“Joint and Several Liability”

… What does it mean?

Expert knowledge means success

Contents

Note: This publication has not been updated since it was last published. Some of the hyperlinks may have changed and may need updating. In addition, some of the information in this publication may be out of date.

Joint and Several Liability... what does it mean?

A joint and several liability is an undertaking by two or more members of a group (such as a general partnership) to be responsible, either individually or jointly, for any liability which may exist after any member or members have failed to meet their obligations. For example if a group of four people enter into a joint and several liability on a bank loan, then in the event of two of the members reneging on their obligations the remaining two members become fully responsible for the repayment of the loan.

Thus, a joint and several debt is one for which all the debtors may be sued together or one of them individually.

When parties act together in a contract as partners they have joint and several liability. In addition to all the partners being responsible together, each partner is also liable individually for the entire contract - so a creditor could recover a whole debt from any one of them individually, leaving that person to recover their shares from the rest of the partners.

Where more than one person takes on an obligation, their liability may be:

- Joint; or
- Several; or
- Joint and several.

Where more than one party is liable for the same obligation, the agreement will usually set out the nature of those parties' liability. The agreement will also often deal with the liability of successors in title to the original parties.

Different forms of Liability

Difficulties may arise where an agreement is silent as to the nature of the liability but, in general, there will be joint liability if two or more people covenant in the same agreement that they, or any one of them, will do something, or if they covenant generally without using words of severance.

- With joint liability each party is liable up to the full amount of the relevant obligation;
- With several liability the parties are liable only for their respective obligations;
- With joint and several liability the parties are jointly liable to the person or entity to whom the covenant is made but as between obligors themselves, the liabilities are several. This means that someone has a claim and pursues one party and receives payment in full, that party can then pursue the other parties for a contribution to their share of the liability.

Section 1 of the UK Partnership Act 1890 defines a partnership as a '*relation[ship] which subsists between persons carrying on a business in common with a view of profit'*. Partnerships are flexible business model that allow sharing and bringing together of human resources and labour, financial resources, and experience.

In a general partnership formed pursuant to the 1890 Act, all partners are personally liable for the actions of their fellow partners.

Example:
Three partners are in business together. One of those business partners says something that is untrue about a product that the business sells. The other two partners, as well as the partner who made the statement, are liable for the statement and all of their collective assets are available to satisfy any liability for untrue statement. This is known as *joint and several liability*. *Joint* means all of the partners and *several* is a reference to the liability that all of the partners are independently liable for one another's act and omissions. So in this case, the assets of a partner who has nothing to do with any wrongdoing may be used to recover losses caused by a partner involved in the wrongdoing.

What it means in practice

If you have taken out a credit agreement, loan or have a bank account in joint names (with another person) then you are both liable for the full amount of any debt.

This means that if you have a joint loan with a spouse or partner and one of you fails to repay the debt (this often happens following divorce or separation) then the lender could still ask you for payment of the full amount (not just half).

The lender cannot recover the money twice but can pursue both of you, or just one of you, for all amounts still outstanding until they have obtained full payment.

When does a Partnership exist?

Properly established, the terms of a partnership are established by a formal partnership agreement which usually sets out responsibilities, profit sharing, and expense sharing. However, a written partnership agreement is not required for a partnership to exist. Section 2 of the Partnership Act 1890 provides that in determining whether a partnership does or does not exist, regard shall be had to the following rules:

(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof;

(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived;

(3) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular:

(a) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such;

(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of a business does not of itself make the servant or agent a partner in the business or liable as such;

(c) A person being a widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner in the business or liable as such;

(d) The advance of money by way of loan to a person engaged in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on a business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such, provided that the contract is in writing, and signed by or on behalf of all the parties thereto;

(e) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

What is not a Partnership?

Within the meaning of the Partnership Act 1890, the relationship between members of any company or association which is:

- Registered as a company under the Companies Acts or the Limited Liability Partnership Act; or
- Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter; or
- A company engaged in working mines within and subject to the jurisdiction of the Stannaries;

is not a partnership.

What happens on death?

If someone, who is liable under a contract, dies his/her obligation ceases and the whole obligation passes to surviving guarantors/obligors and not to the personal representatives (except for one exception). When the last surviving party dies, the obligation passes to the personal representatives. Once there is a single debtor, the obligation becomes several.
The exception to the rule that personal representatives of joint contractors or obligors are not liable is partnership. Although partners are jointly liable for partnership debts, the estate of a deceased partner is also severally liable, subject to the prior payment of his/her separate debts.

If a joint and several/guarantor/obligor dies, his/her several liability passes to his personal representatives.

Discharge of Liability

There are complex rules that affect the discharge of joint contractors or obligors and somewhat illogically, some of these also apply to joint and several contractors/obligors. For example, the release of one joint or joint and several contractors will release the others. Similarly, accord and satisfaction with one joint or joint and several contractors will discharge the others. This is the case with joint tortfeasors but not joint and several tortfeasors.

If this affects you, it is suggested that you consult with a lawyer with experience in these matters.

Joint and Several Liability in tort

Joint and several liability is often relevant to tort claims, particularly negligence cases. So far as a claimant is concerned, the defendants are jointly liable, but as between the defendants themselves, the liabilities are several. This means that if the claimant pursues one party, and receives payment in full, that party can then pursue the other defendants for a contribution to his/her share of the liability.

Joint and Several Liability – VAT fraud

On 21 March 2007, the Government announced steps to modernise the Joint and Several Liability measure introduced in 2003, to counter potential mutations in Missing Trader Intra Community VAT Fraud:

- From 1st May 2007, the goods covered by Joint and Several Liability, will be extended to include electronic goods and their related parts and accessories;
- Following Royal Assent to the 2007 Finance Bill, HMRC have greater flexibility to make future changes to these provisions as the fraud mutates; and
- HMRC will be updating guidance to businesses.

These are proportionate steps, which compliment the introduction of the reverse charge accounting procedure announced on 19 March 2007 and aimed solely at those who choose to profit from fraud.

Joint and Several Liability for directors' loans

In the case of *Neville (as administrator of Unigreg Limited) and another v Krikorian and others [2006] EWCA Civ 943,* the Court of Appeal held that where a director knew that his company operated a loan account in favour of another director in breach of the Companies Act 1985, he/she was jointly and severally liable to repay all sums loaned after becoming aware of the existence of the loan account, even if he did not know details of the individual loans made:

- In addition, on becoming aware of the existence of the loan account, the director was in breach of his duty to the company for failing to take steps to recover the monies loaned.
- As a result, the director was liable to repay the company the difference between what could have been recovered from the other director at the time that such steps should have been taken, and the amount that could be recovered now.

The Companies Act 2006

If a company enters into a transaction or arrangement in respect of a director's loan, a quasi-loan, a loan or quasi-loan to a person connected to a director, a credit arrangement or some other arrangement which has not been approved by the members, by resolution, it may be voidable by the company. It may not be possible to void the transaction or arrangement where the return of the monies or asset is no longer possible, the company has been indemnified for any loss or damage or if the rights are acquired in good faith, for value by a person who was not a party to the transaction or arrangement and was unaware of the contravention. The company can require

- a director of the company, or its holding company;
- a person connected with a director of the company, or its holding company, with whom it entered into the transaction or arrangement;
- the director of the company, or its holding company, with whom any person is connected;
- or any other director of the company who authorised the transaction or arrangement,

to account for any direct, or indirect, gain, and, to, either, jointly or severally, indemnify the company for any loss or damage resulting from such a transaction or arrangement.

Further Information

The converse of *joint and several liability* is *several or proportionate liability*, where the parties are liable for only their respective obligations. A common example of several liability is in syndicated loan agreements, which will normally provide that each bank is severally liable for its own part of the loan. If one bank fails to advance its agreed part of the loan to the borrower, then the borrower can sue only that bank, and the other banks in the syndicate have no liability. Several organisations, particularly those representing insurers, are lobbying for a bill to change the law on joint and several liability. Suggestions for reform include:

- Introduce proportionate liability;
- Consider a statutory capping regime on insurance claims to alleviate problems of disproportiate liability. Insureds would have to permit caps on claims, which should be high enough to cover most claims.

This guide is for general interest - it is always essential to take advice on specific issues.

We believe that the facts are correct as at the date of publication, but there may be certain errors and omissions for which we cannot be responsible.

Important Notice

Publication issued or updated on:
28 July 2008

Ref: 158