

Reusing an Insolvent Company Name

A company is deemed 'insolvent' if its liabilities outweigh its assets, and it's unable to repay the money that it owes and fulfil financial obligations, for example and ability to pay debts as and when they fall due.

In this article we will consider the restrictions on the re-use of a company name after liquidation in accordance with Section 216 Insolvency Act 1986 which places certain restrictions on a person who was a director or shadow director of a company (the liquidating/old company) at any time in the period 12 months prior to that company's insolvent liquidation (the 12 month period).

Consider the following scenario – a company has gone into insolvent liquidation, and a particular person was either a director or shadow director of this company at any given time during the 12-month period which ended the day before the company went into liquidation.

Except with the leave [permission] of the Court, S.216 places certain restrictions on directors/shadow directors whereby such person shall not, at any time, in the 5 year period beginning with the date of the liquidation as follows:-

1. Be a director of any company that is known by the "prohibited name";
2. Be concerned, in any way, in the promotion of, formation of and/or management of any company under a prohibited name; and/or,
3. Be concerned or take part in, in any way, the carrying on of a business (otherwise than by a company, such as a partnership or sole trader) under a prohibited name.

In this case, a name is prohibited in relation to this person if:

- a) It's a name by which the liquidating company was known at any point during that 12-month period, or
- b) It's a name is so similar to the name by which the liquidated company was known, indicating an association with that company.

But what constitutes a 'similar' name?

The Court will consider the name by which the old/liquidated company was known as tested against the new company name and where the name is "so similar" by which the old company was known which suggests an association with that company, this could lead to a breach of S.216.

The Court will have regard for the impact of the names on a reasonable person in the relevant commercial field. Such as:-

- [1] the type of business involved
- [2] mutuality of customers and trading.

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Here are some examples:-

- The old company name of “MPJ Construction Ltd” and the new company name of “MPJ Contractors Ltd” was a clear contravention of S.216 due to similarity of “MPJ” [Archer Structures v Christopher Griffiths [2003] EWHC 957 [CH]].
- The old company name of “Air Component Company Ltd” and the new company name of “Air Equipment Company Ltd.” [Ricketts v Ad Valorem Factors Ltd [2003] EWCA Civ 1706].

It is very important that those affected by the restrictions of S.216 seek early legal advice before attempting to incorporate a new company.

The conditions of S.216 may be disapplied having regard for the following circumstances:-

- (1) Prior notification (before incorporating the new company) in the form of a prescribed notice in accordance with the Insolvency Rules 2016 must be published in the Gazette and notice provided to the old company’s creditors at least 28 days after completion of any purchase where the old company is being acquired under arrangements made by the Insolvency Practitioner appointed on behalf of the old/liquidated company;

It is very important that the above steps are commenced before any new company is incorporated as retrospective permission is highly unlikely to be ordered.

- (2) Leave is sought via an application to Court to seek permission to act as a director (or as otherwise required) of the new company no later than 7 working days from the date of the liquidation;
- (3) The new company has been known by the prohibited name throughout the 12-months leading to the old company’s liquidation and during those 12 months the new company has not been dormant which usually involves a company(ies) involved in a group scenario.

A breach of S.216 to the IA 1986 could present liability for an imprisonment, fine or both so it is of critical importance that compliance with S.216 is adopted to avoid such sanctions.

For more information, please contact, Zoe Allen on 0113 225 8811 or ZoeAllen@chadlaw.co.uk / PeterHarling@chadlaw.co.uk

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