

EXTRACTS FROM THE INSOLVENCY ACT 1986 AND INSOLVENCY (ENGLAND AND WALES) RULES 2016

THE PROVISIONS OF SECTIONS 216, 217 AND 235 OF THE INSOLVENCY ACT 1986 and Rules 22.1 to 22.7 of the INSOLVENCY (ENGLAND AND WALES) RULES 2016

RESTRICTION ON RE-USE OF COMPANY NAMES

PERSONAL LIABILITY FOR DEBTS, FOLLOWING CONTRAVENTION OF S.216

Any person who was acting as a director of a company in liquidation at any time in the period of 12 months ending with the day before the company went into liquidation is prohibited from using any name by which the liquidated company was known, including any trading names, or a name which is so similar as to suggest an association with that company.

The restriction from using a prohibited name applies for the period of 5 years beginning with the day on which the company went into liquidation and except with the permission of the court a director cannot:

- a) be a director of any other company that is known to be a prohibited name, or
- b) be in any way, whether directly or indirectly, concerned or take part in the promotion, formation or management of any such company, or
- c) be in any way, whether directly or indirectly, concerned or take part in the carrying on of an unincorporated business under a prohibited name.

Your attention is also drawn to Rules 22.1 to 22.7 of the Insolvency (England and Wales) Rules 2016 which provides three exceptions to the restriction imposed by Section 216 of the Insolvency Act 1986.

It is a criminal offence to contravene Section 216 of the Insolvency Act 1986, and if a person acts in contravention of this section he/she is liable on conviction to imprisonment and/or a fine.

Section 217 of the Insolvency Act 1986 provides, amongst other things, that a person who is involved in the management of a company in contravention of Section 216 of the Insolvency Act 1986 is personally liable for any debts of the company incurred during the period of that involvement.

A copy of Sections 216, 217 and 235 of the Insolvency Act 1986 can be found below, together with a copy of Rules 22.1 to 22.7 of the Insolvency (England and Wales) Rules 2016.

SECTION 216 INSOLVENCY ACT 1986

- (1) This section applies to a person where a company (“the liquidating company”) has gone into insolvent liquidation on or after the appointed day and he was a director or shadow director of the company at any time in the period of 12 months ending with the day before it went into liquidation.
- (2) For the purposes of this section, a name is a prohibited name in relation to such a person if -
 - (a) it is a name by which the liquidating company was known at any time in that period of 12 months, or
 - (b) it is a name which is so similar to a name falling within paragraph (a) as to suggest an association with that company
- (3) Except with leave of the court or in such circumstances as may be prescribed, a person to whom this section applies shall not at any time in the period of 5 years beginning with the day on which the liquidating company went into liquidation -
 - (a) be a director of any other company that is known by a prohibited name, or

- (b) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of any such company, or
 - (c) in any way, whether directly or indirectly, be concerned or take part in the carrying on of a business carried on (otherwise than by a company) under a prohibited name.
- (4) If a person acts in contravention of this section, he is liable to imprisonment or a fine, or both.
 - (5) In subsection (3) “the court” means any court having jurisdiction to wind up companies; and on an application for leave under that subsection, the Secretary of State or the official receiver may appear and call the attention of the court to any matters which seem to him to be relevant.
 - (6) References in this section, in relation to any time, to a name by which a company is known are to the name of the company at that time or to any name under which the company carries on business at that time.
 - (7) For the purposes of this section a company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up.
 - (8) In this section “company” includes a company which may be wound up under Part V of this Act.

SECTION 217 INSOLVENCY ACT 1986

- (1) A person is personally responsible for all the relevant debts of a company if at any time -
 - (a) in contravention of section 216, he is involved in the management of the company, or
 - (b) as a person who is involved in the management of the company, he acts or is willing to act on instructions given (without the leave of the court) by a person whom he knows at that time to be in contravention in relation to the company of section 216.
- (2) Where a person is personally responsible under this section for the relevant debts of a company, he is jointly and severally liable in respect of those debts with the company and any other person who, whether under this section or otherwise, is so liable.
- (3) For the purposes of this section the relevant debts of a company are -
 - (a) in relation to a person who is personally responsible under paragraph (a) of subsection (1), such debts and other liabilities of the company as are incurred at a time when that person was involved in the management of the company, and
 - (b) in relation to a person who is personally responsible under paragraph (b) of that subsection, such debts and other liabilities of the company as are incurred at a time when that person was acting or was willing to act on instructions given as mentioned in that paragraph.
- (4) For the purposes of this section, a person is involved in the management of a company if he is a director of the company or if he is concerned, whether directly or indirectly, or takes part, in the management of the company.
- (5) For the purposes of this section a person who, as a person involved in the management of a company, has at any time acted on instructions given (without the leave of the court) by a person whom he knew at that time to be in contravention in relation to the company of section 216 is presumed, unless the contrary is shown, to have been willing at any time thereafter to act on any instructions given by that person.
- (6) In this section “company” includes a company which may be wound up under Part V.

SECTION 235 INSOLVENCY ACT 1986

Duty to Co-operate with Liquidator

- (1) This section applies as does section 234; and it also applies, in the case of a company in respect of which a winding-up order has been made by the court in England and Wales, as if references to the office-holder included the official receiver, whether or not he is the liquidator.
- (2) Each of the persons mentioned in the next subsection shall -
 - (a) give to the office-holder such information concerning the company and its promotion, formation, business, dealings, affairs or property as the officeholder may at any time after the effective date reasonably require, and
 - (b) attend on the office-holder at such times as the latter may reasonably require.
- (3) The persons referred to above are -
 - (a) those who are or have at any time been officers of the company,
 - (b) those who have taken part in the formation of the company at any time within one year before the effective date,
 - (c) those who are in the employment of the company, or have been in its employment (including employment under a contract for services) within that year, and are in the office-holder's opinion capable of giving information which he requires,
 - (d) those who are, or have within that year been, officers of, or in the employment (including employment under a contract for services) of, another company which is, or within that year was, an officer of the company in question, and
 - (e) in the case of a company being wound up by the court, any person who has acted as administrator, administrative receiver or liquidator of the company.
- (4) For the purposes of subsections (2) and (3), "the effective date" is whichever is applicable of the following dates -
 - (a) the date on which the administration order was made,
 - (b) the date on which the administrative receiver was appointed or, if he was appointed in succession to another administrative receiver, the date on which the first of his predecessors was appointed,
 - (c) the date on which the provisional liquidator was appointed, and
 - (d) the date on which the company went into liquidation.
- (5) If a person without reasonable excuse fails to comply with any obligation imposed by this section, he is liable to a fine and, for continued contravention, to a daily default fine.

PART 22 of the Insolvency (England and Wales) Rules 2016

PERMISSION TO ACT AS DIRECTOR, ETC., OF COMPANY WITH PROHIBITED NAME (SECTION 216 OF THE ACT)

Preliminary

Rule 22.1. - (1) The rules in this Part –

- (a) relate to permission required under section 216 (restriction on re-use of name of company in insolvent liquidation) for a person to act as mentioned in section 216(3) in relation to a company with a prohibited name;
- (b) prescribe the cases excepted from that provision, that is to say, in which a person to whom the section applies may so act without that permission; and
- (c) apply to all windings up to which section 216 applies.

Application for permission under section 216(3)

Rule 22.2. - (1) At least 14 days' notice of any application for permission to act in any of the circumstances which would otherwise be prohibited by section 216(3) must be given by the applicant to the Secretary of State, who may—

- (a) appear at the hearing of the application; and
- (b) whether or not appearing at the hearing, make representations.

Power of court to call for liquidator's report

Rule 22.3. When considering an application for permission under section 216, the court may call on the liquidator, or any former liquidator, of the liquidating company for a report of the circumstances in which that company became insolvent and the extent (if any) of the applicant's apparent responsibility for its doing so.

First excepted case

Rule 22.4. – (1) This Rule applies where -

- (a) a person ("the person") was within the period mentioned in section 216(1) a director, or shadow director, of an insolvent company that has gone into insolvent liquidation; and
 - (b) the person acts in all or any of the ways specified in section 216(3) in connection with, or for the purposes of, the carrying on (or proposed carrying on) of the whole or substantially the whole of the business of the insolvent company where that business (or substantially the whole of it) is (or is to be) acquired from the insolvent company under arrangements—
 - (i) made by its liquidator, or
 - (ii) made before the insolvent company entered into insolvent liquidation by an office-holder acting in relation to it as administrator, administrative receiver or supervisor of a CVA.
- (2) The person will not be taken to have contravened section 216 if prior to that person acting in the circumstances set out in paragraph (1) a notice is, in accordance with the requirements of paragraph (3),—
- (a) given by the person, to every creditor of the insolvent company whose name and address—
 - (i) is known by that person, or
 - (ii) is ascertainable by that person on the making of such enquiries as are reasonable in the circumstances, and
 - (b) published in the Gazette.

- (3) The notice referred to in paragraph (2)—
- (a) may be given and published before the completion of the arrangements referred to in paragraph (1)(b) but must be given and published no later than 28 days after that completion;
 - (b) must contain—
 - (i) identification details for the company,
 - (ii) the name and address of the person,
 - (iii) a statement that it is the person's intention to act (or, where the insolvent company has not entered insolvent liquidation, to act or continue to act) in all or any of the ways specified in section 216(3) in connection with, or for the purposes of, the carrying on of the whole or substantially the whole of the business of the insolvent company,
 - (iv) the prohibited name or, where the company has not entered insolvent liquidation, the name under which the business is being, or is to be, carried on which would be a prohibited name in respect of the person in the event of the insolvent company entering insolvent liquidation,
 - (v) a statement that the person would not otherwise be permitted to undertake those activities without the leave of the court or the application of an exception created by Rules made under the Insolvency Act 1986,
 - (vi) a statement that breach of the prohibition created by section 216 is a criminal offence, and
 - (vii) a statement as set out in rule 22.5 of the effect of issuing the notice under rule 22.4(2);
 - (c) where the company is in administration, has an administrative receiver appointed or is subject to a CVA,-
 - (i) the date that the company entered administration, had an administrative receiver appointed or a CVA approved (whichever is the earliest), and
 - (ii) a statement that the person was a director of the company on that date; and
 - (d) where the company is in insolvent liquidation,-
 - (i) the date that the company entered insolvent liquidation, and
 - (ii) a statement that the person was a director of the company during the 12 months ending with that date.
- (4) Notice may in particular be given under this rule—
- (a) prior to the insolvent company entering insolvent liquidation where the business (or substantially the whole of the business) is, or is to be, acquired by another company under arrangements made by an office-holder acting in relation to the insolvent company as administrator, administrative receiver or supervisor of a CVA (whether or not at the time of the giving of the notice the director is a director of that other company); or
 - (b) at a time where the person is a director of another company where—
 - (i) the other company has acquired, or is to acquire, the whole, or substantially the whole, of the business of the insolvent company under arrangements made by its liquidator, and
 - (ii) it is proposed that after the giving of the notice a prohibited name should be adopted by the other company.
- (5) Notice may not be given under this rule by a person who has already acted in breach of section 216.

Statement as to the effect of the notice under rule 22.4(2)

Rule 22.5. The statement as to the effect of the notice under rule 22.4(2) must be as set out below-

“Section 216(3) of the Insolvency Act 1986 lists the activities that a director of a company that has gone into insolvent liquidation may not undertake unless the court gives permission or there is an exception in the Insolvency Rules made under the Insolvency Act 1986. (This includes the exceptions in Part 22 of the Insolvency (England and Wales) Rules 2016.) These activities are-

- (a) acting as a director of another company that is known by a name which is either the same as a name used by the company in insolvent liquidation in the 12 months before it entered liquidation or is so similar as to suggest an association with that company;
- (b) directly or indirectly being concerned or taking part in the promotion, formation or management of any such company; or
- (c) directly or indirectly being concerned in the carrying on of a business otherwise than through a company under a name of the kind mentioned in (a) above.

This notice is given under rule 22.4 of the Insolvency (England and Wales) Rules 2016 where the business of a company which is in, or may go into, insolvent liquidation is, or is to be, carried on otherwise than by the company in liquidation with the involvement of a director of that company and under the same or a similar name to that of that company.

The purpose of giving this notice is to permit the director to act in these circumstances where the company enters (or has entered) insolvent liquidation without the director committing a criminal offence and in the case of the carrying on of the business through another company, being personally liable for that company's debts.

Notice may be given where the person giving the notice is already the director of a company which proposes to adopt a prohibited name.”

Second excepted case

Rule 22.6.- (1) Where a person to whom section 216 applies as having been a director or shadow director of the liquidating company applies for permission of the court under that section not later than seven business days from the date on which the company went into liquidation, the person may, during the period specified in paragraph (2) below, act in any of the ways mentioned in section 216(3), notwithstanding that the person does not have the permission of the court under that section.

(2) The period referred to in paragraph (1) begins with the day on which the company goes into liquidation and ends either on the day falling six weeks after that date or on the day on which the court disposes of the application for permission under section 216, whichever of those days occurs first.

Third excepted case

Rule 22.7.- The court's permission under section 216(3) is not required where the company there referred to, though known by a prohibited name within the meaning of the section—

- (a) has been known by that name for the whole of the period of 12 months ending with the day before the liquidating company went into liquidation, and
- (b) has not at any time in those 12 months been dormant within the meaning of section 1169(1), (2) and (3)(a) of the Companies Act.