

## **BRIEFING NOTE**

### **Re. Robin Hood Centre PLC (In Liquidation)**

This briefing note discusses the appeal decision of David Foxtton QC (sitting as a Deputy Judge of the High Court) handed down on 15<sup>th</sup> November 2016.<sup>1</sup> It is a rare appeal decision regarding wrongful trading. The full judgment is available upon request.

The original decision of Registrar Jones, dated 31<sup>st</sup> July 2015 and ordering the directors to pay £35,000, was set aside.

#### **What Is Wrongful Trading?**

Section 214 of the Insolvency Act 1986 addresses the situation where directors of a company knew or ought to have concluded that there was no reasonable prospect that their company would avoid formal insolvency. If that is the case and it can be shown that by not realising and taking appropriate action the directors made the end result for creditors worse, those directors can be ordered to pay for the additional financial harm that resulted.

Wrongful trading looks at what the directors knew or ought to have known at a particular point in time. It also takes into account the specific abilities of the directors and the particular circumstances of the company. There are enshrined principles (taken from the decided cases) about not applying too much hindsight or assuming that the directors would foresee everything that was yet to happen at the time; in the words of one of the cases, directors are not expected to be clairvoyant.<sup>2</sup>

The cases also make clear that it is vitally important to be able to show the amount of additional losses that the alleged wrongful trading has caused creditors. A financial comparison needs to be made between the position at the date or dates when wrongful trading is said to have begun and when the liquidation actually did begin.

Furthermore, a distinction needs to be drawn between additional losses which were actually caused by the alleged wrongful trading and losses that would have occurred anyway, such as reduced asset values in a liquidation sale or liabilities pre-dating when the alleged wrongful trading started. There is then a wide judicial discretion on the amount of any sum to be paid by the directors, taking into account the directors' conduct as whole and even external unavoidable factors such as weather.

Due to those various elements wrongful trading is notoriously difficult to prove at trial.

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<sup>1</sup> [2016] EWHC 2893 (Ch).

<sup>2</sup> *Re. Hawkes Hill Publishing Co. Limited (In Liquidation)* [2007] BCC 937 at [41].

## **The Decision of Registrar Jones**

Following a 7-day trial in July 2015 Registrar Jones found that the directors had been guilty of wrongful trading.<sup>3</sup> He then rejected the liquidators' calculation for the alleged additional losses caused by that wrongful trading. The liquidators' highest figure, based upon their earliest of five chosen dates for the commencement of the alleged wrongful trading, was £701,646, being the entire net deficiency in the liquidation of the company.

The Registrar then went on to perform his own calculation, which was not based upon any submissions at trial or part of the liquidators' case advanced prior to trial. He assessed the value of the additional losses caused by the wrongful trading at £35,000 and ordered the two directors to pay that sum. He later made no order for costs due to the number of issues upon which the directors had succeeded at trial, despite them having lost overall.<sup>4</sup>

### ***Re. Ralls Builders Limited (In Liquidation)***

Coincidentally Snowden J. heard the trial of a wrongful trading claim in June 2015. His judgment was handed down on 11<sup>th</sup> February 2016.<sup>5</sup> In that case the directors were found to have traded wrongfully from the second of two dates selected by the liquidators. However, Snowden J. also found that there was conflicting evidence regarding whether that wrongful trading had caused any additional losses; some of the conflicting evidence suggested that the wrongful trading had actually resulted in a profit, benefitting creditors as a whole. On the basis that the liquidators in that case had not proved any additional loss caused by wrongful trading their claim failed.

## **The Appeal**

The liquidators of Robin Hood Centre PLC appealed. That provided the directors with an opportunity to cross-appeal the finding of wrongful trading and the calculation of the £35,000 that they were ordered to pay.

On 15<sup>th</sup> November 2016 David Foxton QC (sitting as a Deputy Judge of the High Court) dismissed the liquidators' appeal and allowed the directors' cross-appeal. He found that the Registrar's own analysis was flawed and because the directors had not had opportunity to address it at trial, the judgment debt of £35,000 would have to be set aside.<sup>6</sup> Furthermore, on the basis that the Registrar had rejected the liquidator's calculation of the additional losses said to be caused by wrongful trading, there was nothing left upon which the Court could base a different calculation.<sup>7</sup>

The liquidators' Grounds of Appeal were all dismissed, as were the directors' other Grounds of Appeal. Consequential issues, such as refunding the sums paid by the directors pursuant to the judgment debt and the costs of the appeal and the proceedings below, were reserved to a further hearing.

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<sup>3</sup> [2015] EWHC 2289 (Ch).

<sup>4</sup> Costs judgment dated 6<sup>th</sup> October 2015.

<sup>5</sup> [2016] EWHC 243 (Ch) (11 February 2016).

<sup>6</sup> Paragraphs [116] to [118], [121] and [142] of the judgment.

<sup>7</sup> Paragraph [125] of the judgment.

The judgment also contains a useful appraisal of when the Court can legitimately adopt a “broad brush” approach to the question of quantum of loss caused by wrongful trading if the records of the company in question are inadequate,<sup>8</sup> which was not the case here.

## **Conclusion**

Wrongful trading cases are comparatively rare; wrongful trading appeals are rarer still. To have this case and *Ralls Builders* in fairly quick succession is unusual. The fact that in both cases the liquidators successfully proved wrongful trading, but failed to prove that it caused any actual loss for creditors, underlines just how fundamental that aspect of the claim can be.

Ashton Bond Gigg acted for the directors.

*The comments in this note are of a general nature only. Full advice should be sought on any specific problems or issues.*

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<sup>8</sup> Based upon the decision in *Re. Purpoint Limited* [1991] BCC 121; see paragraphs [75] to [86] of the judgment.