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Disqualification Newsletter

Newsletter Editor
Dr John Tribe

Dear Subscriber,

Welcome to the latest edition of the Newsletter. In addition to containing various case summaries, one specific item in the context of disqualification is worthy of mention: the Insolvency Service has issued new information about the use of the 'Investigations Hotline'. A new publication revises and updates the previous information on the subject and can be accessed within the Insolvency Service's 'Publications' section and also within its 'Guidance on personal and company insolvency' and 'Investigations and Enforcement Collections'. The direct link to the publication is: www.gov.uk/government/publications?departments%5B%5D=insolvency-service.

The main changes brought about in relation to the use of the Hotline are as follows:

- Users wishing to complain about persons subject to bankruptcy/debt relief restrictions are now asked to contact the Official Receiver rather than complete the breach form, except when complaining about acting as a director;
- The Insolvency Service's general enquiry line number has changed to 0300 678 0015;
- The publication now provides further details regarding how to find the office-holder of an insolvent company, whether a director is disqualified and whether he has permission to act in respect of a specified company;
- There are now links to further relevant information for each type of complaint;
- Hyperlinks and addresses for web pages have been updated to reflect the move of content from the old website of the Insolvency Service to gov.uk.

The Newsletter contains summary reports of a number of recent decisions on directors' disqualification. Some of the summary reports have been drawn

from various Lexis summaries, including the summaries set out in the All ER (D) and BCLC. This database is available (as is the main work and other titles of note) in the Lexis Library.

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.

CASE LAW UPDATE

Secretary of State for Business, Innovation and Skills v Weston

[2014] EWHC 2933 (Ch), [2014] All ER (D) 43 (Sep), His Honour Judge David Cooke, sitting as Judge of the High Court, Chancery Division, Birmingham District Registry

Directors' disqualification – criminal court declining to make a disqualification order under CDDA 1986, s 2(2)(b) – whether winding-up court could make disqualification order under s 2(2)(a) – whether making of disqualification order by the winding-up court was an abuse of process.

FACTS:

The first defendant, Weston, was the director of two companies that let property. The second defendant, Williams, was a director of a company that provided accountancy services to both companies. From April 2007, it became necessary for deposits paid by residential tenants to be held and administered in accordance with an approved scheme under the Housing Act 2004 ('the 2004 Act'). Williams made declarations to an approved scheme, and Weston made applications to register both companies with an approved lettings scheme (NALS). In doing so, Weston made statements as to the way in which deposits were held, which were false. Williams procured the issue of the accountant's reports required for the two companies to be registered with NALS and to do so falsified the signature of a member of his staff on the documents. They did not pay the deposits into suitable client accounts, but into the companies' ordinary bank accounts so that they could be used as working capital. The tenants and landlords, therefore, did not receive the protection the 2004 Act was intended to provide. Both Weston and Williams were subsequently arrested, and pleaded guilty to offences of fraud and making false instruments in relation to the affairs of the companies. The prosecutor made an application for disqualification, and it

appeared that the Insolvency Service had been in liaison with him when he had done so. The criminal court held that it was not appropriate to make a disqualification against the defendants. The Secretary of State for Business, Innovation and Skills brought a claim in the Chancery Division, seeking disqualification orders.

The Secretary of State submitted that disqualification orders should be made under s 2(2)(a) of the Company Directors Disqualification Act 1986 (CDDA 1986). Weston submitted that, in the light of the earlier proceedings, the present proceedings were an abuse of process. Right thinking people would regard it as unfair that he should face the same application again, brought by another representative of the state. He made a secondary submission that he posed no risk to the public in acting as a director and that, accordingly, the court should exercise its discretion against making the disqualification order.

HELD:

(1) In deciding whether a subsequent application to the civil court to make a disqualification order was unfair, after the criminal court had decided not to do so, the court had to ask itself whether it would be manifestly unfair to a party to litigation before it, or it would otherwise bring the administration of justice into disrepute among right-thinking people, to allow the proceedings to continue. Those were two aspects which might have to be considered separately. It would be highly relevant to consider the degree of overlap between the two sets of proceedings in terms of the facts and issues before the court, and whether the second proceedings amounted to a collateral attack on the decision in the first, by a person who was party to the first proceedings and had the opportunity to argue his case in those proceedings (see [39] and [40] of the judgment).

(2) Adopting the commentary contained in various parts of *Mithani: Directors' Disqualification*: on the evidence, the present claim was no more than an attempt by the Secretary of State to obtain a different decision from the court than was given on identical issues by the criminal court, which had the issues placed before it and had made a positive decision to refuse to make the disqualification order. It was unfair that the defendants should be thus exposed to the same claim on two occasions. The unfairness was not relieved by the argument that the claim was being pursued by a different entity. First, the court was not persuaded that in fact, there was a complete separation between the two applicants, because it appeared that the Insolvency Service had been in liaison with the prosecutor when he had made his application for disqualification. Accordingly, even if there were criticisms that could be made of that application, it appeared that the Secretary of State had been content, at the time, to allow the matter to be pursued in the criminal court rather than at that stage bringing it to the civil court and had to some extent at least participated in the application that had been made. Second, there was the general point that, where the basis of the claim and the relief sought was essentially identical, it was just as unfair

to the defendant to have to face it twice at the hands of two applicants as it would be if there were only one (see [52] of the judgment): *Secretary of State for Trade and Industry v Rayna* [2001] All ER (D) 198 (Mar) applied; *Re Barings plc, Secretary of State for Trade and Industry v Baker* (*No 3*) [1999] 1 All ER 1017, [1999] 1 BCLC 262, [2000] 1 WLR 634 considered; *Re Hilton* (*Dennis*) *Ltd* [2001] All ER (D) 52 (May) considered; *Re Samuel Chandler Ltd, Secretary of State for Trade and Industry v Nimley* [2002] All ER (D) 283 (Jan) considered and disapproved.

(3) Accordingly, the claim would be dismissed.

Mr James Morgan (instructed by Bond Dickinson LLP) for the Secretary of State.

The first defendant appeared in person.

Mr Ali Tabari (instructed under the Public Access scheme) for the second defendant.

Official Receiver v Wild

[2012] EWHC 4279 (Ch), [2013] All ER (D) 186 (Aug), His Honour Judge Hodge QC, sitting as a judge of the High Court, Chancery Division, Manchester District Registry

Directors' disqualification – unfitness – improper use of intellectual property rights – improperly continuing the same business through different companies with confusingly similar names – use of high pressure sales techniques at customer presentations – misleading customers – period for which disqualification order should be imposed.

FACTS:

The defendant was the sole director of three companies carrying on business selling memberships of a holiday club which gave access to unused weeks in time-share resorts. Memberships would be sold to the public attending, inter alia, weekend presentations to which they were invited by way of notification that they had either won or been awarded a free holiday. The first company was APD Leisure & Marketing Ltd ('Leisure & Marketing'), which was incorporated in 2003. Leisure & Marketing operated as a distributor for the sale of the products of a company which operated as Sunterra Europe Ltd ('Sunterra'), but was re-branded as Diamond Resorts Europe Ltd ('Diamond'). However, in 2008, Diamond terminated the distribution agreement with Leisure and Marketing for the sale of its Sunterra products. Subsequently, Diamond obtained a default judgment against Leisure & Marketing for infringing Diamond's trademark and passing itself off in regard to Sunterra. In March 2009, the defendant's second company, APD Leisure Group Ltd ('Group'), was incorporated, and in August, the defendant's third company, APD Leisure & Marketing Group Europe Ltd ('Group Europe'), was incorporated. In the meantime, in June 2009, the Secretary of State for Business, Innovation and Skills (the Secretary of State) began investigating the affairs of Leisure & Marketing. In the result, in October 2009, a

provisional liquidator was appointed over Leisure & Marketing and, in March 2010, the company was wound up on public interest grounds upon a petition presented by the Secretary of State. In due course, winding-up orders were made on public interest grounds against Group and Group Europe, the judge finding that, following the appointment of the provisional liquidator for Leisure & Marketing, the defendant had circumvented that order by means of continuing the same business but through different companies which had confusingly similar names. The instant proceedings were commenced by the Official Receiver ('OR') seeking the defendant's disqualification as a director pursuant to CDDA 1986, s 6. The allegations against the defendant were, inter alia, that, in the case of Leisure & Marketing only, it had used the Diamond and/or Sunterra intellectual property rights in the form of logos and promotional material with no right to do so, that the defendant had allowed the continuation of the business and practices from Leisure & Marketing to Group and then to Group Europe, used high pressure sales techniques at the customer presentations, and the companies had failed to give customers what they had bargained for. The OR sought a disqualification order in either the top *Sevenoaks* bracket of years, namely 10–15 years, or towards the top end of the middle bracket, namely 5–10 years.

The issues that fell for determination by the court were: (i) whether the defendant should be disqualified as a director pursuant to s 6 of the Act; and (ii) if so, the appropriate period for disqualification.

HELD:

(1) It was clear from the evidence that customer presentations had continued to be given after the appointment of the provisional liquidator in respect of Leisure & Marketing. Upon attending presentations, customers had been subjected to aggressive sales techniques and had been put under extreme pressure to sign agreements and to pay money over. Those techniques had included customers being informed that the offer being made to them was only available while they were at the presentation itself, and that, if they chose to enter into a contract, they had to do so at the company's premises, thus depriving the customer of the consumer protection which they would have otherwise enjoyed had they signed the contracts elsewhere and with the addition that the companies had failed to give customers what they had bargained for. It had been clear from the reactions of customers and their evidence that aggressive sales techniques had been used. In addition, misrepresentations had been made as to the availability of holidays. On the evidence, the defendant's conduct as a director of all three companies, whether viewed individually or collectively, made him unfit, within the meaning of s 6 of the Act, to be concerned in the management of a company (see [52]–[54], [57], [58], [64], [67] of the judgment): *Re Sevenoaks Stationers* (*Retail*) *Ltd* [1991] 3 All ER 578 considered; *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007–3BL plc* [2011] 3 All ER 470 considered.

(2) The instant case had not fallen within the top bracket but, rather, had fallen at the top end of the middle bracket. Had the instant case been one where the defendant had set out from the outset to engage in unacceptable and aggressive sales tactics, the case would have fallen within the top bracket. However, on the evidence, everything had seemed to go wrong for the defendant from the time when Diamond terminated the exiting distribution agreement with Leisure & Marketing. Up to that date, the defendant and his companies had been seeking to provide a good business service for customers. However, the defendant and Leisure & Marketing had found themselves effectively without much of a business and he had tried to keep the business afloat. In so doing, he had resorted to unacceptable and overly aggressive sales practices. He should not have done so and the fact that he did had merited disqualification (see [73], [74] of the judgment).

(3) Bearing all the factors, the appropriate disqualification period was one of nine years (see [75] of the judgment): *Re Sevenoaks Stationers (Retail) Ltd* [1991] 3 All ER 578 applied.

Mr David Mohyuddin (instructed by Howes Percival LLP) for the Official Receiver.

The defendant appeared in person.

Re Clenaware Systems Ltd, Harris v Secretary of State for Business, Innovation and Skills

[2013] EWHC 2514 (Ch), [2014] 1 BCLC 447, His Honour Judge Simon Barker QC, sitting as a Judge of the High Court, Chancery Division, Birmingham District Registry

Application for permission to act notwithstanding disqualification – CDDA 1986, ss 1A and 17 – whether and if so the terms upon which permission should be granted.

FACTS:

The applicant (H) was a director of a company (DDL) which went into insolvent liquidation. He accepted in disqualification proceedings that during the period of his directorship, the company had traded to the detriment of HMRC in respect of VAT by failing to submit VAT returns and accruing VAT liabilities totalling £211,000 by the date of its liquidation. Over the same period, the company received almost £1m into its bank account and made payments in excess of £152,000 for the benefit of directors. He entered into a disqualification undertaking to the Secretary of State pursuant to s 1A of the CDDA 1986 for a period of four years. H had other business interests including his involvement with three interlinked companies, Clenaware Systems Ltd ('CSL'), Clenaware Leasing Ltd ('CLL'), and TIVG Ltd ('TIVG').

CSL produced glass washers, dishwashers and glass dryers which were sold to the catering industry and healthcare sector. It had 11 employees. It had been

formed to acquire assets of the former Clenaware company from its administrators by or with funding from a wealthy Irish investor (G). H was actively involved in every aspect of CSL's business and everyone at CSL reported to him. Under H's direction, CSL had been trading for nearly four years, but remained loss-making. It had accumulated losses of £437,000 and net liabilities of almost £63,000. CSL's liabilities included a loan from G of £393,470 which was repayable on demand. It was up to date with its obligations to HMRC. TIVG was a dormant company which had developed a remote monitoring system (RMS) for commercial catering equipment. It did not sell RMS units but supplied them to CSL without payment.

CLL was a newly formed company which had obtained a consumer credit and consumer hire licence with a view to purchasing machines from CSL and hiring or selling them to CSL's customers on credit terms. H applied to the court under s 17 of the CDDA 1986 for leave (ie permission) to act as a director of TIVG, CSL and CLL. On an interim basis, H was permitted to continue as a director of CSL but not of TIVG or CLL. He proposed a number of safeguards to be imposed as conditions for the grant and continuation of permission; if any condition ceased to be satisfied, he accepted that his permission should be revoked and remain revoked unless reinstated by the court.

HELD:

(1) It appeared from the records held at Companies House record that the claimant held other directorships. If there were any directorships that had been overlooked, the claimant had to resign them immediately as a condition of any permission.

(2) An applicant under s 17 had to show a need to be a director which outweighed the need to protect the public that was the purpose of the disqualification order or undertaking: *Re Tech Textiles Ltd* [1998] 1 BCLC 259, *Re Dawes & Henderson* (*Agencies*) *Ltd* (*No 2*) [1999] 2 BCLC 317 and *Re Barings plc* (*No 4*) *sub nom Re Barings plc* (*No 3*), *Secretary of State for Trade and Industry v Baker* [1999] 1 BCLC 262, [1999] 1 All ER 1017, [2000] 1 WLR 634 applied.

(3) Permission would be given in respect of CSL with the imposition of additional conditions necessary to protect the public and alleviate concerns over CSL's solvency and H's central role in CSL's business. The conditions related to the capitalisation of G's loan, the reliability of CSL's accounts, in particular the stock value, and an adequate monitoring system to identify the risk of insolvency at an early stage. It would therefore be a condition of permission in relation to CSL that G's loan of £393,470 was converted into preference shares. That was volunteered by G. It would also be a condition that, during the disqualification period, no dividend on CSL's share capital would be declared or paid if and to the extent that it would have the effect of reducing CSL's distributable profit to less than £50,000. That was to ensure that, if and when profitable, CSL retained a solvency margin. It would also be a condition that there was a stock take and valuation by an experienced

independent auditor. That condition would not be satisfied if the stock value had been overstated by more than 15%. A further condition was an annual review and verification of current assets and current liabilities by an independent auditor. If the current liabilities equalled or exceeded the current assets, CSL's solvency would be in question and the condition would not have been satisfied.

(4) There was no sufficient justification for H to be reappointed a director of TIVG, whether viewed in isolation or with the other companies. It was in a precarious financial position and its survival depended on funding from G. There had been no proposal to guarantee its solvency over the disqualification period. There was a further matter relevant to H's conduct, which was that TIVG had been a debtor of DDL and had not attempted to honour that obligation before DDL's insolvency. The need for H to be reappointed a director of TIVG was outweighed by the risks. If he wished to continue TIVG's activities, he could do so without the benefit and protection of limited liability.

(5) No compelling existing or future need had been demonstrated for H's services as a director or as a person taking part in the management of a credit finance company, such as CLL.

Ms Rowena Meager (instructed by SGH Martineau LLP) for the claimant.

Mr James Morgan (on 26 June) and Matthew Weaver (on 18 July) (instructed by Wragge Lawrence Graham & Co LLP) for the Secretary of State.

Feld v Secretary of State for Business, Innovation and Skills

[2014] EWHC 1383 (Ch), [2014] All ER (D) 166 (May), Mr Edward Murray, sitting as deputy Judge of the High Court, Chancery Division, Companies Court

Appeal – directors' disqualification – unfitness – defendant subject to disqualification order granted permission under CDDA 1986, s 17 to act as director upon various conditions – defendant alleged to have breached the conditions – disqualification order made against the defendant for having breached the conditions – whether allegation of breach made out – whether disqualification order should have been made – whether period of disqualification excessive.

FACTS:

In April 1997, the claimant was made subject to a disqualification order for a period of ten years by the Crown Court. In 2004, he applied for permission to act as a director of a company (ATEL). In June 2004, permission was granted for him to do so, subject to certain conditions. The draft order for permission had been prepared by the claimant and his co-applicants. ATEL was subsequently placed into liquidation. The statement of affairs showed a total deficiency as regards creditors of £1,103,180.32. The defendant Secretary of State applied for an order disqualifying the claimant under s 6 of the CDDA 1986, in relation to the claimant's conduct as a director of ATEL.

The Registrar made the disqualification order, having concluded that there were a number of breaches of the order for permission made in 2004, which formed a sufficient basis for her conclusion that the claimant's conduct as a director of ATEL made him unfit to be concerned in the management of a company. She held that she was, therefore, obliged by s 6(1) of the Act to make a disqualification order. The disqualification period was one of 12 years. In making her decision, the Registrar had relied on the principles for the interpretation of contractual documents outlined in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98. The claimant appealed.

The claimant submitted that: (i) the Registrar erred, as a matter of law, in not finding the order of June 2004 to be either obtuse or incoherent; and (ii) the period of disqualification was excessive. In respect of issue (i), the claimant contended that the judge had erred in her application of the principles of contractual interpretation to the order and in holding that the intention and understanding of the claimant as to the interpretation of the order was relevant to the court's interpretation of the order. Consideration was given to *R v Evans* [2004] All ER (D) 80 (Dec).

HELD:

(*1*) *Evans* provided support for the proposition that the proper approach to interpretation of a court order was, broadly, to apply the principles of statutory interpretation. Where a court order was to be applied to a person who had a hand in drafting the terms of the order, the court should be entitled to have regard, as part of the exercise of construing the order, to what that person could reasonably have been thought to have intended in drafting the order in a particular way, as far as that may be objectively determined on the basis of the evidence presented to the court. The common starting point was the natural and ordinary meaning of the words used in light of the syntax, context and background in which those words were used. What additional principles and factors come into play as part of the court's exercise of interpretation would depend on the nature of the writing to be interpreted and would be highly dependent on the facts of the specific case (see [23], [27], [28] of the judgment).

(2) While the reference of the Registrar to the principles of contractual interpretation in *West Bromwich* was not entirely apposite to the exercise of interpreting a court order, her actual approach to the interpretation of the order had been entirely consistent with the proper approach to interpretation of a court order as outlined in *Evans*. There was no merit in the argument put forward by the claimant that the Registrar had been led into error in her interpretation of the order. The order was not obtuse or conceptually incoherent (see [29], [33], [35] of the judgment): *Investors' Compensation Scheme Ltd v West Bromwich Building Society, Investors' Compensation Scheme Ltd v Hopkin & Sons* (*a firm*)*, Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98 applied; and R v Evans [2004] All ER (D) 80 (Dec) applied.

(3) The Registrar's judgment in relation to the length of disqualification was in accordance with both principle and authority. It followed that the appeal as to the length of disqualification period also failed. The Registrar had found numerous instances of acts by the claimant that were clear breaches of a condition of the order. Those breaches had been sufficient in her view to found her conclusion that his conduct in committing those breaches was such as to make him unfit to be concerned in the management of a company with the meaning of s 6 of the Act (see [38], [45] of the judgment).

The appeal would, therefore, be dismissed.

The claimant did not appear and was not represented.

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

Re Portland Place (Historic House) Ltd, Davenport v Secretary of State for Business, Innovation and Skills

[2012] EWHC 4199 (Ch), [2012] All ER (D) 163 (Jun), [2013] WTLR 1049, Morgan J, High Court of Justice, Chancery Division, Companies Court

Application for permission to act notwithstanding disqualification – Claimant former director of company disqualified from being director following conviction for fraud – Claimant previously seeking permission to be director of companies – Prior proceedings being dismissed – Litigation being commenced against company – Claimant seeking permission to direct company and instruct company's solicitors in litigation – Whether application impermissibly challenging prior decisions – Whether permission to instruct company's solicitors in litigation should be granted – CDDA 1986, ss 1 and 17.

FACTS:

The claimant had been the sole director of a company ('the company'). The company had issued one share and the registered shareholder had executed a deed of trust in the claimant's favour. The company had purchased a property ('the property'), a substantial part of the purchase price of which had been borrowed from a bank ('the bank'). In October 2005, the company had executed a deed of trust, signed by the claimant as director, declaring that the property was held by the company as nominee on behalf of the claimant ('the deed'). In December 2009, a restraining order had been made against the claimant and the company, freezing the claimant's assets, his beneficial share in the company and the property. In May 2011, the claimant had been convicted of fraud in respect of misrepresentations concerning a different company. Permission to appeal had been refused. The claimant had renewed his application to the full court and the decision was pending. In September 2011, the claimant had been sentenced to imprisonment and disqualified from being a director under s 2 of the CDDA 1986 for ten years. Two directors were appointed to the company. Receivers were subsequently appointed in respect of the company on the bank's application and in March 2012, the bank commenced proceedings for possession of the property ('the

litigation'). The claimant was joined as a defendant to the litigation. The claimant had previously made applications for permission to be a director of the company and other companies, which had been refused, in particular by a registrar ('the registrar'). The claimant sought permission to give instructions to the company's solicitors in respect of the property in the litigation under ss 1(1)(a) and 17 of the Act. He further sought to act as the company's agent in the litigation and negotiations. The claimant sought to give instructions on the company's behalf on the basis that: (i) he was the beneficial owner of the property; (ii) the company was bound by the trust deed to give effect to his directions; (iii) the property was his home; (iv) the litigation depended on facts of which he had first-hand knowledge; and (v) it would save costs to have common representation for the company and himself in the litigation. The Secretary of State opposed the application on the basis that it was an impermissible challenge to the registrar's decision.

It fell to be determined by the court: (i) whether the application was an impermissible challenge other than by way of appeal; and (ii) whether permission to instruct the company's solicitors in the litigation should be granted.

HELD (allowing the application):

(1) It was settled law that it would be important to focus on the particular facts of the case and adopt a merits-based approach when considering whether there had been an abuse of process. In the circumstances, the claimant should be allowed to re-apply under ss 1(1)(a) and 17 of the Act as there had been a change of circumstances. The orders sought had been sufficiently different from those that had been refused by the registrar. They could have been made by the registrar, but it had not been an abuse of process to re-apply: *Johnson v Gore Wood & Co* (*a firm*) [2001] 1 All ER 481 applied.

(2) It was an established principle of law that the general discretion under s 1(1)(a) of the Act would require the balancing of factors that would include: (i) the protection of the public; (ii) deterrence; and (iii) the needs and legitimate interest of the claimant. Further, there had been no rule that would prevent a court granting an order under ss 1(1)(a) and 17 of the Act from being made against a dishonest former director. The courts had a discretion unfettered by statute and it would be wrong for the court to fetter its discretion: *Re Barings plc, Secretary of State for Trade and Industry v Baker* (*No 3*) [1999] 1 All ER 1017, [1999] 1 BCLC 262, [2000] 1 WLR 634 applied; *Shuttleworth v Secretary of State for Trade and Industry, Re Dawes & Henderson Ltd* [1999] 2 BCLC 317 applied.

(3) In the instant case, it would be appropriate to grant the claimant permission under ss 1(1)(a) and 17 of the Act to give instructions to the company under the deed insofar as it was effective. To guard against the potential ineffectiveness of the deed, the order would be prefaced by 'insofar as effective'. The directors would not be placed in a position of conflict of interests as their duty would be to act consistently with their

duty under the deed. There would be no conceivable risk of harm to the public as the order would only allow the claimant to give directions to the company's solicitor and permit instructions to the company in accordance with the deed. The claimant would not be granted permission to manage the affairs of the company in the litigation and negotiations as agent in place of the directors as that would be impractical and undesirable for the efficient conduct of the litigation. There would be a real advantage on the directors acting as they could test if the deed had been effective and act on the claimant's instructions.

Mr Robert Dudridge (instructed by Malletts, Solicitors) for the claimant.

Mr Lance Ashworth QC (instructed by Wragge Lawrence Graham & Co LLP) for the Secretary of State.

Secretary of State for Business, Innovation and Skills v Doherty

[2014] EWHC 2816 (Ch), Norris J, High Court of Justice, Chancery Division, Manchester District Registry

Directors' disqualification – CDDA 1986, s 6 – Whether defendant making representations personally or allowing company to make representations – Whether representations being untrue – Whether defendant being unfit to be concerned in management of company.

FACTS:

In November 2002, a company ('the company') was incorporated and operated as a property developer and landlord, including for one accommodation complex ('the property'). In September 2009, it went into administration and, in October, it went into liquidation. According to the statement of affairs of the company, the deficiency exceeded £50m, but on the basis of creditor claims lodged, it exceeded £69m. A significant element of the deficiency was attributable to the claims of asset finance companies who had, according to documentation, purchased alarm and security systems from another company (Amco), which were said to be installed at the property. The defendant was one of the directors of the company. The Secretary of State issued proceedings, relying on certain of the transactions between the company, Amco and the asset funders as demonstrating that the defendant's conduct as a director of the company made him unfit to be concerned in the management of a company within s 6 of the CDDA 1986.

The issues for determination by the court were: (i) whether the defendant had either himself represented or had allowed the company to represent that equipment had been supplied to the company for which the asset funders should pay and that the company would enter into an asset lease or hire purchase agreement in respect of those items in six agreements; (ii) whether the defendant's representations had been untrue; and (iii) whether the making of untrue statements about the supply and installation of security and fire systems at the property and the leasing or hire purchase of such assets from funders demonstrated unfitness to be concerned in the management of a

company. The defendant conceded that part of the fifth agreement had been false. As regards (i) above, the court stated that there were two limbs to the Secretary of State's case on representation. The first was that the defendant had 'falsely represented' certain matters to funders, ie that the defendant had done something to bring about the making of the untrue representation. The second was that the defendant had 'allowed the company' to make a representation, ie that he knew or ought to have known that the representations were made by the company and that they were untrue but did nothing to correct the position. The court accepted as correct the statement of the law in *Mithani: Directors Disqualification* at para III[415P]–[415Q] on this point.

HELD:

(1) The defendant had personally made representations to asset funders in the alleged terms with respect to the first to third and fifth agreements. On the balance of probabilities, the defendant had not personally made the representations concerning the fourth agreement. However, it was to be inferred that he had allowed the company to make representations concerning that agreement (see [17], [19], [21], [25], [32], [33], [39] of the judgment).

(2) Some of the representations made by the defendant had been untrue. The representations made in the second agreement had been untrue and it was admitted by the defendant that part of the fifth agreement was false. With respect to the remaining four agreements, the court was assessing the likelihood of their truth by reference to everything which Amco had said it had sold and installed. On that basis there was such an enormous discrepancy between what Amco had said it had supplied and installed, and what had been found on the site, that what the company had said it had inspected and accepted and/or had been hiring was almost certainly false. The suggested explanations for the discrepancy did not reflect events that had probably occurred (see [70]–[72], [73], [75] of the judgment).

(3) The defendant had behaved in a cavalier and reckless way which had fallen below the standards of competence which had been appropriate to the management of the company. There had been a lack of commercial probity in his approach to funding the improvements necessary for the successful operation of the property. He was unfit to be concerned in the management of a company. It was a serious case and the defendant would be disqualified for a period of seven years (see [83], [85] of the judgment).

Mr David Mohyuddin (instructed by Bond Dickinson LLP) for the Secretary of State.

Mr Antoine Tinnion (instructed under the Direct Access Scheme) for the defendant.

Re UK Flood Control Ltd, Secretary of State for Business, Innovation and Skills v Taylor

5 August 2013, District Judge Sheldrake, Birmingham Civil Justice Centre

Directors' disqualification – failure to keep and/or maintain adequate accounting records – failure to deliver up accounting records to the liquidator – period for which the defendant should be disqualified.

FACTS:

The Secretary of State for Business, Innovation and Skills brought an application for a disqualification order pursuant to CDDA 1986, s 6 against the defendant. The principal allegation upon which he relied was that the defendant had failed to keep, maintain and/or preserve adequate accounting records in respect of the company or, alternatively, had failed to deliver up such records to the liquidator. As a consequence, it was not possible for the liquidator, inter alia, to determine the true position of the assets of the company or to account for payments amounting to nearly £100,000 made by the company

The Defendant accepted that his conduct warranted the making of a disqualification order against him. The Secretary of State sought a disqualification order for a period towards the top end of the middle bracket of 5–10 years in *Re Sevenoaks Stationers* (*Retail*) *Ltd* [1991] 3 All ER 578. The Secretary of State relied upon the fact that failures to maintain accounting records and delivery them up to an office-holder were serious, and that the assertion of the defendant that he did not have any accounting knowledge and could not afford to obtain the services of an accountant or bookkeeper could not be justified to reduce the period of disqualification.

HELD:

(1) The conduct of the defendant justified the making of a disqualification order against him.

(2) The defendant did not deliberately conceal the position concerning the state of the company from the liquidator or the Secretary of State. His defalcations were down more to naivety and ineptitude rather than a deliberate course of wrongdoing. In addition, the defendant readily accepted that his conduct had been wanting and that he should be disqualified. His clear and open admission of culpability would be taken into account in fixing the appropriate period of disqualification.

(3) The defendant's assertion that his conduct fell within the lowest bracket of 2–5 years in *Sevenoaks* could not be accepted. However, taking into account the nature of the conduct referred to above and the fact that he admitted his wrongdoing, a disqualification order towards the lower end or middle of the 6–10-year bracket was appropriate. A disqualification order for a period of seven years would be made against the defendant.

Mr James Morgan (instructed by Wragge Lawrence Graham & Co LLP) for the Secretary of State.

The defendant appeared in person.

Re Wolstenholmes LLP, Secretary of State for Business, Innovation and Skills v Saddique and Cardinali

10 June 2014, His Honour Judge Bird, sitting as a Judge of the High Court, Chancery Division, Manchester District Registry

Directors' disqualification – LLP carrying on solicitors' practice – LLP being intervened by the Solicitors' Regulation Authority on account of fraud and other serious irregularities – defendants alleged to be de facto and/or shadow members of LLP – whether and the extent to which the defendants exercised control over the affairs of the LLP – period for which the defendants should be disqualified.

FACTS:

In December 2009, as a result of a large number of complaints, the Solicitors Regulation Authority ('SRA') intervened in the solicitors' practice known as Wolstenholmes LLP ('Wolstenholmes') which was subsequently wound up. Very serious failings, amounting to fraud, were discovered by the SRA. As a result of those activities, a total of nearly £14m (as at 6 June 2014) had to be paid from the Solicitors' Compensation Fund maintained by the SRA to compensate former clients of the practice. The Secretary of State concluded that both defendants, S and C, had been involved and had spearheaded a concerted fraud, both on the Solicitors' Compensation Fund and also on the many innocent clients of Wolstenholmes. He sought their disqualification pursuant to CDDA 1986, s 6. S was already subject to a disqualification order which had been made against him for a period of 15 years in connection with an MTIC fraud.

HELD:

(1) Although neither defendant was qualified to be a member of Wolstenholmes (because they did not hold the requisite qualification pursuant to the Solicitors Recognised Bodies Regulations and rule 14 of the Solicitors Code of Conduct), in certain respects each had acted as a de facto member and in other respects as a shadow member. It followed that they were both liable to be disqualified under CDDA 1986, s 6.

(2) The thrust of the defendants' defence was that they played a limited role in the business of Wolstenholmes, and were involved simply in sales and marketing. However, it was clear that that assertion was incorrect. It was plain that both defendants were engaged in far more detail with the management of Wolstenholmes than they asserted. In reality, they were both 'at the apex of the management structure' of Wolstenholmes. They both exercised an inappropriate and indeed unlawful degree of control over the affairs of Wolstenholmes and were ultimately responsible for the irregularities which caused Wolstenholmes to collapse. In addition, S acted in the affairs of Wolstenholmes while he was an undischarged bankrupt contrary to the provisions of CDDA 1986, s 11.

(3) It was plain that both defendants were unfit to be concerned in the management of a company.

(4) The defendants had involved themselves in a business in which members of the public are entitled to place absolute trust. That trust was abused at great cost to members of the public and at great cost to the SRA and to the Solicitors Compensation Fund. Fraud of the kind, which was rife under their management, justified a disqualification period for the maximum that the law allowed. Accordingly, each of them would be disqualified for a period of 15 years.

MR Daniel Margolin (instructed by Wragge Lawrence Graham & Co LLP) appeared on behalf of the Claimants.

The Defendants did not appear and were not represented.