

Insolvency & Restructuring - Switzerland

Zurich Supreme Court confirms criminal liability

Contributed by **FRORIEP**

February 21 2014

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Introduction

Under Swiss law, by order of a claw-back action, a civil court can demand the return of disposed assets to the insolvency estate following a company insolvency and liquidation. It can also lead to the criminal prosecution of the individuals responsible for undervaluing company assets ahead of insolvency proceedings.

Insolvency offences are set out in Articles 163 to 171*bis*, 323 and 324 of the Criminal Code. These criminal provisions aim to protect the creditor's rights on the debtor's assets. In this case, the court had to consider the application of the insolvency offence according to Article 164. This criminal provision penalises the reduction of assets to the detriment of creditors. This is a crime committed by the debtor company, its directors or board members which results in the reduction of the debtor's assets to the creditors' detriment. Among other things, this may be a disposal of assets for no consideration or for consideration at an undervalue. If all requirements are met, the debtor can expect imprisonment of up to five years or a monetary penalty. Subject to the same requirements, any third party carrying out any of these acts to the detriment of creditors is liable to imprisonment not exceeding three years or a monetary penalty.

According to Article 286 of the Debt Enforcement and Insolvency Law, the disposal of assets for no consideration or for obviously unfair consideration entitles creditors to a claw-back claim against third parties. Notwithstanding the exception of occasional customary gifts, all such transactions made by the debtor in the year before the commencement of insolvency proceedings will be voidable. This also applies to transactions in which the debtor accepts a consideration disproportionate to his or her performance. As a consequence of a successful claw-back claim, a third party must return the disposed assets to the insolvency estate. In this regard, the return of assets will not always lead to a criminal prosecution and the condemnation of the individual responsible. From a criminal law viewpoint, it is crucial that the individual's actions meet all necessary objective and subjective requirements as set out in Section 164 of the code.

Facts

Shortly after the death of Hugo Erb, the company's head and founder, the entire Erb Group collapsed at the end of 2003 and the company consequently declared itself insolvent. The Erb Group was an acting company globally, consisting of 80 legal entities with almost 5,000 employees and a turnover of approximately Sfr4.5 billion. The insolvency of the Erb Group is the second largest collapse of a company in Switzerland's economic history.

Rolf Erb, the son of the company founder, was appointed as the company's new head. Shortly after the company's collapse, Erb declared himself bankrupt. Erb attracted the public's attention when he gave his 10-month old twins Eugensberg Castle, which used to be the Erb family residence. Erb also gave away other assets to third parties (including his collection of expensive vintage cars) shortly before the group's collapse and his own bankruptcy. According to the prosecutor office in charge, Eugensberg Castle would have had a value of approximately Sfr27 million. As a result, the prosecutor office and Erb Group's creditors requested that Erb be held criminally liable for these transactions and that the disposed assets be returned to the bankruptcy estate to satisfy the creditors.

Decision

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Erb denied all accusations made by the prosecutor and the creditor's lawyer before the courts of first and second instance. He argued that his father was responsible for the group's business behaviour, since his father had been solely in charge until his death in 2003. With regard to insolvency offences, and in particular to the required return of Eugensberg Castle, Erb argued that the family residence would not belong to the group and consequently would not form part of the bankruptcy estate.

The Zurich Supreme Court rejected the defendant's argument. On January 15 2014 the court decided that Erb had purchased Eugensberg Castle from Erb Group (ie, Hugo Erb AG), but had paid no consideration. The court therefore concluded that this was a serious case of white collar crime. Among other things, the court held that Erb had given Eugensberg Castle to his twins with the sole purpose of depriving assets from the group's bankruptcy estate and creditors.

Consequently, the court found Erb guilty of reducing the group's assets to the detriment of creditors according to Article 164, (as well as professional fraud and repeated forgery of documents), and sentenced him to seven years' imprisonment. Further, the court ordered that several assets - including Eugensberg Castle and the collection of vintage cars - be returned to the bankruptcy estate. The Supreme Court confirmed the first-instance court's decision. After the trial, Erb announced that he will appeal before the Federal Supreme Court.

Comment

It is unsurprising that the Zurich Supreme Court confirmed Erb's criminal liability and ordered that the assets (in particular Eugensberg Castle) be returned to the insolvency estate. Even though the severity of the sentence was not solely due to the insolvency offences committed, the prosecution authorities and courts have once more confirmed their determination to prosecute such misbehaviour.

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