| *Ref:* | **Master51** |
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*Judgment: approved by the Court for handing down*
*(subject to editorial corrections)**

| *Delivered:* | **5/10/07** |
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**IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND**

**CHANCERY DIVISION (COMPANIES)**

**-------**

**IN THE MATTER OF KEADYANNE LTD IN LIQUIDATION**

**AND**

**IN THE MATTER OF THE COMPANY DIRECTOR'S DISQUALIFICATION (NORTHERN IRELAND) ORDER 2002**

**BETWEEN:**

**THE DEPARTMENT OF ENTERPRISE TRADE AND INVESTMENT**

**and**

**MICHAEL REID AND SHARON LOUISE GILLESPIE**

**Respondents**

**-----**

**Master Redpath**

In this case the second named Respondent applies for leave to continue to act as a Company Director.

The second Respondent entered into an undertaking on 3 June 2007 by virtue of which she agreed to be disqualified from acting as a Company Director for a period of six years.

The liquidator in her affidavit alleged the following matters, in relation to the second Respondent's involvement in Keadyanne Ltd (the Company) by

reference to which the second Respondent was unfit to be concerned in the management of a limited company:-

1. She caused and permitted the Company to trade from 6 April 2003 to 19 April 2004 at a time when she knew or ought to have known that it was insolvent and when such trading was to the detriment of creditors as evidenced by the following:-

(a) the Company was unable to meet its liabilities for PAYE from no later than 12 February 2003. In the period of trading from 6 April 2003 to liquidation the sum due and outstanding to Inland Revenue in respect of PAYE increased by £17,164.62 from £2,176.41 to £19,341.03.

(b) the Company was unable to meet its liabilities for NIC from no later than 30 October 2002. In the period of trading from 6 April 2003 to liquidation, the sum due and outstanding to Inland Revenue in respect of NIC increased from £20,787.30 to £28,547.09.

(c) the Company was unable to meet its liability for VAT from no later than 20 July 2002. In the period of trading from 6 April 2003 to liquidation the sum due and outstanding HM Customs & Excise in respect of VAT, increased by £17,062.03 from £15,503.02 to £32,565.05.

(d) in her questionnaire for directors the second Respondent stated that she suspected the Company was in financial difficulty in September 2003 and formally discussed with the first Respondent a possible management buy out by herself and others.

(e) a time to pay agreement was entered into with HM Customs & Excise on 4 April 2005 in which the Company agreed to pay £36,661.96 payable in nineteen instalments. Seven payments were made and 12 were defaulted upon.

(f) an analysis of creditors prepared for the Insolvency Service showed that in the period from 6 April 2003 to 20 September 2004 the monies due to creditors increased by £49,064.20 from £40,107.38 to £89,1071.58.

2. She caused and permitted the Company to be financed by the retention of £80,453.17 of debts properly payable to the Crown comprising outstanding PAYE and NIC for the period 2002/03 to 2003/04 of £47,880.12 and monies due to HM Customs and Excise in respect of VAT for the period 2002 to 2004 of £32,565.05.

3. She failed to ensure that the Company had a duly appointed Company Secretary from 17 March 2004 to 5 September 2004.

4. She caused and permitted the Company to fail to file accounts in time with the Company's Registry in respect of the period ended 31 March 2002 and failed to file annual accounts for the year ended 31 March 2003.

5. She caused and permitted the Company to fail to ensure that the annual returns in respect of the periods up to 2 June 2001, 2002 and 2003 were filed in time for the Company's Registry.

6. She failed to ensure that the statutory records for the Company were preserved or, if they were preserved, she failed to deliver them up contrary to the provisions of the Companies (Northern Ireland) Order 1986.

The Company ceased trading on 19 April 2004 and the estimated deficiency was in the region of £377,000.00.

In her questionnaire for directors the second Respondent stated that she was Publications Director of the company responsible for organising and coordinating editorial, design and sales for each publication. She also liaised with clients, bringing in new contracts, and dealt daily with staff issues. The first Respondent in his questionnaire indicated that he was the Managing Director, overseeing the running of the business in conjunction with the Publications Director (the second Respondent).

The second Respondent now applies for leave to continue to act as a Company Director in relation to a Company called Imagine 8 which was formed on 8 May 2003 and commenced trading on April 2004 coinciding with the cessation of trading of the Company, the involvement in whose affairs, has led to her disqualification as a Company Director.

Imagine 8 employs six persons together with the Applicant. She has not been active as the Director since the date of her disqualification.

The Applicant accepts in her affidavit filed on 17 July 2007 paragraph 2:-

> "Prior to my involvement in Keadyanne Ltd, I was involved with a series of similar companies which all had liquidity problems. I can also stress that in each company, I was not responsible for finance, accounts or banking. A chronological discussion of my involvement in previous directorships in respect of other companies is set out below".

It was submitted on her behalf that there was no issue of dishonesty in relation to her involvement in the Company. The auditor of the Company Mr Falconer of Falconer Stewart gave evidence on the Applicant's behalf. He gave evidence that the Company's Secretary is a Company called Syban Ltd which is a Company related to the auditors. He gave evidence that there was no question as to the Company's solvency and that his Company sent in a representative once a month to carryout bank reconciliations and to perform checks on debtors and creditors and to recommend timeous payment of debts. Syban Ltd also carry out VAT calculations and to do the VAT returns. They produce six monthly management accounts and hold a meeting with the Directors. They also operate the Company payroll and send out payslips. His evidence was that they would continue to carry out that particular role. Counsel for the Applicant indicated to the Court that the Applicant would be prepared to agree to the following conditions were the Court minded to allow her to continue to act as a Company Director:-

1. That Falconer Stewart should continue to act as Company Auditors unless leave was granted by the Court.

2. That Falconer Stewart would continue to compile VAT and PAYE returns.

3. All payments to Crown creditors should be made within the appropriate time.

4. Syban Ltd would continue to act as Company Secretary.

5. That the Court would limit the leave until January 2009 when the matter could be reconsidered.

6. All cheques would be co-signed by Syban Ltd.

7. Miss Patterson (a new director) could remain as a co-director.

Mr Falconer also gave evidence that the company was solvent. In the year to September 2006 it had showed a small loss but that also since then it had received £60,000.00 in grants that would strengthen the balance sheet. He conceded in cross examination that in March 2006 there were arrears of £32,000.00 owed in VAT and PAYE but he said this has since been settled. Imagine 8 has a bank overdraft of £25,000.00 with a limit of £40,000.00.

I should state at this point that having heard the evidence I consider that the applicant's role in this company is, on a balance of probabilities, central to its wellbeing. In particular she drums up the business and the company relies heavily on her personal relationships with the customers.

It should also be noted in this case that the second-respondent has admitted the case made by the Department. In the Secretary of State for Trade & Industry v Griffiths [1998] 2 All E 142 the Court of Appeal of England and Wales stated that where a director admitted the offence with which he was charged, by for example agreeing to submit to a disqualification order under the `Carecraft' procedure this might have some relevance in an application for permission to continue to act. This is exactly the position in this case and should be taken into account.

It is also clear that there is no allegation of dishonestly in relation to this particular disqualification. In the case In Re Barings Plc the Secretary of State for Trade and Industry -v- Baker (No 5) [1999] BCC 639 Sir Richard Scott VC says at page 962:

> ""Miss Glouchester emphasised, and the cases to which she referred me show, Section 17 leave should not be granted in circumstances in which the effect of its grant would be to undermine the purpose of the disqualification order. As a general principle, and apart from any authority, I think that must be right. The improprieties which have led to and require the making of a disqualification order must be kept clearly in mind when considering whether a grant of Section 17 leave should be made.
>
> If the conduct of a director has been tainted by any dishonesty, if the Company in question has been allowed to continue trading whilst obviously hopelessly insolvent, if a director has been withdrawing from a struggling company excessive amounts by way of remuneration in anticipation of the company's collapse and, in effect living off the company's creditors, and if the disqualification order were then made, these circumstances would loom very large in any Section 17 application. The court would, I am sure, have in mind the need to protect the public from any repetition of the conduct in question. That conduct, and the protection of the public from it, would have been the major factor requiring the imposition of the disqualification".

As I say there is no issue of dishonesty in this case and that it is not a matter that the court must take into account.

In the case of Re Dawes & Henderson (Agencies) Limited (No 2) [1999] 2 BCLC 317 Sir Richard Scott VC states at page 326:-

> "The discretion given to the court …. is unfettered by any statutory condition or criterion. It would in my view be wrong for the court to create any such fetters or conditions … 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".

Mithani on Company Directors' Disqualification (August 2007) states at Part V1 paragraph [84]:-

> "The reason why no fetters or conditions may be placed upon a court in determining whether permission should be granted is obvious: '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' (a quote from Re Dawes and Henderson cited above at page 326 of the judgment).
>
> In other words because each case for permission will depend entirely upon its own facts, a court dealing with an application for permission in one case simply cannot lay down guidance as to what circumstances another court should apply in connection with its exercise of discretion in another case. However the following points may be made in connection with the approach of the court to the grant of permission:
>
> 1. The proper starting point for an application for permission is to recognise that the purpose of disqualification is protective rather than penal. However, permission is not to be given to freely because the court must not override the achievement of the policy objective of ensuring that the risk of harm to the public is minimised.

2. There is no presumption in favour of permission being granted. The onus is upon the applicant to persuade the court on a balance of probabilities that it should exercise its discretion in its favour. ….
3. Each case is to be assessed on its own particular merits so that the emphasis given by a judge in a particular case to the particular circumstances of that case will not necessarily be a guide to the weight to be attributed to similar circumstances in a different case".

Sir Richard Scott in the Baker (No 5) case referred to above went on to state at page 966:-

> "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 director of a particular company must be kept in balance with one and 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".

In the case of In Re Tech Textiles Limited [1998] 1 BCLC 259 Arden J stated at page 267:-

> "Leave … in my view is not to be to freely given. Legislative policy requires the disqualification of unfit directors to minimise the risk of harm to the public, and the courts must not by granting leave prevent the achievement of this policy objective. Nor would the court wish anyone dealing with the director to be mislead as to the gravity with which it views the order that has been made".

It has been opened to the court in this case that the suggested conditions should be sufficient to ensure protection of the public from any

further default by the applicant. I bear in mind the comments made by Sir Richard Scott in Re Dawes and Henderson referred to above where he states at page 211:-

> "Further, the policy behind the 1986 Act is that individuals against whom disqualification orders are made should none the less be able to earn their living in whatever business they may choose to turn their hand to. It is in the public interest that that should be so".

In relation to conditions Mithani states at Part VI paragraph [106]:-

> "It has been seen that the requirement of the protection of the public has to be considered primarily by reference to the nature of the misconduct that resulted in the disqualification order. Safeguards must be in place to avoid or at least substantially reduce the possibility of recurrence of that conduct. In the guiding case of Re Gibson Davies Limited [1995] BCC 11, the general principles upon which the court's discretion will be exercised were set out. … it appeared to the court that D was a key figure in the successful operation of CFL [the company to which the applicant wished to continue to act as the director for]".

The applicant offered a number of conditions to be applied including:-

> "1. No cheque or financial agreement on behalf of the company to be signed by the applicant alone.
> 2. Any director's loan owed by the company to the applicant should not be paid unless all creditors were paid first.
> 3. The applicant was not to be granted or accept any security over the Company's assets.
> 4. The applicant's emoluments from the Company were not to exceed £380.00 per week or such greater sum as reasonable and unanimously agreed with the Board of Directors.

5. The applicant to procure the filing of annual returns and accounts and taxes.
6. The applicant was to ensure that the Company to implement agreed accounting controls.
7. The applicant was to procure the Company to prepare monthly management accounts for submission to auditors.
8. The auditors were to report to the Board of Directors in any matters of concern and the applicant would take appropriate action to rectify matters.
9. Only auditors willing to accept those obligations were to be appointed".

In that case the applicant was given permission to act as a Director of the Company after incorporation of the safeguards noted above.

It seems to me very clear that the Applicant in this case, on the facts outlined to me, is central to the success of Imagine 8. I also remind myself again that the purpose of Company Director disqualifications is not to punish individuals but to protect the public.

Imagine 8 employs six people, and although in its early stages, it appears to be a Company that may, if properly managed, turn out to be a successful Company.

I must also take into account the fact the disqualification in this particular case was for six years and that in itself is evidences serious default on the part of the Applicant.

However, as with all things, these matters should be placed in context. In the case Re: Hennelly's Utilities Ltd [2005] B.C.C. 542 Geoffrey Vos QC sitting as a Deputy Judge of the High Court granted leave to a Director

disqualified for eight years to continue to act. This Director previously had been Director of five companies with a very bad trading record, each of which went into insolvent liquidation with large debts. Together the five companies had an estimated deficiency as regards creditors of £10m and sums owed to the Crown amounted to £5m.

It was accepted by the Court in that case that the applicant carried out a central role in the Company and despite the heavy burden imposed on the applicant because of the length of his disqualification, the Court having imposed suitable conditions, granted leave for the applicant to continue to act as a Company Director.

I remind myself again of the comments already made in this judgment confirming that each case must be decided on its own individual facts. However the above is illustrative of how, in appropriate circumstances, leave will be granted.

Accordingly, I am minded to rule that the Applicant be permitted to continue to act as a Company Director of Imagine 8 on the following, extremely strict conditions:-

1. Falconer Stewart should continue to act as Company Auditors unless leave is granted by the Court.

2. Falconer Stewart should continue to conduct the VAT and PAYE returns.

3. All payments to Crown creditors are to be made within the appropriate time.

4. Syban Ltd should continue to act as a Company Secretary.

5. All cheques are to be co-signed by Syban Ltd.

6. Miss Patterson should continue to act as a Director.

7. Any Directors loan owed by the Company to the Applicant should not be repaid unless all creditors are paid first.

8. The Applicant must not to be granted or accept any security over the Company's assets.

9. This leave is limited until January 2009 when the Court will review the situation and decide whether or not the very strict conditions applied in this case have been complied with.

10. A copy of the Order and the judgment in this case be provided to the company's bank.

The penultimate condition in particular places an onerous burden on the court as it requires the Court to oversee the running of a limited company by a disqualified director. The Court will rely heavily upon the Auditors and the Company Secretary to ensure that the affairs of this company are properly conducted. The Applicant may be assured that in the event of the slightest default in relation to the strict conditions imposed any leave to continue to act will be withdrawn. The Auditors and Company Secretary must also know that they are under a duty to report to the Court in the event of any default in the very strict conditions imposed in relation to this particular case.

Finally, I direct that the Applicant shall be responsible for the cost of the Department in relation to this application.