Trends in the prosecution of directors

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Corporate Crime analysis: Jason Mansell and Polly Dyer, barristers at QEB Hollis Whiteman Chambers, say directors should ensure that they are aware of their personal responsibilities under the Companies Acts and Insolvency Act 1986, particularly given the range of civil and criminal tools available.

What are the key areas in which prosecutions are currently taking place? What are the reasons behind this?

The Companies Acts and Insolvency Act 1986 (IA 1986) create what some may consider to be a surprisingly large number of criminal offences. However, a large proportion are rarely prosecuted, with authorities generally preferring to pursue civil remedies as opposed to launching criminal proceedings. When prosecuted, prosecutions generally take place for fraudulent trading contrary to section 993 of the Companies Act 2006 (CA 2006) and offences contrary to IA 1986, s 262A (fraud in obtaining a voluntary arrangement) and IA 1986, ss 353–62 (offences concerning bankrupts). Failure to deliver accounts and annual returns also attracts criminal prosecutions, although it is again clear that criminal sanctions are far from the preferred option (more than 150,000 private and public companies in England and Wales were made subject to a civil penalty in connection with the late filing of accounts in 2014/15).

In December 2015, the Department for Business, Innovation and Skills (BIS) unsuccessfully prosecuted three former directors of parcel delivery company City Link for allegedly failing to give statutory notice to the Secretary of State of plans to make staff redundant contrary to section 194(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992). This was the first time action had been taken against directors for a failure to file a form HR1. While the defendants were ultimately found not guilty, the case was seen as a change of approach for BIS, a result of the government being forced to pay millions of pounds in compensation to staff made redundant without proper consultation over the past few years. In this matter, the judge concluded that on the facts that there was a realistic potential for a sale in administration and, as such, the notification requirements under TULR(C)A 1992, s 193 were not triggered. While the prosecution was criticised for attempting to apply a 'retrospective crystal ball', arguably the verdict was very much dependent on the facts in the case.

What approach has BIS taken to enforcement in this area, and why? Do you expect this approach to enforcement to continue?

While BIS has recently turned its attention to TULR(C)A 1992, the BIS Criminal Enforcement Team obtained convictions against 156 defendants between April 2014 and March 2015. An application for the disqualification of the director usually follows any relevant conviction. Examples of cases include IA 1986 offences, specifically those relating to bankrupts, at times (and not unusually) in conjunction with offences contrary to the Fraud Act 2006 and Company Directors Disqualification Act 1986. BIS also continues to prosecute offences contrary to IA 1986, s 262A albeit to a limited extent—only two individuals were prosecuted between January and August 2014 and only five in 2013. Figures showing historic BIS prosecutions are not readily available, however it is understood that in 2006/7 the figure for BIS prosecutions stood at 277 defendants (it is not known how many were subsequently convicted), all of which might suggest that the bringing of criminal proceedings in relation to the Acts is the exception as opposed to the rule.

What approach has the court taken to sentencing in this area, and why? Do you expect this approach to sentencing to continue?

An important feature in the sentencing of directors under this legislative framework is the absence of sentencing guidelines for the offences in question. Taking, for example, the offence of fraudulent trading contrary CA 2006, s 993 (previously section 458 of the Companies Act 1985 (CA 1985)), there are no offence specific guidelines and the Court of Appeal has expressly held that the guidance in relation to fraud offences does not apply, although in certain cases it may be appropriate to pay some regard to the guideline—for example, in relation to confidence fraud (see *R v McCrae* [2012]

EWCA Crim 976 and *R v Mackey* [2012] EWCA Crim 2205). In *R v Smith and Palk* [1997] 2 Cr App Rep (S) 167, it was held that, in broad terms:

> 'It is right to say that a charge of fraudulent trading resulting in a substantial total deficiency to creditors was less seriously regarded than a charge of theft or fraud of an equivalent amount.'

The CPS website provides that 'in view of the increase in maximum sentence for Fraudulent Trading offences occurring after 15.1.7 it may be arguable that, contrary to what was said in *Smith and Palk*, such offences are now to be treated equally as seriously as comparable Theft and Fraud offences'. However, *Smith and Palk* was cited without adverse comment in the more recent case of *Mackey*, although the court did clarify that this perhaps more aptly applied to the 'bottom end of the scale'.

Factors which are likely to be relevant to sentence include:

- the amount
- the manner in which the offence was carried out
- the period over which it was carried out
- the position of the defendant in the company and his or her measure of control over it
- any abuse of trust involved
- any effect on public confidence in the integrity of commercial life
- any loss to small investors
- the personal benefit to the defendant
- the plea, and
- the age and character of the defendant

However, it should be noted that increasingly when dealing with such directors there is a tendency to impose an immediate custodial sentence, notwithstanding any powerful mitigation advanced, including cases where there is good character (as there is in most) and particularly difficult family circumstances.

Are there any trends emerging in this area? Do you have any predictions for future developments?

Generally, in cases concerning economic crime, particularly fraud cases, the sentences imposed have been becoming more severe—the desire to deter the white-collar offender is being taken very seriously. IA 1986 offences are often combined with other offences involving dishonesty, a trend which is likely to continue. BIS has traditionally confined its prosecutions to fraudulent trading, undischarged bankruptcy offences, breaches of disqualification orders and offences concerning the failure to keep accounting records. The commencement of prosecutions under TULR(C)A 1992 potentially does mark a change in stance, attempting to further incentivise (by a stick) directors to forward plan and consider their personal obligations.

What does all this mean for lawyers and their clients? What should they do next?

Directors should ensure that they are aware of their personal responsibilities under the Companies Acts and IA 1986, particularly given the range of civil and criminal tools available. Of course, CA 2006 has widened when a director may be in default with the phrase 'authorises or permits, participates in, or fails to take all reasonable steps to prevent' a contravention (CA 2006, s 1121), a departure from the position under CA 1985 which caught only those directors who 'knowingly and willfully' authorised or permitted the contravention. If a director is unsure of his/her obligations or concerned about liability arising under the Acts, appropriate legal advice should be obtained at the earliest opportunity.

Jason Mansell is a defence specialist in Financial Conduct Authority (FCA) and professional disciplinary litigation and business related crime. He draws on his extensive previous experience as a regulator, prosecutor and senior lawyer at Allen & Overy LLP to defend individuals and corporates under investigation or facing charges. He has been and is currently instructed in connection with a number of LIBOR and FOREX investigations and in connection with insider dealing, market abuse and market manipulation allegations.

Polly Dyer prosecutes and defends clients in all aspects of business and financial crime. She has been instructed by the FCA in its first criminal prosecution of a 'land banking' fraud and she has prosecuted for the Department for Work and Pensions. She is currently defending a client in a BIS prosecution and has a detailed knowledge of the law on disclosure and the law and procedure relating to confiscation.

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