

Directors' Duties post COVID-19

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- Looking at developments during the period of the pandemic and the post-COVID future, including:
 - noteworthy cases;
 - impact of legislation changes; and
 - possible issues going forward

Noteworthy cases

Re System Building Services Group Ltd [2020] BCC 345

- Claim against a director arising, inter alia, from a purchase by him from the company's then liquidator at an undervalue and payments made from the company's bank account after it had entered administration
- The director remained a director notwithstanding the administration and then liquidation of the company (see paras 61 & 64 of Sch B1 IA1986 and s103 IA1986)
- However, these provisions (and s114 IA1986) prevent a director from exercising any management power within an administration and have the effect of all powers ceasing upon liquidation
- As such, the director asserted that his duties (as per ss170 to 177 CA2006) also ceased

Re System Building Services Group Ltd [2020] BCC 345

- The director suggested that once the company enters administration or liquidation, the duties of the director pre-formal insolvency remain only in respect of the exercise of any powers by a director *qua director*
- The Court rejected this assertion as follows:
 - ss170-177 of CA2006 are “general duties” of a director and extend beyond merely the exercise of a power *qua director*
 - simply being a director triggers the duties
 - s170(2) extends duties to after the director ceases to be a director and therefore extends the scope to beyond simply the exercise of a power by a director
 - CA2006 expressly confirms where given provisions are not to apply post-liquidation (e.g. s193)
 - ss170-177 are based on common law duties and need to be interpreted in that context
 - the specific duties imposed by IA1986 do not extinguish the fundamental duties under CA2006

Re System Building Services Group Ltd [2020] BCC 345

- whilst there is little case law or commentary on the duties of directors post-liquidation, that does not lead to the conclusion that the CA2006 duties cease upon liquidation (or administration)

Re JD Group Ltd [2022] EWHC 202 (Ch)

- Claim against a director in respect of the companies part in a MTIC fraud. The claim was advanced pursuant to ss212 and 213 IA1986
- Useful reminder of the tests to be applied in cases of fraudulent trading (which are relatively rare):
 - twofold test for dishonesty
 - knowledge includes blind eye knowledge
 - tribunal needs to determine the defendant's actual state of knowledge and whether their conduct was honest or dishonest applying the objective standards of ordinary, decent people
- To be guilty of fraudulent trading, the director must be shown to have known of the fraud (not necessarily every detail or the precise mechanics). Untargeted, speculative suspicion will not be sufficient

Re JD Group Ltd [2022] EWHC 202 (Ch)

- Case law (**Natwest v Bilta [2021] EWCA Civ 680**) supports the principle that a party down the chain may be liable for dishonest assistance and fraudulent trading when the making of payments passed down the chain to facilitate the non payment of VAT by the defaulter
- As the director was well aware that the necessary due diligence was not being carried out, he was guilty of fraudulent trading and breach of duty

Manolete Partners plc v Nag [2022] EWHC 153 (Ch)

- Claim against a director for misapplying the proceeds of sale of the company's business and against the director's wife for dishonest assistance and knowing receipt
- Useful reminder of the tests for dishonest assistance and knowing receipt, particularly in cases of a spouse who relies on trust in their spouse and signing documents without knowing what they were
- Dishonest assistance requires:
 - a trust;
 - a breach of trust by the director;
 - assistance by the spouse;
 - spouse "*not acting as an honest person would*";
 - two-stage test for dishonesty

Manolete Partners plc v Nag [2022] EWHC 153 (Ch)

- In spouse cases, there is a difference between having a high level of trust in your spouse and simply doing whatever he/she says regardless of whether it is right or wrong
- As for knowing receipt, what is required to be established is:
 - a disposal of the company's property;
 - received by the defendant (legally or beneficially); and
 - knowledge by the recipient that the property belonged to the company. As to this limb, the question is whether a reasonable person would have appreciated the transfer was probably in breach of trust or would have made enquiries or sought advice which would have revealed the probability of the breach of trust

Re Keeping Kids Company [2021] EWHC 175 (Ch) & Re Umbrella Care Ltd [2022] EWHC 86 (Ch)

- These two cases provide an up to date definition of “de facto” directors
- In **Re Keeping Kids Company**, the Court emphasised that there is no single test
- The starting point is the corporate governance of the company and the court’s role is to identify functions that were the sole responsibility of a director and who carried out or discharged those functions
- If there were multiple directors, a de facto director will be on an equal footing with the de jure directors and not simply a consultant or adviser, or exercising influence in a different capacity (such as a shareholder)

Re Keeping Kids Company [2021] EWHC 175 (Ch) & Re Umbrella Care Ltd [2022] EWHC 86 (Ch)

- The summary of applicable points as identified by Arden LJ in **Smithton Ltd v Nagggar [2015] 1 WLR 189** at [34] to [45] remain informative
- A focus on corporate governance will, however, be far less relevant in cases where the company is run on an informal basis

Legislation change:
Wrongful trading

- Section 12 of **Corporate Insolvency and Governance Act 2020** suspended wrongful trading claims against directors
- It did so by providing that for a certain period(s), the court is to assume that the director is not responsible for any worsening of the financial position of the company
- The period was initially 1 March 2020 to 30 September 2020. By Reg 2 of the **Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of Relevant Period) Regulations 2020**, responsibility for a worsening position as also excluded for the period 26 November 2020 to 30 June 2021
- Slightly oddly, this leaves a hiatus of 1 October 2020 to 25 November 2020

- It is not, however, a complete answer to claims against directors:
 - certain finance sector companies are not included;
 - it does not offer complete protection in respect of companies already struggling prior to 1 March 2020;
 - doesn't cover fraudulent trading;
 - doesn't provide a defence to s212 IA1986 claims.
- As for s212 claims, the actions of continuing to trade and prolonging the life of the company beyond that which it should have been could form a proper claim of breach of duty (see **Re E D Games Ltd** [2009] EWHC 223 (Ch))
- However, there are obvious risks in pursuing such a claim.
- Firstly, **E D Games** was a strike out/summary judgment application and, as such, the burden of proof was a relatively low one for the liquidator to overcome.
- Secondly, the Court expressed some doubt as to the likely success at trial

- Thirdly, there is no reported case applying **E D Games**
- Fourthly, the Courts may well be sympathetic to directors who are accused of causing losses to a company by trading during a period when Parliament passed legislation to suspend liability for wrongful trading

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Issues going
forward

Claims against directors?

- Fraudulently obtained BBILS or CBILS
 - Government has already started to decline to honour guarantees
 - Lenders may have claims against directors under the tort of deceit
 - For deceit, the Court needs to be satisfied that:
 - the director made a representation which was false
 - the director knew that the representation was made and that it was untrue, or was reckless as to its truth or falsity
 - the director intended that the representation would induce the lender to act or refrain from acting
 - the lender was in fact induced by the representation to act or refrain from acting
 - the claimant thereby suffered loss
- There is no requirement for a pre-existing legal relationship or a duty of care

Claims against directors?

- Failing to manage climate risk?
- Shell shareholder ClientEarth has indicated an intention to bring claims against Shell's directors
 - basis is failing to manage climate risk or properly prepare the company for the transition to net zero in line with the Paris Agreement
 - ClientEarth alleges that Shell's physical assets "*are heavily exposed to extreme weather events and the wider economic impacts of climate breakdown*" and that as the net-zero transition progresses, Shell is facing "*potentially massive limitations on its operations*"
 - proposed derivative claim is to be brought for breach of duties under ss172-174 CA2006
 - s172(1)(d) requires a director to have regard to "*...the impact of the company's operations on the community and the environment*"

Questions?



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