BREACHES OF DIRECTORS' DUTIES

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This paper aims to highlight aspects of claims against directors for breaches of the duties now codified in Chapter 2 of Part 10 of the Companies Act 2006. It assumes a degree of familiarity with ss 170-175 of that Act,

Ratification of breaches

1. A director's duties are owed to the company as a legal entity separate from its members. At common law, the general rule (at least for so long as the relevant company was solvent) was that the interests of the company equated with those of its shareholders as a general body, both present and future: see *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286, at 291.

2. Consistently with the general rule referred to immediately above, it was open to the members of a company to ratify any breach of duty by the directors, providing the relevant breach did not involve unlawful conduct: see *Rolled Steel Products (Holdings) Ltd v British Steel Corporation*[1] [1986] Ch 246, at 296 F per Slade LJ; *Bamford v Bamford* [1970] Ch 212, at 237 H to 238 B per Harman LJ.

3. As Lord Sumption put it in *Prest v Prest* [2013] 2 AC 415 at [41], a company's shareholders may approve a foolish or negligent decision by directors if made in the ordinary course of business, at least where the relevant company is solvent. The shareholders cannot, however, validly consent to their own appropriation of the company's assets for purposes which are not the company's.

4. Putting it another way, at common law all of the shareholders could relieve a director from liability for any breach of duty, provided that the breach was not *ultra vires* the company and did not involve a fraud on its creditors. Examples of *ultra vires* conduct include the distribution of assets of the company to the shareholders other than by way of a distribution of profit lawfully made or by a reduction in capital duly sanctioned by the court or possibly a return of capital by the adoption of a special procedure under the Companies Acts: *Ultraframe (UK) Ltd v Fielding and ors* [2003] EWCA Civ 1805; [2004] RPC 24 at [39] per Waller LJ; *Progress Property Company Ltd v Moorgath Group Ltd* [2010] UKSC 55; [2011] 1 WLR 1.

5. A breach of the common law no-conflict fiduciary duty was also capable of being ratified by the members, provided the ratification was not brought about by unfair or improper means: see *North West Transportation Co Ltd v Beatty* (1887) 12 App Cas 589 at 593-4 per Sir Richard Bagallay.

6. In *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722 the matter was put by Street CJ (at p 730) in these terms:

   In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done.

7. There must, however, have been a ratification. It is not enough that the shareholders would have ratified if they had known or thought about it before liquidation supervenes: see *Re D'Jan of London Ltd* [1994] 1 BCLC 561, at 564 a.

[1] Previously a breach of fiduciary duty which involved an act which was ultra vires the company (in the sense of being outside the objects specified in the company's memorandum of association) was incapable of ratification, but the changes effected by the Companies Act 1989 have altered this such that an ultra vires act may be ratified by special resolution as may the release of the directors from the personal liability which would otherwise result.

8. The ratification need not have taken place at a formal meeting of the members; where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be: *In re Duomatic* [1969] 2 Ch 365, at 373 per Buckley J.

9. In *EIC Services Ltd v Phipps* [2003] EWHC 1507 (Ch)[2] Neuberger J considered that any requirement for approval in meeting by the (or a group of) the shareholders of a particular course may be avoided on the *Duomatic* principle:

   if all members (or members of the relevant group), being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether members of the group give their consent in different ways at different times, does not matter.

10. Later (at para 135) Neuberger J said this:

    Before the *Duomatic* principle can be satisfied, the shareholders who are said to have assented or waived must have the appropriate or "full" knowledge. If a shareholder is not aware that his "assent" is being sought to the matter, let alone that the obtaining of his consent is at least a significant factor in relation to the matter, he cannot, in my view, have the necessary "full knowledge" to enable him to "assent"…

11. Operation of the *Duomatic* principle requires, therefore, that everyone entitled to vote on the question applied his or her mind to it and decided in favour of the step taken.

12. It is difficult to see how ratification or waiver of a breach of fiduciary duty could be effective without knowledge that the director's conduct constituted or at least might constitute wrongdoing: *cf In re Pearce Duff & Co Ltd* [1960] 1 WLR 1014 where the court held shareholders' consent to short notice of a meeting to pass a special resolution was ineffective in circumstances where they did not have in mind at all that the initial notice was defective. See also the argument of J Chadwick QC (as he then was) in *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258, at 289 F. But see *Knight v Frost* [1999] 1 BCLC 364 at 375 for authority to the effect that the members need not know that the conduct which they are asked to ratify constitutes a breach of duty/trust, provided full disclosure of the relevant circumstances is made.

13. The application of the *Duomatic* principle has its limits; see *Ultraframe (UK) Ltd v Fielding* [2004] RPC 479 at [40]:

    . . . if a director of a company 100% owned by himself decided simply to take the assets of the company for himself, he would not be able to rely on the *Duomatic* principle, because such conduct could not be considered a bona fide distribution of profits and would be a reduction in capital and ultra vires the company without the sanction from the court.

14. In relation to breaches committed after 1 October 2007 ratification is governed by s 239 of the 2006 Act[3]. That provides as follows:

    (1) This section applies to the ratification by a company of conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company.

[2] Some aspects of the decision are reported at [2003] 1 WLR 2360 but not Neuberger J's consideration of the application of the *Duomatic* principle. There was a successful appeal [2005] 1 WLR 1377 but not on the judge's conclusion on this point.
[3] See Sch 3, paragraph 17 of The Companies Act 2006 (Commencement No. 3 Consequential Amendments, Transitional Provisions and Savings) Order 2007 (SI 2007/2194).

(2) The decision of the company to ratify such conduct must be made by resolution of the members of the company.

(3) Where the resolution is proposed as a written resolution neither the director (if a member of the company) nor any member connected with him is an eligible member.

(4) Where the resolution is proposed at a meeting, it is passed only if the necessary majority is obtained disregarding votes in favour of the resolution by the director (if a member of the company) and any member connected with him. This does not prevent the director or any such member from attending, being counted towards the quorum and taking part in the proceedings at any meeting at which the decision is considered.

(5) For the purposes of this section—

(a) "conduct" includes acts and omissions;
(b) "director" includes a former director;
(c) a shadow director is treated as a director; and
(d) in section 252 (meaning of "connected person"), subsection (3) does not apply (exclusion of person who is himself a director).

(6) Nothing in this section affects—

(a) the validity of a decision taken by unanimous consent of the members of the company, or

(b) any power of the directors to agree not to sue, or to settle or release a claim made by them on behalf of the company.

(7) This section does not affect any other enactment or rule of law imposing additional requirements for valid ratification or any rule of law as to acts that are incapable of being ratified by the company.

15. As to whether a members is a connected person for the purposes of s 239, see ss 252 and 254 of the 2006 Act.

16. Subsection (6) expressly preserves the ability of members unanimously (formally or informally) to ratify any breach so the preceding restrictions on who may vote do not apply (subject to the *Ultraframe* qualification referred to above: see *Goldtrail Travel Ltd (in liquidation) v Aydin and ors* [2014] EWHC 1587 (Ch); [2015] 1 BCLC 89 at [116]-[118]).

17. The effect of ss (7) is to preserve the common law in relation to any additional requirements for a valid ratification and as to acts that are incapable of ratification by the members. Such acts will include those which are *ultra vires* the company in the strict sense and also those which, pursuant to any rule of law, are incapable of being ratified for any other reason: see *Franbar Holdings Ltd v Patel* [2008] EWHC 1534 (Ch); [2009] 1 BCLC 1 at [44]. It follows that, for example, ratification by the members at a time when the company is insolvent will still be invalid: *Goldtrail* at [114]-[115].

Limitation of claims

18. The time within which any claim for breach of a director's duties should be brought to avoid successful reliance on a limitation defence will depend on (among other things):

(1) which of the relevant duties is said to have been breached;

(2) what remedies are sought;

(3) the presence or absence of fraud;

(4) whether there is any basis for an extension of time based on concealment.

19. Misfeasance claims brought by office-holders against directors under s 212 of the 1986 Act are subject to the same limitation periods which would have applied had the claims been made by the company itself. Section 212 does not create any new substantive rights in favour of administrators or liquidators; the provision is purely procedural enabling the office holder to bring proceedings in his own name which would otherwise have to be brought in the name of the company: see, for example, *Re Eurocruit Europe Ltd* [2007] EWHC 1433 (Ch); [2007] 2 BCLC 598.

20. Any claim based on s 174 (duty to exercise reasonable care, skill and diligence) will be subject to a 6 year limitation period, by analogy with claims in tort[4]. If the director has the benefit of a service agreement or other contractual arrangement with the company, there may be scope for a claim in contract alleging breach of any express or implied[5] term as to reasonable skill and care, again subject to a 6 year limitation period[6].

21. In respect of claims for breach of those duties properly characterised as fiduciary (e.g. the duties under ss 172 and 175 CA 2006), the applicable limitation period (if any) varies according to the nature of the breach and the relief sought.

22. It is in consequence of the fiduciary character of the relevant duties, that directors fall to be treated as if they were trustees of those funds of the company which were in their hands or under their control and any misapplication of such monies will be a breach of trust: *Belmont Finance Corporation v Williams Furniture Ltd and others (No 2)* [1980] 1 All ER 393 at 405 d per Buckley LJ. The status of a director as a quasi-trustee means that the relevant claim may be subject to section 21 of the Limitation Act 1980.

23. Section 21 is in these terms (so far as relevant):

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action-

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.

(2) ...

(3) Subject to the proceeding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.

24. For a detailed discussion of the applicable limitation periods in the context of claims against directors, reference may be made to the decision of the Court of Appeal in *Gwembe Valley*

[4] As to which, see s 2 of the Limitation Act 1980. Time will start running from the date damage is sustained.
[5] See the Supply of Goods and Services Act 1982.
[6] See s 5 of the 1980 Act. Here the relevant cause of action will accrue on the date of breach.

Development Co Ltd v Koshy (No3) [2003] EWCA Civ 1048; [2004] 1 BCLC 131 at [77] et seq per Mummery LJ.

25. For s 21(a) to be applicable to a claim against a director, the director must have been implicated in dishonest conduct: *Vivendi SA and anr v Richards and anr* [2013] EWHC 3006 (Ch); [2013] BCC 771 at [187]. See also *Armitage v Nurse* [1998] Ch 241. Conduct will be dishonest in this context if the director acts in a way which he does not believe is in the interests of the company (which may, if appropriate, mean the interests of the company's creditors): *cf Vivendi* at [192].

26. It is important to note that for a claim to fall within s 21(b) the director concerned need not still have the relevant property; the provision extends to claims to recover property "previously received by the trustee and converted to his use": see, for example, *JJ Harrison (Properties) Ltd v Harrison* [2002] 1 BCLC 162 at [39]-[40].

27. Note also the decision in *Re Pantone 485 Ltd* [2002] 1 BCLC 266 where the misfeasant directors were treated as having received sums paid in breach of trust notwithstanding that the actual recipients were companies controlled by the directors.

28. Assuming that the relevant breach of duty is prima facie subject to a 6 year (or other defined) limitation period which has expired, it may be open to the company (or, if insolvent, the office holder) to rely on s 32 of the Limitation Act 1980. That provides (so far as is relevant):

> (1) Subject to [subsections (3) and (4A)] below, where in the case of any action for which a period of limitation is prescribed by this Act, either—
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> (a) the action is based upon the fraud of the defendant; or
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> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
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> (c) the action is for relief from the consequences of a mistake;
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> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
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> (2) References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.
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> (3) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

29. Section 32(1)(b) refers to facts being deliberately concealed from the claimant. As Morgan J noted in *IT Human Resources plc v Land* [2014] EWHC 3812 (Ch) at [134], such concealment need not be contemporaneous with the wrongdoing: see *Sheldon v RHM Outhwaite Ltd* [1996] AC 102. For there to be deliberate concealment within section 32(1)(b), the defendant must have considered whether to inform the claimant of the relevant fact and decided not to do so; the fact which the defendant decides not to disclose must ordinarily be one which it was his duty to disclose or must at least be one which he would ordinarily have disclosed in the normal course of his relationship with the claimant: see *Williams v Fanshaw Porter & Hazlehurst* [2004] 1 WLR 3185 at [14] per Park J. In the same case, Mance LJ said of section 32(10(b) at [34] that it applied where a defendant deliberately concealed facts knowing that they were relevant to an actual or potential breach of duty and at [36] he added that where there was a duty to speak then the intentional suppression of information which it is known

should be communicated pursuant to that duty can readily be regarded as "concealment" of the information.

30. Section 32(2) refers to deliberate commission of a breach of duty amounting to deliberate concealment of the facts involved in "that breach" of duty. In order for there to be "deliberate commission of a breach of duty" within s 32(2) there must be a deliberate breach of that duty, that is a breach which is committed intentionally: *IT Human Resources* at [135]. The distinction for the purposes of section 32(2) is between intentional wrongdoing on the one hand and negligence or inadvertent wrongdoing on the other: ibid, citing *Cave v Robinson Jarvis & Rolf* [2003] 1 AC 384 at [17] and [25] per Lord Millett and at [58] and [60] per Lord Scott.

31. As to the duty to disclose, it is important to note that the duty under s 172 CA 2006 (to act in the way in which the director considers, in good faith, would be most likely to promote the success of the company) can involve a duty on the director to disclose his own wrongdoing: see *Fassihi v Item Software Ltd* [2004] 994 at [41]; *Brandeaux Advisers (UK) Ltd v Chadwick* [2010] EWHC 3241 (QB) at [47] and *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch) at [192] to [195].

32. A company which complains about a director's failure to disclose a matter must establish that the director subjectively concluded that disclosure was in the best interests of the company, or at least, that the director would have so concluded had he been acting in good faith: *GHLM* at [194]. Pursuing such a claim based on alleged failure to disclose should probably involve pleading that the relevant director was not acting in good faith: *IT Human Resources* at [125].

Interaction with claims under ss 238 and 239 IA

33. Sections 238 and 239 of the Insolvency Act 1986 provide for reversal of the effects of certain transactions (those at an undervalue and those amounting to preferences) provided certain conditions are satisfied. The respondents to such applications are the counter-parties to the impugned transactions.

34. In certain circumstances, most obviously the insolvency of the counter-parties or because a transaction falls outside the relevant claw-back period, it may be appropriate to consider to what extent there is a claim against the relevant directors for breach of duty.

35. A transaction falling within s 238(4)[7] (even if it was not entered into at a relevant time for the purposes of s 240 of the 1986 Act) will constitute an actionable breach of duty on the part of the directors subject to any available defences (e.g. ratification, limitation).

36. A director responsible for a preference vulnerable under s 239 will, however, not necessarily commit a misfeasance or breach of duty. That would be tantamount to saying that directors simply have a duty not to allows 239 to be breached which, according to Hazel Williamson QC (sitting as a deputy High Court judge) in *Re Brian D Pierson (Contractors) Ltd* [2001] 1 BCLC 275 at 299 *d*, is too sweeping a proposition. It must, she said, be a matter of fact, in any particular case, whether the acts or a director which are held to constitute the giving of a preference are also, in their own right, acts which amount to misfeasance and breach of duty. See also *Knight v Frost and ors* [1999] 1 BCLC 364 where Hart J doubted (at p 382 *d*) that a preferential payment by an insolvent company to a creditor made outside the statutory claw-back period would give rise to an obligation on the relevant director to replace the money at the suit of the company.

[7] Which provides: For the purposes of this section [i.e. s 238] . . . a company enters into a transaction with a person at an undervalue if:

(a) The company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or

(b) The company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the vale, in money or money's worth, of the consideration provided by the company,

37. The fact that the conditions laid down by s 239 are not all met should not, of itself, however, necessarily preclude a finding of breach of duty: *GHLM Trading v Maroo* (supra) at [168].

38. In *GHLM* Newey J said this by way of guidance:

> [169] It seems to me that a company seeking redress in respect of a 'preference' to which section 239 does not apply is likely to need to show: (a) that it has suffered loss, (b) that the director has profited (so that the no profit rule) or (c) that the transaction in question is not binding on the company. In a typical case, the first of these may be impossible: if the 'preference' involved was the discharge of a debt, the company's balance sheet position is likely to be unaffected. The second might well also be problematic if the company has not entered into an insolvency regime: if, say, the 'preference' involved the discharge of a debt owed to a director, it could be hard to say whether or to what extent the director was better off than he would have been had he still been owed the money by the company.
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> [170] As for whether the transaction is binding, ordinary agency principles indicate that a company can disavow a contract which a director has caused it to enter into if: (a) the director was acting in his own interests rather than those of the company, its members or (where appropriate) its creditors as a class, and (b) the other party to the contract had notice of the director's breach of duty. Thus, 'Unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal' (*Bowstead & Reynolds on Agency* (19th edn, 2010) para 3–007), and 'No act done by an agent in excess of his actual authority is binding on the principal with respect to persons having notice that in doing the act the agent is exceeding his authority' (*Bowstead & Reynolds*, para 8–049). The transaction may also be open to challenge on equitable principles: 'A contract made or act done by an agent which is, to the knowledge of the other party involved, in violation of the agent's equitable duties to his principal entitles the principal to equitable relief against the third party' (*Bowstead & Reynolds*, para 8–217).
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> [171] The better view appears to be that, where a director has caused his company to enter into a contract in pursuit of his own interests, and not in the interests of the company, its members or (where appropriate) its creditors as a class, and the other contracting party had notice of that fact, the contract is void rather than voidable: see eg *Bowstead & Reynolds*, paras 8–067 and 8–220, Richard Nolan, *Controlling Fiduciary Power* [2009] CLJ 293 esp at 317–319, *Heinl v Jyske Bank* (*Gibraltar*) *Ltd* [1999] 1 Lloyd's Rep (Banking) 511, and *Hopkins v T L Dallas Group Ltd* [2005] 1 BCLC 543. On this basis, it is hard to see how it could matter whether the requirements of s 239 of the 1986 Act are satisfied.

39. It would appear that a preference for which relief is not available under s 239 must, to be actionable as a breach of director's duty, involve a conscious application of the company's funds for the known purpose of preferring his own or his associate's interest, and therefore a misapplication of those funds: see *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250 (as explained in *Re Brian D Pierson (Contractors) Ltd* (supra) at p 299 *c*).

Section 1157 CA 2006

40. The Court enjoys a statutory power to relieve directors of liability for breach of duty etc in certain circumstances. The source of the power is 1157 of the 2006 Act[8] which is in these terms:

> (1) If in proceedings for negligence, default, breach of duty or breach of trust against—
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> (a) an officer of a company, or

[8] Which came into force on 01.10.08: see The Companies Act 2006(Commencement No. 5, Transitional Provisions and Savings Order) 2007, SI 2007/3495 at art 5(1)(d).

(b) a person employed by a company as auditor (whether he is or is not an officer of the company),

it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit.

(2) If any such officer or person has reason to apprehend that a claim will or might be made against him in respect of negligence, default, breach of duty or breach of trust—

(a) he may apply to the court for relief, and

(b) the court has the same power to relieve him as it would have had if it had been a court before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought.

(3) Where a case to which subsection (1) applies is being tried by a judge with a jury, the judge, after hearing the evidence, may, if he is satisfied that the defendant (in Scotland, the defender) ought in pursuance of that subsection to be relieved either in whole or in part from the liability sought to be enforced against him, withdraw the case from the jury and forthwith direct judgment to be entered for the defendant (in Scotland, grant decree of absolvitor) on such terms as to costs (in Scotland, expenses) or otherwise as the judge may think proper.

41. The section re-enacts in substantially identical language what was s 727 of the 1985 Act.

42. The ability (under ss (2)) to seek pre-emptive relief is very rarely invoked, at least by directors. *Re Home Treat Ltd* [1991] BCLC 705 is an example of a successful application under what was then s 727 CA 1985 by an administrator in relation to the carrying on of a business which was *ultra vires* its objects.

43. The onus is on the delinquent director to satisfy the Court of the entitlement to relief under the provision *Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712; [2001] 2 BCLC 531 (CA) at [58] per Robert Walker LJ. It is incumbent on those seeking relief, therefore, to make a positive case: see *Re Kirbys Coaches Ltd* [1991] BCLC 414 at 415 *g*.

44. There is authority to the effect that reliance on s 1157 does not have to be pleaded or foreshadowed in advance[9] (meaning those prosecuting misfeasance claims should assume it might feature at trial) but the necessary platform must be contained in the evidence. Query whether such an approach has survived the coming into force of the CPR.

45. The form of the liability faced by the relevant director would appear to be irrelevant to the availability of relief under s 1157. An attempt in *Coleman Taymar Ltd v Oakes* [2001] 2 BCLC 749 to exclude from the ambit of the section relief in the form of an account of profits (rather than liability for loss caused to the relevant company) was rejected.

46. Before the court can consider relieving a director of liability under s 1157 it must be satisfied that he or she has acted honesty and reasonably. If those "absolutely necessary preconditions" are not met, there can be no question of relief: *Bairstow v Queens Moat Houses plc* (supra) at [63] per Robert Walker LJ (citing *National Trustees Co of Australia v General Finance Co of Australia* [1905] AC 373, at 381).

47. Reasonableness and, it seems, honesty[10] are determined objectively in this context: *ibid* at [58].

[9] See *Re Kirbys Coaches Ltd* [1991] BCLC 414.

[10] In *Re MDA Investment Management Ltd* [2004] EWHC 42 (Ch); [2005] BCC783 Park J cited and agreed with an observation of Robert Reid QC (sitting as a deputy High Court judge) in *Coleman Taymar Ltd v Oakes* [2001] 2 BCLC 749, at 770 to the effect that subjectivity may have a role in relation to 'honesty'. Such an approach would be inconsistent with *Bairstow v Queens Moat Houses* (which was not cited in either *Coleman Taymar* or *MDA*).

48. Whether a director has acted honestly or not for the purposes of relief is usually capable of fairly summary determination. In *Kirbys Coaches* (supra) Hoffmann J volunteered (at p 415 *g*) that it may be that honesty would be assumed in favour of an applicant in the absence of evidence to the contrary.

49. More generally, it might be said that the hallmarks of disqualifying behaviour might be summarised as including the following: personal gain or benefit, deception, and conscious impropriety.

50. The requirement of reasonableness throws up an immediate query of the extent to which s 1157 has any application to a director's breach of s 174 of the 2006 Act (duty to act with reasonable care, skill and diligence). For liability under s 174 to arise the Court must necessarily have concluded that the director has acted negligently (and therefore unreasonably). Yet s 1157 expressly applies to liability for negligence and so contemplates that conduct may be reasonable for the purposes of s 1157 notwithstanding that it amounts to a lack of reasonable care for the purposes of s 174: see *Re D'Jan of London Ltd* [1994] 1 BCLC 561.

51. Ultimately in this context, it appears that the Court is engaged upon a qualitative assessment of the relative culpability of the director's behaviour. Gross negligence would not be a good starting point for successful invocation of s 1157 but where the negligence amounts to mere inadvertence there is potentially reasonable scope for exemption.

52. As to what constitutes reasonableness generally in this context (whatever the nature of the breach), it will frequently be relevant to enquire whether the director in question (or the company of which he or she was a director) obtained (or ought to have obtained) professional advice before acting as he (it) did. The answer to that question is not, however, necessarily decisive: see *Murray v Leisureplay plc* [2004] EWHC 1927 at [121].

53. For examples where the failure to take advice was fatal see *In re Duomatic Ltd* [1969] 2 Ch 365; *Re DKG Contractors Ltd* [1990] BCC 903; *Re Ruscoe Ltd*, unrep Mr Registrar Jones, 7 Aug 2012.

54. Even where advice has been taken it is not necessarily a 'passport to relief'. The basis of the advice (including what the advisor was told by the director/company), the identity of the advisor[11], whether the advice was followed and the directors' actual knowledge and experience[12] are all relevant factors.

55. Assuming the threshold conditions are made it, that does not necessarily lead to the granting of relief (in whole or in part). The Court retains a discretion, to be exercised by reference to "all the circumstances of the case" and on the basis of fairness.

56. Relevant circumstances are likely to include the following: receipt or otherwise of relevant professional advice; the seriousness of the breach; the extent to which the director has taken steps to remedy the breach; whether any insolvency procedure to which the company may be subject was brought about by external factors outside the director's control and so forth.

57. Whether the director has acted reasonably may also be tested by asking whether he or she has acted 'in the way in which a man of affairs with reasonable care and circumspection could reasonably be expected to act in such a case': see *Duomatic* (supra), applied in *PNC Telecom plc v Thomas (No 2)* [2007] EWHC 2157 (Ch); [2008] 2 BCLC 95.

[11] In *Coleman Taymar Ltd v Oakes* (supra) advice was sought from a solicitor but not one specialising in company law and because the director had never sought (or obtained) advice about the conflict of duty which was at the centre of the claim, meant that there was no relevant advice given to be taken into account under what was then s 727.
[12] In *Re Loquitar Ltd* [2003] 2 BCLC 442

58. If the director in question has benefitted personally from the relevant misfeasance relief is almost certain to be refused, at least if the Company is insolvent: see *Re Marini Ltd* [2003] EWHC 334 (Ch); [2004] BCC 172; *Queensway Systems Ltd v Walker* [2003] EWHC 2496; [2007] 2 BCLC 577. See also *Inn Spirit Ltd v Burns* [2002] EWHC 1731 (Ch); [2002] 2 BCLC 780 at [30].

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