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Disqualification Newsletter

Newsletter Editor
Dr John Tribe

Dear Subscriber,

This Newsletter contains an interesting article by Donald Lilly (Barrister, 4 Stone Buildings); Neil Davies (Solicitor and Director, Neil Davies and Partners); and Ann-Marie Chinnery (Solicitor with Neil Davies and Partners) entitled *'Transparency & Trust: a new era for directors' disqualification?*' The article sets out recent reform initiatives regarding the disqualification regime and provides a full consideration of the disqualification-related provisions of the Small Business, Enterprise and Employment Bill 2014 which reflect those initiatives.

The Newsletter also contains summary reports of three recent decisions on directors' disqualification.

Since the last edition of this Newsletter the Insolvency Service has published its Annual Report and Accounts (see www.gov.uk/government/uploads/system/uploads/attachment_data/file/330792/Annual-Report-and-Accounts-2013–14.pdf). The document makes interesting reading, not least because of the information it contains on directors' disqualification. It is noted that:

- There has been a 23% increase in disqualifications compared to 2012–2013;
- The average length of disqualification undertakings and orders secured against directors is six years;
- 10% of directors were disqualified for a period in excess of ten years with 41% disqualified for a period of longer than five years;
- The net benefit to the market for each director disqualified is over £100,000.

The Insolvency Service has recently published a new guidance document entitled ***'Unfit conduct: our disqualification and restrictions search facilities'***: see The Insolvency Service, 22 July 2014. The guidance is available at www.gov.uk/government/publications/unfit-conduct-our-disqualification-

and-restrictions-search-facilities. It sets out how one can search online for details of the unfit conduct that led the Insolvency Service to take enforcement action against a person.

Dr John Tribe

Newsletter Editor

FEEDBACK

We would be pleased to hear from subscribers who have any comments or suggestions regarding the content of this Newsletter, or any comments or queries on disqualification law, practice and procedure. Letters which raise issues of interest may be published in the Newsletter. Please address letters to the editor of the Newsletter: Dr John Tribe, Kingston Law School, Kingston University, Kingston Hill, Kingston upon Thames, Surrey, England, KT2 7LB, Email: j.tribe@kingston.ac.uk.

Article

Transparency and Trust: a new era for directors' disqualification?

By Donald Lilly, Barrister, 4 Stone Buildings; Neil Davies, Solicitor and Director, Neil Davies and Partners; and Ann-Marie Chinnery, Solicitor with Neil Davies and Partners.

In July 2013, the Department of Business, Innovation and Skills ('DBIS') launched a discussion paper entitled 'Transparency and Trust'. The purpose of the discussion paper was to outline the steps DBIS might take in order to maintain and enhance the transparency of UK businesses, thereby engendering greater confidence and trust in the UK as a place to conduct business. A major theme of the paper was accountability; in particular, accountability of directors of companies who might undermine that trust and confidence. The paper appears to have arisen out of the *'Common principles on misuse of companies and legal arrangements*' agreed by the G8 leaders at the Lough Erne Summit in June 2013

Government Response, at p 13..

The discussion paper touched on a wide range of company and business matters, including the directors' disqualification regime.

There was a substantial consultation process, involving over 100 published institutional responses and no doubt countless individual responses. The Government Response to that consultation process was published in April 2014 and, as outlined below, the response envisions substantial legislative amendments to be undertaken by Parliament in the near future. Copies of the consultation documentation, including each of the institutional responses, can be found at www.gov.uk/government/consultations.

In July 2014, the Small Business, Enterprise and Employment Bill ('the Bill') was introduced in the House of Commons which, among other things, seeks to implement the amendments proposed by the Government in its response ('the Government Response').

The purpose of this article is to summarise the proposed amendments to the directors' disqualification regime outlined in the Government Response along with the relevant parts of the Bill and to provide these authors' views on those proposed amendments.

The Government Response and the Bill

The proposed amendments to the disqualification regime can be organised into six broad categories:

(1) Targeting of individuals who 'control' directors

DBIS in the original discussion document targeted what it called 'nominee' directors. However, it abandoned that term after criticism, especially from the ICAEW, that there is no established meaning for a 'nominee' director. In the Government Response, DBIS adopts another term that is new to the law – a 'front' director. DBIS suggests that a lack of transparency is created in companies where the directors registered at Companies House are in fact a 'front obscuring those who really exercise control'

Government Response, at [158].. The term 'front' director is used throughout the Government Response, even though the individuals they describe at first blush appear to be what lawyers traditionally would consider to be shadow directors. The reason for this is that the shadow director concept, as presently defined, only extends to individuals who control the entirety of the board (or at least a majority of it), whereas the Government is considering extending that concept to an individual who controls a minority of the board, perhaps even just a sole director

Government Response, at [197]. See also *Re Unisoft Group Ltd* (*No 2*) [1994] 1 BCLC 709, at 620g–h *per* Harman J and *Ultraframe* (*UK*) *Ltd v Fielding* [2005] EWHC 1638 (Ch), at [1272] *per* Lewison J (as he then was)..

Numerous proposals were suggested by DBIS to increase the accountability of 'nominee' or 'front' directors, many of which have been abandoned as a result of the consultation process. For the purposes of the disqualification regime, however, the present proposal is to extend the disqualification regime to 'front' directors

Government Response, at [201] and [202]..

It is of course already the case under s 6(3)(c) and s 8(1) of the Company Directors Disqualification Act 1986 (the 'CDDA') that a disqualification order may be made against not only an individual acting as a *de jure* director, but also as a shadow director. The meaning of 'shadow director' under the CDDA is set out under s 22(5), which is in virtually identical terms as s 251 of the Companies Act 2006. This proposal, therefore, appears limited to the potential extension either of the meaning of a shadow director to an individual who is a puppet master in respect of a minority of *de jure* directors or the introduction of the new concept of a 'front' director into the CDDA.

We have some concern with DBIS's proposals.

Feedback

The extension of the meaning of shadow director beyond that already determined by cases such as *Re Unisoft* and *Ultraframe* does not only impact upon the disqualification regime, but also company and insolvency law generally. The implications of such an extension, in particular in light of the fact that the concepts of *de facto* and shadow directors have to some extent merged

Holland v Commissioners for Her Majesty's Revenue and Customs [2010] UKSC 51., could be significant. For example, it is common in joint venture and similar structure for a particular shareholder to be able to nominate a director to the board of directors. That would not normally give rise to any possible implication of shadow directorship unless the nominations represented a majority control of the board. If the concept of 'front' directors is introduced that position changes, meaning that a joint venture participant who has a close relationship with a nominated director could be subject to the full panoply of directors' duties, insolvency claims and disqualification. It seems to these authors that such an approach might as well make UK companies unattractive for international business and joint ventures, a consequence DBIS is unlikely to desire. It is for that reason that we consider an extension of the shadow director concept – which should remain uniform, as it is now, across company, insolvency and disqualification legislation – should not be undertaken. Although we share the ICAEW's view that novel concepts such as 'nominee' or 'front' directors should be avoided if possible, the alternative of extending the notion of a shadow director is less desirable.

Thus, if the notion of a 'front' director is to be introduced into the disqualification regime, it should be done through the development of a new concept unique to disqualification. The Bill in fact adopts this approach. While clause 79 of the Bill proposes amendments to the definition of 'shadow director' under s 251(2) of the Companies Act 2006, those changes appear to reduce the scope of the concept by expressly carving out individuals who give instructions further to an enactment or as a Minister of the Crown

The proposed new s 251(b) and (c) of the Companies Act 2006.. Instead, the Bill introduces, by clause 93, a new concept to the disqualification regime, that of a *'person instructing unfit directors*'. By clause 93, a new s 8ZA of the CDDA has been proposed which gives the court a discretion to disqualify an individual (defined as 'P') who exercises a *'requisite amount of influence'* over a director in respect of which the court is satisfied a disqualification order should be made

The proposed new s 8ZA(1) of the CDDA.. The required influence is itself defined as circumstances where the conduct which renders the director unfit was undertaken by him in accordance with directions or instructions from 'P'

The proposed new s 8ZA(2) of the CDDA.. There are then further consequential proposed amendments to the CDDA involving matters such as the procedure for such an application and the giving of disqualification undertakings

The proposed new s 8ZB to s 8ZE..

The breadth of this new provision is of concern to these authors. The new s 8ZA jurisdiction raises the same concerns as already outlined above in respect of joint venture participants who may be dissuaded from selecting the UK as a place to incorporate or trade if they could be disqualified in circumstances where the joint venture fails, and their representative director has conducted himself in a manner that renders him unfit. Moreover, there is a real question of whether the person behind a 'front' director really has the necessary control or influence to warrant an extension of the disqualification regime simply by giving a direction or instruction. It is the director that owes duties to the company, not the person giving the instructions. Directors have historically always been subject to demands from individuals who have the power to remove them (e.g. majority shareholders), but it has traditionally – and in our view properly – always been the director who must exercise the independent judgment as to whether the 'instructions' from such persons should be followed. The proposed s 8ZA seems to undermine this fundamental rule of English Company Law in that a person – even a majority shareholder – expressing a firm wish or even a demand now must independently assess whether it would be a breach for the director to undertake the request, rather than rely on the director's own judgment.

(2) Replacement of Schedule 1 to the CDDA with a 'new, broader and more generic, provision'

The approach adopted by DBIS in the discussion paper was effectively to add four additional factors for the court to consider under the pre-existing Schedule 1 to the CDDA; namely (a) material breaches of sectoral regulation; (b) the wide social impacts of a failed company; (c) the nature of creditors and degree of loss suffered by them; and (d) the director's previous failures

Government Response, at [207]..

The general view received was that there was little support for simply adding to the existing Schedule 1. The view voiced by a senior counsel – and a view with which these authors fully agree – was that Schedule 1 could not and should not be seen as an exhaustive list

Government Response, at [208].. As a consequence, factors such as material breaches of sectoral regulation and relevant social impact already might be taken into account by the courts. Concerns were also raised in respect of introducing the nature of creditors and directors' previous failures as factors for the court to consider. We also share those concerns.

The concept of 'vulnerable' creditors is not one that should be introduced into the disqualification regime. It would in our view be virtually impossible to adequately identify the characteristics of a 'vulnerable' creditor with sufficient certainty. This factor has not been included within the new proposed Schedule 1 (dealt with in more detail below) and we agree with its exclusion.

We also share concerns about the introduction of a director's previous conduct as a factor to take into account. There are at least two difficulties

with this. The first is one of principle: conduct is either such as to warrant disqualification or it is not. A director is entitled to have the conduct about which the Insolvency Service complains set out in the claim made against him and the issue for the court to decide is whether that particular conduct warrants disqualification. Just as the fact that he may have previously conducted himself in an exemplary way should not weigh into whether the pleaded conduct warrants disqualification, it should also not weigh against a director. If previous conduct itself warrants disqualification, it should be pleaded as such and considered as an allegation of unfitness by itself. The second concern is one of practicalities. Contested disqualification trials are an expensive endeavour already. While it is of course in the public interest to disqualify directors who are unfit, it is also in the public interest to do so as efficiently as possible, not only to prevent undue strain upon public resources, but also to ensure that defendant directors are afforded a fair trial process. If the Insolvency Service could trawl through a directors previous conduct – which might span years or even decades – that raises the spectre of larger, longer and more expensive trials which might turn into a public examination of a director's career, rather than focussing upon specifically alleged misconduct.

The proposal put forward by DBIS in the Government Response was to *'recast a more **generic set** of factors that the court **must** take into account'* [sic]

Government Response, at [222].. This then became the proposed new Schedule 1 to the CDDA, as set out under clause 94 of the Bill. Matters that must be taken into account in all cases are simply: (1) the extent to which the person was responsible for material contraventions by a company of applicable legislation or other requirements; (2) the extent to which the person was responsible for the company becoming insolvent; (3) the frequency of those breaches; and (4) the nature and extent of any loss or harm caused

The new proposed paras 1–4 of Schedule 1 to the CDDA.. In these authors' views, this amendment is to be welcomed simply because it makes clear what is already the practice of the courts – the factors to be taken into account (assuming they have been properly particularised) are broad and include any material breach by the director and the seriousness of the consequences of those breaches.

The Bill also includes specific provision for the court to take into account any misfeasance or breach of fiduciary duty by the director in relation to the company or material breach of legislative or other obligation of the director

The new proposed paras 5–7 of Schedule 1 to the CDDA.. This appears to be an implementation of the proposal in respect of 'previous conduct' as a factor. For the reasons we have already stated, we have concerns about the provision of this factor – although it is of course a matter of judicial practice the weight given to such conduct in deciding whether a director should be disqualified.

Having regard to the breadth of the new Schedule 1 provisions and the discretion of the courts in giving weight to the various factors involved, these authors seriously question whether there is anything to be gained by the new draft Schedule 1.

(3) Accountability for misconduct overseas

Although the present disqualification regime permits the court to take into account foreign conduct for the purposes of determining unfitness, there must be a relevant insolvency event in respect of a company subject to winding-up in England and Wales

This of course extends to certain foreign incorporated companies: see *Mithani: Directors' Disqualification* at para III[66] et seq. before disqualification proceedings may be commenced against such a director. There is no equivalent provision to s 2 of the CDDA (which provides for disqualification of a director in light of a UK criminal conviction) for foreign convictions. Thus, there is arguably a lacuna in respect of directors who have been subject to the equivalent of disqualification, criminal or similar orders and convictions in foreign jurisdictions, who then seek to become directors of UK companies.

The 'overwhelming majority' of those who responded to the consultation process were of the view that overseas restrictions or convictions in connection with the management of companies should restrict an individual from being a director in the UK

Government Response, at [229].. In principle, we agree; but we are also of the view that any such potential disqualification must be subject to court oversight and discretion. As already mentioned above, foreign jurisdictions might as well have a system of corporate law or corporate culture quite different from that in England and Wales, and what might be considered abroad to be serious malpractice in respect of a company may not be considered serious in England and Wales (and indeed vice versa). We are therefore encouraged to see that the draft clause 92 of the Bill is framed so that the proposed new s 5A of the CDDA would provide that: (a) where a director has been convicted of a relevant offence, the power of the Secretary of State is limited to applying to the court for a disqualification order

Proposed s 5A(1) of the CDDA.; (b) the court has discretion to make a disqualification order

Proposed s 5A(2) of the CDDA.; and (c) a relevant foreign offence is only one for which there is a corresponding indictable offence in England and Wales

Proposed s 5A(3) of the CDDA..

DBIS also has suggested that further consideration be given to the interaction between UK and foreign disqualification regimes, particularly as to whether regulations should be made to permit the enforcement of foreign restriction orders within England and Wales

Government Response, at [236].. We do not see that such an approach would have an appreciable benefit to the already proposed system of disqualification. For the reasons already stated, any form of automatic disqualification based upon a foreign conviction is not appropriate, given that foreign laws may well be in a constant state of flux and even if it is agreed now that the

foreign law is consistent with English and Welsh law, that will not necessarily be the case in the future. Therefore, some form of judicial intervention is required to assess the nature and treatment of the foreign conviction or restriction. To allow for that effective judicial oversight, it appears to these authors that the better approach is to permit a disqualification application in England and Wales to be based upon a foreign conviction or restriction, rather than to enforce that foreign order itself in England and Wales. It is notable that this particular proposal has not made its way into the Bill.

(4) Increased cooperation through information sharing between sectoral regulators and the Insolvency Service

DBIS observes that the task of enforcing good corporate governance by directors often depends upon effective cooperation between different enforcement agencies, citing in particular, the Financial Conduct Authority ('FCA')

Government Response, at [238].. DBIS also observes, however, that cooperation between sectoral regulators, such as the FCA, and the Insolvency Service could be inhibited if material in the regulators' hands does not fall within the gateways provided by the CDDA for disclosure and use as 'investigative material' for a disqualification claim

Government Response, at [239].. The Government Response suggested that it intended to 'remove the legislative barriers to the types of investigative material that can be provided by sectoral regulators or others for use by the Insolvency Service to pursue the disqualification of a director'

Government Response, at p 63. . Clause 97 gives effect to this intention. If this clause is implemented in its existing form, it will enable the Secretary of State to bring disqualification proceedings under s 8 of the CDDA based on any information he receives from any source whatsoever (including information received from a member of the public) provided he is satisfied that it is in the public interest to bring such proceedings.

DBIS invited views on whether sectoral regulators should be given additional power to disqualify directors themselves.

Views of those consulted were mixed about giving regulators the powers to disqualify directors. Concerns were voiced that sectoral regulators do not have the experience of disqualification proceedings as does the Insolvency Service and that the same could be achieved by simply taking regulatory breaches into account in the disqualification proceedings brought by the Insolvency Service

Government Response, at [246] and [247].. Even of those who did believe such powers should be given, about half of them thought that such cases should always proceed to court (i.e. regulators could not accept undertakings, as the Insolvency Service can)

Government Response, at [245]..

In light of the consultation process, DBIS has decided not to seek the grant of disqualification powers to sectoral regulators

Government Response, at [256].. We firmly agree. In addition to the concerns stated by the consultation participant, the giving of such power does not solve the fundamental problem, which is one of information. While a regulator might have access to information that would not be available in the hands of the Insolvency Service, the same may be true whereby the Insolvency Service has information, particularly about the insolvency itself, which would not – or would not efficiently – find its way into the regulator's hands.

Instead, DBIS focuses in its conclusions upon information sharing between regulators and the Insolvency Service, along with an express provision that sectoral breaches should be a factor in determining unfitness

Government Response, at [252]–[256].. The latter point has already been addressed above. Regarding information sharing, these authors take the view that it is to be welcomed. We also agree with DBIS's suggestion that regulators should have the power to report directors suspected of unfit conduct to the Insolvency Service. As DBIS's own comments suggest, however, this appears to be more of an internal issue for those government agencies through training and secondment, rather than a judicial or even a legislative matter.

The Bill does not address any information sharing as set out in the Government Response, but instead, under clause 95, heightens the obligations of Office-Holders to prepare reports

The proposed new s 7A(1) and (3) of the CDDA. on the conduct of directors of insolvent companies and keep the Secretary of State informed of 'new information' that comes to light ('new information' being defined as information that would have been included in the report had it been known to the Office-Holder at the time of preparing the report)

The proposed new s 7A(5) and (6) of the CDDA.. These provisions are to be welcomed, as Office-Holders who have information relevant to the disqualification of directors ought to, in our views, ensure that information is provided to the Secretary of State and such should be an ongoing obligation. The Bill also removes, by s 97, the requirement that an application under s 8 of the CDDA be based upon 'investigative material' or the 'report, information or documents' – this amendment is also to be welcomed. If material is available to demonstrate a directors' unfitness, an application for unfitness should not be constrained by artificial barriers for use of evidence obtained outside the scope of an investigation.

(5) The introduction of compensation orders against disqualified directors

It is of course correct that the disqualification regime presently does not afford any compensatory relief to creditors or shareholders or other persons who have been adversely affected financially by the conduct that ultimately is found to have rendered him unfit to act as a director. In its discussion paper, DBIS suggested two potential reforms that might provide a degree of such compensation: (a) to allow liquidators to assign fraudulent and wrongful

trading actions; and (b) to give the court the power to make compensation orders against directors that have been disqualified.

The first of these suggestions falls outside the scope of this article. Regarding compensation orders, a sizeable two-thirds of consultation participants broadly supported the concept of compensation orders

Government Response, at [267].. The devil appears to have been in the detail however, as there were differing views spread widely across those consulted as to how they would operate

Government Response, at [269].. The approach in the Bill, under clause 98, is to make a compensation order solely based upon causation – a compensation order can be made where a person is disqualified and the conduct giving rise to that disqualification as *'caused loss'*

The proposed new s 15A(3) of the CDDA..

While we of course agree that directors guilty of misconduct should, so far as they are able, compensate those who have been adversely affected by that conduct, we have some difficulty seeing how a 'compensation order' will operate in practice.

First, DBIS suggests that the sort of behaviour that would amount to misconduct for the purposes of s 212 would also give rise to a compensation claim

Government Response, at [269].. That view is at odds with the wording of the proposed s 15A of the CDDA, which only requires the Secretary of State to establish a causal link between the unfit conduct and the loss. Therefore, conduct that might warrant disqualification, but which does not amount to misfeasance under s 212, could give rise to a compensation order even though not a claim under s 212.

Second, further clarification should be provided in the statute by what is meant by 'causing' loss. For example, if a director is disqualified on the basis of failing to maintain proper books and records, is it possible for the Secretary of State to argue that had proper books and records been maintained, the company would have succeeded, or perhaps the director would have ceased trading sooner? It is arguable that such minor 'unfit conduct' could have wide causal ramifications and thus *prima facie* given rise to substantial compensatory claims under the new s 15A. In these authors' views, if compensation orders are to be enacted, the concept of 'causing' should be more clearly defined and restricted to conduct with a direct causal link to the loss in question.

Third, there are issues about whether a creditor or class of creditors is bound by compensation claim litigation. If a compensation claim on the application of the Secretary of State failed, would that mean the subject-matter of that claim was *res judicata* for a claim by a liquidator or a creditor, in particular one who was specifically named in the claim, as envisioned by the proposed s 15B(1)(a)? If the Secretary of State accepted a compensation undertaking from a director, would a liquidator or creditor nonetheless be entitled to

bring a s 212 claim for any losses they suffered above and beyond the compensation undertaking? These are difficult questions that remain unanswered in the Government's Response

Government Response, at [273]–[275]. and have no specific answer within the proposed Bill. It appears to us that the costs and efficiency benefits of a compensation order could only be achieved if the outcome bound the company, its creditors and members; but that would raise issues in respect of claims where the victim wished to litigate the matter itself, or more probably, was not satisfied with a compensation undertaking.

Finally, the Bill envisions that the compensation payable – whether by order or undertaking – would be paid either to the company or, alternatively, to a creditor or class of creditors specified by the order or undertaking. A matter that is not addressed in the Government Response or in the Bill is how the Secretary of State will (or Court should) decide whether to contribute the compensation to the company as a whole or to a specified creditor and, if the latter, which creditor or creditors should be so specified. There are problems with both approaches. If the compensation returns to the company as a whole, then there is a possibility that creditors who cannot establish a causal link under s 15A(3) will nonetheless benefit from the order, because they will receive their *pro rata* share of the company's assets which have been increased by the compensation order. If a specified creditor is compensated (e.g. one who can show causal loss), there is the problem that the Secretary of State might be aware of all creditors who could show such loss at the time he makes the application for a compensation order, and thus some creditors will benefit from the scheme, while others will not. It is notable that the proposed limitation period under the new s 15A(5) of two years from the disqualification order is not subject to any qualification on discoverability.

In those circumstances, these authors presently take the view that compensation should be left as a private matter to be litigated by liquidators or individual creditors and members.

(6) Extension of the time limit for instituting disqualification proceedings

The final matter considered as part of the discussion paper was that of the present time period for bringing disqualification proceedings under s 6, which stands at two years. Less than one-third of those consulted stated a view at all, and of those who did, views were mixed. Half agreed that the limit should be raised to five years, the other half considered the present time period should be retained or increased to only three years

Government Response, at [280]..

DBIS has concluded that the time period should be increased to three years. This proposed extension is found at clause 96 of the Bill, which amends s 7(2) of the CDDA to read '3 years' instead of '2 years' and we support this amendment. While the two-year time limit is appropriate for many, if not most, disqualification proceedings, large and complex insolvencies may

require a longer investigative period. Indeed, it is in directors' interests as well that investigations are not undertaken too quickly, and expensive claims commenced precipitously. Although the IoD suggested that it was important that the threat of disqualification does not 'hang over directors too long', three years is not a particularly long time period in the company context, especially where directors could be subject to equitable claims for breach of fiduciary duty far after a three-year period has elapsed.

Having said that, these authors would also encourage better communication (though much improved from a few years ago) to directors who are likely to have proceedings launched against them, so that they are not informed only a matter of weeks or even days before the two- (or three-) year deadline that proceedings are to be commenced against them. Given that the deadline is to be extended, that hopefully will accommodate a better pre-action procedure so that directors have the opportunity to comment on draft evidence or a form of pre-action letter prior to the commencement of proceedings against them.

CASE LAW UPDATE

Her Majesty's Secretary of State for Business Innovation and Skills v Russell Drummond

Sheriffdom of North Strathclyde at Paisley, Sheriff T McCartney, Date of judgment: 7 July 2014; Date of written reasons: 23 July 2014

Directors' disqualification – unfitness – CDDA 1986, s 6 – failure to deliver accounting records of the company to liquidator – failure to prepare and file VAT and other returns – failure to prepare and file annual accounts with Companies House – failure to furnish statement of affairs – failure to provide information.

The Secretary of State for Business, Innovation and Skills brought disqualification proceedings against the defender under CDDA 1986, s 6 arising from his conduct of Fernmast Ltd ('the Company'). The defender was the sole director of the Company at all material times until the date of its liquidation. The conduct of the defender which formed the basis of the application for a disqualification order was that the defender had:

a. failed to comply with his statutory duty to deliver to the liquidator the accounting records of the Company;

b. failed to ensure that the Company complied with its statutory duty to prepare and file VAT and other returns to HMRC;

c. failed to ensure that the Company met its statutory obligation to prepare and file accounts with Companies House. There had been a total of four such failures;

d. failed in his statutory duty to complete and return a Statement of Affairs relating to the Company to the liquidator;

e. failed to respond to requests for information made by the Secretary of State and/or to provide an explanation for such failures.

The substance of the allegations made against the defender was not disputed. The only substantive issue in the case was the period for which the defender should be disqualified. The defender contended (via a letter sent by him to the court) that the reason the Company had failed was due to changing and difficult economic conditions, and that the failures alleged against him were through ignorance and lack of corporate awareness rather than any deliberate policy.

HELD:

(1) The failures complained of made the defender unfit to be concerned in the management of a company;

(2) There was a clear breach of the standards required of a person with the responsibility of director of a company and the public required protection from the defender;

(3) The case fell into the middle bracket of six to ten years in *Re Sevenoaks Stationers* (*Retail*) *Ltd* [1991] Ch 164. A disqualification order for a period of seven years would be made against the defender.

Mr Steven Chesney, Solicitor, of Burness Paull LLP, for the Secretary of State.

The defender did not appear and was not represented.

Re Slepe Services Ltd, Official Receiver v Tully

Peterborough County Court, District Judge Sunita Mason CBE, 13 February 2014.

Directors' disqualification – unfitness – CDDA 1986, s 6 – VAT defalcations – duty to keep accounting records.

The Official Receiver brought disqualification proceedings against the defendant under CDDA 1986, s 6 arising from his conduct of Slepe Services Ltd ('the Company') which was wound up by an order of court on the petition of HMRC presented for unpaid taxes. The allegations against the defendant were that:

(a) he had failed to maintain and/or deliver-up adequate accounting records in respect of the Company to the Official Receiver; and

(b) he had, for a substantial period of time, failed to prepare and file returns to HMRC in respect of the Company and had failed to make payments of VAT and other taxes due and owing from the Company to HMRC. In addition, the information that was recorded on the returns which had been made was incorrect, as the defendant, who was a senior partner in an accounting firm, must have known.

The Official Receiver contended that the neglect on the part of the Company to pay taxes for such a substantial period of time was the direct and

operating cause of the failure and insolvency of the Company and was conduct which the court was required to consider under CDDA 1986, Schedule 1, as was the defendant's failure to cooperate with the Official Receiver. The defendant disputed the assertion that the Company was insolvent and contended, in any event, that his conduct did not make him unfit to be involved in the management of a company.

HELD:

(1) It was plain from the fact that the Company had been wound up by the court for failure to pay its debts that the insolvency requirement in s 6(1) was made out. There had been no challenge to the winding-up order and it was not open to the defendant, therefore, to contend that the company was not insolvent.

(2) The allegation of a failure to maintain adequate accounting records and/or to deliver them to the Official Receiver was made out. That failure was attributable wholly or mainly to the defendant, and made the defendant unfit to be concerned with the management of a company: *Re Grayan Building Services Ltd* [1995] 1 BCLC 276; *Re Rolus Properties* [1988] 4BCC 446; and *Re Firedart* [1994] BCLC 340 considered and applied.

(3) The substance of the allegation concerning the failure to file returns with HMRC was also made out as was the allegation that that the Company had traded for a substantial period of time without paying or taking any steps to pay monies owed to HMRC.

(4) It was plain that the defendant, a qualified accountant, allowed the Company to breach its various obligations with impunity, knowing full well what they were, and had failed to demonstrate that he had learnt any lessons from his mistakes. A disqualification order towards the mid to upper end of the middle bracket of six to ten years in *Re Sevenoaks Stationers* (*Retail*) *Ltd* [1991] Ch 164 was appropriate. Given the defendant's previous good character, and the grave impact which the imposition of a disqualification order would have upon him, a disqualification order for a period of eight years was imposed.

Mr Tony Hannon, Official Receiver, appeared in person.

The defendant also appeared in person.

Her Majesty's Secretary of State for Business Innovation and Skills v Keith Millar

[2014] CSOH 127, Outer House, Court of Session, Lord Woolman, 6 August 2014.

Directors' disqualification – unfitness – failure to pay sums owed to HMRC – unfair treatment of Crown debts – transfer of assets at undervalue – period for which disqualification order should be imposed.

The Secretary of State for Business, Innovation and Skills brought disqualification proceedings against the respondent under CDDA 1986, s 6 arising from his conduct of Brian Whyte Funerals (Ayrshire) Ltd ('the Company'), of which, at all material times, he was the sole director.

The Secretary of State's allegations against the respondent were as follows: (a) in the tax years 2007/08, 2008/09 and 2009/10, the Company failed to pay sums due and owing to HMRC in respect of PAYE, NIC and corporation tax. As at the date of liquidation, the total sum due to HMRC was over £41,000; (b) over the same period, the Company made payments of over £1m to other creditors. It therefore treated the Crown differently and detrimentally from the manner in which it treated its other creditors; and (c) the Company transferred three vehicles to a third party for no consideration. They were valued in the accounts of the Company at £128,000 and appear to have been the Company's principal tangible assets. By way of a series of transactions, the respondent and his wife obtained a benefit in excess of £75,000 from the disposal of these vehicles.

The respondent failed to lodge answers in response to the petition and the matter, therefore, proceeded to a hearing on an uncontested basis.

HELD:

The respondent's conduct demonstrated a serious want of probity. Applying the guidance in *Re Sevenoaks Stationers* (*Retail*) *Ltd* [1991] Ch 164, the respondent would be disqualified for a period of six years.

Mr David Thomson (Instructed by Burness Paull LLP) appeared on behalf of the Secretary of State.

The respondent did not appear and was not represented.

Case Law Update