Oifig an Stiúrthóra um Fhorfheidhmiú Corparáideach

Office of the Director of Corporate Enforcement

Section 842(h), Companies Act, 2014

Policy on Period of Disqualification to be offered in Undertakings

Background

1. Section 842(h) of the Companies Act, 2014 ("the 2014 Act"), provides that a person who was a director of a company[1] that is struck off the register by the Registrar of Companies for failure to file its annual returns may be disqualified unless the person can prove that the company had no outstanding debts at the time of strike off or at any time prior to this Office taking proceedings.

2. The 2014 Act also introduced a capacity for the Director of Corporate Enforcement (the "Director"), at his discretion, to offer disqualification undertakings in any case where he has reasonable grounds for believing that an individual is liable to disqualification in one or more of the circumstances specified in section 842 of the 2014 Act.

3. The purpose of this paper is to outline the general policy of the Director in respect of:

    a. the circumstances in which an undertaking will be offered in cases to which section 842(h) applies; and
    b. the duration of the period of disqualification that should be offered in any such undertakings.

[1] The section applies to any person who was a director when the Registrar of Companies issued a statutory notice to the company in relation to the consequences of the company's failure to file Annual Returns and following which that company is struck off the register.

Circumstances in which undertakings will be offered

4. The relevant legislation provides that the power to offer disqualification undertakings is at the discretion of the Director. In this regard, the Director would generally intend to offer undertakings in most instances where he forms the opinion that disqualification under section 842(h) is warranted. However, it should be noted that the Director is specifically precluded from offering an undertaking in any case where he considers that the period of disqualification warranted is longer than 5 years.

5. In addition, the Director reserves the right not to offer an undertaking for any other reason. Examples of reasons where undertakings would be unlikely to be offered include:

    a. where the circumstances of the case are so novel or unusual that the Office is not satisfied that it would be in a position to determine an appropriate period of disqualification or, possibly, even if disqualification was warranted in the case. In such cases, it would generally be considered more appropriate to let the Courts determine the matter;

    b. the Office considering that there is a public interest dimension which would suggest that it would be appropriate that the matter be determined by the Courts;

    c. the Office is unable to establish the whereabouts of individuals and, in consequence, is unable to effect delivery of an undertaking offer.

    These examples are provided for illustrative purposes only. It should be stressed that this is, and should not be considered to be, an exhaustive list of the circumstances in which an undertaking would be unlikely to be offered.

Jurisprudence in relation to the disqualification periods in Section 842(h) cases

6. Section 842(h) came into force on 1 June, 2015 and there have been no Court proceedings to date on foot of this provision. However, the provision is virtually identical to its predecessor, i.e., Section 160(2)(h) of the Companies Act, 1990. The latter provision has been the subject of many Court applications by this Office. As part of such applications, the Office would generally provide whatever evidence is available to substantiate the fact that the company had material outstanding liabilities. This might, for example, include details of judgements and/or Revenue liabilities.

7. However, apart from such details, this Office and the Court would generally only have had very limited information available in relation to the circumstances of the company and/or its directors. The Court of Appeal in the Walfab case[2] accepted that there was no requirement on the Director to present evidence of such wider issues and held that they were, in any event, largely irrelevant to applications under this subsection.

8. Having regard to the extensive jurisprudence available, it is possible to discern a reasonably consistent approach from the Courts to the types of cases arising, with clear differentiation arising depending on the facts and circumstances of the individual cases to the extent that such information is available to the Court. Thus, the Courts have imposed periods of disqualification ranging from 1 – 12 years, while they have, on occasion, also exercised the discretion conferred upon them by the legislation to make restriction orders[3] against the directors in lieu of imposing a disqualification.

9. The key precedent in relation to this type of case is the Clawhammer judgement[4]. In that judgement, the Court had before it very little information on the circumstances of the companies themselves, apart from the fact that the companies in question

[2] *Director of Corporate Enforcement v Walsh & ors [2016] IECA 2*
[3] *A restriction order has a fixed period of 5 years.*
[4] *Re Clawhammer Ltd [2005] IEHC85.*

had been struck off and that there appeared to be debts outstanding (the judgment covered 3 separate cases). J. Finlay Geoghegan determined that the "standard" period of disqualification in such cases should be 5 years before consideration of any mitigating or aggravating factors.

10. Given the limited information generally available to the Court in such cases, there would rarely be evidence of either mitigating or aggravating factors. Accordingly, disqualification periods of 5 years were regularly imposed, though a lower tariff of 4 years was often applied in cases where the directors had taken the earliest opportunity to appear in Court to acknowledge their failure to ensure that the company was wound up properly and had not opposed the applications. The principles outlined in the Clawhammer case have been endorsed in several subsequent Court judgements.

Determination of appropriate period of disqualification in undertakings

11. As outlined above the "standard" period of disqualification typically imposed by the Courts is 5 years, or 4 years where the respondents appear in Court; do not defend the application and where there is no evidence available of any other material mitigating or aggravating factors. The ODCE considers that this body of jurisprudence provides very helpful guidance for determining the appropriate term that might be offered by the ODCE in comparable cases.

12. Given that an individual accepting an undertaking could reasonably be considered to be similar to an individual who does not oppose a Court application, it would appear that the appropriate "starting point" in a standard case should be 4 years since this would, based on the aforementioned jurisprudence, appear to be the most likely term imposed by the Courts in such a case. Accepting an undertaking does offer significant advantages to individuals facing disqualification in terms of avoiding the stress and costs of facing Court proceedings. However, determining cases on the basis of an undertaking is also a very attractive option for the State because it obviates the need for costly Court proceedings, thereby providing time savings and

other efficiencies to the Courts and this Office because it avoids the necessity to prepare and present a disqualification application before the Courts. In these circumstances, the Office considers that it reasonable and appropriate – and in keeping with the spirit of the legislation - that it should seek to incentivise individuals to accept an undertaking.

13. Having regard to the foregoing considerations, the Office considers that in order to provide an incentive to individuals to accept undertakings, it should offer a discount from the standard "starting point" of 4 years. Accordingly, the ODCE has determined that ***it will generally offer a term of disqualification of 3 years in typical Section 842(h) cases.***

14. However, in cases where there is evidence of aggravating factors available to the Office (for example, where there is evidence of multiple struck-off companies, indications of deliberate efforts to evade liabilities, etc.), the Office may, and fully reserves the right to, determine that an undertaking with a longer period of disqualification should be offered. This could be up to the maximum permitted under the legislation, i.e. 5 years. As indicated in paragraph 4 above, an undertaking will not, and cannot, be offered if the Office considers that a period of disqualification of greater than 5 years is warranted. In any such case, the matter will be put before the Courts for a determination. In considering whether a longer period of disqualification is appropriate, the Office will have regard to previous Court determinations in comparable cases where longer periods of disqualification have been imposed.

15. Conversely, if there is evidence of material mitigating factors available to the Office, those will be considered and a shorter period of disqualification may be offered.

16. The period of disqualification offered on foot of an undertaking is not negotiable and the Office will not enter into discussions on the period of disqualification. There is absolutely no obligation on any individual to accept the terms of any undertaking offered to them and if they consider that the period of disqualification is excessive or

otherwise unfair, they should not accept the undertaking, whereupon it will then be a matter for the Court to determine the matter.

17. The Office would also note that, while the Court has jurisdiction to make a declaration of restriction as an alternative to disqualification, this is not an option that is available to the ODCE.

Disqualification undertakings in other cases under Section 842

18. Apart from subsection (h), section 842 contains a number of other grounds on which individuals can be disqualified by the Courts. These include being guilty of a fraud, guilty of breach of duty, conduct that makes him/her unfit, persistent default in relation to relevant requirements, failure to maintain proper accounting records or disqualification abroad. Policy in relation to undertakings that might be offered in respect of any disqualification cases arising on foot of these other grounds will be issued separately in due course.

Review

19. This policy will be reviewed from time to time having regard to relevant considerations, including, but not limited to, any developments in relevant jurisprudence.

Office of the Director of Corporate Enforcement

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