

# Woodfines Road Transport Conference

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## Insolvency in the Transport Sector

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# Statistics

- In 2017, the transport and logistics sector had seen a 46% year-on-year increase in 'significant' financial difficulty
- In 2018, 500 transport and storage companies entered an insolvency process
- With the uncertainty surrounding Brexit, insolvency figures in the transport and logistics sector are expected to rise in 2019



# When is a Company insolvent?

- When a Company enters an insolvency process (e.g. Administration / Liquidation) **OR**
- Whilst a Company is trading but where a Company is unable to pay its debts. Either because:
  - The company does not have enough assets to pay its debts; or
  - The company cannot pay its debts as they fall due.



# Why do we need to know this?

1. A director may be personally liable where it allows a Company to continue to trade whilst it is insolvent.
2. A director's duty under the Companies Act alters where a Company is insolvent. Normally, a director's duty is to promote the success of the company for the benefit of its members as a whole (s172 Companies Act 2006). This changes at the time the Company is actually insolvent OR **at a time when a director knows or should know that the company is or is likely to become insolvent\***. Then the director's duty is to consider and act in the interests of the Company's creditors.
3. As a director, duties and obligations change when a Company is unable to pay its debts and steps should be taken to ensure that these duties are met (and steps taken recorded) so as to limit a director's personal liability.



# What are the potential claims against a director personally?

- Fraudulent trading (s.213 and s.246Z of the Insolvency Act 1986);
- Wrongful trading (s.214 and s.246ZB);
- Transactions at an undervalue (s.238);
- Preference claims (s.239);
- Misfeasance claims (s.212) (includes breach of fiduciary duty owed to the Company or the Company's creditors);
- Unlawful Dividend payments (s860 Companies Act 2006);



# How can a director be pursued?

- Monetary claim against a Director to repay, restore or account for money/property or contribute by way of compensation.
- Directors Disqualification proceedings by the Insolvency Service. Where an Order is made, will prevent a person from being involved in the forming, marketing or running of a Company for a minimum of 2 years and a maximum of 15 years.
- Obligation to co-operate with any Liquidator / Administrator appointed by a Company.



# When should a director take advice?

- Where there are warning signs of a Company's inability to pay debts (e.g. unable to pay suppliers or payroll / creditor pursues Court action, serves a Statutory Demand or issues a winding up petition);
- Where a director is not being given access to accounting information;
- Note: Finance Director will be held to a higher standard!



# Why should a director take advice?

- To assess whether a Company is insolvent / or is likely to become insolvent;
- To understand when his / her duty changes from a duty to members to a duty to creditors;
- To understand what steps should be taken to limit their personal liability and further, how to record those steps;
- To increase a director's likelihood of successfully defending a claim by a Liquidator / Administrator (e.g. relying on statutory defences such as ss(3) s214 IA 1986 - the Court shall not make a declaration of wrongful trading where a director **took every step with a view to minimising loss to Company creditors**);
- To assess whether there are alternatives to a formal insolvency process (e.g. by improving internal credit control processes / re-financing / assessing financial performance of contracts / reviewing overheads / redundancy processes etc).



# Next Steps

- Undertake a “health check” of your finances to help limit your directors exposure to personal liability but also, to assess financial standing for the purpose of operator licensing.
- Review contracts with existing and new customers and suppliers. Do these protect the Company as much as they can? (Payment terms / application of interest / limitation of liability clauses / penalties. etc).
- Contact us where there are any concerns surrounding the financial performance of your company / it’s solvency or how to take steps to best protect the position of your Company’s directors personally.

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