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Case Comment

Bare undertakings in disqualification proceedings: a postscript

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Case: Blackspur Group Plc (No.3), Re [2001] EWCA Civ 1595; [2004] B.C.C. 839 (CA (Civ Div))

***Comp. Law. 123** In a recent issue of *Company Lawyer*, the present writer discussed changes made to the Company Directors Disqualification Act 1986 (CDDA) by the Insolvency Act 2000 that have made it possible for disqualification proceedings to be compromised by offer and acceptance of undertakings without the involvement of the court.¹ It was seen there that the Secretary of State for Trade and Industry's practice is to refuse to accept an undertaking unless the director concerned is prepared to make admissions as to the factual basis of disqualification and agree to the formal recording of the admissions in a schedule to the undertaking. The director is required to make the admissions "solely for the purposes of the [CDDA] and for any other purposes consequential to the giving of a disqualification undertaking". This means that the admissions can only be relied on in future CDDA proceedings² or in other contexts where CDDA disqualification has a direct impact.³ Patten J. upheld the Secretary of State's practice in relation to admissions in *Re Blackspur Group plc, Secretary of State for Trade and Industry v. Eastaway*,⁴ a decision supported by the writer.⁵ The appeal from Patten J.'s decision has now been heard.⁶ The present article serves to revisit the background to the case and to reflect briefly on the out-come in the Court of Appeal.

The two-stage test

The decision to accept an undertaking is a matter exclusively within the Secretary of State's administrative discretion. The statute prescribes two criteria that must be applied to determine whether the Secretary of State is entitled to accept an undertaking. First, she must judge that the conduct of the person offering the undertaking makes him or her unfit to be concerned in the management of a company.⁷ In other words, she is required to form a view on the merits. Secondly, she must consider that it is expedient in the public interest for her to accept the undertaking instead of applying, or proceeding with an application, for a disqualification order.⁸

Can the Secretary of State refuse to accept an undertaking unless the director makes admissions?

In *Blackspur*, the defendant in a set of extant proceedings indicated that he wished to take advantage of the new law by offering a disqualification undertaking. However, he was unwilling to agree to the annexing of a schedule of unfit conduct to the undertaking from fear of stigma and the likely impact that any admissions might have on his accountancy career. He applied for the proceedings against him to be stayed or dismissed on the basis that the Secretary of State was acting *ultra vires* in insisting on a schedule of admissions with the result that the refusal to accept his undertaking was unreasonable. He contended that section 1A of the CDDA empowered the Secretary of State to accept a bare undertaking without admissions (*i.e.* an undertaking stating simply that the person giving it will not act in a prohibited capacity for a specified period) so as to eliminate the need for and costs of court proceedings. There was, he claimed, nothing in the legislation permitting the Secretary of State to insist on a director agreeing to a schedule of unfit conduct as a pre-condition to acceptance of an undertaking.

The Court of Appeal upheld Patten J. and rejected the application. At the outset, Chadwick L.J. sought to formulate the question before the court in precise terms having regard to the wording of CDDA, section 7(2A) out-lined above. It was clear on the statutory wording that the Secretary of State

has no power to *require* a ***Comp. Law. 124** statement of admissions because she has no power to require a disqualification undertaking to be offered or given. The power conferred by the Act is to *accept* an undertaking which is offered and that power is circumscribed by the conditions in section 7(2A). It followed that the relevant question was whether it is ever open to the Secretary of State to form the view that it is not in the public interest to accept a bare undertaking without admissions. On that question, the Court of Appeal made the following points:

(1) The statute says that the Secretary of State may accept an undertaking if it appears to her that it is expedient in the public interest that she should do so. As a matter of statutory construction, there is no fetter (other than relevance) on the matters which the Secretary of State can take into account in deciding whether to accept or refuse an undertaking. If Parliament had intended that the Secretary of State should not take into account the desirability of a schedule of unfit conduct in exercising the discretion, it could have said so.

(2) The Secretary of State was not acting irrationally, as in most cases she can reasonably take the view that a schedule will serve some useful purpose. A statement of agreed or undisputed facts will provide a useful starting point for the court on any subsequent application to vary or discharge the undertaking under section 8A or for leave to act as a director notwithstanding disqualification. A statement is also likely to prove useful as the basis on which the Secretary of State can publicise the fact that a disqualification undertaking has been offered and accepted and the underlying reasons for the disqualification.

Comment

The Court of Appeal has ruled that the Secretary of State does have *vires* to reach agreement as to the terms on which a disqualification undertaking is offered and that, ultimately, it is open to the Secretary of State to determine whether, in the public interest, she should refuse to accept a bare undertaking in a given case. Clearly, the Secretary of State's decision to refuse an undertaking offered in an individual case is susceptible to judicial review on grounds of *Wednesbury* unreasonableness. It seems, however, that, in the majority of cases, the Secretary of State will not be *Wednesbury* unreasonable simply because she insists on a schedule of admissions.

The Court of Appeal's decision makes abundant sense on practical grounds. In any subsequent CDDA proceedings, the court will need to have a clear idea of the factual basis of the original disqualification. For example, on an application for leave to act as a director, the court must assess the nature and seriousness of the applicant's previous misconduct in considering whether leave can be granted. It serves the interests of efficient regulation for the parties to agree and set out the factual basis of disqualification in the undertaking. In the absence of admissions, the court hearing the leave application would be obliged to reopen the issue of the director's unfitness.

The decision can also be supported on philosophical grounds. Directors' disqualification is justified on a rationale of public protection, including protection achieved through general deterrence and the setting of proper standards.⁹ Unless the factual basis of disqualification is made transparent, directors and their advisers will have no means of ascertaining what the expected standards are and how the Secretary of State is currently applying them. In this respect, the Court of Appeal appears to have struck the right balance between the overall purposes of the CDDA and the procedural streamlining that the reform seeks to bring about.

It will be interesting to see how practice in relation to schedules of admissions develops. Clearly, the Secretary of State has been given the green light to continue with her current practice. However, whatever the practical and philosophical merits of schedules, it is to be hoped that we do not end up reproducing the often tortuous and costly process of negotiation that grew up in relation to *Carecraft* statements.¹⁰ One point likely to arise in practice is whether, on an application for leave by a disqualified director, the Secretary of State would be entitled to adduce evidence of unfit conduct going beyond the boundaries of the agreed schedule. Intuitively, one would have thought not, unless the evidence came to light after the disqualification and could not therefore have been put to the director when the terms of the original undertaking were under negotiation.

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1. A. Walters, "Bare Undertakings in Directors' Disqualification Proceedings: The Insolvency Act 2000, Blackspur and Beyond" (2001) 22 *Company Lawyer* 290.
2. For example, an application by the director to vary the undertaking under CDDA, s. 8A, or for leave to act as a director or in any other restricted capacity despite being disqualified.
3. So, for example, a person disqualified under the CDDA is automatically disqualified from acting as a charity trustee but the Charity Commissioners have power to waive the disqualification provided the relevant charity is not an incorporated body. The Charity Commissioners could therefore rely on the schedule of admissions in deciding whether or not to exercise their waiver.
4. Unreported, May 23, 2001, Ch D.
5. (2001) 22 *Company Lawyer* 290 at 295-297.
6. Unreported, September 13, 2001, CA.
7. CDDA, ss. 7(2A), 8(2A)(a) and 9(1A).
8. CDDA, ss. 7(2A) and 8(2A)(b).
9. See e.g. *Re Grayan Building Services Ltd* [1995] Ch. 241; [1995] 3 W.L.R. 1; [1995] B.C.C. 554, CA; *Re Westmid Packaging Services Ltd (No. 2)* [1998] 2 All E.R. 124; [1998] B.C.C. 836; [1998] 2 B.C.L.C. 646, CA; *Re Bradcrown Ltd* [2001] 1 B.C.L.C. 547, Ch D.
10. *Re Carecraft Construction Co. Ltd* [1994] 1 W.L.R. 172; [1993] 4 All E.R. 499; [1993] B.C.C. 336; [1993] B.C.L.C. 1259, Ch D. See further (2001) 22 *Company Lawyer* 290 at 293 and A. Walters and M. Davis-White, *Directors' Disqualification: Law and Practice* (Sweet & Maxwell, 1999), chapter 8.

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