# Re Arise Networks Ltd Official Receiver v Obaigbena

[2021] EWHC 852 (Ch), [2021] All ER (D) 32 (Apr)

Company – Director. Where a company was wholly reliant on external loans to be able to discharge its liabilities, a director needed to be able to justify a decision to cause the company to continue to trade. Accordingly, applying settled law to the facts, the Chancery Division held that there had been conduct which fell under the concept of unfit conduct pursuant to s 6 of the Company Directors Disqualification Act 1986, and it disqualified the defendant from acting as a director for seven years. The court so ruled concerning a compulsory liquidation of a company, in respect of which the defendant had been the sole director. The court considered that directors who gambled with the position of the creditors, in the belief that all would be fine in the end, were not acting in the interests of those creditors and were, instead, taking risks to their detriment.

**Catchwords**

*Company – Director – Disqualification*

**Background**

The proceedings concerned an application for a disqualification order under s 6 of the Company Directors Disqualification Act 1986 (CDDA 1986) to be made in respect of the defendant (O). The application arose out of the compulsory liquidation of a company (Arise), in respect of which O had been the sole director for the majority of the period from its incorporation on 30 October 2012, until it had been compulsorily wound up on 22 April 2016.

**Issues and decisions**

(1) Whether O's conduct as a director had been such as to make him 'unfit' to be concerned in the management of a company.

The question of unfitness was a mix of fact and law, including whether the specific conduct measured up to a standard of probity and competence set down by the court. The court needed to consider the facts, determine any relevant disputes and then decide whether the director's conduct fell into the category of demonstrating a serious failure or serious failures constituting misconduct which justified a finding of unfitness. The question remained whether the conduct complained of made O unfit. The cases demonstrated that no further 'finesse' in relation to the test was needed or advisable. Unfitness was a question of fact, or 'a value judgment'. A determination of unfitness involved a comparison with a standard of behaviour against which the conduct complained of might be measured. Ordinary commercial misjudgement was, in itself, insufficient to demonstrate unfitness. It was settled law that 'risks that have eventuated may in retrospect, and with the wisdom of hindsight, appear to have been taken wrongly, but the purpose of limited liability is to provide some protection from risk-taking, subject to proper standards of care and compliance with duty' (see [5], [8] of the judgment).

In the present case, the reality was, as it was agreed and as the evidence demonstrated, that the liabilities of Arise had increased from December 2014 onwards and the sums which had been received in that period and used towards the debts of Arise had fallen far short of the continuing increase in liabilities. The evidence also demonstrated that, even prior to the period relevant to the charge, being December 2014 onwards, the funding being provided had not always arrived in time to pay the outstanding bills of Arise (see [14], [15] of the judgment).

Concerning December 2014 onwards, the evidence demonstrated that, despite the uncertainty in relation to when funds would be received from Nigeria, Arise had continued to trade and incur significant liabilities. Arise had been unable to trade out of its difficulties because, put simply, it had had no revenues. Continued trading had merely increased its liabilities. Arise had failed to pay the petition debt and it had been placed into compulsory liquidation in April 2016. Therefore, the court rejected O's assertion that there had been any other assets available and that that had been a reason as to why Arise had continued to trade. It had not been made out from the evidence and appeared to be something which O had sought to rely on while he had been questioned before the court (see [35]-[47] of the judgment).

In a case where the company was wholly reliant on external loans to be able to discharge its liabilities, a director needed to be able to justify a decision to cause the company to continue to trade. The court did not accept the justification as being a belief that, at some stage in the future, funds would be released to pay those liabilities. Such an approach had been effectively trading to the detriment of creditors with no reasonable prospect of the creditors being paid. The only sums which had come from other sources to support Arise had related to VAT refunds. That exemplified the position of Arise having been, effectively, wholly reliant on external funding in the way of loans. In the present case, there had been complete uncertainty as to when the relevant currency restrictions would be lifted and how much, if any, funds would have trickled through before then (see [49] of the judgment).

The charge stated that, from 31 December 2014 onwards, there had been no reasonable prospect of the creditors being paid or Arise avoiding insolvent liquidation. The position of Arise did not improve during 2015 or even 2016. There was no change in the uncertain position relating to the currency restrictions during the period after 31 December 2014 which would support a decision to continue to trade. Equally, there was no credible evidence that Arise had any other source for the payment of its liabilities beyond the external funding by way of loans. The court believed O's evidence that there was no way of knowing when the currency restrictions would be lifted. Equally, he also stated that he had tried to obtain the release of as much as he could from Nigeria, despite the currency restrictions. The efforts he had made did not prevent a finding of unfitness based on the charge relied on by the Official Receiver. Despite his best efforts, the uncertainty and the lack of sufficient funds to discharge increasing liabilities had been apparent month on month when he had caused Arise to continue to trade, which had been to the detriment of creditors. The evidence did not support there being a reasonable prospect of the creditors being paid or of Arise avoiding insolvent liquidation (see [50] of the judgment).

It followed that the charge relied on by the claimant, the Official Receiver, was established. The court was also satisfied that that had been conduct which fell under the concept of unfit conduct pursuant to CDDA 1986 s 6. It demonstrated a lack of regard for, and compliance with, proper standards. There was no protection for the creditors in relation to the risk-taking of O. He might well have believed that, at some stage in the future, sufficient funds would be released, but from the end of December 2014 onwards, until its liquidation, he had caused Arise to trade to the detriment of its creditors. The ongoing month by month increase in liabilities did not cause O to alter his decision to cause the continued trading of the company. There had been very little regard by O to the risks Arise had been incurring towards its creditors (see [51] of the judgment).

*Sevenoaks Stationers (Retail) Ltd, Re* [1991] Ch 164 [1991] 3 All ER 578 [1990] 3 WLR 1165 [1991] BCLC 325 considered; *Bath Glass Ltd, Re* [1988] BCLC 329 considered; *UKLI Ltd, Re; Secretary of State for Business, Innovation and Skills v Chohan* [2013] EWHC 680 (Ch) [2013] All ER (D) 253 (Mar) considered.

(2) The court considered the appropriate disqualification period.

The present case was one which fell squarely into the middle bracket as being a serious case. The conduct of O had been a gamble which the creditors had paid for. There had been no evidence to support his belief that there had been a reasonable prospect that creditors would be paid. Believing that, at some stage in the future, sums would be released when month after month the liabilities had increased, with many creditors being owed sums dating back some considerable time as the year of

2015 progressed, took the case well into the middle bracket. In particular, despite the lack of any evidence that the position in Nigeria would be changing at some time in the future, O had continued effectively to trade to the detriment of creditors with the ever-increasing liabilities. The increase in the liabilities during the period from December 2014, until the liquidation had been in excess of £2m in relation to the unconnected creditors and over £5m for the connected creditors. Directors who gambled with the position of the creditors, in the belief that all would be fine in the end, were not acting in the interests of those creditors and were, instead, taking risks to their detriment. The middle bracket was not only for those cases where directors continue to trade for more nefarious reasons. With the exception of the unreliability of O as a witness on certain aspects, the present case was not a case of dishonesty. However, that did not mean that the case was any less serious. The public interest was served by disqualifying O for a period of seven years (see [57] of the judgment).

*Sevenoaks Stationers (Retail) Ltd, Re* [1991] Ch 164 [1990] 3 WLR 1165 [1991] 3 All ER 578 considered; *Hitco 2000 Ltd, Re* [1995] 2 BCLC 63 considered; *Westmid Packing Services Ltd, Re, Secretary of State for Trade and Industry v Griffiths* [1998] 2 All ER 124 [1998] 2 BCLC 646 [1997] All ER (D) 117 considered; *Secretary of State for Trade and Industry v Reynard* [2002] EWCA Civ 497 [2002] 2 BCLC 625 [2002] All ER (D) 113 (Apr) considered.

Carla Dougan-Bacchus, Barrister

**Judgment date**

8 April 2021

**Judge**

Judge Agnello QC

**Representation**

Tiran Nersessian (instructed by Gowling WLG) for the Official Receiver.

Daisy Brown (instructed by RadcliffesLeBrasseur LLP) for O.

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