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Directors' Liability for Increase in Net Deficiency from Wrongful Trading

Wright v Chappell [2024] EWHC
2166 (Ch)

10 September 2024

LEGAL
UPDATE

In this Update

Creditors, insolvency practitioners and litigation funders should take note – in a recent English decision, errant directors who had breached their directors’ duties in respect of a company which had continued to trade while insolvent or bordering on insolvency, were assessed to be liable for the increase in net deficiency of the company’s assets caused by the breaches over the relevant time period.

This manner of calculating compensation may be an additional string in an insolvency practitioner’s bow when handling asset recovery matters, particularly where a director’s breach has enabled the insolvent company to continue to trade.

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INTRODUCTION

Wright v Chappell [2024] EWHC 2166 (Ch) involved a wrongful trading scenario. The English High Court held former directors of the British Home Stores group of companies jointly and severally liable for £110,230,000. This amount was the increase in net deficiency of the company's assets caused by the breaches over the relevant time period.

The former directors had breached their duties to consider the interests of creditors at a time when the company was insolvent or bordering on insolvency. This duty, known as the "creditor duty", is a common law obligation that was recently affirmed and explained in Singapore's context by the Court of Appeal in *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024] SGCA 10.

BASIS OF COMPENSATION

The English High Court held that the starting point for assessing equitable compensation for breach of the creditor duty is the total increase in net deficiency of the company's assets from the date of breach until the date of liquidation, but only to the extent caused by the breach.

The former directors were held to have breached their duties on 26 June 2015 and 8 September 2015. They had caused the companies to enter into certain loan facilities when it should have been apparent that insolvency was imminent. These breaches led to the continued operation of the companies until 25 April 2016, when the companies entered liquidation. These caused a total increase in net deficiency of the companies' assets of £133,500,000 (from 26 June 2015 to 25 April 2016) and £45,400,000 (from 8 September 2015 to 25 April 2016). After some adjustment by the court to account for increases in net deficiency not caused by the directors' breaches, and for overlaps in losses between the two periods (to prevent double recovery), the total compensation due amounted to £110,230,000.

The court rejected arguments that compensation should be limited to the loss suffered by the company arising out of a single transaction or single venture. Although applicable in certain circumstances, for instance where a company suffers loss as a result of a preferential transaction or the isolated loss of an asset, this measure may not be appropriate when the breach directly enables the company to continue to trade. For comparison, the quantum of compensation that would have been allowed by the court, if calculated by reference to the single transactions, would have only amounted to £34,000,000.

KEY TAKEAWAYS

Wright v Chappell establishes a useful precedent for wrongful trading situations, and can aid insolvency practitioners and creditors in their assessment of the commercial viability of pursuing asset recovery proceedings against errant directors. Further, the written decisions published for this case are fairly extensive and thus helpfully illustrate how proceedings may be conducted against errant directors in such wrongful trading scenarios.

However, one should take note that as the statutory provisions relating to wrongful trading claims in Singapore differ from those in England, advice and guidance from experienced insolvency specialist counsel may be helpful.

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