

# Competition disqualification orders

## Competition Law Association

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# The legislation

- Section 9A(1)-(3) CCDA: the court must make a disqualification order against a person if the following two conditions are satisfied in relation to him:
  - the first condition is that an undertaking which is a company of which he is a director commits a breach of competition law;
  - the second condition is that the court considers that his conduct as a director makes him unfit to be concerned in the management of a company.

# How to decide if conduct as a director makes him unfit (1)

*s.9A(5) For the purpose of deciding under subsection (3) whether a person is unfit to be concerned in the management of a company the court—*

*(a) must have regard to whether subsection (6) applies to him;*

*(b) may have regard to his conduct as a director of a company in connection with any other breach of competition law;*

*(c) must not have regard to the matters mentioned in Schedule 1.*

# How to decide if conduct as a director makes him unfit (2)

*s.9A(6) This subsection applies to a person if as a director of the company—*

*(a) his conduct contributed to the breach of competition law mentioned in subsection (2);*

*(b) his conduct did not contribute to the breach but he had reasonable grounds to suspect that the conduct of the undertaking constituted the breach and he took no steps to prevent it;*

*(c) he did not know but ought to have known that the conduct of the undertaking constituted the breach.*

# How to decide if conduct as a director makes him unfit (3)

*s.9A(7) For the purposes of subsection (6)(a) it is immaterial whether the person knew that the conduct of the undertaking constituted the breach.*

*s.9A(9) The maximum period of disqualification under this section is 15 years.*

*s.9E(4) Conduct includes omission.*

# The CMA's case against Michael Martin (1)

Mr Martin knew about the Burnham-on-Sea estate agents' cartel infringement and contributed to the breach (within the meaning of section 9A(6)(a) CDDA) by either:

- his active encouragement of the proposal to make a price-fixing agreement and thereafter his acquiescence in or agreement to the participation of Gary Berryman in the infringement; or
- by his failure to prevent or discourage the proposal to make a price-fixing agreement and/or Gary Berryman's participation in the infringement.

# The CMA's case against Michael Martin (2)

If Mr Martin did not contribute to the breach, regardless of whether he knew about the infringement:

- he had reasonable grounds to suspect that the conduct of Gary Berryman constituted the breach and he took no steps to prevent it (within the meaning of section 9A(6)(b) CDDA); and/or
- he ought to have known that the conduct of Gary Berryman constituted the breach (within the meaning of section 9A(6)(c)).
- CMA had originally sought 3 year disqualification
  - Would have accepted 2 yr 6 month undertaking
  - But reserved right to seek longer disqualification if contested

# The result

- On the evidence, ICC Judge Jones found that Mr Martin had known of the breach, and had allowed Berrymans to participate in and perform it. Although he had not been directly involved in cartel activity in the sense of attending meetings, his conduct as a director had contributed to the breach: he ought to have reported his employees' conduct to the Board and taken all possible steps to prevent it.
- Conduct therefore fell within s.9A(6)(a)
- Result was no need to consider s.9A(6)(b) or (c)
- Serious misconduct made him unfit
- 7 year disqualification order resulted

# But what if...?

- A director does not contribute to a breach;
- A director does not have reasonable grounds to suspect that the the conduct of the undertaking constituted a breach (but would have taken steps to prevent it had he had such grounds); and
- A director does not know but “ought” to have known that the conduct of the undertaking constituted a breach
- i.e. a “pure” s.9A(6)(c) case
- Clearly a range of possible circumstances could fall within this rubric, from a single oversight to a complete dereliction of duty

# Can a human rights argument help?

- The pre-Human Rights Act “traditional approach” to the question of unfitness
- An order must be made if the director's conduct "*viewed cumulatively and taking into account any extenuating circumstances has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies*" (*Re Grayan Building Services Ltd* [1995] Ch. 241 at 253)
- Specifically excludes consideration of wider conduct (which may only be relevant to mitigation)

# Can a human rights argument help?

*Secretary of State for Trade and Industry v Arif* [1996] BCC 586 at 595:

- “The Court of Appeal has explained, in *Re Grayan* ... that it is not open to a court to decide to make no order for disqualification, by reason of events which have occurred during the period between the date of the failure of the company and the date of the order. Once a finding of unfit conduct has been made, the court is required to make a disqualification order; notwithstanding that it may be satisfied that as at the date of the order, no further protection is required for the public. ...”

# Can a human rights argument help?

- “... It is clear, therefore, that there will be cases in which the court is required to make a disqualification order of two years in circumstances in which it is satisfied both (a) that that is the longest period of disqualification which could be appropriate having regard to the nature of the unfit conduct which it has identified, and (b) that the effect of the proceedings has been already to prevent the respondent from acting as a director for more than two years. In such a case the period of pending proceedings could not be taken into account.”

# Can a human rights argument help?

Consider *In re Pamstock* [1994] BCC 264 at 282, per Vinelott J

- “The respondent seemed to me (so far as I can judge from the evidence before me) to be a man who today is capable of discharging his duties as a director, honestly and diligently. .... As I observed at the beginning of this judgment, a disqualification order is likely to have a disproportionately severe effect on him. Apart from the stigma of a disqualification order it will be difficult and may be impossible for him to continue in his career as the provider of venture capital and as a professional non-executive director if he must seek leave before accepting any appointment. However ... under the legislation as it now stands, I am required to have tunnel vision and to consider whether in relation to Pamstock the respondent's conduct fell short of the minimum standard which the court today requires to be observed by the director of a company which enjoys the privilege of limited liability, and if it does, to impose a disqualification order for a minimum of two years.”

# Can a human rights argument help?

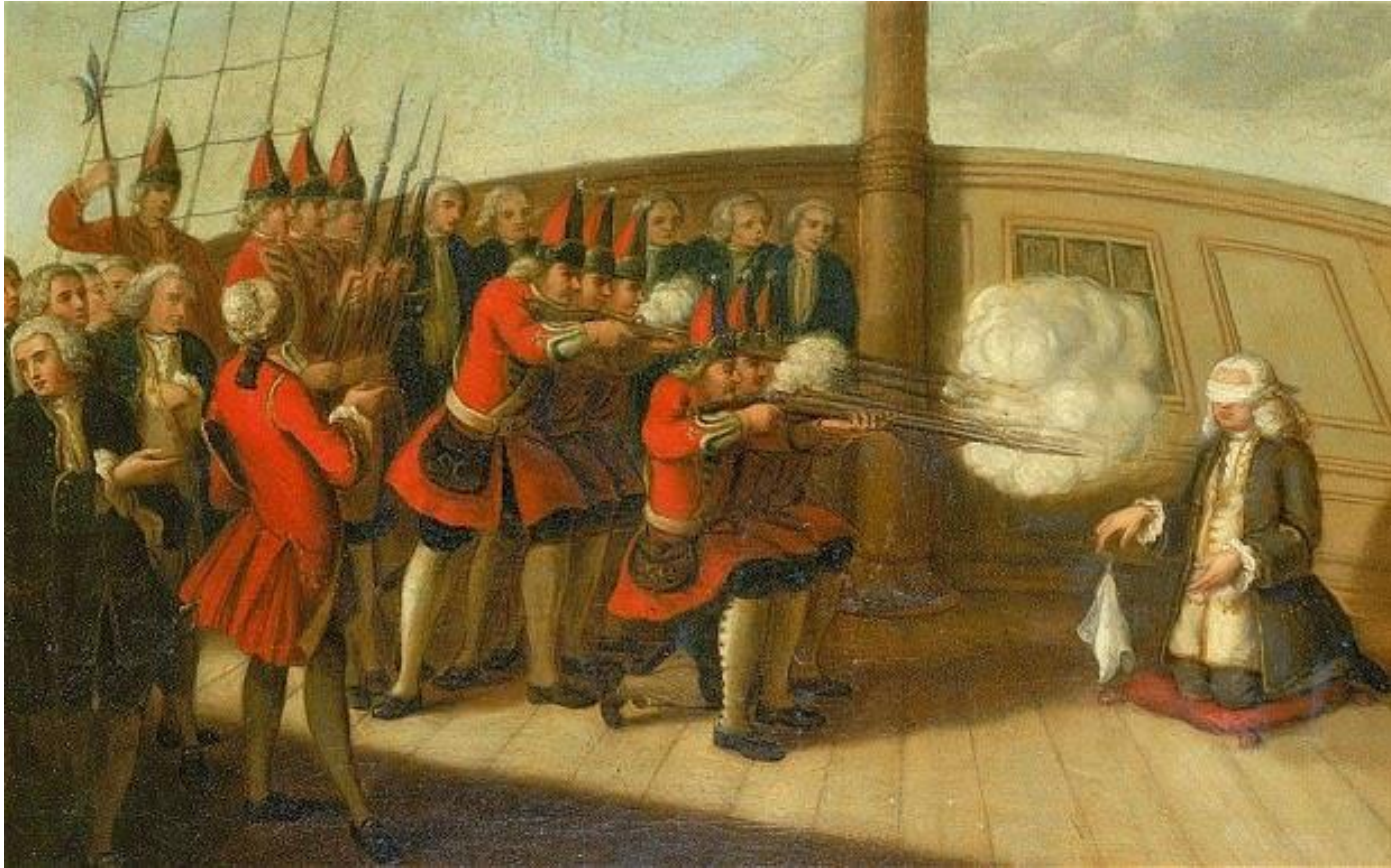
Return to *In re Grayan Building Services*, per Hoffmann LJ

- “The question is whether, in the words of section 6(1), "his conduct as a director . . . makes him unfit to be concerned in the management of a company." Mr. Bannister submitted that this required the court to be satisfied that the defendant was at the time of the hearing a person who, for the future protection of the public, should not be allowed to concern himself in the management of a company. For this purpose the court could look at any evidence which showed that despite the defendant's shortcomings in the past, he was unlikely to offend again. I do not agree. ... In my view the construction for which Mr. Bannister contends is not consistent with the court having a *duty* to disqualify a director whose conduct has shown him to be unfit. If the court always had to be satisfied at the hearing that the protection of the public required a period of disqualification, there would be no need to make disqualification mandatory....”

# Can a human rights argument help?

- “... Even if the court had a discretion, it would not, having formed the view that disqualification was necessary in the public interest, be acting judicially if it did not make a disqualification order. The purpose of making disqualification mandatory was to ensure that everyone whose conduct had fallen below the appropriate standard was disqualified for at least two years, whether in the individual case the court thought that this was necessary in the public interest or not. Parliament has decided that it is occasionally necessary to disqualify a company director to encourage the others.”

# Pour encourager les autres



# Article 8 ECHR is engaged

- A person's private life encompasses his business and professional life as well as his reputation: see *Niemietz v Germany* (1993) 16 EHRR 97 at [29]; *Sidabras v Lithuania* (2006) 42 EHRR 104.
- Not doubted by the ECtHR that Article 8 was engaged by the making of a DDO in *DC, HS and AD v United Kingdom* [2000] BCC 710 at 717, or in *WGS and MSLS v United Kingdom* [2000] BCC 719 at 726.
- Confirmed by the Supreme Court in *R (T) v Chief Constable of Greater Manchester Police* [2015] AC 49 at [138], per Lord Reed JSC, that “*laws which have the effect of jeopardising a person's ability to pursue his chosen career, or which in practice close off to him a wide range of potential employments, must be regarded as interfering with his private life.*”
- Adverse effect on reputation: *In re Guardian News and Media Ltd* [2010] 2 AC 697 at [39] and [42]
- Not challenged by CMA and accepted by Court in *Martin* at §110(b)

# Proportionality

- No doubt that a CDO is in accordance with the law and serves a legitimate aim. So question becomes one of proportionality
- Submitted for MM:
  - *In re Grayan, Arif and Pamlock* all now need to be read in the light of the requirement of proportionality
  - s.3 HRA 1998 allows legislation to be read down: ostensibly mandatory duty is subject to a caveat "... except insofar as it would be incompatible with Article 8 ECHR to do so. Compare *R v Waya* [2013] 1 AC 294 concerning confiscation orders.
  - A proportionality assessment must take into account all the circumstances, and reflect the need for individual consideration of the impact on the individual, and the justification for imposing the measure on the individual, in each case. See e.g. Lord Bingham in *EB (Kosovo)* [2009] 1 AC 1159 at [12].

# The court's answer

- The flaw in the submission is that it ignores sections 1 and 17 CDDA, which allow a disqualified director to apply for leave to act
- Allows an individualised assessment of proportionality at that stage
- The importance of public confidence in limited companies and the use of regulatory mechanisms to ensure respect for directors' duties justifies a mandatory disqualification
- The fact that a disqualified director must commit resources to apply for leave and suffer reputational harm from disqualification cannot outweigh those interests
- Parliament had legislated for CDOs in the knowledge of the operation of the DDO regime
- The effect of adopting the suggested approach would frontload the section 17 procedure, requiring an assessment of risk from the outset, which would be more resource intensive and impracticable

# The continuing problem

- The Court's approach:
  - Fails to recognise the full effect of HRA 1998
  - Fails to engage with the acknowledged effect of a disqualification order on an individual notwithstanding the s.17 avenue
  - Treats the central purpose of the regime as being to “encourage the others”, rather than to assess the risk to the public presented by an individual
  - Fails to address the “tunnel vision” problem
  - While apparently reflecting a concern for the “burden on defendants”, deprives defendants of an opportunity to satisfy the Court that they present no risk to the public

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