



WELCOME to this webinar
presentation on:

Tax Avoidance and Insolvent
Companies

With Patrick Cannon



Barrister

Old Square Tax Chambers

Patrick@patrickcannon.net

www.patrickcannon.net





My talking points:

- When a company fails owing tax
- Payments made to remuneration trusts free of PAYE and NIC
- Claims available to insolvency practitioners under CA 2006 and IA 1986
- Recent case law
- Personal liability of directors of insolvent companies for unpaid taxes under FA 2020



Position before FA 2020 added joint liability notices

WHEN A COMPANY FAILS OWING TAX

APN's, FN's and the Loan Charge for disguised remuneration schemes have led to company insolvencies where HMRC is the principal creditor. Insolvency practitioners are making claims against directors who made payments free of PAYE and NIC under CA 2006 and IA 1986 provisions below. Mixed success because of defences of reasonable remuneration for services supplied , or, acting honestly and reasonably; s1157 CA 2006.

Vining Sparks [2019] - not dishonest as relied on advice and UT in *RFC 2012 plc*; **Implement Consulting [2019]** - payment to EBT's were unlawful distributions and should be paid back: s847 CA 2006

1. **s 172 CA 2006** : breach of director's duty - claim failed in **Vining Sparks** as not dishonest
2. **s 212 IA 1986** : misfeasance
3. **s 213 IA 1986**: fraudulent trading
4. **s 214 IA 1986** : wrongful trading
5. **s 847 CA 2006**: unlawful distribution - claim succeeded in **Implement Consulting** but inconsistency at heart of decision because the insolvency was caused by failure to pay PAYE and NIC and yet if the payment was a distribution, no such tax arose, so company was not insolvent and no tax debt

See my Taxation article 14 November 2019 "Who pays the debt?" at <https://www.patrickcannon.net/employee-benefit-trusts-payee/>

And also my Blog on this topic at <https://www.patrickcannon.net/can-a-dissolved-company-be-investigated/>



Section 172 of the Companies Act 2006, imposes on a director the duty to 'act in a way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole'

Section 212 of the Insolvency Act 1986 makes a director personally accountable to pay back to the company the amount of the loss caused by any misfeasance to the extent that the court so orders.

Section 213 of the Insolvency Act 1986 provides that if, in a winding-up, it appears that any company business has been carried on with intent to defraud its creditors or creditors of any other person, or for any fraudulent purpose, then the court may, on the liquidator's application, declare that any people who knowingly carried on the business in that way are to be liable to make such contributions (if any) to the company's assets as the court thinks proper.





Section 214 of the Insolvency Act 1986 provides that, if the court is satisfied that a director of a company which has gone into insolvent liquidation knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, the court can order that director to make such contribution to the company's assets as the court thinks proper.

Section 847 of the Companies Act 1986 provides that a recipient member who knows or has reasonable grounds to believe that a distribution or part of it is unlawful is liable to repay it or that part of it to the company.. No such liability exists in respect of a member who is an innocent recipient.

Section 1157 of the Companies Act 2006 empowers the court, in any proceedings against an officer of a company for negligence, breach of duty or breach of trust, to relieve them from liability if he has acted honestly and reasonably and ought, in the circumstances, fairly to be excused. In circumstances where directors have continued trading on professional advice, this has been used as a basis for escaping liability under s.212 of the IA 1986





Reliance on professional advice :

Mr Bernard relied on the taxpayer wins in *Sempra Metals* [2008] and the tribunal decisions in *RFC 2012 plc v HMRC*



Genuine belief :

So, Mr Bernard was found to have genuinely believed that the EBT contributions were not subject to PAYE and NIC and acted in good faith



EBTs had operated as intended and were not shams:

Therefore no dishonest or bad faith failure to deduct PAYE and NIC and pay to HMRC. Liquidators' claim under s172 for breach of duty was dismissed.



Liquidators' claim fails:

Vining Sparks v Bernard [2019]

Liquidators framed their claim against the director under s 172 CA 1986 for failing to promote the success of the company by causing it to evade its PAYE and NIC liabilities in relation to payments into EBTs and that he had acted dishonestly in doing so.

This was a Baxendale-Walker promoted EBT scheme



Substance over form:

Payments were not incidental to carrying on business nor for company's benefit. Therefore payments via EBTs were in substance distributions to the shareholders.



Part 23 CA 2006 requirements not followed:

As a return of capital to shareholders the requirements to pay a distribution should have been followed but were not.



Section 857 CA 2006 therefore applied:

Member who knows or has reasonable grounds to know that a distribution is unlawful must repay it to the company.



Liquidators' claim succeeds:

Implement Consulting v Ross and Bell [2019]

The directors were also the 80% shareholders. Liquidators claimed that the aim of the schemes was to strip out the distributable reserves of the company by making tax free payments to the shareholder employees via EBTs.



Reconciling the two cases?

Vining Sparks is a robust decision especially as Mr Bernard relied on Baxendale-Walker's advice as promoter and did not take independent advice.

In *Implement Consulting* the director/shareholders also failed to take independent advice and did not read counsel's opinions supplied to the promoter and were strongly criticised by judge who said that this undermined their position.

How then to explain the differences in outcome for what were essentially similar cases?

01.

Not a shareholder or dishonest :

Mr Bernard in *Vining Sparks* was not also a shareholder and so the unlawful distribution point was not taken. The case against him was put highly in terms of dishonesty and that was not proved.

02.

Judicial attitudes to tax schemes :

The judge in *Implement Consulting* was unsympathetic to "profit extraction schemes". The judge in *Vining Sparks* took a more balanced view and quoted Lord Tomlin in *CIR v Westminster*

03.

Liquidator overreach?:

It is easier to establish that there has been an unlawful distribution followed by liability to repay it compared with establishing a dishonest failure to promote the best interest of the company.



Anomaly in the *Implement* decision?

If the amounts paid really were distributions then there could not have been a PAYE or NIC liability to deduct and nothing for the company to account for. As such no liability to HMRC arose and so the company could not have been insolvent.

A liquidator should not then have been appointed and there would have been no challenge to the lawfulness of the payments.

The shareholders would have been liable to tax on the distributions but HMRC out of time to assess but this was not an issue for the company. Tax relief given to the company would have been withdrawn but this would not have caused insolvency.

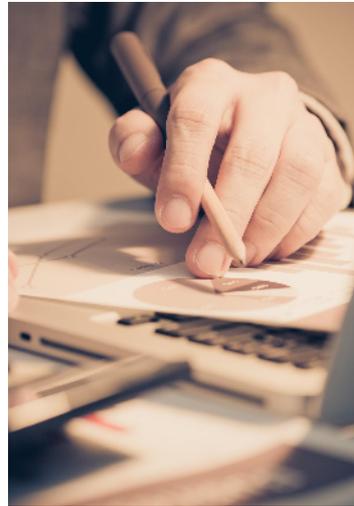
Everything went round in a circle but this anomaly was not pointed out to the judge.





Schedule 13 FA 2020

Personal liability of directors



Where tax debt in the insolvent company arises from:

1. Tax avoidance arrangements or tax evasive conduct;
2. Repeated insolvencies; or
3. Penalties for facilitation of tax avoidance or evasion

Liability established by service on director of a

"Joint Liability Notice"

Appeal allowed only if conditions for notice not met or company turns out not to be insolvent.

Para 14: "...otherwise the tribunal must uphold the notice."

No challenge to underlying company tax liability allowed.



“Tax avoidance and evasion cases” :

Conditions A to E: tax avoidance arrangements or tax evasive conduct; company is insolvent or at serious risk of insolvency; director was responsible for entry into the tax arrangements; a tax liability arises; and serious possibility tax will not be paid.

“Tax avoidance arrangements” :

- GAAR final decision notice
- FN
- DOTAS arrangements
- Order to disclose notifiable arrangements

“Tax evasive conduct” :

- Giving to HMRC any deliberately inaccurate return, claim, document or information, or
- Deliberately failing to comply with an obligation specified in the Table in paragraph 1 of Schedule 41 to FA 2008 (obligations to notify liability to tax, etc).





Contrast directors' personal liability for “Furlough Fraud” by company under Sch 16 FA 2020

The new world of furlough fraud and the 100% income tax rate plus penalties on CJRS receipts not applied properly

01.

Directors of insolvent companies:

- Joint and several liability for the 100% tax charge
- New “joint liability notice” procedure in Sch 13, FA 2020 applied to Sch 16 tax liabilities
- To be personally liable the director must satisfy conditions A to D

02.

Conditions A to D:

- A - Company either insolvent or serious possibility of insolvency
- B - Company is liable to the 100% tax charge
- C - the individual was responsible for the management of the company at the time the income tax first became chargeable and the individual knew (at that time) that the company was not entitled to the amount of the coronavirus support payment in relation to which the tax is chargeable.
- D - there is a serious possibility that some or all of the income tax liability will not be paid.



THANK YOU

EMAIL ADDRESS :

patrick@patrickcannon.net

PHONE NUMBER :

+44 (020) 7242 2744

WEBSITE:

www.patrickcannon.net