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Disqualification Newsletter

NEWSLETTER EDITOR
Dr. John Tribe

Filing Instructions: Please file at the front of Binder 1 of *Mithani: Directors' Disqualification.*

Dear Subscriber,

This Newsletter contains: (1) a summary of the recent House of Commons Business, Innovation and Skills Committee report on the Insolvency Service; (2) summaries of unfitness cases from the Insolvency Service's recent 'disqualification activity'; and (3) more detailed summaries of two unfitness cases, one case on permission to act under CDDA 1986, s 17, and a case on abuse of process.

Dr. John Tribe

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

PASTURES NEW FOR PROFESSOR PARRY

As the new editor of the *Disqualification Newsletter*, I would like to take this opportunity to thank my predecessor, Professor Rebecca Parry. Rebecca has edited the *Disqualification Newsletter* from its inception in 1998. Under her editorship, authorship and guidance the Newsletter has appeared some four times a year, and provided an interesting and informative addition to the main loose-leaf work. Rebecca has made an important contribution to the subject through her work as editor. She has navigated a steady and interesting course through the "murky waters of both law and …facts"* which make up

the law, practice and procedure of directors' disqualification and allied subjects. The Editorial Board wish her success in her future endeavours.

On her editorship of the Newsletter, the general editor of the main work, His Honour Judge Abbas Mithani QC, said:

> "Professor Rebecca Parry's contribution to the Newsletter has been immense. She has almost single-handedly been responsible for the publication of over 50 issues of the Newsletter. She displayed and imparted to our subscribers not just her great knowledge and likeness of the subject but also an academic perspective to it. Her editorship of the Newsletter will be sorely missed. However, she will continue to contribute to the main work and will, therefore, continue to provide our subscribers with her great academic expertise and experience on the subject. We are very pleased that Dr. John Tribe has agreed to take over from her. John is the KPMG Principal Lecturer in Restructuring at Kingston University Law School. Following completion of postgraduate work at University College London, where he was awarded the Joseph Hume Scholarship in Law, John was appointed to his first academic post at Kingston Law School in August 2003 as a Lecturer in Law. John was the curator of a display on the history of bankruptcy at the Royal Courts of Justice (2010–2011) and is an editorial board member of Butterworths' Corporate Rescue and Insolvency, an editorial board member of the Australia Insolvency Law Bulletin, and a consultant editor of Jordan Publishing's Bankruptcy and Personal Insolvency Reports.
>
> John has published widely on personal insolvency, corporate insolvency and bankruptcy history. In 2006 he gave evidence to the Scottish Parliament on bankruptcy reform and his work has been supportively cited by a number of his senior colleagues. An experienced media commentator, he has appeared on BBC television and radio and given a number of quotes to the national press on personal insolvency matters. John has undertaken commissioned research for the Insolvency Service (2005 and 2007), Grant Thornton (2007), KPMG (2009), Baker Tilly (2011) and the London Gazette (2012 – ongoing).
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> In addition John curates a small museum on the history of bankruptcy – The Muir Hunter Museum of Bankruptcy. This has many interesting items from the history of the subject. These include quirky objects as well as more significant documentary material relating to famous bankruptcies and important policy developments. John is currently cataloguing and digitising Prof. Muir Hunter QC's working papers from the Cork Committee. This invaluable collection contains, *inter alia*, all of the Cork Committee position papers and other interesting policy documents. This includes material on directors' disqualification.
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> We have no doubt that the very high standards achieved by the Newsletter under Rebecca's editorship will continue under John's editorship. John is already a member of our board of advisory editors. He now becomes a contributor. We extend a warm welcome to him."

* *Secretary of State for Trade and Industry v. Goldberg and another* [2003] EWHC 2843 (Ch), [2004] BCLC 597, at [6].

FUNDING AND DISQUALIFICATION – A COMMONS' CRITIQUE OF THE INSOLVENCY SERVICE

There have been a number of newsworthy items affecting the areas covered by the Newsletter since the last edition*. The most notable of these is the recent report of the House of Commons Business, Innovation and Skills (BIS) on the Insolvency Service (IS), which expressed concern about a number of areas of its work. In the context of its investigation and enforcement regime, the Report makes particularly interesting reading because it comes against the backdrop of a reduction in disqualification cases, as the following table demonstrates:

Directors' disqualifications: 2009–2012**

Year	Number of disqualifications
2011–2012	1,215
2010–2011	1,800
2009–2010	2,164

In relation to disqualification, the Report notes:

> "48. The target of 68 per cent for stakeholder confidence in the enforcement regime has clearly proved a challenge for the Insolvency Service. Public perception of resource pressures may dampen stakeholder confidence but we do not accept that this is the prime reason for the Service to miss its targets in this area. Confidence in the enforcement regime is a key factor in the success of the Insolvency Service. In its response to this Report the Service must demonstrate that it has a strategy for promoting the successes of the investigatory and enforcement regime so that confidence in it can be better measured …
>
> 61. Both the insolvency industry and the Insolvency Service have recognised that resource constraints, both in terms of funding and staffing, have had an impact on the investigatory and enforcement regime. While we welcome additional funding from the Department for Business, Innovation and Skills, we remain concerned that this area of activity remains under-resourced …
>
> 62. We are strongly of the opinion that **the levels of disqualification of errant directors should not be determined by an arbitrary level set in what the Insolvency Service describes as the public interest**. We believe that any dilution of enforcement activity would send entirely the wrong message to delinquent directors and recommend that the Department

provides the Insolvency Service with sufficient, and if necessary, additional funding to disqualify or sanction all directors who have been found guilty of misconduct***." (Emphasis supplied).

The Committee members were clearly dissatisfied with the current disqualification activity at the IS. It will be interesting to see how the IS responds to this. What the Report does perhaps suggest is that further work in the area will emerge if more funding is made available. It is hoped that more funding will be forthcoming as the area of disqualification is integral not to just to the regime for enforcing breaches of insolvency law, but also to the regime for enforcing breaches of company law.

* See, for example, Milman, D, 'Disqualification of directors: an evaluation of current law, poicy and practice in the UK' (2013) Company Law Newsletter, pp 1–5; and Clench, T, 'D reports – what you really need to know' (2013) 26(2) Insolv. Int. 2013). pp 17–23.

** See, further, Insolvency Service Annual Report 2011–12 – available at: http://www.official-documents.gov.uk/document/hc1213/hc03/0358/0358.pdf

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http://www.publications.parliament.uk/pa/cm201213/cmselect/cmbis/675/675.pdf.

UPDATES FROM INSOLVENCY SERVICE NEWSFEED

The IS provides a newsfeed on its activity in the area of directors' disqualification*. Recent cases include the following:

(a) The imposition of a disqualification order against two directors, Bradleigh Anthony Caley and John George Evans, for a period of 12 years each, for lack of commercial probity in the conduct of the affairs of Wine Vinters Ltd. The defendants had encouraged members of the public to invest in the company and, consequently, in the purchase of wine from the Bordeaux region of France. This was wine that was still in the barrel. It had yet to be bottled, which meant that the investment was risky and the true quality of the wine would not be known at the point of purchase. The public appeared keen to invest, and a total investment of some £1,562,888 was made into the venture. Only £446,756 was used to purchase wine for the customers. The residue, over £1 million, was used by the two directors to fund their "lavish lifestyles". This included giving money to relatives, friends and various associates. The money was also used, *inter alia*, to fund visits to restaurants, gentlemen's clubs and bars. The directors oiled the wheels of their scheme in various ways, for example, by maintaining a Mayfair address, although, in reality, the base of operations was Bromley in Kent; and by including a number of misleading statements in their promotional brochure.

(b) The imposition of disqualification against Stephen James Dodd, a director of Brian James Holdings Ltd, a furniture retailer, by means of a disqualification undertaking for a period of five years. Despite the fact that the company had entered a period of financial difficulty, when

the company was failing to pay suppliers, and when there was a significant risk that customers who had paid deposits would not receive their furniture, Mr Dodd paid £53,864 from the company account to himself and his friends.
These payments to Mr Dodd included wage arrears and advance holiday pay at a rate of more than double his previous salary. Customers were owed approximately £100,000 and total loses when the company went in to administrative receivership were in excess of £2.5 million. This was before customers and creditors had been paid.

(c) The imposition of disqualification by means of a disqualification undertaking for a period of seven years against Greg John Middleton for the conduct of the affairs of Sigma Labour Services Ltd, a payroll services company, that entered voluntary liquidation in May 2011. The company had failed to keep proper records as a result of which, *inter alia*, some £15 million of transactions could not be accounted for and the company's tax liability could not be calculated.

(d) The imposition of a disqualification order for a period of 13 years against Qasim Ali Munir for the conduct of the affairs of Farman Homes Ltd. The defendant had provided a false document to HM Land Registry in order to release a charge held by the company on a property he had purchased from Farman Homes. By releasing the charge, the defendant managed to ensure that the sale proceeds from the property were paid to him and his associates – and not to the bank. He had also had failed to co-operate with the company's administrators, and failed to deliver up any of the company's accounting records as a result of which it was not possible to verify certain aspects of the company's Farman Homes trading or to establish its assets and liabilities at the date of administration.

(e) The imposition of a disqualification order for a period of eleven years each against two brothers, Paul John Aspden and Peter Keith Aspden, in respect of their conduct of the affairs of Independent Property Consultants Ltd. Members of the public had paid over £1,500,000 to the company for properties in four Bulgarian developments but these properties never materialised. The defendants also misled clients into parting with almost £1,000,000 for apartments in the Sal Vista resort development in Cape Verde. Again, customers did not receive the properties they had paid for.
As well as failing to provide the properties customers had paid for, the company also failed to properly protect customers' money. Inadequate ring-fencing led to at least £643,244 of clients' funds being lost and investigators were unable to establish where the money had gone.

* http://www.bis.gov.uk/insolvency/news/press-releases.

RE GOURMET RESTAURANTS LTD, SECRETARY OF STATE FOR BUSINESS, INNOVATION & SKILLS V JAMAL AHMED ALI HIRANI

High Court of Justice, Chancery Division, Companies Court, 13 February 2013, Mr Registrar Jones.

Directors' disqualification – unfitness – CDDA 1986, s 6 – dishonesty – false entries made in the company's accounting records – false documents – securing a pecuniary advantage.

Fitness to stand trial – medical evidence – depression – adjournment – case management – public interest – adjournment refused.

This was the Secretary of State's application for a disqualification order under CDDA 1986, s 6, against Jamaal Ahmed Ali Hirani. Mr Hirani was a director of Gourmet Restaurants Ltd ('the Company'). The Company was incorporated on 2 June 2005 when Mr Hirani was appointed as a director and chief executive officer. The shares of the Company were held as follows: 51% Napier Brown; 30% Mr Hirani; 15% Anand and Arjun Varma; and 2.5% Mr Gammell. The Varmas became directors on 17 December 2008.

On 19 January 2009, Mr Hirani resigned. He began a constructive dismissal claim in the Employment Tribunal and also claimed payment for accrued holidays. The claim for constructive dismissal was dismissed after a three-day hearing.

In his capacity as a director of the Company, it was alleged that Mr Hirani had caused the following false entries to be made in the Company's accounting records and false documents to be created for the purpose of securing a pecuniary advantage: (i) false entries to be made in the Company's banking records to show that he had lent £150,000 to the Company, when he had not ("the £150,000 Loan Issue"); and (ii) false sales invoices to a value of £160,000 to be created in the Company's sales ledger to obtain advances under the Company's invoice discounting facility ("the £160,000 Invoices Issue").

Mr Hirani alleged in his written evidence in opposition that the false entries were created by the accounts staff upon the instructions (directly or indirectly) of the Varmas in order to falsely incriminate him and/or had nothing to do with him.

Mr Hirani had a medical history, including one failed suicide attempt, leading up to his disqualification trial. He sought an adjournment of the trial.

HELD:

(1) The adjournment would be refused. The court had to be careful and cautious before reaching the conclusion that the trial should proceed in the absence of a defendant both generally and, in particular, in a case where the claim was for a disqualification order which by its nature could seriously affect a defendant's ability to work and earn a livelihood

in the future. However, the medical evidence did not demonstrate that Mr Hirani was unable to attend a hearing and participate in the trial. Mr Hirani's medical condition was not sufficiently serious to prevent attendance and participation.

(2) The court had to make a disqualification order under CDDA 1986, s 6 if it was satisfied: (i) the defendant had been a director of a company which has at any time (subject to time limits for commencing the claim) become insolvent; and (ii) his conduct as a director of that company made him unfit to be concerned in the management of a company.

(3) The first of the conditions was plainly met. There was no doubt that allegations of a failure to keep proper accounting records, causing false invoices to be raised and being responsible for false accounting records, either individually or cumulatively, would result in the second condition also being satisfied if the allegations could be proved against Mr Hirani.

(4) The Employment Tribunal had decided a number of the facts upon which Mr Hirani had relied in his opposition to the application for the disqualification order against him. The Secretary of State submitted that Mr Hirani should not be permitted in these proceedings to re-litigate any factual matters decided or any conclusions reached by the Tribunal. However, on the facts, the court refused to accede to the request, the following cases having been considered by the court: *Hollington v F Hewthorn & Co Ltd* [1943] 1 KB 587; *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321, [2004] Ch 1; *Shierson v Rastogi* [2007] BPIR 891; *Hunter v Chief Constable of the West Midlands Police and others* [1982] AC 528, HL; *Re Thomas Christy Ltd* (*in liquidation*) [1994] 2 BCLC 527; *Secretary of State for Business, Innovation and Skills v Nadhan Singh Potiwal* [2012] EWHC 3723 (Ch).

(6) It was extremely unlikely that the entries in respect of the £150,000 Loan Issue would have been connected to a plot to oust Mr Hirani from the Company as he alleged. The evidence plainly pointed in the direction of Mr Hirani as the person who caused the false accounting. The allegation in respect of the £150,000 Loan Issue was made out. However, the allegation in respect of the £160,000 Invoices Issue was not made out.

(7) The allegation in respect of the £150,000 Loan Issue amounted to a very serious breach by Mr Hirani of his duties as a director and, by itself, made him unfit. It warranted the imposition of a disqualification order for a period of ten years.

Mr Christopher Buckley (*instructed by Wragge & Co LLP*) *for the Secretary of State.*

The defendant did not attend and was not represented.

RE MEDIA PRINT AND INVESTMENTS PLC, SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS V CROZIER AND DOLAN

High Court of Justice, Chancery Division, Companies Court, 3 December 2012, Chief Registrar Baister.

Directors' disqualification – unfitness – CDDA 1986, s 6 – false invoices – preferences – dishonesty.

Richard Crozier and Michael Dolan were directors of Media & Print Investments Ltd ("MPI"), Goodman Baylis Ltd ("GBL") and Friary Press Ltd ("FPL"). The Secretary of State sought disqualification orders against them because of their conduct in relation to the three companies. MPI was a holding company. It was incorporated on 24 November 2005. It held interests in multiple group companies, two of which were GBL and FPL. Despite a period of profitable activity, various companies in the group (including MPI, FPL and GBL) went into administration in September 2008. The directors contended that the collapse of the various companies was caused by a squeeze on the availability of credit and on union action. But, for the latter, they contended that no unfitness proceedings would have been brought. Following administration, all the companies had substantial total deficiencies to creditors: £1,208,160 (MPI), £4,699,279 (GBL), £1,942,972 (FPL). All or most of the companies appeared, from the accounting records, to have been insolvent for some time. Neither GBL nor FPL had been paying tax on time.

The allegations against the directors were that they: (a) caused or allowed FPL to raise two false invoices totalling £440,461 and to obtain payment for them from its discounter; (b) caused or allowed three printing presses and a gathering and binding machine, which were secured by a chattels mortgage dated 19 December 2003 in favour of HSBC, to be sold, without accounting to the charge-holder for the proceeds of sale causing it a loss estimated as £545,378; and (c) made payments to the detriment of MPI and its creditors at a time when it was insolvent in that it could not pay its debts as and when they fell due.

HELD:

(1) False invoices were raised by the defendants, and they then factored those invoices. At worst their conduct was dishonest either from the start or at the very least, by their admission, from the time they chose to embark on a cover up of their activities; at best their conduct evidenced incompetence to a marked degree. The defendants' conduct was also inept in terms of maintaining the accuracy and integrity of company records. Even if the defendants did not cause the false invoices to be raised, they *allowed* them to be raised. The allegation was made out on the facts, and plainly constituted unfitness warranting the making of a disqualification order.

(2) The defendants had caused or allowed the assets to be sold when they were subject to a charge. The way in which the defendants behaved

showed a lack of commercial probity, alternatively a cavalier attitude towards the company's financing arrangements with HSBC that amounted to incompetence of a degree warranting the making of a disqualification order. Financing arrangements of the kind FPL entered into with HSBC depend on trust, just as invoice discounting or factoring arrangements do. It was in the public interest that the courts see to it, as far as possible, that such trust is not undermined.

(3) The payments alleged to be made to the detriment of the creditors were not disputed, and the allegation was, therefore, made out.

(4) Both defendants were unfit. They would each be disqualified for a period of eight years.

Miss Lucy Wilson-Barnes (*instructed by Wragge & Co LLP*) *for the Secretary of State.*

Mr Richard Miles (*instructed by Bark & Co*) *for the defendants.*

EDWARD ORMUS SHERINGTON DAVENPORT V SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS

High Court of Justice, Chancery Division, Companies Court, 14 December 2011, Mrs Registrar Derrett.

Directors' disqualification – permission to act – CDDA 1986, ss 1 and 17 – prior conviction of conspiracy to defraud – seven-year, eight-month imprisonment and ten-year disqualification order – whether permission should be granted.

Edward Davenport applied to the court under CDDA 1986, s 17 for permission to act as a company director of three companies, namely, Portland Place Historic House Ltd, Maverick Enterprises Ltd, and Lawrence Poutney Investments Ltd. Following a three-month trial, Mr Davenport had been convicted of conspiracy to defraud and sentenced to seven years and eight months' imprisonment. He was also made subject to a disqualification order under CDDA 1986, s 2 for a period of ten years.

Mr Davenport's fraud conviction arose from his conduct in relation to Gresham Ltd. The company held itself out as being able to source multi-million pound loans for use in large-scale commercial projects all over the world from Canada to the Middle East. To all outward appearances it was long-established, wealthy and prestigious. It operated from expensive London premises, and had a balance sheet showing significant assets. It had a flattering corporate brochure, and used headed notepaper that lent an image of corporate credibility. This was entirely false. It was essentially worthless, and its only business was conducted in a fraudulent manner. It took advanced fees or deposits, but never provided or sourced any finance from its clients. Gresham Ltd was wound up in October 2009 owing creditors £2 million.

The Secretary of State stated that there had never been a case of permission being granted where an individual had been convicted of fraud: see main work at *VI[114]–[124]*. The companies in respect of which Mr Davenport sought permission did little more than simply hold property. They were only used as vehicles for property ownership and property management.

HELD:

(1) Mr Davenport did not have any special skills that would make it necessary for him to act or continue to act as director of any of the companies;

(2) it was not appropriate for permission to be given, having regard to the circumstances of Mr Davenport's conviction and the sentence imposed against him, including the period for which the disqualification order was imposed. The court could not be satisfied that there would be no recurrence of the conduct that led to Mr Davenport's conviction and the imposition of the disqualification order against him. The requirement to protect the public militated against permission being granted to him.

Ms Lisa Freeman (*instructed under the Direct Access Scheme*) *appeared for Mr Davenport.*

Mr Philip Jones QC (*instructed by Wragge & Co, 55 Colmore Row, Birmingham, West Midlands, B3 2AS*) *appeared for the Secretary of State.*

SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS V NADHAN SINGH POTIWAL

[2012] EWHC 3723 (Ch), High Court of Justice, Chancery Division, Companies Court, Briggs J.

Directors' disqualification – unfitness – evidence – abuse of process – striking out – fraudulent evasion of VAT.

The Secretary of State applied to strike out part of written evidence of the defendant served by him in opposition to the Secretary of State's application for a disqualification order under CDDA 1986, s 6. The application to strike out was made on the ground that the reliance upon the evidence amounted to an abuse of the process of the court because the matters upon which the defendant relied had been determined previously by the VAT Tribunal.

The defendant had been a director of Red 12 Trading Ltd. Whilst the sole director of that company, he had participated in transactions connected with the fraudulent evasion of VAT. He had also caused Red 12 Trading Ltd to claim more that £2 million by way of a VAT refund from HMRC. In his written evidence, the defendant denied that he either knew or ought to have known that Red 12 was participating in any VAT fraud. The Secretary of State contended that the denial amounted to an abuse of the process of the court because in a written decision published on 2 January 2009, on an appeal by Red 12 Trading Ltd from HMRC's disallowance of its VAT claims,

the VAT Tribunal concluded that he knew that Red 12 Trading Ltd had participated in the fraudulent evasion of VAT.

HELD:

(1) The defendant had every opportunity, both when giving evidence and subjecting himself to cross-examination, to defend himself against the allegations which the Tribunal found to be proved.

(2) The defendant's evidence in which he denied that he had knowledge of the VAT fraud in which Red 12 Trading Ltd had participated, to the extent found against him by the VAT Tribunal, should be struck out as an abuse of process, the following cases having been considered by the court: *Carl Zeiss Stiftung v Rayner & Keeler and ors* [1967] 1 AC 583; *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510; *Henderson v Henderson* (1843) 3 Hare 100*; Phosphate Sewage v Molleson* [1879] 4 App Cas 801; *Re Thomas Christy* (*in liquidation*) [1994] 2 BCLC 527; *Johnson v Gore Wood & Co* [2002] 2 AC 1; *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321; *Dadourian Group International Inc v Sims and ors* [2006] EWHC 2973 (Ch); *Hunter v Chief Constable of the West Midlands* [1982] AC 529; *Taylor Walton v Laing* [2007] EWCA Civ 1146.

Mr Mark Cunningham QC (*instructed by Wragge & Co*) *for the Secretary of State.*

Miss Alison Graham-Wells (*instructed by Mackrell Turner Garrett Solicitors*) *for the defendant.*

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