

Directors owe a range of duties to investors

The fight for business has never been tougher, and with the economy finally on the mend, now is the time to remind directors of their responsibilities, says **Jonathan Silverman**



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As the economy hopefully turns the corner and businesses put on turnover, the strain on working capital increases and the chances of business going bust from overtrading emerges. When combined with the chance that the bank may decide to call in facilities in the belief that at long last there will be a buyer for the business, directors need to remain vigilant.

As a result, now is the time to remind company directors of their potential exposure, and the following may be a useful check list.

Under the Companies Act 2006, directors must comply with the general duties set under the Act (s.170-177). Although directors may delegate certain tasks and duties, they retain overall responsibility.

Consequently, if directors breach their responsibilities, companies will have a claim

against them under statute; moreover, shareholders can bring a derivative action seeking relief on behalf of the company (s.260), so it's no longer just a question of keeping creditors at bay.

Civil and criminal liability

Do not overlook the common law duties principally, which are: to act *bona fide* in the interests of the company; to act for proper purposes; not to misapply company property and to account for a secret profit.

It's also worth reminding clients of potential civil and criminal liability, in order for them not to 'step over the line'. Offences include fraud, insider dealing, money laundering, market abuse, wrongful and fraudulent doings and bribery offences.

When advising, remember to check whether the company's articles or any shareholders' agreement set out additional duties or potential liability on directors.

Misleading statements

Directors of quoted companies have a responsibility for the listing prospectus and may be liable to compensate an investor for misleading or inaccurate statements, (see s.90 FSMA). As well, they need to keep in mind the relevant listing rules and corporate governance obligations, for instance, FRC UK Corporate Governance Code and the Transparency Directive.

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Where a company fails, much will depend upon how the directors acted at the time: did they take every reasonable step with a view to minimising the potential loss to the company's creditors?

Insolvency practitioners are obliged to investigate the conduct of the directors and submit a report as to conduct and whether further action should be taken. They may seek to bring an action against a particular director, if they have available funds, alternatively there can be the risk of disqualification proceedings.

The most common problem arises if a company continues to trade while unable to pay its debts as they fall due.

One aspect often overlooked is that while shareholders generally have no right to claim against a director, they can bring a derivative claim on behalf of the company, as mentioned above. Also, watch out for exposure of 'shadow directors' and 'de facto directors' (see s.250 CA 2006).

After a number of years when it has been difficult for companies to obtain business, it's crucial to emphasise to clients that now is not the time to be reckless in gaining turnover at any cost. **SJ**



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