

LEGAL UPDATE

Director defends himself against allegation of manifest mismanagement

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On 30 January 2018, the Arnhem-Leeuwarden Court of Appeal [ruled](#) in a case in which a receiver accused a (former) director of mismanagement. If a receiver can demonstrate that the management board of a private limited liability company (BV) has manifestly improperly performed its duties, and also that it is plausible that this improper performance of its duties is an important cause of the bankruptcy, the director is in principle jointly and severally liable to the bankrupt estate pursuant to Section 2:248 paragraph 1 of the Dutch Civil Code. The burden of proof that rests on the receiver and the director respectively in such proceedings is also referred to as a 'ping-pong'. The receiver initially has a heavy burden of proof, as the receiver must prove that no reasonable thinking director could have acted in such a way under the same circumstances. However, when it comes to providing evidence, the receiver is assisted (considerably) by the second paragraph of Section 2:248 of the Dutch Civil Code, which provides for a special distribution of the burden of proof. If the management has not complied with the accounting or publication obligations in respect of the annual financial statements, this establishes a manifest improper performance of its duties, and it is presumed that this is a major cause of the bankruptcy. The director is then in the (difficult) position of having to provide plausible evidence that there are facts or circumstances other than the mismanagement that were a major cause of the bankruptcy. If the director is able to provide this evidence, the (ping-pong) ball is passed back to the receiver, who must provide plausible evidence that, notwithstanding this, the mismanagement was (also) a major cause of the bankruptcy.

The case heard by the Arnhem-Leeuwarden Court of Appeal concerned a company that produced and sold sails and sun blinds. The receiver was of the opinion that the director did not comply with the accounting obligation and breached the publication obligation. Both the District Court and the Court of Appeal did not express an opinion on whether the accounting records that were kept were indeed insufficient and on whether the publication obligation was breached. Even if that were the case, the director provided plausible evidence (according to the District Court and the Court of Appeal) that other circumstances were an important cause of the bankruptcy. The judgment shows that the market in which the company operated was under severe pressure. The entrepreneur made a lot of efforts to try to reverse the loss of turnover. For example, he tried to save costs through redundancies and a rent reduction and he had discussions with a competitor about a collaboration or even a takeover. When it also transpired that the stocks had been incorrectly valued (without the director being to blame for this), the director was eventually forced to file for the company's bankruptcy.

As already outlined, a breach of the accounting or publication obligation establishes mismanagement. Therefore, the director presented the circumstances referred to above as plausible evidence that circumstances other than mismanagement were a cause of the bankruptcy. When making such a case, a director must also demonstrate that he did not fail to take action to prevent such circumstances setting in. As the director had succeeded in rebutting the presumption of mismanagement, the (ping-pong) ball was passed back to the receiver again. If it was up to the receiver to demonstrate that, notwithstanding the other circumstances, mismanagement was a major cause of the bankruptcy. The Court of Appeal overruled the decision of the District Court in this respect. The District Court had ruled that, pursuant to Section 2:248 paragraph 1 of the Dutch Civil Code, and irrespective of the presumption of evidence in paragraph 2 of this Section, it was now up to the receiver to prove that the director had improperly performed his duties.

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This is not the case. Therefore, the mismanagement stands, and the receiver can continue to invoke the second paragraph of Section 2:248. However, to do so, the receiver must be able to make a plausible case that the mismanagement was a major cause of the bankruptcy.

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