**Directors have duty to their company not themselves**

I have previously talked about wrongful trading which comes about when the directors should have known better than to just let the business carry on getting worse and do nothing about it or even worse - fraudulent trading, when they have carried on a business with the specific intent of defrauding creditors. In both cases the directors are at risk of being held personally liable for the debts.

As insolvency practitioners (“IPs”) dealing with a liquidation or administration we have a duty to investigate what happened before our appointment and if any misconduct comes to light we may have to bring about claims against the directors personally and report them to the Insolvency Service which could warrant a disqualification for up to 15 years from acting as a directors. In serious cases of fraud if found guilty they could be imprisoned for up to 10 years.

There is a little known sweep up claim called misfeasance which applies when an officer of a company has ‘misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of fiduciary or any other duty in relation to the company’.

Basically this means they have not behaved as they should have done. This can be quite wide ranging but usually applies when a theft has been committed or company assets have been kept for personal gain.

Misfeasance claims in liquidations typically range from directors who hiked up their salaries to beyond what was a fair salary for their services to cases we have seen where the director has built their own personal house using materials and labour paid for by the company.

**Who is at risk of such claims and what happens?**

Any employee or manager can be at risk of such claims being brought against them but more often than not the key culprits are the company’s Directors.

Claims can also be brought about against a Liquidator or Administrative Receiver of a company but the less said about that the better!

Misfeasance can only be brought in certain situations and where a company has entered a formal liquidation. A claim can be made by the Official Receiver, a liquidator, a creditor or a shareholder.

**What will the Claimant need to prove to bring about a successful claim?**

The liquidator will need to prove to the Court’s satisfaction that the director has misapplied funds/property and/or breached their fiduciary duties.

Misfeasance is an easier claim to make than Fraudulent or Wrongful Trading referred to above because there is not such a large burden of proof and the liquidator does not need to prove insolvency.

**What are the Consequences?**

If misfeasance can be proven the claimant (usually the liquidator) will apply to Court for an order that either:

* The defendant repay, restore or account for the money, or property, or any part of it together with interest at such rate the Court sees fit; or
* The defendant contributes such sum to the company’s assets by way of compensation.

In addition per above it will lead to a negative report being filed by the liquidator with the Insolvency Service who may be likely to disqualify the directors from acting for any company in the future.

As previously mentioned one of the best defences for directors is if they took professional advice and acted upon it.

Misfeasance actions are relatively few and far between but if in doubt seek advice from a firm of Licensed Insolvency Practitioners like us or talk to your solicitor or accountant.