



Neutral Citation Number: [2021] EWHC 523 (Ch)

IN THE HIGH COURT OF JUSTICE

Case No. CH-2020-000182

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

CHANCERY APPEALS (ChD)

Rolls Building
Fetter Lane
London
EC4A 1NL

14 January 2021

Before:

MRS JUSTICE BACON

B E T W E E N :

BILAL AHMED

Appellant

- and -

**THE SECRETARY OF STATE FOR BUSINESS, ENERGY
AND INDUSTRIAL STRATEGY**

Respondent

MR M. BROWN (instructed by **Cousins Business Law**) appeared on behalf of the Appellant.

MR T. SHEPHERD (instructed by **The Insolvency Service**) appeared on behalf of the Respondent.

Hearing dates: 14 January 2021

A P P R O V E D J U D G M E N T

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

(v i a M i c r o s o f t T e a m s)

MRS JUSTICE BACON:**Introduction**

- 1 This is an appeal from a decision from Deputy ICC Judge Barnett on 10 July 2020 on an application by the appellant, Mr Ahmed, for an order under s. 8A of the Company Directors Disqualification Act 1986 (“the Act”) that the undertaking given by him should cease to be in force. In the alternative, Mr Ahmed sought permission pursuant to s. 17 of the Act for him to act as a director for a specific company, NuBnk Limited (“NuBnk”).
- 2 The Deputy ICC Judge refused an order under section 8A of the Act but gave permission under s. 17 for Mr Ahmed to act as a director of NuBnk, subject to a set of conditions.
- 3 Mr Ahmed unsurprisingly does not challenge the decision on s. 17, but does challenge the decision on section 8A as being wrong in law and/or insufficiently reasoned. If his appeal on that point is successful, Mr Ahmed asks the court to exercise its discretion afresh so as to shorten the period of disqualification in the undertaking such that the undertaking should now cease to be in force.
- 4 The Secretary of State opposes the appeal and contends that there was no error in the Judge’s reasoning. Alternatively, even if there was an error in the reasoning of the Judge, the Secretary of State contends that there are no grounds to reduce the period of disqualification in the present case.
- 5 In one sense, this appeal might be said to be largely academic, since the effect of the Judge’s decision was to enable Mr Ahmed to act as a director of NuBnk, which is what he sought. I also note that the disqualification undertaking will, in any event, expire on 9 May 2021 which is less than four months away, and Mr Ahmed has not suggested that he is seeking to become the director of any other company during that period. It is, nevertheless, possible that Mr Ahmed might wish to do so between now and 9 May 2021, and the current position is that this would be precluded by his undertaking unless he were to come back to court. The appeal also raises a point of principle as to the application of s. 8A which could be of some significance in other cases even if, in Mr Ahmed’s case, he was able to achieve what he wanted (at least in part) by the alternative route of s. 17 of the Act.
- 6 In the hearing before me, Mr Brown appeared for Mr Ahmed and Mr Shepherd appeared on behalf of the Secretary of State. Given the circumstances of the current COVID-19 pandemic, the hearing was conducted remotely using Microsoft Teams.

Factual background

- 7 I can set out the background to the appeal very shortly. As the Deputy ICC Judge noted, the facts are not in dispute.

- 8 Mr Ahmed had been the director of a company, Landstone Homes (PB) Limited (“Landstone”) the sole asset of which was a plot of land in Birmingham. That land was subject to an option to tax, such that when it was sold VAT would be paid on the sale. The sale duly took place on 2 July 2012, but Mr Ahmed failed to ensure that Landstone accounted to HMRC for the VAT due (in the sum of £170,000). Instead, he personally received £50,000 from the sale and used the £170,000 VAT receipts as the deposit for a purchase of apartments in Dubai. The Dubai transaction failed and on 23 April 2013, Landstone went into liquidation with no funds available to pay HMRC any of the £170,000 VAT due to it.
- 9 On 14 April 2015, directors’ disqualification proceedings were issued by the Secretary of State. Those proceedings were resolved by Mr Ahmed entering into a disqualification undertaking on 18 April 2016. The undertaking was in a standard form providing that, on the basis set out in the schedule attached to the undertaking, Mr Ahmed would not act as a director of a company for a period of five years commencing at the end of 21 days from the date on which the undertaking was accepted by the Secretary of State. On that basis, his period of disqualification under the undertaking will, as I have noted, run until 9 May 2021.
- 10 The schedule attached to the undertaking was headed “Schedule of unfit conduct to the disqualification undertaking given by Bilal Ahmed”. It stated that Mr Ahmed did not dispute a series of matters, which consisted essentially of the facts that I have summarised above.
- 11 On 23 December 2019, Mr Ahmed issued his claim form seeking relief under s. 8A or alternatively s. 17 of the Act. The basis for his application was that at the time of his misconduct he was suffering from mental illness coupled with a narcotic and alcohol addiction. Following treatment over a number of years from May 2013 onwards, including psychiatric treatment and admission to various different drug rehabilitation clinics, Mr Ahmed said that he had recovered from his addictions and mental illnesses and was in the process of rebuilding his business reputation, in particular through his involvement in NuBnk. On that basis, while Mr Ahmed did not contest the original basis for his disqualification, he said that circumstances had changed in a way that justified an order under s. 8A or alternatively s. 17.
- 12 The evidence before the Deputy ICC Judge included affidavits provided by Mr Ahmed himself, an affidavit made by one of the directors of NuBnk, and a psychiatric report together with associated medical reports prepared by Mr Dhandayudham, a consultant in addiction psychiatry. The psychiatric report set out in some detail the history of Mr Ahmed’s mental health and addiction problems, and stated that Mr Ahmed had ceased alcohol and narcotics abuse in September 2016. Mr Dhandayudham’s opinion was that Mr Ahmed’s escalating alcohol and drug use, stress and possible depressive disorder were likely to have led him not to evaluate the risks of his business decisions or the consequences of the non-payment of VAT, and that his ability to behave rationally may have been somewhat limited. Mr Dhandayudham also said that on the basis of Mr Ahmed’s current level of functioning, he had

no concerns about his ability to be responsibly involved in the management of a company. That medical evidence was unchallenged and was accepted by the Deputy ICC Judge.

Relevant legal principles

13 Section 1A(1) of the Act sets out the effect of a disqualification undertaking as follows:

“(1) In the circumstances specified in sections 5A, 7, 8, 8ZC and 8ZE, the Secretary of State may accept a disqualification undertaking, that is to say an undertaking by any person that, for a period specified in the undertaking, the person—

(a) will not be a director of a company, act as receiver of a company’s property or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company unless (in each case) he has the leave of a court, and

(b) will not act as an insolvency practitioner.”

14 The procedure for obtaining the leave of the court for the purposes of this section is set out in s. 17 of the Act.

15 In addition, s. 8A of the Act provides the court with a rather more far-reaching power to reduce the period of the undertaking or to bring it to an end altogether:

“(1) The court may, on the application of a person who is subject to a disqualification undertaking—

(a) reduce the period for which the undertaking is to be in force, or

(b) provide for it to cease to be in force.

(2) On the hearing of an application under subsection (1), the Secretary of State shall appear and call the attention of the court to any matters which seem to him to be relevant, and may himself give evidence or call witnesses.”

16 The leading case on the application of s. 8A is the decision of Hart J in *Re INS Realisations Limited* [2006] 1 WLR 3433, a case in which the applicant had given an undertaking to the court not to act as a director for a period of five years and subsequently (as in this case) applied for an order for relief under s. 8A of the Act. Her argument was that on the facts of the case, she should be permitted to resile from her agreement. At §31 of his judgment, Hart J commented that:

“I cannot see any good reason why the court should not, in the exercise of its jurisdiction under section 8A, treat the agreement as binding on the applicant unless either some ground is shown which would be sufficient to discharge a private law contract or some ground of public interest is shown which outweighs the importance of holding a party to his agreement. ... It is also, broadly speaking, the approach taken by the court when asked to release a party from an undertaking given to the court as part of a consensual settlement to proceedings.”

- 17 On the facts, Hart J did not consider that there was any such justification for allowing the applicant to resile from her agreement, as such. He did not, however, consider that this should inevitably preclude the exercise of the court’s discretion under section 8A of the Act. In considering the ambit of the court’s discretion under that section, he noted at §39 of his judgment that:

“One of the purposes of the undertakings regime is to enable court proceedings to be avoided altogether. That purpose could not sensibly be achieved if a director who has given an undertaking were able, in an unrestricted way and without having to show some special circumstances, to apply to the court to be relieved of it.”

- 18 That therefore raised the question of what type of “special circumstances” might justify the court’s exercise of discretion under section 8A. In that regard, §40 of the judgment cited with approval of the judgment of Potter LJ in *Di Placito v Slater & Ors* [2004] 1 WLR 1605, §31, that:

“...it is more apt to emphasise that the discretion is not simply a discretion at large, but is to be exercised only in a situation where circumstances have subsequently arisen which, by reason of their type or gravity, were not circumstances which were intended to be covered or ought to have been foreseen at the time the undertaking was given.”

- 19 On the facts of the case, Hart J considered that there were “special circumstances” that made it appropriate for an order to be made under section 8A that the undertaking should cease to be enforced. Those were, as he explained at §43, an “unusual combination of events” under which the only director of the company who had ended up being subject to continuing disqualification (i.e. the applicant) was someone who had played no active part in the insolvency of the company, and where the Secretary of State had not advanced any argument of public interest as to why she should continue to be the subject of disqualification.

- 20 It follows from the analysis in *Re INS* that there are several quite distinct scenarios in which “special circumstances” may arise of a nature that might justify the application of section 8A

of the Act. One is where the applicant contends that they should be permitted to resile from the undertaking on the basis that the factual basis of the undertaking was incorrect, or that the undertaking was given on the basis of a misrepresentation or mistake. A second and quite different type of case is where, even if the original basis for the undertaking is not impugned, the applicant seeks relief on the basis that circumstances have subsequently arisen that were not intended to be covered by the undertaking or could not have been foreseen when the undertaking was given.

- 21 In both cases, of course, the fact that particular special circumstances have arisen which might in principle engage s. 8A will not automatically mean that the court should make an order in the applicant's favour. Rather, it will need to be shown that the circumstances are such that it is appropriate in the exercise of the court's discretion either to reduce the length of the undertaking or to discharge the undertaking altogether. That will necessarily be a fact sensitive exercise in each case.

The disputed decision

- 22 As with the present hearing, the hearing before the Deputy ICC Judge took place remotely using video conferencing facilities and the Judge handed down an *ex tempore* judgment on the day of the hearing.
- 23 Although the judgment indicated that there had been a suggestion, in the oral submissions of counsel for Mr Ahmed, that Mr Ahmed had lacked capacity to give the undertaking in 2016, the Deputy ICC Judge considered that the evidence did not support that submission. The application therefore turned on whether the circumstances had subsequently changed so as to justify the exercise of the court's discretion under s. 8A, i.e. the second of the two bases for the application of section 8A that I have outlined above.
- 24 After setting out (correctly) the passage from *Di Placito v Slater* cited at §40 of *Re INS*, the judgment in the present case continued as follows:

“Mr Ahmed's case does not fall within that narrow compass and the court should be slow to exercise its discretion to permit the variation or revocation of a disqualification undertaking other than as expressly set out in section 17 of the Act. Indeed, Mr Shepherd puts it to me there is simply no jurisdiction to invoke section 8A particularly when section 17, if applicable, gives Mr Ahmed the relief that he seeks.

I agree with that submission. It seems to me that this is not a case which properly ought to be addressed in the context of a section 8A application but is a matter which ought properly to be dealt with under section 17 of the Act.”

25 Having reached that conclusion, the Judge went on to consider s. 17 and, as I have said, agreed with Mr Ahmed that it was appropriate for permission to be given under that provision for Mr Ahmed to serve as a director of NuBnk. Permission was duly given, albeit subject to a number of conditions that were set out in the order dated 14 July 2020.

The appeal: arguments of the parties and discussion

26 Mr Ahmed disputes the decision to dismiss his application under s. 8A on three grounds. The first is that the wrong legal test was applied, on the basis that the Judge apparently accepted the submission that there was no jurisdiction to invoke s. 8A at all in circumstances where s. 17 would give Mr Ahmed the relief that he sought. The second ground is that even if the Judge did not consider that there was no jurisdiction to invoke s. 8A as such, the availability of relief under s. 17 was clearly a factor that weighed heavily in his decision under section 8A, which (it was submitted) was irrelevant. The third ground of appeal is that no sufficient reasons were given for the refusal of relief under section 8A.

27 The position of the Secretary of State is that, properly interpreted, the Judge was not saying that he had no jurisdiction to invoke section 8A. Indeed, Mr Shepherd said that this was not a submission that he had made before the Judge. Rather, Mr Shepherd's submission, which he contended that the Judge accepted, was simply that, on the facts of the present case, s. 17 was the more appropriate basis for relief. That was, Mr Shepherd submitted, a perfectly permissible approach for the Judge to take, for which sufficient reasons were given, albeit that those reasons were inevitably concise in the context of an *ex tempore* judgment given in a remote hearing.

28 It seems to me that the terms of the judgment do suggest that the Judge may have considered that he did not have jurisdiction to invoke s. 8A in this case. But even if that was not intended, it is clear that – at the very least – the Judge decided that it was appropriate to address the application under s. 17 of the Act rather than considering it under s. 8A. While the Judge correctly set out the relevant part of the test for the application of s. 8A in this case, there is no discussion in the judgment of whether the facts of this case amounted to special circumstances that could justify an order under that section and if not why not. Instead, the Judge took the view – as he expressly said – that this case was not properly to be addressed under s. 8A and should instead be dealt with under s. 17.

29 Whether put as being an error of law or an insufficiency of reasoning, the grounds of appeal come down essentially to a central criticism that this was not an approach that the Judge could properly adopt. I agree with that submission. Section 8A and s. 17 applications are made on quite different bases, with different consequences. If successful, all that an applicant can obtain under s. 17 is the leave of the court to act for a company in one of the ways that would otherwise be prohibited by the undertaking given under s. 1A. Moreover, as the terms of s. 1A make clear, leave must be obtained from the court in each case in which a departure from

the undertaking is sought. So the leave of the court is not permission at large to depart from the undertaking, but is confined to the involvement of the person in a specific way in a specific company. An order under section 8A, by contrast, abridges the effect of the undertaking across the board for all purposes and for all companies.

- 30 It is therefore unsurprising that the first and primary form of relief sought by Mr Ahmed in his claim form was an order under section 8A that the undertaking should cease to be in force. The application under s. 17 was advanced in the alternative, effectively if the s. 8A application failed.
- 31 That being the case, the Deputy ICC Judge should have considered the s. 8A application and decided it on its substance before considering whether, in the alternative, s. 17 might be applied. It was not an answer to say that there was an alternative course available to the court in the form of s. 17, where that alternative course did not provide relief of the nature and scope that Mr Ahmed sought under s. 8A.
- 32 It appears from the Judge's analysis on this point, which I have cited above, that at least part of the reasoning behind his approach was his conclusion that the court "should be slow to exercise its discretion" to vary or revoke a disqualification order, other than as set out in s. 17. That seems to betray a confusion about the interaction between ss. 17 and 8A. As I have explained, ss. 17 and 8A are procedures with quite different purposes and effects, and there is nothing in the Act which suggests that an undertaking should not, in principle, be varied or revoked save as set out in s. 17. Indeed, s. 17 does not permit the variation or revocation of an undertaking at all. Rather, it provides the leave of the court within the scope of, and as expressly recognised by, the undertaking. I therefore consider that the Judge did err in failing to address the substance of the application under s. 8A of the Act.

Exercising the discretion afresh

- 33 It is therefore, open to me to exercise a discretion under s. 8A afresh and make the order sought by Mr Ahmed, and Mr Brown invites me to do so on the basis of the evidence before the court. He says that this is a rare case where the applicant, Mr Ahmed, produced evidence that showed both that his original conduct was causally linked to his mental illness and addictions, and that he had subsequently received treatment and had recovered to such an extent that the expert report concluded that he was no longer likely to behave in that way. That evidence, as I have already noted, was not disputed by the Secretary of State.
- 34 Mr Brown also pointed out that Mr Ahmed had waited for three and a half years, after giving his undertaking, before he applied to the court, such that it could be demonstrated that his rehabilitation was both significant and long-standing. These are not, Mr Brown said, circumstances that could have been foreseen at the time that the original undertaking was given. While Mr Ahmed's treatment had commenced before that undertaking, there was no

certainty that it would be successful and (in particular) it could not have been foreseen that Mr Ahmed's recovery would be as significant as set out in the expert report.

35 Mr Shepherd, for the Secretary of State, submitted that I should not exercise my discretion to truncate the duration of the undertaking. His overarching submission was that rehabilitation in itself is not the type of situation that should justify the variation of an undertaking given under the Act. He pointed out that Hart J in *Re INS* expressly recognised the purpose of the undertakings regime as being to enable court proceedings to be avoided, and he noted that this would be undermined if a director could be relieved of such an undertaking absent some special circumstances.

36 Mr Shepherd also drew my attention to the examples of the application of section 8A set out in *Mithani: Directors Disqualification*, §2538, where the only two situations that could be of possible relevance to the present case are the following:

“(f) Where a substantial error was made concerning the nature of the misconduct or unfit conduct, or a substantial change in the circumstances has arisen from the time when a disqualification undertaking was accepted such that it is no longer in the public interest for the applicant to be bound by the terms of his undertaking. This will include cases ... [where] the facts and matters which are alleged to support the schedule of misconduct or unfit conduct are found to be incorrect or unreliable based on information obtained after the undertaking was signed such as where evidence in opposition is furnished by a defendant which demonstrates that there was no, or no, proper basis upon which the applicant should have been disqualified.

...

(i) Where new information is available to the applicant or the Secretary of State which was not available at the time when the disqualification undertaking was accepted, particularly where it could not reasonably have been made available to the applicant.”

37 Mr Shepherd said that neither of those two examples envisaged the situation in the present case, where a director had been rehabilitated and on that basis said that he was no longer likely to offend.

38 Mr Shepherd fairly acknowledged that the examples given *Mithani* are not exhaustive. He also stopped short of a submission that rehabilitation would never be sufficient for the application of s. 8A. But he did submit that it would have to be quite an unusual case before rehabilitation should be accepted as the basis for an order under that section. The situation

was, he said, quite different under s. 17 where leave could be given under tightly circumscribed conditions.

- 39 I consider that Mr Shepherd is right to say that rehabilitation will not, absent particularly compelling circumstances, justify an order under s. 8A. As both counsel accepted, rehabilitation of an offending director is one of the underlying policy reasons for the regime that is set out in the Act. It follows that an essential element of the purpose of accepting an undertaking under the Act is to allow the offending director to change their ways. The fact that a director does, indeed, do so should not therefore, in itself, be a reason to reduce the length of the undertaking that is given. Put another way, although the successful rehabilitation of a director may well not be foreseen at the time that an undertaking is given, the possibility of rehabilitation is something that is foreseen and indeed a desired outcome of the undertakings procedure. Where that outcome arises, therefore, it cannot be described as giving rise in itself to special circumstances.
- 40 Mr Brown is of course right to say that on that analysis there is no difference in treatment of a dishonest director who fails to reform during the time of the undertaking, as compared with an honest director like Mr Ahmed who has taken substantial steps to obtain the treatment that he needed and persevere with it to the extent of recovering very substantially.
- 41 I agree that this is, indeed, the result of the analysis insofar as section 8A is concerned. But that is a consequence of the fact that an undertaking given under the Act is inevitably a somewhat blunt tool. Section 8A is not, in my view, a provision that turns that blunt tool into a precision laser, allowing the court to fine-tune the application of the undertaking according to the facts of an individual case. Rather, s. 8A is a corrective provision which enables the court to intervene to provide relief in particular circumstances where the nature of the new facts or changed circumstances make it appropriate to vary the undertaking given. If that regime is to be effective, those circumstances will inevitably be limited and somewhat unusual. For the reasons I have given, the fact of rehabilitation will not, in general, fall within that category.
- 42 That does not mean, of course, that successful rehabilitation will have no impact at all on a director who has given an undertaking under the Act. It is much to Mr Ahmed's credit that he has obtained the treatment that he needed and he has no doubt put considerable effort into his successful recovery. That was recognised by the fact that he was successful in obtaining an order in his favour under s. 17 of the Act.
- 43 Like Mr Shepherd, I do not rule out that on the facts of a particular different case there may be a compelling reason to make an order under s. 8A where a director has shown significant rehabilitation. In my judgment, however, the facts of the present case do not justify such an order.

44 It follows that I will uphold the order of the Judge albeit for different reasons to those that he gave.