

## **DIRECTORS' PERSONAL LIABILITY**

How many times do you worry about liability as a director and whether this can attack you personally?

How many different situations might arise legally which might involve personal liability as a director?

The answer may disturb or worry but the important thing is to be aware of the risks and to offset those risks as far as possible.

1. Bank Guarantee
2. Wrongful trading
3. Fraudulent trading
4. Tort of deceit
5. Phoenix companies
6. Misfeasance

Are any of these relevant to you?

### **Personal Guarantee**

This is the easy one and you should remember if you have signed a guarantee in favour of a bank.

Most frequently these are used to support overdraft and other banking facilities made available to companies and are normally given by one or two of the directors.

Top tip! Watch out for the cap or ceiling on these guarantees as invariably this cap or ceiling is exclusive i.e. it will be exclusive of bank charges, interest and legal fees. If for example the cap is £25,000.00, in the event of the company not making payments to the bank and the bank then knocks on your door under the guarantee, the total amount due may well be substantially more by several thousands of pounds than the cap.

Top tip number 2 – Stay in control and hands on as a director. If you are not hands on and in control, then you should not be a director.

### **Wrongful Trading**

In a nutshell this is designed to protect creditors and appears to be a horrendously complicated test requiring directors to have hindsight in advance! If a company goes into insolvent liquidation, the liquidator may well ask questions in terms of exposure of creditors beyond a certain level and whether that exposure came about in a situation that should involve personal liability.

The law will change in the near future on this but it is important to be aware of the risks and to plan to avoid them.

Top tip number 3 – Prevention is always better than cure – make sure that you think things through carefully before increasing bank facilities and if in doubt tell banks more not less.

### **Fraudulent Trading**

This is self-explanatory and involves a situation where fraud is involved.

Under these circumstances a director will not be able to hide behind a company and avoid personal liability.

### **Phoenix Companies**

This is designed to protect the public against a director of a recently liquidated company, setting up a company with a similar name of which he or she is also a director. Under certain circumstances personal liability may apply.

Top tip number 4 – If you have it in mind to carry on in business after a business failure, please seek advice sooner rather than later to avoid any difficulties in this area. There are plenty of mines in the minefield; it is good sense to have a map!

## **Misfeasance**

This is surprisingly misunderstood and generally not well known as an area of potential difficulty for most directors.

There is a risk of a misfeasance summons in pretty much any arena, where a director's conduct may be called into question.

## **Deceit**

A recent case shows that this is an area to be taken seriously.

The case involved an over enthusiastic assurance to a supplier concerning the financial position of the company.

Top tip number 5 – Do take care when making comments or assurances which are intended to be relied on. Please don't fall into the e-mail trap i.e. assuming that because e-mail is "chatty" and informal, it cannot bite and involve liability – indeed it can.

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