

DIRECTORS' DISQUALIFICATION COMPENSATION ORDERS – HAS THEIR TIME FINALLY COME?



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The regime by which disqualified directors can be ordered to pay compensation for the benefit of creditors has been little used, but we may at last be seeing an uptick in cases.



The regime

In July 2013, the then Secretary of State for Business Innovation and Skills, Vince Cable, made a speech proposing improvements to the law on directors' disqualification:

Requiring disqualified directors to undertake some form of education

before they can go on to run another business is an option here. We might also allow the courts to make financial awards against directors they are disqualifying to compensate creditors who have suffered as a result of their actions. This would hit directors where it hurts and provide more direct accountability to those affected by misconduct¹.

Less than two years later the Small Business Enterprise and Employment Act 2015 was passed. It conferred on the court a new power to make a compensation order against a person, on the application of the Secretary of State, where the conduct for which that person had been disqualified had caused loss to one or more creditors of

the insolvent company. The Secretary of State could accept a compensation undertaking from a person where the conditions for the making of a compensation order were met, just as the Secretary of State could already accept a disqualification undertaking from a director rather than having to apply to court for a disqualification order.



Little used

Sections 15A and 15B Company Directors Disqualification Act 1986 came into force on 1 October 2015, and the Compensation Orders (Disqualified Directors) Proceedings (England and Wales) Rules 2016 came into force on 1 October 2016. Then, it appears,

¹ https://www.regulation.org.uk/library/2013_trust_why_it_matters.pdf

very little happened. According to an Insolvency Service response to a Freedom of Information request, in the period 1 November 2019 – 24 February 2023 only one compensation order was made². That single compensation order was granted by Insolvency and Companies Court Judge Prentis in *Re Noble Vintners* [2019] EWHC 2806. As indicated by its name, Noble Vintners Ltd bought and sold wine on behalf of clients. Shortly before going into liquidation its director transferred £560,000 of company funds to another company of which he was sole director and shareholder, without any legitimate purpose. At the time of writing *Re Noble Vintners* remains the only reported case on compensation orders.

Between 1 November 2019 and 24 February 2023, 29 compensation undertakings offered by directors were accepted by the Secretary of State³. To avoid legal costs many directors will choose to offer an undertaking rather than fight. Unfortunately that means few cases going to court, with the result that those advising directors only have *Re Noble Vintners* to go on. ICC Judge Prentis' judgment is therefore essential reading for advisors. It contains helpful guidance on the principles the court should apply when considering whether to make a compensation order, and on the terms of the order.



Abuse of pandemic financial support schemes

As has been widely publicised, for several years the Insolvency Service has been targeting for disqualification directors who abused the Covid-19 pandemic financial support schemes.

Between 1 April 2022 and 30 June 2023, 1200 directors were disqualified.

Of this figure, 611 were disqualified for misconduct involving abuse of Covid-19 schemes⁴.

These cases, often involving bounce-back loans, provide the perfect opportunity for the Secretary of State to seek compensation orders on a wider scale.

By way of reminder, under the bounce-back loan ("BBL") scheme, a business could borrow up to 25% of its turnover in the previous year, up to a maximum of £50,000. The funds could only be used to provide economic benefit to the business.



Recent cases

On 25 July 2023 Chief Insolvency and Companies Court Judge Briggs heard the uncontested disposal of a claim for disqualification against a director accused of providing false or inaccurate information to his company's bank about the company's turnover when applying for a BBL, with the result the company obtained a BBL to which it was not fully entitled. It was further alleged that the director had failed to use the BBL for the economic benefit of the company and instead used it to benefit himself. The claim was undefended, and the director did not attend the hearing. At the time of writing the Insolvency Service has not issued a press release naming the director. This may be because the disqualification only actually takes effect 21 days after the disqualification order is made, and within this time the director may decide to apply for permission to appeal.

In what is likely to have been an ex tempore judgment Chief ICC Judge Briggs referred to a passage in the Court of Appeal's decision in *R v Dag and Dagistan* [2023] EWCA Crim 636, an appeal from a prosecution by the Insolvency Service:

43. However, in our judgment, the Recorder was right to recognise that the Bounce Back Loan Scheme presented an exceptionally vulnerable target at a time of national emergency which the appellants had ruthlessly exploited and that this increased the level of their culpability...

Chief ICC Judge Briggs made a top-bracket 13-year disqualification order against the director. Turning to the Secretary of State's application for a compensation order, the judge noted that it was clear that a loss had been caused to the company's bank. In addition to ordering the director to pay the £49,985 of the BBL which had not been used for the company's benefit, the judge permitted the Secretary of State to claim interest at the contractual rate of 2.5% per annum (as per the terms and conditions of the BBL).

It is understood that Insolvency and Companies Court Judge Barber has reserved judgment in another compensation order case, and that judgment is imminent. This may be *Re Pure Zanzibar Ltd* (see [2022] EWHC 971 for ICC Judge Barber's disqualification judgment). The misconduct in *Pure Zanzibar* was rather niche: taking holiday bookings and payments without a valid ATOL licence. But given that it has been four years since the last reported case on compensation orders, we can hardly be picky!



2 <https://www.gov.uk/government/publications/insolvency-service-foi-responses-january-to-march-2023/foi2223-145-number-of-compensation-orders-and-undertakings-that-involved-compensation>

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4 https://www.theguardian.com/world/2023/jul/16/half-of-uk-company-directors-struck-off-linked-to-alleged-covid-loan?CMP=Share_AndroidApp_Other