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Disqualification Newsletter

Newsletter Editor
Dr. John Tribe

Dear Subscriber,

This Newsletter contains: a summary of the *Transparency & Trust Discussion Paper* launched by the Secretary of State for Business, Innovation and Skills, Dr Vince Cable, MP, which touches on the reform of directors' disqualification; and a case law update. The cases summarised in the update include the following: an unfitness case relating to the failure to maintain adequate company records: *SofSBIS v Mears*; a Scottish case on unfitness case involving group companies: *SofSBIS v Bloch*; an unfitness case involving the disqualification of a *de facto* director: *Re UKLI Ltd, SOSBI v Chohan*; and an unfitness case involving the breach of an order giving permission to act under CDDA 1986, s 17 following a previous disqualification order: *Re Aerospace & Technical Engineering Ltd, SOSBIS v Feld*.

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 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

DR. CABLE'S TRANSPARENCY & TRUST: ENHANCING THE TRANSPARENCY OF UK COMPANY OWNERSHIP AND INCREASING TRUST IN UK BUSINESS DISCUSSION PAPER

On 15 July 2013, Dr. Vince Cable MP, the Secretary of State for Business, Innovation and Skills, launched the *Transparency & Trust: Enhancing The*

Dr. Cable's Transparency & Trust

*Transparency of UK Company Ownership and Increasing Trust in UK Business Discussion Paper**. This 89-page document contains a large number of points that will be of interest to readers of the Newsletter. Although the document is lengthy, it is worth considering in its entirety. A distillation of the key points in the context of directors' disqualification is attempted here. The substance of the directors' disqualification discussion in the paper, including a helpful overview of the regime, can be found at pages 56 to 80. Amongst this material are some interesting statistics. For example the document notes:

On average, some 100 directors are disqualified each month as a result of IS enquiries – some five directors every working day – and the average length of a disqualification is around six years. The majority of these disqualifications relate to corporate insolvencies. The economy benefits from the disqualification regime: analysis suggests that for every company director disqualified there is a potential saving to the economy of about £85,000 in terms of potential damage they would otherwise cause."**

The consultation closes on 16 September 2013. The discussion paper springs from the G8 summit in June 2013, and global attempts to determine how companies are owned and controlled. In particular Dr. Cable states that *'enhanced transparency of company ownership will help … to tackle tax evasion, money laundering and terrorist financing.'*** In relation to directors' disqualification, Dr. Cable notes that:

having an effective system for identifying and dealing with poor business behaviour gives confidence in UK companies and helps create an environment in which honest entrepreneurs are willing to invest in activities promoting growth and employment. Businesses and individuals who behave honestly and responsibly should not be placed at a disadvantage by those who do not play by the rules.****

An immediate response to this point may be that such a system already exists in the form of the current legislation on directors' disqualification and bankruptcy restrictions. The key issue, it could be argued, is how well the current scheme for ensuring public confidence in the administration of companies is funded*****.

The principal matters regarding the reform of directors' disqualification in the paper on which observations are invited are******:

1) Whether to amend directors' statutory duties in key sectors such as banking and whether to allow sectoral regulators to disqualify directors in their sector.

2) What additional factors the court might take into account in director disqualification proceedings, such as the nature and number of previous company failures a director has been involved in.

3) Whether there are options available to help creditors receive compensation when they have suffered from a director's fraudulent or reckless behaviour.

4) Whether the time limit for bringing disqualification proceedings in insolvent company cases should be extended from two to five years.

5) Whether directors who have been disqualified should be offered education or training to equip them with the skills they need to go on to run a successful company.

6) Whether individuals subject to foreign restrictions should be prevented from being a director of a UK company; and whether directors convicted of a criminal offence in relation to the management of an overseas company should be able to be disqualified in the UK.

As noted above, the consultation closes on the 16 September 2013. If the proposals suggested in the document are implemented, they could fundamentally affect the nature and workings of the disqualification regime.

* See:https://www.gov.uk/government/news/cable-announces-proposals-to-radically-improve-company-transparency-and-boost-public-trust-in-business

** https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212079/bis-13–959-transparency-and-trust-enhancing-the-transparency-of-uk-company-ownership-and-increaing-trust-in-uk- business.pdf, at paragraph 7.7.

*** *Ibid*, at page 3.

**** *Ibid.*

***** On this see: http://www.jordansinsolvencylaw.co.uk/articles/is-directors-disqualification-properly-funded

****** *Ibid*, at page 5 and 6.

CASE LAW UPDATE

Secretary of State for Business, Innovation & Skills v Victor Robert Mears

Brighton County Court, District Judge D Pollard, 17 May 2013

Directors' disqualification – unfitness – failure to maintain or preserve adequate accounting records – failure to deliver accounting records to the liquidator.

Victor Robert Mears, ('Mr M'), was the sole registered director and shareholder of Lapland New Forest Limited ('the Company') from its incorporation on 12/08/08. The Company was set up to run a Christmas-themed park that operated in the New Forest. The park was opened to the public on

29/11/08. Ticket sales had commenced on 22/09/08. Following numerous complaints, a trading standards investigation was instigated. The park subsequent closed as the Company's online credit card facilities were suspended. A statement of affairs sworn by Mr M showed a total deficiency of £1,265,735 to creditors. Following an investigation by the liquidator, the Insolvency Service was unable to account for £222,955.45 of expenditure from the Company's records. Mr M's only explanation about the unaccounted

expenditure was an allegation of extortion by a Mr Charles 'Charlie' Cooper who would not provide receipts for work done by him for the Company. The case of Mr M was that he had kept proper records, and that it was Mr Cooper who had done work on behalf of the Company but had not given Mr M or the Company receipts for the work he had carried out.

A disqualification order had previously been made against Mr M in March 2011 by the Bristol Crown Court following his conviction for an offence or offences to which CDDA 1986, s 2 applied. The Court of Appeal had quashed this conviction on 10/11/11. On 30/01/12, the Secretary of State applied for a fresh disqualification order against Mr M. The only allegation against Mr M was that he failed to ensure that the Company maintained and/or preserved adequate accounting records or that he failed to deliver such accounting records to the liquidator. As a consequence, the liquidator could not say whether the unaccounted expenditure was properly and legitimately incurred by the Company.

HELD:

Mr M was responsible for the failure by the Company to comply with its obligation under CA 2006, ss 386 and 388 to keep proper accounting records.

1) The liquidator would have had to spend a considerable time in reconstructing the records of the company, and this must have involved him in substantial expense. The lack of proper records also prevented him from chasing persons who may have owed money to the company. Both these factors had reduced the pool of money which might otherwise have been available to the creditors of the Company.

2) Mr M had sought to place the blame for his actions or inactions on others, rather than accepting responsibility for them himself. That was a matter that needed to be taken into account in deciding whether to disqualify Mr M and, if so, for how long.

3) In spite of the fact that the application to disqualify Mr M was based on a single allegation of a failure to keep and/or preserve or deliver adequate records, the allegation was sufficiently serious – taking into account the above matters, particularly the loss occasioned to members of the public who had purchased tickets in good faith to enable them and their families to enjoy a Christmas experience and who had been deprived of that experience, and the failure of Mr M to accept responsibility for his acts and omissions – to warrant a disqualification order in or about the top bracket specified in *Re Sevenoaks Stationers* [1991] Ch 164, 174F. A disqualification order for a period of 10 years 21 days would be made.

[EDITORIAL NOTE: It appears from the entry relating to this disqualification registered at Companies House that the period of the disqualification ordered against Mr M was, in fact, 10 years rather than 10 years and 21 days. It would appear that the 21 days referred to by the Judge was in fact the period specified in CDDA 1986, s 1(2) as to the date when, in the absence of

any contrary indication under the terms of a disqualification order, the period of disqualification commences: see *Mithani: Directors' Disqualification* at V[15] ff.

Ms Catherine Doran (instructed by Howes Percival) for the Secretary of State.

Mr Victor Mears appeared in person.

Secretary of State for Business, Innovation and Skills v Stephen Bloch

[2013] CSOH 57, 2013 WL 1563205, Outer House, Court of Session, Lord Woolman

Directors' disqualification – s 8 of the Company Directors Disqualification Act 1986 – unfitness

Group companies – lease obligations – restructuring – whitewash declaration under s 156(4) Companies Act 1985 – intra-group payments

This was an application by the Secretary of State for a disqualification order against Stephen Bloch under CDDA 1986, s 8.

Mr Bloch was the sole director of Centenary Holdings III Limited ('CH3'). When he took office, CH3 had assets of £15 million. Within a year, CH3 went into liquidation with a few thousand pounds in its bank accounts.

CH3 traced its origins to Robert Brown Ltd, a company that was incorporated in 1928 as a manufacturer, wholesaler and retailer of alcoholic beverages. In 1963, Robert Brown Ltd became part of the Seagram group, and changed its name to Seagram Distillers Ltd. Subsequently, Seagram Distillers Ltd became a public company and, in December 2000, the Seagram group merged with another multi-national group whose parent company was Vivendi Universal SA. In 2001, Vivendi arranged for CH3 to sell its drinks business to Diageo plc and Pernod Ricard SA. Subsequently, CH3 became non-trading. In 2002, the company re-registered as CH3 plc before becoming a private company under its current name in December 2003. Vivendi held all of the shares in CH3. At December 2003, CH3 had substantial assets and liabilities. Its assets were valued in excess of £1 billion. Its liabilities mainly comprised tenancy obligations under several commercial leases. A provision of about £42 million was required to be made to reflect the outstanding liabilities under the leases.

Vivendi had a significant lease obligation relating to 'the Ark', a distinctive building in Hammersmith, London. The building was unoccupied. The rent, service charges and rates for the Ark leases totalled about £5 million each year. The leases were dated 19 December 1995 and 8 February 1996 and each was of 25 years duration. The landlord was Deka Immobilien Investment GmBH ('Deka'). In late 2002, Vivendi unsuccessfully attempted to market the leases. Consequently, Vivendi approached Deka to negotiate a release from the lease obligations. Deka demanded a sum in the region of £30 million to release Vivendi. Vivendi was not willing to pay that sum and instead, in June 2003, offered Deka £20 million in cash to allow Vivendi to

surrender the leases. Deka declined the offer. As a consequence, the Vivendi group went through a restructuring process advised by PwC, the main aim of which was to address the 'toxic' Ark problem by isolating it in CH3. The restructuring involved financial assistance, and required a whitewash declaration pursuant to s 156(4) of the Companies Act 1985. Vivendi's head of legal division, Mr Richard Constant, who up to this point had been the sole director of CH3, was not prepared to sign the whitewash declaration as under the restructuring scheme he would cease being a director of CH3 and would, therefore, have no control, influence or direction of the company after its sale by Vivendi.

The whitewash declaration was signed by Mr Bloch on 22 January 2004, the same day he took over from Mr Constant as sole director of CH3. Mr Bloch received a 'signing on fee' of £50,000, and a service agreement under which he would ultimately be paid £150,000 a year. When he swore the whitewash declaration, Mr Bloch knew that the £15 million assets would allow CH3 to meet its obligations for at least 12 months. Part of the balance was also available for investment by Mr Bloch, hopefully yielding an income stream for CH3. A business plan, essential for assessing the future financial viability of CH3, was also available to Mr Bloch. This 'fragile' document included a plan to approach Deka to consent to multi-letting the Ark. CH3 was also going to contribute funds towards the purchase of the Paramount Hotel Group which was being offered for sale in the region of £250 million. PWC called the plan difficult but viable. The liquidator, Mr Craven, was more robust. He opined that CH3 was insolvent from its inception. This was because it was non-trading, and its cash assets of £15 million were outweighed by the lease liabilities of about £35 million.

Mr Bloch was aware that CH3 would become insolvent within a relatively short period of his appointment unless something happened. Hope rested on the twin pillars of the business plan. Neither proposal came to fruition. Paramount Hotels signed an agreement with another bidder in April 2004, and there was no substantive meeting between CH3 and Deka to discuss the leases until August 2004. When the meeting did occur it was not successful. Mr Bloch took a hard line negotiating tactic and offered to buy the Ark for a reduced price rather than seek consent for sub-letting. Deka turned that proposal down.

Instead of the business plan progressing, what occurred was the payment of a number of large sums from the £15 million held by CH3. The first was a payment of £600,000 to Mr Richards (the ultimate shareholder of CH3 and its sister companies (Centenary 6 Ltd (C6) and Centenary 7 Ltd (C7) following the restructuring) for consultancy services. The payment was made to a Jersey based company of which Mr Richards was the beneficial owner. The second payment was a dividend of £5,314,000 to C6. According to Mr Bloch, this was to enable C6 to make investments for the benefit of CH3. CH3's current balance sheet was such that its bankers were unwilling to grant loans to it. However, in order to make the dividend distribution, CH3 required distributable reserves. It showed this in its balance sheet by reducing the value of the Ark liabilities on the basis that it would be multi-let. The

meeting with Deka had yet to take place. Two days after it received the dividend, C6 loaned C7 £5.314 million. Mr Bloch was the sole director of all three companies. There was no evidence of any investments being made by C6 or C7 on behalf of CH3. In August 2010, C7 was wound up.

A number of further payments were made by CH3. These were, inter alia, (a) payments to C7 totalling £2,595,000; (b) a loan to a company called Herongate Construction Ltd for £250,000. The liquidator of CH3 failed to find any logical reason for this loan being made; (c) a payment of £338,000 by way of unsecured loan to Cloverleaf Holdings Limited, a Monaco based company. This loan was paid into the bank account of a Linda A Miller of Long Beach, California. The liquidator found no explanation as to why there was a disconnect between the borrower and payee; and (d) £2.75 million was paid to Phonevision Australia Pty Ltd, a company that held a number of valuable 4G wireless licences. The payment structure was convoluted and left CH3 some £2.7 million worse off.

CH3 was wound up on the ground that it was insolvent. The deficiency to creditors as at the date of the liquidation was estimated at £67 million. The liquidators sought damages in excess of £77 million from Mr Bloch, Mr Constant, Vivendi and PWC. That action was resolved in early 2011 by means of an 'extra judicial settlement'. In May 2011, Vivendi instituted a claim against Mr Bloch and Mr Richards for payment of around £10 million. That claim alleged that Mr Bloch had breached his duty as a director to CH3. At the time of the hearing of the disqualification proceedings, that claim was still pending.

On 25 January 2005, the Secretary of State authorised an investigation to be carried out under s 477 of the Companies Act 1985. The investigators submitted their report in August 2005. However, the bringing of disqualification proceedings had been delayed. The Secretary of State attributed this delay to the fact that this was a very complex matter in which his officers and their legal and his legal advisors had been required to spend a great deal of time in analysing the voluminous materials and the issues that arose.

HELD:

1) In deciding whether to make a disqualification order against a director, the court had to be satisfied that the conduct of the director viewed cumulatively, and taking into account any extenuating circumstances, had fallen below the standards of probity and competence appropriate for persons fit to be directors of companies: see *Re Grayan Building Services Ltd* (*in liquidation*) [1995] Ch 241, 253–254, per Hoffmann, LJ.

2) The following passage from *Mithani: Directors' Disqualification* at III[344] correctly represented the approach which the court had to take in deciding whether unfitness had been established:

   Ultimately, the question whether unfitness is established is a matter for the judge dealing with the issue to exercise a 'value judgment'. It is submitted that the making of that value judgment requires no more than for a court to come to a common sense decision about whether the

facts of the case when applied to the standard of conduct laid down by the courts should result in a finding of unfitness being made against the defendant.

3) In addition, the legal principles and the approach of the court to the circumstances that obtained in the present case were correctly represented by the following points that could be deduced from various passages in *Mithani: Directors' Disqualificatio*n:

   a) The court must approach the issues in a case by taking off the spectacles of hindsight and considering the situation that confronted the director: see *Mithani* at III[410B];

   b) Mere commercial misjudgement will not justify disqualification: see *Mithani at* III[398];

   c) However, incompetence, resulting in the misapplication of company funds or putting them at risk by inappropriate transactions may justify the making of a disqualification order: see *Mithani* at III[436];

   d) Trading while insolvent and without a reasonable prospect of meeting creditors' claims is likely to constitute incompetence of sufficient seriousness to justify the making of a disqualification order: *Mithani* at III[438A]; and

   e) Payment of excessive remuneration to another at a time when the director knows the company is insolvent or is failing to discharge creditors' debts is conduct which is blameworthy and may justify the imposition of disqualification: see *Mithani* at [537].

4) The Secretary of State had established his case. There was little or no challenge on the facts. It was questionable whether Mr Bloch fully understood what strategy to employ in making CH3 viable. It seemed to depend largely on his optimistic belief that some deal would turn up that would allow CH3 to continue in business. Mr Bloch failed to implement the business plan. He appeared to have done very little to progress the multiple sub-letting. No attempt was made to secure the consent of Deka to the multi-letting of the Ark. Mr Bloch failed, and continued to fail to appreciate that CH3 monies were effectively held by CH3 on trust for its creditors. It was not open to Mr Bloch to use those funds in risky speculations.

5) Viewed cumulatively and individually Mr Bloch's conduct was extremely serious, and clearly such as to render him unfit to be concerned in the management of a company. He denuded the company of its substantial assets during the period of his directorship. Two factors could be taken into account in mitigation. First, there was no allegation that Mr Bloch had been dishonest or sought to line his own pockets. Second, the lapse of time between the conduct and the present proceedings was relevant in deciding the period of disqualification that it was appropriate for the court to impose, particularly if Mr Bloch had

been prejudiced by it: see *Mithani* at III[1638]. Mr Bloch had stated that since the proceedings had commended, he had turned down a number of offers of directorship.

A disqualification order for a period of eight years was made against Mr Bloch.

D. Thomson (instructed by Burness Paul & Williamsons LLP) for the Secretary of State.

Mr Bloch appeared in person.

Re UKLI Ltd, Secretary of State for Business, Innovation and Skills v Chohan and others

Ch D, Companies Court, Mr Justice Hildyard, [2013] EWHC 680 (Ch), [2013] All E R (D) 253 (Mar).

Directors' disqualification – unfitness – s 6 of the Company Directors Disqualification Act 1986 – de facto directorship – guidelines

Prohibited collective investment schemes – s 235 of the Financial Services and Markets Act 2000

This was an application for a disqualification order by the Secretary of State against the defendant Baljinder Chohan, arising from Mr Chohan's conduct of the affairs of UKLI Ltd.

UKLI Ltd went into administration in April 2008 and into liquidation in November 2008. At the time of the liquidation, UKLI owed creditors over £70 million.

UKLI Ltd operated a land bank scheme (i.e. where small parcels of land are divided from a large land holding and then sold to investors following marketing activity). UKLI Ltd owned the larger land holdings from which the small parcels of land were carved out and offered to the public. A potential purchaser might invest in a small parcel of land in the expectation that, in due course, it might be sold on at a profit. The profit would arise from the parcel of land attracting planning permission or some other form of change in use. UKLI Ltd had 17 sites and sold over 5,000 small parcels of land through a sales force.

Following an investigation, the Financial Services Authority (FSA) concluded that UKLI Ltd's approach to selling the plots of land was not lawful.

Six of the seven directors of the company entered into a disqualification undertaking. Mr Chohan was unwilling to. The present proceedings related to him only. He had been subject to a previous disqualification order, which had been made against him in January 2008, for a period of four years.

Mr Chohan was not a *de jure* director of UKLI. The Secretary of State contended that he was either a shadow director or a *de facto* director from April 2006 to March 2007 and sought to disqualify him on that basis.

HELD:

1) While certain authorities provided useful tests, ultimately the vital question in determining whether or not a person acted as a *de facto* director was one of fact. Whether or not the company held the *de facto* director out as a director was not an essential requirement. However, the following characteristics were all relevant, though not every one had to be established, and there was inevitably some overlap between them:

   '(1) A de facto director must presume to act as if he were a director.

   (2) He must be or have been in point of fact part of the corporate governing structure and participated in directing the affairs of the company in relation to the acts or conduct complained of.

   (3) He must be either the sole person directing the affairs of the company or a substantial or predominant influence and force in so doing as regards the matters of which complaint is made. Influence is not otherwise likely to be sufficient.

   (4) The person concerned has undertaken acts or functions such as to suggest that his remit to act in relation to the management of the company is the same as if he were a de jure director.

   (5) The functions he performs and the acts of which complaint is made must be such as could only be undertaken by a director, not ones which could properly be performed by a manager or other employee below board level.

   (6) It is relevant whether the person was held out as a director or claimed or purported to act as such: but that, and/or use of the title, is not a necessary requirement, and even that may not always be sufficient.

   (7) His role may relate to part of the affairs of the company only, so long as that part is the part of which complaint is made.

   (8) Lack of accountability to others may be an indicator; so also may the fact of involvement in major decisions.

   (9) The power to intervene to prevent some act on behalf of the company may suffice.

   (10) The person concerned must be someone who was more than a mere agent, employee or advisor.'

2) Mr Chohan had been involved as a *de facto* or shadow director in relation to the promotion and implementation of the land bank scheme administered by UKLI Ltd. He was also involved in the financial affairs of UKLI Ltd.

3) His conduct was unfit and warranted the imposition of a period of disqualification of 12 years, taking into account, inter alia, the following:

a) the seriousness of Mr Chohan's conduct, which effectively 'involved criminal conduct and rais[ed] compelling concerns about his probity and integrity';

b) the fact that Mr Chohan has already been the subject of a previous disqualification order;

c) the very substantial amounts of money invested in UKLI and lost by investors; and

d) the period or periods for which the other directors were disqualified pursuant to the disqualification undertakings they had given, and the fact that the longer period for which Mr Chohan was disqualified reflected his greater culpability.

Mark Cunningham QC and Ms Catherine Addy (instructed by Howes Percival LLP) for the Secretary of State.

The defendant did not appear and was not represented.

Re Woodhall Realisations Ltd, Secretary of State for Business, Innovation and Skills v Aidan Chan Edmund Earley

Ch.D, Companies Court, Mrs Registrar Derrett, 2 July 2013.

Directors' disqualification – unfitness – s 6 of the Company Directors Disqualification Act 1986 – ss 172 and 174 Companies Act 2006 – promoting the success of the company – reasonable care and skill – directors' duty to creditors

The Secretary of State brought proceedings against the defendant, Aiden Chan Edmund Earley, pursuant to s 6 of the Company Directors' Disqualification Act 1986. The Defendant was a director of three companies, Wood Hall Realisations Ltd (Wood Hall), C4E Realisations Ltd (C4E) and Set Meals Realisations Ltd (Set Meals). He was a 39.5% shareholder in C4E. All the shares in Wood Hall and Set Meals were owned by C4E. Wood Hall's business was that of a provider of catering to television and film productions. Poor trading in 2007 and the inability of the companies to raise funds meant that the companies were unable to meet their liabilities to HMRC. The Defendant's view was that the assets of the companies exceeded their liabilities, and a scheme was devised which provided for the businesses operated by the companies and their other assets to be transferred to new companies, leaving the liabilities owed to HMRC in the old companies, and the companies would then be placed in members' voluntary liquidation (MVL). The consideration for the transfers would be deferred and repaid to the old companies in order for them to discharge their remaining creditors before the expiry of 12 months from the liquidation. The scheme was implemented, and each of the companies was placed into MVL on 26 November 2007. The statutory declarations of solvency under IA 1986, s 89 were signed by the defendant.

The Secretary of State's allegation of unfitness was based on the allegation that, on 26 November 2007, the defendant exposed the creditors of Wood

Hall (and, in particular, HMRC) to the unreasonable risk that their debts would not be paid by causing Wood Hall to transfer all of its assets to Wood Hall Catering and Events Ltd and the C4E Group plc, the newly formed companies of which the defendant was a director, without ensuring that any payment was made for the assets and without ensuring that any security was provided. The Defendant retained control of and the benefit of the assets of the companies by transferring them to the newly formed purchasing companies of which he was a director. Subsequent to this transfer, no payments were received for these assets. The result was that there was a deficiency to the creditors of Wood Hall's creditors in a sum of at least £836,000. Wood Hall entered into creditors' voluntary liquidation as a result of this deficiency.

The same allegation was made against the Defendant in relation to C4E and Set Meals. C4E was placed into creditors' voluntary liquidation with a deficiency to creditors of £622,363. Set Meals was placed into CVL with a deficiency to creditors of £608, 726.

HELD:

1) The directors of a company must have regard to the interest of the company's creditors in circumstances where a company is insolvent or is of doubtful solvency. In those circumstances, the assets of the company are to be regarded as being for the benefit of the creditors pending liquidation, a return to solvency or some other administration of the assets: see *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250 at 252.

2) The Defendant accepted that he was an experienced director and that he understood the insolvency process. He admitted that he knew what his duties were as a director. The scheme did not come about as a result of any advice sought by the Defendant. He seemed to have floated his ideas past insolvency practitioners. However, he then chose to ignore what they said. The evidence showed that the Defendant did not obtain and/or rely upon professional advice in causing the companies to enter into the transactions.

3) The companies were insolvent on a cash-flow basis as at the date of the transactions, and had been for some time. In those circumstances, the director's duty was to the creditors and that duty was paramount. By entering into the transactions and transferring the assets and business to the purchasing companies, the defendant increased the risk to the unsecured creditors left behind that they would not be paid. Reliance on personal trust as opposed to proper security was inconsistent with the Defendant's duty to the creditors of the old companies. If effective security could not be obtained, then he should not have caused those companies to proceed with the transactions.

4) On a balance of probabilities, there were sufficient assets to pay the creditors before the transactions were put in place and the transactions increased the risk to creditors. The failure to take advice and the motive behind causing or allowing the companies to enter into the above transactions justified the imposition of a disqualification order for a period of five years.

Mr Philip Capon (instructed by Howes Percival LLP) for the Secretary of State

The Defendant appeared in person.

Re Aerospace & Technical Engineering Ltd, Secretary of State for Business, Innovation and Skills v Robert Philip Feld

Ch.D, Companies Court, Mrs Registrar Derrett, 30 July 2013.

Directors' disqualification – unfitness – s 6 of the Company Directors Disqualification Act 1986 – permission to act as a company director – s 17 of the Company Directors Disqualification Act 1986 – repeat disqualification

The Secretary of State sought a disqualification order against Robert Philip Feld ('Mr Feld') pursuant to s 6 of the Company Directors Disqualification Act 1986. Mr Feld was a director of Aerospace & Technical Engineering Ltd (ATEL). His co-directors Mr Scott and Mr Swan had both given disqualification undertakings.

On 1 April 1997, Mr Feld was made subject to a disqualification order for a period of ten years by the Wood Green Crown Court. The order was made pursuant to section 2 of the CDDA in criminal proceedings arising out of Mr Feld's directorship of Resort Hotels Plc. Mr Feld was found to have issued an inflated profit forecast and was jailed for eight years for fraud. The sentence was subsequently reduced to six years by the Court of Appeal.

Mr Feld had conducted business as a sole trader under the trading name of

'Aerospace and Technical Engineering' since about 1 December 2003. His business was that of precision manufacturing, serving various industrial sectors.

ATEL was incorporated on 11 November 2003, and traded as a precision subcontract engineering machinist business. Its directors from incorporation were Mr Swan and Mr Scott. The company's incorporation arose out of the fact the lease of the premises from which Mr Feld traded had to be held in the name of the limited liability company and, as a result, the employees and business of the sole tradership had to also be transferred.

By application dated 13 April 2004, Mr Feld sought permission to act as a director of ATEL pursuant to CDDA 1986, s 17. Mr Feld's application was supported by affidavits from himself, Mr Swan and Mr Scott. The application came before District Judge Parker in the Croydon County Court on

22 June 2004. He gave permission to Mr Feld to act as a director of ATEL on various conditions, one of which was that Mr Feld would be:

eliminated from any responsibilities for, or to have any hand in, the finances of the First Claimant save those responsibilities imposed by law on the Third Claimant by virtue of being a director of the First Claimant and in attending board meetings.

Mr Feld was appointed director of ATEL on 13 January 2005. ATEL was placed into liquidation on 17 January 2008. The statement of affairs showed a total deficiency as regards creditors of £1,103,180.32. HMRC was owed some £480,000 and trade creditors over £296,000.

The Secretary of State alleged that Mr Feld had acted in breach of the above condition because he had responsibility for and/or a 'hand in' the finances of ATEL in circumstances that did not fall within the express exception given in the condition.

HELD:

1) Mr Feld's involvement in ATEL was evident from the face of the various documents (including key finance documents) and the evidence of the three parties who had contemporaneous dealings with Mr Feld in his capacity as director of ATEL. The unchallenged evidence demonstrated that Mr Feld exercised an element of responsibility over these matters, whether that was to the complete exclusion of his co-directors or not. This was a case which raised serious allegations of wrongdoing against Mr Feld.

2) Mr Feld breached the permission that he had been granted under section 17.

3) The matter was rendered extremely serious by the fact that Mr Feld's failure to comply with the condition imposed by the court for the grant of permission meant that he had acted in breach of an existing disqualification. His conduct, therefore, fell within the top *Sevenoaks* bracket. The starting point was the imposition of a disqualification order for a period of 12 years. However, credit would be given to him for a period of some 14 months during which he had been subject to disqualification pursuant to an undertaking which he had given to the court. Accordingly, the period of disqualification would be 10 years and 10 months.

Mr T Nersessian (instructed by Wragge & Co LLP) for the Secretary of State.

Mr G Hodkinson for the Defendant.