



# Waking the Dead: A Fresh Look at Phoenix Companies

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# Behold, the Phoenix

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*First Independent Factors & Finance Ltd v. Mountford* [2008] 835 (Ch) per Lewison J. at [17]

The principal target of ss.216 and 217 is what is often called the ‘phoenix syndrome’. The ‘phoenix’ problem results from the continuance of the activities of a failed company by those responsible for the failure, using the vehicle of a new company. The new company, often trading under the same or a similar name, uses the old company’s assets, often acquired at an undervalue, and exploits its goodwill and business opportunities.

Meanwhile, the creditors of the old company are left to prove their debts against a valueless shell and the management conceal their previous failure from the public. The phoenix company rises out of the ashes of the defunct company.

# Behold, the Phoenix

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*First Independent Factors & Finance Ltd v. Mountford* [2008] BCC 598 per Lewison J. at [17]

However, although the ‘phoenix syndrome’ is the principal target of the sections, the words of the sections encompass factual situations that cannot be described in those terms. The court should not adopt a strained interpretation of the words of the statute simply in order to confine its operation to true cases of phoenix syndrome: *Ricketts v Ad Valorem Factors Ltd* [2004] B.C.C. 164... That case .. itself was not a phoenix case, yet the director was liable ... [The section] should be construed to include transactions which are not within those sections on their fair interpretation... the sections should be construed together with the rules so as to produce a rational and coherent scheme

# Who bears the curse of the Phoenix?

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S.216(1) ... a person where a **company** has **gone into insolvent liquidation** ... and he was a **director** or **shadow director** of the company at any point in time in the period of 12 months ending with the day before it went into liquidation.

- **company** s.216(8) ( $\neq$  partnership (*Re Newtons Coaches* [2017] BCC 34))
- **goes into insolvent liquidation** s.216(7) assets < debts + liabilities + w/u expenses

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- **director** s.251 includes “any person occupying the position of director, by whatever name called”, covering a *de facto* director (*HMRC v. Holland* [2010] UKSC 51, *Smithton Ltd v. Naggar* [2014] EWCA Civ 939)
- **shadow director** s.251 means “a person in accordance with whose directions or instructions the directors of the company are accustomed to act”

# How shall the Phoenix be known?

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S.216(2) a name is a prohibited name in relation to such a person if -

(a) a name **by which OldCo was known** at any time in 12 month period or

(b) a name which is **so similar** to (a) as to suggest an association with OldCo

- **by which OldCo was known** s.216(2) – its name, any name on which it carried on in business (includes trading names *Griffin v. UHY Hacker Young* [2010] PNLR 20)

- **so similar** objective test (*Archer Structures v. Griffiths* [2004] BCC 156)

# How shall the Phoenix be known?

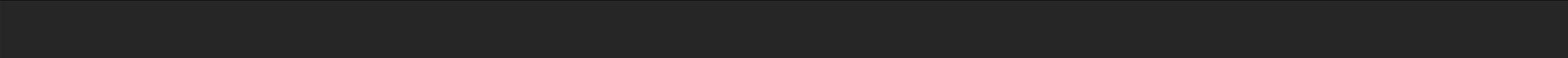
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Saxon Drinks Limited – selling Saxon 1050™ <i>Griffin v. UHY Hacker Young</i>	Brand Central Limited t/a Saxon Drinks UK, selling Saxon 1050™
MPJ Construction Limited <i>Archer Structures v. Griffiths</i>	MPJ Contractors Limited
Air Component Co Limited <i>Ricketts v. Ad Valorem Factors Ltd</i>	Air Equipment Co Limited
Walsh Construction Limited <i>HMRC v. Walsh</i> [2005] EWHC 1304 Ch	SG&T Walsh Limited

# How must the curse be borne?

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S.216(3) (subject to exceptions) person **shall not** at any time within 5 years from OldCo's liquidation

- (a) be a director of any other company that is known by a prohibited name;
  - (b) directly or indirectly be concerned or take part in the promotion, formation or management of any such company;
  - (c) directly or indirectly be concerned or take part in the carrying on of a business carried on (otherwise than by a company) under a prohibited name.
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# And for those who transgress?

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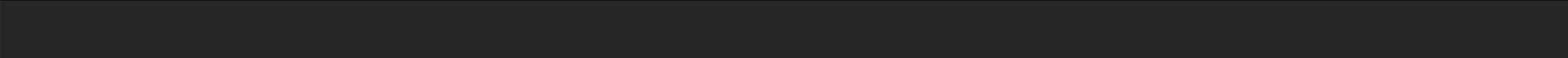
S.216(4) imprisonment, fine or imprisonment and fine

S.420 & Schedule 10: on indictment 2 years and/or fine; on summary 6 months and/or statutory maximum fine

Strict liability

Compensation under Powers of Criminal Courts (Sentencing) Act 2000

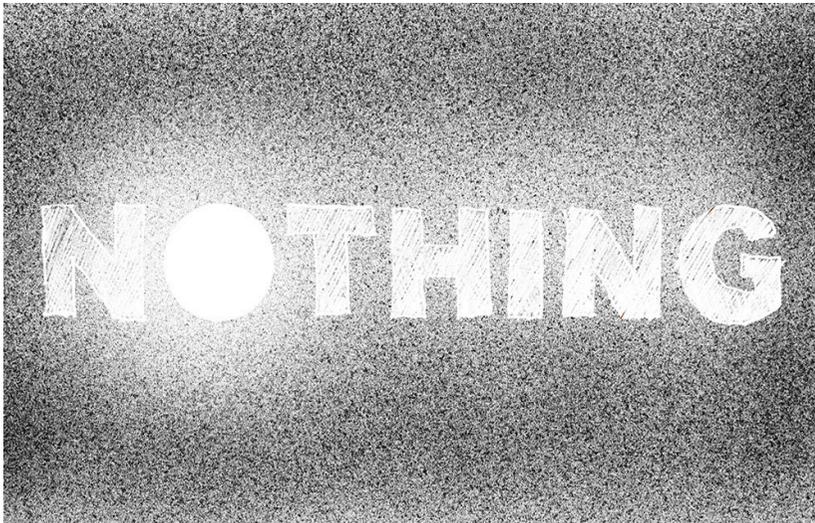
Proceeds of Crime Act 2002



# What about the creditors?

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Creditors of OldCo



Creditors of NewCo



# Liability of cursed (& flunkies)

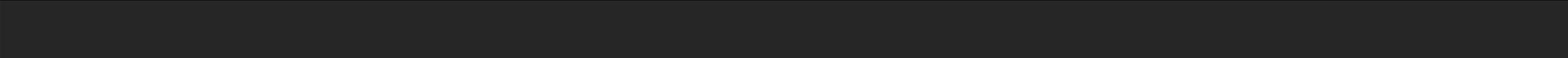
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S.217(1) A person is personally responsible for the relevant debts of NewCo if at any time:

(a) in contravention of s.216, he is **involved in the management of the company**

(b) ~~in contravention of s.216~~, he is involved in the management of the company and acts or is willing to act on instructions of a person who he knows is in contravention of s.216

**involved in the management of the company**: s.217(4) – director, concerned in management



# How is such liability to be borne?

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Strictly

S.217(2) jointly and severally

S.217(3) relevant debts

- time qualified

- when NewCo carries out only part of its business under prohibited name, civil liability restricted to debts carrying out that part: *Glasgow City Council v. Craig* [2008] SLT 212

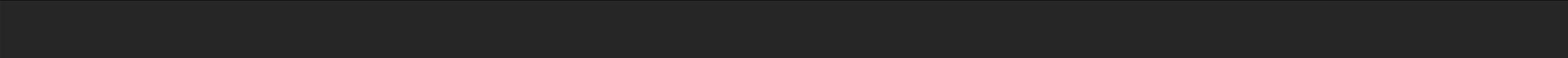
# Comparing the criminal and civil

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	CRIMINAL	CIVIL
Role of person in OldCo	Director or shadow director	Not necessary
Role of person in NewCo	Director or Concerned in or takes part in promotion, formation or management of company or Concerned in or takes part in carrying on business carried on (other than by company)	Involved in management of NewCo (director or takes part in management)
Type of Phoenix	Companies (regd/unregd) Unincorporated associations	Companies (regd/unregd)

# How may the curse be lifted?

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- Leave of the court
  - Giving notice to creditors under r.22.4
  - Interim protection pending the grant of permission under r.22.6
  - Company already known by prohibited name, r.22.7
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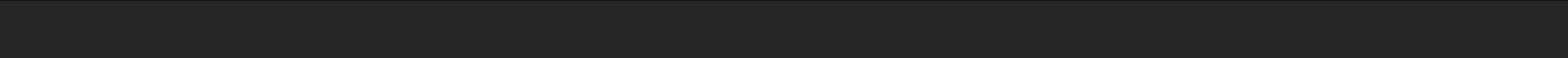
# The leave of the court, s.216(3) and r.22.2-3

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- Wide discretion
- Usually considers whether OldCo's insolvency applicant's fault
- Principal considerations (*Penrose v. OR* [1996] 1 WLR 482) whether OldCo's business bought at undervalue, danger that creditors of OldCo misled
- Leave cannot be retrospective
- r.22.6 exception provides an interim safe harbour providing application made within 7 days of OldCo's insolvency

# Notice to creditors r.22.4

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- NewCo acquires (or is to acquire) the whole or substantially the whole of OldCo's business under arrangements made (1) by liquidator (2) pre-liquidation by administrator / administrative receiver / supervisor of CVA
  - Notice to every creditor & in London Gazette
  - Notice *before* acting in breach of s.216
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# NewCo already known by prohibited name, r.22.7

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- NewCo has been known by prohibited name continuously for at least 12 months before liquidation
- Company with prohibited name must not have been dormant at any time within those 12 months.

# Can't shake the trucking curse

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The use of “Phoenix” arrangements to avoid previous liabilities may amount to unacceptable business practice. A phoenix company is where the assets of one limited company are moved to another legal entity (sometimes referred to as a ‘pre-pack’) but with no obligation to pay the failed company’s debts. The conduct of the company is an important factor for considering repute and any suggestion that a company has for example favoured trade creditors over the Crown will prompt questions as to the motives behind such actions. Commissioners will scrutinise such applications carefully to ensure the promotion of the principle of fair competition.

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