

A low-angle, black and white photograph of several skyscrapers reaching towards the sky. The perspective is from the ground looking up, making the buildings appear to converge towards the top of the frame. The buildings have a grid-like pattern of windows. A thin red vertical line is positioned to the left of the text, and a thin red horizontal line is positioned above the text.

COMPANY
DIRECTORS'
RESPONSIBILITIES
TO CREDITORS
ANDREW KEAY

Company Directors' Responsibilities to Creditors

Andrew Keay



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Company Directors' Responsibilities to Creditors

Company directors have certain responsibilities to creditors of their companies. In particular, they should avoid fraudulent and wrongful trading and should consider, as part of their duties to their companies, the interests of creditors when their companies might be, or are, in financial difficulty.

The work is precipitated by the lack of coherence in the consideration of wrongful trading and the recent delivery of important cases on fraudulent trading. Also, this timely work is the first to examine comprehensively directors' responsibilities to creditors in times of financial strife, as well as addressing when these responsibilities arise, and what directors should have to do to ensure that they comply with their obligations.

Keay explores the relevant issues from doctrinal, normative and comparative perspectives, seeking to address the question as to when directors are liable for wrongful trading, fraudulent trading or breach of their duties to creditors and whether directors should be held responsible for wrongful trading and failing to consider the interests of creditors. Besides the relevant UK legislation and case law, legislation and case law from several Commonwealth countries, and especially Australia and Canada, as well as Ireland and the United States are examined and compared, and reforms which take into account the aims and rationale of the relevant legislation as well as creditors' interests are proposed and assessed. Importantly, as far as directors' duties to creditors are concerned, new approaches for courts which would make the nature of the responsibility and its timing more precise are suggested.

Andrew Keay is Professor of Corporate and Commercial Law in the School of Law's Centre for Business Law and Practice at the University of Leeds, where he specialises in teaching Corporate Law and Insolvency Law. He is the Commonwealth editor of *Gore Browne on Companies* and he is a member of the editorial boards of several journals. He has authored a number of books, including *McPherson's Law of Company Liquidation*, 2001, *Insolvency Law: Corporate and Personal*, 2003, *Insolvency Legislation: Annotations and Commentary*, 2005 (the latter two co-authored).

Preface

The focus of the corporate governance debate, certainly in the UK, has been on the accountability of directors to shareholders and employees. But other persons involved in companies must not be forgotten. This book concerns itself with directors and the interests of creditors. If one wanted to be very technical, one could say that there are, indirectly, a number of responsibilities that directors of companies owe to their companies' creditors. I mention some of these in Chapter 1. Most of them are clear and warrant little attention. But the focus of this book is on those responsibilities that are not precise and which are worthy of not only a doctrinal examination, but also a theoretical examination. Essentially, the book addresses three responsibilities that directors have to their companies' creditors. These are: not to engage in fraudulent trading; not to engage in wrongful trading; and a duty to consider the interests of the creditors in certain circumstances.

The doctrinal aspects of these responsibilities are not without a significant lack of clarity. But also, there is some substantial theoretical debate concerning whether these responsibilities should in fact be imposed on directors at all. First, the book endeavours to provide an exposition of the law relating to these responsibilities as well as engaging in some analysis of problem issues and making suggestions for reform. Second, the book seeks to identify the theoretical arguments that may be propounded in favour and against the existence of these responsibilities. Third, the book includes some comparative discussion, using, primarily, common law jurisdictions as relevant comparators. Because of limits on length I have not been able to engage in detailed comparative discussions, but nevertheless it might be that academics and lawyers in other jurisdictions, particularly Ireland, Australia, the United States, Canada and New Zealand, might find aspects of the book to be interesting and also relevant to issues pertaining to their respective jurisdictions.

It is hoped that the work provides a rounded examination of the responsibilities owed by directors. I have sought to discuss the doctrinal and theoretical issues in separate parts of the book for ease of exposition and to make sure that the reader understands and can distinguish what the law appears to be at the present and what it arguably should be from a normative perspective. In places it is difficult (and inappropriate) to separate doctrinal

and theoretical discussion, and there will, on occasions, be overlaps. I have endeavoured to limit repetition of arguments. The comparative discussion is scattered throughout the book and included in appropriate places.

I wish to pay tribute to some interesting and incisive works written in the late 1980s and early 1990s by several writers that have been particularly helpful to me in developing, as well as challenging, some of my thinking on directors' duties to creditors contained in this book. In particular I acknowledge the writings of Len Sealy and Vanessa Finch, which have been especially thought-provoking. The relevant works of these commentators and others who have written important contributions are cited in several chapters and in particular in Chapters 11–13.

I wish to thank a number of people and organisations. First, the School of Law at the University of Leeds for granting me some study leave to permit me to work on this book. Second, I thank the Arts and Humanities Research Council (AHRC) for awarding me a Research Leave Grant that also enabled me to complete the research for, and the writing of, this book. I should also acknowledge the work of those anonymous persons who acted as reviewers for the AHRC, for such work often goes unnoticed and without appropriate recognition. Without the support of the School of Law and the AHRC this book would have taken much longer to see light of day.

Third, I am also thankful for helpful and provocative comments provided by anonymous referees relating to the following articles that I have had published: 'The director's duty to take into account the interests of company creditors: when is it triggered?' (2001) 25 *Melbourne University Law Review* 315; 'Directors' duties to creditors: contractarian concerns relating to efficiency and over-protection of creditors' (2003) 66 *MLR* 665; 'A theoretical analysis of the director's duty to consider creditor interests: the Progressive School's approach' (2004) 4 *Journal of Corporate Law Studies* 87; and 'Formulating a framework for directors' duties to creditors: an entity maximisation approach' (2005) 64 *Cambridge Law Journal* 614. Large parts of these articles, with some updated thinking on my part, are included in the book. Of course, I alone am responsible for any errors.

Fourth, I thank Michael Murray, my co-author in the article, 'Making company directors liable: a comparative analysis of wrongful trading in the United Kingdom and insolvent trading in Australia' (2005) 14 *International Insolvency Review* 27, for allowing me to draw upon material in that article. Fifth, I thank Louis Doyle, my co-author on the book, *Insolvency Legislation: Annotations and Commentary*, for allowing me to use material written in relation to ss 213, 214 and 215 and included in that book. Sixth, I am most thankful to several publishers for allowing me to draw upon material that I have had published by them in articles and books. I acknowledge that I use, with the permission of the named publishers, material from the following:

'Fraudulent trading: the intent to defraud element' (2006) 35 *Common Law World Review* 121–134 (Vathek Publishing);

- Insolvency Legislation: Annotations and Commentary*, 2005 (Jordan Publishing);
- ‘Making company directors liable: a comparative analysis of wrongful trading in the United Kingdom and insolvent trading in Australia’ (2005) 14 *International Insolvency Review* 27 (John Wiley and Sons);
- ‘Do recent Canadian developments require a re-think in the United Kingdom on the issue of directors’ duties to consider creditor interests?’ (2005) 18 *Insolvency Intelligence* 65–68 (Sweet & Maxwell);
- ‘Wrongful trading and the liability of company directors: a theoretical perspective’ (2005) 25 *Legal Studies* 431 (Society of Legal Scholars);
- ‘Formulating a framework for directors’ duties to creditors: an entity maximisation approach’ (2005) 64 *Cambridge Law Journal* 614 (Cambridge University Press);
- ‘A theoretical analysis of the director’s duty to consider creditor interests: the Progressive School’s approach’ (2004) 4 *Journal of Corporate Law Studies* 307 (Hart Publishing);
- ‘Another way of skinning the cat: enforcing directors’ duties to creditors’ (2004) 17 *Insolvency Intelligence* 1 (Sweet & Maxwell);
- ‘Directors’ duties to creditors: contractarian concerns relating to efficiency and over-protection of creditors’ (2003) 66 *Modern Law Review* 665 (Blackwell Publishing);
- ‘Directors taking into account creditor interests’ (2003) 24 *Company Lawyer* 300 (Sweet & Maxwell);
- ‘The duty of directors to take into account creditors’ interests: has it any role to play?’ [2002] *Journal of Business Law* 379 (Sweet & Maxwell);
- ‘The director’s duty to take into account the interests of company creditors: when is it triggered?’ (2001) 25 *Melbourne University Law Review* 315 (Melbourne University Law Review Association Inc 2001);
- McPherson’s Law of Company Liquidation*, 2001, parts of Chapters 11 and 16 (Sweet & Maxwell).

Seventh, I would like to thank Daniel Attenborough, my research assistant in the School of Law at the University of Leeds, for his assistance in researching comparative aspects of material relating to fraudulent and wrongful trading.

Finally, as always, I thank my wife, Rhonda, for her patience and support at all times, but particularly when it comes to my research and writing.

I have endeavoured to state the law as it is available to me as at 1 April 2006 although I have made some mention of changes to the Company Law Reform Bill 2005 effected after that date.

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Leeds

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