Directors Disqualification and Deterrence: *Rwamba v Secretary of State for Business*

20/10/2020

Miles J allowed Mr Rwamba's appeal against the decision of the court below to dismiss his application for leave to act as a director of two companies, and granted him permission to act. The judgment considered the interaction and balance between the questions of "need" and "public protection" and the element of deterrence, which the judge viewed as being "baked" into the disqualification regime, but that did not mean special weight should be applied to deterrence and against granting permission simply because the disqualification arose from a breach of conditions attached to an earlier permission decision. A fair minded observer of the public would look beyond the headlines.

The case will be of interest to practitioners who specialise in proceedings, and applications for leave to act, made under the Company Directors Disqualification Act 1986.

Hugh Sims QC acted for Mr Rwamba on the appeal, instructed by Kaur Maxwell.

***Rwamba v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 2778 (Ch)**

Mr Rwamba applied to the court under section 17(3) of the Company Directors Disqualification Act 1986 for leave to be a director of two recruitment companies, Match Options Limited and Match Options Franchising Limited ("the Companies"), notwithstanding his disqualification. ICC Judge Prentis dismissed the application by his order of 25 February 2020. Mr Rwamba appealed that decision (with permission of Fancourt J). Judge Prentis heard the application at two hearings and gave two judgments, on 17 October 2019 ([2019] EWHC 2669 (Ch)) and 25 February 2020 ([2020] EWHC 352 (Ch)).

Judge Prentis concluded that there were two aspects to public protection: First, that protection must not be unduly undermined by the giving of a permission on conditions which risk not being met. That involves a balancing exercise. Secondly, it is not enough for an applicant to show that there is no undue risk, because the grant may nevertheless undermine wider public protection, for example the deterrent effect conveyed by the perception of disqualification proceedings. He went on to note that where, as in the present case, the permission sought is from a disqualification brought about by breach of a previous permission, the second aspect of public protection must weigh more heavily in such a case. He observed that permission given to one who has already been disqualified twice, and the second time for breach of an earlier permission, carries with it the unavoidable additional risk that the disqualification regime is perceived as lax and permissive, a perception which would lead to a lowering of corporate standards contrary to a purpose of the Act. So, he concluded, the reasons in favour of permission were going to have to be that the more cogent if it is to be granted. He found they were insufficiently cogent and dismissed the application for leave.

Miles J reviewed the decision on appeal, and the case law referred to. He set out a number of principles in relation to leave to act applications, which he distilled from the authorities cited to him (at [34]), as follows:

i) The court has a discretion under section 17 to allow a person who has been disqualified to be a director of a company or be concerned or take part in the promotion, formation, or management of a company.

ii) The onus is on an applicant under the section to persuade the court to grant permission. The starting point when approaching the jurisdiction is that the applicant has been held unfit to be a director for the period of the order (or has

accepted the equivalent when giving an undertaking). Nonetheless leave may be given in a proper case.

iii) It is for the court (and not for the Secretary of State) to be satisfied that it is appropriate to give leave for the applicant to be a director etc.

iv) The discretion under section 17 to give leave is unfettered. It is wrong to seek to add glosses or preconditions. The question for the court is whether in all the circumstances it is appropriate to give leave; and in approaching this question the court balances all the relevant factors.

v) Though it is usual to establish that the Company has a "need" for the applicant to be a director or involved in the management, this is not a precondition. For instance, the appointment may be made to allow the director to obtain a tax advantage.

vi) The court should, among other things, have regard to the nature and seriousness of the conduct that led to the disqualification order or undertaking and the length of the disqualification. Where that conduct was dishonest a court may be reluctant to give leave.

vii) The court should, when deciding whether to give leave for a director to act as a director have regard to the purposes of a disqualification order.

viii) Protecting the public directly by prohibiting the disqualified person from acting and (ii) deterring both the particular director and others from the kind of conduct that has led to the order

ix) Leave should not be too freely given as this would tend to undermine the protective and deterrent purposes of a disqualification order. The court would not wish anyone dealing with a director to be misled as to the gravity of a disqualification order.

x) On the other hand, the power of the court to grant leave under section 17 is inherent in the disqualification regime and in an appropriate case it may serve the public interest to allow a disqualified person to be a director of a specific company.

xi) Moreover, the fact that the applicant for leave has agreed to the imposition of conditions designed to ensure high standards of corporate conduct may itself be seen as promoting the policy of deterring misconduct.

xii) Where a judge has decided to give or decline leave under section 17 an appellate court will only allow an appeal where the judge has taken into account irrelevant factors or failed to take into account relevant ones or acted outside the generous ambit of his or her discretion or has come to a conclusion which is plainly wrong.

In making his appeal Mr Rwamba did not take issue with deterrence being part of the relevant public policy. His main complaint was that the judge below went wrong in thinking that deterrence has special weight merely because the disqualification was for breach of the conditions of an earlier order for section 17 leave, without more. Miles J accepted that submission. He noted that the sequence of events (earlier leave order, breach, disqualification, fresh leave application) was no doubt relevant, but it did not justify putting greater weight into the scales against the applicant. If the court (having considered that sequence of events and the risk of recidivism) is satisfied on the second application that there is no material risk of breach of the second order or its conditions, the case should be treated the same as any other application for leave. The court must still consider the impact (if any) of giving leave on the general deterrence of disqualifications, but that is common to all leave applications.

At [43] Miles J dealt with the concern expressed by the judge below that the public would perceive the system as unduly lax were the court to give permission in the present case in the following way: *"…any question of perception should be assessed by postulating a fair minded and informed member of the public, and not one who has been told the bare headlines. It may be tested this way: suppose leave were given and the fair minded observer were asked how this would affect his or her views about the seriousness and force of the disqualification regime and orders made under it. The observer would (being informed) understand some general things about the regime and some specific ones about this case. He or she would understand*

(generally) that leave is an inherent part of the disqualification regime, that it requires judicial scrutiny, and that it will only be granted where the court is satisfied on proper grounds; and (specifically) that the applicant had carelessly (but not dishonestly) breached the earlier permission order, had apologised, and had offered a series of conditions which imposed stringent controls on the business to minimise the risk of breach, that the Secretary of State did not oppose an order including those conditions, and that the court was satisfied that there was no material risk to the public of future breaches of the conditions or of further corporate misconduct were leave to be given. The observer would also understand that the process of agreeing and putting such conditions in place is time-consuming and costly and is not undertaken lightly. I do not think that the fair minded observer would think that the grant of leave would undercut or weaken the disqualification regime generally, or the disqualification of Mr Rwamba specifically. The observer would not, to my mind, attach special weight to the fact that the disqualification arose out of an earlier permission order."

Having concluded, therefore, at [44], that the judge below had erred by giving special weight to the public policy of deterrence, merely because the disqualification arose from the breach of an earlier permission order, he considered the case afresh, and exercised his discretion to grant leave, noting a number of points in favour, including (see at [46]-51]):

i) that Mr Rwamba had recognised his earlier errors;
ii) the length of the 2015 undertaking;
iii) the short period of the proposed permission;
iv) the absence of any dishonesty;
v) the Secretary of State's non-opposition;
vi) the absence of a risk of breach of the condition or of wider risks in the management of the Companies, in light of extensive and prescriptive conditions proposed;
vii) both Companies were solvent and trading profitably;
viii) it would assist fund raising efforts if Mr Rwamba became a director of the Companies;
ix) it would assist the Companies' ability to grow their business to have Mr Rwamba as part of their public face as a director; and
x) the wish of the managing director, Mrs Kirigo to step back from the business in favour of Mr Rwamba, to permit her to spend more time with their child, who had special educational needs, was a further factor which could be taken into account.

He concluded that in these circumstances a fair minded observer would not consider that the grant of leave in the present circumstances would go against the grain of the disqualification regime generally or diminish the seriousness of the 2015 undertaking by which Mr Rwamba was disqualified as a director. The giving of leave was inherent in the disqualification regime, the public was fully protected by the conditions of leave (which have been considered and commented on by the Secretary of State), and there were good reasons for allowing Mr Rwamba to act as a director of the Companies.

Hugh Sims QC
Barrister
Guildhall Chambers

20/10/2020