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## Recovery Matters

### Debt Relief Orders – Proposed amendments to the eligibility criteria

You may recall that last year we reported on, and broadly welcomed, Debt Relief Orders. These came into effect from 6 April 2009, and allow someone who does not own his or her own home, has little or no surplus income or assets and owes less than £15,000 to creditors to ask the Official Receiver to write off their debts. You may recall that there is no need to involve the Court, with applications simply made to the Insolvency Service via an approved debt adviser.



Orders last for 12 months, in which time creditors named in the order will be unable to take action to recover their debt unless they obtain authority from the Court. If the debtor's circumstances remain unchanged through to the end of the 12 month period, the debts included in the order are cancelled and the debtor is discharged.

To apply for a debt relief order, you must:

- Be unable to pay your debts;
- Owe less than £15,000 to your creditors;
- Have total assets of £300 or less, although you can separately own a car up to a value of £1,000;
- Have monthly disposable income, after tax, nic and household expenses, of not more than £50;
- Must live, or some time in the last 3 years have been living or carrying on a business, in England or Wales;
- Must not have been the subject of another DRO within the last 6 years nor be involved in another formal

insolvency procedure at the time of application.

In response to complaints that this process excluded individuals if they had built a small pension pot of more than £300, the government has announced plans to allow such individuals to also apply for this low cost debt relief solution. In a recent survey by Citizens Advice Bureau, figures showed that 96 per cent of people were excluded from DROs because of their pension and 78 percent of these people had a pension fund of less than £5,000. It remains to be seen whether these proposals will survive in view of the forthcoming elections.

### What's in the name?

As an Insolvency Practitioner, I come into contact with a number of directors who seek to start up again and want to use the name of their existing insolvent company. Although the rights and wrongs of the phoenix have been rehearsed many times, this begs the question as to what value there may be in the name of an insolvent company.

Let's start from first principles. S216 of the Insolvency Act 1986 prohibits any person involved in the promotion or

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management of a company that enters insolvent liquidation from taking a similar role in a company with a similar name within a period of 5 years from the date of insolvency. Any person (usually a director or possibly a shadow director) in breach of this may become liable personally for the debts of the new company, and will also be committing a criminal offence, which could be liable to a fine or even imprisonment.

So the effects of getting this wrong can be quite severe. Clearly the authorities want to stop those responsible for causing the debt from inflicting pain on creditors a second time, particularly on the basis of some kind of deception, so as to lure unsuspecting customers into trading with them again, not knowing that they are trading with a new venture entirely.

Directors can feel a genuine affection for the Company name. Although it may have historic, and dare I say romantic, connotations to the founder directors, its name may well be synonymous with debt, pain and anguish amongst its suppliers. Of course, its customers may not know about its demise and there is perceived and possibly actual value linked in its name in relation to its customer database.

I should make it very clear here, that we are talking purely about the “use” of the name. There is nothing to stop directors going into liquidation, starting up again, buying goodwill, at value, from a liquidator – all perfectly transparent – and even buying the trading name from the liquidator. However, he cannot use that name to trade for 5 years as it will be a prohibited name under S216 of the Insolvency Act 1986.

Of course, the goodwill can be valued, and the usual adage applies – if the director wants the business and the name, then it must have a value! I must admit, that in nearly all cases that I have come across in over 20 years of experience, the name is probably not worth anything, but the directors feel the desire to trade with it. More often than not, it would be far more beneficial to trade under a completely new name, than be associated with the old name. Of course, we are only talking about the trading name. The liquidator cannot change the company name, as that can only be initiated by at least 75% of the Company’s shareholders, by way of special resolution.

A director can seek to apply to the Court to trade with a prohibited name. Usually he would have to show this was

genuinely in the interest of customers and suppliers or that it would be a severe restriction on the director, for example if the company name was similar to his own name or it related to a general trading genre and location (e.g. Smith Electrics, Electrical Engineers (Portsmouth)). Alternatively he can buy substantially all the assets from a liquidator and serve notice on the insolvent company creditors advising them of what he has done and his involvement in both companies. However, this can be problematic because he may already be in breach of S216 if he is a director of the newly formed company when he serves the notice. There is an exception to S216 where the company which has a similar name has been trading for over a year.

In such cases, S216 does not apply. It should also be noticed that S216 does not apply in the case of administration, although it would kick in if the administration converted to liquidation, which is often the case.

In advising clients, you may be asked about starting up again and the use of the name. There are a number of pitfalls in this area, so you should probably suggest your client speaks to an insolvency practitioner before incurring set up costs for any phoenix company. You may also question whether the name has really got any value at all!

