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## S O L I C I T O R S

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### Legal Actions Brought By Insolvency Practitioners Against Directors And Shareholders

Insolvency Practitioners (IP's) now have more ability than ever to launch legal actions against directors and shareholders of failed, insolvent companies, often using insurance backed products, that give the IP the comfort of knowing that even if there is no money in the insolvent company, he can still launch a legal action against a director or shareholder, safe in the knowledge that even if the IP loses in the legal proceedings, the insurance product will pay any legal costs that might be ordered by the Court to be paid by him to his opponent Director/ Shareholder. That is a powerful weapon for the IP.

In the context of corporate failures, actions will most commonly be brought against directors and shareholders (to include de facto and shadow directors) alleging, for example:

- That shareholders received an illegal or improper dividend in the period before oldco went into formal Insolvency, and seeking repayment of it.
- That the director/s traded the company on for too long (i.e. beyond that point when they knew or ought to have known of its inevitable failure) and thus wrongfully or fraudulently traded the business of the company.
- That the directors made payments to themselves or their Associates which Preferred their position over that of other creditors.
- That the directors sold or otherwise dealt with oldco's assets, in the lead up to liquidation/administration, at an Undervalue or as a transaction to defraud creditors.
- That the director's conduct in some other way was improper so as to attract a claim for Miffeasance against the director.

#### **Impact Of Such Proceedings By Ip's:**

Apart from the time and worry caused by those proceedings, there is the obvious threat to the director's personal asset base, most commonly his interest in his matrimonial home, if the Liquidator's action were to succeed.

Any litigation is expensive, in terms of time and money, to defend or prosecute. IP's, before bringing such actions, will inevitably do their homework and investigate the likely extent of the personal asset base of the target director or shareholder.

## How Should The Director Or Shareholder React To Such Threats?

- The director should respond as soon as possible, in writing. Such proceedings by the IP will usually be preceded by a letter threatening proceedings from the IP's solicitors. It needs to be responded to, in writing, as fully as possible and where appropriate, needs to be followed up by a meeting with the IP and his solicitor. The letter to the IP should aim to identify areas of weaknesses in the Liquidator's identified case, most commonly by reliance on a combination of matters of fact and law, supported where possible by Company and other relevant documents.
- If the IP is pursuing (or proposing to pursue) the litigation with insurance backed funding, then he will be duty bound to bring to the attention of the insurer any representations made by the director which might cause the IP/insurer to think again about the likely success of such proceedings and, therefore, whether they should, in fact, be pursued.

### Security For Costs:

If the IP threatens to bring proceedings, in the name of the company, then the director needs to be sure that if the IP loses, he will be in a position to pay the legal costs of the director/ shareholder if ordered to do so by the Court. A request that the office holder (who will bring the proceedings on behalf of oldco) pay a sum for costs into Court by way of security is, therefore, often appropriate.

The Court will usually only order security to be paid for costs by an IP if the director can (for example) show that he has an arguable defence to the IP's case. The letter to the IP, referred to above, will therefore serve the purpose of setting out the grounds of that opposition at the earliest stage.

### What If The Director/Shareholder Has No Real Defence To Some Or All Of The Liquidator's Claim?

It is often the case that the director/shareholder has no defence to some or all of the claim. The well advised director/shareholder will, where appropriate, explain to the Liquidator/his solicitors, that he has other creditors so that even if the IP succeeds in his action, then there may be insufficient funds to pay the IP's claim in any event. Many a threatened action by an IP is settled once the IP has been told that the director's available capital and assets, that might otherwise satisfy any judgment that could be obtained, will instead be used to fund the legal defence of the claim against him.

### Summary Of Position:

The threat of such proceedings needs to be nipped in the bud. From the director's perspective, such proceedings are time consuming, expensive and have an uncertain outcome.

The above is intended only to give a flavour of how to deal with such claims. Specific advice needs to be obtained in relation to each case. The team of **NDP** is well placed to give that advice.