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A WARNING FOR ALL DIRECTORS OF RESURRECTED COMPANIES

The practice of resurrecting a company from the ashes of an insolvent liquidation which then trades on, run by the same people, is known as "phoenixism." The insolvent company's business transfers to the "new" company but not its debts, much to the understandable chagrin of the creditors left behind in the liquidated entity.

S216 Insolvency Act 1986 is intended to counter one of the unfair advantages of phoenixism by forbidding the use, in certain circumstances, of a "prohibited name." A prohibited name is one that the liquidated company was known by, or one *"which is so similar…as to suggest an association with that company"* at any time in the 12 months ending with the day before the insolvent company's entry into liquidation. Directors or shadow directors of such companies must not, for five years, starting from the day of the commencement of the insolvent liquidation, be a director or be concerned in the promotion formation or management, or "*in any way...be "concerned or take part"* in any company using a prohibited name. This applies, to an existing company as well as a "new" company.

The penalties which attach to an individual in breach of s216 are severe. Under s217, personal liability attaches jointly and severally with the new company for all of its debts incurred during the period of the breach. It is also a criminal offence to breach s216, punishable by a fine, or prison, or both.

Permission to use a prohibited name may be granted by the Court. Such a name can also be allowed where a company has traded continuously for at least 12 months prior to the liquidation or where there has been a substantial purchase of liquidated assets from the liquidator and notices given to creditors.

PSV 1982 Limited v Langdon [2022] EWCA Civ 1319 is an interesting judgment, albeit on preliminary matters, as it widens the ambit to include all directors or shadow directors who breach s216, not just those named in proceedings. Mr Langdon was a director and shareholder of Discovery Yachts Group Limited ("DYGL") which began using a prohibited name in October 2017. In January 2018 DYGL breached a contract. Proceedings were issued, but prior to trial DYGL entered administration. Damages were awarded for £1,125,824. PSV were assigned the award for damages and sought to recover from Mr Langdon under s217. The Court held the following:

1. Directors facing proceedings under s217 cannot contest the result of proceedings already brought against a company under s217.

2. A company entering a contract when not using a prohibited name will be liable under s217 if a breach occurs when the prohibited name is subsequently used.

3. Creditors, or the director themselves, may apply for the director to be joined in proceedings.

4. If there is any risk of injustice *"Parliament intended the risk to lie with the director rather than the creditor."*

Editor's Note

This preliminary judgment will be of great interest to office-holders and their insurers, widening the scope for recoveries without the risk or expense of further litigation. Hard on the heels of *Sequana* this is another decision which strengthens the position of creditors.

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