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How difficult is it to get leave under s 17 of the Company Directors Disqualification Act 1986?

KEY POINTS

- Disqualification from being a director or taking part in the management of a company can have catastrophic consequences for the individual, making them virtually unable to earn a living in the corporate sector.
- If they wish to run or manage a company in the future, they will need to obtain the permission of the court to do so.
- Although the previous case law on the subject suggested that permission would not readily be granted by the courts, recent case law suggests that the courts' approach to the grant of permission may be considerably more flexible.
- Preparation and timing of an application for permission is vital, and failure to do so could be both fatal and costly.

BACKGROUND

Section 1(1) of the Company Directors Disqualification Act 1986 (CDDA 1986) provides that a person who is subject to a disqualification order shall, during the period of his disqualification, be subject to two separate sets of prohibition:

- a prohibition that he will not be a director of a company, act as receiver of a company's property or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company *unless (in each case) he has the leave (ie, permission) of a court*, and
- a prohibition that he will not act as an insolvency practitioner.
(*Emphasis supplied.*)

The prohibition in (a) is 'qualified', ie, the person subject to the disqualification order may act in any of those capacities with the permission of the court. The prohibition in (b) is 'absolute', ie, the court has no power to grant permission in relation to it. Sections 1A(1) (which permits the Secretary of State to accept a disqualification undertaking) and 9B(3) and (4) (which permits the Competition

and Markets Authority (CMA) or a sectoral regulator specified in s 9E of the CDDA 1986 to accept a competition undertaking, ie, a disqualification undertaking for the competition breaches specified in s 9A(4) of the CDDA 1986) are cast in a similar manner and have identical effect to a disqualification order. Neither the court, in the case of a disqualification order, nor the Secretary of State (or the CMA or specified regulator), in the case of a disqualification undertaking, can 'pick and choose' which of these prohibitions should be included in a disqualification order or, as the case may be, disqualification undertaking: see, by way of example, *Re Cannonquest Ltd* [1997] 2 BCLC 473.

A person against whom disqualification proceedings are brought, or proposed to be brought, should consider, as soon as he is first notified that disqualification proceedings may be taken against him (usually at the stage where he receives the 10-day letter under s 16(1) of the CDDA 1986) whether it may be appropriate for him to make an application for permission. This is so even if he decides to defend the proceedings. That is because the making of a disqualification order against him (or the acceptance of a disqualification

undertaking) will not just prohibit him from acting as a director of a company but also from being involved in any managerial capacity in the company and, therefore, potentially being able to earn a living in the corporate sector. A person who commits a breach of the prohibitions is guilty of a criminal offence under ss 13 and 14 of the CDDA 1986 and will also be subject to civil liability under s 15 of the CDDA 1986.

This article does not consider the grant of permission in competition cases. Nor does it consider the grant of permission to act in any capacity other than as a director, or in the management, of a company. Unless otherwise stated, or the context otherwise requires, the reference to 'an applicant' or 'the applicant' in this article is to a person who is subject to a disqualification order or disqualification undertaking (other than for competition breaches) who has made or proposes to make an application to the court for permission to act as a director or in the management of a company.

THE RELEVANT STATUTORY AND RELATED PROVISIONS GOVERNING PERMISSION

The statutory provisions which govern applications for permission are set out in s 17 of the CDDA 1986. However, that section does little more than: (a) specify the courts which have jurisdiction to grant permission: ss 17(1)-(4) of the CDDA 1986; (b) provide details of the respondent to the application, ie, those who have standing to respond to the application: ss 19(5)-(7) of the CDDA 1986; and (c) set out the duties of the respondent at the hearing of the application: s 17(7) of the CDDA 1986. The form of the application and the other procedural provisions which govern it are set

out in paras 17-23 of the Practice Direction on Directors Disqualification Proceedings. Permission may only be granted by the court. The Secretary of State has no power to grant permission to the applicant even in the case of a disqualification undertaking which he has accepted.

No guidance is given either in the CDDA 1986 or any other statutory provision about what matters the court should be taken into account in deciding whether to grant permission. The absence of such guidance essentially leaves the decision to grant permission entirely in the discretion of the court. It is clear that the discretion is extremely wide, subject only to the requirement that it should be exercised judicially: see *Re Dawes & Henderson (Agencies) Ltd* (No 2) [1999] 2 BCLC 317 at 326.

WHAT THE COURTS WILL TAKE INTO ACCOUNT IN THE EXERCISE OF ITS DISCRETION

'Need' as a requirement for permission?

More than one judge has emphasised that permission should not be given too freely. The court must bear in mind the purposes of disqualification, which are to protect the public from the past misconduct of the applicant, to deter him and others in his position from engaging in inappropriate conduct relating to the affairs of a company, and to promote good practices among company directors.

These observations led the courts initially to require the applicant to demonstrate 'need' as a condition of the grant of permission (or as a vital factor affecting the manner in which they should exercise their discretion) before they went on to consider any other relevant factors relevant to the exercise of their discretion. Examples of cases where this was said to be the position included *Re Cargo Agency Ltd* [1992] BCLC 686, *Re Gibson Davies Ltd* [1995] BCC 11 and *Re Amaron Ltd, Secretary of State for Trade and Industry v Lubrani* [1998] BCC 264. The expression 'need', in this context, meant having to demonstrate a 'need' (as opposed to simply a 'desire') on the part of the applicant to

engage in the prohibited activities for which permission was being sought by him and also a 'need' on the part of the company to engage him in those activities. However, in *Re Barings plc* (No 4), *Secretary of State for Trade and Industry v Baker* [1999] 1 BCLC 262 and *Re Dawes & Henderson (Agencies) Ltd* (No 2) [1999] 2 BCLC 317, this requirement was rejected by the court. In both cases, Sir Richard Scott V-C stated that the grant of permission should not be precluded simply because alternative routes were open to the applicant to carry on business (such as provide his services to the company through being a mere employee of, or an independent contractor with, the company) or by carrying on business as a sole trader or in partnership.

The approach after *Barings and Dawes and Henderson*

The propositions which may be derived from the judgments of the Vice Chancellor in those cases and several others (including those analysed in this article), following those two cases, may be summarised (based on the commentary contained in *Mithani: Directors' Disqualification* at various places in Division VI, Chapters 3, 4, 5 and 10) as follows:

- (1) The proper starting point for an application for permission is to recognise that the purpose of disqualification is primarily protective rather than penal. However, permission is not to be given too freely because the court must not override the achievement of the policy objective of the disqualification regime of ensuring that the risk of harm to the public is minimised.
- (2) There is no presumption in favour of permission either being granted or refused. The onus is upon the applicant to persuade the court, on the balance of probabilities, that it should exercise its discretion to grant permission in his favour.
- (3) The grant of permission is a privilege, not a right.
- (4) Permission will only be granted in respect of specific companies.
- (5) The court must conduct a careful balancing exercise in deciding whether permission should be granted. The balancing

exercise involves weighing the right of the applicant to seek to be involved in the running of a company (which is recognised by ss 1(1), 1A(1), 9B(3), (4) and 17), on the one hand, and ensuring that the public is protected from his past misconduct and that the reasons for, and purposes of, his disqualification are not undermined, on the other.

- (6) The applicant does not have to establish 'need'. However, a lack of 'need' may be a relevant factor in the balancing exercise.
- (7) The principles concerning the exercise of the discretion of the court will be the same whether the applicant is subject to a disqualification order or disqualification undertaking.
- (8) The principles relating to the grant of discretion will be different where a person is subject to a competition disqualification order or competition undertaking from those which apply where he is subject to a non-competition disqualification order or undertaking. That is because the purpose of the two jurisdictions (and the underlying protection which each jurisdiction is meant to confer on the public) is different.
- (9) The concept of public protection is extremely wide. The court does not just have to consider whether the public can be protected from the risk of the applicant's past misconduct but also whether it will be at risk from the manner in which the company's existing and future business and affairs are conducted.
- (10) To achieve sufficient protection for the public against the risk of future misconduct, an applicant will usually need to provide safeguards against each potential risk. The need for the safeguards will depend upon the nature and degree of risk. These will be identified from the reasons for the disqualification, the circumstances in which permission is sought, and the expectations which the court may reasonably expect from the future conduct of the applicant. It will rarely, if at all, be appropriate for permission to be granted without any safeguards being put in place in order to protect the public.

Feature

- (11) Each case will be assessed on its own merits. The emphasis given by a judge in a particular case to the particular circumstances of that case will not necessarily be a guide to the weight to be attributed to similar circumstances in a different case.
- (12) The protection of the public and the need to be a director have to be kept in balance with one another. Where there is virtually no risk of recurrence, 'need' may not be an important factor in deciding whether permission should be granted. However, in a case where no 'need' has been demonstrated, there would have to be only a very small risk to the public which the granting of the permission might produce to justify the refusal of the application. In contrast, if a substantial and pressing 'need' on the part of the company, or on the part of the individual in order to be able to earn his living, could be shown in favour of the grant of permission, then it might be appropriate to accept some slight risk to the public if the permission sought were granted.
- (13) 'Need' on the part of the company to have the applicant engage in the prohibited activities will carry more weight than 'need' on the part of the applicant to engage in those activities.
- (14) The court may be prepared to grant permission for the applicant to be involved in the management of a company even if it is not prepared to grant him permission to act as a director of the company.
- (15) It is important to for the court: (i) to identify the conduct which led to the imposition of the disqualification in order to enable it to identify the conduct from which the public needed protection; and (ii) to ascertain whether that conduct might be repeated in the future.
- (16) Several other factors (such as whether the applicant admits responsibility for his past misconduct, his age, and whether he intends to be the sole or the 'principal' director of the company) may be relevant to the question of how the court should exercise its discretion. These factors must be included in the 'mix' in deciding whether the balancing

exercise which the court has to conduct is in favour of permission being granted.

- (17) Even if the court is not prepared to grant permission throughout the course of the applicant's disqualification, it may be prepared to grant it for a limited period or for a limited purpose.

HOW IMPORTANT IS 'NEED' AS A FACTOR IN DECIDING WHETHER PERMISSION SHOULD BE GRANTED?

The shift away from 'need' having to be established almost as a precondition to the grant of permission has relegated this factor to be of varying – but, in most cases, little practical significance. In *Haughey v Secretary of State for Business Energy and Industrial Strategy* [2018] EWHC 3566 (Ch), ICC Judge Jones said:

'On occasions "need" may have substantial weight, on other occasions it may not... Each case... will depend entirely upon its own facts. The weight of "need" will depend upon the facts and its significance depends upon the weight on the other side of the scale.'

In that case, the applicant had entered into a disqualification undertaking for six years. He had caused or allowed the company in question to make payment of dividends of some £600,000 and to make payments of some £250,000 towards the expenses of an associated company as a result of which the company had become insolvent. After his disqualification, he set up as a sole-trader and grew his business. He had since kept proper accounts and met his tax obligations. ICC Judge Jones granted the applicant permission on the basis that he had shown remorse, had learnt from his disqualification and had built up a new successful business. However, strong safeguards had to be put in place to avoid the recurrence of the applicant's past misconduct, the most important of which was the appointment of two additional directors, one extremely experienced in the industry and the other an experienced and reliable chartered accountant. The judge did not consider 'need' to be an important factor, on the facts, and gave it little weight in reaching his decision to grant permission.

HAS THERE BEEN A RELAXATION OF THE CIRCUMSTANCES IN WHICH THE COURTS WILL GRANT PERMISSION?

The removal of the requirement to demonstrate 'need' is an important reason why there are more cases now, than before, of the court granting permission. However, quite apart from this, recent case law suggests that courts are more willing to grant permission now than they were previously.

Fraud and dishonesty

In *Secretary of State for Trade and Industry v Barnett*, above, Rattree J stated that in a case where the applicant had been disqualified because of dishonesty, it was unlikely 'that adequate protection to the public can be provided without the full and absolute operation of a disqualification order.' However, surprisingly, in *Keith Owen v Secretary of State for Business Innovation and Skills* [2017] BCC 298, permission was granted by Chief Registrar Baister to an applicant (who had been disqualified by the Crown Court, following conviction, for a period of seven years under s 2 of the CDDA 1986) to act in the management (but not as a director) of two companies (one of them, an unlimited company), despite the fact that he had been involved in a multi-million-pound food labelling fraud, described after the criminal trial by the Department for Environment, Food and Rural Affairs as 'the biggest food industry fraud that the department has ever prosecuted'. Permission was granted on the basis that it was necessary to 'rehabilitate persons convicted of a criminal offence once they [had] served their sentence for the crimes [for] which they have been convicted. The rehabilitation of offenders who have paid their price to society by serving any sentence imposed on them must... be seen as going to public protection, a policy to which the disqualification regime is, in part, addressed.' Chief Registrar Baister found 'need' to be demonstrated and held that the risk to the public from the repetition of the applicant's past misconduct was low, given that, *inter alia*: (a) the period of the disqualification under the disqualification order had a very short amount of time (some 18 months) left to

run; (b) the safeguards that had been put in place which made it 'highly unlikely' that the applicant's past conduct would be repeated; and (c) the businesses were trading relatively successfully and there was clear evidence that the directors of the company would supervise the applicant properly. The Secretary of State's opposition to permission, in that case, had largely been based on a policy decision that because the disqualification order had been made under s 2 of the CDDA following his conviction of an indictable offence specified in that section, that was sufficient for the court to refuse permission. Chief Registrar Baister rejected the assertion because: (i) s 17 did not prohibit the grant of permission where the disqualification arose under s 2; (ii) although the court looked at the conduct which gave rise to the disqualification, the ultimate question for it was whether there was a risk of the repetition of the conduct which gave rise to the disqualification. In the present case, the risk, if any, was small; and (iii) the conduct of the applicant fell at the lower end in the middle bracket of disqualification of six to 10 years in *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164.

Similarly, in *Yarde v Secretary of State for Business, Innovation and Skills* (17 May 2017, unreported), the same judge granted the applicant permission when it is unlikely that in the early days of the exercise of the jurisdiction, the court would have done so. In that case, the applicant had entered into a disqualification undertaking for a period of 11 years for, *inter alia*, having caused or allowed the company to be involved in a substantial 'missing trader intra-community' (ie, carousel) fraud. The application of the applicant to be a director of C Ltd was opposed by the Secretary of State on the ground that the applicant had been guilty of 'very serious misconduct...which merited a top bracket disqualification, even taking into account the fact that the relevant trading occurred during a short period and some years before [the company] was wound up. Allowing a person subject to a top bracket disqualification order or undertaking to act as a director almost immediately after his disqualification would send to the world an odd message about the way in which the courts regard the applicant's

conduct and would fly in the face of the policy considerations informing the disqualification regime, detracting from the deterrent effect of disqualification orders and undertakings.' The Secretary of State contended that this should be the 'determinative consideration in this case', that the circumstances of the case were 'not so exceptional as to justify departing from what should be the norm' and that, accordingly, permission should not be granted. Chief Registrar Baister was satisfied that 'need' had been established by the applicant. He found, *inter alia*, that without the involvement of the applicant in C Ltd as a director, no other person could undertake the day-to-day running of C Ltd and that the applicant had the skills, contacts and commercial knowledge relating to the business of the company which none of the other shareholders and directors of C Ltd had. In addition, the applicant's continued involvement as a director was material to C Ltd's ability to maintain the funding necessary to implement the company's planned expansion and C Ltd had to operate as a limited company in order to meet the requirements of a company associated with it which had a stake in C Ltd, and to maintain the C Ltd's brand name. The Chief Registrar was also satisfied that the risk to the public arising from the repetition of the applicant's past misconduct was low because the previous misconduct on the part of the applicant had occurred some 10 years previously and C Ltd did not carry out the same business as the former company had done (and it was a condition of the grant of permission that it would not do so). C Ltd was profitable and its continued and future success was important, not just to the applicant but also to its investors. It was unlikely that they would allow conduct which would expose C Ltd or its other directors to risk. The court also made it a condition of the grant of permission that an additional director from a firm of accountants be appointed to the company in order that that the court had the comfort of knowing that the applicant would be supervised in his role. The Chief Registrar also observed that if Parliament had intended that permission should never be given in a 'top bracket' *Sevenoaks* case, it would have legislated to that effect. It did not. The Chief Registrar granted

permission to the applicant, albeit limited in time, in order that the court took on some responsibility for the continued protection of the public by ensuring that in the short to medium term, the applicant lived up to what the court expected from him.

Repeat disqualification

It had, also, long been thought that a person who had acted in breach of an order granting him permission to act as a director, or in the management, of a company under s 17 would, absent compelling reasons, be unable to demonstrate to the court that he should be granted permission to act for a second or subsequent occasion. Thus, in *Rwamba v Secretary of State for Business, Energy and Industrial Strategy* [2019] EWHC 2669 (Ch), ICC Judge Prentis refused to grant the applicant permission. The applicant had entered into a disqualification undertaking for a period of four years, ending in November 2013, in respect of his involvement in the affairs of E Ltd, which had entered into administration. In June 2010, he was granted permission to act as a director of MOLI Ltd, subject to various conditions. That company also failed and entered into administration in 2012. In May 2015, the applicant was disqualified again, pursuant to a disqualification undertaking, for a period of six years on the basis that he had breached the terms of the conditions which were attached to the grant of the permission which he had obtained in June 2010 to act as a director of MOLI Ltd and had thereby acted in breach of his disqualification. He applied for permission to act as a director of two related companies, C1 and C2, until expiry of that undertaking in May 2021. He contended that his being a director was necessary for the expansion and growth of the companies, and that his wife, who was a director of the companies, wanted to spend more time with their child. ICC Judge Prentis refused the application, holding, *inter alia*, that: (a) in a case such as was before him, the grant of permission might undermine wider public protection, for example, the deterrent effect conveyed by the perception of the imposition of disqualification; (b)

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permission given to one who had already been disqualified twice, and the second time for breach of an earlier permission, carried with it the unavoidable additional risk that the disqualification regime was perceived as lax and permissive, a perception which could lead to a lowering of corporate standards contrary to one of the main purposes of the CDDA 1986. It followed that the reasons in favour of the grant of permission, in such a case, would have to be more cogent if it was to be granted; and (c) the evidence in support of the application was simply too fragile to ascribe much cogency to them. The applicant's appeal against ICC Judge Prentis' decision was allowed by Miles J (see [2020] EWHC 2778 (Ch)) on the basis that Judge Prentis had erred in the exercise of his discretion by, *inter alia*: (a) thinking that deterrence had special weight merely because the disqualification had been for breach of the conditions of an earlier order for permission under s 17, without more; (b) having thrown 'the blanket too widely' in concluding that an application for permission under a disqualification which itself arose from breach of an earlier order attracted a higher burden; and (c) giving special weight to the public policy of deterrence, merely because the disqualification had arisen from the breach of an earlier permission order. On the facts of the case, there were a number of points that favoured permission being granted. A fair-minded observer would not consider that the grant of permission, in the present circumstances, would go against the grain of the disqualification regime generally or diminish the seriousness of the six-year disqualification undertaking by which the appellant was disqualified. The giving of permission was inherent in the disqualification regime, the public was fully protected by the extensive and comprehensive conditions for granting permission (which had been considered and commented on by the Secretary of State), and there were good reasons for allowing the appellant to act as a director of the two companies. In the circumstances, the appeal was allowed, and permission was granted to the appellant subject to those conditions.

The modern authorities clearly show that the court is more likely now, than previously, to grant permission, provided it is satisfied that the public will not be exposed to the risk of the past acts or omissions of the applicant being repeated. It will usually require strict conditions to be attached to the grant of permission to avoid that risk. If the applicant breaches any of those conditions, he would not only risk the cesser or removal of the permission, but also be exposed to the criminal and civil consequences of the breach, specified ss 13-15 of the CDDA 1986.

The imposition of conditions necessary to protect the public

The conditions necessary for the protection of the public will vary from case to case and will depend upon all the circumstances of a particular case, principally by reference to the length of the disqualification and the seriousness of the misconduct that gave rise to its imposition.

Examples of conditions which the court often imposes include:

- (1) requiring that an independent person, having expertise or experience in financial and accounting matters, is appointed as an additional director of the company to supervise the applicant's activities and the company's performance;
- (2) restricting the ability of the applicant to procure the company to enter into transactions which may give rise to the repetition of the applicant's past misconduct;
- (3) restricting the applicant's salary and other benefits from the company;
- (4) deferring the applicant's claims against the company in favour of others, particularly the independent creditors of the company;
- (5) requiring that the company should not act as corporate director of another company;
- (6) requiring the payment of Crown debts to be made timeously;
- (7) requiring the company to be, or remain, adequately capitalised;
- (8) restricting the applicant to a specific role or to allow him to undertake specific functions only;

- (9) restricting the applicant's right to receive dividends distributable by the company.

Response of the Secretary of State to the application

Section 17(5) of the CDDA 1986 provides that, on the hearing of the application for permission for the purposes of s 1(1)(a) or 1A(1)(a), the Secretary of State shall appear and call the attention of the court to any matters which seem to him to be relevant and may himself give evidence or call witnesses. However, s 17(5) is specifically excluded from application where a disqualification order is made under s 9A of the CDDA 1986 or a competition is accepted under s 9B of the CDDA 1986. In those circumstances, it is whichever of the CMA, or the regulator specified in s 9E which applied for the order, or accepted the undertaking, that needs to attend and draw the attention of the court to any relevant matters and give evidence or call witnesses.

It will not usually be appropriate for the Secretary of State to take a stance of positive opposition to the application in discharge of his obligations under s 17(5). His function is simply to draw matters to the court's attention in a neutral way. However, in an appropriate case, the Secretary of State may oppose an application for permission and is not precluded from bringing an appeal if he considers that permission should not have been granted (as happened, for example, in *Re TLL Realisations Ltd, Secretary of State for Trade and Industry v Collins* [2000] 2 BCLC 223) or should not have been granted on the terms and upon the conditions specified by the court.

CONCLUSION

Whilst, plainly, the courts are more willing to grant permission than previously, practitioners should not assume that the courts will be willing to grant permission in all cases. The court will not grant permission merely because the Secretary of State supports the grant of permission. It will wish to satisfy itself independently that it is both appropriate to grant permission and that the conditions for its grant are appropriate and practicable. It follows that the approach of the court to the application will be 'quasi-

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inquisitorial', so that even if the Secretary of State is content that the applicant has satisfactorily addressed all the issues raised by him, the court will look into more detail about any concerns it has – including seeking more information from, and conducting its own questioning of, the applicant – in order to satisfy itself that case advanced by the applicant warrants permission being granted. Specifically, it will check and scrutinise the proposed conditions to ensure they are reasonable and relevant to the risk being safeguarded against. The conditions should not require the court to have any role other than to consider applications made to it where a condition expressly states that it must, such as where permission has been granted for a limited period only which the applicant seeks to renew. It is not usually appropriate for the court to supervise the order or for reports to be made to it.

The burden of proving that permission under s 17 should be granted is upon the applicant. Although the standard of proof is the usual civil standard of proof – the balance of probabilities – and the Secretary of State may be expected to act neutrally in responding to an application for permission, proper preparation of the application is vital to success. Guidance issued by the Secretary of State (reproduced in *Mithani: Directors' Disqualification*, at X[1351]–[1400]) sets out a list of those matters which should normally be dealt with in the written evidence in support of the application in order that the Secretary of State can discharge his functions under s 17(5). The court will expect the applicant to have put before it all the information necessary to enable it to consider, at the hearing of the application, whether it should grant permission. The applicant should not, assume that the court will adjourn an application for permission which is not supported by proper evidence to enable him to put his house in order. In *Re Lombard Shipping and Forwarding Ltd, Secretary of State for Trade and Industry v Woollen and Bainbridge* (2 March 1993, unreported, transcript, p 4), His Honour Judge Paul Baker QC dismissed an application for permission which was not supported by adequate evidence, stating:

'[O]n the evidence before me I am unable to give leave... [Counsel for the applicant] said there may be inadequacy in the evidence, but it could be put right. It is not for the court to negotiate in that sort of way and say what will be satisfactory and what will not. There is adequate guidance in the authorities as to what the court is likely to require... [Whilst] a later application [is not precluded]... I find the evidence is quite unsatisfactory and insufficient for me to justify granting [Mr W] leave to continue as a director.'

Nor may an applicant assume that he will be granted interim permission where he does not get his tackle in order. In *Hease v Secretary of State for Trade and Industry* [2005] EWHC 2909 (Ch), the Secretary of State was unable to consider the applicant's evidence in support of the application due to the lateness of the making of the application for permission, and sought more time to do so. The applicant's application for interim permission was refused, Etherton J stating (at [16]–[17]) that the applicant should have known from the date that he signed the disqualification undertaking that he would need permission to continue to act as a director of the companies in respect of which he had applied for permission, yet he had delayed in making his application:

'[T]he application has been delayed... but plainly there was an urgency which should have been appreciated... when the undertaking was given... I have to balance the public interest against the private interests of Mr Hease. I have to judge the significance of the period of 7 days in circumstances in which there is already a finance director (albeit on holiday), and the perceived harm to the companies, if no interim relief is given during the short period, is the possible damage to the reputation of the companies by virtue of Mr Hease having to resign and then be reappointed in due course, if appropriate. I have to take into account the public interest in circumstances in which a disqualification undertaking has been given for a period of 6 years, the Secretary of State is understandably not

in a position to advise the court of matters which may be relevant to the decision whether or not to grant the application, whether for 7 days or longer, and the Secretary of State opposes even interim relief for 7 days on that basis. I am quite clear in my own mind that, in those circumstances, it is proportionate that I favour the public interest over the private interest of Mr Hease.'

Proper timing and preparation of the application is, therefore, vital to its success. An applicant must not leave the preparation of the application to the last minute. He must proactively take steps to gather the information necessary to support the application, at the very latest, as soon as he considers that he may need the permission of the court to allow him to work in the corporate sphere. Whilst the court may be prepared to review any refusal if fresh evidence is made available to it on a subsequent application, the applicant may have to resign his directorship and desist from acting in the management of the company in the meantime. In addition, there would be no guarantee that the court would be willing to accommodate an early hearing of the renewed application where the material which the applicant should have produced in support of the original application has been delayed as a result wholly, or even partly, on account of the failure on his part to prepare his case properly. ■

The views expressed in this article are those of the authors alone and are given in their personal capacity.

Further reading

- LexisPSL Restructuring & Insolvency; Directors and insolvency; Directors' disqualification; What is prohibited for a disqualified director?
- LexisPSL Restructuring & Insolvency; Directors and insolvency; Directors' disqualification; Checklist of matters that must always be included in any application for permission under section 17 of the Company Directors Disqualification Act 1986