

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

[2019] SC EDIN 27

NOTE BY SHERIFF PETER JOHN BRAID

in

SUMMARY APPLICATION IN TERMS OF SECTION 17 OF
THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986

re

JOSEPH MENG LOONG LEE, residing in Kent

Pursuer

Pursuer: O'Brien; Shoosmiths
Defender: Scott; Shepherd+ Wedderburn

Edinburgh, 12 March 2019

Introduction

[1] In this summary application, the pursuer, who is disqualified from acting as a company director without leave of the court, seeks an order in terms of section 17 of the Company Directors Disqualification Act 1986 ("the 1986 Act"), granting him leave to continue to act as a director, and participate in the management, of certain companies. He originally sought leave in respect of 13 companies but, during the course of proceedings, that has been whittled down to the following six companies (unless otherwise stated, all are incorporated under the Companies Acts and all have their registered office at 10 Craigmillar Park, Edinburgh):

- Consensus Capital Group Limited (company number SC386154);
- Consensus Capital Property Holdings Limited (company number SC400368);
- Whitechester Limited, a company incorporated under the Law of the British Virgin Islands with company number 621884 and having its registered office at

Craigmuir Chambers Road Town, Tortola, British Virgin Islands (“the BVI company”);

- Gateway, Glasgow Limited (company number SC21530);
- St Margarets Nursery Limited (company number SC402531);
- Charlotte Square Property Management Limited (company number SC412117).

[2] Interim leave has already been granted, subject to various conditions and undertakings which the pursuer proposes should continue in the event of a final order being made.

[3] After sundry procedure, an evidential hearing took place on 1 February 2019. Affidavits were lodged of the pursuer and three witnesses: [redacted], Stuart Glass and Steven Stewart.

[4] The Secretary of State for Business, Energy and Industrial Strategy, who of necessity appeared at the hearing having regard to the terms of section 17(5) of the 1986 Act, adopted a neutral stance throughout the proceedings. Accordingly, none of the content of the affidavits was challenged and I am content to proceed on the basis that they are truthful and accurate.

[5] Counsel, in the form of Mr O’Brien, appeared for the pursuer. He made a typically comprehensive, lucid and helpful submission.

Background

[6] As averred in article 1 of condescendence, the pursuer was a director of CC York Place Limited, a company incorporated under the Companies Acts, which entered into administration on 1 December 2015. On the basis of the pursuer’s conduct as a director of that company, the Secretary of State for Business Energy and Industrial Strategy applied to

this court for a disqualification order under section 6 of the 1986 Act to prohibit the pursuer from acting as a director without leave of the court. Before that application was heard, the Secretary of State accepted a disqualification undertaking from the pursuer in terms of section 7 of the Act. In it, the pursuer undertook, for a period of six years, not to act as a director without leave of the court. The basis of the Secretary of State's application was that the pursuer had made preferential payments to certain of the company's creditors, and to himself, in August and September 2015 after a drawdown of £1.1m under a loan agreement with the third party had been declined pending further financial information. In amplification of this, Mr O'Brien explained that CC York Place was previously owned by [redacted] and a Mr Montague. Ownership of the company was transferred to the pursuer. The company was engaged in redeveloping a property. It (legitimately) owed substantial sums to [redacted] and Mr Montague in the form of consultancy fees. The company had two sources of funding. One was the company which was ultimately to acquire the property and the other was a company called Merchant Capital. Merchant Capital refused to advance any more money. The pursuer believed that this would only be a temporary refusal and that the funds would eventually be released. Under that belief, he paid the two consultancy fees and also paid himself monies which he was owed. In the event his optimism that the funding would be forthcoming was misplaced and the company entered administration with the eventual outcome that the contractor was left unpaid. Mr O'Brien stressed that each of the companies which are the subject of the present application had an entirely different type of business from CC York Place and that the pursuer had no ownership interest in any of the companies. There was therefore not the same degree of creditor exposure as there had been with CC York Place, and there were in any event controls in place which would prevent the pursuer from making payments unilaterally.

[7] As counsel explained, it is not possible to give an undertaking subject to exceptions. If a person wishes, at the time of being made subject to a disqualification order, or giving an undertaking to continue to act as a director for one or more companies, it is necessary to seek the leave of the court under section 17 at the same time as, or after, the order is made or the undertaking given. There is therefore no inherent incompatibility between the undertaking having been given, and the present application.

Section 17

[8] Section 17 of the 1986 Act, insofar as material, is in the following terms:

17.— Application for leave under an order or undertaking.

(1) Where a person is subject to a disqualification order made by a court having jurisdiction to wind up companies, any application for leave for the purposes of section 1(1)(a) shall be made to that court.

(2) Where—

- (a) a person is subject to a disqualification order made under [section 2](#) by a court other than a court having jurisdiction to wind up companies, or
- (b) a person is subject to a disqualification order made under [section 5](#),

any application for leave for the purposes of section 1(1)(a) shall be made to any court which, when the order was made, had jurisdiction to wind up the company (or, if there is more than one such company, any of the companies) to which the offence (or any of the offences) in question related.

(3) Where a person is subject to a disqualification undertaking accepted at any time under [section 5A, 7 or 8], any application for leave for the purposes of section 1A(1)(a) shall be made to any court to which, if the Secretary of State had applied for a disqualification order under the section in question at that time, his application could have been made.

...

(5) On the hearing of an application for leave for the purposes of section 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.
...”

[9] For completeness, counsel also referred to section 22 of the 1986 Act and the definition of company therein (which includes the BVI Company).

Case law

[10] Counsel referred to *Shuttleworth v Secretary of State for Trading Industry. Re Dawes & Henderson (Agencies) Limited* [2000] BCC 204 and to *Re TLL Realisations Limited. Secretary of State for Trading Industry v Collins and Others* [2000] BCC 998. In the former, there was a review of the authorities by Sir Richard Scott V-C at pages 210 and 211. His approach was (in general) approved by the Court of Appeal in *Re TLL Realisations Ltd*. For present purposes it is unnecessary to discuss those cases in detail. I am content to accept the proposition which counsel derived from them, which was that the first question (after consideration of the circumstances which led to the undertaking having been given) is whether there is a legitimate interest which it is necessary to preserve. That interest may be that of the pursuer, or the company of which he wishes to be a director, or its employees. If there is a legitimate interest, the next question is whether any risk is at an acceptable level, bearing in mind the need for the pursuer to earn a living and the need for the company to have his services.

Submissions for the pursuer

[11] Adopting that approach, the circumstances which led to the undertaking are set out at paragraph [6] above. Counsel stressed that the pursuer had been a director of a number of companies, only one of which had failed. While he accepted that the transgression was

relatively serious, it was merely one lapse, to be viewed against an otherwise impressive track record.

[12] As regards the question of necessity and legitimate interest, counsel referred to the affidavits. There was, first, a need for the pursuer to be granted leave in order that he could earn a living. As set out in paragraph 10 of his affidavit, for over 10 years his role had involved managing companies. Before that, from 1997-2007 he had worked for various banks in several roles including the role of lending director. Due to his disqualification as a director, it was highly unlikely that he would be able to obtain a similar role with a bank. If he were not granted leave to continue to act as a director he would be unable to continue to earn a living. Separately, there was a need on the part of the companies for the pursuer to continue to act as a director. [redacted] was the beneficial owner of the group which included all the companies which were the subject of this application, other than Charlotte Square Property Management Limited, which was not part of the group. The parent company was Consensus Capital Group Limited, of which the other companies were subsidiaries. While the pursuer was not the sole director of any of the companies, he had detailed knowledge of the businesses, of [redacted]'s affairs and of the companies in respect of which leave was sought. It had taken him around two years to become fully familiar with the range of [redacted]'s businesses. If he had to resign as director, a lengthy handover period would be required for any other person to take over his role. If he were not granted leave, it would be impossible for him to continue in the same role as a non-director. [redacted] had built up trust in the pursuer over a period of time. He had significant sums invested in the companies with an aggregate of £2.2m of directors' loans outstanding at the present time. If the pursuer ceased to be a director there would be a financial and operational impact on the companies. If the pursuer were not able to continue managing

[redacted]'s investments, [redacted] may choose to liquidate all of his investments instead of appointing a replacement manager. As far as the pursuer was aware [redacted] did not want to resume fulltime employment and did not want to manage the group, as he had done prior to 2012 when the pursuer first became involved.

[13] Turning to [redacted]'s affidavit, he confirmed that the pursuer was irreplaceable, because of the sensitive information which he held, and the difficult decisions he had to make. [redacted] would not attempt to replace him, if he had to cease acting as a director, but would change the direction of the companies completely. His intention would be to liquidate all of his investments if the pursuer were not granted leave to continue as director.

[14] The final aspect of need was in relation to the number of persons employed by, and dependent on, the various companies, including professionals whose services the companies used. Of most significance in this regard was St Margarets Nursery Limited which, as its name suggests, runs a children's nursery, in Edinburgh. The nursery currently had 160 children registered with usually between 80 and 85 children in attendance at any one time. The company also had approximately 25 staff, on a mixture of part-time and fulltime contracts.

[15] As regards risk, if the pursuer were allowed to continue as director of the six companies, counsel referred to the undertaking given by [redacted]. He owns 100% of the shares in Consensus Capital Group Limited which in turn owns 100% of the shares in the other group companies. He also owns 100% of the shares in Charlotte Square Property Management Limited. His undertaking is that during any period in which the pursuer remains involved in the companies on the basis of leave granted by the court, he will not call up or demand payment of some or all of the outstanding loans from the companies or cause, arrange or direct for the companies to make payment of some or all of the outstanding loans

except to the extent that the company could make such payment and remain solvent (i.e. that the company's assets would still exceed its liabilities) immediately thereafter and that this position must be confirmed by an independent accountant prior to such payment being made. The creditors were further protected by the copious conditions attached to the interim order which the pursuer agreed should continue to apply in the event that leave were granted.

[16] Under reference to the affidavits already referred to and those of Stuart Glass, a qualified accountant who prepares statutory accounts for all of the companies in question and Steven Stewart, a finance manager employed by Consensus Capital Group Limited, counsel then embarked upon an examination of the financial position of each of the companies. He also referred to various accounts of the companies which had been lodged in process. As at 31 March 2018, Consensus Capital Group Limited had shareholder funds of £1,938,753. [redacted] was owed £309,529. Any risk to creditors in relation to that company was largely theoretical. As at 30 September 2018, Consensus Capital Property Holdings Limited had net assets of £1,086,654. Its property portfolio was valued in 2017 at a combined value of £5.8m. It was funded in part by a secured loan from the Bank of Scotland for £3.4m. It was trading profitably. Whitechester Limited, incorporated in the British Virgin Islands, was an intermediary company which did not trade. It owned Gateway Glasgow Limited. Gateway Glasgow Limited was a property investment business which had sold off property which it owned and held substantial assets, amounting to £1,838,244.94 at 26 October 2018. Whereas Whitechester's accounts showed net liabilities of £1,817,470, that was on the basis that its shareholding of Gateways was valued at cost at a figure £12,000. The actual value of Gateways assets was substantially higher. Whitechester

had no external creditors. Gateway had sufficient cash in hand to pay its remaining external creditors.

[17] As regards St Margarets Nursery, it was a different sort of business (see above). It had net liabilities of £227,476 by reason of loans from [redacted] and other group companies. The pursuer provided strategic direction for the company and had helped to turn it round in the two and a half years in which he worked for it. In this regard counsel referred to Care Inspectorate Report dated 26 July 2017 number 5/34 of process.

[18] Finally, as regards Charlotte Square Property Management Limited, it provided property management services for the group. As at 31 March 2018 it had net liabilities of £177,325. However, the main creditor was [redacted] who was owed £211,279.

[19] Overall the opinion of the accounting witnesses was that the companies were solvent.

The conditions

[20] The conditions which it is proposed be attached to any order granting leave are, stated briefly, as follows:

1. A copy of the undertaking and the interlocutor granting leave is to be served on each of the directors of the companies in respect of which leave is granted, the companies' respective secretaries and the companies' respective accountants/auditors;
2. In the event that any of the companies changes its accountants, auditors, directors or shareholders a copy of the undertaking and interlocutor is to be served on any new accountants etc;

3. The pursuer is to procure that each of the companies prepares monthly management accounts within three months of the month end, submits them promptly to the directors and the companies accountants/auditors and prepares annual accounts within three months of the end of the financial year;
4. The pursuer is to further procure an instruction to be issued by each of the companies to the accountants/auditors that they report any matters of concern in writing to the board and thereafter the pursuer shall procure the prompt implementation of any corrective action as agreed by the board (and if the board decline to take such action, the pursuer shall resign);
5. In the event of any of the companies seeking to change its accountants and/or auditors the pursuer is to procure that that company only instructs accountants and/or auditors who are willing to accept and act upon such instruction;
6. The pursuer is to ensure that each company holds formal board meetings quarterly, properly minuted;
7. The pursuer is to procure that each of the companies files annual returns and accounts timeously and similarly files returns due to HM Revenue and Customs timeously;
8. No increase in the pursuer's salary or benefits and no payment of any dividend is to be effected without confirmation being obtained from the company's accountants/auditors that the declaration or payment is one which the company should make and that the company will be left with adequate reserves to finance its current and anticipated liabilities;
9. No cheque etc is to be signed by the pursuer alone;

10. No director's loan owed by any of the companies to the pursuer shall be repaid unless all creditors of the company are paid first;

11. The pursuer shall not be granted or accept any security over the assets of the companies.

[21] In all these circumstances, counsel submitted that the application should be granted in respect of each of the six companies. The matter which led to the undertaking being given was a one-off, which was unlikely to be repeated. In particular the circumstances surrounding the six companies were completely different to those which prevailed previously. A need had been demonstrated. The creditors were adequately protected. There was negligible risk, particularly having regard to the conditions.

The Secretary of State's position

[22] Mr Scott, for the Secretary of State, addressed me briefly. He agreed that the need was not a prerequisite but that a balancing exercise had to be carried out. A starting point was the conduct which led to the undertaking. The significant feature of it was that the pursuer had made preferential payments to associates (in a non-legal sense) and to himself. As regards the conditions to be attached to any order, these would not be policed by the Secretary of State.

Discussion

[23] As counsel conceded, this is a relatively unusual application in as much as leave is sought in respect of six companies. At first sight, it would drive a coach and four through any disqualification (or undertaking) were wholesale leave to be granted to enable the subject of a disqualification or the giver of an undertaking to continue to act as director of a

large number of companies. Nonetheless, as counsel submitted, the 1986 Act makes clear that any disqualification operates merely so as to prevent a person from acting as a director without leave and there is no option, when an order is made or an undertaking given, to exclude one or more companies from that order or undertaking. The only means by which a person may continue to act as a director is to seek leave of the court, and for leave to be granted.

[24] It is also clear from the authorities referred to by counsel that in deciding whether to grant leave, the court has an unfettered discretion. Relevant in the exercise of that discretion are: the circumstances which led to the disqualification; the extent to which there is the need, be that of the person making the application, a company or employees, for the applicant to continue as director; and, last but not least the need to protect the public from a repetition of the conduct which led to the disqualification. The court must then carry out a balancing exercise.

[25] Dealing with that last matter first, as counsel accepted, the conduct falls within the middle bracket of severity, albeit at the lower end of the range. It clearly had an adverse effect on the insolvent company's major creditor, who went unpaid, at the expense of two of the pursuer's business associates and the pursuer himself. While there is no suggestion of dishonesty, the pursuer's conduct on any view fell far short of the standard expected of him as a director. That said, I accept that the trading position of the six companies concerned in this application is markedly different and that the circumstances are unlikely to be repeated.

[26] As regards need, I do accept that the pursuer may find it difficult to secure employment elsewhere if he had to resign his present directorships, although since that may be due in part not to the disqualification but to the behaviour which led to it, that may be something of a neutral factor. Nonetheless, I do accept that the pursuer has detailed

knowledge of the affairs and management of these six companies and that they do require his involvement in order to continue trading. I also take into account that, in relation to St Margarets, a significant number of children (and teachers) would be adversely affected if that company were required to cease trading. I also accept that the pursuer does appear to have undoubted management skills and in particular that he has helped to transform the fortunes of that school.

[27] As regards protection of the public, on the material available to me, the companies all appear to be solvent, at least if [redacted]'s loans are left out of account, and he has undertaken not to secure repayment unless the company or companies in question were left in a solvent position. The creditors are also protected to an extent, at least on paper, by the stringent conditions to be attached to any order.

[28] This leads on to the aspect of this application which troubles me most, which is that, while the undertakings and conditions appear stringent, there is in fact no means of policing them. The pursuer is willing to undertake to comply with the conditions but it seems to me that does not add anything because he requires to comply with the order of the court in any event. While it is the Secretary of State who suggested the conditions, he has no intention of monitoring compliance, and to that extent the insistence on conditions may on one view be seen as something of a cosmetic exercise, with no teeth attached in the event of non-compliance. In relation to some of the conditions, it may well be, as counsel suggested, that in the event of non-compliance the pursuer would be at risk of acting without the leave of the court, were he to continue acting as a director whilst in breach. Even if that is the case in relation to breach of some of the conditions (for example, in relation to number 4, which requires him to resign in certain circumstances, the pursuer might be acting in contravention of his leave were he not to resign where the conditions for his doing so had been triggered),

it would clearly not be the outcome of every breach. Further, as I understand it, it was previously the Secretary of State's practice to ask the court to include in any order granting leave, a formula of words to the effect that in the event of any of the conditions attached to the order being breached, the permission granted by the court would immediately cease. However, Lady Wolffe declined to approve such wording in *Buckley v Secretary of State for Business, Energy and Industrial Strategy* [2017] CSOH 105 on the grounds that it would lead to uncertainty. I respectfully agree with that approach, and the Secretary of State no longer requests that such wording be inserted into any interlocutor, but the consequence of that is that one possible theoretical safeguard which may have existed if such wording had been adopted, is no longer there. The fact is that the effect of a breach of any of the conditions remains unclear.

[29] I did wonder whether one approach might be for the court to grant interim leave for a relatively long period – say 6 months or a year – to monitor compliance with the order, before eventually making a final order; but I do not consider that it is the court's function to act as a monitoring agency. In any event, the conditions have, it seems, been largely (although not absolutely) complied with since the interim order was first made in the present case. That is sufficient to give some (albeit a small) measure of comfort that the pursuer will continue to comply with the conditions when the watchful eye of the court is no longer upon him.

Decision

[30] Taking all of the above into account, and having carried out the necessary balancing exercise, I have decided that it is appropriate to grant the application. I accept that the risk

to the public is reduced to an acceptable degree by the companies' financial standing, bolstered by [redacted]'s undertaking and by the conditions which are proposed, and by the fact that the conduct which led to the undertaking having been given is in any event unlikely to be repeated. I will therefore grant leave to the pursuer to act as a director (with all that entails) of the six companies in question, subject to the conditions already attached to the interim order, summarised at paragraph 20 above. Taking account also of the lack of any monitoring of those conditions, I have also come to the view that the most effective safeguard is for this Note to be available to the public, hence it will be uploaded to the SCTS website. There is no purpose in having the pursuer undertake to comply with the conditions, since he is obliged to do that in any event.

Expenses

[31] The pursuer conceded expenses to the Secretary of State, and I have so ordered.