The company directors disqualification act law company business partnership essay...

Law

Lord Woolf MR in Re Blackspur Group Plc & Others[6], stated that " the main purpose of the Act of 1986 is the protection of the public, by means of prohibitory remedial action, by anticipated deterrent effect on further misconduct and by encouragement of higher standards of honesty and diligence in corporate management, from those who are unfit to be concerned in the management of a company." These words of Lord Woolf have been accepted in many cases. Public protection means protection of creditors, lenders, employees, customers[7]etc whose payments are still outstanding. Primary aim of the disqualification order is to protect the public rather than punishing the individual[8]and this is portrayed through the following cases. In Re Lo-Line Electric Motors and Others[9], Sir Nicolas Browne-Wilkinson VC firmly stated that the primary purpose of the disqualification order is to protect the creditors from directors of insolvent companies.[10]The same has been pointed out in Re Grayan Building Services Ltd[11], where Lord Justice Hoffmann said that protection of public is important but it is not relevant for the director to pose a risk to the public at the time of the hearing. He also said that the purpose of disqualification is important so as to punish everyone whose conduct has fallen below the appropriate standard in the interests of the public.[12]It is clear from the above cases that public protection is given prior importance in order to protect the creditors and other lenders from evil minded directors. However, In Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths and others[13], Lord Woolf MR agreed that public protection is the primary purpose for disqualification but other factors such as deterrence may also play importance in disqualifying a director.[14]By

now it is apparent that public protection is taken very seriously in disqualification cases but, as Lord Woolf said above that there are other factors for disqualification. This essay consists about disqualification of directors for unfitness. Disqualification for unfitness is found under section 6, 8 and section 9 along with schedule 1 of the CDDA. Section 6 explains that a director will be disqualified if he is or has been the director of any company which has become insolvent and if he is considered to be unfit for the management of a company.[15]What constitutes being unfit for the administration and management of the company is stated in Schedule 1 of the statue.[16]According to section 6, a director can be unfit regarded the company has become insolvent but under section 8 and section 9 along with Schedule 1 (Part 1) the conduct of a director can be termed unfit regardless of the company going into insolvency. Section 6(4) states that the minimum period for disqualification is 2 years and maximum period for disqualification is 15 years.[17]How many years a director is disqualified for depends upon the seriousness of the director’s conduct.[18]This section also applies to shadow directors.[19]Section 251 of the Companies Act[20]describes a shadow director " as a person in accordance with whose directions or instructions the directors of the company are accustomed to".[21]A shadow director is a person who is not an appointed board of director but performs functions as one. Generally, there are two ways by which a director can be disqualified for unfitness. They are disqualification order (court proceedings) and undertakings (decisions taken by the Secretary of State). S1 of CDDA describes disqualification order is an order made against a director who shall no longer be a director of a company and who will not be allowed to take

part in the promotion, formation or management of a company unless he has a leave of the court.[22]S1A of CDDA describes that undertakings can only take place on the grounds of unfitness on insolvency (s7) and once the company has been investigated (s8).[23]Disqualification undertaking has an identical effect to a disqualification order[24]with the only difference being undertaking is achieved administratively by the Secretary of State without the involvement of the court.[25]Disqualification cases are mainly undertaken to protect the public so, no matter how the disqualification is undertaken, public protection is given the most importance. As explained above, public protection need not be the sole reason for disqualification. In Re Barings No 3[26], Mr Norris, the defendant, was not disqualified in order to protect the public from dishonesty or fraudulence[27]or even misuse of limited liability. The question in this case was not whether his actions posed a risk to the public, he was termed to be unfit as the director of Barings Plc because he was incompetent in carrying out a task which he was expected to do. It is clear from this case that imputation of dishonest and fraudulent conduct[28]is not really required for a director to be found unfit. Directors can be found unfit to carry on the management of a company on various other grounds as well. In Re Sevenoaks[29], Lord Justice Dillon said that non-payment of debts to the Crown or creditors is not enough to charge a director from being unfit but, making deliberate decisions only to pay those creditors who pressed for payment is sufficient to prove that the conduct of the director is unfit to carry on the management of a company.[30]Just like in Re Barings No 3[31], Lord Justice Dillon in this case stated that dishonesty is not required for the director to get into trouble but, incompetence and

negligence (failure to keep proper accounting) of a very high standard is what is required to render the director unfit.[32]A director cannot be necessarily found unfit even if he is guilty of misfeasance or breach of duty.[33]It is against the moral and legal duties of the director to use the company assets for personal advantage. In Secretary of State for Trade and Industry v Richardson[34], Ferris J stated that if a director intended to make a payment in a way which would produce a personal gain for him regardless of paying the creditors' the outstanding amount, he would be found unfit for management of a company.[35]A director will be found unfit if he intentionally uses the company's money. In Re A&C Group Services Ltd[36], the respondent Mr Thoroughgood used the company's assets to pay for airfares and luxurious trip to America. He also bought 3 cars for and refurnished the office without consulting his co-directors. The judge in this case held that such misuse of power by the director leads to disqualification. Directors can also be found unfit even if it is not their duty to perform the particular task.[37]" Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them."[38]Directors are jointly responsible for activities of other directors. In Re Landhurst[39], Hart J said that, " even where there are no reasons to think the reliance (in this case on co-director) is misplaced, a director may still be in breach of duty if he leaves to others matters for which the board as a whole must take responsibility."[40]The same proposition was put forth by Jonathan Parker J in Re Barings No 5[41], which was decided around a month after Re Landhurst[42], that " Directors had, both collectively and individually, a continuing duty to acquire and maintain a

sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors."[43]This proposition states that at some point in the business all the directors owe a duty to collectively participate in the company’s business affairs. It is clear that precedence plays a vital role in any decisions of the courts and as the heading states ‘ Board of Director’, it means that the board should work together and no one director can be entirely blamed even if the functions are delegated to a particular director. Finding whether the director of a company is unfit to carry out the functions expected of him is not very easy for the courts. Firstly, the courts have to be satisfied and convinced that the actions done by the director or even shadow director are unfit and that the misuse of the power requires the director to be disqualified. The judges in all the cases mentioned above have had almost similar views on when a director could be found unfit to carry on the business activities. Schedule 1 of the 1986 Act[44]just gives an idea on when a director’s conduct can be found unfit. " To reach a finding of unfitness the court must be satisfied that the director has been guilty of a serious failure or serious failures, whether deliberately or through incompetence, to perform those duties of directors which are attendant on the privilege of trading through companies with limited liability."[45]What Justice Gibson is saying is that the director can be found unfit for the management of a company even if his conduct do not fall within the specific section of the Schedule. The court just needs to be satisfied that his actions are unfit for him to be a director of a company. ConclusionRichard Williams in his journal article stated that there is very little evidence to prove that the disqualification regime brought any substantive measure of

protection to the public from the undesirable entrepreneurial activities. [46]The NAO (National Audit Office) reports convey that disqualification of unfit directors provided direct benefits to creditors but, statistics suggest that most of the disqualification do not really direct protective benefit.[47]By referring to the NAO reports Richard William put down in his journal that it was found that disqualification regime was unsuccessful in deterring unfitness of the directors and also ineffective in protecting the public.[48]The main purpose of the act is to provide protective benefits to the creditor and if the purpose is only not being fulfilled by disqualifying unfit directors then the act would not make sense and would not be successfully continuing for 27 years and on. As we have learnt from the above mentioned cases that disqualifying unfit directors is very important as it gives a sense of protection to the creditor, lender, employees from the undesirable conduct of directors. Although the NAO reports criticise unfitness and also the delays by the courts or the Secretary of state in giving decisions, it is still unclear whether unfitness under this particular act[49]is really inefficient or unproductive towards director misconduct and mismanagement. However, even with the difference in opinion, it is clear from the cases that the courts give a lot of thought while deciding disqualification cases in whether the conduct of the director poses a threat to the public. There is a lot of thinking required for the courts to be satisfied that the director is unfit to manage the company. If unfitness were to be weak then CDDA would not be the central legislation in disqualification of directors. There will never come a time when the entire society would think the same way. Maybe there are criticisms regarding

disqualifications and unfitness but, I personally feel that from the cases discussed in this essay that judges see to it that whoever unfit is disqualified.