



## Update: personal liability for directors

**Question:** when is a 'limited liability' company not a limited liability company?

**Answer:** when the director is made personally liable for the liabilities of the company.

There has been much publicity over the past twelve months concerning the changes to company legislation as a result of the Companies Act 2006. There has been particular focus on the fact that the duties of a director are now enshrined in statute, emphasising more than ever the risk to directors as a result of failure to comply with those duties.

However, two recent cases have highlighted additional risk to directors, completely independently of their duties as a director of a company. Both cases, emphasise the need to be extremely careful about what you sign.

### Quest 4 Finance Limited v Maxwell & others

This case emphasises the need to be extremely careful when signing documentation connected with a finance facility.

The directors in question signed their company to a payroll finance facility. The facility was sold to the directors on the basis that personal guarantees were not required. The directors were, however, asked to sign 'warranties' which, they were told, were to protect the funder solely in the event of any act of fraud by the directors.

The company subsequently became insolvent in circumstances where there was no suggestion whatsoever that the directors had been guilty of fraud. However, it transpired that the true meaning and effect of the 'warranties' was to make the directors personally liable for the monies owed by the company to the funder.

In this case, the directors were able to defend the claim successfully on the basis of the false statements made by the funder prior to the directors signing the 'warranties'. However, the case does not mean that, in all cases, a director will be entitled to rely upon what he is told by the funder.

In many cases, a director may be asked to sign a document that purports to be a 'limited' or 'capped' guarantee, asked to sign a 'fraud-only warranty' or, in some circumstances, asked to sign a personal guarantee that is only intended as a temporary measure. We have encountered many situations where a director is asked to sign a 'temporary' personal guarantee but, in fact, the guarantee is never released and, as a result, the directors remain liable under it.

**The message is clear:** be extremely careful when signing documentation and, to be 100% sure what you are signing, seek independent legal advice.

### **Contex Drouzba Limited v Wiseman & another**

This case highlights the risk to directors where their company is in financial difficulties and a director continues to trade the company without seeking proper advice.

The directors in question, irrespective of the fact that the company was in financial difficulties, signed order forms for the purchase of new goods.

The Court held that the director had acted fraudulently in signing the order forms when he knew that the Company was in financial difficulties and had no chance of raising sufficient funds to pay for those goods.

It therefore followed that the director was guilty of deceit and liable to pay the supplier personally.

**Again, the message is clear:** if a company is experiencing financial difficulties, seek advice as soon as possible. It may be that the directors are acting reasonably by continuing to trade the company with a view to trading through the financial difficulties. However, the risk of 'getting it wrong' is considerable and could result in the director being personally liable to creditors.

**Berryman will be hosting a seminar during the summer to highlight these and other risks to directors and discussing how to avoid the major pitfalls. For more information or in order to express an interest in attending these seminars, please contact Jemma Taylor-Smith by email : [jemma.taylor-smith@berryman.co.uk](mailto:jemma.taylor-smith@berryman.co.uk)**

### **Contact us**

**For further information on the above, please contact:**

Carl Mifflin

**DD** 0845 310 7265

**E** [carl.mifflin@berryman.co.uk](mailto:carl.mifflin@berryman.co.uk)

**Berryman** Park House Friar Lane Nottingham NG1 6DN

**DX** 10004 Nottm 1 **T** 0115 945 3700 **F** 0115 948 0234

**W** [www.berryman.co.uk](http://www.berryman.co.uk)

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