OUTER HOUSE, COURT OF SESSION

[2026] CSOH 77

P1090/24

OPINION OF LORD LAKE

in the Petition of

THE SECRETARY OF STATE FOR BUSINESS AND TRADE

Petitioner

for

a disqualification order under Section 6(1) of the Company Directors Disqualification Act 1986

against

GARRY PETTIGREW

Respondent

Petitioner: Tosh; Womble Bond Dickinson LLP
Respondent: Party respondent

20 August 2026

Introduction

[1] In this petition, the Secretary of State for Business and Trade seeks a disqualification order under the Company Directors Disqualification Act 1986, section 6(1), against Mr Pettigrew in respect of his conduct as a director of Healthcare Environmental Services

Limited ("HES"). In terms of section 6, the court must make an order against a person (i) who was a director of a company which has at any time become insolvent and (ii) whose conduct as a director makes the person unfit to be concerned in the management of a company. There are other bases on which disqualification may be required but these are the ones relevant to this matter.

[2] There is no dispute that first requirement is satisfied. It was agreed by joint minute that Mr Pettigrew was a director of HES from the date it was formed, 26 March 1997, and remained a director up until the making of a winding up order on 25 April 2019. There was unchallenged evidence that at the time of the winding up order, the liabilities of HES exceeded its assets by £15,424,568.22. The dispute between the parties concerns the second requirement - whether the defender's conduct as a director makes him unfit to be concerned in the management of a company. In terms of section 12C of the 1986 Act, in determining whether this is established regard must be had to the factors specified in Schedule 1. These factors include

- The extent to which the person was responsible for the causes of any material contravention by a company or overseas company of any applicable legislative or other requirement. (Paragraph 1)
- Where applicable, the extent to which the person was responsible for the causes of a company or overseas company becoming insolvent. (paragraph 2)
- The nature and extent of any loss or harm caused, or any potential loss or harm which could have been caused, by the person's conduct in relation to a company or overseas company. (paragraph 4)
- Any misfeasance or breach of any fiduciary duty by the director in relation to a company or overseas company. (paragraph 5)

- Any material breach of any legislative or other obligation of the director which applies as a result of being a director of a company or overseas company. (paragraph 6)

[3] In support of the case against him, the petitioner relies on transactions which Mr Pettigrew caused the company to enter into between October and December 2018. The details of the transactions which the petitioner founds upon were explained in evidence as follows:

(a) On 2 October, both Mr and Mrs Pettigrew transferred their shares in HES to HEG Sustainable Solutions Limited (HEG), a company in which Mr Pettigrew held 60% of the shares and Mrs Pettigrew held the remaining 40%. Both Mr and Mrs Pettigrew were directors of HEG at all relevant times.

(b) Following the transfer of shares but still on 2 October, HES declared a dividend of £2,498,000 which was payable to HEG. In the books of the companies this resulted in a debt of that sum owed by HES to HEG.

(c) HES then transferred assets and a Miscellaneous Expenses Credit account to HEG to meet the liability that had arisen from the declaration of the dividend. The assets transferred were ones without which HES was unable to conduct its business.

(d) Between 2 October and 4 October, Mr and Mrs Pettigrew transferred an outstanding directors' loan account due to them from HES to Starryshaw Consultants Limited. This shareholding in this company was distributed the same way as for HEG and, again, both Mr and Mrs Pettigrew were directors.

(e) Assets valued at £1,737,850 were transferred from HES to Starryshaw in repayment of the loan debts.

(f) The transfer of assets to Starryshaw was reversed at the end of October 2018.

(g) On 5 December 2018, assets with a value of £648,393 were transferred from HEG to HES and assets with a value of £1,130,198 were transferred by HES to Starryshaw.

The details of the transactions were given in the evidence of James Stephen, one of the liquidators of HES, and Robert Clarke, Chief Investigator with the Insolvency Service and were not disputed. Mr Pettigrew did dispute that, when they were viewed in context, they demonstrated that he was unfit to be a director. Much of the evidence I heard was concerned with establishing the context in which the transactions took place and Mr Pettigrew's state of knowledge.

[4] Having identified the issue that I have to consider, it is appropriate that I make clear some issues that do not arise for the purposes of my decision. As I have indicated above, it was necessary for the petitioner to show that HES had become insolvent. Mr Pettigrew wished to lead evidence and argue that the insolvency was brought about by the acts of others. In particular, he sought to show that it was the result of actions taken by persons employed by the Environment Agency, the NHS and the United Kingdom Government acting through the Cabinet Office and COBRA committees. He has strong feelings on this issue and goes so far as to state that there was a conspiracy against the company. He considers that the Environment Agency treated HES unfairly by giving its competitors more favourable treatment. He considers that the conduct of NHS bodies exacerbated difficulties that HES faced in conducting its business. He considers that when the matter was escalated to government level, individuals who were involved expressed a desire to destroy his

business. As I explained during the hearing of evidence, these matters are irrelevant to the decision I must make. This is not an inquiry into the causes of and responsibility for HES becoming insolvent. This is not a case in which the disqualification is sought on the basis that there was something about the business of the company which meant that it was inevitable that it would fail or that the conduct of the business and affairs of the company was itself so poor as to demonstrate unfitness. The petitioner's case centres on transactions entered into when the company when, as it is averred,

> "the Defender knew, or ought to have known, that HES was verging on insolvent as a result of facing the loss of contracts, including the contracts with the various NHS authorities, and severely restricted trading conditions due to breaches of its [Environment Agency] permit conditions".

The reasons *why* the company was in this state are not part of the basis on which the petitioner seeks to establish unfitness. What matters is whether the petitioner has established that the company was in this state. If not, the case will fail. If it is proved it was in that state, the causes of it being in that state cannot render the transactions acceptable.

The proof

[5] The action was raised in Hamilton Sheriff Court but was remitted to the Court of Session. I heard a proof before answer in which evidence was heard over 6 days with submissions being heard on a seventh day. The petitioner led the following witnesses:

(a) James Stephen. Mr Stephen is an Insolvency Practitioner and was appointed as liquidator of HES jointly with William Tait.

(b) Fiona Daly. Ms Daly works in the NHS in England. When issues arose as to whether HES would be able to continue to perform its obligations under contracts with NHS bodies, she was involved in meetings to consider what actions should be taken.

(c) Alison Keith. Ms Keith was the solicitor instructed by the company. The defender objected to her evidence on the basis that it was subject to legal professional privilege. However, the party with the right to invoke that privilege was the company and the decisions for the company were in the hands of the liquidators after the making of the winding up order. As the liquidators had called Ms Keith to give evidence, privilege had been waived by implication.

(d) Robin Bispham. Mr Bispham works for the Environment Agency and was involved in monitoring compliance by HES with permits under which they operated.

(e) John Mackintosh. Mr Mackintosh is employed by HSBC who were the bankers for HES and had lent them monies secured by a floating charge.

(f) Robert Clarke. Mr Clarke is a Chief Investigator within the Insolvency Service. He was involved in the investigation of the affairs of HES.

In addition to giving evidence himself, the respondent led evidence from:

(a) Keith Crozier. Mr Crozier has been the UK General Manager for HES.

(b) Wendy Raynor. At the time of the events concerning HES, she was employed by NHS Scotland where she was the National Lead for healthcare waste. At the time of the proof she was on secondment to the Scottish Government.

(c) Kay Thomson. Ms Thomson was a director at Scott-Moncrieff, Chartered Accountants, dealing with corporate finance and provided advice to HES / Mr Pettigrew.

(d) Ian Buchanan. Mr Buchanan worked from SEPA in the Operational Directorate and was involved in high-level discussions regarding HES.

(e) Janet Arkle. Ms Arkle worked for HES as its credit control supervisor. She gave evidence that it has been a successful and profitable company prior to the end of 2018.

The parties' contentions

[6] As is clear from the averment quoted above, the petitioner contends that the transactions put assets beyond the reach of creditors in breach of fiduciary duties owed to HES at a time when Mr Pettigrew knew or ought to have known that it was facing the loss of contracts, severely restricted trading conditions and insolvency. It is claimed that the respondent was aware that there was no reasonable likelihood that HES would be able to return to a position in which the Normanton site complied with the conditions in a permit from the Environment Agency ("EA") by the date required, that this meant that he should have known that enforcement action to suspend the permit was likely and that it would be unable to fulfil its contracts with the NHS leading to their cancellation. The petitioner contends that Mr Pettigrew knew or ought to have known that insolvency was imminent or at the least it was very probable that HES would enter into an insolvent liquidation and that in that situation, his duty was to act in the interests of the creditors as a whole (*BTI 2014 LLC* v *Sequana SA* [2024] AC 211). The transactions were carried out with regard to the interests of the respondent and his wife and denuded the company of its assets and ability to trade to the detriment of its creditors. Further, it is claimed that the transactions were carried out without the consent of HES's bankers, HSBC, who held fixed and floating securities over the assets.

[7] The respondent contends that HES was solvent on a balance sheet and on a cash flow basis, both before and after the transactions, and that it cannot be said that at that time insolvent liquidation was probable with the result that the obligation to act in the interests of the creditors identified in *Sequana* does not arise. He submits also that the allegation of unfitness collapses if insolvent liquidation was not probable at the date of the transactions. He contends that the transactions had the effect of reducing liabilities to the same value as the assets transferred and that they did not amount to an extraction of value. They did not amount to a preference or gratuitous alienation and there was no intention to prejudice creditors. He contended that the transaction was not in breach of a floating charge and the fact that the bank did nothing to challenge the transactions is relevant. He argues that the fact that after the transactions he caused the company to enter further transactions which resulted in transfers to it is not consistent with any intention to strip value from the company. HES had continued to trade after the transactions and had pursued recovery of debts while, at the same time, efforts had been made to find a buyer for the company. He noted that there had been an expression of interest and argued that this demonstrated that the purchaser did not see liquidation as inevitable. He said that HES still had permits at the time of the transfer and the regulatory concerns did not render liquidation probable. If a site was to become unavailable, HES could continue to provide its services from other sites. He contends that the petitioner is making use of hindsight considering events which followed the transactions and that that it not permitted.

Scope of director's duties

[8] Both parties rely on the decision in *Sequana* in support of their case. It determines the scope of the duties of a company director and, as those duties are a matter which must be

considered in determining whether unfitness has been established, it is the appropriate place to begin. In *Sequana*, the claimant sought sums representing dividends which it was claimed the directors had caused the company to pay in breach of a duty owed by them to consider the interests of its creditors. All the judgments affirmed earlier Court of Appeal authority that there was such a duty and went on to consider the point at which it arose. It was common to all the judgments that it was not enough that there was a "real risk" of insolvency of the company. As to when the duty did arise, there are subtle differences between the various judgments, and this may explain why both parties seek to rely on this case. As the issue of whether Mr Pettigrew as a director owed duties to the creditors lies at the heart of the allegations against him, it is necessary to consider the issue in a little detail.

[9] In *Sequana* Lord Reed examined the rationale for the rule that had begun to evolve in the decision of the Court of Appeal in *West Mercia Safetywear Limited* v *Dodd* [1988] BCLC 250 to the effect that in some situations when performing their duties directors must have regard to the interests of the creditors. He noted that this was based on the idea that, although it is necessary to respect the separate legal personality of the company, the creditors have an economic interest in the company distinct from that of its members. As the financial position of the company worsens the creditors have an interest in the assets of the company to which they may require to have recourse in an insolvent liquidation or administration. In that situation the directors should manage the company affairs in a way that takes that interest into account and avoids prejudicing it (Lord Reed, paragraphs 45 and 46). The extent to which the interests of creditors must be taken into account varies according to the company's financial position. When the company is "financially stable", the interests of the company are synonymous with the interests of its shareholders, and the interests of creditors need not be considered (Lord Reed, paragraph 47). As the financial position

changes, there comes a time when the creditors have an interest and, as the position deteriorates further, there may come a time when the creditors have the sole or predominant interest (Lord Reed, paragraphs 48-51, 77-81).

[10] For reasons which are considered below, in this case it is not necessary to establish the point at which the creditors interests are the *only* ones that the directors need to consider and the focus is on identifying at what point it becomes necessary to consider the interests of the creditors at all. Lord Reed considered that this point should be determined by reference to the rationale for the rule that creditor's interests must be considered – that they may need to look to realisation of assets in an insolvent liquidation or administration to achieve payment of sums owed to them (paragraphs 12 and 48). Having regard to that, the duty to have regard to the interests of creditors arises,

> "when the company is insolvent or bordering on insolvency, or where an insolvent liquidation or administration is probable, or where the transaction in question would place the company in one of those situations." Paragraph 12).

He considers this in more detail in paragraphs 51, 77 and 81. Three matters are apparent from the passage quoted. The first is that the use of the term "bordering on insolvency" is broader than bordering on liquidation. Lord Reed said that "insolvency" should be understood as a reference to meeting the tests in section 123(1)(e) and (2) of the 1986 Act. The second is that this expression contemplates that the company does not have to have reached the stage of insolvency for the duty to apply. The third is that the effect of the transaction in question should be considered in deciding whether the test is met.

[11] Lord Reed said that he understood the passage quoted represented the views of the other members of the court (paragraph 12), but it is useful to consider the other judgments for completeness. Lord Briggs and Lord Kitchin stated that "once liquidation is inevitable" directors could be in breach of duty "if they do not treat minimising loss to creditors as their

paramount consideration" (page 148). They also note that while liquidation makes the creditors interests paramount, insolvency itself may not (paragraph 165), and they consider in detail in what circumstances the creditors' interests may be paramount (paragraphs 166 to 175). They go on to note that prior to that time, the interests of creditors must be considered and given "appropriate weight" (paragraph 176). What that weight should be will depend on the facts and how likely it is that liquidation will be avoided. They state that they consider that for the duty to arise, there should be imminent insolvency or the probability of an insolvent liquidation about which the directors know or ought to know (paragraph 203). "Imminent insolvency" is said to mean one "which the directors know or ought to know is just round the corner and going to happen". Lord Hodge said he agreed with Lord Briggs but states the same test as Lord Reed – whether the company is insolvent or bordering on insolvency (paragraph 207). Lady Arden says that the duty to consider the interests of creditors applies to directors of "financially distressed companies" (paragraph 283) although she went on to say that the interests of creditors would supplant the interests of shareholders altogether only when the company was irreversibly insolvent making an insolvent liquidation or administration unavoidable (paragraphs 305 to 311). It is apparent that all these views adhere to the underlying rationale expressed by Lord Reed and recognise that a requirement to consider creditors' interests arises before the stage at which they are to be the only interests considered. The references to insolvency being "imminent" should be seen in the context of the facts of the case in which there was a gap of 10 years between the payment of the dividend and the winding up of the company.

The interests considered in entering into the transaction

[12] Before considering the financial state of the company, it is useful to consider the circumstances of the decision to enter into the transactions narrated in para [3] above and what matters were considered.

[13] Ms Keith gave evidence that when Mr Pettigrew phoned her on 26 September 2018, he said that business was "not going particularly well at the moment" and that there were "significant challenges". He referred to the fact that Enforcement Notices had been served on HES by the EA. Her evidence was that Mr Pettigrew said that he wanted to "protect the various parts of the business". In a telephone conference call on 1 October 2018 with Ms Keith and also Ms Thomson, Mr Boyd, and Mr Macdonald, Mr Pettigrew said that he wanted the transaction done the next day because he feared that the EA were going to declare an emergency. The note of the call records that Ms Keith expressed her concern that he did not have the consent of HSBC, HES's bankers, but that Mr Pettigrew was clear he wanted to push on regardless. The issue of speaking to the bank also arose in a conference call the following day between Ms Keith, Kay Thomson and David Boyd (ie without Mr Pettigrew). In her note of the call Ms Keith records that she considered that it was a very high-risk strategy to proceed without at least notifying HSBC in advance. The note of the call records that Ms Keith said that she had queried the logic of divesting HES of its assets with Mr Pettigrew. These conversations were all recorded in a file notes made contemporaneously, and I accept Ms Keith's evidence based on them.

[14] The evidence from Mr Mackintosh was to the same effect. He said that at the meeting at which the bank was told about the transactions, Mr Pettigrew said that they were done to protect his position albeit he also claimed it was to protect the position of the bank. It is not clear how moving all the assets out of a company where they were subject to a

floating charge in favour of the bank to another in which the bank had no security was protecting the bank's position but that is not material for this purpose. What does matter is the transaction was motivated by a desire to "protect" the assets. This is supported further by Mr Mackintosh's evidence that Mr Pettigrew said that he would transfer the assets back once the problems HES faced arising from cancellation of contracts and adverse publicity had been resolved. He said that the transfer back would happen with the resolution of contractual issues with the NHS bodies or a successful sale of the company had been achieved. I accept the evidence of Mr Mackintosh in these regards.

[15] The general tenor of all the communications is that Mr Pettigrew was concerned at the fortunes of HES and that the transactions were intended to "protect" the assets. The issue that arises is, protect them from what? In the context, the clear inference is that the protection is sought from creditors and the urgency arose because the EA were about to take action that would have a materially adverse effect on the position of the company.

[16] During cross-examination of Ms Keith, Mr Pettigrew sought to establish that his motive for the transactions was to be able to make a payment or payments to his wife as part of a divorce settlement. I accept from the evidence that he was separating from his wife but do not accept that the transactions were motivated by a desire to provide funds for her. If this had been the intention, I would have expected there to be some mention of it in the contemporaneous records of his dealings with Ms Keith but there is none. Further, it is not apparent how a transfer of assets to other companies in which his wife was also a shareholder would have assisted in relation to making financial provision. Also, such a motive is inconsistent with his expressed desire to protect the various parts of the business and to return the assets to the company in future.

[17] I conclude that the motive for entering into the transactions was to ensure that assets were put beyond the reach of the company's creditors, a liquidator or an administrator. Not only were the legitimate interests of the creditors not protected, the whole purpose of the transactions was to put creditors in a worse position. It is for that reason that when examining *Sequana* I have considered only the point at which it becomes necessary to consider the interests of creditors and not the later point at which the creditors' interests are paramount or supplant the interests of the shareholders. If there was *any* duty to consider the interests of the creditors, it was breached. The issue is therefore whether there was such a duty and the answer to that question requires consideration of the position of the company at the time of the transactions.

The affairs of the company prior to the transactions

[18] To understand the position of HES at the time, it is necessary to examine briefly the nature of its business. There was no controversy as to this in the evidence. HES carried on the business of the collection and disposal of waste. The business of the company had been built up since the company's formation. It had started with five employees and grew to having hundreds of staff providing services to approximately 35,000 customers. Of particular relevance to this action is that it provided services for the collection and disposal of all regulated medical waste in Scotland and met 30% of the demand for collection and disposal regulated medical waste from hospitals in England. The collection of healthcare waste was a regulated activity. In Scotland the company operated under a permit from the Scottish Environment Protection Agency and in England the Environmental Permit required for their activities was issued by the Environment Agency. A permit was required for each of the sites from which HES conducted its activities. In relation to the sites in England, the

issue and regulation of permits was governed by the Environmental Permitting (England and Wales) Regulations 2016. The permits obtained by the company contained various conditions which the company was required to observe.

[19] The means that could be used by HES to effect disposal of waste depended on its hazard classification. The evidence was focused to a large extent on clinical waste in respect of which the disposal had to be by way of incineration. For safety reasons this must be carried out at a higher temperature than incineration of ordinary domestic waste. This and the need to have equipment to control the resulting emissions meant that this process required specialist incinerators and could not be carried out in equipment commonly used by local authorities to dispose of domestic waste. At the time of the events in question, HES did not have any facilities of its own to carry high temperature incineration nor did it have long term contracts with third parties to carry out this work. Instead, the company purchased capacity for high temperature incineration in an *ad hoc* manner in what was referred to as a "spot market". At the time of the events in question HES was commissioning a plant in Shotts which would be capable of carrying out high temperature incineration, but that process has not reached a stage where it could be used.

[20] Of particular relevance to the events considered at the proof was a site HES operated at Normanton in North Yorkshire. This was what was known as a "transfer station". When waste is collected from an NHS site, it could be taken straight to a location for final disposal but may also be taken to a transfer station where it is combined with waste from other sites before being sent for various forms of appropriate disposal. This was the operation carried out at Normanton. The permit for the operation of that site stipulated that no more than 70 tonnes of waste could be stored there at any time and that waste could not be stored on site for more than 7 days.

[21] The evidence both from Mr Pettigrew and Mr Bispham of the EA was that HES was largely compliant with the conditions in the permit for Normanton prior to 2018. However, the position deteriorated significantly throughout 2018.

(a) In terms of the 2016 Regulations the EA are required to make periodic inspections of regulated facilities. An inspection carried out of the Normanton site by the EA in January 2018 revealed non-compliance with permit conditions. Waste was being stored for longer than the period of 7 days allowed and there was a concern that the total quantity of waste stored exceeded 70 tonnes. This was not disputed by Mr Pettigrew.

(b) The record of a further inspection in March 2018 states that the amount of waste on site was approximately double the amount permitted. In his statement, Mr Pettigrew said that the EA "did not seem too bothered by this". Having regard to the enforcement action which followed, I reject his evidence in this regard.

(c) In May 2018 the EA started an enforcement action against HES. The 2016 Regulations make provision for the EA to issue Enforcement Notices (Regulation 36) and Suspension Notices (Regulation 37). An Enforcement Notice must identify the matters which the Regulator considers amount to a contravention of the permit conditions, specify the steps that must be taken to remediate and the period within which those steps must be taken. A Suspension Notice may be served if the regulator considers that there is a contravention of a permit leading to a risk of pollution. If a suspension notice is served, the environmental permit ceases to have effect, and it would no longer be lawful to continue with the activity in question. The initial enforcement notice served in May required HES to restore the Normanton site to compliance with the permit conditions no later than 25 September 2018. A second enforcement notice was served in July in respect of waste at Normanton that was not being stored within a building as required by the permit. The Notice required that HES remedy this by 13 August 2018. Mr Pettigrew did not dispute the service of the notices or their contents.

(d) At the site operated by HES at Bradford, there were similar issues where there were excessive quantities of waste being stored and waste being stored outside buildings leading to service of enforcement notices.

(e) A meeting took place on 20 July between representatives of the EA and representatives of HES, including Mr Pettigrew. Mr Pettigrew was told by the EA representatives that they were minded to suspend in part the Normanton permit if the quantity of waste stored was not brought into conformity with the permit. This was reiterated in a letter dated 2 August 2028. In a reply, Mr Pettigrew accepted that the standards at Normanton were unacceptable but he said that if the EA suspended the Normanton permit, it would give him no alternative but to close that site and other sites.

(f) Prior to 20 August, the EA contacted NHS to notify them that they were minded to suspend permits as they were aware that doing so could affect NHS operations. This was a concern because, as Ms Daly explained, it was necessary for Normanton to be operational in order to maintain "business as usual".

(g) Ms Daly and others attended a meeting with representatives of the EA and representatives of HES, including Mr Pettigrew, on 20 August 2018. At the meeting Mr Pettigrew said that the problem was that there was no capacity for high temperature incineration in the market. This was not accepted by the NHS personnel who, by phoning around waste management firms on a no-names basis, had identified capacity that might be used to remedy the situation at Normanton. Mr Pettigrew instead sought an increase in the permitted quantity of waste that could be stored at Normanton. He said that HES were not being treated in the same way as other waste management companies. He was not willing to use the incineration capacity that had been identified by the NHS.

(h) Mr Pettigrew admitted in his evidence that by September 2018 the waste stored at Normanton was 100 tonnes over the permitted capacity. A meeting took place on 12 September 2018 attended by Mr Pettigrew and Mr Crozier for HES and representatives from the Cabinet Office, the Crown, the NHS and DEFRA. Mr Pettigrew said that HES would not meet the deadline for restoring Normanton to compliance with the permit conditions. At this meeting, Ms Daly presented a plan to Mr Pettigrew which would entail waste being moved to and disposed of by other operators who would be paid by HES. Mr Pettigrew rejected this plan. He said that it would make it impossible for the business to continue. He was invited to identify what changes would have to be made to the plan to make it acceptable but indicated that there was nothing that could be done that would make the plan workable for HES. He described the proposed plan as "commercial suicide" and said that it would not happen. There was no significant dispute in relation to what had taken place at this meeting.

(i) Mr Bispham gave evidence that there were occasions in 2018 in which the EA identified that anatomical waste was not being stored in refrigerated conditions at Normanton, Newcastle and Bradford as required by permit conditions. Although Mr Pettigrew appeared to reject this and said the allegation was completely false, he also said that the situation had been "exaggerated in press reports". In his oral evidence at the proof he said, "there was no great volume of body parts". In my view these are recognition that at least some body parts were being stored in non-refrigerated conditions and undermines his bald denial of the claims. I accept the evidence of Mr Bispham in this regard and reject Mr Pettigrew's denials. Mr Bispham also explained that further Enforcement Notices were served on HES during 2018 in respect of odour and storage of excessive quantities of waste at its Newcastle site. Mr Crozier said that by 18 September HES was exposed to daily threats of site closures.

(j) HES did not comply with the Enforcement Notice served in respect of Normanton by bringing the site back to compliance by the date required - 25 September 2018. As a consequence, on 26 September 2018 the EA served a notice on HES partially suspending the permit with effect from 3 October 2018.

[22] Based on the above, I reject Mr Pettigrew's submissions that HES still had the permit at the time of the transactions as a Notice that would suspend the Normanton permit had already been issued earlier. Mr Bispham gave evidence of the various notices having been served on HES and in that there was no challenge to this part of this evidence I conclude that the notices were sent. Even although the notice of 26 September 2018 was only a partial suspension of one site, it was apparent that it would have major effects on HES. As to the

effect of the Notice, Mr Pettigrew himself had said in his letter of 3 August 2018 that the partial suspension would lead to him closing down Normanton and other sites. Ms Daly considered that without Normanton in operation, it would not be possible to maintain BAU – business as usual.

[23] Even prior to service of the Suspension Notice, I consider that the circumstances were such that Mr Pettigrew was aware that action by the EA was inevitable and that at least a suspension would be imposed. Nothing had been done to restore the Normanton site to conformity with the permit condition and Mr Pettigrew had been told in the meeting of 20 July 2018 and by letter that if nothing was done, suspension would follow. It appears that it was being told of this that led to his threat to close the site. Mr Pettigrew may have hoped that, faced with his refusal to change his position and his warnings of the dire consequences of suspension, the EA would "blink" and not impose a suspension. There was, however, never an indication from the EA that they would change their position. In view of their role and the interests they are required to protect, this was not surprising. I conclude that at the time of the transactions, Mr Pettigrew was aware that a partial suspension of the Normanton permit was inevitable. In his evidence he said that this would not have meant that HES was unable to perform its duties under the contract with NHS bodies. He said that the company had contingency plans which would mean that it could continue to operate. This is inconsistent with the terms of his own letter in August 2018 and inconsistent with the ongoing deterioration in the position at the company's sites and the number of Enforcement Notices being served. I conclude that by 2 October 2018, Mr Pettigrew was aware that the partial suspension of the permit for Normanton that was imminent would make it very difficult for the company to fulfil its contractual obligations. In that situation, it ought to have been apparent to him that HES would be subject to claims for breach of contract and or

repayment of sums already paid by NHS bodies and that these would have a material adverse effect on the finances of the company. As the suspension was to take effect on 3 October 2018, I infer that this was the event that Mr Pettigrew described in the conference call as the emergency which he was concerned about and which would arise the following day.

The effect of the transactions

[24] Mr Stephen gave unchallenged evidence that the effect of the transactions was that 70% of the plant, machinery and motor vehicles belonging to HES had been transferred away from the company and that this rendered the operation of some of the company sites unviable. Without these assets, HES was in a position where it could not meet its contract obligations. Mr Pettigrew sought to stress that the assets had not been taken off site. This is true but it ignores the fact that HES had lost ownership of them and no longer had an entitlement to use them. There was no evidence of any agreements having been put in place between HES and the new owners to ensure that access to the assets could be maintained. The transaction removed the ability of the company to earn revenue under the contracts and meant that it would face claims for breach of contract and cancellation of contracts. Liabilities would inevitably mount with no means of generating income to meet them. Without the ability to generate revenue, the position of the company was bound to deteriorate until its assets were wholly eroded. Insolvent liquidation or administration was bound to follow although at the time of the transactions it would not be possible to state with accuracy when that would occur. The inevitability is a significant factor. In *Sequana* the liabilities of the company that had paid the dividend were not determined by its activities as it did not trade. It existed only to meet the liabilities for environmental clean-up

costs, and the liquidation came about because the liabilities were much greater than had been estimated. The payment of the dividend did not contribute to the company incurring the liabilities. Here, by contrast, the transactions resulted in a situation in which the accumulation of liabilities to customers was inevitable.

[25] One of the key effects of the transactions was on the relationship between HES and its bank, HSBC. In accordance with Mr Pettigrew's express wishes, HSBC were not told of the transactions until after they had been carried out. It is apparent from the evidence of Mr Mackintosh that when the meeting with the bank at which they were informed was arranged, the bank did not realise they were going to be told that the assets have been transferred out of the company. Mr Macintosh said that they were asked to attend the meeting to consider the situation arising from the fact that the company might suffer financial difficulty as a result of losing contracts. I would note in passing that this indicates that Mr Pettigrew, having given this impression to Mr Mackintosh, was aware of the danger of loss of contracts and financial difficulties that would result and that it was imminent.

[26] When representatives of the Bank were informed on 10 October 2018 of what had been done, the bank issued a reservation of rights letter to HES on 12 October 2018. Although the assets were subject only to a floating charge, it is apparent from the letter that what had been done was in breach of the terms of the agreement between them it was said to amount to a Termination Event as defined in the agreement. The letter indicates that that the bank would not at that time exercise their contractual rights that flowed from this, but they were not waived and the Bank reserved their entitlement to exercise them in future. The Bank required that HES appoint PWC, initially to carry out a security review but later to seek a buyer for the business. There was some ambiguity in the evidence about exactly when PWC were appointed but it is apparent that it was at or about the time the bank were

told of the transaction and that their role developed to be one in which they would facilitate a sale of the business of HES.

[27] Although the Bank did not seek to exercise any remedies under its agreement with HES when it heard of the transactions and did not raise court proceedings to restore the position, Mr Mackintosh explained in his evidence that they had taken the view that a challenge in the courts would take too long and that as long as HES were cooperating with the attempts to find a buyer, they should adopt that route. I accept his evidence in this regard. The fact that no proceedings were taken does not therefore imply in any way that the Bank thought the transaction was acceptable or appropriate. It was merely a pragmatic response to the situation presented to them.

[28] While the transactions imperiled the relationship that HES had with their bank it cannot be said that it caused a rupture. There was concern as to cash flow in October and HES required additional finance to meet problems - it first required a short-term facility of £1.3m and, after that was repaid when it fell due, it required a further advance of £1.8m. The Bank provided these facilities although the advance of £1.8m was not repaid prior to the liquidation. Following the winding up order, the Bank was paid in full but to date no dividend has been paid to ordinary creditors although that might change if monies are recovered from court proceedings involving NHS bodies.

Other issues raised by the parties

[29] Mr Pettigrew submitted that later transactions in which monies were transferred to the company were inconsistent with there being any intention on his part to denude it of assets. He claims that the fact that Mitie made payment of £550,000 to HES for bins sold to them demonstrates his desire to inject capital back into the business. I reject his evidence in

this regard. Mr Clarke explained that the bins were indeed sold but the payment was made to HES only on the insistence of Mitie, the buyer. He explained that Mitie insisted that the invoices for the bins came from HES as they were of the view that HES owned them. Although Mr Pettigrew caused invoices to be issued in the name of HES they originally had payment details for a different account. It was Mitie who had insisted on making payment to the account they were familiar with. The defender also submitted that there was a further payment of £400,000 made to HES. I do not consider that the defender has established this but, even if he had proved both payments, in view of the clear evidence as to his motives referred to above, it would not make any difference to my conclusion that he was motivated by a desire to put assets where they were beyond the reach of creditors.

[30] The position is the same in relation to Mr Pettigrew's claim that his efforts to recover sums owed to HES mitigates the effect of the transactions or demonstrates a desire on his part to act in the interests of the company. Nothing done after the transactions undermines the clear evidence of motive at the time and immediately after they were undertaken and the evidence of their effect.

[31] Mr Pettigrew submitted that the fact that an offer was made for the business by a third party after the transactions and before it ceased trading meant that liquidation was not inevitable. I accept that such an offer was made but it was indicative only and was subject to due diligence. This is sufficient to indicate that the offeror was not aware of the financial position of the company. I do not consider that it is possible to reach any conclusion as to solvency or the prospects for the company on the basis of the offer

Assessment of fitness

[32] In my view, Mr Pettigrew acted in breach of his fiduciary duties as a director in causing the company to enter into the transactions. At the time they were entered into, and having regard to the effect of the transactions themselves, the company was at least bordering on insolvency. It was readily foreseeable that it would not be able to pay debts as they fell due and/or that its liabilities would exceed its assets. The situation in which the company was deprived of its ability to generate revenue or even to meet its existing contractual obligations meant that it was inevitable that it would enter an insolvent liquidation or administration. It was Mr Pettigrew's concern that this was going to happen even in the absence of the transactions which motivated him to carry them out. This means that this is not merely a situation in which he failed to consider the interests of the creditors, he acted with the intention of causing prejudice to those interests he was required to consider and, having regard to their practical consequences, put the company on a path which mean that insolvent liquidation or administration was probable.

[33] The circumstances were such that Mr Pettigrew was obliged to consider the interests of the creditors and acting instead so as to prejudice those interests is an egregious breach of the duties of a director. This weighs heavily against Mr Pettigrew when considering paragraph 5 of Schedule 1 to the 1986 Act noted in para [2] above. In addition to that, the petitioner relied on the other matters as falling within the other issues I am required to consider. The first is that Mr Pettigrew caused HES to operate in breach of its permit and therefore in breach of a legislative requirement. I agree that this is a matter which tends to show unfitness. Any breach of a permit intended to regulate disposal of controlled waste where issues of public health might arise is a serious matter. A short-term breach that is remedied when it is brought to the attention of the director might not found any inference of

unfitness. Here, however, the breach took place over a number of sites and over a sustained period. When notices were served and Mr Pettigrew was told that the permit might be suspended, his response was to indicate he would not comply and to attempt to intimidate the EA with the possible consequences of enforcement action. He was given the details of businesses whose services he could have called on to remedy the position and return to compliance, but he refused to do so. The basis for this refusal was the costs to HES that would result.

[34] The second further issue from the Schedule concerns the fact that Mr Pettigrew implemented the transactions without having sought the consent of the secured lender. While this clearly was the case and it could have resulted in the bank withdrawing lending support and putting the company into administration, this is not what transpired. I consider that rather than being seen as evidence of unfitness on its own, this is better seen as demonstrating the flagrancy of his desire to disregard his duties to creditors and to proceed regardless to suit his own interests. Although Ms Arkle said that HES remained able to meet its debts as they fell due until December 2018, it is apparent that the company was under some financial pressure earlier as referred to in para [28] above. In the absence of evidence considering in any detail the factors that contributed to the insolvent liquidation, although the effect of the transactions was such that they did contribute, I cannot assess the extent to which various factors contributed.

Conclusion

[35] Having regard only to the breach of fiduciary duty in relation to the transactions and causing the company to remain in breach of its environmental permits, I consider it has been

established that Mr Pettigrew's conduct as a director makes him unfit to be concerned in the management of a company.

[36] In this situation I am required to impose disqualification. The issue is for what period it should be imposed. Having regard to the brackets for potential periods discussed in *Re Sevenoaks Stationers (Retail) Limited* [1991] Ch 164, I consider that the circumstances of this case put it in the middle bracket of five to ten years –cases which are serious which do not fall within the top bracket which might related to cases where there has been fraud or it is a repeat disqualification. In this regard, I rely on the following matters:

(a) The flagrant nature of the breach to seek actively to prejudice the interests of creditors.

(b) Mr Pettigrew's denial of the breach of his duties

(c) The fact that while the action was still before the sheriff court, Mr Pettigrew was found to have been in contempt of court by reason of having photographed witnesses, posting the photographs on social media and making insulting comments.

(d) Although the disqualification undertaking given by Mr Pettigrew's wife and fellow director lasted for just three years and six months, she had acknowledged that her conduct fell below the standards expected. In addition, while as a director Mrs Pettigrew bore responsibility for the HES entering into the transaction, it was apparent from the evidence that I heard that Mr Pettigrew was the principal architect of them.

[37] Although the case falls within the middle bracket, I consider that the nature of the breach by Pettigrew of his duties is such to mean that it is at the top end of that bracket. In these circumstances I conclude that disqualification for a period of 9 years is appropriate