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Separate Legal Personality

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Overview

As well as advising on all manner of commercial and procurement matters, the Council's in-house commercial lawyers regularly encounter issues in connection with the provision of care services. Given the size of the Council, the number of services it commissions and the way in which the care market operates, the Council is often faced with situations where a company's inability to meets its contractual commitments is brought to its urgent attention. Sometimes companies default on their obligations or give extremely short notice of an imminent default, for it later to come to light that the company directors' behaviour should be called into question. This leaves the Council with little comfort that they will be compensated if they pursue a company which may no longer have any assets. At other times, the Council is persuaded to pay for services on the faith of misrepresentations about the company's longevity and wherewithal. In such cases, the question arises whether those running the company might be sued personally and how to go about bringing such proceedings to impose personal liability. In that connection, it is not uncommon for outside counsel to be instructed to assist.

Introduction

Clients often suffer losses at the hands of persons running a company which happens to have no real assets to go after. It is human nature for such clients to want to blame the persons with human faces who they actually dealt with, rather than the corporate entity of the business they were running at the time, which may prove to be a hollowed-out shell.

The question thus arises whether such clients can sue not the company (or not just the company) but those running it in their personal capacity for their role in whatever wrongdoing was committed. Unfortunately, when such situations arise, misunderstandings abound. The same unscrupulous sorts that are willing to fleece their company and treat its assets as their own, tend to perpetrate the myth that nobody can sue them for any wrong they do whilst acting for the company and only the company can be sued.

It is true that those dealing with a company on a contract cannot typically hold its agents liable for breaching the company's contract, but that is because the contract belongs to the company and not to the agent. When the directors of a company get involved in committing a tort, the fact they were acting for the company at the time offers them no protection.

A company's separate legal personality does not permit a director of a company to avoid liability for committing torts even if they do commit them in the name of the company. A person cannot avoid responsibility for harming their victim just by saying that they were hurting them on behalf of their company.

Yet, this area of law is regularly confused, and even by lawyers. But that is unsurprising, and not only because it can be conceptually difficult to conceive of a company as its own person and what it means to be an agent acting for a company.

Reasons for confusion

The main reason why this area of law is so easily misunderstood is that until very recently there was a bright line rule of law in effect preventing outside third parties from suing those running a company where the company itself was able to sue those same people. The rule against reflective losses held that a third-party creditor could not sue those controlling a company for any losses which reflected the losses suffered by the company as a result of the same or similar wrongdoing by those controllers[1]. If a director of a company owing a third party millions of pounds stole all of the company's money to avoid payment, the third party could not sue the director directly but was instead expected to go after the shell of a company and if necessary try to control its insolvency.

Indeed, that is what happened in the case of Marex v Savilleja right up to the Court of Appeal[2]. The Court held that the creditor of rthe company could not sue the asset stripping director even though he had fleeced the company to avoid paying the debt to the third party because the rule against reflective losses prevented it. Thankfully, the Supreme Court recognised the injustice being driven by that rule and abolished it, at least as far as third-party outsiders are concerned[3]. However, the confusion caused by the operation of that rule for many decades may take a long time to clear up.

The rule against reflective losses was not the only legal doctrine liable to cause confusion.

Piercing the corporate veil has also added to misunderstandings. That principle is itself a confusing and controversial doctrine. Indeed, the Supreme Court has questioned several times whether there is even a jurisdictional basis for the doctrine. More often than not, the courts uphold personal liability on controllers not because they pierce the veil but because they lift it up and find that the controllers were the true actors for example because company assets were held on trust for them or because the company was the directors agent or because the company's involvement was a sham. Piercing the veil is commonly employed as clumsy shorthand for invoking other relationships or doctrines or getting the relief that would be available on other causes of action without actually spelling out those causes of action.

But the critical distinction is that piercing the veil involves disapplying a company's separate legal personality. It is very different to holding controllers of a company liable for their wrongdoing, whilst also recognising the valid existence of a company's separate legal personality. Lifting or piercing the veil is especially relevant in cases where a party needs to prove that property registered to a Company or rights under a contract held in a Company's name should be treated instead as belonging to the controller. Veil-piercing or lifting is not even necessary however when an outsider has a cause of action to claim losses against a controller.

The principle of separate legal personality in a contract context is also liable to confuse. A person may be forgiven for thinking that if a director cannot be liable for breaching a company's contract, it stands to reason that they can also not be liable for committing any torts whilst acting for the company. It is not a wild assumption to presume contract and tort will be treated the same. But in fact they are not treated the same. Only in a contractual

[1] See the since overturned decision of Johnson v Gore Wood [2002] 2 A.C. 1 2002, and also the since rebuked interpretation of that case placed on that decision by Lord Neuberger in Gardner v Parker [2004] EWCA Civ 781.

[2] As happened in the case of Marex v Sevilleja [2020] UKSC 31.

[3] See Marex v Sevilleja [2020] UKSC 31. Note it is still relevant for actions by shareholders to recover losses caused to their shareholding.

context, is a director free to breach a company's contract free from personal liability. The reason for that is to do with agency law and privity of contract. An agent will never be liable on their principal's contract as they are simply not party to it. But that limitation does not give a director immunity from personal liability for harming people whilst running a company.

As Lord Hoffman put it in Standard Chartered Bank v Pakistan Shipping Corporation [2003] 1 A.C. 959 at paragraph 21:

> 'No one can escape liability for his fraud by saying "I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable."'

The general rule

Outside of the contractual context, just like any agent will be personally liable to third parties for the torts they commit, a director will also be liable. As Cairns LJ held in *Ferguson v Wilson* (1866) LR 2 Ch App 77 at 89-90:

> 'What is the position of directors of a public company? They are merely agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through its directors, and the case is, as regards directors, merely the ordinary case of principal and agent. Wherever an agent is liable those directors would be liable; where the liability would attach to the principal, and the principal only, the liability is the liability of the company.'

The reason an agent will be liable to third parties is because of the principle of personal responsibility. It is a general principle of the common law that a person must be held responsible for his own acts and omissions which amount to a tort[4]. As a matter of agency law, personal liability is not extinguished merely because a person commits the tort whilst acting as an agent for their principal[5]. That agency relationship may give rise to the principal having vicarious liability for his or her agent, but vicarious liability is a form of secondary liability and not primary liability to be attributed to them.

The same principles apply also to directors acting for a company[6]. Separate legal personality does not exonerate a director from liability for the torts they commit even where they may be attributed to the Company. The attribution of an agent's acts to a company does not absolve the agent from his own liability[7]. It becomes a question of the extent of their involvement and participation in the tort.

Personal liability can arise in one or more of two ways: where the controller commits all of the elements of the tort themselves; or where they commission it such as to become joint tortfeasor[8]. In either case, by committing a tort themselves or by actively participating in

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[4] See for example the discussion on corrective justice in Honoré, Responsibility and Fault, Hart Publishing, 1999, p68.

[5] See Bowstead and Reynolds on Agency, Sweet & Maxwell, 22nd Ed, article 113.

[6] See the dictum of Cairns LJ in *Ferguson v Wilson* (1866) LR 2 Ch App 77, pp89-90. See also chapter 9 of Bowstead and Reynolds on Agency, Sweet & Maxwell, 22nd Ed.

[7] See the observations of Dillon LJ in Welsh Development Agency v Export Finance Co Ltd [1992] B.C.C. 270 at p288, where the limits of the Said v Butt rule were discussed. See also Standard Chartered Bank v Pakistan Shipping Corporation [2003] 1 A.C. 959 where the House of Lord clarified that a director's agency would not insulate a director from liability for deceit where they had backdated documents to obtain payment under a letter of credit.

[8] Liability as a joint tortfeasor can itself arise in two way: where two or more persons participate in some 'joint enterprise' or share some 'common design' to commit or commission a tort (see Credit Lyonnais Bank Nederland NV v Export Credit Guarantee Department [2000] 1 A.C. 486 HL); and/or where one instigates the commission of the tort by instructing, soliciting or inciting another or others to commit it (per Hobhouse LJ in the Court of Appeal in Credit Lyonnais Bank Nederland NV v Export Credit Guarantee Department [1998] 1 Lloyd's Rep.19 CA (Civ Div) which was affirmed on appeal by the House of Lords: [2000] 1 A.C. 486 HL). See also Clerk & Lindsell on Torts, Sweet & Maxwell, 32nd Ed, 4-04. In a company context, instigating the

bringing it about the director will likely exceed their authority as mere agent[9]. Establishing liability is fact-sensitive and there is no simple formula for determining whether the requisite level of assistance and combination in some common design has taken place, but the assistance must be more than de minimis or trivial, and whilst a common design would normally be expressly communicated between the principal and the accessory, intention is something capable of being inferred[10].

Causes of action leading to personal liability

The courts have upheld personal liability on the part of directors on all sorts of causes of action including:

- *Procuring a breach of contract*: a director can be personally liable for procuring a breach of their company's contract where they exceed their authority by acting in bad faith towards their company. That can include exposing their company to potential liabilities, and even reputational harm. In Antzuzis & Others v DJ Houghton Catching Services & Others [2019] EWHC 843 (QB), for example, directors of a company that exploited their employees amongst other things by requiring the employees to work excessive hours, for less than the minimum wage were considered to act in bad faith towards their company by potentially exposing the company to claims and liabilities. They could thus be sued by their employees in tort for losses caused by procuring a breach of their employment contracts[11].
- *Negligence causing pure economic losses:* directors can be liable on an action for negligence causing pure economic losses where they have voluntarily assumed responsibility to protect the claimant from suffering such losses[12]. That commonly arises in a professional negligence context out of negligent mis-statements, but it is not limited to such contexts[13]. An assumption of responsibility, whilst difficult to prove[14], may arise where:

commission can be said to arise where a person 'intends and procures and shares a common design that the infringement takes place' they will be liable, per Lord Templemann CBS Songs v Amstrad [1988] 2 All ER 484 at p496. Similar wording was adopted in C Evans & Sons Ltd v Spritebrand ltd [1985] 2 All ER 415 in which the court refused to strike out a claim against directors where there was evidence they might have procured or commissioned an infringement of copyright; and also MCA Records Inc v Charly Records Ltd [2001] EWCA Civ 1441 where it was held that a director would be jointly liable if he participated in the tort by directing infringement as that went beyond normal governance functions. For a case where a director was found not to have been sufficiently involved to procure a company's copyright infringement, see Wirex Ltd v Cryptocarbon Global Ltd [2021] EWHC 617 (IPEC).

[9] See Chadwick LJ MCA Records Inc v Charly Records Ltd [2001] EWCA Civ 1441 paras.49-50.

[10] See Fish & Fish Ltd v Sea Shepherd UK, the Steve Irwin [2015] UKSC 10, paras 20-24, 37-44, 55-61, 90-91.

[11] See Antzuzis & Others v DJ Houghton Catching Services & Others [2019] EWHC 843 (QB).

[12] See Williams v Natural Life Health Foods Ltd [1998] 1W.L.R. 830 HL; Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] A.C. 465. But different principles apply if the negligence causes damage to property or to the person of if the alleged negligence really involves fraud or some economic tort including the tort of deceit: see for example Noel v Poland [2001] 2 B.C.L.C. 645 per Toulson J.

[13] Per Lord Sumption in Playboy Club London Ltd v Banca Nazionale del Lavoro S.p.A. [2018] UKSC 43 at [6]. And also Henderson v Merrett Syndicates Ltd [1995] 2 A.C. 145.

[14] See for example Partco Group Ltd v Wragg [2002] 2 B.C.L.C. 323 where making of statements relating to a takeover bid without any personal assurances was not enough to give rise to assumption of responsibility. But see Fairline Shipping Corp v Adamson [1975] 1 Q.B. 180· where assumption of responsibility has been successfully argued in a case where director of a warehousing company was considered to have assumed personal responsibility to customers where he wrote a letter on his personal notepaper in the first person singular offering to store the Claimant's goods in his own premises in circumstances where the director wanted the storage to be his own venture and not that of the company; and see also Morgan Crucible Co Plc v Hill Samuel Bank ltd [1991] 1 All ER 148 where the Court of Appeal allowed an amended plea to be advanced against directors who allegedly made misrepresentations intended to be relied upon to a party making a takeover bid.

(1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry, and (4) it is so acted upon by the advisee to his detriment.[15]

- *Injury to property or person:* a person running a company may carry out activities that give rise to a personal duty of care to prevent injury or damage to third parties. Whilst the involvement of a company may negate a duty of care on the part of those running it, the ordinary principles for establishing a duty of care apply. Therefore situations involving a foreseeable risk of harm in circumstances of close proximity generally give rise to a duty of care being owed, and the fact such duty can be attributed also to a company does not necessarily negate the directors from also being liable[16]. Directors might thus be liable for causing personal injury whilst placing workers in a dangerous working environment[17], for damage to customer property whilst responsible for safekeeping their goods[18], for crashing a motor vehicle being driving for the company[19], and for running a ship aground when it was unseaworthy due to defective boilers[20]. In similar ways the law is also willing to impose a duty of care on a parent company to those dealing with its subsidiary[21].
- *Causing waste to property*: directors were held responsible for actions done on behalf of their company which led to third-party property being damaged. In Mancetter Developments Ltd v Garmanson Ltd [1986] Q.B. 1212 a director of a tenant company was liable in waste for causing his company to remove industrial machinery without making good holes made in the walls for the installation of fans and pipes.
- *Conversion:* where a controller themselves commit the act of conversion[22] or they procure others in their company to do it, they can be liable on an action for conversion[23], but they will typically have to have control of the goods and deny the true owner's claim to the goods upon notice of it[24].
- *Passing off and copyright infringement*: a director will be liable where he 'procured of or commissioned' copyright infringement by others in his or her company and he or she cannot escape liability by arranging for the company

[15] See Caparo Industries Plc v Dickman [1990] 2 A.C. 605 at 638C-E.
[16] Per Viscount Haldane in Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] A.C. 705.
[17] See Lewis v Boutilier (1919) 52 D.L.R. 383; Berger v Willowdale AMC (1983) 145 D.L.R. (3d) 247.
[18] See Fairline Shipping Corp v Adamson [1975] Q.B. 180 QBD.
[19] See Microsoft v Auschina Polaris (1996) 71 F.C.R. 231 at 242.
[20] See Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] A.C. 705.
[21] See Chandler v Cape Plc [2012] EWCA Civ 525. Such duty can be imposed where there is a similarity of business, some actual or expected superiority of knowledge on the part of the parent company, actual or constructive foresight on the parent company's part of risk and harm and actual or constructive knowledge of reliance by the subsidiary on the intervention of the parent company. See also Okpabi v Royal Dutch Shell [2021] UKSC 3 and also Vedanta Resources plc v Lungowe [2019] UKSC 20 the Supreme Court was willing to uphold parent company liability or so-called 'value chain' liability and to impose duties of care on parent company controllers without involving any piercing of the corporate veil.
[22] See Thunder Air Ltd v Hilmarsson [2008] EWHC 355 (Ch).
[23] See for example Caparo Industries Plc v Dickman [1990] 2 A.C. 605 at 638C-E.
[24] See Article 114, Bowstead and Reynolds on Agency, Sweet & Maxwell, 22nd Ed.

he controls to commit the breach[25]. Liability commonly arises too in passing off cases[26].

- *Deceit:* a director that knowingly makes a false representation intending an outside third party to rely on it will be personally liable on an action for deceit where that outside third party acts in reliance on it and suffers losses[27]. In this context, a false representation can include a statement about a company's creditworthiness which induces a customer to enter into a transaction when the director knows the company cannot meet its obligations[28]. The mere signing of a contract can itself constitute the misrepresentation by impliedly representing that the company is able to meet its payment obligations when the person signing it knows for a fact it cannot[29]. A statement that money invested in a company will be used for a specific purpose can also give rise to a deceit when the misrepresenting director intends to use the money to repay existing debts[30]. Care must be taken in advancing any action in deceit to identify the correct directors that made the misrepresentations as in cases involving multiple directors, innocent co-directors who are not involved in making the representations will not be liable for the deceit of their co-directors[31].

- *Conspiracy:* a director can be liable for conspiring to cause losses to a third party, including planning to fold a company or strip it of assets[32], and such liability for conspiracy may be capable of being attributed to the company itself at least in civil law so that the corporate personality is a co-conspirator involved (at least notionally) in the collusion for the purposes of establishing conspiracy of the director[33]. A claimant can sue for losses caused by a conspiracy where it can be shown that two or more persons combined to perform acts which were unlawful or which although not unlawful were done with the predominant intent of causing injury[34].

- *Unlawful means tort:* a director can be personally liable to an outside third party for using unlawful means towards his or her own company to cause economic losses not to the company (or not just to the company) but to that

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[25] See C Evans & Sons Ltd v Spritebrand ltd [1985] 2 All ER 415 ; also MCA Records Inc v Charly Records Ltd [2001] EWCA Civ 1441.

[26] See for example Global Crossing Ltd v Global Crossing Ltd [2006] EWHC 2043 (Ch).

[27] See Standard Chartered Bank v Pakistan National Shipping Corp [2003] 1 B.C.L.C. 244 where it was held that a director who acted on behalf of his company and made fraudulent misrepresentations to a bank to obtain payment would be liable along with his company for that misrepresentation.

[28] See Lindsay v O'Loughlane [2010] EWHC 529 (QB), but see also the formality requirements for representations relating to character as discussed in that case and arising under s6, the Statute of Frauds Amendment Act 1828.

[29] See Context Drouzha Ltd Wiseman [2007] EWCA Civ 1201.

[30] Edgington v Fitzmaurice (1885) 29 ChD 459.

[31] See Cargill v Bower (1878) 10 ChD 502. But they may be liable if they participate as joint tortfeasors or as a part of a conspiracy.

[32] See Palmer Birch (A Partnership) v Lloyd [2018] EWHC 2316 (TCC), where two individuals conspired to liquidate a company to avoid the company having to pay the claimants under a contract and were liable for unlawful means conspiracy (the unlawful means being inducing breach of contract by the company without justification).

[33] See Belmont Finance Corp Ltd v Williams Furniture Ltd [1979] Ch 250; Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia (No 2) [1998] 1 W.L.R. 294. But see R v McDonnell [1966] 1 Q.B. 233 for the principles arising under the common law for the crime of conspiracy. But note the fact that liability is attributable to the company does not exonerate the director as co-conspirators, although an ignorant fellow director acting in good faith and not colluding will not be liable in conspiracy solely for doing something which might procure a breach of contract by his company (just as any agent would not be liable for procuring a breach by his principal: Said v Butt [1920] 3 K.B. 497) save perhaps with the exception that liability may potentially arise where equitable interests have already been acquired in property by third parties: see : Telemetrix plc v Modern Engineers of Bristol (Holdings) plc [1985] B.C.L.C. 213.

[34] See Allen v Flood [1898] A.C. 1 at 108.

outsider[35]. Primarily this claim is based on the principles upheld by the House of Lords in OBG Ltd v Allan [2007] UKHL 21; [2008] A.C. 1.

- *Dishonest assistance:* a director of a company that assists or procures his company to act deliberately in breach of trust, or a fiduciary duty[36], knowing of that breach[37], can be held liable for dishonestly assisting a breach of trust, or fiduciary duty, and they will be liable to pay equitable compensation, akin to damages, for all losses flowing from the breach of trust or fiduciary duty[38], including in cases where the company is insolvent[39].
- *Knowing receipt:* a director may be required to account as a constructive trustee if he or she lets their company be used for fraud that he or she has notice of by way of actual or constructive knowledge, including by turning a blind eye[40]. In any case, where a director takes receipt knowing it is trust property and/or converts trust property to their own use, they will be liable to account and there will be no time limit in limitation to recover such trust property[41].
- *Bribery and secret commissions:* a director can be personally liable to account for a bribe he or she receives for a company[42].

Personal liability under statute

There are also a diverse assortment of statutes where personal liability is imposed.

Unsurprisingly the Insolvency Act 1986 make provision for personal liability in lots of situations, including transactions at an undervalue or phoenix situations.

Where the company itself enters into an undervalue transaction purposefully to defraud its own creditors. Where an asset-stripper causes his company to enter into an arrangement for example to transfer assets to another party (or themselves) for an undervalue with the

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[35] See chapter 6 regarding asset-stripping and Marex v Savilleja [2020] UKSC 31 or for guidance on the tort: OBG Ltd v Allan [2007] UKHL 21; [2008] A.C. 1 and also Clerk & Lindsell on Torts, Sweet & Maxwell, 22nd Ed, 24-72.

[36] Fiona Trust & Holding Corporation v Privalov [2010] EWHC 3199 (Comm).

[37] But nothing less than dishonesty will do: Ivey v Genting Casinos UK Ltd (t/a Crockfords Club) [2017] UKSC 67, [2018] A.C. 391, [2017] 10 WLUK 580 applied. But the dishonesty need not involve obvious, large transfers but might include a gradual erosion of trust assets by dissipation: Trustor AB Ltd (Swedish Company) v Smallbone [1968] 1 W.L.R. 1555.

[38] See Royal Brunei Airlines Sdn Bhd v Tam [1995] 2 A.C. 378.

[39] See Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 A.C. 378, [1995] 5 WLUK 382.

[40] See Shell International Trading Co Ltd v Tikhonov [2010] EWHC 1770 (QB) in which Jack J held the corporate veil could not prevent a defendant, a senior employee of Shell, from being held liable to account in respect of bribes received directly by a company he controlled. See also Agip (Africa) Ltd v Jackson [1991] 3 W.L.R. 116 (CA). In any case, the controller of a one-man company that arranges for a transfer to that company of assets in breach of trust will be liable personally for his company's knowing receipt on an action in dishonest assistance: see also Trustor AB v Smallbone [2001] W.L.R. 1177.

[41] See s21 Limitation Act 1980 and JJ Harrison (Properties) Ltd v Harrison [2002] 1 B.C.L.C. 162 and First Subsea Ltd v Balltec Ltd [2017] Civ 187). The time period for fraudulent breach of trust in knowing receipt is different to that for dishonest assistance. Absent fraud or concealment being discovered or reasonably discoverable under s32, by analogy to s21, limitation on an action for dishonest assistance will be 6 years: see Gwembe Valley Development Co Ltd v Kosby [1998] 2 B.C.L.C. 613.

[42] See Shell International Trading Co Ltd v Tikhonov [2010] EWHC 1770 (QB). Jack J also held the that corporate veil could not prevent a defendant, a senior employee of Shell, from being held liable to account in respect of bribes received directly by a company he controlled. Here an impeachable bribe has been paid, a claimant is entitled not only to that bribe but can also rescind any transaction arising out of it as of right, and an impeachable bribe may include a secret commission: see Wood v Commercial First Business Ltd [2021] EWCA Civ 471. The Court of Appeal provided clarity on secret commission cases by replacing the need for any agency arrangement with a test concerned only with some obligation or expectation that the intermediary would give disinterested and impartial advice, information or recommendations. The Court of Appeal cast some doubt on the distinction between fully secret and half secret commissions by finding there was an entitlement to rescission in a case where information had been provided to suggest a commission may be payable when one had in fact been paid.

purpose of avoiding creditors, the court has powers to reverse the transaction or to order the recipient to pay compensation in relief[43].

The third is the phoenix situation. It arises where the first company is liquidated but the asset-stripper starts up a new company carrying on using the name of the liquidated company without permission to do so. In such situations, those running the newco can be personally liable unless they comply with legislation permitting the newco to acquire the former company's trading name or they obtain permission[44].

Personal liability in proceedings

Those running a company can be personally liable in proceedings in three common situations.

First, the courts may require a party other than a claimant to pay security for the defendant's costs under r25.14CPR if satisfied it is just to make such order in all of the circumstances. That can arise where a director has contributed to paying the claimant's costs[45] and a failure to furnish documents relating to such funding can be treated as 'deliberate reticence' and lead to adverse inferences being drawn[46].

Second, those running a company may be ordered to pay the costs of proceedings that involve their company under s51 of the Senior Courts Act 1981. Whilst such non-party costs orders are exceptional, and they are only to be made where the court considers it just in all of the circumstances, they can be made, for example, where company controllers have: derived personal advantage from the litigation[47]; or pursued speculative litigation or incurred unreasonable costs by improperly arguing a case[48]. And it is not necessary to show that the director has acted in bad faith, or in abuse of the court's process or involved himself in some other impropriety[49].The non-party will however need to be joined under r46.2 CPR and adequate notice given to ensure an opportunity to respond.

Third, those controlling a company may be committed for contempt of court and contempt may arise, for example, where: they have aided and abetted a company to commit a breach of court order; or they knowingly cause their company to avoid paying a judgment debt or to breach a court order; or they do not take reasonable steps to ensure compliance; or they are criminally responsible for interfering with the course of justice for example by deliberately frustrating the purpose of an order[50].

Conclusions

Those faced with clients contemplating suing a director rather than (or as well as) the company should thus not be deterred from seeking to set up a cause of action against directors personally – unless it is one based purely on the contract. The fact personal liability may exists however does not make the task of proving the commission of some tort any easier. Often decisions will be made in small companies without any formal minutes being produced recording decisions made at formally convened meetings. Practitioners may thus find it hard formulating and advancing their cases when they are largely in the dark. They will thus want to consider the array of disclosure levers at their disposal including through resort to pre-action correspondence, pre-action disclosure applications or subject access data requests.

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[43] See s423 Insolvency Act 1986.
[44] See s217, Insolvency Act 1986.
[45] See the judgment of Lord Brown in Dymocks Franchise Systems (NSW) v Todd [2004] 1 W.L.R. 2807 (PC) (costs) at paras. 24-25.
[46] See SARPD Oil International Ltd v Addax Energy SA [2016] EWCA Civ 120.
[47] See Brampton Manor (Leisure) v McLean [2007] EWHC 3340 (Ch). See also Secretary of State for Trade and Industry v Aurum Marketing Ltd [2002] B.C.C. 31.
[48] Goodwood Recoveries Ltd v Breen [2006] 1 W.L.R. 2723
[49] See Secretary of State for Trade and Industry v Aurum Marketing Ltd [2002] B.C.C. 31.
[50] See Attorney General v Punch Ltd [2003] 1 A.C. 1046.

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The article which follows provides an overview and summary of that book.

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