

Restructuring and Insolvency  
Case Law Update  
Rosling King LLP



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The High Court has recently considered whether directors were in breach of their duties after a company entered insolvency. Specifically, the Court considered whether it could exercise its discretion in accordance with section 212 of the Insolvency Act 1986, whereby the Court can order summary judgment against an officer of the company who has misapplied, retained or become accountable for money or property of the company, or been guilty of any misfeasance or breach of fiduciary or other duty in relation to the company.

### The Claim

The liquidators of the company, Nixon & Hope Limited (“N&H”), (the “Liquidators”) applied to the Court for summary judgment against its directors, Mr Richard Joseph Hodges (“RJH”), Mr Robert Adrian Hodges (“RAH”), Mr Parjinder Singh Sangha and Mr David Vizor (together the “Directors”), on the basis that, after the onset of insolvency, the Directors breached their duties to N&H. The claim centred around the following four allegations:

- (1) Salary payments made to each of the Directors after the onset of insolvency. The Directors conceded this point, subject to arguing/agreeing interest, thereby acknowledging that they had breached their duties;
- (2) Unexplained and unjustifiable payments to RAH between 12 September 2012 and 28 May 2014 totalling £339,000;
- (3) The transfer of N&H’s intellectual property rights (“IP Rights”) to NHIP for no actual consideration; and
- (4) The transfer of N&H’s tangible assets to Bencher and its stock to F2G Retail Sales Limited (“F2GRS”) for no actual consideration. RJH and RAH were both directors of Bencher and are connected to F2GRS.

### The Defence

The Directors based their defence on section 1157 of the Companies Act 2006 (the “Companies Act”), namely that, having regard to all the circumstances of the case, they had acted honestly and reasonably and therefore should be relieved from any liability.

In relation to (2) above, RAH argued that he was entitled to all the payments he received from N&H during the specified period and that there was more depth to this issue which warranted a trial.

In response to (3) above, the Directors argued that in actual fact, N&H had never owned the IP rights to which the Liquidators referred. The Directors alleged that they were only ever a licensee and Mega Floors Limited was the true owner of the IP rights.

Finally, the Directors argued that they had acted honestly and reasonably and had not personally benefitted from the transfer of tangible assets to Bencher or F2GRS, as detailed at (4) above.

### The Judgment

The Court was not convinced by the Directors' arguments and the Judge felt that the Directors had not put forward a defence with any real prospect of success at trial. On that basis, the Court granted summary judgment in favour of the Liquidators.

The Judge held that no director acting reasonably could have made or authorised the agreements detailed above which effectively gave away N&H's assets for no consideration. As such, there was no real prospect of the section 1157 Companies Act defence succeeding at trial. Further, the Judge felt that there was no basis for the Court to further consider the conduct of the Directors, which would justify summary judgment being refused.

In light of the above, the Judge ordered the following:

- (1) Summary judgment against RAH in the sum of £339,000, on the basis that the evidence provided and defence put forward by RAH had no real prospect of succeeding at trial;
- (2) The Directors contribute £250,000 to the assets of N&H, jointly and severally; and
- (3) An enquiry be carried out as to the full sum which is to be contributed by the Directors to N&H's assets by way of compensation for their misfeasance in connection with the transfer/disposal of tangible assets, as at (4) above.

Further, the Judge ordered that N&H is to be put back in the position it would have been in had the Directors not entered into the transaction whereby they transferred the company's assets for no actual consideration. As such, Bencher is to pay the equivalent of the open market value between a willing buyer and a willing seller for the assets received from N&H.

### Commentary

This case serves as a clear reminder of the duties which directors owe their company upon insolvency. Directors should continue to ensure that company assets are not disposed of for illusory or no actual consideration. Failing to comply with such an obligation could result in individual liability.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.