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Directors and Officers Insurance – Extra Territorial Liabilities

Tim Hayes from Pannone LLP looks at the one London to New York ‘red-eye’ directors are all trying to avoid.....

When Ian Norris lost his High Court battle to resist extradition to the USA, many company directors could be forgiven for thinking that the increased risk of being extradited to the US on a whim had suddenly doubled overnight.

However this is not the bolt out of the blue that many think. In recent times a Senior CEO with a sports betting company was arrested whilst on route through JFK Airport. He faced internal extradition between New York and Louisiana but eventually managed to get home to the UK when he successfully argued that the charge and offence - although recognised under the Louisiana State law - were not offences recognised under New York State law.

The US Authorities' zealous pursuit of those involved in on-line gambling continued when a CEO of an AIM listed UK registered company involved in sports betting was arrested at Dallas Airport whilst on route to his place of business Costa Rica. Clearly then there may be many directors who have followed the Sarbanes-Oxley legislation, NatWest 3's extradition and now this development with Norris, who, whether through holding positions in local companies or through positions held in companies doing business in various jurisdictions, now lie awake a night worrying about the inherent risk of exposure to foreign criminal proceedings.

Recent developments show that the risk of arrest within the relevant jurisdiction should not be underestimated. A recent protocol issued by the Attorney-General is unlikely to help either. It does not specify any criteria for the determination of where cases should be tried.

Ian Norris' one last hope is an Appeal to the House of Lords. If successful he will ensure that the trend where British Citizens can still be extradited to the US without prima facie evidence of an offence is reversed. If not he could be on a flight to the US.

Clearly it has become easier for foreign prosecuting authorities to extradite directors from the UK. Look for example at the much lower threshold test enshrined in the Extradition Act 2003. The fact that there is no obligation for the USA to produce prima facie evidence but simply state the charge shows the exposure to criminal proceedings in foreign jurisdictions that directors face. If for example Norris was extradited on conspiracy to defraud he could at a later date face strict liability offences in the USA. Such inevitable consequences would not have been considered or examined by UK Court.

These recent high profile cases are likely to fuel demand for director and officers' insurance products which expressly provide cover to do with financial consequences of foreign proceedings. However, foremost in every director's mind must be the fact that policies only cover wrongdoing in a capacity as a director. In the case of the NatWest 3 it maybe that the wrong doing has nothing to do with their capacity of a director.

Care should be taken to ensure that the wordings of "claim and defence costs" are properly defined and that there is express cover for defence costs incurred in extradition proceedings including judicial review. In addition directors could do worse than cast a close eye over policies looking at none standard terms such as the cover for the cost of bail bonds and for public relations expenses.

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Tom Hayes is a member of the North West Fraud Forum.