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Webinar: "Competition Director Disqualification Proceedings: Latest Case Law and Practical Considerations"

Date: Wednesday 3 March 2021
Speakers: Robert Palmer, QC and Deba Das

Robert Palmer QC

i. Michael Martin's Disqualification

- Robert Palmer QC represented Mr. Martin in the director disqualification proceedings brought against him by the CMA, following on from the Burnham-on-Sea estate agent's cartel infringement case. The CMA had successfully argued in that case that (contrary to his denials) Mr. Martin had knowingly contributed to a competition breach within the meaning of s.9A(6)(a) CDDA. The court had made a 7 year competition disqualification order (CDO) against him.

ii. The Traditional Approach

- In the case of Mr. Martin, Mr. Palmer had argued that in certain circumstances a human rights angle could be used to deviate from the traditional reading of director unfitness under s.9A(3), requiring consideration of the question of 'proportionality'. This human rights angle would be particularly relevant where a director did not contribute to a breach under s.9A(6)(a), had no reasonable grounds to suspect the breach under (b), and did not know of the breach, but crucially under (c) "ought" to have known: what might be referred to as a pure '(c)' scenario.

- In *Re Grayan Building Services* [1995] Hoffman LJ made clear that when the court is deciding on whether to impose a Director Disqualification Order (DDO), it can only consider the conduct that the director is accused of and any extenuating circumstances relating to that specific conduct, to the exclusion of everything else. It must adopt a 'tunnel vision' approach. In the context of a CDO, that would mean that the court would be required to ignore, for example, whether the director had provided extensive competition compliance training and had never previously breached competition law, when deciding whether he/she was "unfit". The court must also ignore the fact that a director may have been suspended from being a director on a 'de facto' basis for the entire duration of the proceedings, which can be years.

- As further shown in *Secretary of State for Trade and Industry v Arif* [1996] and *re Pamstock* [1994] the court has no choice but to impose an order if the two conditions under s.9A(1)-(3) are met. This is irrespective of whether at the date of the order no public protection requirement is being met (*Arif*), and the judge feels that the CDO will have a disproportionately severe effect on the director due to the stigma that surrounds the order (*Pamstock*). These cases, however, were decided before the Human Rights Act 1998 (HRA). It is time that they were revisited.

iii. The Human Rights Argument

- Mr. Palmer had run the human rights argument in Mr. Martin's case: namely that a CDO engages an individual's Article 8 rights (right to a private life) as it interferes in their professional life and therefore it must be justified and proportionate. The 'tunnel vision' approach to s.9(3) was argued to be disproportionate and the court should take into account individual circumstances – especially in the pure '(c)' scenario above. (Given the ultimate findings of fact made in Mr Martin's case, the making of a CDO was in the event a clearly proportionate outcome and it was not necessary to consider a pure '(c)' scenario.)

- The court agreed that Article 8 was engaged, triggering a requirement that disqualification be proportionate; however, it disagreed that proportionality needs to be examined at the stage of imposing a CDO. Instead, the judge concluded that proportionality is already catered for by the scheme of the Act as a whole, in that sections 1 and 17 CDDA allow disqualified directors to apply for leave to act. That procedure allows individualised assessment of proportionality at that stage.

- While this is the interpretation of the court thus far, Mr. Palmer argues that this is an incorrect interpretation of the HRA, which requires an individualised approach based on proportionality at each stage of the process, given that the effect of a CDO represents an interference with Article 8 rights. A CDO has such a stigma that it will adversely affect career prospects and reputation at the disqualification stage, even if a section 17 application is later successful. Further, given the CDDA's primary purpose is to protect the public, rather than act as a deterrent ("pour encourager les autres"), it should be interpreted as requiring the question of the "fitness" of the director to be assessed with regard to all the circumstances, not just on the basis of a tunnel vision approach. Given the Insolvency and Companies Court's approach, the point may ultimately have to be determined at a higher level, if it arises in a future case.

Deba Das

- Mr Das led a team at Freshfields successfully acting for directors in the first contested leave to act proceedings before the High Court (*Re Fourfront* / *Stamatis & Davies v CMA*) where two directors that had accepted competition disqualification undertakings ***(CDUs***) were granted limited permission to continue to act as directors of their companies.

iv. The Prevalence of CDUs

- The CMA's preferred route with director disqualifications are undertakings under s.9B CDDA where a director agrees not to act as a director for up to 15 years. If accepted by the CMA, the undertaking will be published on Companies House. This route allows the CMA to negotiate quickly and achieve its objective of deterrence through

publicity. So far, undertakings have been accepted in 18 director disqualification cases.

- The CMA often offers undertakings at an early stage with a disqualification period significantly less than it would pursue in court. This is done in order to settle early, and as a general rule the later the director leaves it to give the undertaking the longer the period of disqualification that the CMA will accept.

- This presents challenges to directors as at the early stages a director will have limited information on the CMA's evidence of unfit conduct, however, if they hold out for more information, the disqualification period is likely to be longer.

i. Section 17 – Leave Applications

- Following undertakings or a CDO, a director has the option to apply for leave to act under section 17 CDDA which allows him to act as a director in specific circumstances. The court will grant leave if the company's 'need' for that director outweighs the director's threat to 'public protection'. *Re Morija* [2008] makes clear that this is a two stage balancing process with a forward looking analysis – the application is not an opportunity to further punish the director and the reasoning behind the CDO will not be re-examined.

- In *Re Fourfront* the director was granted leave under section 17 as 'need' was satisfied due to the ample financial evidence given showing that without the director the company was at risk of not surviving, and 'public protection' was also satisfied as the director set out stringent new competition compliance measures to be implemented, including the appointment of a solicitor as a non-executive compliance director, and regular training, targeted email searches and an agreement to provide regular reports to the CMA.

- In *Robin Davies v CMA* the director, Mr. Davies, was similarly successful in establishing 'need' by arguing that he was essential to a pharmaceutical company (an essential supplier during COVID), and 'public protection' through his extensive competition compliance proposals.

- Deba Das stresses that a section 17 application will turn on its facts – factors that will be considered include the length of the disqualification period, the contents of the Schedule of Unfitness and whether the director is applying to act in the same company that committed the infringement or a different company. The fact that a director has a shorter disqualification period does not signify that his breach is less serious, but instead it will signify that the public needs to be protected for a shorter period and will therefore make the grant of a CDU more likely (provided the Court is persuaded that appropriate measures are in place to protect the public such as the compliance measures adopted in *Re Fourfront*).

Ultimately, it seems that the direction of travel with CDOs and undertakings is upwards – with longer periods and more regular investigations. The disqualification regime seems currently to be viewed by the CMA as a more useful tool than the cartel offence – as public sanctions (well-publicised by the CMA) they arguably meet the interests of deterrence and and are somewhat easier to achieve than criminal prosecution (particularly undertakings).