Neutral Citation Number: [2019] EWHC 2806 (Ch)

Case No: CR-2018-011039

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

RE: NOBLE VINTNERS LIMITED

AND RE: THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: Friday 1 November 2019

Before :

ICC JUDGE PRENTIS

- -

Between :

THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY	**Claimant**
- and –	
KEVIN WILLIAM EAGLING	**Defendant**

- -

Christopher Buckley (instructed by **Shepherd + Wedderburn**) for the **Claimant**
The Defendant did not appear and was not represented

Hearing dates: Wednesday 2 October 2019

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JUDGMENT

- -

ICC JUDGE PRENTIS :

Introduction

1. This is the first case brought by the Secretary of State under the compensation order regime introduced as sections 15A and 15B of the *Company Directors Disqualification Act 1986* (the "Act") with effect from 1 October 2015. The sections are now supported by the *Compensation Orders (Disqualified Directors) Proceedings (England and Wales) Rules 2016 (SI 2016/890)* (the "Rules"), effective since 1 October 2016, and the *Disqualified Directors Compensation Orders (Fees) (England and Wales) Order 2016 (SI 2016/1047)* (the "Fees Order"), effective since 30 November 2016. There are similar provisions which apply to compensation undertakings, the variation or revocation of which is covered by section 15C of the Act; and to Scotland.

2. The regime has caused some consternation, particularly described in *Mithani on Directors' Disqualification* (looseleaf), viewing negatively its inter-relationship with the *Insolvency Act 1986* ("IA86") routes of recovery, and more generally its potential disruption of the priorities of distribution contained in the IA86 and the *Insolvency (England and Wales) Rules 2016 (SI 2016/1024)* ("IR16"), and of the principle of pari passu distribution which has applied to English insolvency since the mid-nineteenth century.

3. So far as is proper within the confines of this case, those are matters which I must address. I record the assistance I have received from Mr Buckley, Counsel for the Secretary of State; and, through him, from the Civil Servants who attended court.

Background

4. On 14 May 2019 at an uncontested disposal hearing I disqualified Kevin William Eagling under the Act for the maximum 15 years.

5. Noble Vintners Limited (the "Company") traded as a wine broker, its market being high net worth individuals, often found through telemarketing, who wished to acquire stocks of the most renowned wines for, usually, investment. There were three aspects to the Company's business: it would itself buy stock which it would then sell to its clients; it would buy particular wines for individuals; and it would sell wines on behalf of individuals. Wines in its hands were stored in temperature- and humidity-controlled bonded warehouses.

6. The Company commenced trade shortly after incorporation on 8 June 2011. In 2013 it was taken over by one David Cooper, who was also a director from 10 July 2013 to 26 November 2015. On 20 May 2015 Mr Eagling, who had been a manager at the Company, became sole shareholder and was appointed as a director. Following Mr Cooper's resignation Mr Eagling (whose directorship had ceased between 27 August 2015 and reappointment on 2 November 2015) was sole director. On 22 June 2017 the Company entered creditors' voluntary liquidation with an estimated deficiency of £1,678,614. Nedim Patrick Ailyan was appointed liquidator.

7. The report to creditors contained Mr Eagling's "Company History". In the third person he describes how:

> "Mr Eagling took over the Company in earnest in November 2015, after a handover period where Mr Cooper consulted on the transfer and details of the business.
>
> After a slow period leading up to Christmas 2015, the Company suffered several setbacks at the turn of [the] year. All of the staff had to be replaced as the sales manager left the Company and took the key personnel with him… During 2016 Mr Eagling maintained the Company's administrative personnel and premises as a constant, but trading dropped substantially due to high sale staff turnover and the Company severely depleted its cash reserves.
>
> During this time the Company suffered from the freezing of its HSBC bank account due to a large payment from a single client, which was a huge setback for an already faltering operation. HSBC, after a period of several months, reopened the bank account… but reimbursed some of the case held in the account, c.£300k, to the original payees…
>
> In the last quarter of 2016 the possibility of the Company continuing to successfully trade appeared slight, and the manager [who was the sales director] began to scale down operations…".

8. On 19 December 2018 the Secretary of State issued these proceedings, seeking both disqualification under section 6 of the Act and a compensation order. The compensation order sought was in the following terms:

"a. the Defendant shall pay the amount of £559,484.00 (or such other creditor losses that are determined by the Court to have been caused by the Defendant) to the Claimant; and

b. the amount of £559,484.00 (or such other sum determined by the Court) shall be distributed as follows by the Claimant:

i. compensation of £460,067.37 payable to 28 customers/ creditors of the Company as set out and in the respective amounts as detailed at page 1045 of DB1 to the Affidavit of David Brooks dated 19 December 2018; and

ii. compensation of £99,416.63 payable pro rata to the general body of the Company's customers/ creditors".

9. On 4 January 2019 I ordered service of the claim out of the jurisdiction, Mr Eagling now residing in Northern Cyprus.

10. On 19 February 2019 ICC Judge Barber gave directions for Mr Eagling to file and serve an acknowledgment of service and evidence in answer on debarring terms.

11. Mr Eagling having failed to comply, and the Court being satisfied as to service, the 14 May 2019 hearing was effective.

12. The evidence in support of the disqualification of Mr Eagling was set out in the affidavit of David Brooks of 19 December 2018. He is Chief Examiner in the Insolvent Investigations South Directorate of the Insolvency Service, an Executive Agency of the Department for Business, Energy and Industrial

Strategy. As compensation orders are by section 15A(3)(b) of the Act founded upon the "conduct for which the person is subject to the [disqualification] order", I must set out the grounds alleged.

> "…between 2 November 2015 and 18 October 2016 Kevin William Eagling caused the misappropriation of company funds totalling £559,484 from Noble Vintners Limited in that:
>
> (a) At 31 October 2015 Noble had unfulfilled customer orders of approximately £1,028,265. Noble held stock in its warehouse with an in bond value of £91,444 and had cash at bank of £187,168.97[;] it was without sufficient funds to fulfil its outstanding orders.
>
> (b) Between 2 November 2015 and 24 December 2015 the first Noble bank account [held at HSBC] received £276,174 and made payments of £463,326. The first Noble bank account was suspended and facilities withdrawn on 22 December 2015. With the exception of deposits totalling £32,124 other deposits made in the period were refunded to customers through their bank or the merchant services provider. The balance to close of £82,734 was issued to Noble by cheque.
>
> (c) Between 21 January 2016 and 18 January 201[7] the new Noble bank account [held at the Clydesdale] received funds of £596,757.12 and made payments of £596,742.06. Of these amounts:
>
> i. £253,170 was received from wine merchants to whom wine had been sold by Noble. £209,115 of this amount was in

respect of wine belonging to Noble's customers who had contracted to re-sell their wine through Noble on the basis of information provided by Noble. None of the customers who supplied the wine received any payment from Noble for the wines they had transferred in good faith. The remaining sum of £44,005 was received for the sale of unallocated stock held in the company's bonded warehouse.

ii. £256,643 was received from known customers of Noble in respect of orders of wine placed. Wine fulfilling £16,921 of these orders was transferred to the customers. Only £5,800 was paid to wine merchants in the period and no further wine was purchased by Noble. There was little attempt to fulfil new or outstanding customer orders in the period.

iii. A further receipt of £82,734 comprised the closing balance of funds from the [HSBC] account. This in turn comprised receipts from two Noble customers totalling £32,124 made after 2 November 2015. The remaining credit pre-dated this amount.

(d) Mr Eagling was the sole signatory to the [Clydesdale] account. Of payments made from this account £559,484 was paid by cheque and bank transfer to the account of another company [Eagling Partners Ltd]. This company was incorporated on 25 November 2015, Mr Eagling was sole director and sole shareholder. This company failed to submit any returns to Companies House and was struck off and

> dissolved on 2 May 2017. There is no evidence that Noble had a legitimate business purpose in transferring this sum to the company".

13. On 14 May I found those grounds made out, supported as they were by the ensuing detail of Mr Brooks' affidavit. Thus, by 2 November 2015 the Company had very little prospect of meeting its substantial creditors. It continued to incur obligations, including those generated by its own recommendations to clients to buy or sell wine, which it very largely did not meet. It instead chose to pay almost all its income over the period to a company controlled by Mr Eagling, without any commercial justification. The payments to Eagling Partners Ltd, whether by cheque (which was £103,000 of them) or bank transfer (the remaining £456,484) were made not in that company's name, but to "NVC Management". Despite that nomenclature, it provided no management services. As sole director, Mr Eagling was responsible for all of this.

14. As well as disqualifying Mr Eagling I gave additional directions leading to this hearing. Those have resulted in a second affidavit from Mr Brooks addressing at my request such background as there is to the compensation order regime, and its application here. In giving those directions I had anticipated receiving an affidavit describing Parliamentary debates and exhibiting Hansard reports concerning the implementation of what is on any reading new and far-reaching legislation.

The regime

15. There was none of that. The regime instead derives only from a July 2013 Discussion Paper promulgated by the Department for Business Innovation & Skills entitled *Transparency & Trust: enhancing the transparency of UK company ownership and increasing trust in UK business*, and the Government Response to it, under the same title, of April 2014.

16. The Discussion Paper introduces the topic as follows:

> "11.13 We want to explore whether giving the court a power to make a compensatory award against a director at the time it makes a disqualification order would improve confidence in the insolvency regime. The aim would be to increase the likelihood of culpable directors being called to account for their actions, whilst providing better recourse to funds for creditors who have suffered".

17. The Government Response says this:

> "259. …the main purpose of the disqualification regime is to protect the market and consumers from acts of directors whose conduct falls below expected standards. Currently, those who have suffered loss as a result of misconduct do not generally benefit, and might feel disqualification is not a sufficient deterrent or form of redress.
>
> 260. We are conscious that under the current disqualification regime [*insolvency regime is meant*], the measures that allow action against miscreant directors to secure financial redress for creditors are not heavily used… Since 1986 there have only been around 30 reported

wrongful trading cases, about 50 preference claims and about 80 reported cases arising from undervalue transactions".

18. The "Summary way forward" is this:

> "When Parliamentary time allows we will give the Secretary of State the power to apply to the court for a compensation order against a director who has been disqualified… where creditors have suffered identifiable losses from their misconduct".

19. So the intention was to enhance in the public interest the protective aspect of the disqualification regime by giving monetary redress to creditors financially affected by the misconduct, thereby giving the regime as a whole more "bite", actual and perceived; and also to fill gaps in the exploitation of IA86 remedies, notwithstanding that that would only be in cases where there was a disqualification.

20. Materially, section 15A reads thus:

> "(1) The court may make a compensation order against a person on the application of the Secretary of State if it is satisfied that the conditions mentioned in subsection (3) are met...
>
> (3) The conditions are that-
>
> (a) the person is subject to a disqualification order… under this Act, and

(b) conduct for which the person is subject to the order… has caused loss to one or more creditors of an insolvent company of which the person has at any time been a director.

(4) An 'insolvent company' is a company that is or has been insolvent and a company becomes insolvent if-

(a) the company goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up,

(b) the company enters administration, or

(c) an administrative receiver of the company is appointed.

(5) The Secretary of State may apply for a compensation order at any time before the end of the period of two years beginning with the date on which the disqualification ordered referred to in paragraph (a) of subsection (3) was made…

(7) In this section and 15B… 'the court' means-

(a) in a case where a disqualification order has been made, the court that made the order…".

21. Materially, section 15B reads:

"(1) A compensation order is an order requiring the person against whom it is made to pay an amount specified in the order-

(a) to the Secretary of State for the benefit of-

(i) a creditor or creditors specified in the order;

(ii) a class or classes of creditor so specified;

(b) as a contribution to the assets of a company so specified…

(3) When specifying an amount the court (in the case of an order)… must in particular have regard to-

(a) the amount of the loss caused;

(b) the nature of the conduct mentioned in section 15A(3)(b);

(c) whether the person has made any other financial contribution in recompense for the conduct (whether under a statutory provision or otherwise)…

(5) An amount payable under a compensation order… is provable as a bankruptcy debt".

22. The regime was originally introduced as section 110 of the *Small Business, Enterprise and Employment Act 2015.* By paragraph 4 of schedule 1(1) to the *Small Business, Enterprise and Employment Act 2015 (Commencement No.2 and Transitional Provisions) Regulations 2015 (SI 2015/1689),* section 15A(3)(b) conduct must have occurred on or after 1 October 2015.

23. Section 15A provides a single basis for liability. There is no distinction between its role within the disqualification regime and its additional role under the insolvency regime. That distinction may, though, be drawn in the operation of the section 15B distribution provisions.

24. Radically, liability is based not on loss to the relevant company but on loss to its individual creditors. That removes any direct correlation between this regime and the remedies available under the IA86. Potentially, it also enables recoveries to be made in cases where there is wrongdoing which causes no loss to the company, or where such loss is problematic, including what may be described as the *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250 line of cases. That is of particular pertinence in disqualification, where a regular ground is that a director caused the company to pay other creditors ahead of the Crown, and thereby to trade to the Crown's detriment.

25. This is therefore a new, free-standing, regime, and must be interpreted as such.

26. It is also a single regime designed in the public interest to cover the entirety of the conduct for which a director might be disqualified. That points, so far as is legitimate, to the most flexible possible interpretation.

27. Most of the Act's bases for disqualification are covered by its section 12C, which engages the schedule 1 list of "matters to be taken into account in all cases" and "additional matters to be taken into account where person is or has been a director". These are no more than factors which the court is bound to consider, but they include not just responsibility for breach of legislative requirements, misfeasance, and breach of fiduciary duty, but also the more open-ended responsibility for the causes of insolvency. The compensation regime must therefore cater not just for breaches of duty, but for conduct which, while falling short of or outside of a breach, is nevertheless unfit or otherwise a ground for disqualification.

28. While, no doubt, most applications for compensation will be following section 6 disqualifications, the pre-condition to the exercise of discretion contained in section 15A(3)(a) requires only a "disqualification order" under any section.

29. The second pre-condition is that at section 15A(3)(b). Its words and phrases require some examination.

30. "Conduct for which the person is subject to the order" must refer only to such parts of the conduct as have caused loss. The regime could not sensibly be disapplied just because certain elements of the misconduct had not been causative of loss.

31. The misconduct must have "caused loss to one or more creditors of an insolvent company of which the person has at any time been a director". Before investigating "caused loss", it is perhaps helpful to identify to whom. "Creditor" is undefined by the Act, although a creditor must be of an "insolvent company" as defined by section 15A(4). As the relevant loss is that of the creditor and not of the insolvent company, there is no need to restrict relevant creditors to those who have a provable claim, so long as it can be established that they are owed an obligation by the insolvent company, whether present or future or conditional or of any other category, sounding in money.

32. As to the insolvent company, insolvency is a requirement because it is not the policy of the Act to extend this regime to those who can recover losses from solvent companies. There are two corollaries of that. First, it is enough that the disqualified person has at any time been a director of such an insolvent company: there is no requirement that he was a director at the time of the

relevant misconduct. Secondly, there is no requirement that the "insolvent company" was insolvent at the time the creditor suffered the loss.

33. It is a notable feature that while the "insolvent company" may be the company in respect of which the disqualification proceedings were brought, that is not necessarily so. What is essential is that the misconduct has "caused loss" to a creditor of such a company.

34. "Loss" is undefined. As by section 15B a compensation order is bound to be in "an amount specified", the loss must be measurable in monetary terms. There seems no reason in policy why, so long as that condition is met, any other restriction should be imposed on the nature of the loss (although no doubt the court would not exercise its discretion to award compensation were the loss founded on illegality).

35. As a matter of construction, the loss must also be as a creditor of the relevant insolvent company. Although it would be possible linguistically to dissociate the loss from the status of being a creditor of a relevant insolvent company, such that provided the person was such a creditor their loss suffered by the misconduct could be taken into account even if it was not loss related to their dealings with that company, that would be impermissibly wide: the insolvent company requirement would become no more than a quixotic hurdle.

36. However, that does not mean that the compensatable loss and the loss for which the person is a creditor of the insolvent company is the same. That could not be so, because this regime creates the new hypothesised cause of action between the disqualified director and the creditor. By way of practical example, in a detrimental trading to the Crown case its claim against the

insolvent company is for the entirety of the tax debt. The misconduct, though, is based on discriminatory treatment. So a compensation order based on that could extend only to the difference between what the Crown actually received over the period of discrimination and what without the misconduct it ought to have received over that period, which might still include payment of penalties and interest.

37. The loss must also have been caused by the misconduct. The Act does not address directly what it means by causation. However, the unqualified words "caused loss" indicate that the conduct need not be, for example, the predominant cause of loss: if that was required, it could have been specified. By contrast, mere "but for" causality would fail to preserve a sufficiently meaningful relationship between the misconduct and the loss in many misconduct situations (think, for example, of the regular allegation of failure to keep proper accounting records), although it might be a useful device for excluding certain aspects of loss.

38. In locating the middle road I have found assistance in a dictum of Lord Browne-Wilkinson's in *Target Holdings Ltd v Redferns* [1996] AC 421, 439. Albeit in a different context he said that:

> "Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach".

39. Lord Browne-Wilkinson was there assisted by the minority judgment of McLachlin J in *Canson Enterprises v Boughton & Co* (1991) 85 DLR (4th)

129, discussed again in the Supreme Court in *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58, [2015] AC 1503. One other element of McLachlin J's judgment was that "Foreseeability is not a concern in assessing compensation".

40. An amalgam of Lord Browne-Wilkinson's description of what "the word compensation suggests" and McLachlin J's removal of the concept of foreseeability seems appropriate to the statutory scheme of compensation here. So, using hindsight and common sense but without considering foreseeability the court must be satisfied that the misconduct has caused loss within the meaning of the Act to a creditor of a relevant insolvent company. It follows that the loss caused will be assessed as at the date of the final hearing of the compensation order claim, on the basis of the fullest-available evidence. Using hindsight is standard practice in assessing loss in IA86 claims: as Lord Scott of Foscote said in the transaction at an undervalue case of *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] UKHL 2, [2001] 1 WLR 143 at [26], "reality should… be given precedence over speculation". Should the application of that test cause unfairness because, say, although the loss was caused by the misconduct, it was but one of a number of causes, then that can be dealt with under the court's discretion either at the section 15A stage, or at the section 15B stage.

41. Section 15B contains a discretion extending both to the amount of any compensation order and for whose benefit it is payable.

42. As to amount, the section 15B(3) matters to which the court must have particular regard- the amount of the loss caused, the nature of the misconduct,

and what other financial contribution the person has made in recompense for the misconduct- can be read, although non-exclusive, as a sensible order of steps by which to consider quantification.

43. The amount of the loss is the section 15A(3)(b) figure.

44. The nature of the misconduct would extend to consideration of relative responsibility between multiple directors. It could also, as Mr Buckley suggested, permit the court to balance the claimed loss against the nature of the conduct, for example where relatively minor yet culpable negligence had caused vast losses.

45. As to other financial contribution, it will be seen that this is no more than a factor to which the court is obliged to have regard. There is not, and given the difference between the loss-sufferers under this regime and the insolvency regime there could never be, any express provision for setting-off one against the other. As I say, the compensation order regime has created a new, separate, cause of action. It follows that, strictly, res judicata cannot apply. Nevertheless, in many situations there will be overlap between the facts founding the compensation regime and those founding claims within a liquidation or administration, and the culpable person will be the same. Further, on occasion there may be competition between the disqualification compensation regime and criminal confiscation or compensation, each fulfilling their own beneficial statutory purpose.

46. Concerns that the double regimes will permit double recovery for what is factually, if not legally, the same wrong are, though, in my view misplaced. Despite the technical differences between the comparators, the court is bound

to have in mind that no statute should be interpreted so as to impose a double liability absent clear words; and these words indicate the contrary. Likewise, even if res judicata does not apply, a claim for compensation may be wholly or partly impugned under CPR rule 3.4 as, for example, a collateral attack on an earlier decision or other abuse of process. Whether the director has already made a financial contribution within the express words of section 15B(3)(c), or is at risk of having to do so, at the forefront of the court's mind will necessarily be that compensation orders are sought in the public interest, and their effect ought not to be to undermine that interest.

47. Criticisms of the regime raised both in this regard and as to the potentially harmful relationship between it and the insolvency regime also appear to me to attribute insufficient weight to the staged process prescribed by the scheme of the Act, and in particular to the position of the court within it. Any compensation order application is initiated by the Secretary of State in her discretion. The Insolvency Service has internal guidance directed at factors which ought to be considered in recommending an application. As discussed, the court has its own discretion as to whether to make a compensation order, as well as a full discretion as to its amount and beneficiaries.

48. The court also has the opportunity to have the fullest information before it when deciding how to exercise its powers. Rule 4(3) of the Rules provides the minimum content of the evidence in support of the application. By rule 4(2) it is to be served on the defendant, and by rule 4(4) on the liquidator, administrator, and administrative receiver of any section 15A(3)(b) insolvent company. Mirroring the *Insolvent Companies (Disqualification of Unfit*

Directors) Proceedings Rules 1987 (SI 1987/2023), not least because, as here, the compensation claim will frequently be made within the disqualification claim, the defendant is by rule 7 given 28 days to respond (a rule which in practice is rarely honoured, or insisted on by the court). By rule 8(4) the compensation claim may be determined on the first date or adjourned with directions; and by rule 8(3) "subject to the direction of the court, any of the parties may give evidence, call and cross-examine witnesses at the hearing".

49. So the court at the final hearing will have the widest opportunity to hear evidence and to sound views. In an appropriate case an office-holder could appear to contest the claim in whole or in part; likewise creditors who might benefit were the section 15B division of amounts payable different. One of the roles of the court at the first hearing will be to consider whether there are other interested parties who should be joined or notified.

50. This is, then, a regime with checks and balances at every stage.

51. It will be for the court under section 15B(1) with the benefit of all that information to determine whether any compensation order will require payment for the benefit of creditors or a class of creditors, or as contribution to the assets of the company, or some combination. No doubt the court will always bear in mind, and especially when the relevant misconduct is on all fours with an insolvency remedy, the appropriateness of allocating proceeds to particular creditors rather than to creditors generally. In every case it will also have to consider the public interest in insolvency practitioners being remunerated, what the relevant practitioners have done in order to allow the disqualification and compensation claims to be made, and how they are to be

remunerated if not through the compensation order; and how monies would be distributed were they to be within the insolvent company. Where there is to be an order for contribution, the funds available to the practitioner to enforce such an order will be highly material to whether the order is for payment direct to the company, or through the Secretary of State: unlike the section 15B(1)(a) payment for creditors, which must be to the Secretary of State, section 15B(1)(b) is non-prescriptive.

52. Where there are or may be IA86 proceedings, the Court is also going to have to consider at this stage, as well as at any enforcement stage, the question of recoverability, and whether the Secretary of State and the office-holder are competing for the same pot.

53. If the compensation order application is issued after the making of the disqualification order, then although that is expressly permitted by section 15A(5) the court would still be obliged to weigh whether it would be fair to make an order, in particular bearing in mind when the director was first notified of the risk that the disqualification might be followed by a compensation claim, and how he had responded to the claims before having such knowledge. I have noted that the current editions of the Insolvency Service's *Guide to Director Disqualification* and *Effects of a Disqualification Order* do both specifically identify the risk that a claim for compensation may follow one for disqualification.

54. I record that it was accepted before me that once this regime is exploited more fully the likelihood is that fewer disqualification cases will settle, and there will therefore be more call for court time and resources. That does not affect

the above interpretation of any of these provisions. It must be assumed that Parliament has borne this consequence in mind.

55. I must finally address the Fees Order. Paragraph 3 says this:

> "(1) The Secretary of State is to be paid a fee for performing the function of distributing to a creditor an amount received by the Secretary of State in respect of a compensation order…
>
> (2) The fee is to be paid out of the amount received before such a distribution is made to a creditor.
>
> (3) The fee means the aggregate of-
>
> (a) the time spent by the appropriate officials carrying out the Secretary of State's functions under paragraph (1) in relation to all creditors specified in a compensation order…, multiplied by the hourly rate in accordance with the table in the Schedule; and
>
> (b) any necessary disbursements or expenses properly incurred in carrying out that function,
>
> divided equally between the total number of creditors specified in the compensation order".

I need not reproduce the Schedule, but note that it contains hourly rates for ten different Insolvency Service grades, ranging from £31 to £69.

56. There are a number of points.

57. First, I read the paragraph 3(3)(a) reference to the time spent "in relation to all creditors specified in a compensation order" as being to each class of creditors: a class might be a single known individual or an as yet undetermined class, and there is no reason why the former should bear the costs of the latter.

58. Secondly, the Fees Order refers to fees payable "for performing the function of distributing". I read the word "distributing" in a wider way than is used in the IR16, which distinguish in Chapters 2 and 3 of Part 14 the ascertainment and calculation of the debt, and the subsequent distribution. It is clear from section 15B(1)(a)(ii)'s contemplation of a class of creditors that that class may not yet be ascertained, even if the amount of the compensation order is. It is also clear that not only may there be no insolvency practitioner still in place in respect of the relevant insolvent company, but it would be no function of theirs to administer the compensation order funds payable to the Secretary of State. "Distributing" must therefore include all processes necessary to allow payment to those within any class. Further, where the court orders the Secretary of State to receive a section 15B(1)(b) payment of a contribution, the fees must extend to its collection and distribution: paragraph 3 is posited on the Secretary of State being the payee under the compensation order.

59. Thirdly, neither the Fees Order nor any applicable legislation prescribes any particular mode of distribution, or ascertainment. So, for example, there is no direct means for a creditor to challenge their admission or not into the class; and there is no protection for the Secretary of State who distributes the collected sums but is then faced with a claim by a creditor who ought to have

been included within the class. All those matters could, it seems to me, be resolved by an application to court, to give effect to the purpose of its order which was to distribute the funds to those within the relevant categories.

60. Likewise, "the function of distributing" would include an application to court to vary the terms of the compensation order where, for example, an identified recipient could no longer be found.

61. Finally, modest as the Secretary of State's tabulated fees are, their application must be subject to the court's oversight in the case of controversy. Following discussion at the hearing, I anticipate that in practice, rather than the Secretary of State responding to such recipients as may raise queries over the fees, the calculation of the fees will form a part of the notification of payment to each recipient.

The compensation order in this case

62. Mr Eagling is subject to the 14 May 2019 disqualification order.

63. That order is founded on his misappropriation from the Company of the £559,484 it paid without justification to Eagling Partners Ltd. The Company is in CVL and the removal from it of these sums has plainly caused a loss to its creditors in that amount.

64. Mr Eagling's misconduct was of the most serious sort. He was solely responsible for it. He was the sole beneficiary of it.

65. Mr Eagling has made no other recompense, and it is very unlikely that he will be called on to do so. The liquidator, Mr Ailyan, has been kept informed of these proceedings, but has not sought to make any representations. He does not have the funds to pursue Mr Eagling. His latest report to creditors, to 21 June 2019, shows that he has outstanding remuneration in excess of £14,000, as against £250 in retained funds. Other than potential claims against Mr Eagling, there are no remaining assets to be realised.

66. There will therefore be a compensation order in the sum of £559,484.

67. The next question is its division.

68. The Secretary of State has identified the 28 unpaid creditors of the Company whose debts accrued after 2 November 2015. Mr Buckley confirmed that none was treated as having a proprietary claim.

69. Nine are creditors because over the period the Company sold their wine but did not account to them for the proceeds. Their debts range from £5,125 to £61,725 and total £209,115. To this figure has been applied the 10% commission which would have been payable anyway; and their debts therefore total £188,221.50.

70. 24 are creditors for monies paid over for specific purchases (five are creditors within both categories). These range from £2,030 to £65,818 and total £271,845.87. Aside from the £32,124 paid by two of them into the HSBC account, all paid into the replacement account with the Clydesdale. Although they have no proprietary claim, it nevertheless seems to me that in theory they could under the Act be treated as suffering a loss based not upon the loss of

purchase price, but the failure to obtain any uplift in value of the wines which ought to have been bought and which they would have retained. The contrary could, of course, also apply where the value of the wines had dropped. The reality is that if those elements were to be factored into the calculation of loss there would need to be detailed factual investigations. Those would constitute an inappropriate expending of resources of time and money where these sums were removed by Mr Eagling some years ago, he is now in North Cyprus, and recoveries in full must therefore be problematic. As it is, measuring the loss suffered by these creditors in the amount of the purchase price which was subsequently wrongly paid away for the benefit of Mr Eagling is a pragmatic solution which remains within the bounds of loss caused by the misconduct.

71. The 28 creditors are therefore those at whose direct expense Mr Eagling benefitted himself.

72. That leaves £99,416.63 of loss to be paid as a contribution to the assets of the Company. That sum is considerably in excess of the £50,610 of non-attributable monies paid into the Clydesdale account on closure of the HSBC account, which may fairly be said to represent what remained of the unused payments made by pre-misconduct creditors. On recovery such a sum would not only permit Mr Ailyan to be paid his fees and expenses, but would allow a dividend to the creditors generally.

73. In considering whether this division is appropriate, I have borne in mind that the claims of the 28 creditors not being proprietary, they would under the IA86 have no priority of treatment over the earlier creditors. However, I am satisfied that here it would work an unfairness were these creditors, who have

suffered the most direct loss, to have the payments they made or ought to have received attributed to payment of those whose losses had already been suffered.

74. I will therefore make the division suggested by the Secretary of State, including that she be the payee of the contribution element. I do so with the additional provision that all recoveries are to be attributed pro rata between the two classes: there is no reason why one class should have priority over the other in the event that full compensation of £559,484 is not recovered.

75. The Secretary of State is also to have her costs of these proceedings, which on 14 May I reserved to this hearing. I summarily assess those at £29,000.