The Blame Game - *Secretary of State v Geoghegan and others*

A senior employee of a company – no matter how malfeasant, fraudulent, dishonest, incompetent, or inept they have proved themselves to be in the performance of their role – cannot be disqualified under section 6 of the Company Directors Disqualification Act 1986 unless they were one of the company's directors or shadow directors.

In the world of companies, therefore, disqualification for unfitness following insolvency is the sole preserve of directors and those in accordance with whose direction or instruction the directors are accustomed to act.

The same is not true in the world of LLPs. The CDDA is incorporated into that world by the LLP Regulations 2001. Those give the terse instruction that the CDDA applies to LLPs, with certain modifications, chief amongst which is that the reference to a 'director' includes reference to a member of an LLP.

Accordingly, a member of an LLP – no matter how junior – can be subject to proceedings under section 6 in circumstances where their company world counterpart cannot be, unless they are a director.

That this is the correct understanding of the law has now been confirmed in *Secretary of State v Geoghegan and others* [2021] EWHC 672 (Ch). The case concerns the fallout from the very public collapse of the PR firm, Bell Pottinger LLP, following its 'dirty tricks' activities in South Africa in 2017. The Secretary of State brought disqualification proceedings against three members, one of whom (H) was on the LLP's management board, but two of whom (G and L) were not, though they were said to be instrumental in the South African campaign.

G and L argued that the CDDA should be read as only applying to members of LLPs who were in management positions or who performed roles equivalent to company directors. The business of Bell Pottinger had been converted into an LLP in 2013, whereupon a significant number of former employees of the business were offered membership. G and L therefore found themselves reclassified as members, but in all other respects their roles and responsibilities were unchanged. Was it really right that the decision of the senior management of Bell Pottinger to reorganise the business into an LLP should mean that G and L should now be subject to the CDDA regime when they would otherwise not have been?

Or as the judge put it:

By substituting "member" of an LLP for "director" in the CDDA, did Parliament really intend to include junior members/ partners of a large LLP who have no involvement whatsoever in the management of the LLP within the purview of disqualification?

Whilst the court had some sympathy for the argument advanced by G and L, it held that the legislation was clear: by including 'member' within the term 'director', Parliament intended that the CDDA could apply to any member of an LLP, regardless of their role in the business. Thus if the conduct of G and L as members of the LLP demonstrated that they were unfit to be concerned in the management of a company or LLP, they could be disqualified from future directorship of a company or membership of an LLP.

Although the result was probably inevitable, it is a little disquieting. Junior members of LLPs often owe their very status as members to a tax efficient reorganisation of the business in which they had no say. So long as things are going well, their change in status offers little downside, but probably little upside either. But if things go sour, they may find themselves with limited legal protections: not only do they not have the rights granted to employees by the Employment Rights Act 1996 (courtesy

of Baroness Hale's asides on the effect of section 4 of the LLP Act 2000 in *Clyde & Co v Bates van Winkelhoff*) but, as *Geoghegan* demonstrates, they could find themselves in the CDDA firing line as well. And to cap it all, of course, if the business goes bust then their 'drawings' are amenable to clawback under section 214A of the Insolvency Act 1986 in a way that an employee's salary never could be.

That is a distinctly unattractive position to be in, but it is regrettably not an unusual one. The various statutory liabilities imposed on directors are part of the quid pro quo of limited liability afforded to companies. However, the lazy application of the same regime to all members of an LLP is in danger of bringing LLPs into disrepute. The inherent flexibility in the LLP structure means that a one-size-fits-all legislative regime may produce some potentially unpalatable outcomes: particularly where membership may have been thrust unwillingly or unwittingly onto those one would ordinarily describe as employees. For the law's treatment of junior employees and junior members of an LLP to be so different when they may be doing the same job does not chime with commercial reality. Regardless of the rights and wrongs of the conduct in this particular case, there is something unsettling about CDDA proceedings being brought against members of an LLP in circumstances in which they could not have been brought against employees of a company doing an identical job, on the basis of identical conduct.

Thomas Braithwaite