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Fraudulent Trading

In its simplest form, Fraudulent Trading is where a company carries on a business with the intention of defrauding creditors, or for any fraudulent purpose, and this applies whether the company is trading, has ceased trading or is in the process of being wound up.

Section 993 Companies Act 2006 (replacing s. 458 of the earlier 1985 Act) provides that if any business of a company is carried on;-

- with intent to defraud creditors of the company or creditors of any other person or
- for any fraudulent purpose

every person who is knowingly a party to the carrying on of the business in that manner commits an offence.

Also s.9 Fraud Act 2006 makes it an offence for a *person* knowingly to be a party to the carrying on of a fraudulent business where the business is not carried on by a company.

Non-corporate traders covered by the new offence include sole traders, partnerships, trusts and companies registered overseas. The Fraud Act offence is committed when a person:-

- Is knowingly a party to the carrying on of a business
- With intent to defraud creditors of any person or
- For any other fraudulent purpose.

The phrase "to defraud creditors of any person" covers the situation where creditors are creditors of the business, but the business is not a legal person. The creditors could be creditors of individuals or of other related companies.

The term "fraudulent purpose" denotes an intention to go "beyond the bounds of what ordinary decent people engaged in business would regard as honest, or "involving, according to the current notions of fair trading among commercial men, real moral blame"

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Certain types of bodies are exempt from fraudulent trading, particularly "Any body not formed for the purpose of carrying on a business which has for its object the acquisition of gain by the body or its individual members"

Although a non profit making body cannot be guilty of fraudulent trading, the individual trustees of a charity can be guilty of offences.

Fraudulent trading cases cover a wide ambit of criminal culpability. At one extreme there may be calculated and reckless trading on a large scale, with no genuine intention to discharge the company's debts but simply to line the directors' pockets. At the other end of the scale there may be a properly funded business which runs into financial problems, where the directors attempt to trade in order to save their employees' jobs, but come to a point where they should have faced up to reality and ceased to trade, but didn't.

Cases which highlight some of the issues concerning fraudulent trading are:-

- **Smith [1997] 2 Cr App R (S) 167** in which the offenders had admitted using misleading accounts and false invoices to maintain the credit of a marketing company which had eventually failed, with losses of £520,000.(3 years imprisonment reduced on appeal to 18 months)
- **Leaf [2008] 1 Cr App R (S) 14**, in which the defendant had been convicted in 2005 of 13 counts of fraudulent trading in company purchase schemes resulting in a loss of £22 million in tax. The Court of Appeal reduced consecutive sentences totalling 12½ years to ten years, consisting of five-year sentences on the two most serious counts, to be served consecutively with the remaining sentences to be served concurrently.

Fraudulent Trading may impact on liability for corporate insolvency. A limited liability company has a separate legal identity from its directors and managers and so they are not normally liable personally for the debts of the company. The Insolvency Act 1986 however provides that knowingly parties to such conduct may be required to contribute to the assets of the company concerned in the course of its winding-up.

A finding of Fraudulent Trading at criminal law may also lead to a confiscation order being made against the perpetrators of the illegality, and require payment of any benefit gained as a consequence of the misconduct.

Saunders Law Ltd has considerable experience of dealing with such cases, and will defend its client's interests with expertise, energy and commitment.