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

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### Director Disqualification – Inevitable Isn't It?

#### A Case Study:

The business of the director failed up to two years ago. The director has since then sorted out his personal guarantee obligations to oldco's bankers and possibly, guarantees that he may have given to one or two key suppliers to oldco.

The director has begun trading again, through another limited company, with some success. He may well have bought back the business and assets from oldco, from its Office Holding Insolvency Practitioner, (the Office Holder).

Newco trades with Debentures in place, to secure the director's investment, and newco has adequate funding. All is apparently going well. He now trades with the benefit of sound accountancy and legal advice.

However..... a letter from the Insolvency Service/its solicitors, lands on the director's doormat. It threatens the commencement of director disqualification proceedings against the director under (most commonly) Section 6 of the Company Director Disqualification Act 1986 (the CDDA), for a period of between 2-15 years.

The letter alleges that the director's conduct makes him "unfit" to be a director (within the meaning of section 6) because he has, most commonly said to have, engaged in one or more of the following types of conduct (the list below is not exhaustive).

- Trading to the detriment of the Crown (by running up unpaid Crown debt in oldco) or of creditors generally.
- Failing to mention, preserve or deliver up for oldco, to the Office Holder adequate or proper books and records for oldco, with the consequences that are said to flow from that. Such a failure, if established, can also lead to **criminal** proceedings against the director.
- Preferring the position of some creditors over others, in the lead up to liquidation.
- Setting up Newco in anticipation of the failure of oldco, to the detriment of oldco's position at Liquidation.
- Acting in breach of one or more of the myriad of duties said to be owed to the Company by the director.
- Acting in the management of a company in breach of the terms of an earlier disqualification order.

## Consequences Of Disqualification Action:

These include:

- The director's time is heavily committed to dealing with the proposed disqualification claim. He is thus distracted from the business of Newco to the detriment of Newco. The very threat of disqualification proceedings stops the director from giving his undivided attention to Newco and from planning properly or effectively.
- If disqualified, whether by agreement or Court Order, the director cannot into the future, act as a director or be involved in the management (which term is defined very wisely) of a business, for the period of the disqualification. To so act may be a criminal offence, which on conviction can attract a fine and/or imprisonment.
- Adverse publicity. The Insolvency Service will likely issue a press release to a newspaper circulating in the client's locality, giving details of the disqualification and the reasons for it. That may cause embarrassment and possibly a loss of confidence in the director, in the eyes of bankers, suppliers, customers and contacts.
- Expense. Instructing solicitors to advise on such investigations and proceedings can be very expensive.

## What Should The Well Advised Director Do?

- The incoming letter will invite the director to make written representations, within a short defined period, as to why he should not be made the subject of a disqualification action. The director should seize the opportunity and make those written representations.
- The incoming letter may offer to provide the director with a draft copy of the evidence that is to be relied upon against him. In any event, the well advised director will apply for and obtain that draft evidence and other key documents, before he responds to the Insolvency Service.
- The well advised director will support his written representations with as much documentary evidence as possible, at this early point. That may include company documents or written statements from third parties, such as the company accountant, the company solicitor or employees or customers. The nature and extent of the supporting evidence will very much depend on the allegations that are made in each case.
- The director will define his objectives, in relation to the claim, at this early point. They are likely to include:

- o Defending the proceedings to a conclusion;

**OR**

- o Making written representations to persuade the Insolvency Service to abandon the threat of proceedings. The Insolvency

Service will abandon proceedings/ threaten proceedings if compelling evidence can be put forward on behalf of the director as to why proceedings should not be commenced;

*OR*

- Accepting a period of disqualification, albeit one that is possibly lower than that sought by the Insolvency Service, whether or not combined with an application to Court for permission to continue acting as a director, under section 17 CDDA.
- Limiting the amount of legal costs that are going to be incurred.
- If immediate compromise is decided upon, then the director will need to enter into a suitably worded **Disqualification Undertaking**.

**Summary:**

Disqualification is not inevitable. Disqualification proceedings are brought in the public interest. In bringing proceedings, the Insolvency Service knows only one side of the story; the Director must take the opportunity to put over his side of the story as early as possible. A key objective of the director must be to make the right written and oral representations, supported by the right evidence, at the right time, to achieve the objectives identified. The team at **NDP** is well placed to provide that advice.