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CAN A DIRECTOR RELY ON ADVICE GIVEN ON AN EBT'S VALIDITY?

Employee Benefit Trusts (“EBTs”) are discretionary trusts, ostensibly set up on behalf of employees as “incentives”. In reality they are tax avoidance schemes, habitually established for the benefit of equity holding directors, who instead of receiving a salary attracting PAYE and NIC typically enjoy tax-free deferred remuneration or disguised distributions via a third party trust fund.

The recent decision in *Hunt v Balfour-Lynn & Ors* [2022] EWHC 784 (Ch) raises questions as to whether a director may now rely on professional advice as a defence against claims made by liquidators regarding EBTs.

Between 2002 and 2010, £27,706,849 of PAYE and NICs otherwise due to HMRC were avoided and paid to the Respondents. In this instance the EBT was incepted to keep an experienced management team together.

The Liquidator brought claims under the Companies Act 2006 for breach of fiduciary duty and failure to disclose an interest in a transaction and a claim under section 423 of the Insolvency Act 1986 for transactions at an undervalue for the purpose of defeating creditors' claims.

The Respondents argued that they had relied on extensive professional advice and that it was reasonable to rely on such advice.

On reading the judgment two points become apparent:

- 1) the quality and professional standing of the advisors; and
- 2) the extended period over which advice regarding the scheme was sought - and given.

BDO were first approached in 2002 and their Terms of Business stated that there could be no guarantee of the intended/expected outcome. However one director involved in the scheme stated at trial: *“These people were the best of the best...we were relying on experts in their field.”* As late as 2008 the advice given to the directors stated: *“Please note that HMRC’s decision to issue protective assessments does not alter BDO’s opinion on how robust the arrangement is.”*

The Court held that the directors were entitled to rely upon the advice given to them, which had not altered despite HMRC’s enquiries and legislative changes: *“As described from the outset and throughout BDO was intimately connected with the scheme...BDO was engaged on an ongoing basis to give advice and was active under that management. It was a firm of the highest reputation...there was nothing on this evidence which ought to have led (the directors) to be second guessing the advice of BDO, experts in this field.”* The Court also decided that the Liquidator’s claims were statute barred. The scheme had been commenced for genuine commercial reasons and so there was no concealment to allow for time to be extended under section 32 of the Limitation Act 1980.

Editor’s Note

Whilst this judgment may cause consternation regarding EBT claims, the detailed and extensive advice given distinguishes this case from a more standard EBT scenario involving dishonesty or disguised distributions to shareholders. We also understand that the Liquidator is currently seeking leave to appeal. Given the history of EBT litigation and the sums at stake, this matter may not be finally decided for some considerable time.



Insolvency and Corporate Recovery Team Jane Gollodge Grant Rechin Mark Silvester (Editor) Arthur Fernandes Michael Segen Georgina Kyriacou Henry Harris Priscilla Oronsaye
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SBP LAW SOLICITORS

Glade House, 52–54 Carter Lane, London EC4V 5EF
Tel: +44 (0)20 7332 2222 • Fax: +44 (0)20 7236 2112 • DX: 1030 LDE

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