



Update

Insolvency

16 April 2009

Liquidators Must Balance the Costs and Benefits of Litigation Including Prospects of Return to Creditors

On 31 March 2009, Justices Spigelman, Hodgson and Austin of the New South Wales Court of Appeal, handed down their decision in *Gregory Winfield Hall v Peter Renwick Poolman* [2009] NSWCA 64.

The decision highlights some of the matters that a liquidator should consider before commencing litigation.

Facts

Two of the Reynolds Group of companies, which owned vineyards and a winery near Orange in New South Wales, were placed into liquidation. The liquidators sued two of the directors for insolvent trading and were successful. In defending the claim, both of the directors argued, amongst other things, that they ought to fairly be excused under ss 1317S and 1318 of the Corporations Act since success in the litigation would result in only a negligible return to creditors (with most of the recovery going to the liquidators' fees and litigation funder). However, the trial judge ordered that the liquidators' conduct be referred to an inquiry under s 536(1)(a) of the Act. The appeal concerned the decision to refer the liquidators' conduct for inquiry.

Finding

The appellate court found that there was a miscarriage of judicial discretion and set aside the order for an inquiry into the liquidators' conduct. Their Honours found that in exercising his discretion to order an inquiry, the trial judge had failed to give weight to one matter being the public interest in conducting public examinations and bringing directors to account for allowing a company to trade while insolvent. The trial judge's focus had been on the lack of likelihood of a return to creditors after the liquidators' costs and legal fees were paid. In addition the trial judge had taken the view that the liquidators should have sought directions at an early stage, a position that the appellate court did not accept.

In reaching their view, their Honours made it clear that the public interest in bringing directors to account for their actions did not overwhelm all other considerations. Rather, a liquidator's duty is to collect the assets of the company with the costs and benefits of doing so clearly in view.

Pre-litigation and litigation costs must also be proportionate to prospective benefits (including possible reimbursements of the liquidator's costs and expenses) and any funding agreement entered into must not be on manifestly unreasonable terms. Finally liquidators must not pursue litigation simply to generate fees.

Implications

This decision sits as a good reminder to liquidators of the matters which should all be weighed up before embarking on litigation. It is clear that Courts will look closely at liquidators' conduct in circumstances where the litigation does not result in a return to creditors.

Key Contacts

If you require any further information, please contact:

Melbourne

Penelope Pengilley, Partner

T: +61 (0)3 9321 9821

E: penelope.pengilley@holdingredlich.com.au

Sydney

Greg Wrobel, Partner

T: +61 (0)2 8083 0411

E: greg.wrobel@holdingredlich.com.au

Brisbane

Paul Venus, Partner

T: +61 (0)7 3135 0613

E: paul.venus@holdingredlich.com.au

Disclaimer

The information in this publication is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, we do not guarantee that the information in this article is accurate at the date it is received or that it will continue to be accurate in the future.