Re Bell Pottinger LLP and another Secretary of State for Business, Energy and Industrial Strategy v Geoghegan and others

[2021] EWHC 672 (Ch), [2021] All ER (D) 107 (Mar)

Partnership – Limited liability partnership. The applicants unsuccessfully applied to strike out disqualification proceedings brought against them by the claimant Secretary of State pursuant to s 6 of the Company Directors Disqualification Act 1986. Their main case was that, as they were not members of the management board of the limited liability partnership (LLP) in question, they were not involved in or responsible for the management and control of its business and affairs. Accordingly, they claimed that s 6 of the Act did not apply to them. In dismissing their application, the Chancery Division held that the meaning of s 6(1)(b) of the Act in relation to directors, could not have a different meaning when applied to members of an LLP. The only capacity that Parliament had available to it was as a member of an LLP as the Limited Liability Partnership Act 2000 only defined a member and there was no requirement to have a management board or any particular structure in an LLP.

Catchwords

Partnership – Limited liability partnership – Disqualification of member

Background

Limited liability partnerships (LLPs) were incorporated pursuant to the Limited Liability Partnership Act 2000 (LLPA 2000) which allowed for regulations to be made to apply elements of company and insolvency law to LLPs. Pursuant to that power, the Limited Liability Partnership Regulations 2001, SI 2001/1090 (the Regulations), applied various aspects of the Companies Act 2006, the Company Directors Disqualification Act 1986 (CDDA 1986) and the Insolvency Act 1986.

The present proceedings arose out of the collapse of the well-known PR agency, Bell Pottinger. Its business was conducted through an LLP called Bell Pottinger LLP (BP LLP), which was incorporated on 23 November 2012. On 1 January 2013, the three defendants and others were registered as members of BP LLP. The first defendant, G, was first employed in the Bell Pottinger business in 2005 at the age of 21. On 1 January 2012, she was promoted to the position of director. However, 'Director' was purely a title and she was not a de jure director of any company within the group. In 2016, G was promoted to FC Divisional Managing Director but was not on the senior leadership team. The second defendant, L, was also never appointed a director of any group company. The third defendant, H, was a director of the company and also the Chief Executive Officer of the Bell Pottinger Group.

On 20 December 2012, the initial members of BP LLP entered into a Partnership Deed that regulated how BP LLP's business was to be conducted and the respective rights and obligations of the members. There was no requirement for an LLP to have such a Deed in place but where one did, it formed a sort of constitution for the LLP. The duties and responsibilities of members of BP LLP were set out in cl 15 of the Partnership Deed. They included the usual mix of common law and fiduciary duties, very much a hybrid structure, with the Management Board perhaps akin to a board of directors in a company but with fiduciary and other obligations between the members akin to a traditional partnership.

BP LLP had a client, Oakbay Investments Pty Limited, on whose behalf BP LLP had conducted a marketing campaign in South Africa (the Oakbay account). As a result of their involvement with the Oakbay account, on 6 July 2017 and 30 August 2017 respectively, the defendants were removed as members of BP LLP. Following the fallout from the Oakbay account campaign, BP LLP had its membership of the Public Relations and Communications Association (the PRCA Association) terminated for bringing the public relations and communications industry into disrepute. In September 2017, BP LLP went into administration. Nearly two years later, in September 2019, BP LLP went into compulsory liquidation.

In September 2020, the claimant Secretary of State issued a disqualification claim against the defendants pursuant to CDDA 1986 s 6. The single allegation made against them was that they had demonstrated a lack of commercial probity and/or which had contravened their duties under the Partnership Deed. The said campaign had allegedly contributed in part to BP's failure following the termination of BP's membership of the PRCA Association.

G and L (together, 'the applicants') applied to strike out the disqualification proceedings under CPR 3.4(a) or (b), alternatively, for summary judgment under CPR 24. In particular the applicants' case was dependent on the management structure within BP LLP as established by the Partnership Deed. Their main case was that, as they were not members of the management board of BP LLP, they were not involved in or responsible for the management and control of the business and affairs of BP LLP.

Accordingly, they claimed that CDDA 1986 s 6 did not apply to them. They claimed that as their conduct of the Oakbray account was a trading activity below management board level or the equivalent board level for a company, it could not lead to the conclusion that they were unfit to be concerned in the management of a company or LLP which was the test that the court had to apply. H was not a party to the application but, by agreement of the parties, he put in evidence and short submissions on his behalf were made at the hearing.

Issues and decisions

By substituting 'member' of an LLP for 'director' in CDDA 1996, whether Parliament had really intended to include junior members/partners of a large LLP who had no involvement whatsoever in the management of the LLP within the purview of disqualification.

The partners in traditional partnerships had unlimited liability. The benefit of trading with limited liability was currently available to partners through LLPs. That was why CDDA 1986 had been extended to apply to LLPs. Parliament's intention should surely have been the same as in relation to companies: to protect the public from those that had shown themselves to be unfit and to raise standards in relation to those who traded with the benefit of limited liability (see [34] of the judgment).

Regulation 4(2) of the Regulations provided, so far as material: '(2) The provisions of the [CDDA] shall apply to limited liability partnerships, except where the context otherwise requires,...'. Accordingly, wherever CDDA 1986 referred to a company, that included an LLP; and wherever it referred to a director, that included a member of an LLP. That meant, for instance, that where a disqualification order was made in the terms set out in CDDA 1986 s 1, the person was disqualified from being a member of an LLP or being directly or indirectly concerned in the management of an LLP. A disqualified person was prohibited from being a member of an LLP whether or not they were involved in the management of the LLP (see [36] of the judgment).

It was clear from the wording in CDDA 1986 s 6(1)(b), that there was no conflation between 'conduct as a director' and being 'concerned in the management of a company'. The former defined the relevant capacity in which the director was alleged to have misconducted themselves; the latter was the test of unfitness that the court had to apply in relation to such misconduct and whether it rendered the director 'unfit to be concerned in the management of a company'. The conduct was confined to allegations in relation to the company, whereas the test was whether that conduct showed the person to be unfit to be concerned in the management of a company. The only line that Parliament had drawn in relation to that was the standard applied by the court. There was no line drawn in relation to the conduct that could be relied on by the Secretary of State, save that it had to be conduct in the capacity of a director (see [70] of the judgment).

Given such a conclusion on the meaning of CDDA 1986 s 6(1)(b), in relation to directors, it could not have a different meaning when applied to members of an LLP. The only capacity that Parliament had available to it was as a member of an LLP as LLPA 2000 only defined a member and there was no requirement to have a management board or any particular structure in an LLP (see [71] of the judgment).

The applicants' applications for both strike out and summary judgment would be dismissed. It would be for the trial judge to determine if the alleged misconduct was proved and whether such misconduct made the applicants unfit to be concerned in the management of a company or LLP (see [82], [83] of the judgment).

Barings plc (No 5), Re, Secretary of State for Trade and Industry v Baker (No 5) [2000] 1 BCLC 523 applied; *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349 applied; *Williams v Central Bank of Nigeria* [2014] UKSC 10 applied; *Secretary of State for Trade and Industry v Gray* [1995] Ch 241 followed; *Barings plc, Re, Secretary of State for Trade and* Industry v Baker (No 5) [1999] 1 BCLC 433 followed; Re Keeping Kids Co Official Receiver v Atkinson and others [2021] EWHC 175 (Ch) followed; Pepper (Inspector of Taxes) v Hart [1993] AC 593 considered; Corran v Butters and others [2017] EWHC 2294 (Ch) considered.

Neneh Munu Barrister

Judgment date

23 March 2021

Judge

Michael Green J

Representation

Hugh Sims QC and Simon Passfield (instructed by Mishcon de Reya LLP) for the applicants

Tiran Nersessian (instructed by Howes Percival LLP) for the Secretary of State

Christopher Harrison (instructed by Cohen & Gresser (UK) LLP) for H.

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