

News with Clout

Providing Corporate & Personal Solvency Solutions

TO TRADE OR NOT TO TRADE?

This is a complex question posed by many a discerning director when their company starts to slide.

In the context of the insolvent trading provisions of the Corporations Act there is no easy answer.

Clearly we all know that survival or restructuring to ensure survival be it a formal process or informal, the chances of maintaining or at least restoring value is seriously enhanced.

This is being recognized by the authorities who are in control of the law reform agenda, which has recently been the focus of submissions from the professional ranks.

The courts also seem to be wading in on the argument, as readers may know with the interesting decision in Hall v Poolman, where the defenses available under the Act received some attention.

There has also been The Stake Man case, which has highlighted the relief provisions of the Act under Sections 1317S and 1318. These provisions provide an opportunity for the Court to grant relief from civil penalties under the Act where the director acted honestly as well as having regard to all the circumstances.

In the Stake Man case the company conducted an operation which bought green logs, processed them, then wholesaled them to the market for stakes and flooring materials. The sole director decided to purchase drying kilns so that the timber could be dried and therefore increase his range of products and overall margins. The kilns did not perform resulting in a long dispute with the manufacturer, big ongoing losses in the company and a gradual cashburn.

An external expert accountant with experience in the timber industry was retained to review the business and assess and advise on various issues.

The expert advised whilst the business appeared to be weakening, the green timber side of the business was

As soon as the expert changed his tune and advised that the company had become insolvent the director did not hesitate and appointed a voluntary administrator.

The subsequently appointed liquidator eventually proceeded to take the director on for breaching the insolvent trading provisions of the Act.

Justice Goldberg of the Federal Court decided that the director had none of the usual defences available to him under Section 588H of the Act in that the expert was not retained with the specific idea in mind of providing ongoing advice as to the company's ongoing solvency. However the Judge was persuaded that the director:

- had done the right thing in actively seeking to resolve the company's financial and operational problems
- retained an expert who did not warn of insolvency
- tipped the company into administration as soon as he was told he was insolvent.
- Had gone out looking for investors
- Continually kept an eye on the trading operations which included trying to keep the company's creditors at 90 days
- Got no financial benefit out of keeping the company alive.

Goldberg did however make an order for costs in favour of the liquidator.

You would have to agree these are little known but interesting provisions of the Act in this current environment. Food for thought when advising directors that are teetering on the edge of the abyss.

As ever we welcome your enquiries!