LIABILITY ISSUES ARISING ON INCORPORATION OF PROFESSIONAL PRACTICES

by Roger S. Doulton, Solicitor, Winward Fearon & Co.

PART TWO

7. The company's rights against its directors - the historical position

Paradoxically the ability of a company to sue its directors for breach of their duties of skill and care *may be* significantly weaker than a company's capacity to sue its employees. Actions against directors by companies (or more usually their liquidators) to recover damages by reason of a failure on the part of the directors to exercise proper levels of skill and care have had a pretty chequered history in the English courts: so chequered, indeed, that between the seminal decision of *Romer J. in Re City Equitable Fire Insurance Company (1925) Ch.* and *Selangor United Rubber Estate v. Craddock (No. 3) (1968) 1 W.L.R.* it is difficult to find a single reported case. The reason for this lies in the fact that, historically, the courts have imposed a subjective standard of care on directors (what on earth would you expect of that silly idiot Roger Doulton?) as opposed to the objective standard of care (the standard of the reasonably competent practitioner) imposed in actions for professional negligence. (See, famously, *Bolam v. Friern Hospital Management Commitee (1957) 1 W.L.R.).* Accordingly actions against directors have not been easy as directors have always had the defence available to them that however awful their conduct it is, nonetheless, the best that can be expected from a person of his particular skill and experience. In the words of Chitty J.:-

> "Mr Crook was, in my opinion, undoubtedly deceived. It is said that if he had investigated the accounts he would have discovered that they had been falsified. But Mr Crook is a country gentleman; he is not a skilled accountant; and it does appear that after these dividends had been paid Mr Crook was set upon enquiry, and that he then immediately proceeded to take steps to examine the accounts. For that purpose he went to Waghorn and Waghorn, acting apparently on the instructions of Denham, showed him everything. He showed him a great deal too much, with the result that Mr Crook, who was, as I have said, a country gentleman and not a skilled accountant, discovered nothing. These rogues, in short - for a roguery there was - put before him so much that he came away with as little information as he possessed when he went. I am satisfied that if Mr Crook had endeavoured during the period in question to make an investigation, the investigation would have ended in the same way."

The reason for this state of affairs was twofold. First (contrast the position in the USA)

the law emerged out of the law of trust and was developed in the Chancery Division. Since many trustees were, and are, private individuals the requirement imposed by the courts was no greater than that trustees should exhibit that same level of skill and care as they would exercise in dealing with their own personal affairs. Second, company directors are not, in any event, an homogenous group and it was thought quite inappropriate to insist, therefore, on an objective test in these circumstances. Plainly the level of skill and care to be expected of a director of I.C.I. might be very different from that expected of your local window cleaner. (Contrast, however, the comments made in the Court of Appeal in *Wilsher v. Essex Area Health Authority* concerning the concept of the actor as opposed to the act being irrelevant to the tort of negligence.)

Two classic earlier expositions of this subjective nature of a director's duty appear in the cases of *Overend Gurney & Co v. Gibb (1872) L.R.* and in *Lagunas Nitrate Co. v. Lagunas Syndicate (1899)*. In this latter case Lindley M.R. said the following:-

> "If directors act within their powers, if they act with such care as is reasonably to be expected of them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company ... the amount of care to be taken is difficult to define; but it is plain that directors are not liable for all the mistakes they may make, although if they had taken more care they might have avoided them ... their negligence must not be the omission to take all possible care; it must be much more blameable than that: it must in a business sense be culpable and gross."

This line of cases culminated in the very famous case of *Re City Equitable Fire Insurance Company (1925) 1 Ch.* - a case which at least two leading text book writers have plainly not read since in both it is stated that the directors were not found to be negligent whereas, in fact, Romer J made it plain that, but for the existence in the articles of association of a clause exempting the directors from liability for all but "wilful default", he would have found some of the directors to be liable.

Be that as it may the case was, and remains (subject to what I say later) a classic statement of principle and deserves a read almost as much for the lucidity and brilliance of Romer J's judgment as for its importance in law:-

> "There are, in addition, one or two other general propositions that seem to be warranted by the reported cases:-

1. A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience ... it is perhaps only another way of stating the same proposition to say that the directors are not liable for mere errors of judgement (contrast the House of Lords comment on Lord Denning's judgement in *Whitehouse v. Jordan*).

2. A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature.

3. In respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion justified in trusting that official to perform such duties honestly."

And there, somewhat surprisingly, at any rate until recently, the matter was supposed to rest. I say "somewhat surprisingly" because Section 310 of the Companies Act 1985 (re-enacting Section 78 of the Companies Act 1928 and Section 205 of the Companies Act 1948) renders void any provision in any contract or in the company's articles or otherwise which purports to exempt or indemnify any officer (including director, manager, secretary or auditor) from:-

> "any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company."

Consequently a director is answerable and accountable for all his breaches of fiduciary or other duties and also for all breaches by him of the Companies Act 1985 which make him liable to the company. Any constitutional or contractual attempt to exonerate him is void. Accordingly those directors who would, but for the "wilful default" clause in the articles of association of City Equitable Fire Insurance Co, have been found liable would, following the Companies Act 1928, have been unable to escape liability.

It is noteworthy, and I would suggest important in the current climate, that all the directors involved in the *Re City Equitable* case were non-executive directors. And it is with that in mind that I turn to consider the present position.

8. The company's right against its directors - the current position???

Is there any reason to suppose that the subjective test no longer has the force of law?

Because of the dominance of *Re City Equitable Fire Insurance Co (1925) Ch.* there is, in fact, extremely little authority on this point.Nonetheless it is suggested in all the text books which I have read, albeit with varying degrees of certainty, that the position may now have altered both in respect of executive directors and in respect of non-executive directors. Butterworths is particularly strong on this point. What are the reasons for believing that matters are not quite so lax as heretofore?

(a) As we have seen, and in the case of ordinary employees, the courts have readily inferred an implied term in the contract of employment requiring the exercise of reasonable skill in the performance of the duties of the job. It is suggested that there is no reason why the same test should not be applied to an employed director particularly where there is a service contract. The assumption of a greater liability is quid pro quo for the greater security afforded by the service contract in terms of statutory protection and redundancy and pension rights.

(b) There now is the very important (but unreported) case of *Dorchester Finance Company Ltd v. Stebbings and Others (1974) D. No. 3538.*

This has the look of a case upon which much will turn in the future. In this case non-executive directors who were also Chartered Accountants were found liable for breach of their duty of skill and care in spite of the fact that they had acted bona fide throughout. The plaintiff company's business was money lending. At the material time it had three directors. However, only Stebbing was full time. Parsons and Hamilton made only rare visits to the company's premises. Stebbing and Parsons were qualified accountants. Hamilton was unqualified but had considerable experience. Over a period Stebbing caused the company to make loans to a number of people and other companies with whom he had some connection or dealing. He was able to do this at least partly because Parsons and Hamilton signed company cheques in blank at his request. Parsons and Hamilton were held to have failed to exhibit the necessary skill and care in the performance of their duties as directors. In his judgement Mr Justice Foster rejected the argument that they were entitled to rely on the competence and diligence of the company's auditors and laid particular stress on their experience in acountancy:-

> "For a Chartered Accountant, and an experienced accountant, to put forward the proposition that a non-executive director has no duties to perform I find quite alarming. It would be an argument which, if put forward by a director

with no accountancy experience, would involve total disregard of many sections of the Companies Act 1948. The signing of cheques by Hamilton and Parsons was, in my judgement negligent, as it allowed Stebbing to do as he pleased. Apart from them they not only failed to exhibit the necessary skill and care in the performance of their duties as directors but also to perform any duty at all as directors of Dorchester. In the Companies Act the duties of a director whether executive or not are the same."

So far as expert directors acting within an area of their expertise are concerned it would be a very unsafe proposition indeed to assume that the subjective standard will continue to apply. Whether or not this remains the case in the case of either non-expert directors or, alternatively, expert directors acting outside the area of their expertise seems to me to remain in doubt and certainly the suggestion which I next consider does not seem to me conclusive on this point.

(c) It is suggested in the Institute of Directors' booklet on Directors' Personal Liability that Section 214 of the Insolvency Act 1986 (to which I will refer later on another point) may impose a newer and higher standard of skill and care on the basis that since every fact and matter known to a director and decision taken by the director ultimately has an effect on the company's solvency. The standard of the skill and the care imposed by that section applies to all directors' acts and decisions. That test I refer to in greater detail below and is somewhat hybrid between the subjective and objective test. The proposition, it seems to me, is, in any event, too wide.

If I am right in the above what is the application, therefore, of this law to an action by an incorporated firm of professionals against an employee to recover damages suffered by that company by reason of the director's or employee's negligence?

Very tentatively I would suggest the following may be the position:-

(i) That in an action brought by an incorporated firm of professionals against a director operating qua director (i.e. in the financial management of a company unless, that is, perhaps, he is an accountant) that standard of care *may* remain subjective.

Here I ask my next question:-

But what if you entrust the financial management of your company to a finance committee? Even as solicitors one would surely expect them to show expertise in this

field. Otherwise one would not have entrusted financial management of the company to them in the first place. Certainly when I put the suggestion that the subjective test might be relevant to a friend of mine who specialises in insolvency he was far from convinced that most liquidators would see it that way!

(ii) That in an action brought by an incorporated firm of professionals against a negligent director acting not *qua* director but *qua* employee insofar as he is giving professional advice to a client the standard of care which will be imposed by the courts will be the objective or *Bolam* test i.e. the standard of the reasonably competent practitioner.

These propositions have the distinct merit of fitting quite neatly into the distinction drawn by insurers between Directors & Officers insurance and professional indemnity insurance. Not, of course, that that is authority for their accuracy! We will be discussing insurance at a later stage.

N.B. Section 727 of the Companies Act 1985 which allows a director to escape liability where he has been negligent if he has "acted honestly, reasonably and ought fairly to be excused". This section, however, is, as I understand, rarely invoked by the courts. I wonder if they might invoke it more often in the case of straight professional negligence in the kind of situation in which directors of companies tend to run into difficulties.

9. The director's position

If my co-director has committed an act of negligence so great that it threatens my company with insolvency or, at any rate, a substantially reduced trading position, can I, the co-director, choose not to sue him to recover the loss which he has inflicted on the company?

As has often been said, the chief and overriding fiduciary duty of a director is to act bona fide in the interests of the company. Notwithstanding the comments of Lord Denning in *Morris v. Ford Motor Co Ltd* (1973) 1 Q.B. and the comments of the inter-departmental committee following *Lister* it does seem to me at least strongly arguable that a director or board of directors who chose not to sue a co-director or employee to recover such damages may render themselves/itself liable in damages for breach of this overriding duty to act at all times in the interests of the company. It is hard to see how it could possibly be argued that a decision not to sue a co-director or employee in a situation in which that decision would render the company insolvent and/or substantially damage its trading position was in the interests of the company.

This matter was, in fact, touched upon by the Court of Appeal in *Prudential Assurance v. Newman Industries Limited* (No. 2) (1982) 1 Ch. as follows:-

> "In the present case a board, of which all the directors save one were disinterested, with the benefit of the Schroder-Harman report, had reached the conclusion before the start of the action that the prosecution of the action was likely to do more harm than good. That might prove a sound or unsound assessment but it was the commercial assessment of an apparently independent board."

More questions

(a) Can the directors, when appointed, and sanctioned by the members, make a policy decision that it was not in the interests of the company for internal writs to be flying about once a mistake is made?

(b) Would such a decision be a breach of Section 310 of the Companies Act 1985? (As to which see below)

10. The company's right not to sue and its effect

Here I walk into a minefield and one that is far removed from my own particular area of expertise. Two questions arise:-

(a) Can a director be protected from proceedings by the company if the members take a decision not to sue?

(b) If yes, does that decision bind a liquidator?

At first blush the answer to both these questions, somewhat surprisingly, appears to be "yes". In my submission, however, further examination of this problem lends support to the view that the answer to (b) is only "yes" in certain circumstances which is just as well because otherwise much of the law relating to insolvency could be rendered redundant.

It is, of course, the case that this problem is only likely to arise when an incorporated firm of professionals is faced by a claim or a judgment in excess of its insurance cover. It is not, however, particularly difficult to envisage such circumstances. Suppose a company is insufficiently capitalised to meet the judgment. Suppose the plaintiff has not named the individual director or employee as a defendant but relies, instead, on breach of contract as apposed to the company's vicarious liability in tort. Is the

company entitled to choose not to sue its director or employee and simply allow itself to go into liquidation?

> *Pavlides v. Jensen & Others (1956) 3 W.L.R.* is an important case here and has the great merit of comparatively simple factual background. In this case directors of a company negligently (but honestly) sold a mine owned by the company at a considerable undervalue. A minority shareholder brought proceedings against the directors and the company in negligence; the judgment of Danckwerts J is instructive:-
>
> "On the facts of the present case, the sale of the company's mine was not beyond the company, and it is not alleged to be ultra vires. There is no allegation of fraud on the part of the directors or appropriation of assets of the company by the majority shareholders in fraud of the minority. It was open to the company, on the resolution of a majority of the shareholders, to sell the mine at a price decided by the company in that manner, and it was open to the company by a vote of the majority to decide that, if the directors by their negligence or error of judgment had sold the company's mine at an undervalue, proceedings should not be taken by the company against the directors. Applying, therefore, the principles as stated by Lord Davey, it is impossible to see how the present action can be maintained."

In the absence of fraud, therefore, or an ultra vires act (subject to restricted relaxation of the rule in more recent cases) it does seem that the members of a company are entitled to take a decision not to sue a negligent director. Does it, in particular, bind a liquidator?

The answer to this question appears to be:-

> "It depends when the decision was made."

This I take to be the ratio of the very complicated case of *Multinational Gas and Petrochemical Co v. Multinational Gas and Petrochemical Services Ltd* (1983) 3 W.L.R. and emerges most clearly from the Judgment of Dillon L.J. In this case the plaintiff's shareholders were three oil companies which had set up a company in Liberia being a joint venture for the purchase, storage, transportation and sale of gas and liquid gas. Certain decisions were taken which rendered the company liable to its creditors in the minor and trivial sum of £74 million. A liquidator brought proceedings (inter alia) against the directors in negligence. It was held that although the plaintiff company had a separate existence from its shareholders, it existed for their benefit

and provided they acted intra vires and in good faith they could manage its affairs as they chose *while it was solvent;* that the shareholders, who owed no duty to third parties or to future creditors, by approving the directors' acts made those acts the acts of the plaintiff and it could not now complain of the lack of commercial judgement of the directors in making the decisions.

Accordingly, and once more, it was established that shareholders can, in the absence of fraud or ultra vires, run a company just as they wish. It emerges, in particular, from the judgment of Dillon L.J. that this observation is subject to two further important additional conditions precedent as follows:-

1. That it was not alleged that the plaintiff was insolvent when the board meetings sanctioning the directors' conduct were held; and

2. It was not alleged that the joint venturers or the directors of the plaintiff had acted fraudulently *or in bad faith* in any way or were guilty of fraudulent trading. What was alleged was that they had acted negligently.

In the context of an incorporated professional practice, therefore, faced by a claim in excess of its insurance cover, I would put forward the following propositions:-

1. Provided that the company is solvent and will not be rendered insolvent by the claim then the members can, in the absence of fraud or ultra vires, choose not to sue the director or employee who has rendered the company liable, in which event that decision will bind a liquidator;

2. Faced, however, by a situation in which the company would be rendered insolvent if it does not make recovery against the director or employee then the director or employee cannot be so protected from a claim against a liquidator because a decision not to sue would not be held to be in good faith. I am much encouraged in this view by the comments made by Dillon L.J. in the case of *Liquidator of West Mercia Safety Wear Limited v. Dodd & Another* (Times November 24th 1987) explaining his decision in *Multinational Gas and Petrochemical Co v. Multinational Gas and Petrochemical Services Ltd* (1983) 3 W.L.R. as follows:-

"Where a company was insolvent a director's duty to act in the best interest of the company included a duty to protect the interests of the company's creditors.

West Mercia was at the relevant time insolvent to the knowledge of the directors who had been told not to make transfers or deal with the company's account. Mr Dodd had

in fraudulence of the creditors made a transfer for his own benefit.

In the *Multinational* case at the time of the transfer the company concerned was solvent and what the directors had done at the bidding of the shareholders was to make a business decision in good faith and act on that decision which subsequently turned out to be a bad decision.

In the present case Mr Dodd was guilty of a breach of duty and the declaration sought ought to be made against them."

11. Other points

I turn to consider other points which seem of particular relevance to an incorporating partnership:-

(a) Section 214 Insolvency Act 1986 - Wrongful trading

Section 214 of the Insolvency Act 1986 makes a director of a company which has gone into insolvent liquidation liable to contribute to its assets if at some stage before the liquidation he:-

> "Knew that there was no reasonable prospect of avoiding insolvent liquidation or ought to have concluded that this was the case".

Section 214 (4) sets out the standard of care expected being the standard of the reasonably diligent person having both:-

(i) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in that company; and

(ii) the general knowledge, skill and experience that that director has.

Notwithstanding the somewhat hybrid nature of this test it is plain that this standard of care is higher than the subjective standard of care which I have discussed above. Watch out, therefore, those of you who are as inept in financial matters as myself!

NB - the section also applies to shadow directors.

(b) **Loans**

By Section 330 (2) of the Companies Act 1985 no company may lend money to any of its directors or to a director of its holding company and nor may it guarantee or provide security in connection with a loan made by a third person to such director. In addition a company must not arrange for the assignment to it or the assumption by it of any rights, obligations or liabilities under a transaction which, if it had been entered into by the company, would have contravened Section 330 (2) nor must it take part in any arrangements whereby another person enters into a transaction which, if it had been entered into by the company, would have contravened Section 330 (2), and under the arrangement that a person has obtained or is to obtain any benefit from the company or its holding company or a subsidiary of the company or its holding company.

The section is probably confined to loans in the ordinary dictionary meaning of the word and does not cover situations where a company pays bills for a director or supplies goods to a director on credit. However, such transactions are covered by section 330 (3) where the company is a "relevant company" within the meaning of that section. There are certain exceptions to these provisions covering loans of small amounts, directors' expenditure etc. but the rule is otherwise strict.

(c) **Secret profits**

Any profit acquired by a director through holding the office of director must as a matter of law be accounted for to the company unless the director has disclosed the profit in the circumstances in which he acquired it to the company in general meeting and his retention of it has been sanctioned by an ordinary resolution or by the acquiescence of all the individual members entitled to vote thereon or unless he is protected by an appropriately worded provison of the articles. This duty, the duty not to make secret profits, is very strict. See *Regal (Hastings) Limited v. Gulliver* (1942) 1 All E.R. and *Industrial Development Company Consultants Limited v. Cooley* (1972) 2 All E.R. in particular. Accordingly, unless sanctioned, the director of any incorporated firm must (unless, as seems unlikely, he has obtained his directorship other than in his capacity as a director of the incorporated firm) account to his firm for any outside directorship or, for example, fees and giving talks such as these!

(d) **Non-cash assets Section 320 Companies Act 1985**

(e) **Personal Interest in contracts**
A director cannot have personal interest in a contract or other transaction with his company unless:-

(i) he discloses it under Section 317 of the Companies Act 1985; and

(ii) the articles permit it; or

(iii) it is ratified by ordinary resolution of the members.

The effect of any such breach is that:-

(i) the director must account for the profit made; and

(ii) the contract is voidable if the company chooses to avoid it.

12. **Insurance points**

Incorporation of a professional practice will (or may) bring that practice onto a collision course with Section 310 of the Companies Act 1985 and may make it difficult, or even impossible, for the practice to insure its directors and its employees as it wishes. Section 310 reads as follows:-

"(i) this section applies to any provision, whether contained in a company's articles or in any contract with the company or otherwise, for exempting any officer of the company or any person(whether an officer or not) employed by the company as auditor from, or indemnifying him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company.

(ii) except as provided by the following sub-section, any such provision is void.

(iii) the company may, in pursuance of such a provision, indemnify any such officer or auditor against any liability incurred by him in defending any proceedings (whether civil or criminal) in which judgment is given in his favour or he is acquitted, or in connection with any application under Section 144 (3) or (4) (acquisition of shares by innocent nominee) or Section 727 (director in default, but not dishonest or unreasonable), in which relief is granted to him by the court."

This section has given rise to much earnest debate and it is strongly arguable that it renders void the provision of any sort of insurance cover in respect of directors' liability to the company for whom they work i.e. Directors & Officers cover. For this reason most insurers writing Directors & Officers cover apportion the premium between the company reimbursement policy and the individual policy insisting on the director paying that portion of the premium which relates to the individual policy.

I say "it is at least strongly arguable" because there are those who think this view to be wrong. Whichever faction be right, however, it is an issue which remains in sufficient doubt for the Law Society's Standing Committee on Company Law to have published a paper back in July 1986 calling for an amendment to the section. That paper makes interesting reading not least for the suggestion that on a strict view it might be the case that an insurance policy which indemnified the director of a company against his own negligence was void *irrespective of who paid the premium.*

Do similar problems arise in respect of professional indemnify cover? If so, it would seem that clause 13 (3) of the Solicitor's Incorporated Practice Rules 1988 would also be void in so far as it relates to officers. It reads as follows:

> "The losses against which a recognised body is required to insure under this Rule are all losses arising from claims in respect of civil liability incurred in the practice of the recognised body by the recognised body or by any of its officers or employees or former officers or employees or by any solicitor who is or was a consultant to or associate in the body's practice or is or was working in the practice as an agent or locum tenens..."

I have discussed this possibility with a representative of the Law Society. His view is that the payment of premiums by an incorporated professional practice in respect of professional indemnify cover for its directors and officers would not fall foul of section 310 because the duty in the case of professional negligence cover is owed not "to the company" as per section 310 (1) of the Companies Act 1985 but to a third party. I think that this may be the correct view. I would point out, however, that it remains the case that where a director or employee is in breach of a duty to a client the likelihood is that he is also in breach of his duty of skill and care to the company.

In any event, and as things stand at present, the issue does remain live in respect of Directors & Officers cover. I say "at present" because there has been published recently a Green Paper suggesting an amendment to Section 310 to clarify matters. Accordingly it may be that this issue will become a "dead duck" fairly shortly. As things stand at present, however, there is a real risk that any policy premiums which

are met by the company in respect of Directors & Officers cover will be void and arguably at risk even if the director pays the premium.

But what of the policy itself?

Notwithstanding that the master policy contains some element of Directors and Officers cover I suspect that there may be some who do not properly understand the distinction between Directors and Officers cover and professional indemnity cover. I think the simplest way to get at this problem is to ask oneself the question:-

> "To whom do I owe the duty?"

In broad terms if the answer to this question is "my company" then you will be talking about Directors and Officers cover; if the answer to the question is "my client" then you will be taking about professional negligence cover always provided, of course, that the act complained of is the giving of professional advice.

This distinction comes out quite clearly in the Lloyd's standard policy where "Wrongful Act" is defined as:-

> "Any actual or alleged breach of trust, breach of duty, neglect, error, misleading statement, omission or breach of warranty of authority or other act wrongfully committed or attempted by the Assured or in the course of performing duties as a Director or Officer of the Company."

There are also the following two exclusions:-

(a) To the extent that the Assured is entitled to indemnity from any other source; and, more importantly,

(b) Arising from any claim or claims made against the Assured by any third party based upon or alleging or originating from *breach of any professional duty* owed to such third parties.

There is also an exclusion against loss:-

> "brought about by or contributed to or consequent upon any dishonesty, fraud or malicious conduct of the Assured, provided, however, that the Assured shall be entitled to indemnity in respect of:-

(a) legal costs incurred in successfully defending proceedings brought in respect of such loss,

(b) loss where the final judgment or other adjudication of the court hearing proceedings against the Assured determines that the Assured is legally liable in respect of a Wrongful Act on some cause of action which is not dependent upon the existence of a dishonest, fraudulent or malicious purpose or intent, and makes no finding that the Assured was guilty of dishonesty fraud or malicious conduct in relation to the Wrongful Act in question."

Now this is very interesting indeed and I suspect insurers may be in for a nasty shock. How much easier it will be for a liquidator to bring a claim under section 214 of the Insolvency Act (which does not involve an allegation of dishonesty) than for fraudulent trading. After all, the liquidator's job is to recover monies for the company. He will take the easiest route and no allegation of dishonesty - with its attendant higher burden of proof - need necessarily be made even where there has been such dishonesty. Nor need the court make a finding of dishonesty.

Another interesting exclusion is for loss:-

"made, whether in the name of the Company or not, and instigated by any person, whether the Assured or not, who is now or has been or shall be a Director or Officer against the Assured."

This is the so called "insured against insured clause". Why does it exist?

The simple answer to the question lies in an American case where a company which had suffered loss by reason of its negligent directors, knowing those directors to be insured, sacked the directors and then sued the directors to recover the losses. Not on any more I am afraid!

I have asked two very senior brokers in this field recently whether or not it could be argued that the clause applied to a liquidator. I have received two different replies. I make the observation that as a matter of law a receiver is an officer of the company whereas a liquidator is its successor in title.

Another clause one perhaps should note in passing excludes loss:- "made, whether in the name of the Company or not, by or on behalf of any parent or holding or controlling or subsidiary or affiliated company of the Company".

I am well aware in preparing this paper that I have appeared to be skipping somewhat lightly over the water lilies. There is no doubt that the incorporation of a professional practice raises many issues from a liability point of view which to date have no firm answers. There is no doubt, also, that the list I set out above is by no means exhaustive. I have not even begun to analyse the various criminal offences which one might encounter upon incorporation.

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"GREEN PAPER" PROPOSALS – AN AMERICAN'S VIEW

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INTRODUCTION

In January 1989, the Lord Chancellor's Department published three "green papers", two of which were "The Work and Organisation of the Legal Profession" and "Contingency Fees".

The papers are published at a time of an ever-increasing trend of international and multi-national practices and the inevitable comparative analysis of the legal and judicial professions of different countries.

I have been asked to comment on these two "green papers" from the perspective of an American practitioner with some exposure to an international practice.

THE WORK AND ORGANIZATION OF THE LEGAL PROFESSION

One could read this "green paper" as an effective summary of some of the topical issues prevalent in the American legal and judicial systems. It touches on specialization, mandatory continuing legal education, competency, technology, training of law students, use of paralegal or non-legal personnel to perform legal services, legal aid, advertising, use of lay people on professionally-focused committees, professional discipline and victim compensation funds. At the same time, there are some particularly British issues raised – the distinction between solicitors and barristers, rights of audience, attendance on counsel, Queen's counsel, pupillages, tenancies, chambers and partnerships vis-à-vis barristers and Inns of Court.