

Disqualification undertakings and second chances—the correct approach to sections 8A and 17 of the Company Directors Disqualification Act 1986 (*Ahmed v Secretary of State for Business, Enterprise and Industrial Strategy*)

This analysis was first published on Lexis®PSL on 17/03/2021 and can be found [here](#) (subscription required)

Restructuring & Insolvency analysis: The court held that a disqualified director's rehabilitation from drug and alcohol addiction did not amount to 'special circumstances' for the purposes of the court's discretion to discharge a disqualification undertaking under section 8A of the Company Directors Disqualification Act 1986 (CDDA 1986). The decision provides important guidance on the relationship between CDDA 1986, ss 8A and 17, the latter under which a disqualified director can obtain permission to act. Written by Benjamin Archer, barrister, and Carola Binney, pupil barrister, at 4 New Square.

Ahmed v Secretary of State for Business, Enterprise and Industrial Strategy [\[2021\] EWHC 523 \(Ch\)](#), [\[2021\] All ER \(D\) 106 \(Jan\)](#)

What are the practical implications of this case?

The case will be of relevance to practitioners considering how best to advise a client seeking to escape from the strictures of a disqualification undertaking.

Firstly, Mrs Justice Bacon provided welcome clarity on the interaction between [CDDA 1986, ss 8A](#) and [17](#), which represent the primary options for so doing. The court held that applications under [CDDA 1986, ss 8A](#) and [17](#) are made on different bases and have different legal results, and so require separate judicial consideration.

Further, guidance was provided on the precise circumstances in which relief under [CDDA 1986, s 8A](#) might appropriately be granted; the section was held to be a corrective provision, designed to enable the court to interfere with the original disqualification undertaking if appropriate due to new facts or circumstances. The case makes clear that that rehabilitation of any kind will not—absent particularly compelling circumstances—justify an order under [CDDA 1986, s 8A](#). The correct application for disqualified individuals in such a situation will almost always be one under [CDDA 1986, s 17](#) for permission to act.

Practitioners familiar with this area will know that the primary objective of the disqualification regime is always said to be to protect the public from errant directors. But the so-called 'ancillary' objectives, namely deterrence, the promulgation of higher standards of probity and competence in the management of companies, and the rehabilitation of disqualified individuals, are often overlooked particularly, it is submitted, in the context of [CDDA 1986, s 17](#) decisions.

At its core this judgment however makes clear that where the variation or discharge of an undertaking is sought under [CDDA 1986, s 8A](#), as distinct from a mere permission to act, wider policy objectives of the regime will very much be at the forefront of the court's mind. Success is by no means guaranteed, even where the primary need to protect the public has evaporated.

What was the background?

The appellant, Mr Ahmed, had given a disqualification undertaking to the Secretary of State that he would not act as a director of a company for five years. That had resulted from his failure to ensure that a company of which he was sole director accounted to HMRC for some £170,000 of VAT. A fairly typical 'Crown debt' disqualification.

With 17 months of his undertaking left to run, Mr Ahmed applied for an order that the disqualification undertaking should cease to have effect under [CDDA 1986, s 8A](#), or, alternatively, for permission to act as a director of another company with which he had become involved under [CDDA 1986, s 17](#).

[CDDA 1986, s 17](#) is well-trodden ground. It provides a procedure for the court to give a disqualified director permission to act in the formation, promotion or management of a company, generally on conditions. [CDDA 1986, s 8A](#) is by contrast not often invoked. It provides, as relevant:

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

- (a) reduce the period for which the undertaking is to be in force, or
- (b) provide for it to cease to be in force.'

Mr Ahmed's unchallenged evidence in the application was that he had been suffering from mental illness, cocaine, and alcohol addiction at the time the unfit conduct occurred, but that he had since recovered. Those matters were not known to the Secretary of State at the time the disqualification undertaking was offered.

Mr Ahmed's case was that the unfit conduct had been caused by his health and addiction issues, and that there was no public policy reason for the disqualification undertaking to continue now that those issues had been resolved.

At first instance, Deputy Insolvency and Companies Court Judge Barnett granted Mr Ahmed permission to act under [CDDA 1986, s 17](#), subject to conditions agreed by the Secretary of State. The judge however dismissed Mr Ahmed's [CDDA 1986, s 8A](#) application for the disqualification undertaking to cease to have effect altogether.

Mr Ahmed appealed the judge's decision on [CDDA 1986, s 8A](#), arguing that the judge had erred in law by:

- wrongly taking into account the availability of relief under [CDDA 1986, s 17](#) as a basis for denying the more wide-ranging relief under [CDDA 1986, s 8A](#), and
- failing to consider whether Mr Ahmed's recovery from addiction was capable of amounting to 'special circumstances' of the kind that might trigger the [CDDA 1986, s 8A](#) jurisdiction

What did the court decide?

Allowing the appeal in part, Bacon J held that the judge had failed to properly exercise the discretion under section 8A.

On exercising the discretion afresh, however, she nonetheless concluded that Mr Ahmed's rehabilitation did not amount to 'special circumstances'—the application under [CDDA 1986, s 8A](#) was again refused, albeit for different reasons.

The first judge's error

On the first issue of whether the judge had properly exercised his discretion under [CDDA 1986, s 8A](#), Bacon J held that the judge's decision seemed 'to betray a confusion about the interaction between ss. 17 and 8A'. She explained, at para [32], that:

'[...]ss 17 and 8A are procedures with quite different purposes and effects, and there is nothing in the Act which suggests that an undertaking should not, in principle, be varied or revoked save as set out in s. 17. Indeed, s. 17 does not permit the variation or revocation of an undertaking at all. Rather, it provides the leave of the court within the scope of, and as expressly recognised by, the undertaking.'

The first judge had correctly set out the test for the exercise of the [CDDA 1986, s 8A](#) discretion, but there was no evidence that he had applied it, and he had certainly not provided adequate reasons for refusing the application. It was not sufficient to decide that the application should be dealt with under [CDDA 1986, s 17](#) and proceed solely down that route; both applications needed to be considered separately.

It was therefore open to Bacon J on appeal to exercise the discretion afresh.

'Special circumstances'

The need to demonstrate 'special circumstances' to invoke [CDDA 1986, s 8A](#) stemmed from a decision of Hart J in *Re INS Realisations Ltd* [2006] EWHC 135 (Ch), which Bacon J referred to as the 'leading case on the application of s. 8' (at para [16]).

Hart J, at para [31], cited with approval a decision of Lord Justice Potter in *Di Placito v Slater and others* [2003] EWCA Civ 1863, which itself concerned the release of an undertaking given to the court by a party to proceedings. His Lordship held that:

'[...]the discretion is not simply a discretion at large, but is to be exercised only in a situation where circumstances have subsequently arisen which, by reason of their type or gravity, were not circumstances which were intended to be covered or ought to have been foreseen at the time the undertaking was given.' (at para [40])

While the Secretary of State did not go as far as to submit that rehabilitation would never be sufficiently 'special' for those purposes, Bacon J nevertheless held that:

'[...]Mr Shepherd is right to say that rehabilitation will not, absent particularly compelling circumstances, justify an order under s. 8A. As both counsel accepted, rehabilitation of an offending director is one of the underlying policy reasons for the regime that is set out in the Act.' (at para [39])

Bacon J went on to find that Mr Ahmed's recovery from addiction did not amount to 'special circumstances' of the kind envisaged:

'[...]As both counsel accepted, rehabilitation of an offending director is one of the underlying policy reasons for the regime that is set out in the Act. It follows that an essential element of the purpose of accepting an undertaking under the Act is to allow the offending director to change their ways. The fact that a director does, indeed, do so should not therefore, in itself, be a reason to reduce the length of the undertaking that is given. Put another way, although the successful rehabilitation of a director may well not be foreseen at the time that an undertaking is given, the possibility of rehabilitation is something that is foreseen and indeed a desired outcome of the undertakings procedure. Where that outcome arises, therefore, it cannot be described as giving rise in itself to special circumstances.' (at para [39])

Mr Ahmed's recovery was much to be commended, but that had been recognised by the grant of permission to act under [CDDA 1986, s 17](#). The facts before the court could not justify a [CDDA 1986, s 8A](#) order.

Case details

- Court: Business and Property Courts of England and Wales, Chancery Appeals (ChD)
- Judge: Bacon J
- Date of judgment: 14 January 2021

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