INSOLVENCY BULLETIN

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Liquidators' Expenses Claim Dismissed

Re Ralls Builders Ltd (No 2) [2016] EWHC 1812 (Ch)

In his substantive judgment earlier in the year, Snowden J dismissed a wrongful trading claim against the directors because the liquidators had failed to establish a causal link been the directors' failure to take all steps to minimise the creditors' loss and the subsequent loss to the company. Whilst it has long been thought that the correct measure of damages was the increase in the net deficiency, the court found in this case that no such deficiency increase had arisen as a direct result of the directors' actions. In other words, even though all the necessary aspects of a wrongful trading claim were proven, it was not the directors' decision to keep trading that caused the creditors' losses.

The court has now examined a second limb of the liquidators' claim which was for a contribution from the directors towards their increased costs and expenses. This was roundly rejected by Snowden J.

The liquidators' additional costs of investigating and prosecuting an action for wrongful trading amounted to £256,160. It was recognised by the judge and the parties that it is a long-established tenet of English law that a party's own management time in dealing with litigation cannot be recovered as damages. There is an exception, emanating from *Re Nossen's Letter Patent (1969),* by which such time costs might be recoverable where a party's own employees are so specialised as to amount to expert witnesses. However, the judge relied on earlier authorities (and particularly Warren J's judgment in *SISU v Tucker (2006))* to conclude that an IP was not entitled to be treated any differently to any other litigant and did not come within the *Nossen* exception so could not recover his own time costs as part of a damages award.

The judge also considered the meaning of s. 214 and concluded that a wrongful trading case would not be made out simply because the directors had failed to cease trading once they realised that insolvent liquidation was inevitable. Snowden J refused to characterise such a decision as 'wrongful' *per se*. This, however, has *always* been understood to be the case – we cannot understand the emphasis on whether the conduct was wrongful as the word 'wrongful' does not appear anywhere in s.214. To introduce the issue of whether the directors' conduct was wrongful introduces a mental element to s.214 which is simply not in the legislation. Section 214 is clear that from the point of realisation of inevitability of insolvency, the directors are under an obligation to take a positive decision – which may be to cease trading or to continue trading – and, if they get that judgment call wrong, they will be liable to contribute to the assets of the company pursuant to s.214(1).

This is a tough result for the liquidators who had acted quite properly in bringing an action against directors who they considered had made the wrong judgment call even once the realised that insolvent liquidation was inevitable. It is clear, however, from this judgment that section 214 does not introduce strict liability – the liquidator will also have to show that the directors' decision actually led to an increased loss to the creditors.

If you have any queries in relation to this, or any other, matter, please do not hesitate to contact us – *office@amblaw.co.uk* or 020 3651 5646.

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