Director disqualification: How to apply to court for permission to act as a company director notwithstanding disqualification

Where a disqualified person wishes to act as a company director (or be involved in the promotion, formation or management of a company), during the currency of any such disqualification, that person can issue an application under Section 17 Company Directors Disqualification Act 1986 ("CDDA") ("Section 17 application") for permission to act as a director notwithstanding disqualification. This short article looks at how and in what circumstances you can do this.

Requirements to be met before embarking on a Section 17 application

While the CDDA 1986 contains detailed guidance on the factors to be taken into account in determining whether a person's conduct makes him unfit for the purposes of section 6, there is no express statutory guidance as to how the courts should go about exercising their discretion when faced with an application for permission to act, notwithstanding disqualification. However, the three points that can be made with some confidence, taking into account the case law, are that:

(a) the onus lies firmly with the applicant seeking permission to satisfy the court that this indulgence should be granted to him;

(b) the application must relate to a specified company or companies (no blanket permission); and

(c) in cases where permission is granted, it is frequently granted only subject to conditions and safeguards.

Accordingly, on an application under Section 17, the court has to be satisfied **both**

- that there is a need to make the order; and
- that if the order is made, the public would remain adequately protected (introduction of conditions/safeguards to prevent unfitness previously complained of does not happen again).

A mere desire of the applicant to be a director of a company which he had devised, and which appears to have been successful, is not a need within the meaning of (i) above.

The need for the public to be protected

The protection of the public is of paramount importance in determining the outcome of any Section 17 application. The very purpose of the disqualification jurisdiction is to protect the public and, accordingly, leave will only be granted where the applicant can persuade the court that the purpose of the disqualification order will not be undermined. The primary issues the court should consider include the following criteria:

(a) the seriousness and type of conduct leading to the disqualification order;

(b) the risk of recurrence of unfit conduct; and

(c) the trading prospects of the company/companies in respect of which the application is made.

The application, supporting evidence and the approach of the Secretary of State and the Court

Section 17 applications for permission are governed by paragraph 17 of the Practice Direction: Directors Disqualification Proceedings [2015] BCC 224. The information, which the Secretary of State considers should normally be included in the applicant's evidence in support of the application, in order for it to be considered properly, is extensive – the effort needed to put a solid application together that is worthy of serious consideration by the court is not to be underestimated. We can really help to put together a strong application which includes the information which, first hand, we have gleaned from the Insolvency Service they want to see included.

Although the Secretary of State is not technically a party to the application, he is obliged to appear on Section 17 applications, albeit in a neutral stance on the application; that is to say, he does not (and indeed, cannot) consent to it. The Secretary of State will also normally insist that necessary conditions are attached to the permission to act (the court will never grant unconditional permission to act) and that safeguards are put in place to ensure that the conduct previously complained of cannot be repeated in the future with a view to ensuring protection of the public. These can be formulated and decided on a case by case basis.

The court is encouraged to take a critical approach when considering an applicant's evidence and should satisfy itself that permission should be granted notwithstanding the fact that the applicant's evidence may not have been challenged by the Secretary of State.

In terms of timing, the application for permission should be made early enough so that the same judge can consider both the disqualification and permission applications (which should be heard one after the other, in the absence of any reason to the contrary) so that leave is only sought if the court proceeds to make a disqualification order. This may save considerable time and costs. If it proves impossible or impractical to issue the permission application in advance for hearing at the same time as the disqualification application, then an application for interim leave is a possibility.

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