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# Competition Disqualification – The English High Court's approach following *Re Property Group (2010) Ltd*

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## Key Points:

- Re Property Group was the first competition directors' disqualification case to go to trial and the first occasion on which the English court made a competition disqualification order.
- The underlying breach of competition law involved an agreement between estate agents to fix minimum levels of commission for residential sales.
- The court found that the defendant knew of the infringing agreement, failed to take any steps to prevent its agreement or implementation and thereby contributed to the breach.
- As a result the court disqualified the defendant for 7 years.

## I. Introduction

*Re Property Group (2010) Ltd*[1] ('*Re Property Group*') was the first competition disqualification case to go to trial following an application by the Competition and Markets Authority ('the CMA') pursuant to section 9A of the Company Directors Disqualification Act 1986 ('CDDA'). The disqualification case followed the acceptance by two companies of which the defendant was a director that they had participated with five other estate agents in an agreement and/or concerted practice to fix minimum levels of commission fees for the provision of residential estate agency services[2].

[1] *Re Property Group (2010) Ltd, Competition and Markets Authority v Martin* [2020] EWHC 1751 (Ch); [2020] BCLC 424.
[2] CMA Case 50235: *Residential estate agency services in the Burnham-on-Sea area*.

## II. The competition disqualification regime

The competition disqualification regime[3] was inserted into the CDDA with effect from 20 June 2013[4]. Sections 9A and 9B CDDA provide two routes by which the CMA (or a specified regulator) may secure a disqualification on competition grounds:

1. first, the court may make a competition disqualification order under section 9A;
2. secondly, the CMA (or a specified regulator) may accept a competition disqualification undertaking[5] under section 9B.

As is the case with 'traditional' disqualification (primarily brought under section 6 CDDA) the majority of cases have been compromised by way of undertaking. Since 30 November 2016 the CMA has secured the disqualification of 21 directors through the acceptance of undertakings and one by court order (in *Re Property Group*). There are also proceedings currently before the High Court against one director[6].

## III. Section 9A CDDA

*Re Property Group* is the only competition disqualification case to go to trial and is therefore the only occasion on which the court has considered section 9A CDDA (other than briefly in the context of permission to act applications, for example *Re Fourfront Group Ltd*[7]).

Pursuant to section 9A the court must (i.e. it is mandatory) make a disqualification order against a person if the conditions set out in subsections (2) and (3) are satisfied in relation to him (subsection (1)):

1) the first condition is that an undertaking which is a company of which he is a director commits a breach of competition law (subsection (2)) ('the First Condition');

2) the second condition is that the court considers that his conduct as a director makes him unfit to be concerned in the management of a company (subsection (3)) ('the Second Condition').

### A. The First Condition

In *Re Property Group* it was accepted that the First Condition was satisfied. There was therefore no discussion of the requirements of the First Condition in the judgment; however, there are a number of aspects that are worth considering.

*1. 'Company' and 'director'*

'Company' and 'director' are concepts that are familiar from traditional disqualification. 'Company' is defined in section 22(2) CDDA as:

(a) a company registered under the Companies Act 2006 in Great Britain, or
(b) a company that may be wound up under Part 5 of the Insolvency Act 1986 (unregistered companies).

The exact extent of subsection 22(2)(b) is beyond the scope of this article; however, it has been held to include foreign companies (i.e. those registered abroad) with a relevant connection to the jurisdiction, unregistered companies (which includes companies incorporated by private Act of Parliament) and industrial and provident societies.

The CDDA also applies to a number of entities that either do not, or do not clearly, fall within the definition of 'company' set out in section 22(2), including building societies (section 22A CDDA), incorporated friendly societies (section 22B CDDA), charitable incorporated organisations (section 22F CDDA), protected cell companies (section 22H CDDA) and limited liability partnerships (Limited Liability Partnerships Regulations 2001/1090, regulation 4(2)).

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[3] Sections 9A to 9E CDDA.
[4] Enterprise Act 2002, section 204, and Enterprise Act 2002 (Commencement No. 3, Transitional and Transitory Provisions and Savings) Order 2003/1397, article 2(1) and paragraph 1 of schedule 1.
[5] 'Disqualification undertaking' is defined in section 9B(3) CDDA (section 9B(4) should also be noted).
[6] CMA Case 50507: *Nortriptyline Tablets* ('Nortriptyline').
[7] *Re Fourfront Group Ltd, Stamatis & Davies v Competition and Markets Authority* [2019] EWHC 3318 (Ch).

'Director' includes directors in fact (section 22(4) CDDA – ordinarily referred to a de facto directors) and shadow directors[8] (section 9E(5) CDDA).

*2. Breach of competition law*

With effect from 31 December 2020 section 9A(4) provides:

An undertaking commits a breach of competition law it if engages in conduct which infringes either of the following–

a. the Chapter 1 prohibition (within the meaning of the Competition Act 1998) (prohibition on agreements, etc. preventing, restricting or distorting competition);
b. the Chapter 2 prohibition (within the meaning of that Act) (prohibition on abuse of a dominant position).

How a dispute as to whether there has been a breach of competition law will be determined in competition disqualification proceedings is not entirely clear. It is difficult to see why a defendant in proceedings brought under section 9A would be bound by a decision of the CMA in the competition proceedings finding a breach of competition law and it is far from clear that a defendant would be bound by a settlement between the relevant company and the CMA in which a breach is admitted. In the ordinary course, therefore, if the defendant disputes that there was a breach of competition law that issue will have to be determined in the disqualification proceedings.

As that is not an issue that judges in the Companies Court (the sub-list within the Business and Property Courts that hears disqualification cases) are well placed to determine, the CMA is likely to invite the court to transfer a dispute about the competition element of a disqualification case to the Competition Appeal Tribunal ('the CAT') pursuant to the Section 16 Enterprise Act 2002 Regulations 2015/1643.

In both the Pre-cast concrete[9] and the Nortriptyline[10] cases the relevant company appealed against the decision of the CMA, the CMA issued disqualification proceedings before the appeal had been determined and the determination of the First Condition was transferred to the CAT. In the Pre-cast concrete case the determination of the First Condition was stayed pending the final determination of the company's appeal, and following the dismissal of the company's appeal it was declared by consent that the First Condition was satisfied (see the order of 13 January 2021[11]), whilst in the Nortriptyline case the First Condition was determined alongside the company's appeal[12].

Such approach raises two potential concerns for defendants:

1. first, if the competition element of a disqualification case is to be determined alongside the relevant company's appeal, disqualification proceedings will have to be issued before a breach of competition law has been established (as happened in both the Pre-cast concrete[13] and the Nortriptyline[14] cases). That raises obvious reputational concerns for defendants who dispute that there has even been a breach of competition law. As the facts of *Re Keeping Kids Company*[15] demonstrate, the mere fact that directors' disqualification proceedings have been issued against an individual can have a significant impact on the opportunities open to them;

2. secondly, a defendant could be faced with the prospect of fighting, and funding, separate trials (one before the CAT and one in the Companies Court). This will be a particular concern where (i) the company has not appealed so the defendant cannot simply piggyback on the company's appeal, or (ii) the defendant's position as to whether there has been a breach of competition law is not identical to that of the company (a situation that may well be encountered in companies with larger boards).

[8] 'Shadow director' is defined in section 22(5) CDDA.
[9] CMA Case 50299: *Supply of products to the construction industry (pre-cast concrete drainage products)* ('Pre-cast concrete').
[10] Nortriptyline (n 6).
[11] Available at https://www.catribunal.org.uk/sites/default/files/2021-01/1337_FPMCCANN_Order_CDDO_130121.pdf.
[12] *Lexon (UK) Limited v Competition and Markets Authority* [2021] CAT 5, [282]-[290]
[13] Pre-cast concrete (n 9).
[14] Nortriptyline (n 6).
[15] *Re Keeping Kids Company, Official Receiver v Batmanghelidjh and others* [2021] EWHC 175 (Ch) (a case under section 6 CDDA).

## B. The Second Condition

In *Re Property Group* the defendant, relying on sections 3 and 6 of the Human Rights Act 1998 and Article 8 of the European Convention on Human Rights, sought to argue that the court must take into account the likely impact of a disqualification order and only make an order if it was proportionate to do so. However, the necessity for any proportionality assessment was rejected by the judge in the light of the ability of a person who is subject to a disqualification order to apply to the court for permission under section 17 CDDA[16].

In determining whether the Second Condition is satisfied, the court's focus is not, as one might expect from the words of section 9A(3) CDDA, on whether the defendant is currently unfit. Instead, the judge held that the court will only have regard to the defendant's past conduct as a director relied on by the CMA to obtain a disqualification order, what is often referred to as adopting 'tunnel vision'. In particular the court will ask whether the defendant's conduct identified by the CMA[17]:

> '… viewed cumulatively and taking into account any extenuating circumstances has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies.'

The court will not, therefore, in determining whether the Second Condition is satisfied have regard to the defendant's conduct either prior to or after[18] the breach in question (these matters may, however, be considered when determining the appropriate period of disqualification) or whether the making of a disqualification order is proportionate. It follows that:

1. if the defendant has an exemplary record since the relevant breach of competition law, which may have been a number of years ago, that record and the 'fitness to be concerned in the management of a company' it might demonstrate will not be taken into account by the court when determining whether the Second Condition is satisfied; and

2. the court will make a disqualification order even if at the date of the hearing the defendant is no longer considered to be unfit to be concerned in the management of a company (see for instance *Re Pamstock Ltd*[19]).

In competition disqualification cases the question of unfitness is further informed by sections 9A(5) to (7) and 9E(4) CDDA:

> **9A Competition disqualification order**
>
> (5) For the purpose of deciding under subsection (3) whether a person is unfit to be concerned in the management of a company the court—
>
> (a) must have regard to whether subsection (6) applies to him;
>
> (b) may have regard to his conduct as a director of a company in connection with any other breach of competition law;
>
> (c) must not have regard to the matters mentioned in Schedule 1.
>
> (6) This subsection applies to a person if as a director of the company–
>
> (a) his conduct contributed to the breach of competition law mentioned in subsection (2);
>
> (b) his conduct did not contribute to the breach but he had reasonable grounds to suspect that the conduct of the undertaking constituted the breach and he took no steps to prevent it;
>
> (c) he did not know but ought to have known that the conduct of the undertaking constituted the breach.
>
> (7) For the purposes of subsection (6)(a) it is immaterial whether the person knew that the conduct of the undertaking constituted the breach.

[16] It is suggested that there is potentially scope to revisit this argument in a borderline case where the proportionality of a disqualification order might be in issue (as the judge noted in *Re Property Group* at [111] in the light of his findings of fact the making of a disqualification order was proportionate in any event).
[17] *Re Property Group* at [14], quoting *Re Grayan Building Services Ltd* [1995] Ch 241 at 253 (a case under section 6 CDDA).
[18] It is suggested that an argument can be made that the court should have regard to the defendant's response to the competition investigation, for instance genuine attempts to improve competition law compliance and training, as it relates to conduct as a director of the same company in respect of the same breach of competition law.
[19] *Re Pamstock Ltd* [1994] 1 BCLC 716 at 737 (a case under section 6 CDDA).

**9E Interpretation**

(4) Conduct includes omission.

In *Re Property Group* the judge found that the defendant knew about the infringing agreement and therefore concluded[20]:

> 'Those findings of fact lead to the inevitable decision that his knowledge means his failure to inform the board and/or to prevent the agreement being made and performed amounts to misconduct. He breached his duties owed to Berrymans as a director and his duties as a director of all three companies. Directors with his knowledge should take all reasonable steps possible to ensure a company does not enter into an anti-competitive agreement in breach of the Competition Act 1998. Mr Martin did not.'

As a result the judge found that the defendant's conduct contributed to the breach of competition law (section 9A(6)(a)) and did not go on to decide whether sections 9A(6)(b) and/or (c) applied[21].

As a result two questions in particular regarding subsection (6) remain unresolved.

First, what status does subsection (6) have? The point was not expressly decided in *Re Property Group*; however, it appears from the judge's reasoning[22] that the application of subsection (6) to a defendant is not determinative of unfitness and is merely a matter to which the court must 'have regard' pursuant to subsection 9A(5)(a). It follows that even if subsection (6) applies to a defendant the court must go on to decide separately whether s/he is unfit[23]. It therefore remains to be seen what, if any, real relevance the application of subsection (6) to a defendant has.

Secondly, what are the appropriate tests under subsections (6)(b) and (c):

1. whilst whether a defendant had 'reasonable grounds to suspect' (section 9A(6)(b) CDDA) would appear to be an objective test[24], it is difficult to see how a purely objective test would avoid the dangers of hindsight highlighted by Laddie J in *Re Living Images Ltd*[25]:

   > 'I should add that the court must also be alert to the dangers of hindsight. By the time an application comes before the court, the conduct of the directors has to be judged on the basis of statements given to the official receiver, no doubt frequently under stress, and a comparatively small collection of documents selected to support the official receiver's and the respondents' respective positions. On the basis of this the court has to pass judgment on the way in which the directors conducted the affairs of the company over a period of days, weeks or, as in this case, months. Those statements and documents are analysed in the clinical atmosphere of the courtroom. They are analysed, for example, with the benefit of knowing that the company went into liquidation. It is very easy therefore to look at the signals available to the directors at the time and to assume that they, or any other competent director, would have realised that the end was coming. The court must be careful not to fall into the trap of being too wise after the event.'

2. 'ought to have known' (section 9A(6)(c) CDDA) appears to be a test of negligence or incompetence. However, in cases brought under section 6 CDDA a high degree of negligence is required to justify a finding of unfitness (per Jonathan Parker J in *Re Barings plc (No 5)*[26]):

   > '… the burden is on the Secretary of State to satisfy the court that the conduct complained of demonstrates incompetence of a high degree. Various expressions have been used by the courts in this connection, including 'total incompetence' (see *Re Lo-Line Electric Motors Ltd* [1988] BCLC 698 at 703, [1988] Ch 477 at 486 per Browne-Wilkinson V-C), incompetence 'in a very marked degree' (see *Re Sevenoaks Stationers (Retail) Ltd* [1991] BCLC 325 at 337, [1991] Ch 164 at 184 per Dillon LJ) and 'really gross incompetence' (see *Re Dawson Print*

[20] *Re Property Group* at [98].
[21] *Re Property Group* at [100] and [101]. The judge did, however, note at [101] that 'Plainly the former [i.e. section 9A(6)(b)] would have applied but for the fact that his conduct contributed to the breach of competition law'.
[22] In particular the application of the *Re Grayan* test at [14] (n 17).
[23] This was the position of both the CMA and the defendant in *Re Property Group*.
[24] For instance as in *R v Lane* [2018] 1 WLR 3647 (a non-disqualification case).
[25] *Re Living Images Ltd* [1996] BCC 112 at 116 (a case under section 6 CDDA).
[26] *Re Barings plc (No 5), Secretary of State for Trade and Industry v Baker* [1999] 1 BCLC 433 at 483-484.

*Group Ltd* [1987] BCLC 601 per Hoffmann J). Whatever words one chooses to use, the substantive point is that the burden on the Secretary of State in establishing unfitness based on incompetence is a heavy one.'

## IV. Period of disqualification

The other notable aspect of the decision in *Re Property Group* relates to the period of disqualification.

Under section 9A the maximum period of disqualification is 15 years and, unlike under section 6 CDDA, there is no minimum period. This suggests that Parliament considered that there might be competition disqualification cases in which disqualification was required but a period of two years (the minimum period in section 6 cases) was not justified; however, in the light of the views expressed by the court to date it is difficult to envisage a case in which the court is likely to order a period of less than two years.

In both *Re Property Group* and *Re Fourfront Group*[27] (the first application for permission to act following the acceptance of undertakings pursuant to section 9B CDDA) the bracketing of periods used in section 6 cases[28] was adopted:

1. a top bracket of over 10 years for particularly serious cases;
2. a middle bracket of between six and 10 years for serious cases which do not merit the top bracket; and
3. a minimum bracket of (in section 9A cases) up to five years to be applied where, though disqualification is mandatory, the case is, relatively speaking, not very serious.

The application of such brackets can be illustrated with some examples from section 6 cases:

1) a minimum bracket period will ordinarily be imposed for a minor or 'technical' wrong[29], for instance failing to keep proper books and records or trading to the detriment of HMRC (which essentially consists of not paying HMRC whilst paying a company's other creditors);
2) a period in the middle bracket might be appropriate in a case involving payments to connected parties or less serious regulatory breaches;
3) a top bracket case will often involve dishonesty or fraud.

One might therefore expect the majority of competition cases to justify periods in the middle or top brackets (involvement in a breach of competition law is unlikely to be regarded as a minor or 'technical' wrong). However, the CMA has accepted some disqualification undertakings for surprisingly short periods: to date it has accepted 21 disqualification undertakings for periods of between 18 months and 12 years and the majority (over 70%) have been for 5 years or less (i.e. within the minimum bracket). Therefore, if a defendant is willing to give a disqualification undertaking s/he may be able to get away with a relatively short period of disqualification.

However, it is clear that the court will generally regard involvement in a breach of competition law as serious. In *Re Property Group*:

1) despite the CMA having accepted undertakings from three directors of other companies involved in the same infringement for periods of 3 years, 3.5 years and 5 years (i.e. all three cases came within the minimum bracket) the judge felt compelled to impose a middle bracket period of 7 years[30]; and

2) the judge noted[31] that there was an argument that the appropriate period was actually in the top bracket (i.e. over 10 years) as the infringing agreement involved fixing minimum levels of commission fees for the sale of residential houses, for most people their most valuable and important asset.

Such approach is consistent with the judgment in *Re Fourfront Group*[32] which appeared to suggest that the judge considered the cases before him should be regarded as middle bracket cases despite the CMA having accepted disqualification undertakings for 2 years 9 months and 18 months.

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[27] *Re Fourfront Group* (n 7).
[28] The brackets were approved by the Court of Appeal in *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164 at 174.
[29] *Re Fourfront Group* (n 7) at [44].
[30] *Re Property Group* in particular at [116]-[119] and [122].
[31] *Re Property Group* at [116].
[32] *Re Fourfront Group* (n 7) in particular at [19] and [44].

It therefore appears that in the usual course at least directors should expect the courts to regard involvement in breaches of competition law as serious and justifying significant periods of disqualification and potentially significantly longer than the CMA might ask for by way of undertaking (in *Re Property Group* the CMA initially told the defendant, who was ultimately disqualified for 7 years, that it would accept a 2-year disqualification undertaking).

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