

Directors Disqualification: Applying for Permission to Act During the Corona Pandemic

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On 6 April 2020 the Temporary Insolvency Practice Direction ("TIPD") came into force. On 7 April 2020 the guidance note issued by Chief ICCJ Briggs confirmed that, for the purposes of TIPD, applications under section 17 Company Directors Disqualification Act 1986 are deemed urgent.

When an individual is disqualified from acting as a company director, the court can grant permission under section 17 for that individual to act as a director of a specific company, usually subject to conditions.

If you are acting for a client who is considering offering a disqualification undertaking, or who faces a disqualification order being made against him at trial, it is a good idea to start planning for a section 17 application well in advance.

The key points to think about are:

- How long is the disqualification likely to be? If more than 6 years it is going to be difficult to persuade the court to grant permission.
- Is the company the individual wants permission to be a director of solvent? Is it up to date with HMRC and Companies House filings? If not, what steps can be taken now to improve the position of the company before a section 17 application is made?
- What structure is in place to ensure the misconduct that took place in the old company is not repeated in the new company? It could be an independent director. It could be greater involvement of chartered accountants. If the disqualification is for trading to the detriment of HMRC, it is likely to be a condition of permission being granted under section 17 that the new company file all returns and

make all payments to HMRC on or before the due date. Any failure to comply will mean permission lapses and the director is in breach of his disqualification.

Once you have decided that a section 17 application will be required, think about its timing. When a signed disqualification undertaking is accepted by the Secretary of State there follows 21 days' grace in which the director can either resign his directorships or obtain section 17 permission. 21 days is not long to prepare all of the affidavit evidence, issue the application, and have it heard. If time permits, prepare the bulk of the evidence before sending the signed undertaking to the Insolvency Service, so that once the undertaking is accepted, the application for permission can be issued immediately.

The more notice you can give the Secretary of State, the better, because his solicitors will always have queries on your client's evidence. The Secretary of State cannot 'consent' to section 17 permission being granted, so don't bother asking. He is required by statute to attend the hearing (by counsel) and draw the court's attention to any relevant matters. The best you can hope for is that the Secretary of State takes a neutral position. He is more likely to take a neutral position if you can answer his solicitor's queries before the hearing.

While the pandemic lasts, the hearing will be remote, so follow the steps in paragraph 5 of TIPD. I could (and perhaps will) write another article about how the court approaches section 17 applications and the conditions that are usually imposed if permission is granted. Each of the ICC judges has their own idiosyncrasies, but they all like to see contrition on the part of the director. If possible the director should login to the remote hearing, to demonstrate his concern and to hear in person any comments addressed to him. Disqualification is, after all, meant to be a deterrent, so the judges feel more comfortable about giving permission to act if they see and read in the evidence that the director has learnt a lesson and will strive not to repeat the past.

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