Schedule 1 is split into: Part I, matters applicable in all cases; and Part II, matters applicable where the company has become insolvent. This is to take care of disqualification after inspection (see below) where the company need not be insolvent.

There are no provisions relating to personal liability for the debts of the company.

The case law indicates that unfitness has become divided into three main areas, i.e. (1) commercial immorality; (2) recklessness in management; and (3) gross incompetence.

Disqualification following Secretary of State investigation (s 8)

If it appears to the Secretary of State: (a) from a report made by inspectors under s 437 of the Companies Act 1985 (provision for inspectors to make interim and final reports) or (b) from information or documents obtained under s 447 (power to require production of documents) or s 448 (regarding entry and search of premises) of the 1985 Act that (c) it is in the public interest that a disqualification order should be made against a person who is or has been a director or shadow director of any company, then (d) the Secretary of State may apply to the court for such an order. *The company need not be insolvent*. The court must be satisfied that the particular director's conduct makes him unfit to manage a company and Sch 1 applies.

There is no minimum period of disqualification. The maximum is 15 years. There are no provisions in s 8 relating to personal liability of directors.

Disqualification: some illustrative case law

The following cases in which the courts have interpreted the various sections of the Company Directors Disqualification Act 1986 are included in order to enable the student to give examples of the application of the Act in the business context.

Nationality, residence and domicile

The High Court decided in ***Re Seagull Manufacturing Co (No 2)*** [1994] 2 All ER 767 that a disqualification order may be made against a director regardless of his or her nationality and current residence and domicile. Furthermore, the conduct leading to the disqualification need not have occurred within the jurisdiction. In other words, you can run an English company badly from abroad. The director concerned was a British subject but at all material times he was resident and domiciled in the Channel Islands. Nevertheless, he could be disqualified under s 6 for unfitness. The relevant legislation contained no express jurisdiction requirement or territorial distinction.

Director/secretaries

The High Court also decided in ***Re Pamstock Ltd*** [1994] 1 BCLC 716 that a director who was also the secretary of the company could be disqualified as much for failure to perform his duties as secretary as those of a director. The company had two directors and one was also the company secretary. It traded beyond the point at which it should have ceased to do so and went into insolvent liquidation. The judge said that as the company secretary one of the directors had failed to ensure that accounts and returns were filed on time and that an adequate system of management was put in place. These were serious defaults which must be taken into account when dealing with the period of disqualification. This implies that it was the director's failure to carry out his duties as a secretary that was at the root of his disqualification for two years. There is, of course, no power to disqualify a company secretary from acting as such.

Inactive directors

It is also worth noting that it is not a defence to an application for a disqualification order that the director concerned was not an active participant in the business of the company. Thus, in ***Re Park House Properties Ltd*** [1997] 2 BCLC 530 the High Court disqualified three directors as unfit by reason of irresponsible trading leading to insolvency even though they were inactive in the running of the business. The company was run by a husband but his wife, son and daughter were also directors and shareholders but played no part in the running of the business and did not receive a salary or fees. Having disqualified the husband for four years, Neuberger J disqualified the other three directors for two years in each case, saying that a director has legal duties and could not escape liability by saying that he or she knew nothing about what was going on.

Conduct in collateral companies

The Court of Appeal has decided that in order to satisfy the requirements of s 6(1)(b) of the Company Directors Disqualification Act 1986 the director concerned must be a director of the lead company which must be insolvent. However, his conduct in relation to other companies of which he is or has been a director may be taken into account. This conduct does not have to be the same or similar to that in regard to the lead company, and the collateral companies do not have to be insolvent, although the lead company must be. See ***Secretary of State for Trade and Industry*** v ***Ivens*** [1997] BCLC 334.

Failure to keep proper accounting records and improper retention of monies due to the Inland Revenue, Customs and Excise and National Insurance contributions

The following case covers the above points and others and to that extent is probably one of the most seminal cases on disqualification for unfitness.

Re Firedart Ltd, Official Receiver* v *Fairall [1994] 2 BCLC 340

Mr Alan John Fairall was a director of Firedart which was an advertising agency. It began trading in 1984 and went into insolvent liquidation in 1988. The Official Receiver as liquidator applied to the court under s 6 of the Company Directors Disqualification Act 1986 (Unfit Directors) for Mr Fairall to be disqualified as a director. The main allegations against Mr Fairall were:

- failure to maintain accounting records as required by ss 386 and 387 of the Companies Act 2006 (formerly CA 1985, ss 221 *et seq.*);
- trading through the company while it was insolvent;
- the receipt of remuneration and benefits in kind which exceeded the level which the company could be expected to bear; and
- improper retention of monies due to the Inland Revenue, Customs and Excise and what is now the Contributions Agency (NIC contributions).

In disqualifying Mr Fairall for six years, Mrs Justice Arden stated how essential it was for officers of a company to ensure that proper accounting records are maintained. She said:

> When directors do not maintain accounting records in accordance with the very specific requirements of s 221 of the Companies Act 1985 they cannot know their company's financial position with accuracy. There is, therefore, a risk that the situation is much worse than they know and that creditors will suffer in consequence. Directors who permit this situation to arise must expect the conclusion to be

> drawn in an appropriate case that they are in consequence not fit to be concerned in the management of a company.

Also raised was the responsibility for maintenance of accounting records. On this the judge said:

> Mr Fairall states that the company's accountants maintained its accounting records from 31 January 1987. The accountants however say that they were not responsible for writing up the books prior to August 1987. However that may be I accept the submission on behalf of the Official Receiver that it was Mr Fairall who was responsible for providing information to the accountants to enable the accounting records to be maintained accurately and up to date. I further find that he did not provide all the necessary information and explanations, that there is no excuse for his failure to do so and that therefore he is responsible for the deficiencies in the accounting records even after the firm of accountants had been instructed to carry out the bookkeeping function for the company. According to Terence Anthony Price, a partner in or proprietor of Firedart's accountants, the flow of information from Mr Fairall was 'spasmodic' and Mr Fairall was always too busy to provide any necessary explanations. I accept this evidence.

Comment

(i) It is of interest that the court affirmed that it is the duty of the directors to keep and supply accounting information and that the duty cannot be avoided merely by employing accountants.

(ii) The necessity for directors to make use of and understand the company's accounts was also stressed in ***Re Continental Assurance Co of London plc*** [1996] 28 LS Gaz 29. The High Court disqualified a corporate financier from acting as a director for three years because in his role as a non-executive director he failed to read the company's accounts (which he would have understood) and so did not discover illegal loans made to acquire the company's own shares constituting illegal financial assistance contrary to s 151 of the Companies Act 1985 (now CA 2006, s 678).

(iii) The disqualification regime is important to lawyers and accountants engaged in insolvency practice. For those in business as directors the cases represent a 'warning order' as to what to avoid to prevent disqualification. For professionals in general and audit practice they are less important in that they will normally have resigned some time before insolvency proceedings take place. A wise professional will not stay long with a board that fails to keep accounting records and file accounts!

Pleas in mitigation

As regards pleas in mitigation by directors in connection with disqualification case law indicates that the following might be successful:

- reliance on professional directors; thus where a board contains say a qualified accountant the others being business amateurs, the court may excuse them while disqualifying the accountant though the court will not in any case excuse sheer incompetence;
- the effect on employees may be relevant in the sense that it will be difficult to run the company if the director is disqualified so that jobs may be lost.

Directors' undertakings not to act

It was held by the High Court in ***Re Blackspur Group plc*** [1997] 1 WLR 710 that an undertaking by a director not to act as such or in the management of a company was not acceptable to the court except possibly in exceptional circumstances. The court, therefore, would not prevent the Secretary of State from proceeding with an application for disqualification merely because the director concerned had given such an undertaking. A statutory amendment would be required to allow the court to accept such an undertaking on a general basis. However, the

High Court did say that it would be desirable to amend the relevant legislation in order to give an undertaking the same status and effect as an order under the 1986 Act. In ***Secretary of State for Trade and Industry* v *Cleland*** [1997] 1 BCLC 437 the High Court did grant a stay of disqualification proceedings in return for an undertaking from a director that he would not work as a director in the future. There were special circumstances in that the director was 60 years of age and in poor health. Additionally, the Secretary of State's action was out of time and the BIS were asking for an extension of time. The action failed.

The Insolvency Act 2000

The relevant legislation was amended by s 6 of the Insolvency Act 2000. This allows the Secretary of State for Trade and Industry to accept from a director he considers unfit a consent to a period of disqualification without the need for court involvement. The director's undertaking suffices. The relevant periods of disqualification are as for those in court proceedings. The director concerned may subsequently apply to the court to vary the undertaking he has given. The Secretary of State is entitled to make acceptance of the undertaking conditional on there being a statement giving the basis on which the director admits he is unfit to be concerned in the management of a company (***In re Blackspur Group plc (No 3)*** (2001) *The Times*, 5 July). The reasons for unsuitability will normally emanate from the insolvency practitioner concerned who has recommended the disqualification.

The decision in ***Re Blackspur Group plc***, 1997 (above) is largely overtaken by the Act of 2000, as is ***Cleland*** since the normal procedure now would be to give an undertaking to the Secretary of State not the court. The material is retained as explanatory of the use of Insolvency Act 2000 procedure.

Disqualification and personal liability

Disqualification and personal liability for fraudulent and wrongful trading (s 10)

The court may disqualify a director who has participated in fraudulent trading under s 213 of the Insolvency Act 1986 (IA 1986), or wrongful trading under s 214, IA 1986. There is no minimum period, the maximum being 15 years.

Fraudulent trading

The crime of fraudulent trading in s 993, CA 2006 is now separated from the personal liability section, which is in s 213, IA 1986. Criminal liability can arise whether the company is in liquidation or not. Civil liability arises only if the company is wound up.

In the case of fraudulent trading and wrongful trading (see below) only the liquidator may apply to the court for a declaration of civil liability, but all persons, knowingly parties (including the directors), may have civil liability under s 213, IA 1986: for example, a creditor or accountant or auditor of the company may be held liable if he has participated. Only directors and shadow directors are liable under s 214, IA 1986 for wrongful trading. There is thus no danger of auditors, bankers or other advisers who are merely mounting a rescue campaign for the company becoming involved under s 214, IA 1986 unless they participate in

management more than is necessary to carry out their functions, when they might be regarded as shadow directors.

Since it is necessary to prove fraud under s 213, IA 1986, which is not an easy matter, whereas only proof of negligence is required under s 214, IA 1986, it would appear that s 214, which sets out the requirements for wrongful trading, will clearly become the main section for directors' personal liability.

There is no need for participation in the company's management or business. Liability for fraudulent trading and to contribute to the company's assets may be incurred by a creditor who accepts payment of his debt out of money that he knows has been obtained by the fraud of the directors (see ***Morris* v *Banque Arabe et Inter-nationale D'Investissement SA (No 2)*** (2000) *The Times*, 26 October).

It is important to note that s 213, IA 1986 requires that the business has been carried on to defraud *creditors*. The fact that only one creditor has been defrauded does not satisfy the definition of fraudulent trading ruled the Court of Appeal in ***Morphites* v *Bernasconi*** [2003] 2 BCLC 53. In that case it was only the company's landlord that was defrauded in regard to payment of rent.

Wrongful trading generally

Section 214, IA 1986 sets out the requirements for wrongful trading. They are: (a) that the company has gone into insolvent liquidation; (b) that at some time before the commencement of the winding-up the person concerned knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation; and (c) that the person concerned was a director or shadow director of the company at that time. The court cannot make a declaration of civil liability where the time mentioned in (b) above was before 28 April 1986.

If the requirements, (a) to (c) above, are satisfied the court may, on the application of the liquidator, declare the person concerned liable to make such contribution (if any) to the company's assets as the court thinks proper (see below).

The court will not make a declaration if satisfied that the person concerned took every step that he ought to have taken, with a view to minimising the potential loss to the creditors.

The section is concerned with liability for negligence and the court is required to take into account not only the director's own knowledge, skill and experience, but also the skill and experience that can be expected from a reasonably diligent director. The test is objective and not subjective. Thus, a director may be liable even if he does his best if he falls below the standard of the reasonably diligent director. The court will have to consider current practice.

In Re Produce Marketing Consortium Ltd [1989] 3 All ER I

The liquidator of Produce Marketing had asked the court for an order that Eric Peter David and Ronald William Murphy, who were directors of the company, should contribute to the company assets in his hands.

This followed a finding by the court that the two directors concerned were liable for wrongful trading on the basis that they had pressed on with their insolvent company's business in the unrealistic – but not fraudulent or dishonest – hope that it would eventually trade out of its difficulties.

Mr Justice Knox said the fact that wrongful trading was not based on fraud was not a reason for giving a nominal or low figure of contribution. Having taken into account all the surrounding circumstances – that the case was one of failure to appreciate what should have been clear rather

than a dishonest course of wrongdoing, that there had been occasions when positive untruths were told, that a solemn warning from the company's auditors in February 1987 that it was insolvent was ignored – a contribution of £75,000 plus interest was an appropriate contribution for the directors to make. Mr David and Mr Murphy were jointly and severally liable for the payment of this sum and, in addition, they were liable for the costs of the case.

Comment

(i) This was the first case to deal with compensation to the company for wrongful trading. It was a significant breakthrough for creditors, since the assets available to them in the winding-up may be considerably increased by a personal contribution from directors if, of course, they can pay it. It does give a warning order to directors to take professional advice at the earliest possible date, since this could be much cheaper than having to face the possibility of making contributions of considerable amounts to the company's assets in the event of a winding-up.

(ii) In an earlier decision, ***Halls* v *David and Another*** (1989) *The Times*, 18 February, the court had decided that its power to forgive directors who had acted honestly and reasonably (see Chapter 17) was not available in regard to wrongful trading.

The amount payable

In cases of wrongful trading the court may declare that the director(s) concerned should make a personal contribution to the company's assets if the liquidator of the company makes an application. The amount of the contribution depends on the facts in each particular case and the court is given a wide discretion. However, the general approach is that the directors' personal contributions should be the amount by which the company's assets have been depleted by their conduct. As we have seen, the court can also make a disqualification order. *However, if the court does not make a declaration regarding personal liability, it cannot make a disqualification order*.

Time limits

Section 214 does not straightforwardly contain any time limit on the liquidator's ability to bring such proceedings. The Court of Appeal has decided that it is six years from the cause of action, i.e. the time at which the relevant ingredients of wrongful trading could have been established on the basis of the evidence.

Moore* v *Gadd [1997] 8 LSG 27

The liquidators of Farmizer (Products) Ltd brought proceedings under s 214 of the Insolvency Act 1986 against Mr Richard Gadd and Mrs Ada Gadd, the directors of the company, for a declaration that they knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation and that they should make a contribution to the assets of the company. The proceedings were brought more than six years after the cause of action, i.e. the time when the relevant ingredients of wrongful trading could have been established on the basis of the evidence. Counsel for the liquidators contended that the section did carry a limitation period and, indeed, it does contain almost at the beginning, the phrase 'if in the course of winding-up'. Therefore, it was contended that so long as the company was in the course of winding-up, which it was, the liquidators could ask the court for the declaration. The Court of Appeal did not accept this contention on the basis that limitation periods are normally specific and the expression 'in the course of winding-up' was markedly dissimilar to any other prescribed period of limitation. The Court of Appeal went on to conclude that s 214 proceedings were

proceedings for the recovery of a sum of money which the court declared the delinquent director(s) liable to contribute to the assets of the company. This fell within s 9(1) of the Limitation Act 1980 which applies to proceedings to 'recover any sum recoverable by virtue of any enactment' (in this case the Insolvency Act 1986). The six-year limitation provision of s 9(1) of the 1980 Act applied and therefore the liquidators' proceedings was struck out as time barred.

Comment

It should be noted that this case has no effect on the absence of time limits in cases of disqualification for unfitness already considered.

The 'every step' defence

Directors may have a defence against personal liability for wrongful trading if they can show that they took 'every step' that a reasonably diligent person would have taken to minimise the potential loss to creditors, once they knew (or ought to have known) that the company was unlikely to avoid going into insolvent liquidation. If the directors can establish such a defence, the court cannot make an order against them.

It may be difficult to satisfy the court that a particular director took 'every step' or even most of the steps and the court will have to take a view of conduct in all the circumstances of the case. Taking every step may well involve immediate cessation of trading or, if the business can be sold, it could mean the appointment of an administrator who will keep the company going until it is sold. Certainly directors of companies which are in danger of insolvent liquidation should take competent professional advice at the earliest possible opportunity.

Abilities of a director

As we have seen, wrongful trading is concerned with liability for negligent mismanagement, not dishonesty, though a dishonest person will, in most, if not every, case have been guilty also of negligent mismanagement. The court has to assess what steps a director took (or ought to have taken) when considering whether to apply the relief from liability. The court must take into account the director's conduct by the standard of a reasonably diligent person who has the following abilities.

(a) General ability, i.e. the general knowledge, skill and experience that can reasonably be expected of a person carrying out the same functions as the director. This is the lowest standard allowed. Nevertheless, general incompetence will not be sanctioned. Thus directors may be liable even if they have done their best if their best was not good enough for the office they held. Furthermore, it is no defence for directors to say that in fact they did not carry out any functions such as attending board meetings because they will be judged by the functions of the office with which they have been entrusted. The general knowledge, skill and experience to be expected for a director of a small company with limited operations will be less than for the directors of bigger and more sophisticated organisations, although the courts have already decided that there are basic minimum standards to be applied to everyone.

(b) Actual ability, i.e. the standard of a reasonably diligent person with the general knowledge, skill and experience that the director actually has. In this case the actual ability of the director will be assessed. This introduces a higher standard for talented and professionally qualified or experienced directors. However, the reverse will not apply and directors with less than average ability will be judged by the general standard even if they are personally below it.

In summary, talented directors are judged by their own standards while incompetent directors are judged by the standard of reasonably competent directors. The court will consider current standards of business practice.

Wrongful trading: profitable but undercapitalised companies

When discussing the matter of a director's knowledge at a particular time of the company's insolvency and yet continuing to trade it is important to note the decision of the Court of Appeal in ***Secretary of State for Trade and Industry* v *Creegan*** [2002] 1 BCLC 99. It deals essentially with what is meant by insolvency for this purpose. There are two forms of insolvency. One is balance sheet insolvency, i.e. the company's liabilities exceed its assets. The second is cash flow insolvency, i.e. where the company does not have sufficient funds coming in to pay its creditors as they fall due. The Court of Appeal made clear in the above case that both tests of insolvency must be satisfied and the director must know or ought to know that these tests are not satisfied and yet continue to trade. Therefore, a company that is undercapitalised but has at the particular time no cash flow problem can continue trading without the directors being under threat of wrongful trading proceedings even though the situation may not be desirable in general business terms.

Action by directors

There are several actions which directors can take to avoid disqualification and personal liability if an insolvency were to ensue:

(a) Make sure that the board has up-to-date and adequate financial information. A mitigating factor for the court in deciding whether to disqualify directors or find them personally liable is whether the board has considered regular budgets and whether forecasts were produced carefully, even if they turned out to be inaccurate.
(b) Seek professional accounting advice if there are any doubts about the financial position of the company. If things have gone too far, an insolvency practitioner should be asked to give advice on alternative insolvency procedures. If there is still hope for the company, an administration order might be the solution so that ultimately there may be no need for liquidation. The most common applicants for administration orders are directors who hope that the appointment of an administrator may save their companies.
(c) Early warnings from the company's auditors must be heeded. Directors have generally found greater difficulty when asking the court for relief if they have not acted upon warnings from the company's auditors about the financial state of the company.
(d) Any difficulties should be discussed fully at frequent board meetings and the board should try to act unanimously. If one or two directors wish to stop trading but are overruled by the majority who wish to carry on, then the majority may have difficulty later on in justifying their decision to continue trading.
(e) The proceedings of board meetings should be minuted properly. Although board minutes are not normally conclusive, they can be good evidence that a board exercised its functions properly.
(f) Resignation from the board is not usually an adequate response to a problem within the company because a director must take 'every step' to protect creditors. A director who feels, however, that the rest of the board is inadvisedly but implacably determined to continue trading in spite of insolvency or impending insolvency might usefully write to

the board giving his view. If this produces no change and he resigns, the court might well accept that resignation was the only course open to him. However, the High Court has decided that a director of an insolvent company whose recommendations regarding necessary economies had been disregarded by the controlling directors was not necessarily to be treated as unfit to be concerned in the management of a company under s 6(1)(b) of the Company Directors Disqualification Act 1986 simply because he failed to resign from the board.

Re a Company (No 004803 of 1996) (1996) *The Times*, 2 December

Mr Taylor was employed as a bookkeeper of a company at an annual salary of £8,000 and was also a director and 10 per cent shareholder of the company. As a result of a letter from the company's bankers in October 1991, Mr Taylor had made recommendations to the company for specific economies which would have given it a reasonable chance of trading out of its difficulties. However, the other directors had refused to implement these recommendations. In September 1993 the company went into voluntary liquidation with a deficiency in excess of £100,000. The Secretary of State had argued that Mr Taylor ought to have resigned his directorship by the end of 1992 and, in failing to do so, he should be treated as unfit to be concerned in the management of a company under s 6(1)(b) of the Company Directors Disqualification Act 1986. The district judge did not agree, though he thought that perhaps Mr Taylor would have been wiser to resign since by continuing to act as a director of an insolvent company he had exposed himself to potential liability under s 214 of the Insolvency Act 1986 (wrongful trading). However, Mr Justice Chadwick said that the district judge, against whose decision the BIS appealed, had properly considered the question of Mr Taylor's personal responsibility. He had seen and heard both Mr Taylor and the company's auditor. A director who protested against further trading, because he thought that there was no reasonable prospect of avoiding insolvency, was entitled to remain on the board using his influence to try to bring trading to an end. It was necessary to consider the purpose of a director remaining in that capacity. If it could be shown that the only reason why he remained a director was to draw his fee or preserve his status, then a court might think he lacked an appreciation of a director's duties and was unfit to be concerned in a company's management. In this case the district judge in the lower court had not found Mr Taylor lacking in this way and therefore the original decision was upheld. Mr Taylor was not disqualified.

(g) The court is bound to look more favourably on directors who have acted honestly and have not tried to benefit themselves at the expense of creditors. The court is also likely to take into account the willingness of directors to make a financial commitment to the company. The court will also consider relevant personal circumstances, such as matrimonial difficulties or more general factors such as recession.

Creditors

If a company becomes insolvent these days, its creditors have a better chance than ever of gaining access to the private assets of the directors in order to increase the amount which they are likely to receive. At the various creditors' meetings, which must be held in insolvent liquidation, creditors can impress upon the liquidator their wish to pursue the recovery of money from the directors personally. Any cash received will be available for distribution to the creditors and improve their position in terms of the dividend which the liquidator can pay.

Disqualification in other capacities (s 1)

It is worth noting that the Company Directors Disqualification Act 1986 provides that when making a disqualification order the court can disqualify a person not only from acting as a director but also from acting as a liquidator or administrator of a company, or from acting as administrative receiver, or from being concerned in any way directly or indirectly in the promotion, formation or management of a company. The legislation could, therefore, bear very hard on accountant/directors who could be disqualified not only from membership of the board but also from certain of their professional activities.

In this connection the Insolvency Act 2000 amended s 1 of the CDDA 1986 by providing that an individual who is the subject of a disqualification order or undertaking cannot obtain leave of the court to act as an insolvency practitioner. He may ask the court for leave to act as a director.

Competition violation: disqualification of directors

The Enterprise Act 2002 applies and inserts new provisions into s 9 of the CDDA 1986. A competition violation involves engaging in conduct that infringes any of the following:

- Chapter I of the Competition Act 1998 (agreements preventing, restricting or distorting competition, e.g. restricting retail outlets for goods);
- Chapter II of the 1998 Act (abuse of a dominant position, e.g. monopoly trading); and
- Articles 81 and 82 of the EC Treaty that carry similar prohibitions.
- The Office of Fair Trading makes application to the court for a disqualification order.

Register of disqualification orders

This register is kept by the Registrar of Companies. The public can inspect the register and see the names of those currently disqualified from acting as directors. Obviously, the name is removed at the end of the period of disqualification.

Personal liability only

Acting while disqualified or a bankrupt

By reason of s 15 a person who is disqualified and/or an undischarged bankrupt who becomes involved in the management of a company is jointly and severally liable with the company and any other person who is liable for the company's debts under s 15 or under some other section for such debts and other liabilities of the company as are incurred while the person concerned was involved in management.

In order to prevent disqualified persons and undischarged bankrupts from running a company through nominee managers, s 15 provides that anyone who acts or is willing to act (without leave from the court) on instructions given by a person whom he knows, at the time of acting or being willing to act, to be in either or both of the above categories, is also jointly and severally liable for debts and other liabilities incurred while he was acting or willing to act.

The phoenix syndrome (IA 1986, s 216)

The purpose of this section is to prevent a practice under which company directors may contrive to mislead the public by utilising a company name which is the same as or similar to one of a failed company of which they also were directors in order to conduct a virtually identical business.

The provisions used to prevent this forbid a director or shadow director of the failed company from being a director or shadow director of a company with the same or similar name and business to the failed company for five years. If they infringe the above rules, they commit a criminal offence and under s 217 of the IA 1986 are personally liable jointly and severally for the debts of the second company during the period for which they managed it. If they manage through nominees who are aware of the circumstances, the nominees are also jointly and severally liable with the directors and shadow directors.

The court can, as in ***Penrose*** v ***Official Receiver*** [1996] 2 All ER 96, give exemption from the above requirements and the business and its name can be sold by an insolvency practitioner and run by a new management. There is no objection to this.

Disqualification: can violation of s 216 be taken into account?

The High Court has ruled that when deciding whether to disqualify a director for unfitness under s 6 of the CDDA 1986 the court may take into account the unauthorised use of a liquidated company's name even though breach of s 216 does not appear in Sch 1 of the CDDA 1986. Schedule 1 was not exhaustive in terms of what the court could take into account (***In re Migration Services International Ltd*** [2000] 1 BCLC 666).

Directors and National Insurance contributions

The Social Security Act 1998 contains two powers to deal with problems caused by unscrupulous directors who fail to pay employees' National Insurance contributions, as follows: those found guilty of the new criminal offence could be imprisoned for up to seven years, or the NIC debt can be transferred to the fraudulent or negligent directors as a personal debt. (See s 64 of the Social Security Act 1998, inserting ss 121C and 121D into the Social Security and Administration Act 1982.)

Liability as a signatory, CA 2006, ss 82–85

Although the sanction of personal liability has been removed for failure to state the company's name correctly on cheques, such a failure is not devoid of civil consequences, though they are now visited wholly on the company.

Leave to act while disqualified

Section 17 of the CDDA 1986 gives the court power to grant leave to directors to act while disqualified. In ***Re Westmid Services Ltd, Secretary of State for Trade and Industry*** v ***Griffiths*** [1998] 2 All ER 124 the Court of Appeal gave guidance as to the exercise of the court's discretion under s 17. This includes:

- the age and state of health of the director;
- the length of time he has been disqualified;
- whether the offence was admitted;