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Disqualification Newsletter

Newsletter Editor
Dr John Tribe

Dear Subscriber,

Welcome to the latest newsletter. The Newsletter contains an important news item: the passing of the Small Business, Enterprise and Employment Act 2015. As noted in the summary below, Pt 9 of the Act makes substantial changes to the regime for disqualifying directors. However, at the date of this Newsletter going to print, the provisions of Pt 9 had not come into force.

The Newsletter also contains various summaries of cases on disqualification.

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 in general. Letters which raise issues of interest may be published in the Newsletter. Please address letters to the editor of this newsletter: Dr. John Tribe, Kingston Law School, Kingston University, Kingston Hill, Kingston upon Thames, Surrey, England, KT2 7LB, Email: j.tribe@kingston.ac.uk

NEWS

Small Business, Enterprise and Employment Act 2015 — impact on directors' disqualification

The Small Business, Enterprise and Employment Act 2015 ('SBEEA 2015') received Royal Assent on 26 March 2015 and introduced a series of amendments and legislative clarifications intended to ensure that the UK continues to be recognised globally as a trusted and fair place to do business and to open up new opportunities for small businesses to innovate and compete. The Act has brought in a number of changes to companies and insolvency to ensure a strong regulatory regime for those that administer insolvencies.

Insolvency professionals should be aware of these changes as they have an impact on many aspects of insolvency practice and procedures, and in particular the regime for disqualifying directors.

The changes to the regime for disqualifying directors are contained in Pt 9 of the Act. They are summarised below. A full consideration of the disqualification-related provisions of the Small Business, Enterprise and Employment Bill 2014 presented to Parliament (before it became the Small Business, Enterprise and Employment Act 2015) may be found in Lilly, Davies and Chinnery 'Transparency and Trust: a new era for directors' disqualification' in the (2014) 57 *Disqualification Newsletter*, (August).

SSBEA 2015, Pt 9 comprises ss 104 to 116. Sections 104 to 111 and Sch 7 relate to England Wales and Scotland; s 112 and Sch 8 deal with provisions similar to those in ss 104 to 111 which will be introduced in the Northern Irish legislation relating to disqualification when Pt 9 comes into force; and ss 112 to 116 deal with certain prohibitions made or arising in one country in the United Kingdom being recognised in another country in the United Kingdom.

At the date of this Newsletter going to print, the provisions of Pt 9 had not come into force.

Directors' disqualification (*SBEEA 2015, ss 104–111*)

The main changes to the Company Directors Disqualification Act 1996 brought about by SBEEA 2015 are:

- to require insolvency practitioners (IPs) to report to the Secretary of State (SoS) on the conduct of every director of a company that becomes insolvent;
- to require the report to describe any conduct which may assist the SoS in deciding whether it is in the public interest to apply for the making of a disqualification order;
- to require courts to consider a wider range of matters than previously, including the director's track record, and the nature of those who have suffered due to the misconduct, when deciding whether or not to disqualify;
- to enable disqualification proceedings to be taken (or a disqualification undertaking to be accepted) in the UK where there has been misconduct, or directors have been convicted, in overseas companies;
- to enable disqualification proceedings to be taken against (or a disqualification undertaking to be accepted from) a person who has caused a director's unfitness;
- to increase the period of time within which disqualification proceedings may be taken under CDDA 1986, s 6 following a formal insolvency from two to three years;

- to remove legislative barriers between regulators which currently restrict the use which may be made of information and reports provided by other regulators in deciding whether or not to bring disqualification proceedings; and
- to introduce a new power to enable the SoS to apply for compensation against a disqualified director where the misconduct has caused identifiable loss to a creditor or creditors

CASE LAW

(1) Her Majesty's Secretary of State for Business, innovation and Skills v Andrew Page Drummond

[2015] CSOH 45, Lord Doherty, Court of Session, Outer House

Directors' disqualification – section 6 unfitness – floating charges – property development – dispositions in breach of charges – removing assets from the company – defeating secured creditors – grave misconduct – serious want of commercial probity – unfitness – period of disqualification.

FACTS:

The Secretary of State sought a disqualification order under s 6 of the Company Directors Disqualification Act 1986 against Andrew Page Drummond ('the respondent').

The respondent was a director of West Court Developments (Dundee) Limited ('the company') from its incorporation on 10 August 2007 until he resigned as a director on 11 November 2010. Following the respondent's resignation, the company was without appointed officers until its dissolution on 3 February 2012. The principal activity of the company was the carrying on of property development, letting and sales. The principal asset of the company was a portfolio of over 40 flats and townhouses at a property development site at 26 Milton Street, Dundee. The company acquired and developed the portfolio using funds loaned to it by AIB Bank. The company also owned land at the rear of 337 and 339 Strathmore Avenue, Dundee. That land consisted of car parking and it lay adjacent to the development site at 26 Milton Street.

On 23 August 2007, the company granted a floating charge in favour of the AIB Bank over the whole of its property. Clause 8.3 of the floating charge provided: 'Except with the written consent of [AIB Bank], no part of the heritable, real or leasehold property of the company … shall be sold or otherwise disposed of …' On the same date, the company also granted a standard security in favour of AIB Bank over the properties at 26 Milton Street. The standard security was registered in the Land Register of Scotland on 7 September 2007. It was a condition of the standard security that the company was not to grant any conveyance, transfer or assignation of the properties to any person without the prior written consent of AIB Bank.

The respondent executed various dispositions on behalf of the company in breach of the aforementioned conditions. First, on 15 October 2010, he

executed a disposition on behalf of the company disposing of the properties at 26 Milton Street to Mylnefield Properties Ltd. The properties had a value of between £6.5 million and £7 million. No consideration was paid to the company in respect of the transfer. That disposition was in breach of the floating charge and the standard security. On 27 September 2010, 22 October 2010, 22 November 2010 and 17 January 2011, the respondent executed four dispositions transferring the interests of the company in the land at the rear of Strathmore Avenue to Zala Properties Ltd. Those dispositions were also in breach of the aforementioned conditions, and no consideration was paid to the company for them. Mylnefield Properties Ltd and Zala Properties Ltd were companies which were connected to the respondent.

HELD:

(1) It was clear that the aim of the various dispositions was to remove the company's assets from the reach of its creditors, and in particular, its secured creditor. The respondent knowingly and deliberately attempted to achieve that end. In doing so, he also knowingly and deliberately granted dispositions in breach of the prohibitions contained in the floating charge and the standard security. All of the transactions had as their object denuding the company of its assets to the benefit of connected persons and to the detriment of its secured creditor.

(2) The respondent's actions amounted to serious misconduct, and displayed a serious want of commercial probity such as to render him unfit to be concerned in the management of a company.

(3) Relying on the commentary contained in *Mithani: Directors' Disqualification* at **III[1512]**, **III[1518]** and **III[1542]**–**[1551]**, a disqualification order for a period of 10 years would be made against the respondent. Had the respondent ultimately succeeded in his aim of thwarting the secured creditor, he would have been disqualified him for 13 years. Having regard to the way matters have turned out, the appropriate course was to disqualify him for a period of 10 years.

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

The respondent did not appear and was not represented.

(2) Her Majesty's Secretary of State for Business, Innovation and Skills v Thomas Banks Hamilton

[2015] CSOH 46, Lord Doherty, Court of Session, Outer House

Directors' Disqualification – unfitness – accountant – care homes investment – misapplication of funds – HMRC shortfall – upper bracket unfitness – period of disqualification

FACTS:

The Secretary of State ('the petitioner') sought a disqualification order under s 6 of the Company Directors Disqualification Act 1986 against Thomas Banks Hamilton ('the respondent').

The respondent qualified as a chartered accountant in 1980. Prior to his becoming a director of Ascot Care Homes Limited ('Ascot'), he had worked for many years in the care home industry and had a good deal of knowledge and experience of that industry. He had been a company director of many companies. He was very familiar with the duties of company directors.

In 2008, the respondent approached a David Newett to seek investment in a business venture to acquire and operate nursing homes. The respondent and Mr Newett had known each for more than 20 years. They had done business together previously. Mr Newett introduced the respondent to Endless LLP, a private investment partnership of which he, a Garry Wilson and Darren Foreshaw were the partners. Agreement was reached that Endless LLP would provide finance to enable the acquisition of a business in Callander which operated three care homes, Ashlea House, Mountview House and Pinewood Lodge. Endless LLP (or another entity within the Endless Group) was to purchase the care homes and lease them back to be operated by a care home company run by the respondent. Endless LLP was to be an equal shareholder with the respondent in the new business venture, Ascot Care Homes Holdings Limited ('Holdings'). Ascot was to be a wholly owned subsidiary of Holdings.

On 30 May 2008, the respondent and Stirling Investments Properties LLP ('SIP') each acquired one of the two issued shares of Holdings. Mr Newett and his wife were the partners in SIP. The intention was that SIP's shareholding in Holdings would be transferred to Endless LLP or another entity within the Endless Group. On 14 May 2010, a stock transfer form was duly executed by Mr and Mrs Newett transferring SIP's share to Ascot Healthcare Investments LLP ('AHI'), a related partnership in the Endless Group, but it appears that the transfer was not registered in Holdings' Register of Members.

The unchallenged evidence from Mr Newett was that the stock transfer had been 'a tidying up exercise.' It ought to have been registered after the transfer but the chief financial officer at Endless LLP, who had had the responsibility for doing that, had overlooked it. Both the petitioner and the respondent accepted that SIP held its shareholding in Holdings as the nominee of AHI.

A related partnership, Endless Investments LLP ('Investments'), duly acquired Ashlea House, Mountview House and Pinewood Lodge. Investments let each of the homes to Holdings for a period of 35 years from 29 September 2008. The initial annual rents were £113,000, £102,000 and £125,000 respectively.

The respondent was appointed as a director of Holdings, of Pinewood Nursing Home Limited ('Pinewood') and of Ascot. He continued to hold office as a director in each company until the companies entered administration in December 2010. Pinewood was a wholly owned subsidiary of Ascot.

In September 2010, Endless carried out investigations into Ascot's income and expenditure. The care homes were visited and access was obtained to Ascot's books and financial information. The petitioner maintained that as a

result of those investigations, it was discovered that very substantial unauthorised payments had been taken by the respondent from Ascot. The respondent maintained that all of these payments were known to David Newett and were authorised by him.

On 22 December 2010, joint administrators were appointed to Ascot and Holdings. The joint administrators were appointed provisional liquidators of Pinewood the following day. In fact, Pinewood had ceased trading in 2009 and its business and assets had been taken over by Ascot. Claims totalling £1,133,822.71 were lodged in the administration of Ascot. There were no known creditors of Pinewood. HMRC submitted a claim in the Ascot administration of £291,490.21 for outstanding PAYE and national insurance contributions for the years 2009/10 and 2010/11. The only claim lodged in the Holdings administration was by HMRC for corporation tax of £2,631.52. There were insufficient funds in the administrations to enable any dividends to be paid to any class of creditors.

The petitioner maintained that the respondent's conduct as a director of Ascot and Holdings made him unfit to be concerned in the management of a company. First, the petitioner contended that the respondent had caused or permitted the misapplication of £158,843.68 of Ascot's funds, namely: (a) unauthorised payments to him totalling £70,474.04; (b) unauthorised payments totalling £38,858.82 to settle liabilities incurred by him in respect of personal expenses using Ascot credit cards; and (c) unauthorised payments totalling £49,510.82 to settle liabilities incurred by himself and third parties connected to him. Second, the petitioner contended that the respondent had caused Ascot wrongfully to delay repayment of Free Personal Care ('FPC') rebates to residents and their families.

HELD:

(1) The respondent's misapplication of funds and his retention of FPC payments amounted to misconduct. That misconduct made him unfit to be concerned in the management of a company. The misapplication of funds from Ascot was on a very significant scale. It involved deceit and putting his own personal interests above the interests of the company and its creditors. He treated the company's funds as if they were his own. The pursuit of a deliberate policy to use FPC payments as working capital, rather than refund them promptly to residents, demonstrated a serious lack of probity. The respondent was in a position of trust in relation to residents and their families, and his conduct was detrimental to them.

(2) The respondent's conduct materially contributed to Ascot and Holdings becoming insolvent. It was the major cause of Endless losing confidence in him and its decision not to make any further investment in Ascot while the respondent was at the helm. The misapplication of funds was to the prejudice of creditors of Ascot. It made a material contribution towards the company not being able to pay its debts as they fell due. The misapplication continued despite the respondent being well aware of the company being in that predicament.

(3) This was a serious case. Relying on the commentary contained in *Mithani: Directors' Disqualification* at **III[1512]**ff, **III[1518]** ff and **III[1558]** ff, a disqualification order for a period of 9 years would be made.

Mr D Thomson (instructed by Shepherd & Wedderburn LLP) appeared on behalf of the Secretary of State.

The respondent appeared in person.

SHORTER CASE SUMMARIES

(1) Re Eastern Paradise Ltd and Indian Rose Ltd, Secretary of State for Business, Innovation and Skills v Alam and others, District Judge Troy, the County Court at Leeds, 26 January 2015

FACTS AND OUTCOME:

The Secretary of State sought a disqualification order under s 6 of the CDDA 1986 against the defendants. He alleged that the defendants had caused or allowed the companies to employ illegal workers as waiters, cooks and butchers in breach of UK immigration rules.

The court found those breaches proved and to have led directly or indirectly to the insolvency of the companies.

The court said that it was unacceptable for an employer not to check the employment status of a proposed employee.

The court regarded the conduct of the defendants as demonstrating a sufficient want of probity to justify the making of disqualification orders against them.

The defendants would be made subject to varying periods of disqualification to reflect the nature of the breaches, the occasions on which they had occurred and the extent to which the defendants had cooperated in the investigations conducted by the authorities to investigate the breaches.

Mr Christopher Royle (instructed by Bond Dickinson LLP) appeared on behalf of the Secretary of State.

The respondent did not appear and was not represented.

(2) Re Joyston Alternative Asset (No 4) Limited and Arck LLP, Secretary of State for Business, Innovation and Skills v Richard Clay, District Judge Richmond, High Court of Justice, Chancery Division, Manchester District Registry

FACTS AND OUTCOME:

The Secretary of State sought a disqualification order under s 6 of the CDDA 1986 against the defendant. He alleged that the defendant had: (a) as a director of Joyston Alternative Asset No (4) Ltd ('the Company'): (i) caused or allowed potential investors to be misled by representing that the guardian of funds was authorised by the Financial Conduct Authority to hold client funds; (ii) caused or allowed the Company to make purchases and payments totalling £535,880.00 in the knowledge that no such dissipation of funds was allowed under the terms under which it was deposited; and (iii) caused or allowed the Company to make payments totalling £6,672,441.00 to connected companies for which no security or benefit was received in the knowledge that no such dissipation of funds was allowed under the terms under which it was deposited; and (b) as a partner of Arck LLP ('the LLP'), caused or allowed false representations to be made by presenting bank statements which he knew or ought to have known were false to advisors of investors. In one case, a purported balance of £12,269,425.00 was in fact £25.87; in another case, the purported balance of £13,750,000.00 was in fact £25.90.

The statement of affairs in relation to the Company indicated a deficit as regards creditors and shareholders of over £7m. The deficit in relation to the LLP, as regards creditors and members, was thought to be a sum in excess of £73M.

The conduct of the defendant showed a serious want of probity. A disqualification order for the maximum period of 15 years would be made.

Ms Laura D'Cruz (instructed by Howes Percival LLP) appeared on behalf of the Secretary of State.

The defendant did not appear and was not represented.

(3) Official Receiver v Michael Joseph Ogden, District Judge Khan, the County Court at Manchester, 8 January 2015

FACTS AND OUTCOME:

The Official Receiver applied for a debt relief restrictions order ('DRRO') against the respondent on the ground that "during the moratorium period of the debt relief order ('DRO'), the respondent had failed in his statutory duty to notify the Official Receiver that he became due to receive a PPI refund totalling £4012.16 pursuant to the provisions of s 251J(5) of the IA 1986."

The respondent had returned his PPI acceptance forms on 22 October 2013 which was after the moratorium period had expired and after he had received a letter confirming his discharge from the debts scheduled in the DRO.

The court made a DRRO for a period of 6 years having regard to the fact that the respondent's conduct was 'cynical and calculated' and that the amount of the deficiency in proportion to the PPI payment was significant: £13,448/4102.16. However, it took into account in mitigation the fact that the respondent had not contested the application and had not benefited personally. He had given the money to his mother who had looked after him for many years whilst he was recovering from a broken neck in 2005.

The Official Receiver appeared in person

The respondent did not appear and was not represented.

(4) Official Receiver v Benjamin Wilson, Chief Registrar Baister, High Court of Justice, Bankruptcy, 10 June 2014

FACTS AND OUTCOME:

The Official Receiver applied for a bankruptcy restrictions order ('BRO') against the respondent on the grounds that he had: (a) caused or attempted to cause his assets and/or third party assets to be transferred to the benefit of specific creditors; (b) received a payment and/or arranged a payment to be received in breach of an injunction to the detriment of a creditor or creditors; and (c) dealt with, or attempted to deal with, assets to the detriment of the general body of creditors.

The court found the allegations made out. The Chief Registrar found that the behaviour of the respondent was 'indicative of a pattern of behaviour that began with the dishonesty of the way in which the business was conducted from the outset and continued in the face of injunctions and court judgments. It is a very, very serious matter indeed and, to my mind … merits an order in the top bracket, and I have no hesitation in agreeing with [counsel for the Official Receiver] that fifteen years is the appropriate period in the circumstances of this case.'

Mr Christopher Buckley (instructed by Bond Dickinson LLP) appeared on behalf of the Official Receiver.

The respondent did not appear and was not represented.

(5) Re Home Net (UK) Ltd and others, District Judge Lynch, the County Court at Northampton, 7 May 2015

FACTS AND OUTCOME:

The Secretary of State applied for a disqualification order against the defendant under s 6 of the CDDA 1986.

The allegations against the defendant in support of the application for the disqualification order were that the defendant had caused or permitted the company to make 22 false VAT returns. The defendant admitted to having

knowingly submitted VAT returns between 2008 and 2010 by which a sum of some £882,068 was obtained from HMRC. The defendant's position from the outset of the application was that he had been advised by leading counsel that the claim against him was an abuse of process. The advice was found to have been wrong and the defendant's application to strike out the claim was dismissed by the court. At the hearing of the application, the Secretary of State argued that the seriousness of the dishonest conduct plainly warranted a period of disqualification in the 'top bracket' set out in *Sevenoaks*. On the day of the hearing, the defendant, who had only just instructed new solicitors and counsel, accepted that his conduct warranted the making of a disqualification order against him but contested the period for which the Secretary of State stated the order should be made.

District Judge Lynch noted that the allegations made against the defendant were extremely serious and that the conduct of the defendant could warrant a period of disqualification in the top bracket. However, relying on the commentary contained in *Mithani: Directors Disqualification*, at **IV[130]** ff, he ruled that the defendant should be given an opportunity to advance any mitigation that might reduce the period for which he should be disqualified. He, accordingly, granted an adjournment, but only on condition that the defendant provide undertakings to the court, which had identical or similar effect to a disqualification order or disqualification undertaking, during the period of the adjournment. He also ordered the defendant to pay the Secretary of State's costs thrown away on an indemnity basis.

Mr Daniel Margolin QC (instructed by Wragge Lawrence Graham LLP) appeared on behalf of the Secretary of State.

Mr Jonathan Wright (instructed by Neil Davies and Partners LLP) appeared for the defendant.