company which was been the subject of a take-over bid had a disappointing first year's trading. The purchase price for the company contained a performance adjustment clause. However an oversight in drafting the contract meant that price could not be adjusted. The Board sued the solicitors. The solicitors counter claimed against the two directors who had signed the contract.

## Purchasers

- A Manchester based clothing manufacturer sought £12,000,000 in damages against five former directors of a company they purchased in 1994 alleging they were misled as to the value of that company.
- A company has issued proceedings against two of the directors of a company it acquired. It is alleged that the former directors made negligent misstatements and misrepresentations to the purchasers and substantial damages are pleaded as a result.
- Company A invested in company B relying upon a statement of working capital that Company B made to its shareholders. Company B has subsequently gone into liquidation and the shares which cost £175,000 are now worthless. Company A contend that the statement was misleading and have brought an action against B's directors.
- A company's director made financial representations to identified bidders for their company, aware that and intending that bidders would rely on these, as they did. Court of Appeal held that if the representations were proven negligent, the directors (and others) would be liable for the breach of their duty and care. Negligence was never established as the matter was settled out of court. Significant defence costs were however paid on behalf of the directors.

## Shareholders

- Shareholders brought an action for mis-management against the directors of a company which had suffered exceptional losses. The directors were able to successfully defend themselves but sizeable legal costs were incurred.
- Shareholders claimed for losses they incurred due to the premature sale of shares following allegedly misleading statements by the directors.
- Six shareholders claimed misrepresentation by the directors of a company regarding the state of affairs of a subsidiary and the support the company would receive from its bank. The shareholders claimed that their preference shares could not be redeemed as a result.
- A Company breached its articles of association by payment of dividends out of capital opening itself up to potential claims from shareholders