Neutral Citation Number: [2021] EWHC 672 (Ch)

Case No: CR-2020-003705

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

IN THE MATTER OF BELL POTTINGER LLP
AND IN THE MATTER OF BELL POTTINGER PRIVATE LIMITED
AND IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986

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

Date: 23/03/2021

Before :

THE HONOURABLE MR JUSTICE MICHAEL GREEN

- -

Between :

THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY	**Claimant/ Respondent**
- and -	
(1) VICTORIA LOUISE GEOGHEGAN	**First Defendant/Applicant**
(2) NICHOLAS ANDREW LAMBERT	**Second Defendant/Applicant**
(3) JAMES BRODIE HENDERSON	**Third Defendant**

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- -

Hugh Sims QC and **Simon Passfield** (instructed by **Mishcon de Reya LLP**) for the **Applicants**
Tiran Nersessian (instructed by **Howes Percival LLP**) for the **Respondent**
Christopher Harrison (instructed by **Cohen & Gresser (UK) LLP**) for the **Third Defendant**

Hearing dates: 3 and 4 March 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE MICHAEL GREEN

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and other websites. The date and time for hand-down is deemed to be 10am on 23 March 2021

Mr Justice Michael Green :

Introduction

1. A Limited Liability Partnership (**LLP**) is a separate legal entity that combines some features of a company and some of a traditional partnership. Most importantly, as its name suggests, it provides the protection of limited liability to the partners, who are called members. LLPs are incorporated pursuant to the Limited Liability Partnership Act 2000 (**LLP Act**) which is very short but allows 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 (the **Regulations**) apply various aspects of the Companies Act 2006, the Company Directors Disqualification Act 1986 (**CDDA**) and the Insolvency Act 1986. The applications before me concern the extent to which the CDDA applies to LLPs and in particular whether a member of the LLP has to be concerned in its management for the CDDA to apply.

2. The issue has arisen in the application by the First and Second Defendants, Ms Victoria Geoghegan and Mr Nicholas Lambert (together the **Applicants**), to strike out under CPR 3.4(a) or (b), alternatively for summary judgment under CPR 24, in respect of disqualification proceedings brought against them by the Claimant, the Secretary of State for Business, Energy and Industrial Strategy (the **SofS**). The disqualification claim arises 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**) and the Applicants were both members of BP LLP. There is also a company involved, Bell Pottinger Private Limited (the **Company**), but the Applicants were not directors of the Company and the disqualification claim against them is therefore not concerned with any allegations in relation to the Company.

3. The SofS is also pursuing the Third Defendant, Mr James Henderson, who was a director of the Company and also the Chief Executive Officer of the Bell Pottinger Group. He is not a party to this application but, by agreement of the parties, he has put in evidence and short submissions on his behalf were made at the hearing.

4. The Applicants' main case is 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. Therefore, they say, s.6 of the CDDA does not apply to them and the proceedings should be struck out. The single allegation that is made against the Applicants relates to their conduct of a specific account/campaign and they say that, as this was a trading activity below management board level or the equivalent board level for a company, it cannot lead to the conclusion that they are unfit to be concerned in the management of a company or LLP which is the test that the Court has to apply.

5. As will be seen this question arises because of the read-across nature of the Regulations which do not precisely spell out how Parliament intended the CDDA to apply to LLPs. The Applicants say that the purpose is clear enough and that Parliament only intended those that are the equivalent of directors in an LLP to be subject to disqualification under the CDDA. The SofS says that the words used by Parliament are plain and unambiguous and there is no doubt that Parliament intended

all members of an LLP to be potentially subject to disqualification. LLPs come in all shapes and sizes, from large solicitors and accountancy firms to small businesses and there is no prescribed management structure, unlike for companies which are required to have directors.

6. By substituting "*member*" of an LLP for "*director*" in the CDDA, did Parliament really intend to include junior members/partners of a large LLP who have no involvement whatsoever in the management of the LLP within the purview of disqualification? And if it did not, where did it draw the line? Those are the essential questions to be determined on this application.

Relevant background facts

7. BP LLP was incorporated on 23 November 2012. On 1 January 2013, BP LLP acquired the businesses of Bell Pottinger Public Relations Limited, Bell Pottinger Public Affairs Limited, Pelham Bell Pottinger Limited and Bell Pottinger Sans Frontieres Limited.

8. On the same date, the Applicants together with Mr Henderson and others were registered as members of BP LLP. At that time there were 45 registered members of BP LLP. Throughout its existence there were some 87 different registered members of BP LLP.

9. Ms Geoghegan was first employed in the Bell Pottinger business in 2005 at the age of 21 as an Account Executive. She steadily rose through the ranks, becoming an Account Manager, Account Director, then an Associate Director and on 1 January 2012 promoted to the position of Director. However, as is common in this sort of business, 'Director' was purely a title and she was not a *de jure* director of any company within the Group. Mr Lambert was also never appointed a director of any Group company. When the business was transferred into BP LLP, Ms Geoghegan says that she and Mr Lambert had no real choice as to whether they became members of BP LLP or not.

10. 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. All subsequent members signed up to the Partnership Deed and it was amended on 28 April 2014 and on 17 March 2017. There is no requirement for an LLP to have such a Deed in place but where one does it forms a sort of constitution for the LLP.

11. Both parties referred to various provisions of the Partnership Deed. In particular the Applicants' case is dependent on the management structure within BP LLP as established by the Partnership Deed. The Company had a central role within BP LLP: it is called the "*Corporate Member*" in the Partnership Deed.

12. There were the following relevant provisions of the Partnership Deed:

> **"Board Member"** means a member of the Management Board who is appointed as such in accordance with this deed;

"Individual Members" means those Members other than the Corporate Member;

"Members" means the Initial Members and the Current Members and every other person who is admitted as a member after the date hereof, in each case until he becomes a Former Member…

…

5.5 Status

Each Individual Member acknowledges that he will be a member of the LLP and that nothing in this deed shall render him an employee of the LLP or any member of the Bell Pottinger Group and he shall not hold himself out as such…

6. MANAGEMENT OF THE LLP AND THE MANAGEMENT BOARD

6.1 Composition of Management Board

The LLP shall have a Management Board comprising such Individual Members or other Individuals (and such number of Board Members) as determined by the Corporate Member from time to time.

6.2 Appointment and removal of Board Members

(a) The Corporate Member may at any time remove any Board Member from the Management Board or appoint any Member as a Board Member and such removal or appointment shall be effective as the Corporate Member may determine.

(b) A Board Member shall cease to be a Board Member immediately on ceasing to be a Member. A Board Member may resign from office as a Board Member at any time by not less than three months' notice in writing to the Corporate Member, or such other period of notice as determined by the Corporate Member from time to time.

(c) The Corporate Member shall appoint a Board Member to be the chairman of the Management Board.

6.3 Responsibility for management of the Business

(a) Subject to any applicable legislation, and subject to any matter which the Management Board may delegate to Individual Board Members or Members, the Management Board shall be responsible for day-to-day management and control of the Business and the affairs of the LLP and shall have the power and authority to do all things necessary to carry out the purpose of the LLP.

(b) The Management Board shall carry on and manage its responsibilities with the assistance from time to time of the

Members and of agents or employees of the LLP as it shall deem necessary.

6.4 Management Board's duty to act in the interests of the LLP

The Management Board shall exercise any power or discretion given to it by this deed, and shall give or withhold any consent under this deed, in a manner in which it in good faith considers to be in the best interests of the LLP having regard to the present and future interests of the LLP and the Members as a whole and all other matters which seem to it to be relevant, but shall not be obliged to have regard to the particular interests of any one Member or Former Member or group of Members or Former Members.

6.5 Liability of the Management Board

The Board Members shall not be liable, responsible or accountable in damages or otherwise to the LLP or to any of the Members or Former Members (and where relevant their successors or assigns), except by reason of acts or omissions due to bad faith, negligence or wilful default, material breach of this deed, or for not having acted in good faith in the reasonable belief that the Management Board's or their actions were in, or not opposed to, the best interests of the LLP.

6.6 Binding authority

(a) All decisions made for and on behalf of the LLP by the Corporate Member or the Management Board in accordance with this deed shall be binding upon all the Members and the LLP.

(b) Subject to his fiduciary responsibilities to the LLP and to clauses 6.6(c) and (d) below, each Member shall have the right, power and authority, acting at all times for and on behalf of the LLP, to enter into and execute any agreement or other document (including a deed), and to undertake and do all acts, necessary or appropriate to carry out his duties in relation to the Business.

(c) Any agreement, Instrument or document (other than a deed) to be signed by the LLP and which is intended to bind the LLP may be signed by any Member of the LLP or such other person as the Corporate Member may authorise in writing from time to time, and a third party dealing with the LLP in good faith shall be entitled to rely on such execution as binding the LLP.

(d) Any deed to be executed by the LLP and which is intended to bind the LLP may be signed by:
   (i) any two Members of the LLP; or
   (ii) any two other persons as the Corporate Member may authorise in writing from time to time; or

(iii) any one Member (as authorised from time to time by the Corporate Member) in the presence of a witness, and a third party dealing with the LLP in good faith shall be entitled to rely on such execution as binding the LLP."

13. The duties and responsibilities of members of BP LLP were set out in clause 15 of the Partnership Deed. They included the usual mix of common law and fiduciary duties such as that members shall:

> "(i) act diligently in the conduct of the Business in accordance with all relevant professional rules, regulations and codes of conduct and comply with all practices, policies, standards and procedures of the LLP;
>
> (ii) conduct himself in a proper and responsible manner;
>
> (iii) use his best skills and endeavours to carry on and promote the Business for the benefit of the LLP;
>
> …
>
> (ix) act with the utmost good faith in all dealings with the other Members and the LLP".

14. It can be seen that this is 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. The SofS relied on clause 5.5 as showing that a Member can only act in their capacity as a member of BP LLP because they have no other capacity. The Applicants relied particularly on clause 6.3 as showing that the Management Board had complete control of the management of BP LLP's business (even though it also refers to responsibility for "*day to day management*" and the involvement of other Members where required). The SofS also pointed out that under clause 6.6(b) any member can enter into contracts on behalf of BP LLP. It is interesting to note that it is possible, under clause 6.1, for non-Members to be appointed to the Management Board by the Company.

15. From January 2013 onwards there were the following members of the Management Board of BP LLP: Mr David Beck who was the Chief Operating Officer; Lord Tim Bell, who was the Chairman; Mr Henderson, who was the Chief Executive Officer; and Mr Thomas Tollis, who was the Company Secretary. Lord Bell resigned on 25 August 2016. (He died on 25 August 2019.) On 6 April 2017, Mr Mark Smith was appointed to the Management Board as Executive Chairman and Managing Partner.

16. The directors of the Company were slightly different. Mr Beck, Lord Bell, Mr Henderson and Mr Smith were directors throughout the material time and Lord Bell resigned at the same time as a director of the Company. In addition, Mr Piers Pottinger was a director as was Mr Thomas Leigh. Mr Leigh was the Chief Financial Officer of the Group but for some reason he was not a member of the Management Board of BP LLP. He resigned as a director on 31 January 2017. Mr Tollis was not a director of the Company.

17. BP LLP's business was divided into nine practice divisions: Political; Financial & Corporate (**FC**); Consumer; Geopolitical; Digital; Crisis & Litigation; Corporate & Brand; Middle East; and Asia. The Applicants worked in the FC division which was the biggest and most successful division. According to Mr Henderson, if the FC division had been disaggregated from the rest of BP LLP it would itself have measured as one of the largest PR firms in the country. Each division was headed by a Divisional Chairman and a Divisional Managing Director. Those individuals, while responsible for the overall management of their division, were not members of the Management Board.

18. Throughout the material times, Mr John Sunnucks was the FC Divisional Chairman. Until 1 September 2016, Mr Gavin Davis was the FC Divisional Managing Director. He left BP LLP on 1 September 2016. Subsequently, Ms Geoghegan was promoted to FC Divisional Managing Director. It is the SofS's case that the promotion was effective from 1 September 2016. It is Ms Geoghegan's case that the promotion was effective from 1 January 2017. This was publicly announced on 19 December 2016. This was on any view a senior position within BP LLP.

19. At one rung below the Management Board, BP LLP had a Senior Leadership Team (**SLT**). The SLT comprised members of the Management Board and one representative from each of the practice divisions, either the Divisional Chairman or the Divisional Managing Director. The SLT was responsible for overseeing the day to day running of BP LLP including financial performance and fulfilling the strategic direction set by the Management Board. Even when she was FC Divisional Managing Director, Ms Geoghegan was not on the SLT. Mr Sunnucks represented the FC division on the SLT. In any event the Applicants say that membership of the SLT is insufficiently senior to make that person subject to the CDDA.

20. The allegations made against the Applicants concern one particular client, Oakbay Investments Pty Limited, and a marketing campaign conducted on its behalf in South Africa that was focused on so-called economic emancipation (the **Oakbay account**). The details of the Applicants' alleged misconduct in relation to their conduct of that campaign and in relation to the Oakbay account are set out in the SofS's evidence in support. Those details are not relevant to this application, save that it is accepted that the allegation concerns their conduct of this one account and not their conduct in relation to the management of BP LLP's business as a whole.

21. As a result of their involvement with the Oakbay account, on 6 July 2017 and 30 August 2017 respectively, the Applicants were removed as members of BP LLP.

22. Following the fallout from the Oakbay account campaign, BP LLP had its membership of the Public Relations and Communications Association terminated. On 12 September 2017, BP LLP went into administration. Nearly two years later, on 6 September 2019, BP LLP went into compulsory liquidation.

23. On 11 September 2020, the SofS issued the disqualification claim supported by the first affirmation of Mr Mark Bruce. The single allegation that is made against both Applicants is as follows:

> "From no later than 12 September 2016 to 5 April 2017, [the Applicants] caused [BP LLP] to conduct a campaign for a client in a manner which demonstrated a

lack of commercial probity and/or which contravened [their] duties under BP's Partnership Deed to conduct [themselves] in a proper and responsible way, not to prejudice the business and to act diligently in the conduct of the business in accordance with all professional rules, regulations, codes of conduct and practices, policies, standards and procedures of the LLP. The said campaign contributed in part to the failure of BP following the termination of BP's membership of the Public Relations and Communications Association for bringing the public relations and communications industry into disrepute."

As against Mr Henderson, the SofS alleges that he failed to make adequate enquiries to properly inform himself about the manner in which the campaign on the Oakbay account was being conducted and failed to exercise proper or adequate control or supervision in relation thereto.

24. The allegations themselves are strongly resisted by the Applicants and Mr Henderson, although they have not yet put in their substantive evidence by way of defence. That is because this application was issued on 19 October 2020. It had been foreshadowed in correspondence between the parties' solicitors prior to the issue of the Claim Form.

The CDDA

25. The disqualification claim in this case is brought by the SofS under s.6 CDDA which is the provision concerned with directors of insolvent companies. If the Court is satisfied under the section, it must impose a minimum 2 year period of disqualification. Section 6 provides relevantly as follows (underlining added):

> **"6. Duty of court to disqualify unfit directors of insolvent companies**
>
> (1) The court shall make a disqualification order against a person in any case where, on an application under this section, it is satisfied –
>
> (a) that he is or has been a director of a company which has at any time become insolvent (whether while he was a director or subsequently), and
>
> (b) that <u>his conduct as a director of that company</u> (either taken alone or taken together with his conduct as a director of one or more other companies or overseas companies) <u>makes him unfit to be concerned in the management of a company</u>.
>
> (1A) In this section references to a person's conduct as a director of any company or overseas company include, where that company or overseas company has become insolvent, references to <u>that person's conduct in relation to any matter connected with or arising out of the insolvency</u>.
>
> …
>
> (3C) In this section and section 7, "director" includes a shadow director.
>
> (4) Under this section the minimum period of disqualification is 2 years, and the maximum period is 15 years."

26. By s.7 CDDA the SofS has to consider that "*it is expedient in the public interest*" before making an application for disqualification. The SofS has 3 years in which to bring proceedings from the time the relevant company became insolvent (as defined in s.6(2)).

27. Somewhat oddly the old s.9 CDDA has become s.12C CDDA (by the amendments made by the Small Business, Enterprise and Employment Act 2015 - **SBEEA**) and this requires the court, in considering whether a person's conduct as a director makes them unfit to be concerned in the management of a company, to "*have regard in particular*" to the matters set out in Schedule 1 CDDA. That Schedule, which has also been changed by the SBEEA, provides for "*Matters to be taken into account*" including:

> "2. Where applicable, the extent to which the person was responsible for the causes of a company or overseas company becoming insolvent.
>
> …
>
> 4. The nature and extent of any loss or harm caused, or any potential loss or harm which could have been caused, by the person's conduct in relation to a company or overseas company.
>
> 5. Any misfeasance or breach of any fiduciary duty by the director in relation to a company or overseas company."

28. If the Court makes a disqualification order, its form is prescribed by s.1 CDDA and it is that:

> "(a) he shall 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 the court, and
>
> (b) he shall not act as an insolvency practitioner."

29. The Applicants focus on the references to "*management*", particularly in s.6(1)(b), and say that "*management*" has a settled meaning in relation to the CDDA and that the relevant "*conduct as a director*" is limited to conduct in the "*management*" of the company. I will return to this below.

The policy of the CDDA

30. The most recent consideration of the CDDA is in the judgment of Falk J in *Re Keeping Kids Company Limited* [2021] EWHC 175 (Ch) (***Kids Company***). In [144], Falk J set out the well-established principles from earlier authority as to the application by the Court of the test under s.6. As she herself said, this largely drew on Jonathan Parker J's judgment in *Re Barings plc (No. 5)* [1999] 1 BCLC 433 (***Re Barings***). As to the policy of the CDDA, Falk J said at [144(c)]:

> "(c) The primary purpose of the jurisdiction under s 6 is to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies have shown them to be a danger to others."

31. Parliament's intention in relation to s.6 CDDA is also to raise standards of those who trade with the benefit of limited liability. As Sir Donald Nicholls V-C (as he then was), sitting in the Court of Appeal with Farquharson and Steyn LJJ, said in *Re Swift 736 Ltd* [1993] BCC 312, at 315E-F:

> "those who make use of limited liability must do so with a proper sense of responsibility. The directors' disqualification procedure is an important sanction introduced by Parliament to raise standards in this regard."

32. In *Re Grayan Building Services Limited; Secretary of State for Trade and Industry v Gray* [1995] Ch 241, Hoffmann LJ set out the test to be applied under s.6 CDDA, which I will come back to. But the other members of the Court of Appeal made some more generalised comments about the purpose of the CDDA. Henry LJ said as follows:

> "The concept of limited liability and the sophistication of our corporate law offers great privileges and great opportunities for those who wish to trade under that regime. But the corporate environment carries with it the discipline that those who avail themselves of those privileges must accept the standards laid down and abide by the regulatory rules and disciplines in place to protect creditors and shareholders. And, while some significant corporate failures will occur despite the directors exercising best managerial practice, in many, too many, cases there have been serious breaches of those rules and disciplines, in situations where the observance of them would or at least might have prevented or reduced the scale of the failure and consequent loss to creditors and investors.
>
> …The parliamentary intention to improve managerial safeguards and standards for the long term good of employees, creditors and investors is clear…The statutory corporate climate is stricter than it has ever been, and those enforcing it should reflect the fact that Parliament has seen the need for higher standards."

Neill LJ added:

> "Those who trade under the regime of limited liability and who avail themselves of the privileges of that regime must accept the standards of probity and competence to which the law requires company directors to conform."

33. The emphasis in those passages is on those trading with the privilege of limited liability. In relation to companies, that clearly is a reference to the directors who are the ones doing the trading. Limited liability as a concept can, perhaps more appropriately, be applied to the shareholders of a company who will not have any further liability to the company or its creditors if they hold fully paid up shares. But so far as the CDDA regime is concerned, the focus is on the directors who also have the benefit of limited liability in the sense that they do not generally bear personal responsibility for the company's debts and liabilities. That benefit does require directors to behave appropriately and to a standard that has been set by Parliament and applied by the courts.

34. The partners in traditional partnerships have unlimited liability. The benefit of trading with limited liability is now available to partners through LLPs. That is why the CDDA has been extended to apply to LLPs. Parliament's intention must surely have been the same as in relation to companies: to protect the public from those that have shown themselves to be unfit and to raise standards in relation to those who trade with the benefit of limited liability.

The Regulations

35. Regulation 4(2) of the Regulations provides as follows:

> "(2) The provisions of the [CDDA] shall apply to limited liability partnerships, except where the context otherwise requires, with the following modifications—
> (a) references to a company shall include references to a limited liability partnership;
> (b) references to the Companies Acts shall include references to the principal Act and regulations made thereunder and references to the companies legislation shall include references to the principal Act, regulations made thereunder and to any enactment applied by regulations to limited liability partnerships;
> (d) references to the Insolvency Act 1986 shall include references to that Act as it applies to limited liability partnerships by virtue of Part IV of these Regulations;
> …
> (f) references to a shadow director shall include references to a shadow member;
> (g) references to a director of a company or to an officer of a company shall include references to a member of a limited liability partnership;
> (h) the modifications, if any, specified in the second column of Part II of Schedule 2 opposite the provision specified in the first column; and
> (i) such further modifications as the context requires for the purpose of giving effect to that legislation as applied by these Regulations."

36. So wherever the CDDA refers to a company, that includes an LLP; and wherever it refers to a director, that includes a member of an LLP. That means, for instance, that where a disqualification order is made in the terms set out in s.1 CDDA, the person is disqualified from being a member of an LLP or being directly or indirectly concerned in the management of an LLP. I was concerned that this broad effect of disqualification would be unclear from the face of the order itself but I was shown an explanatory leaflet prepared by the Insolvency Service that is given to every disqualified person and which makes clear all the positions and activities that the person is disqualified from (it includes being a school governor, a charitable trustee and involvement with many other organisations). A disqualified person is prohibited from being a member of an LLP whether or not they are involved in the management of the LLP.

37. In their attempt to align LLPs with companies, the Regulations also contain a definition of "*shadow member*" which by Reg 4(2)(f) is to be read into the CDDA

wherever a shadow director is referred to. That definition does not easily translate into the LLP structure but it is as follows:

> ""shadow member", in relation to limited liability partnerships, means a person in accordance with whose directions or instructions the members of the limited liability partnership are accustomed to act (but so that a person is not deemed a shadow member by reason only that the members of the limited liability partnership act on advice given by him in a professional capacity)."

Mr Hugh Sims QC, who appeared with Mr Simon Passfield for the Applicants, submitted that the reference to "*the members of the* [LLP]" must in reality be to the members of the management board or similar governing body of the LLP. He said that this is the only way that such a provision could be workable and it means that it would have the same effect as the definition of shadow director which refers to the "*directors of the company*" (see s.22(5) CDDA). However the definition does not say that. It only refers to the "*members*".

38. If s.6 CDDA is transposed in the way required by the Regulations so as to apply to LLPs it reads as follows (with the modifications underlined):

> "(1) The court shall make a disqualification order against a person in any case where, on an application under this section, it is satisfied –
>
> (a) that he is or has been a <u>member of a [LLP]</u> which has at any time become insolvent (whether while he was a <u>member</u> or subsequently), and
>
> (b) that <u>his conduct as a member of that [LLP]</u> (either taken alone or taken together with his conduct as a director of one or more other companies or overseas companies or <u>as a member of one or more other [LLPs] or overseas [LLPs]</u>) makes him unfit to be concerned in the management of a company <u>or a [LLP]</u>.
>
> (1A) In this section references to a person's conduct as a director of any company or overseas company or <u>as a member of a [LLP] or overseas [LLP]</u> include, where that company or overseas company or <u>that [LLP] or overseas [LLP]</u> has become insolvent, references to that person's conduct in relation to any matter connected with or arising out of the insolvency."

39. Mr Sims QC submitted that because Parliament only intended that those who are concerned in the management of the LLP should be subject to disqualification, in the same way that directors who are necessarily only concerned in the management of a company, "*conduct as a member of that* [LLP]" must be qualified to mean "*conduct as a member of and in the management of that* [LLP]". He submitted that that is the appropriate way to construe s.6 CDDA as amended by Reg 4(2) of the Regulations in the light of Parliament's purpose in the Regulations; alternatively he submitted that by the terms of Reg 4(2)(i), the court can modify s.6 CDDA "*as the context requires for the purpose of giving effect to that legislation as applied by these Regulations*".

Interpretation of s.6 CDDA

40. Mr Tiran Nersessian who appeared on behalf of the SofS submitted that the meaning and reach of s.6 CDDA as modified by Reg 4(2) in relation to LLPs is clear. There is no need to read into s.6 CDDA any words limiting the court's jurisdiction to those members of an LLP that were part of the central governing body or management board of the LLP. That is because Parliament could have inserted such a limitation expressly but chose not to do so. Mr Nersessian submitted that this was because Parliament intended the CDDA to apply to any member of an LLP and not to constrain the Court's jurisdiction.

41. Mr Nersessian said that the plain meaning of the words of s.6 CDDA is unambiguous. He referred me to two authorities that suggest that statutory interpretation starts and ends with the meaning of the words used and other aids to interpretation cannot override the natural and ordinary meaning.

42. In *R v Secretary of State for the Environment, Transport and the Regions ex parte Spath Holme* [2001] 2 AC 349 Lord Nicholls said as follows at 396F- 397B:

> "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning "cannot be what Parliament intended", they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613: "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.""

43. Lord Neuberger considered this issue in *Williams v Central Bank of Nigeria* [2014] UKSC 10 at [72]:

> "When interpreting a statute, the court's function is to determine the meaning of the words used in the statute. The fact that context and mischief are factors which must be taken into account does not mean that, when performing its interpretative role, the court can take a free-wheeling view of the intention of Parliament looking at all admissible material, and treating the wording of the statute as merely one item. Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament has used."

44. Mr Sims QC agreed that on a purely literal reading of the words used in s.6 CDDA as modified by Reg 4(2) it was unambiguously referring to all members of an LLP. But he urged me to adopt a purposive construction, saying that this was the modern

approach particularly where a literal interpretation results in a failure to give effect to the evident purpose of the legislation or to an unreasonable or absurd result. Mr Sims QC cited Lord Bingham's speech in *R (Quintavelle) v Secretary of State for Health* [2003] 2 AC 687 at [8]:

> [8] The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.

Mr Nersessian also referred me to [9] and the discussion about cats and dogs:

> "[9] There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now."

45. Mr Sims QC submitted that the rationale for extending the CDDA to LLPs is so that members of an LLP should be subject to the same prohibitions as directors of a company. In other words, it must be targeted at those members who are in the equivalent position of a director. The Explanatory Notes to the LLP Act state as follows:

> "The LLP's existence as a separate legal entity makes it more closely akin to a company than to a partnership (except insofar as the internal relations are governed by agreement between the members…). The underlying approach, therefore, was to draw on the principles enshrined in the legislative treatment of companies."

46. In relation to the Regulations, Mr Sims QC also showed me the comments from the Under-Secretary of State for Trade and Industry in the debate on 23 May 2000 in the House of Commons (as recorded in *Mithani: Disqualification* [2342]):

> "Although the new entity is called a limited liability partnership, in many ways it is neither fish nor fowl. In some respects, it is closer to a partnership, while in others it is closer to a company. That hybrid quality has been at the root of most

> debates on the measure, with some wanting the entity to be allied more closely to a partnership and others wanting it to be allied more closely to a company.
>
> We had to strike a balance…We will therefore apply to …[LLPs], by way of regulation, appropriately modified companies legislation – for example, the Companies Act 1985, the Insolvency Act 1986 and the Company Directors Disqualification Act 1986.
>
> The limited liability of the members is also clearly more closely akin to the position of a company than to that of a partnership. Limited liability is a privilege, and we need to ensure that it is not abused. The companies and insolvency legislation will help to do that."

47. Mr Christopher Harrison who appeared for Mr Henderson referred me to some further Parliamentary material in relation to the LLP Act. In the House of Commons Select Committee on Trade and Industry's Fourth Report dated 10 February 1999 at [73], the Committee said as follows, after referring to representations that had been made by several large accountancy firms which were obviously keen to take advantage of the limited liability advantages of an LLP (bold in original):

> "**We do not however favour the idea that members of an LLP should feel less fully responsible for the general affairs of the LLP than they would be as partners in a partnership.** In cases of doubt as to whether to lay duties on designated members or all members, including the liability to fine in case of failure or default, the balance should tilt towards regarding all members as the equivalent of directors, Should they find such duties unduly onerous, the option of incorporation and employment exists. **It cannot be right that LLP members should have all the benefits of unregulated internal management and none of the penalties thereof**."

The Government's Response to the Select Committee Report dated 14 June 1999 included the following (bold in original):

> "**(cc) LLP Management**
>
> **We do not favour the idea that members of an LLP should feel less fully responsible for the general affairs of the LLP than they would be as partners in a partnership. (paragraph 73)**
>
> 100. While the Committee recognised that there was a consensus amongst those giving evidence that more duties and obligations could be usefully delegated by an LLP's membership to designated members, in particular those functions statutorily or conventionally carried out by a company secretary, they thought that members should feel no less responsible for the general affairs of the LLP than they would as partners in a partnership. We share that view."

48. Mr Sims QC pointed out that the latter two documents were at a much earlier stage of the Bill's progress and that the comments made by the Under-Secretary of State on 23 May 2000 were therefore more relevant. However I do not see that there is any real difference between the positions adopted in both sets of documents. They emphasise that the privilege of trading with limited liability comes with responsibility. As the

policy of the CDDA is to target directors of companies who have benefited from trading with the benefit of limited liability (see [30] – [34] above), so the application of the CDDA to LLPs should similarly target those who are benefiting from trading with limited liability, namely the members, who would otherwise be partners with unlimited liability.

49. I therefore do not derive much assistance in terms of interpreting the CDDA from such materials, quite apart from whether they are admissible or not under *Pepper v Hart* [1993] AC 593 principles.

50. Furthermore, I do not think it is sensible to adopt either a literal or purposive approach to interpreting the legislation as though it were a binary choice. If there is no difficulty in understanding the meaning of the words used, there is no place for implying limitations to such words in order to change their meaning to fit with Parliament's supposed intention derived from other sources. That would be "*free-wheeling*", as Lord Neuberger put it. The intention of Parliament is primarily derived from the words used and in my view it is only if the plain and ordinary meaning of the words in a modern context lead to an absurd or wholly unreasonable result that recourse can be had to other material to discern Parliament's true intention. That is what I understand Lord Bingham to mean by the "*permissible bounds of interpretation*" (see [44] above).

51. I therefore turn to look at the actual words used.

Conduct as a director or as a member of an LLP

52. Mr Nersessian submitted that "*conduct as a director*" in s.6(1)(b) CDDA is merely referring to the capacity in which the person is acting. As Lewison J (as he then was) in *Secretary of State for Trade and Industry v Goldberg* [2004] 1 BCLC 597 said at [46]: "*The phrase 'as a director' means 'in his capacity as a director*'". By clause 5(5) of the Partnership Deed, a member will necessarily be acting as a member in conducting BP LLP's business as they cannot be an employee. Therefore, Mr Nersessian submitted that the allegations brought against the Applicants were in relation to their conduct as members of BP LLP. That is the only capacity in which they can act. Hence there is plainly jurisdiction to pursue this disqualification claim against the Applicants.

53. Mr Sims QC preferred to look beyond the words "*conduct as a director*" to the test for unfitness – "*unfit to be concerned in the management of a company*" – which brings in the concept of management. He submitted that the test of unfitness must inform the relevant conduct and as the test of unfitness is concerned with the "*management of a company*", so the allegations must relate to the director's management of the company.

54. Mr Sims QC then went on to explain that "*management*" in the context of the CDDA has a well-defined meaning derived from the case of *R v Campbell* [1984] BCLC 83, a case from the Court of Appeal, Criminal Division on an appeal from a conviction for contravening a disqualification order made under s.188 of the Companies Act 1948 (which was in similar terms to s.1 CDDA). The wording of s.1 CDDA is much

wider than s.6(1)(b) because it prohibits a person from being "*in any way, whether directly or indirectly…concerned or take part in …the management of a company*" whereas s.6(1)(b) is more narrowly focused on being "*concerned in the management of a company*". Nevertheless the Court of Appeal upheld the trial judge's direction to the jury that there was a "*difference between managing certain specific aspects of the company's activities, such as production, sales, trading and the like, and the central management of the affairs of the company*". There seems to have been an acceptance that "*management*" meant the "*central direction of the company's affairs*" but the Court of Appeal did also say that "*The distinction between 'central management' and 'day-to-day management' is meaningless*." (Mr Sims QC said that this had been followed by HHJ Stephen Davies sitting as a High Court Judge in the Manchester District Registry in *Corran v Butters* [2017] EWHC 2294 (Ch), although this was an unfair prejudice case.)

55. I have to say that I am not convinced that this really assists and whether, in any event, this is the appropriate definition of "*management*" in s.6(1)(b), which was not being considered in *R v Campbell*. Directors are, by definition, concerned in the management of their company. Even non-executive directors can be said to be concerned in the management of their companies, albeit that their roles are limited and they will not be involved day-to-day. So there does not have to be any qualification on what is relevant "*conduct as a director*" to that which is related to their "*management*" of the company.

56. But Mr Sims QC insisted that the allegations that can be made against a director must be limited to their conduct in the central management of the company's affairs. I do not agree and Mr Sims QC has found no authority that supports that proposition. That could either be because it is so obvious that any conduct as a director is potentially relevant to their fitness to be concerned in management or because no director has sought to challenge an allegation on the basis that it is outside the ambit of s.6(1)(b) CDDA.

57. It seems to me the proposition can be tested by reference to an allegation of dishonesty made against a director. If the allegation is that the director conducted a particular aspect of the company's business dishonestly, say a PR campaign on behalf of one client, Mr Sims QC argued that this could not be the subject matter of a disqualification allegation because it was not related to his conduct of the central management of the company's affairs. In my view that simply cannot be right because an allegation of dishonesty against a director in relation to any aspect of the company's business is likely to be relevant to whether they are unfit to be concerned in the management of a company.

58. What the dishonesty example indicates is that there may not be the connection between the two parts of s.6(1)(b) that Mr Sims QC seeks to make. The classic statement of the test for unfitness was in Hoffmann LJ's judgment in *Re Grayan Building Services Ltd* (supra):

> "The court is concerned solely with the conduct specified by the Secretary of State or official receiver under rule 3(3) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987. It must decide whether that conduct, viewed cumulatively and taking into account any

extenuating circumstances, has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies."

59. As explained by Jonathan Parker J (as he then was) in *Re Barings*, the director's conduct has to be evaluated in context, particularly as to their role in management. He said this at pp.484-485 (underlining added):

> "A8. It follows from para A6 (above) that the court will assess the competence or otherwise of the respondent in the context of and by reference to the role in the management of the company which was in fact assigned to him or which he in fact assumed, and by reference to his duties and responsibilities in that role. Thus the existence and extent of any particular duty will depend upon how the particular business is organised and upon what part in the management of that business the respondent could reasonably be expected to play (see *Bishopsgate Investment Management Ltd (in liq) v Maxwell* (No 2) [1993] BCLC 1282 at 1285 per Hoffmann LJ). For example, where the respondent was an executive director the court will assess his conduct by reference to his duties and responsibilities in that capacity.
>
> A9. Thus, while the requisite standard of competence does not vary according to the nature of the company's business or to the respondent's role in the management of that business – and in that sense it may be said that there is a 'universal' standard – that standard must be applied to the facts of each particular case. Hence to say that the Act envisages a 'universal' standard of competence applicable in all circumstances takes the matter little further since it says nothing about whether the requisite standard has been met in any particular case. What can be said is that the court, whilst taking full account of the demands made upon a respondent by his management role, will recognise incompetence in whatever circumstances and at whatever level of management it occurs, from the chairman of the board down to the most junior director. In that sense, there is an element of 'universality' in the court's approach…
>
> [He then quoted from Henry and Neill LJJ's judgments in *Re Grayan*.]
>
> A10. In my judgment it can be no defence to a charge of unfitness based on incompetence for a respondent to contend that even if he was grossly incompetent in discharging the management role in fact assigned to him, or which he in fact assumed, nevertheless he has not been shown to be unfit to be concerned in the management of any company, since it is possible to conceive of a management role (whether in the company or companies in question or in some other company altogether – real or imagined) which he could have performed competently – what I might call the 'lowest common denominator' approach. In the context of an issue as to unfitness it is neither here nor there whether a respondent could have performed some other management role competently. That is not the test of 'unfitness' for the purposes of s 6 (although of course it may be a relevant factor in the context of an application for leave under s 17 of the Act: as to which, see para A2 above). Under s 6 the court is concerned only with the conduct in respect of which complaint is made, set in the context of the respondent's actual management role in the company. If in his conduct in that role the respondent was guilty of incompetence to the requisite degree, then a finding of unfitness will be

made and (under s 6) a disqualification order must follow (see *Re Sevenoaks Stationers (Retail) Ltd* [1991] BCLC 325 at 337, [1991] Ch 164 at 184).

60. This was specifically approved by the Court of Appeal in that case, *Baker v Secretary of State for Trade and Industry* [2001] BCC 273 (CA), where Morritt LJ (as he then was) said:

> "It is not necessary for the Secretary of State to show that the person in question is unfit to be concerned in the management of any company in any role. This test, described by the judge as the lowest common denominator approach, is not what the Act enjoins. As the judge observed, the court is concerned only with the respondent's conduct in respect of which complaint is made set in the context of his actual management role in that company. If his conduct in that role shows incompetence to the requisite degree then a finding of unfitness and a consequential disqualification order should be made."

61. In the passages set out above, Jonathan Parker J and Morritt LJ refer to the director's management role in the company but they do not suggest or imply that the relevant conduct must be at the highest level of management, namely the management exercised by the board. On the contrary, there are indications that relevant conduct may be found "*at whatever level of management it occurs*". The discussion about whether there should be a "*lowest common denominator*" approach, assumes that there are many different relevant management roles within a company and that the focus is on the conduct of the director by reference to the particular management role that they had. I come back to the point that a company director necessarily has a management role, but the particular role and its responsibilities may vary greatly.

62. I also think that it is significant that s.6(1A) CDDA expands the relevant conduct of a director to include their "*conduct in relation to any matter connected with or arising out of the insolvency*". There is no reference to "*management*" in that subsection. Rather, it is there presumably because there may have otherwise been doubt as to whether a director's cooperation or non-cooperation with the office-holders after the company has gone into insolvent liquidation may be considered to be "*conduct as a director*". Even conduct in relation to the disqualification proceedings themselves is relevant conduct – see *Re Godwin Warren Control Systems plc* [1992] BCC 557. That indicates that "*conduct as a director*" is purely a reference to capacity, not the director's role in management.

63. Furthermore, none of the matters to be taken into account in assessing unfitness set out in Schedule 1 CDDA refer to "*management*". While this is a non-exhaustive list, it also indicates that relevant conduct is not limited to management at the highest level.

64. Mr Sims QC sought to strengthen his argument by reference to the inclusion of *de facto* directors within the CDDA. He submitted that the test for *de facto* directorship showed that the CDDA was only concerned with those operating at the highest echelons of the company. He was essentially arguing that in relation to LLPs, the member has to satisfy the test for *de facto* directorship, which means either being a member of the management board or assuming to act at that level.

65. In *Kids Company*, the case against Ms Camila Batmanghelidjh, was dependent on a finding that she was a *de facto* director of the charitable company. Even though she

was the Chief Executive Officer of the company, she was not an appointed director and she did not sit on the board or its committees, although she regularly attended their meetings. The board was comprised of non-executive directors who were the charity trustees. After an exhaustive review of the evidence, Falk J concluded that she was not a *de facto* director because she was not on an equal footing with the board and she was at all times subject to their supervision. In relation to the test for *de facto* directorship, Falk J analysed the authorities, in particular the Supreme Court decision in *Revenue and Customs Comrs v Holland, In re Paycheck Services 3 Ltd* [2010] 1 WLR 2793 and held as follows at [167(b)]:

> "(b) There is no single test, but an important starting point is the company's corporate governance structure. The court is seeking to identify functions that were the sole responsibility of a director or board of directors, that is, the highest level of management of the company. Those who assume and exercise powers and functions that can only properly be exercised or discharged at that highest level of management will, consistent with the purpose of the disqualification legislation, be within its scope as de facto directors. Those who are subordinate and accountable to that highest level of management will not be."

66. Falk J was therefore distinguishing between different levels of management. But she was doing so in order to identify whether the person concerned should be treated as a director, not whether their conduct renders them unfit to be concerned in the management of a company. Those are separate questions: one going to the jurisdiction to disqualify; the other going to whether the person should be disqualified. I therefore think that reliance on the *de facto* directorship test for this purpose was misplaced.

67. Mr Sims QC did manage to find a report on a case concerning the disqualification of a *de facto* and shadow member of an LLP. The case is called *Re Wolstenholmes LLP, Secretary of State for Business, Innovation and Skills v Saddique and Cardinali,* a decision of HHJ Bird sitting as Judge of the High Court in the Manchester District Registry on 10 June 2014 (the abbreviated report is in the *Mithani Disqualification Newsletter Archive/Bulletin58/Case Law Update*). The case concerned a solicitors' firm through which the Defendants had perpetrated a fraud. They were both disqualified for the maximum 15 year period. Neither Defendant was able to be a member of the LLP, but the judge found that they were in reality "*at the apex of the management structure*" of the LLP. According to the report, the judge found that they "*had acted as a de facto member and in other respects as a shadow member*."

68. This case shows only that, for public protection, the net of persons potentially subject to disqualification is drawn widely. I do not believe that the test for *de facto* directorship sheds any light on the relevant conduct as a director within s.6(1)(b) CDDA.

69. Mr Sims QC's central argument is that Parliament must have intended to draw a line somewhere between relevant conduct as a director and irrelevant conduct. He says that, in colloquial terms, the purpose of the CDDA is to "*take off the road*" those who have been shown to be "*bad drivers*". It is not intended to extend to those who were never "*behind the wheel*" in the first place. But that example assumes that which Mr Sims QC has to prove, namely that the relevant conduct is limited to the management of the company at board level.

70. Going back to the wording in s.6(1)(b) CDDA, it seems to me clear that there is no conflation between "*conduct as a director*" and being "*concerned in the management of a company*". The former defines the relevant capacity in which the director is alleged to have misconducted themselves; the latter is the test of unfitness that the Court has to apply in relation to such misconduct and whether it renders the director "*unfit to be concerned in the management of a company*". The conduct is confined to allegations in relation to the company, whereas the test is whether that conduct shows the person to be unfit to be concerned in the management of a company. The only line that Parliament has drawn in relation to this is the standard applied by the Court. There is no line drawn in relation to the conduct that can be relied on by the SofS, save that it has to be conduct in the capacity of a director.

Application to LLPs: conduct as a member

71. Given such a conclusion on the meaning of s.6(1)(b) CDDA in relation to directors, it cannot 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 LLP Act only defines a member and there is no requirement to have a management board or any particular structure in an LLP.

72. Mr Sims QC submitted that Parliament cannot have intended to broaden the ambit of the CDDA so as to include all conduct of a member irrespective of whether it relates to the management of the LLP at a level equivalent to a board of directors. He said that that context would be sufficient for further "*modifications*" within Reg 4(2)(i) of the Regulations to be applied to the CDDA so as to make it work how Parliament must have intended it to work. He referred to a decision of Marcus Smith J in *Scott-Hake v Frost* [2020] EWHC 3677 (Ch) in which it was necessary to read into the Insolvency Act 1986 certain amendments made by the Insolvent Partnerships Order 1994 that made it applicable to traditional partnerships. While these were similar "*read-across*" provisions to the Regulations, what Marcus Smith J had to work out was how terms such as "*contributory*" in the Insolvency Act 1986 should be construed in relation to an insolvent partnership. In this case, however, it is not a term applicable to companies that is difficult to apply to an LLP. It is the words "*conduct as a member*" that need to be construed and there is no place for further modifications so as to understand what is meant by those words.

73. As an interesting aside, I raised with Mr Sims QC the Insolvent Partnerships Order 1994 which, by Article 16, applies the CDDA to an insolvent partnership that has been wound up as an unregistered company under Part V of the Insolvency Act 1986. The modified s.6(1)(b) CDDA reads as follows: "*that his conduct as an officer of that partnership…makes him unfit to be concerned in the management of a company*." An "*officer*" in relation to an insolvent partnership is *"(a) a member; or (b) a person who has management or control of the partnership business*." So the width of s.6(1)(b) as applied to partnerships is at least the same as for LLPs, extending to all partners. And that is where the partners do not even have the privilege of limited liability.

74. Mr Sims QC said that their researches had shown that this provision has hardly been used. There is one unreported case where it has. This is perhaps explicable on the basis that partners have unlimited liability and therefore when their partnership is

wound up the partners are likely to be made bankrupt as well, and so disqualified. That may be so, but the significance of the CDDA potentially applying to partners is that it shows Parliament's intention to have the widest possible reach for the CDDA to raise standards in business generally and to protect the public.

75. Going back to LLPs, it seems to me that I have to construe the CDDA and the Regulations as a whole – see *Quintavelle* (supra). Section 1 CDDA as modified, prohibits a disqualified person from being a member of an LLP, among many other positions, including acting as an insolvency practitioner. That prohibition is not qualified in any way. Subject to obtaining the leave of the Court under s.17 CDDA, a disqualification order means the person cannot be even the most junior member of an LLP with absolutely no management role whatsoever. That is a fairly clear indication that Parliament intended to cast the net widely.

76. Similarly, in relation to s.6(1)(b) CDDA as modified, Parliament saw fit not to limit the members potentially subject to disqualification to those only at the highest level of the LLP. The safeguards for the junior member who is uninvolved in management, is that, under s.7(1) CDDA, the SofS has to conclude before bringing disqualification proceedings that it is expedient in the public interest to do so. Mr Sims QC said that this was no real protection as such a decision is only challengeable by judicial review. Nevertheless, the SofS is required to act responsibly and will only bring proceedings where it is in the public interest to do so.

77. I have to say that when I first looked at the Regulations and the CDDA, I had sympathy for the Applicants' suggested limitations to the category of member intended to be covered and to the relevant conduct. But looking at the words used, the structure of the CDDA and Parliament's clear intention to cover all those trading with the benefit of limited liability, I am in no doubt that there are no such limitations.

78. Take the example we discussed at the hearing of a large solicitors' LLP that has hundreds of members/partners and a management board at the top of the hierarchy. Only the most senior members were engaged in the central management and direction of the LLP's affairs. Can it possibly be right that a junior member who makes serious mistakes in their handling of one particular case for a client could be potentially subject to disqualification? Clearly anxious consideration would have to be given in such a case by the SofS whether it would be appropriate to do so. But if one adds to the example that the junior member acted dishonestly and misappropriated client monies and that this led partially to the insolvency of the LLP, there may be more justification in bringing disqualification proceedings. (I know that this would in all likelihood be looked at by the Solicitors Regulation Authority.)

79. In summary therefore, I hold as follows:

(1) All members of an LLP are potentially liable to face disqualification proceedings;

(2) There is no qualification to the jurisdiction over all members under s.6 CDDA that the member has to be on the management board or at a level equivalent to a director in a company;

(3) The conduct that can be relied on is anything that is done in the capacity of a member of the LLP;

(4) The test for unfitness is the same as in relation to companies, namely the (pejoratively) so called "*jury question*" – see Dillon LJ in *Re Sevenoaks Stationers Ltd* [1991] Ch 164, 176F – whether such conduct makes them unfit to be concerned in the management of a company or an LLP;

(5) There is no line drawn in the legislation, and there is no justification for implying such a line, as to the relevant conduct that can be relied upon by the SofS.

The facts of this case

80. Given my findings above on the law, it is not now relevant to look at the facts of this case in any detail and, at such a preliminary stage, it would be inappropriate to do so, particularly where the Applicants and Mr Henderson have not yet put in their substantive evidence in answer.

81. Because of the way Mr Sims QC put the Applicants' case, that disqualification proceedings could only be brought against members of BP LLP's Management Board and no other members, the disputed evidence, particularly from Mr Henderson, as to Ms Geoghegan's senior role in BP LLP was not relevant to the issues I had to decide. Mr Nersessian submitted that where there were such disputed issues of fact, the Court could not conduct a mini-trial and grant summary judgment. That is obviously correct and there is plenty of support for such a proposition in the authorities. But in the end, because of where Mr Sims QC chose to draw the line, it is not necessary to deal with that evidence. There is no dispute that the Applicants were not on the Management Board.

82. The Applicants' actual roles and responsibilities will have to be explored at the trial because that is crucial context for considering whether they have shown themselves to be unfit. Insofar as the Applicants are saying that the single allegation made against them in relation to their conduct of the Oakbay account is not conduct in the management of BP LLP and so could not succeed at trial even if proved, this is also unsustainable in the light of my finding that there is no line drawn in the legislation between relevant and irrelevant conduct. It will be for the trial judge to determine if the alleged misconduct is proved and whether such misconduct makes the Applicants unfit to be concerned in the management of a company or LLP.

Conclusion

83. For the reasons set out above, I dismiss the Applicants' applications for both strike out and summary judgment.

84. I am grateful to Counsel for their excellent submissions in what was an interesting debate. If the parties are unable to agree an order or for any other reason, I am happy to hold a consequentials hearing that can be arranged through the usual channels.