



Phoenix Companies: Restrictions on the Re-Use of Names following Insolvency



© Everyman Legal Limited 2008 - 2011

Important Notice

This memorandum is designed to provide a general commentary on aspects of the subject matter covered. It does not purport to be comprehensive or render legal advice. Everyman Legal Limited and the author expressly disclaims any liability in respect of the consequences resulting from acting or refraining from acting on the basis of any matter contained in this publication. All rights are reserved.

Phoenix Companies: Restrictions on the Re-Use of Names following Insolvency

The Insolvency Act 1986 introduced new provisions to prohibit the re-use of a company or business name by the directors of a failed company. The legislation was introduced in response to the perceived abuse of the *phoenix company*. Following an insolvency, a new company may spring up with a very similar name, with the same directors and operating from the same premises and suppliers may be unaware of the credit risk they will be running by trading with the new company.

So what is prohibited?

Section 216 of the Insolvency Act 1986 prevents a director from becoming a director of a new company which is known by a prohibited name. It also prevents that person being concerned in the promotion or management of a company with a prohibited name.

A name will be prohibited where it is the same name that the liquidated company was known as at the time in the 12 months immediately before it went into liquidation, or where it is sufficiently similar so as to suggest an association with the liquidated company.

The prohibition on use of the name runs for five years from the date of liquidation and applies to anyone who was a director or shadow director of the relevant company within the 12 months

preceding the liquidation.

What are the penalties for using a prohibited name?

Where a company trades under a prohibited name an individual is guilty of a criminal offence punishable by imprisonment or fine, or both.

Under section 217 of the Act, a person who infringes section 216 becomes personally liable for the 'relevant debts' of the new company. The relevant debts are those debts which were incurred whilst that person was acting in contravention of section 216 or taking instructions from a person he knew to be in contravention of section 216. The liability is automatic and the court has no discretion to grant relief.

How can a Director avoid these sanctions?

The simplest course will be to ensure that the new name (corporate or business) is not the same or similar to that of the old company. If the name of the liquidated company is perceived to have a goodwill value so that there is a commercial advantage in using the old name then there are two routes open to the directors.

Where all or substantially all of the assets of the old company have been sold to the new company by an administrator or liquidator then a

procedure exists for the directors to notify the creditors of the old company of their intended use of the name. Provided this is done within 28 days of the date of the sale then the name ceases to be a prohibited name. A formal notice must also now be placed in the London Gazette. The following should be noted:

- It will be prudent for the directors to retain evidence that the notices were sent to the creditors.
- The prohibition only takes effect once the old company has gone into insolvent liquidation. This may take several months or perhaps a year or more. The procedure involving notices to creditors and the London Gazette advertisement must, though, be effected within 28 days of the sale by an administrator.

The second route is for the directors concerned to apply to the Court for permission to use the name. This permission may be granted in the discretion of the court and would be expected to be exercised based on the character of the applicant and the circumstances of the insolvency. It may be that the failure to follow the procedure (if available) of notifying creditors would be taken into account by the court. The uncertainty of this route means it will seldom be relied upon.

For more information contact:

James Hunt on 0845 868 0962
james.hunt@everymanlegal.com



Everyman Legal Limited
November 2011

www.everymanlegal.com