Section 216 Restriction on Re-Use of Company Names

216[1] [Application] This section applies to 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.

216[2] [Prohibited name] For the purpose 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.

216[3] [Restriction] expect 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) part in the promotion, formation or management of any such company in any way, whether directly or indirectly, be concerned or take.

216[4] [Penalty] If a person acts in contravention of this section, he is liable to imprisonment or a fine, or both.

216[5] ["The Court"] 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.

216[6] [Interpretation re name] 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.

216[7] [Interpretation re insolvency liquidation] 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.

216[8] ["Company"] In this section "company" includes a company, which may be wound up under Part V of this Act.

[Former provision: IA 1985, s.17]

General Note

This is one of a number of innovations made by IA 1985, which together form a package designed to strike down the "phoenix" phenomenon. This term was used to describe an abuse of the privilege of limited liability, which, perhaps more than anything else, showed the inadequacies of the former insolvency law in the corporate sector. A company would be put into receivership [or voluntary liquidation] at a time when it owed

large sums to its unsecured creditors. Frequently, the receiver was appointed by a controlling shareholder who had himself taken a floating charge over the whole of the company's undertaking, and there was nothing to stop him from appointing a receiver with whom he could act in collusion. The receiver would sell the entire business as a going concern at a knockdown price to a new company incorporated by the former controllers of the defunct company. As a result, what was essentially the same business would be carried on by the same people in disregard of the claims of the creditors of the first company, who in effect subsidised the launch of the new company debt-free. It was not unknown for the procedure to be repeated several times. The use of nominees or "front me" could add to the confusion and help to deceive future creditors: on the other hand, advantage could sometimes be gained from using a new company name similar to that of the old company, and cashing in on what left of its goodwill. The present section is aimed to counter both of these latter aspects of the "phoenix syndrome". It is not based on any of the Cork Committee's recommendations, and was introduced at a late stage during the passage of the Insolvency Bill through Parliament in 1985. It makes the re-use of the name of company which has been wound up insolvent a criminal offence in the circumstances defined; but it is rather surprisingly confined in its scope to directors and shadow directors of the extinct company. In addition, any such person and any nominee or "front man" through whom he conducts the second business may incur personal liability, without limitation, under s.217.

S. 216[1]
Many phrases in this subsection have special meanings. "Company" and "gone into insolvent liquidation" are defined in s. 216[8] and 216[7] respectively; the "appointed day" is the day on which the present Act came into force [29 December 1986: see s. 436, 443]; "director" and "shadow director" have the meanings ascribed to them by s.251.
The section is not retrospective as to apply to liquidations that were already in force when the Act took effect.
The prohibition applies to anyone who has been a director or shadow director of the old company within the 12 months prior to its liquidation, and lasts for the period of five years that follows that event [s. 216[3]].

S. 216[2]
The ban applies to the use of the same name or a similar name: see, further, the note to s. 216[6].

It should be emphasised that the present section is not directed against the re-use of an insolvent company's name in itself: there will be no ban on this practice provided that no director of the former company is associated with the second business. It is only *directors* who can contravene the section, and only directors who are liable to punishment. This explains the phrase "a prohibited name *in relation* to such a person".

S. 216[3]
The ban is not restricted to the use of a prohibited name by a newly formed company: an established company [perhaps a member of the same group as the defunct company] may

well have a "similar" name already, or may change its name to a "prohibited" name, with the result that its directors may be caught by this section. [Note that IR 1986, r. 4.230, may give a director an exemption in the former of these cases].
The court is given power to grant dispensations from the prohibition imposed by this section, which it is likely to do when the insolvency is not linked with any blameworthy conduct on the part of the director concerned. Re Bonus Breaks Ltd [1991] BCC546 is an illustration of such a case. There, the applicant had been a director of a company, which had gone into insolvent liquidation, but she had not behaved culpably and had lost substantial sums of her own money. A new company was set up with a capital of £50,000, including £49,000 in redeemable shares. Morritt J gave leave for her to be a director of the new company against undertakings that its capital base would be maintained and that it would not redeem any redeemable shares nor purchase its own shares out of distributable profits for a period of two years, unless such action was approved by a director independent of the company's founders.
The rules also specify three sets of circumstances where the section will not apply: see IR 1986, rr. 4.228ff. These are [1] where the whole, or substantially the whole, of the business of an insolvent company is a successor company and the liquidator [or equivalent office-holder] of the insolvent company gives notice to its creditors under r.4228; [2] for an interim period, where an application is made to the court within seven days of the liquidation and the court grants leave not later than six weeks from that date [r. 4229]; and [3] where the second company has been known by the name in question for at least 12 months prior to the liquidation and has not been a dormant company [r. 4.230]. All other cases will have to go to the court for authorisation: the relevant rules are rr. 4.226, 4.227.
Paragraphs [b] and [c], by the use of the term "indirectly", will be effective to stop a person from controlling another company or carrying on a new business through others as "front" men. In addition, para. [c] makes it clear that it will be an offence to use a prohibited name even where no second company is involved, but in this case the civil consequences prescribed by s. 217 will not be applicable.
The phrase "concerned or take part in the management of a company" is not defined, but the note to s. 217 is relevant in this context.

S. 216[4]
Note that it is only a person who was a director or shadow director of the liquidating company who can be convicted of an offence under this section. In contrast, the civil liability imposed by s. 217 extends also to persons who act on the instructions of such ex-directors.

On penalties, see s. 430 and Sch.10.

S. 216[5]
For the courts having jurisdiction to wind up companies, see ss. 117 and 120. It is clear that "the court" need not be the same court as that which may have been involved in the liquidation of the old company.

S. 216[6]

This provision should be read with s. 216[2] above. In addition to forbidding the use of identical name, the section bans a name "so similar as to suggest an association with" the former company. It is likely that this catch the common and, in many ways, convenient practice of calling a new company by a name such as "John Smith [1991] Ltd", after the original John Smith Ltd has gone out of business. [There will, of course, be no objection to this so long as the first company was wound up solvent].
The offence is not confined to the use of a prohibited name by a company: an unincorporated business is caught as well [s.216[3][c]]. Further, the prohibition is not confined to a company's registered name. A company may carry on business under another name. Thus, for example, John Smith Ltd, before it went into insolvent liquidation, may have used the trade name of "City Autos". It will be an offence for a former director of the company to take part in the management of any business using the name "John Smith", or "City Autos", or any name similar to either. It will also be an offence for him to be a director of any company having the registered name "John Smith Ltd" or "City Autos Ltd" and also of any other, X Ltd, if it trades under "John Smith" or "City Autos" – a similar name in each case.
It is the last of these possibilities that is most likely to mislead creditors and members of the public generally, i.e. the use of the same trade name by a succession of limited companies.

S. 216[7]
This subsection defines "goes into insolvent liquidation" in terms identical to s. 214[6]. See the note to that provision and, for the meaning of "goes into liquidation", s. 247[2].

S. 216[8]
The effect of this provision is to include "unregistered" as well as registered companies within the section. See the note to s. 220.

Section 217 Personal Liability for Debts, following contravention of s. 216

217[1] [Personal liability] 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.

217[2] [Joint and several liability] 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.

217[3] [Relevant debts of company] 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.

217[4] [Person involved in management] 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.

217[5] [Interpretation] 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.

217[6] ["Company"] In this section "company" includes a company which may be wound up under Part V.

[Former provision: IA 1985, s. 18[1] [part], [2]-[6]]

General note
This section imposes personal liability on a person who contravenes s. 216 by re-using a prohibited company name. In addition, it makes similarly liable anyone who allows himself to be used as a "front" man or nominee in breach of that section. Since the criminal liability prescribed by s. 216 affects only directors and shadow directors, the category of those who are potentially liable on a civil basis is wider than those who may be convicted of the statutory offence.

In Thorne v Silverleaf [1994] BCC109, summary judgement was given in favour of the plaintiff against a director who had infringed s. 216. The Court of Appeal held that it was irrelevant that the plaintiff had allegedly aided and abetted the director in the commission of this offence. It was immaterial that he was aware that he was of the facts, and even that he was aware both of the facts and that they constituted a contravention of s. 216. It was also held on the evidence that the plaintiff had not waived his right to seek recovery against the director under s. 217.
Section 217 is drafted in broadly similar terms to CDDA 1986, s. 15, which is also derived from IA 1985, s. 18.

S. 217[1]
Many of the terms used in this provision are defined or explained in the following subsections, and in particular "relevant debts", "involved in the management of a company", "is willing to act" and "company".
For a person to be made liable under para. [b], it will be necessary to show that he knew all the facts, which are relevant to a contravention of s. 216.
Liability under the section is automatic, not requiring a special application to the court of court order of any sort and, for a case coming within para. [a], not requiring a prior conviction of the director concerned.

S. 217[2]
A person liable under this section is primarily liable, jointly and severally with the company and others concerned, and not in any secondary way.

S. 217[3]
Liability extends not only to debts in the narrow sense but also to all other obligations, such as claims for damages; and it applies to all debts and obligations arising during the relevant time and not merely those incurred by the acts of the person in question.
The phrase "willing to act" is explained in s. 217[5].

A director is irrefutably presumed to be "involved in the management" of the company.
In regard to other persons, the best guide to the meaning of the phrase may be found in cases where the courts have constructed closely similar, but not identical, provisions such as "take part in" or "be concerned in" the management of company. For a full discussion, see the notes to CDDA 1986, s. 1[1].

S. 217[5]
This provision creates a presumption against a person who is proved at any one time to have acted on the instructions of another whom he then knew to be contravening s. 216. Once this is shown, he is refutably presumed to have been "willing to act" on the other's instructions at any time afterwards.

S.217[6]
"Unregistered" companies are included by this formula. See the note to s. 220.