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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 extremely important for mention: on 9 December 2014, a new Practice Direction on Directors' Disqualification Proceedings was issued. That Practice Direction replaces the previous Practice Direction on the subject.

The Practice Direction will be considered at length in future issues of the main work. It may be accessed on the Ministry of Justice website at www.justice.gov.uk/courts/procedure-rules/civil/rules/disqualification_proceedings.

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

CASE LAW

Re Artistic Investment Advisers Ltd, Secretary of State for Business and Enterprise v Carlson

[2014] EWHC 2963 (Ch), [2014] All ER (D) 04 (Oct), Mr John Male QC, sitting as a deputy Judge of the High Court, Chancery Division, Companies Court.

Directors' disqualification – unfitness – failure to keep adequate accounting records and failure to deliver up records to liquidator – Deputy Registrar disqualifying defendant on basis of failure to keep adequate accounting records – Defendant appealing – Whether Deputy Registrar erring – Whether Deputy Registrar applying all stages of relevant test for unfitness – s 6(1) of the CDDA 1986.

FACTS:

The defendant, C, and another individual, W, were directors of a company ('the company'), which acted as an investment adviser to an art trading fund in Guernsey. In 2008, the performance of the art trading fund fell. The company's performance started to decline and it ceased trading in 2009. A liquidator was appointed. He submitted an adverse D1 report to the Secretary of State concerning the conduct of C and W. A dialogue ensued between the Insolvency Service and the directors, their accountants and solicitors, in an attempt to show that adequate accountancy records had been kept. An application for a disqualification order was issued against C and W, alleging: (i) failure to keep adequate accounting records; and (ii) failure to deliver up those records to the liquidator. The Deputy Registrar found both allegations to be made out. He made a disqualification order. C appealed against the order.

Consideration was given to the three-stage test under s 6 of the Company Directors Disqualification Act 1986 (CDDA 1986) and to *Re Grayan Building Services Ltd* (*in liquidation*) [1995] 1 BCLC 276 – namely that the court had to decide, first, whether the matters relied upon amounted to misconduct; second, if they did, whether they justified a finding of unfitness; and, third, if they did, what period of disqualification, being not less than two years, should result. The issues for consideration were: (i) whether, as C submitted, the Deputy Registrar had not turned his mind to, and applied, the second stage in the three-stage process in that, having found matters which amounted to misconduct, he had failed to consider whether they justified a finding of unfitness; and (ii) whether, as C submitted, the Deputy Registrar had erred in finding that there was unfitness.

HELD (dismissing the appeal):

(1) The Deputy Registrar's attention had been drawn to *Grayan* and to the three-stage approach, and the judgment showed that he had had them both in mind. It followed that the submission that he had not applied the test in *Grayan* and that he had omitted to undertake the exercise required at stage two of the three-stage process would be rejected: *Re*

Hitco 2000 Ltd [1995] 2 BCLC 63 applied; *Re Structural Concrete Ltd* [2000] All ER (D) 848 applied; and *Re Grayan Building Services Ltd* (*in liquidation*) [1995] BCLC 276 adopted.

(2) Although it was possible to conclude that, taken individually, the Deputy Registrar's findings would not justify the determination made by him that C was unfit, the cumulative effect of the findings made by him justified that determination being made: *Secretary of State for Trade and Industry v Walker* [2003] All ER (D) 142 (Feb) applied; and *Re Firedart Ltd* [1994] 2 BCLC 340 considered.

Mr Philip Capon (instructed by Howes Percival LLP) appeared on behalf of the Secretary of State.

Mr Donald McCue (instructed under the Public Access scheme) appeared on behalf of C.

Secretary of State for Business, Innovation and Skills v Whyte

[2014] CSOH, Lord Tyre, Court of Session, Outer House.

Directors' disqualification – football club – dishonesty or serious want of probity – period of disqualification – s 6 of the CDDA 1986.

FACTS:

This was an application for a disqualification order by the petitioner, the Secretary of State against the respondent, W. The petitioner's case related to the respondent's conduct as a director of two companies, The Rangers Football Club plc ('Rangers') and Tixway Limited ('Tixway').

In relation to Rangers, the first aspect of the petitioner's case related to an agreement between Rangers and Ticketus LLP ('Ticketus') which was entered into immediately after the acquisition of Rangers by Wavetower Limited ('Wavetower'), a company ultimately owned and controlled by the respondent. This agreement provided for the sale by Rangers to Ticketus of the right to sell season tickets for the next three years: in the words of Lord Tyre, 'put bluntly, Rangers sold the right to receive a significant proportion of its income for the next three years in exchange for a sum of £24 million'. The respondent failed to inform the members of Rangers' independent board committee, who were tasked with negotiating the sale of the company to him, that he was entering into an agreement with Ticketus, and also misrepresented to them that the funds for the purchase of the company were to be provided from his own resources and from the commercial activities of a company incorporated in the British Virgin Islands called Liberty Capital Limited, which he also owned. Those misrepresentations occurred prior to the respondent's appointment as a director of Rangers and so were not directly relevant to the court's assessment of his conduct as a director. However, as the court found, they provided context for what followed. What was of direct relevance was that immediately upon his appointment as a director of Rangers, the respondent caused Rangers to enter into the

Ticketus agreement for the sole or main purpose of facilitating his acquisition of Rangers, by providing finance which was lent by Rangers to Wavetower, which in turn used it to repay Rangers' external debt, notably to Lloyds Banking Group. In effect, a significant proportion of Rangers' prospective income for the next three years was used to pay the bank and thus to fund the respondent's acquisition of the club. The court considered it strongly arguable that this amounted to financial assistance prohibited by s 678 of the Companies Act 2006 and was therefore an offence, but was, in any event, satisfied that the Ticketus agreement was entered into by Rangers, under the direction of the respondent, for the benefit of the respondent and not the company, and accordingly constituted a deliberate breach of his fiduciary duty as a director. Furthermore, it had been entered into, knowingly, in breach of the express terms of the share purchase agreement which the court regarded as reinforcing the reprehensible nature of the respondent's conduct.

The second aspect concerned the respondent's management of the affairs of Rangers after his appointment as a director. He deliberately and dishonestly concealed the Ticketus agreement from the other Board members until its existence was discovered by the company's financial controller from an independent source. Moreover, the respondent held no board meetings and provided no information to the other directors regarding the company's financial affairs, thereby rendering it impossible for them to fulfil their own duties as directors.

The third aspect was the sale for around £224,000 of shares which Rangers held in Arsenal Football Club. Although this sale took place at a time when Rangers was in severe financial difficulty, the respondent did not give instructions for the transfer of the sale proceeds to Rangers when they were being held by a company of stockbrokers, with whom he was also connected, and which subsequently went into administration. This resulted in a loss to Rangers of 50% of the proceeds of sale of the Arsenal shares.

The fourth aspect related to the respondent's failure to exercise certain rights, granted by Wavetower to Rangers at the time of the share purchase, to receive payment on demand of sums required to meet playing squad costs and also to pay a sum due to HM Revenue and Customs. This aspect of the case involved a further element of dishonesty on the respondent's part, in that a letter sent on his behalf in January 2012 contained certain untrue statements concerning funds available to Rangers.

The fifth aspect was the failure of Rangers, while owned by the respondent, to meet its obligations to HM Revenue and Customs in respect of PAYE, National Insurance Contributions and VAT. Acting to the exclusion of other directors, the respondent caused Rangers to stop making payment in respect of those liabilities from 7 September 2011, and by February 2012, when HM Revenue and Customs petitioned for an administration order, about £10.5 million had accrued in respect of unpaid tax and unapplied interest.

In addition to these matters, in relation to Tixway, there had been a more or less complete failure to maintain and preserve adequate accounting records and deliver them up to the liquidator, and a failure by the respondent to cooperate with the liquidator.

HELD:

(1) The substance of the allegations against the respondent was established. In the words of Lord Tyre:

> 'Through his actings at the time of and after acquisition of Rangers, the respondent demonstrated a reckless disregard for the interests of the company to which he owed fiduciary duties. His conduct of the business was characterised by dishonesty, in relation to disclosure of the true source of the funds used to purchase the company and repay the bank debt, and by wilful disregard for his duties to the company and to the other members of the board. In relation to the acquisition of Rangers and also the sale of the Arsenal shares he placed his own interests before those of the company. He knowingly permitted the company to trade using money owed to HMRC. In relation to Tixway, he demonstrated a wilful disregard for the duties of a director with regard to record-keeping and co-operation with the liquidator. Again it is well established that the latter are serious matters because they have a direct effect upon the ability of creditors to establish and maintain their claims against the company. Taking all of these aspects cumulatively, as I am required to do, the case for imposition of a period of disqualification is overwhelming.'

(2) A disqualification order for the maximum period of 15 years would be made against the respondent.

Mr D Thomson (instructed by Ledingham Chalmers LLP) appeared on behalf of the Secretary of State.

The respondent did not appear and was not represented.

Official Receiver v Lloyd and Lloyd

16 October 2014, unreported, District Judge McCloughlin, the County Court at Norwich.

Bankruptcy restrictions order – partnership – whether bankruptcy restrictions order may be made for conduct arising in a partnership – allegations of serious impropriety – period for which bankruptcy restrictions order should be imposed.

FACTS:

The respondents, JL and CL, were father and son, who had traded in partnership, and who were made bankrupt on petitions presented by HMRC. The Official Receiver applied for bankruptcy restrictions orders ('BROs') against them alleging that they had, to the detriment of their creditors, sold assets belonging to the partnership to a limited company controlled by them at a significant undervalue and had entered into various other transactions which were designed to put assets out of the reach of their creditors.

The partnership had had traded as engineers from the 1990's. Enquiries revealed that in November 2010 the assets of the partnership (with a value of between £131,780 and £280,130) were sold for £10 to a successor business (and the £10 was not even paid). In addition, mortgages were created over two family homes to a value of £250,000 and commercial premises for £90,000 without any money being supplied in return.

The mortgages were alleged to be a sham intended to prevent the assets being realised in the bankruptcies for the benefit of their creditors.

The respondents argued, *inter alia*:

(1) that the court did not have jurisdiction to make BROs against them in relation to their conduct as partners. The appropriate course of action was for disqualification proceedings to be taken against them under the provisions of s 6 of the CDDA 1986, as modified and applied by article 12 of the Insolvent Partnerships Order 1994;

(2) that the sale of some of the assets about which complaint was made by the Official Receiver could not be criticised as they formed part of the tools of trade of the respondents and did not, therefore, vest in their trustee in bankruptcy under s 283 of the Insolvency Act 1986, and that such assets were, in any event, worthless;

(3) that the respondents had relied on professional advice in relation to the matters in respect of which complaint was made and were, therefore, exculpated from any wrongdoing.

HELD:

(1) The court did have jurisdiction to impose a BRO against a person in relation to his conduct as a partner;

(2) On the facts, it could not be said that the assets formed part of the respondents' tools of trade or were worthless;

(3) On the facts, the professional advice the respondents received was neither independent nor reasonable. It was clear that had failed to act honestly and that they failed to take advice on those matters which it must have been obvious to them they should have done. If they had done so, they would have been informed at the outset that what they proposed doing amounted to serious wrongdoing. It followed that the alleged professional advice could not said to be either reasonable or honest;

(4) The conduct of the respondents amounted to serious wrongdoing. A BRO for a period of 12 years would be made against CL and ten years against JL.

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

Professor Mark Watson-Gandy (instructed under the Public Access scheme) appeared on behalf of the respondents

R v Priority Hire Ltd and Chandler

16 February 2015, His Honour Judge Mithani QC, Worcester Crown Court.

Disqualification order following conviction – breaches of Consumer Protection from Unfair Trading Regulations 2008 – whether disqualification order should be imposed – period for which disqualification order should be imposed – s 2 of the CDDA 1986.

FACTS:

The defendant company, PH Limited ('the company') and its only director, LC, were each charged with three offences of engaging in a commercial practice in which members of the public were misled contrary to the Consumer Protection from Unfair Trading Regulations.

Specifically, in the course of the business of the company, two advertisements to sell cars were issued, one in the Autotrader website and the other on Ebay to which a false description about mileage was given. The advertisements resulted in a sale of one of the motor vehicles. The purchaser of that motor vehicle paid for a vehicle which was falsely represented by the company to have travelled 85,000 miles when it had travelled over 142,000 miles. The basis upon which LC was liable for the offences of the company was that as the sole or main director of the company, he caused or allowed the criminal activity for which the company was responsible to take place.

Both the company and LC pleaded guilty to the offences. It was accepted by the prosecution that there was no fraud involved on the part of LC. The breaches had arisen owing to the fraudulent conduct of one of the employees of the company. It was also accepted by the Prosecution that LC had no knowledge of that conduct.

An issue arose whether and, if so, for how long a disqualification order should be made against LC.

HELD:

(1) It was the responsibility of every business to comply with the requirements that regulate its conduct. The primary purpose of the Consumer Protection from Unfair Trading Regulations 2008 was to protect the public from fraudulent and unfair practices, and specifically to ensure that when businesses deal with members of the public, they were honest and up front about the products they are selling and the services they were providing in order that anyone interested in purchasing those products or utilising or purchasing those services could make informed choices about whether to do so.

(2) In the present case, the failure to comply had resulted in at least one member of the public losing out financially. He paid for a car which he was worth a lot less than it was represented to be. If he had known the full facts about the car, he might not have purchased it at all.

(3) Fines were imposed against both defendants. However, even though the Prosecution had not applied for a disqualification order, one would be

imposed against LC. The breaches of the 2008 Regulations were serious. They had resulted in at least one member of the public being short-changed. Although it was likely that he would be compensated by the company, it was important for the court to make it clear that the benefit of trading with the privilege of limited liability carried responsibilities which it was important for a person who sought to avail himself of that benefit to observe. LC should have supervised and monitored the affairs of the company sufficiently to know what was going on and should not have allowed the company to be in such serious breaches of the Regulations.

(4) A disqualification order for a period towards the top end of the lowest *Sevenoaks* bracket was appropriate. LC would be disqualified for a period of five years. However, as the company appeared to be trading profitably, and LC needed to take advice about how he would need to apply for permission to act under s 17 of the CDDA 1986, the disqualification would begin at the end of the period of 42 days (rather than the 21 days specified in s 1(2)) of the CDDA 1986, from the date of the order.

Spencer Michael v Official Receiver

[2014] Civ 1590, Sullivan, Briggs and Vos LJJ.

Bankruptcy restrictions order – second appeal – whether observations made during the court by trial judge showing actual or apparent bias.

FACTS:

The Official Receiver applied for a bankruptcy restrictions order ('BRO') against the respondent, Mr 'M'. The application was based on allegations that Mr M had: (i) failed to maintain, preserve or deliver up adequate accounting records in relation to his sole trader business; (ii) failed to explain why he had entered into tenancy agreements following the making of the bankruptcy order; and (iii) continued to act as a company director in breach of the requirements of s 11 of the CDDA 1986. Mr M alleged that he had signed the tenancy agreements in order to avoid sustaining further loss and because his IVA proposal was at an advanced stage of preparation. He contended that there had been no obligation to maintain records, that such a notice was only triggered by the service of a notice by HMRC and that, if there was such an obligation, it was owed to HMRC, not the OR. Mr M contended that he had kept records but that they had been lost.

Chief Registrar Baister made a BRO for a period of eight years: see the (2012) 47 *Disqualification Newsletter* (Feb). Mr M appealed contending, *inter alia*, that Chief Registrar Baister had shown bias in the course of his conduct of the trial. Roth J rejected that contention: see [2013] EWHC 4286 (Ch), [2014] BPIR 666. However, he reduced the period of eight years to six and one-half years because he found that the Chief Registrar had failed to have sufficient regard to a concession made by the Official Receiver that one of the

allegations which he had made against the respondent was factually incorrect. Mr M appealed to the Court of Appeal. Permission to bring a second appeal was granted by Rimer LJ: see [2014] EWCA Civ 534.

The basis upon which Roth J rejected the contention that the Chief Registrar had been biased was as follows:

> '… Mr M complains that the judge below frequently interrupted him in "an inconvenient, abrupt and aggressive manner" and that the judge was "hostile". He also says that in the course of the hearing, the judge told him that he did not accept that Mr M was being honest. That, he says, has two consequences. First, it discloses bias on the part of the judge, who, he submits, approached the application with a closed mind. Second, it caused Mr M "a distressing sense of panic" so that he was not able to put his case properly …
>
> … unknown to the Chief Registrar, the staff who were new to the Rolls Building had not turned [the tape recording system] on as required. Thus it emerged that there were no tape recordings of any hearings held in that hearing room for 9 November after the move of the bankruptcy registrars to the Rolls Building on 16 October … But does it mean that it is impossible to determine this ground of appeal and the order must, therefore, be set aside? I do not think so. The rule against bias is, of course, much older than the introduction of tape recorded hearings and, as I understand it, some court hearings, unlike judgments, are still not recorded. In any event, I told Mr M that I am prepared to proceed on the basis that there were many interruptions by the Chief Registrar and that he was told at least once that his answers in evidence were not regarded as honest. I should make clear that I cannot determine if that, indeed, was the case, but I should accept, for the purposes of this appeal, that this occurred …
>
> In the present case, making the allowance I have to Mr M, I do not consider that the matters complained of, as they would be perceived by a fair minded and informed observer, amount to an unfairness to the extent to suggest a real possibility of bias. Some judges interrupt more than others and some litigants provoke more interruptions than others [the judge then cited paras 11 and 12 of the Chief Registrar's judgment]. Having myself now heard Mr M on two occasions … I have to say that I can understand what the Chief Registrar was referring to when, in the course of the party giving evidence as a witness, he does not answer the question asked or he does not focus on the point at issue in making his submission. It may be necessary to interrupt him to direct him to the relevant matter and seek to ensure that he answers the question.
>
> The remark that I accept for the purposes of this application the Chief Registrar made that Mr M was dishonest or that the Chief Registrar could not believe him is of a different nature. Here, the Chief Registrar had to form a view as to whether to believe much of Mr M's evidence. That, it seems to me, is indisputable. The fact that he chose to tell Mr M in the course of argument or evidence that, at least on a

certain point, he did not believe him instead of keeping silent and reserving this for his ultimate written judgment. However, for a judge to indicate in the course of argument his view of the evidence or of the credibility of a witness does not amount to a lack of fair trial, although it may be distressing to a witness or a party to tell them that the judge considers they are being dishonest, it is not impermissible. Indeed, it can sometimes be helpful for the judge to indicate his or her thinking so that submissions can be made accordingly to try to change it. Here in applying the test, I think it is very relevant that the Chief Registrar did accept Mr M's points in a number of respects [examples given].'

HELD (dismissing the appeal):

(1) The Chief Registrar was faced with a litigant in person who had produced prolix written submissions and would not focus on the real issues in either evidence or oral submissions. The Chief Registrar was doing his best to focus Mr M and avoid repeating tangential points being made, which were obviously delaying the proceedings disproportionately. To that end, the Chief Registrar interrupted him frequently, but it was telling that the Chief Registrar recorded in his judgment that Mr M had thanked him for keeping him focused.

(2) The only possible evidence of either apparent predetermination or apparent bias was the single assumed remark that Mr M's 'answers in evidence were not regarded as honest'. As Roth J had found, this comment was relevant because the Chief Registrar had to decide on Mr M's credibility. There were circumstances where a judge could properly indicate that he found an answer impossible to believe in the light of other evidence. The question in each case was whether, in all the circumstances viewed in their proper context, the fair minded and informed observer would conclude that there was a real possibility that the judge was biased.

(3) In the present case, taken in context, the fact that the Chief Registrar said to Mr M that he did not believe that certain answers were honest was unsupportive of any real possibility of bias. Instead, the Chief Registrar was most likely explaining where his evidence could not be right and no doubt seeing if he really wanted to stand by it.

(4) The comment made by Roth J that he could 'not help feeling that the Registrar may have been unduly influenced by Mr M's conduct of the proceedings before him and the irritation that that had caused him', did not support Mr M's case. It was no more than an expression of Roth J's own feelings about what may have occurred, employed in an entirely different context. Roth J was explaining why, two weeks after delivering his impugned judgment, the Chief Registrar might have chosen the wrong part of the second *Sevenoaks* bracket in determining the length of the BRO. In any event, even if Roth J was right in his speculation, it did not amount to anything more than a comment about a judge's natural irritation at being unable to conclude a case expeditiously because of a litigant in person's prolixity. It was no evidence of bias.

(5) It followed that there were no proper grounds for alleging bias and Roth J was entirely justified in his conclusions. There was no basis for thinking that the Chief Registrar, in all the circumstances of the hearing before him, had either actually or apparently predetermined the case. There was no more than an illusory case of bias and Roth J was right to dismiss that part of the appeal. It was clear that the Chief Registrar conducted the hearing 'with the patience of Job.'

Mr Arfan Khan appeared by way of direct access on behalf of Mr M.

Mr Mark Mullen (instructed by the Treasury Solicitor) appeared on behalf of the Official Receiver.

CASE LAW