

BHS judgment – directors duties and professional advice



The eagerly awaited judgment in the claim brought by the joint liquidators (“JLs”) of the BHS Group (“the companies”) against the companies’ former directors has been handed down. In a lengthy judgment the Court grappled with the law on wrongful trading and misfeasance as well as principles of causation and quantum. Several interesting points are summarised below, including whether or not obtaining professional advice is sufficient to protect a director who allows a company to continue to trade whilst insolvent.

The [case](#) addressed the conduct of two of the three respondents, Mr Henningson and Mr Chandler (the respondents). The claims against the third respondent, Mr Chappell, were severed by the court prior to the trial meaning the case against him will be heard at a later date.

Unusually, the parties’ experts agreed that during the period the respondents had stewardship of the companies (one year) the companies’ assets suffered a net deficiency of £140.1million. Typically, parties would disagree on whether there had been a net deficiency of assets at all.

The respondents were accused of wrongful trading and misfeasance.

Wrongful trading

The court relied on [Sequana](#) and confirmed that the JLs needed to establish that the respondents knew or ought to have known that insolvent liquidation or administration was inevitable at each key date. The court considered



the respondents knowledge at six (agreed) key dates and found that the respondents had the requisite knowledge on one of the six key dates; dismissing the claims in respect of the first five dates.

Misfeasance

The court considered several claims (separated into trading and individual misfeasance claims) and found the respondents liable for breaches of duty in respect of some (but not all) of them. The court confirmed that it was open to the respondents to argue a counterfactual that even if they had complied with their duties the companies would have continued to trade and suffer those individual losses in any event (*Davies v Monks* followed). The court assessed the role of each of the respondents and found that in certain of the misfeasance claims even if they had complied with their directors' duties the companies would have still suffered the losses complained of.

Professional advice

The court considered at several points in the judgment the weight it should give to the professional advice obtained by the companies throughout the relevant period. Notably, the court found that the advice could not protect the respondents from liability. Commentary on this case has already identified these parts of the judgment as concerning for professionals and directors, who seek to obtain advice for the very reason of protecting themselves from liability in the event their company suffers an insolvent event. It is important to note, however, that the court found the advice given to the companies was either (1) based on misleading, inaccurate or incomplete information and/or (2) not carefully considered or discussed by the Board. It is also worth noting that the advice was for the benefit of the companies and the individual respondents did not obtain advice on the risk of them being held personally liable. The court emphasised that it was the duty of the directors themselves to ultimately decide whether there was a reasonable prospect of avoiding insolvent liquidation. The court also accepted that in many cases professional advice given may provide an evidential basis for dismissing a wrongful trading claim where those directors carefully consider and follow the advice received. In this case, the court was not satisfied that the respondents had done so.

Quantum

The court used its discretion to determine the share of liability amongst all of the directors (even those that were absent) and found the respondents to be equally (albeit severally) liable for 15% of the companies losses, totalling £6.5million each. The court highlighted the inadequacy of the D&O insurance policy (which had a limit of £20million, including defence costs) and confirmed that a director's lack of means did not justify a reduction in the award of compensation against them. It was submitted in court that the entire limit had already been depleted by the settlement of one the (absent) director's claims and legal costs.

Key Takeaways

Whilst it was not disputed that the companies had suffered significant losses under the stewardship of the respondents, the JLs came unstuck on the stringent test for knowledge in the wrongful trading claims and causation. It should be noted that quantum for the misfeasant trading claim is yet to be determined – the JLs claim compensation totalling the entire net deficiency (up to £133.5m) and the court has invited the parties to make submissions on this point.

Two key takeaways for professional advisers and those taking advice, is that it is not enough to obtain advice. It should always be emphasised how important it is for the board to discuss and consider that advice carefully before making the ultimate decision on how to proceed in the best interests of creditors. It is also worth checking the limit of your D&O policy in the context of the sums being dealt with by the company.



How we can help

If you have concerns about the financial position of your company, or your own personal liability as a director, please do get in touch with our [commercial disputes team](#).

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