

## update

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## Friday Facts: Directors sued for placing company into Administration

*In Downey v Crawford ("Downey") the Federal Court considered a claim made by the liquidator of a company that had initially been placed into administration, as to whether the directors had breached their statutory and fiduciary duties owed to the company by placing it into voluntary administration.*

Often when there has been a break down in the relationship between shareholders and/or directors of companies, the relationship break down is followed by the company in question being placed into administration by the directors. The statement that many creditors, shareholders and former directors commonly make following the appointment of an administrator is "Why?" Many having been involved in the every day affairs of the company claim that it has been trading profitably and expected it to continue to trade that way.

In Downey, when the liquidator of a company known as "ACN 075 004 643" (the "Company") that had initially been placed into administration by the directors of the Company, Mr Andrew Crawford and Mr Gilbert Crawford, the liquidator asked: "Why?" The liquidator alleged that the directors acted in breach of their duties to the Company by causing it to be placed into voluntary administration when it was neither insolvent, nor likely to become so in the future.

The liquidator further alleged that by reason of the directors' conduct, the Company suffered loss and damage being the costs and expenses of the administration and the liquidation, and the loss of the company's business which ceased to trade.

The Company was apparently successful when it entered into negotiations to sell the business to Standard & Poors (Australia) Pty Ltd ("Standard & Poors"). The negotiations apparently broke down and the company's directors threatened to sue Standard & Poors. The directors settled the dispute with Standard & Poors and entered into a confidential deed of settlement in which the Company received a settlement sum. Soon thereafter the Company was placed into administration by its then directors. Following appointment of the administrator a deed of company arrangement was proposed and accepted by the creditors. The deed was subsequently terminated when the liquidator was appointed.

The liquidator after examining the books of the Company took the view that the Company was solvent at the time it was placed into administration and was not likely to become insolvent.

He issued proceedings against the directors claiming general damages and a breach of the statutory and fiduciary duties owed by the directors to the Company by the incurring of administration and liquidation costs.

The Court in assessing whether the directors had breached their duties to the Company had to determine whether the Company was in fact solvent and not likely to become insolvent at the time the resolution was passed by the directors to place the Company into administration. The Court took the view that the fact the Company had stopped trading and the lack of Company records made it difficult to determine the value of potential claims against the Company at the time it was placed into administration. In particular, the Court could not determine the value of unpaid shares and any potential unpaid salaries owed at the time.

The onus was on the liquidator to convince the Court that the directors had acted in breach of their duties in that they had taken steps which did not satisfy the requirements of s436A (1) of the Corporations Act, before it was prepared to grant orders under section 1318 of the Act for the directors to be held liable for the damage caused to the Company.

In this case the liquidator failed to satisfy the Court that the Company was not likely to become insolvent and as such the Court refused to grant the relief against the directors. The case does however highlight the statutory and fiduciary duties which directors have in making decisions which ultimately affect the future of a company.

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