result was that the … companies traded, when in fact insolvent and known to be in difficulties, at the expense of those creditors who, like the Crown, happened not to be pressing for payment. Such conduct on the part of a director can well, in my judgment, be relied on as a ground for saying that he is unfit to be concerned in the management of a company. But what is relevant in the Crown's position is not that the debt was a debt which arose from a compulsory deduction from employees' wages or a compulsory payment of VAT, but that the Crown was not pressing for payment, and the director was taking unfair advantage of that forbearance on the part of the Crown, and, instead of providing adequate working capital, was trading at the Crown's expense while the companies were in jeopardy. It would be equally unfair to trade in that way and in such circumstances at the expense of creditors other than the Crown …

[His Lordship reviewed the various defaults which had been established against the respondent, and fixed a disqualification period of five years.]

BUTLER-SLOSS and STAUGHTON LJJ concurred.

➢ Notes

1. Applications under the CDDA 1986 are normally brought by the Secretary of State for Business, Innovation and Skills or the official receiver against individuals who are or have been **(p. 299)** company directors. The jurisdiction is broader than that, however. In *Asegaai Consultants Ltd* [2012] EWHC 1899 (Ch), a successful application was brought by the company's liquidator against his predecessor liquidator (who had never been a director of any of the companies in question) for disqualification as a director and insolvency practitioner. Newey J held that the liquidator had standing: he did not need a financial interest in a disqualification order being made, since applications are essentially for the protection of the public and not for private advantage; moreover, there was no suspicion that the liquidator had an improper ulterior motive, and the application was fully supported by the company's only legitimate creditor and the Secretary of State.

2. In the same case, Newey J also considered the appropriate way of cumulating relatively minor breaches in order to satisfy the test laid down in s 6:

> Were a serious breach of duty established, the Court could surely take other, less important breaches into account when deciding what, if any, order to make under section 4. A number of relatively minor breaches of duty could also, taken together, be thought serious enough to warrant a disqualification order [24].

Summary of the law and its application.

[6.09] Secretary of State for Trade and Industry v Swan [2005] EWHC 603 (Ch), [2005] BCC 596 (Chancery Division)

The Secretary of State applied for disqualification orders against former directors (S and N) of a parent company and certain other companies within the group. S was both the chairman and chief executive of the parent company and N was a non-executive director. The group had practised 'cheque kiting',[26] which fell within the control of the finance director. As a result of the cheque-kiting practice, an indebtedness statement sent to shareholders showed misleading figures. Other irregularities were alleged. The judge held that it was not established that S had actual knowledge of the cheque kiting, but his failure properly to inquire into the reason for the cheques (for sums completely out of line with the company's normal scale of transaction) before signing them had permitted the group's cheque-kiting policy to continue, and was a serious dereliction of his duty as a director, although only within the lowest of the three categories specified in *Re Sevenoaks Stationers (Retail) Ltd* **[6.08]**. In the circumstances, bearing in mind the purpose of the Act, and that the cheque-kiting policy had not caused any person any loss or played a role in the insolvency of the company, the appropriate period of disqualification was four years. Equally, there was no cogent evidence that N had known of the cheque-kiting policy, but he had failed

to react appropriately to serious allegations of financial and accounting irregularities, made to him against the finance director. If he had investigated, the cheque kiting would have come to light. This lapse in judgement was serious, precisely when decisive action was required of a non-executive director. In all the circumstances, N was disqualified for three years.

ETHERTON J:

76. The burden of proving unfitness [under CDDA 1986 s 6] lies on the SoS [Secretary of State]. Although the standard of proof is the civil standard, that is to say on the balance of probabilities, the seriousness of the allegation is reflected in the need for evidence of appropriate cogency to **(p. 300)** discharge the burden of proof: *Re Living Images Ltd* [1996] 1 BCLC 348, 355–356; *Re H* [1996] AC 563, 586–587 (Lord Nicholls).

77. The determination of unfitness under s.6 is a two-stage process. First, the SoS must establish as facts, to the requisite standard of proof, the matters on which the allegation of unfitness is based. Second, the court must be satisfied that the conduct alleged is sufficiently serious to warrant disqualification.

78. In determining whether past conduct leads to the conclusion of 'unfitness' the court is entitled to consider any relevant contemporary extenuating circumstances.

79. The question is whether, viewed cumulatively and taking into account any extenuating circumstances, the director's conduct in relation to the company has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies: *Re Grayan Building Services Ltd* [1995] Ch. 241, 253 (Hoffmann LJ).

80. So far as incompetence is concerned, the authorities indicate that a high level of incompetence is required to satisfy s.6 of the Act. In *Re Barings plc (No.5)*[1999] 1 BCLC 433 at pp. 483–484 Jonathan Parker J said:

> 'Where, as in the instant case, the Secretary of State's case is based solely on allegations of incompetence (no dishonesty of any sort being alleged against any of the respondents), the burden is on the Secretary of State to satisfy the court that the conduct complained of demonstrates incompetence of a high degree. Various expressions have been used by the courts in this connection, including "total incompetence" (see *Re Lo-Line Electric Motors Ltd* [1998] BCLC 325 at 337, [1988] Ch 477 at 486 per Browne-Wilkinson V-C), incompetence "in a very marked degree" (see *Re Sevenoaks Stationers (Retail) Ltd* **[6.08]** [1991] Ch 164 at 184 per Dillon LJ) and "really gross incompetence" (see *Re Dawson Print Group Ltd* [1987] BCLC 601 per Hoffmann J). Whatever words one chooses to use, the substantive point is that the burden on the Secretary of State in establishing unfitness based on incompetence is a heavy one. The reason for that is the serious nature of a disqualification order, including the fact that (subject to the court giving leave under section 17 of the Act) the order will prevent the respondent being concerned in the management of any company.'

81. On appeal from the decision of Jonathan Parker J, Morritt LJ, giving the judgment of the Court of Appeal, said at [2000] 1 BCLC 523, 534:

> '… the judge made a number of observations on the proper construction and application of the Act to which we refer, not because we disagree with the judge, but because we wish to emphasise the propositions to which he referred. … Third, where the allegation is incompetence without dishonesty it is to be demonstrated to a high degree … This follows from the nature of the penalty. Nevertheless the degree of incompetence should not be exaggerated given the ability of the court to grant leave, as envisaged by the disqualification order as defined in s.1, notwithstanding the making of such an order'.

82. If the court finds the allegations of unfitness proved to the requisite standard and degree, then the court must, under s.6, disqualify the director for a period of two years at least.

83. The fact that the director may be unlikely to offend again may be relevant to the length of the period of disqualification, but not to whether or not he should be disqualified: *Re Landhurst Leasing plc* [1999] 1 BCLC 286, 344h–345b.

84. The disqualification is mandatory in order to protect the parties, raise standards and to act as a deterrent. Hoffman LJ expressed the position as follows in *Re Grayan Building Services Ltd* at p.253H–254D:

> 'Parliament has decided that it is occasionally necessary to disqualify a company director to encourage the others. Or as Sir Donald Nicholls V.-C. said in *In re Swift 736 Ltd*. [1993] BCLC 896, 899:
>
> > **(p. 301)** "Those who make use of limited liability must do so with a proper sense of responsibility. The directors' disqualification procedure is an important sanction introduced by Parliament to raise standards in this regard."
>
> If this should be thought too harsh a view, it must be remembered that a disqualified director can always apply for leave under section 17 and the question of whether he has shown himself unlikely to offend again will obviously be highly material to whether he is granted leave or not. It may also be relevant by way of mitigation on the length of disqualification …'

It follows that I agree with the approach of Vinelott J in *In re Pamstock Ltd* [1994] 1 BCLC 716 when he said that it was his duty to disqualify a director whose conduct 'fell short of the standard of conduct which is today expected of a director of a company which enjoys the privilege of limited liability' even though he did so with regret because, he said, at p. 737:

> 'The respondent seemed to me (so far as I can judge from the evidence before me) to be a man who today is capable of discharging his duties as a director honestly and diligently.'

But the court is required to disqualify a director whose conduct has made him unfit, as the judge said:

> 'even though the misconduct may have occurred some years ago and even though the court may be satisfied that the respondent has since shown himself of capable of behaving responsibly.'

85. Lord Woolf MR summarised the policy behind the legislation as follows in *Re Blackspur Group plc* [1998] 1 WLR 422 CA at p. 426:

> 'The purpose of the Act of 1986 is the protection of the public, by means of prohibitory remedial action, by anticipated deterrent effect on further misconduct and by encouragement of higher standards of honesty and diligence in corporate management, from those who are unfit to be concerned in the management of a company.'

86. The relevant period of disqualification is in the discretion of the judge, to be exercised in accordance with the relevant principles set down in *Re Sevenoaks Stationers (Retail) Ltd* **[6.08]** (particularly serious cases: 11–15 years; serious cases which do not merit the top bracket: 6–10 years; relatively, not very serious cases: 2–5 years).

It is no defence to disqualification proceedings that the company's creditors would be, or could have been, paid in full.

[6.10] Official Receiver v Jupe [2011] 1 BCLC 191 (Nottingham County Court)

When faced with disqualification proceedings brought by the Official Receiver, Jupe, the director, alleged that the liquidator had sold the company's land at a gross undervalue, and that, had it been sold at its true value, all the company's creditors would have been paid in full. Judge Mithani QC, without hearing argument, held that he would have rejected such a defence.

JUDGE MITHANI QC:

21 It is clear that a company becoming insolvent within the meaning of s 6 of the Company Directors Disqualification Act 1986 is simply the gateway to the bringing of disqualification proceedings against a defendant under s 6. Once that gateway is passed, the fact that the creditors of the company have, or might be, paid in full will not, ordinarily, amount to a defence to the proceedings, **(p. 302)** although the court might take that fact into account in coming to its overall assessment about whether unfitness is established. This is because in all but a few cases—for example where the allegation of misconduct relates to the failure of a defendant to co-operate with the office holder—the misconduct complained of will relate to the manner in which a director has conducted the affairs of a company prior to the company having become insolvent within the meaning of s 6(1)(a). Accordingly, any return made to creditors will have little bearing upon that. A substantial or significant return to creditors might, in an appropriate case, if unfitness is established, be a mitigating factor resulting in the imposition of a lesser period of disqualification against a defendant but will seldom amount to a defence to a claim for a disqualification order under s 6. It follows that even if there had been evidence to the effect that the liquidator had sold Normanton's land at an undervalue—and there is none in the present case—that could provide no defence to the defendant to the claim for the disqualification order in the present circumstances.

Applicable principles when the court is asked to give a disqualified director leave to act.

[6.11] Secretary of State for Trade and Industry v Swan (No 2) [2005] EWHC 2479 (Chancery Division)

The facts are outlined in **[6.09]**.

ETHERTON J:

10 There is no dispute as to the relevant principles. The court has a general discretion and, in deciding how exercise it, must balance various different factors, including the need or legitimate interest of the applicant to be a director, the importance of protecting the public from the conduct that led to the Disqualification Order, and also that the purposes of a disqualification are not only to protect the public but to act as a deterrent and to raise standards: see *Re Grayon Building Services Ltd*. [1995] Ch. 241, 253H–254D (Hoffmann L.J.) and *Re Blackspur Group plc* [1998] 1 WLR 422, 426 (Lord Woolf M.R.).

11 In *Re Barings (No.4)* [1999] 1 BCLC 262, Sir Richard Scott V.-C. said at p.269B–D:

'It seems to me that the importance of protecting the public from the conduct that led to the disqualification order and the need that the applicant should be able to act as a director of a

particular company must be kept in balance with one another. The court in considering whether or not to grant leave should, in particular, pay attention to the nature of the defects in company management that led to the disqualification order and ask itself whether, if leave were granted, a situation might arise in which there would be a risk of recurrence of those defects.'

12 In *Re Dawes & Henderson (Agencies) Ltd. (No.2)* [1999] 2 BCLC 317, 326A–D, Sir Richard Scott V.-C. said:

'The discretion given to the court under the 1986 Act to grant leave to an individual against whom a disqualification order has been made, enabling him during the currency of the disqualification order to act as a director of a particular company, is a discretion unfettered by any statutory condition or criterion. It would in my view be wrong for the court to create any such fetters or conditions. The reason why it would be wrong is that no one, when sitting in a particular case to give judgment, can foresee the infinite variety of circumstances that might apply in future cases not before the court. Where Parliament has given the courts an unfettered discretion, I do not think it is for the courts to reduce the ambit of that discretion. But in exercising the statutory discretion courts must, of course, not take into account any irrelevant factors. The emphasis given in a judgment in a particular case on particular circumstances in that case is not necessarily a guide to the weight to be attributed to similar circumstances in a different case. Anything I say in this case about the circumstances that seem to me of weight in this case must be read subject to that warning.'

(p. 303) ➢ Note

To this may be added the comments of Jonathan Parker J in *Re Barings plc (No 5)* **[6.12]** which usefully explain the relevance of Sch 1 in considering 'unfitness' (at 486):

Although in considering the question of unfitness the court had to have regard (among other things) to 'any misfeasance or breach of any fiduciary or other duty' by the respondent in relation to the company, it was not a prerequisite of a finding of unfitness that the respondent should have been guilty of misfeasance or breach of duty in relation to the company. Unfitness might be demonstrated by conduct which did not involve a breach of any statutory or common law duty: for example, trading at the risk of creditors might be the basis of a finding of unfitness even though it might not amount to wrongful trading under s 214 of the Insolvency Act 1986. Nor would it necessarily be an answer to a charge of unfitness founded on allegations of incompetence that the errors which the respondent made could be characterised as errors of judgment rather than as negligent mistakes. It was possible to envisage a case where a respondent had shown himself so completely lacking in judgment as to justify a finding of unfitness, notwithstanding that he had not been guilty of misfeasance or breach of duty. Conversely the fact that a respondent might have been guilty of misfeasance or breach of duty did not necessarily mean that he was unfit. Schedule 1 made it clear that there were a number of matters to which the court was required to have regard in considering the question of unfitness, in addition to misfeasance and breach of duty.

Use of the disqualification jurisdiction to refine the law on directors' duty of care to include appropriate oversight.

[6.12] Re Barings plc (No 5) [1999] 1 BCLC 433 (Chancery Division and Court of Appeal)

The Barings Group, a long-established banking organisation of unquestionable standing, collapsed in 1995 owing

to unauthorised trading activities carried out by a single trader, Leeson, in Singapore, which resulted in massive losses. In these proceedings disqualification orders were sought against three of its former directors who were based in London. Their honesty and integrity were not challenged, but it was alleged that they had been guilty of serious failures of management in relation to Leeson's activities, thereby demonstrating such a high degree of incompetence as to justify their disqualification. More specifically: they had left Leeson in sole control of both the dealing and settlement offices in Singapore, ignoring an internal audit recommendation that the roles be separated; they had met Leeson's requests for funding on a huge scale without proper inquiry; and they had not instituted appropriate internal management controls. Jonathan Parker J, at first instance, held that the case for disqualification had been made, and his ruling was upheld on appeal.

JONATHAN PARKER J: '[E]ach individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them' (see *Re Westmid Packing Services Ltd* [1998] 2 BCLC 646 at 653, [1998] 2 All ER 124 at 130 per Lord Woolf MR, giving the judgment of the Court of Appeal). Later in the judgment Lord Woolf MR said:

> It is of the greatest importance that any individual who undertakes the statutory and fiduciary obligations of being a company director should realise that these are inescapable personal responsibilities.

This does not mean, of course, that directors cannot delegate. Subject to the articles of association of the company, a board of directors may delegate specific tasks and functions. Indeed, some degree of delegation is almost always essential if the company's business is to be carried on efficiently: to that extent there is a clear public interest in delegation by those charged with the responsibility for the management of a business …

(p. 304) But just as the duty of an individual director as formulated by the Court of Appeal in *Re Westmid Packing Services Ltd* does not mean that he may not delegate, neither does it mean that, having delegated a particular function, he is no longer under any duty in relation to the discharge of that function, notwithstanding that the person to whom the function has been delegated may appear both trustworthy and capable of discharging the function …

It is not in dispute in the instant case that where delegation has taken place the board (and the individual directors) will remain responsible for the delegated function or functions and will retain a residual duty of supervision and control … The precise extent of the ritual duty will depend on the facts of each particular case, as will the question whether it has been breached. These are matters which are in dispute in the instant case. It is the Secretary of State's case (denied by the respondents) that each of the respondents was incompetent in failing to discharge his individual duties as a director …

Where there is an issue as to the extent of a director's duties and responsibilities in any particular case, the level of reward which he is entitled to receive or which he may reasonably have expected to receive from the company may be a relevant factor in resolving that issue. It is not that the fitness or otherwise of a respondent depends on how much he is paid. The point is that the higher the level of reward, the greater the responsibilities which may reasonably be expected (prima facie, at least) to go with it. As Sir Richard Scott V-C said when making a disqualification order in respect of Mr Maclean (see *Re Barings plc, Secretary of State for Trade and Industry v Baker* [1998] BCLC 583 at 586):

> [Counsel for the respondent] made the point that if an efficient system is in place, or if the individual in question has good reason for believing there to be an efficient system in place, the delegation within the system of functions to be discharged in accordance with the system by others cannot be the subject of serious criticism if, in the event, the persons to whom responsibilities are delegated fail properly to discharge their duties. That may be so up to a point in theory, but the higher the office within an organisation that is held by an individual, the greater the responsibilities that fall upon him.

It is right that that should be so, because status within an organisation carries with it commensurate rewards. These rewards are matched by the weight of responsibilities that the office carries with it, and those responsibilities require diligent attention from time to time to the question whether the system that has been put in place and over which the individual is presiding is operating efficiently, and whether individuals to whom duties, in accordance with the system, have been delegated are discharging those duties efficiently.

In summary, the following general propositions can, in my judgment, be derived from the authorities to which I was referred in relation to the duties of directors:

(i) Directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors.
(ii) Whilst directors are entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions.
(iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, must depend on the facts of each particular case, including the director's role in the management of the company.

[An appeal by one of the directors was dismissed: [2000] 1 BCLC 523.]

(p. 305) ***Individual directors must ensure they remain adequately informed.***

[6.13] Re Landhurst Leasing plc [1999] 1 BCLC 286 (Chancery Division)

The company, which was in the leasing finance business, had had a meteoric rise followed by a calamitous collapse. Its principal directors, Ball and Ashworth, had been sentenced to terms of imprisonment for offences of corruption and dishonesty. The present disqualification proceedings were brought against three minor players, formerly employees of the company, who had been made directors at a relatively late stage in the company's history. Despite the fact that control of the business remained very much in the hands of Ball and Ashworth and that their roles in the company's affairs continued, as before, to be essentially that of employees, it was held that the respondents could not accept office as directors without assuming corresponding responsibilities, and that it was no answer to a charge of misconduct that they had left to others matters for which the board as a whole had to accept responsibility. Disqualification orders were made against two of the three respondents.

HART J: … [T]he Court of Appeal in *Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths* [1998] 2 BCLC 646 at 653, [1998] 2 All ER 124 at 130 accepted as correct the following propositions:

… the collegiate or collective responsibility of the board of directors of a company is of fundamental importance to corporate governance under English company law. That collegiate or collective responsibility must however be based on individual responsibility. Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them. A proper degree of delegation and division of responsibility is of course permissible, and often necessary, but total abrogating of responsibility is not. A board of directors must not permit one individual to dominate them and use them, as Mr Griffiths plainly did in this case. Mr Davis commented that the appellants' contention (in their affidavits) that Mr Griffiths was the person who must carry the whole blame was itself a depressing failure, even then, to acknowledge the nature of a director's responsibility. There is a good deal of force in that point.

Closely allied to the difficulty of distinguishing the responsibilities and conduct of the individual directors from that of the board as a whole is the question of the extent to which an individual director may trust his or her colleagues. The judgment of Romer J in *Re City Equitable Fire Insurance Co Ltd* **[7.19]** is usually taken as authority for the general proposition that a director may rely on his co-directors to the extent that (a) the matter in question lies with their sphere of responsibility given the way in which the particular business is organised and (b) that there exist no grounds for suspicion that that reliance may be misplaced. But even where there are no reasons to think the reliance is misplaced, a director may still be in breach of duty if he leaves to others matters for which the board as a whole must take responsibility …

[Dealing with the case against one of the respondents, his Lordship continued:] A director in the position of Mr Illidge from September 1991 onwards was necessarily in a difficult position, arriving in the post as he did at a time when it must have been already known to the chairman and the managing directors that the company was about to face possibly terminal difficulties and that knowledge was not being fully shared with him. In setting a standard against which his conduct must be judged for the purposes of the 1986 Act a balance must be struck between the need on the one hand not to deter honest and competent employees (as it is accepted he was) from accepting board appointment in such circumstances and the desirability on the other of reinforcing the hands of those accepting such office by emphasising that their duties require them to act with independence and courage. I have not found striking that balance easy in Mr Illidge's case. I have borne in mind the comparatively short time during which he was a director. I have also borne in mind that, where I have found him to be open to criticism, it is very doubtful whether had he acted differently **(p. 306)** the course which events ultimately took would have been significantly altered. What has caused me difficulty is deciding whether or not the cumulative effect of the omissions for which I have criticised him compel a conclusion that his conduct did not meet the standards which today are expected of a company director. That conduct appears to me to reveal a pattern … of acquiescence in Mr Ball's suppression of information to the auditors and to the board. I do not accept the case he now seeks to make that he was in fact at all times reassured by what Mr Ball told him. I think he well appreciated that a potentially parlous situation had developed, and was conscious that Mr Ball was not sharing that information with the non-executive directors. I consider that this situation obtained for a sufficiently long period during his directorship for it to have been a serious failure on his part not at some stage to take steps to see that the matter was raised at board level. While I have considerable sympathy for him in the position in which he found himself, I have regretfully come to the conclusion that the conduct was such as to require me to disqualify him. My regret is due to the fact that I have little doubt that in any normal context he is a man who is perfectly fit to be concerned in the management of a company.

[His Lordship made a similar finding against a second respondent, Dyer, but held that the case against a third respondent had not been made out.]

Factors to be considered in assessing the disqualification period.

[6.14] Secretary of State for Trade and Industry v Carr [2006] EWHC 2110, [2007] BCC 313 (Chancery Division)

C, a director of a public listed company, settled a substantial compensation claim by F against that company for US$18 million. Then, according to the Secretary of State, C participated in false accounting processes which were intended to hide the company's real financial position from creditors, members and possible investors, making possible a more positive financial outlook than was warranted. Although C had been acquitted of criminal charges relating to some of the conduct which was the subject of the application under CDDA 1986 s 8, he was nevertheless disqualified for 9½ years.

DAVID RICHARDS J: … The allegations which I have held to be established amount to deliberate and dishonest conduct on the part of Mr Carr in the performance of his duties as a director of a listed company. They were not isolated acts but amounted to a sustained attempt over an extended period to conceal and misrepresent the true position as regards the claim by Ford and its settlement by the company. Both were highly material in the context of the group. It involved concealing information which, as I find, he knew

should be disclosed to the board, the auditors, the Stock Exchange, and others and should be disclosed in the accounts. It further involved the use of false accounting treatments, leading to the approval and publication of accounts which he knew to be false, achieved only by misleading the auditors as to the true position. Similarly improper conduct is shown by the treatment of the Rover payment.

These are, in my judgment, very serious matters, which make a substantial period of disqualification inevitable. The top bracket of disqualification for 10 to 15 years is invoked in particularly serious cases, of which in my view this is one. My starting point is that the period of disqualification in this case should be in that bracket, subject to any counter-balancing circumstances.

Submissions were made to me on behalf of Mr Carr as to matters which I should take into account in fixing the period of disqualification. There are some to which I attach no weight. First, I attach no weight to the fact that Mr Carr lost the value of his shareholding, which over a period had cost him approximately £2 million, exceeding, as was submitted, the total value of his remuneration over his period of employment. All other shareholders also lost the value of their shares, but they were deprived by Mr Carr's conduct of the timely provision of highly material information to which they were entitled. If the group had been able to survive, the concealment of the Ford claim **(p. 307)** and settlement might well have benefited him in terms of the value of his shareholding. Mr Carr's personal financial loss does not lessen the seriousness of his conduct or the need to protect the public. At most, it can be said that he did not make money from his misconduct.

Secondly, attention was drawn on Mr Carr's behalf to the periods of disqualification for those former directors who had given undertakings at the date of the hearing. I do not regard these periods, which range from 3 to 6½ years, as providing any useful guidance. Their misconduct, as summarised in the schedules to their undertakings, is not comparable in terms of the duration, scope or, save in some instances, seriousness of the case against Mr Carr. I have not seen Mr Jeffrey's undertaking or the schedule of allegations to which he has admitted. Mr Carr was not only himself closely involved in the matters which I have established against him, but he was also, as chief executive, senior to Mr Jeffrey.

There are other factors which, to a greater or lesser extent, I do take into account. First, while not agreeing to give an undertaking, his decision not to defend the application has saved time and expense for the court, the Secretary of State and witnesses. I should however note that this is not motivated by any apparent recognition of wrongdoing on Mr Carr's part, and it is in the circumstances a factor of only very slight significance. Secondly, there is no evidence or suggestion of other misconduct and he had previously enjoyed a successful career. Thirdly, and significantly, following his resignation from the company and its collapse in December 1999, both of which were well-publicised, he has had no significant management responsibilities. The disqualification proceedings did not commence until August 2004, following delivery of the Inspectors' report in January 2003. I should also take account of the period since the hearing of this application. Fourthly, before the issue of the disqualification proceedings, the Secretary of State was prepared to accept an undertaking for a period of 9 years.

In all the circumstances, I consider that a period of disqualification for 9½ years is appropriate.

➢ Note

Other recent cases provide further illustration of the types of factors the court will consider in the context of directors' disqualification orders. It was held in *Secretary of State for Trade and Industry v Reynard* [2002] EWCA Civ 497 that a former director's conduct during the disqualification proceedings themselves could properly be taken into account by the court for sentencing purposes. Also, in *Ghassemian v Secretary of State for Trade and Industry* [2006] EWHC 1715 (Ch), Lewison J held that a director's lack of cooperation with regulators (in this case, the Official Receiver and the Financial Services Authority) could constitute a ground of unfitness for being a company director. In *Secretary of State for Business Innovation and Skills v Khan* [2012] CSOH 85 (Outer House, Court of Session), Lord Hodge rejected the Secretary of State's argument that the

specific role and involvement of the particular director were irrelevant in the court's determination of the appropriate length of a disqualification order. He reached this conclusion notwithstanding that directors are collectively and individually under a continuing duty to acquire and maintain sufficient knowledge of the company's business. Further, in *Cathie v Secretary of State for Business, Innovation and Skills* [2012] EWCA Civ 739, the Court of Appeal reaffirmed the lower court's finding of unfitness based on the failure of the company to pay overdue taxes to HM Revenue and Customs. In that case, having established that non-payment of taxes led to an inference of unfitness, the burden was 'reversed' in the sense that the defendants had an opportunity to adduce evidence to defeat such inference. Exceptionally, in *Secretary of State for Trade and Industry v Jonkler* [2006] EWHC 135 (Ch), S, a former director who had previously agreed to a disqualification undertaking of five years under CDDA 1986, was released from this undertaking when the Secretary of State discontinued disqualification proceedings against her ex-husband, O, on the basis that the Secretary no longer believed it was in the public interest to subject O to a disqualification order. Finally, in *Davenport v Secretary of State for Business, Innovation and Skills* (Commercial Court, unreported), the court gave leave to a disqualified director, D, under CDDA 1968 ss 1 and 17**(p. 308)** to give instructions to a company pursuant to a deed of trust. A company was specially created to hold a property on trust for D, and proceedings were brought by a bank to possess the property. It was held by Morgan J that, as D would not be dealing with the public, there was no conceivable risk of harm to the public for D to give instructions to the company for the purpose of defending the possession claim.

Further Reading

DAVIES, PL, 'Post-Enron Developments in the United Kingdom' in G Ferrarini et al (eds), *Reforming Company and Takeover Law in Europe* (2004), p 183.
Find This Resource

KEAY, A, 'Company Directors Behaving Poorly: Disciplinary Options for Shareholders' [2007] JBL 656 (on CA 2006 s 168).
Find This Resource

MCCONVILL, J and HOLLAND, E, '"Pre-Nuptial Agreements" for Removing Directors in Australia—Are They a Valid Part of the Marriage between Shareholders and the Board?' [2006] JBL 204.
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MCGLYNN, CMS, 'The Constitution of the Company: Mandatory Statutory Provisions v Private Agreements' (1994) 15 *Company Lawyer* 301.
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Notes:

[1] It is important to be aware of the differences between executive and non-executive directors (see 'Balance of executive and non-executive directors', p 264); appointed, *de facto* and shadow directors ('Directors' duties are owed by *de jure* and *de facto* directors', pp 311ff); alternate directors and nominee directors. These different categories are not mutually exclusive.

[2] CA 2006 Model Articles for Private Companies art 17, provides for appointment by *either* the general meeting or the board of directors. There is the same provision for public companies (Model Articles art 20), but if the appointment is made by the directors it is subject to confirmation by the members (art 21).

[3] *Worcester Corsetry Ltd v Witting* [1936] Ch 640.

[4] In *Theseus Exploration NL v Mining and Associated Industries Ltd* [1973] Qd R 81, the court issued an interim injunction to prevent members of the company electing certain persons as directors, because there was sufficient evidence that those persons intended to use the company's assets solely for the benefit of the majority member.

[5] Recall that the functions of a managing director are not set by law: *Harold Holdsworth & Co (Wakefield) Ltd v Caddies* [1955] 1 WLR 352, HL.

[6] See the discussion at 'Members' personal rights', pp 250ff.

[7] [1946] AC 459.

[8] The House of Lords affirmed the decision of the Court of Appeal on grounds that did not raise this question.

[9] Eg for public companies, see Model Articles art 21; there is no equivalent in the Model Articles for private companies.

[10] The predecessor section, CA 1985 s 303, also indicated that the right was 'notwithstanding anything in the articles', but, since the Act overrides the articles, this was seen as unnecessary.

[11] Although note the practical impediment of having to give special notice, and hold a meeting: see 'Removal of directors', pp 284ff.

[12] The removal of a director may sometimes justify the making of a winding-up order on the 'just and equitable' ground, at least in a small company (see 'Compulsory winding up on the "just and equitable" ground', pp 795ff), or, alternatively, amount to 'unfairly prejudicial' conduct within CA 2006 s 994 (see 'Unfairly prejudicial conduct of the company's affairs', pp 681ff).

[13] CA 2006 s 168 does not deprive the director of any compensation or damages payable in respect of termination of the appointment as director or of any appointment terminating with that as director (s 168(5)(a)).

[14] Although note that the director is subject to the usual common law duty to mitigate his or her damages by seeking substitute employment, ie the director is not automatically entitled to be 'paid out' to the end of the contractual term.

[15] (1864) 5 B & S 840 at 852.

[16] [1914] 2 KB 770. [See the Note following.]

[17] In *Dafen Tinplate Co Ltd v Llanelly Steel Co (1907) Ltd* **[4.25]**.

[18] Or may direct the Official Receiver to make the application, if it comes under CDDA 1986 s 6.

[19] See A Walters, 'Directors' Duties: Impact of the CDDA?' (2000) 21 *Company Lawyer* 110.

[20] Especially when the possible liability of directors for wrongful trading (*Re Produce Marketing Consortium Ltd (No 2)* **[16.16]**) is also taken into account.