

WHAT ARE THE RISKS FOR DIRECTORS IN AN INSOLVENT COMPANY?

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Fortune Law



The past few years have been a rough ride for many small businesses as consumption and credit have dried up and many have gone under as a result. If your company is on the verge of insolvency, what are the risks for you as a Director?

FRAUDULENT TRADING

This is when business is carried on with the intent to defraud creditors, or for any other fraudulent purpose.

If it appears to a liquidator, in the course of the winding up of a company, that fraudulent trading has taken place, it can apply for a court declaration ordering anyone who was knowingly party to the fraudulent business, including the Directors, to make a contribution to the company's assets.

There is a requirement of "actual dishonesty, involving... real moral blame" (**Re Patrick and Lyon Ltd [1933]** Ch 786).

Fraudulent trading is also a criminal offence and can result in a person's disqualification as a Director.

WRONGFUL TRADING

This occurs when a company has gone into insolvent liquidation and at some point before the commencement of its winding up, a Director knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into such insolvent liquidation.

A liquidator may apply to the court for an order that the Director make a contribution to the assets of a company, but only if the company is worse off as a result of the continuation of trading. The application must be sanctioned by the company's creditors, the court or the liquidation committee. It is a defence that the Director took every step he ought to have taken with a view to minimising the potential loss to the company's creditors.

There is no requirement of dishonesty and wrongful trading is not a criminal offence. It is, however, grounds for disqualification as a Director.

MISFEASANCE OR BREACH OF FIDUCIARY DUTY

If, during a winding up, it appears that a Director (or any officer or person who has been concerned, or has taken part, in the promotion, formation or management) 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 any fiduciary or other duty, the court may order the Director to repay, restore or account for money or property with interest or contribute such sum to the

company's assets by way of compensation as the court thinks just. The application may be made by the Official Receiver, liquidator or any creditor.

The above are the main risks for Directors in a struggling company, although there are a number of other fraud and misconduct offences, common law duties and public company matters which may need to be considered. You may also have given a personal guarantee under which creditors can pursue you.



If you would like further information on your duties and as a Director, please call us on 0207 440 2540 or email us at enquiries@fortunelaw.com.

- See more at: <http://www.fortunelaw.com/newsletter/what-are-the-risks-for-directors-in-an-insolvent-company/41#sthash.qBttCoaU.dpuf>