

# Court in the act

**Business Money** talks to City barrister Professor **Mark Watson-Gandy** about newly legislated powers to investigate directors of dissolved companies

**Q** So, what are we looking at here?

**A** Until recently, one wheeze rogue directors could use to try to escape the risk of liability and disqualification was to dissolve their company rather than let it go into liquidation. The logic behind this was that a dissolved company would be outside the jurisdiction of the secretary of state (as there was no longer a company) and the official receiver (as there was no insolvency process). This could be done by rogue directors either applying to dissolve their company or, more simply, by not filing company returns and letting Companies House strike the company off.

**Q** Wasn't there anything that could be done to stop this?

**A** Disgruntled creditors or other aggrieved parties could object to the striking off, assuming they were aware of it. If they did not spot the strike off in time, a disgruntled creditor could apply for a double-barrelled order, restoring the company so it could then be placed in liquidation, but this assumed a willingness on the part of the creditor to throw good money after bad. The secretary of state has the power to defer dissolution under s205 of the Insolvency Act 1986 even after liquidation so investigations can be pursued. However, deferral can be appealed by any party with a legitimate interest: *Kumar v Official Receiver* [2021] (a director and shareholder has sufficient legitimate interest to mount an appeal).

**Q** What has changed?

**A** The Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act 2021 received royal assent on 15 December

2021. The legislation covers England, Scotland, Wales and Northern Ireland. This extends the duty of the court to disqualify unfit directors under s6 of the Companies Disqualification Act 1986 to directors of dissolved companies.

**Q** What does disqualification entail?

**A** Directors' disqualification carries draconian consequences – particularly for those in business or in the professions. It not only bars you from being a director but from being involved in the management of a company, directly or indirectly, without the court's permission. Breach of a disqualification order or undertaking is a criminal offence with the benchmark sentencing set as a period of imprisonment, even in cases where there has been no dishonesty: *R v Attenbury*. Disqualification will also render you ineligible for a variety of other roles.

**Q** Is this only for insolvent companies?

**A** No. The act expressly also catches firms which have been dissolved without becoming insolvent, provided the court at the time it was dissolved would have had jurisdiction to wind the company up: s2(2), Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act 2021.

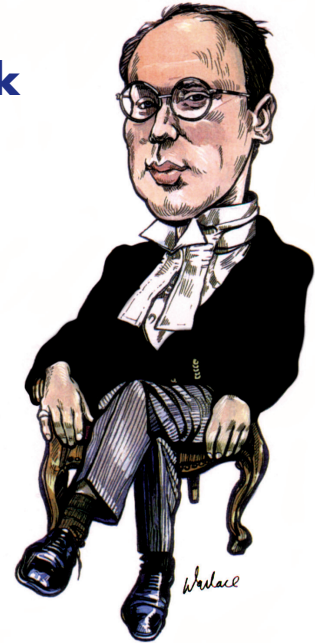
**Q** So, going forward, the loophole has gone?

**A** Not just going forward. The act, unusually, has retroactive effect. The provisions relate to the conduct of directors of companies, and companies dissolved, at any time before as well as after the passing of this act: s2(14), Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act 2021.

**Q** How much of a risk is it?

**A** For directors whose companies were struck off for failing to make company returns, this should be troubling news.

The court can find unfit in failures to comply with the Companies Act requirements.



This includes failing to file returns and accounts: *Re Swift 736 Ltd, Secretary of State for Trade and Industry v Ettinger and another* [1993].

**Q** But directors of dissolved companies only have to worry about the risk of being disqualified?

**A** Not only that. Once a disqualification order has been made, the court has powers to order that disqualified directors pay compensation either to the Secretary of State either for the benefit of the company or for specified creditors: ss 15A-C Company Directors Disqualification Act 1986. The Secretary of State has up to 2 years from the date of the disqualification order to make the application.

**Q** What has prompted all of this?

**A** The legislation is intended to act as a strong deterrent against using the dissolution process as a method of fraudulently avoiding repayment of government-backed loans given to businesses to support them during the coronavirus pandemic, including loans made under the Bounce Back Loans Scheme. The change has been brought in as part of a series of measures to recover compensation for fraudulent applications. Of course, now it is law, the provisions are of far wider application.

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