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David is a barrister, litigator and mediator with significant experience of complex international disputes and, in particular, insolvency, trust and fraud litigation and advocacy. David routinely advises and works with insolvency practitioners, offshore law firms, financial institutions and corporate and commercial clients throughout the world.

“Directors duty to avoid a position of conflict endures in spite of the company facing financial distress: *Davies v Ford*”

Summary

In *Davies v Ford*¹, the High Court provided a timely reminder that under the Companies Act 2006 (“**2006 Act**”) a director’s duties (amongst other matters) to; (a) promote the success of the company², (b) exercise independent judgment³ and; (c) avoid conflicts of interests⁴ remain unaffected even if the company in question is facing financial difficulties.

Background

The claimant, Mr Davies, owned a recycling business named Greenbox Recycling Limited (“**GBR**”) and issued a claim against two former directors, Mr Ford and Mr Monks for breach of their fiduciary duties owed as directors’ of GBR. It was alleged that the two defendants had incorporated another company, Greenbox Recycling (Kent) Limited (“**GBKL**”,) in early 2011 and had diverted new business to GBKL and away from GBR. In late 2011, GBR became insolvent and was later dissolved. Mr Ford also sold his shares to Mr Monks and resigned as a director only a few days after incorporation of GBKL.

The claimant claimed that the two directors had breached their fiduciary duties under the 2006 Act by not acting in the best interests of the company, failing to promote the success of GBR and putting themselves in a position of conflict.

The defendant, Mr Monks, argued that GBR had been close to insolvency (or was insolvent), and was not, therefore, in a position to take advantage of the various business opportunities which were later exploited by GBKL. As such, there had not been a conflict of interest and nor had Mr Monks breached his duties to GBR.

¹ [\[2020\] EWHC 686 \(Ch\)](#)

² Section 172 of Companies Act 2006.

³ Section 173 of Companies Act 2006.

⁴ Section 175 of Companies Act 2006.



Judgment

The judge found that Mr Monks had taken a number of steps which benefitted GBKL, and in so doing, Mr Monks had put himself in “*an obvious position of conflict given his countervailing interest both as a director of, and shareholder in, GBR*”⁵. Particularly, since both companies operated in the same sector and from the same premises. The judge further held that it was immaterial to this finding:

- i) whether GBR could exploit any business opportunities presented⁶, and
- ii) the reason why GBR was unable to take on the business opportunity (in this instance, due to alleged insolvency)⁷.

The Court found that Mr Monks owed a strict duty to avoid conflicts of interests under the 2006 Act.

This case highlights the need for directors to be mindful of their duties to companies in which they have previously held office and, in particular, where they resign or move to exploit other opportunities. Such considerations have heightened importance in the current economic crisis where there is likely to be greater scope for insolvency and corporate restructuring.

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For access to the full text of the judgment click [here](#).

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⁵ See paragraph 275 of the judgment.

⁶ See paragraph 276 – 277 of the judgment and section 175(3) of Companies Act 2006.

⁷ See paragraph 286 of the judgment.