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BHS, a case of misfeasant trading

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In a lengthy judgment the Court has ordered that former directors of BHS are to pay sums arising in both wrongful trading and in "trading" misfeasance.

Nearing 8 years after BHS appointed administrators, the Court handed down a substantial judgement involving a number of claims brought against its former directors.

Two directors were held liable in wrongful trading in that by 8 September 2015, they knew or ought to have concluded that BHS could not have avoided insolvent liquidation. However, of most interest is that it also accepted that in June 2015, three months earlier, the directors had breached their duties by causing the company to enter into a further loan agreement with ACE (on onerous terms) shortly before substantial rental payments fell due, instead of concluding administrators should have been appointed.

In entering into the ACE facilities, Court held that the directors had failed to consider the interest of the company's creditors.

In *Sequana* the Supreme Court confirmed that the duty to consider the interest of creditors is triggered when insolvent liquidation is probable, not inevitable. Entering into the ACE facility was one desperate last throw of the dice - the sort of insolvency deepening activity Arden LJ had in mind in *Sequana* when she considered when the creditor duty is engaged, directors must not only consider their interests, but not materially harm them.

This "misfeasant trading" claim as it has been coined, is the first reported example in England. Wrongful trading claims may be challenging to advance because of the need for the office holder to identify a date by which the directors knew or ought to have realised that the company could not avoid insolvent liquidation. The BHS judgement re-affirms that a decision by the board to enter into specific transactions before that point is reached, without having regard to the interest of creditors, can still give rise to a claim for breach of duty.

What remains to be seen is how the issues of causation and loss in these types of claims will be determined. This was a complex factual matrix and one in which the Court took the view that if the directors had regard to the interest of creditors, the company would not have entered into the ACE facilities at all but would instead have appointed administrators. There may appear at first blush some oddity in concluding the same set of facts can mean wrongful trading had not been triggered, but a breach of duty had arisen by the directors opting to take a step other than appointing an administrator. In BHS it may have made little practical difference given the upcoming rent quarter date but in other cases that may not be so, meaning the office holder will still need to grapple with the issues of causation and loss even if it can demonstrate a breach of duty.

The case also underscores the importance of taking proper professional advice, exercising independent judgement based on that and recording this. In this case, both legal and accounting advice had been obtained, but that did not offer the directors a defence. The Court was not persuaded it was followed, but in any case, it was not for the advisor to make the decision. It was for the directors to seek appropriate advice and apply that to the exercise of their independent judgment. The records, including some of the board minutes which the Court considered to be generic or formulaic in parts, did not evidence discussion had taken place at board level on the various risks involved.

As the first decision on misfeasant trading, this is likely to be the start of a developing area on the application of the duties owed to creditors following *Sequana*.

Wright and Rowley v Chappell and others [2024] EWHC 1417