Neutral Citation Number: [2014] EWHC 2933 (Ch)

Case No: 2BM30562

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 05/09/2014

Before :

HHJ DAVID COOKE

- -

Between :

The Secretary of State for Business, Innovation and Skills	**Claimant**
- and -	
Brandon Weston (1) and David Christopher Williams (2)	**Defendants**

- -
- -

James Morgan (instructed by **Bond Dickinson LLP**) for the **Claimant**
The First Defendant appeared in person
Ali Tabari (directly instructed) for the **Second Defendant**

Hearing dates: 22 July 2014

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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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HHJ DAVID COOKE

HHJ David Cooke:

1. The Secretary of State brings this claim seeking disqualification orders against the defendants under s 2 Company Directors Disqualification Act 1986, following their convictions on counts of fraud and making false instruments in relation to the affairs of two limited companies. It raises issues of principle as to whether the High Court can, or should, make such orders in circumstances where the Crown Court before which the defendants were convicted has considered the matter and declined to make such orders.

Factual background

2. The two companies were Premier Places (Letting) Ltd ("PPL") and Premier Places (Redditch Lettings) Ltd ("PPR") which both traded mainly as letting agents for residential properties, PPL from an office in Worcester and PPR from an office in Redditch. Mr Weston was the controlling director of both companies. Mr Williams is a director of Tax Haven (UK) Ltd, which provided accountancy services to both companies under the trading name 'Williams Maclaren'.

3. From April 2007 it became necessary for deposits paid by residential tenants to be held and administered in accordance with an approved scheme under Chapter 4 of the Housing Act 2004. One such scheme is The Dispute Service ("TDS") and Mr Weston made applications on behalf of both companies to be registered with TDS. Those applications in turn required that the companies must (a) be regulated by an approved body and (b) hold tenants' deposits in a ring fenced client account. Mr Weston accordingly made applications for both companies to register with The National Approved Lettings Scheme ("NALS"), a voluntary accreditation scheme which would be an approved regulator. The applications to NALS required that an accountant's report, signed by a Chartered or Certified Accountant, be submitted confirming that the company applying complied with the NALS Accounting Standards, including the requirements of those standards for deposits to be held in ring fenced client accounts. Members of NALS were thereafter required to submit similar accountant's reports annually confirming continuing compliance with those standards.

4. The companies did open suitable client accounts and arranged with their bank for those accounts to be excluded from set off in respect of the companies own liabilities. What they did not do however was pay all the deposits they held at the time, or received afterwards, into those accounts. Instead they were mostly paid into the ordinary bank accounts of the companies and in effect used as working capital, as they had been before the statutory requirements had come into force. The tenants (and landlords) did not therefore receive the protection the Housing Act was intended to provide and their funds were at risk if the companies were to become insolvent.

5. This also necessarily meant that the statements made by Mr. Weston in the applications to TDS and NALS as to the way deposits were held were false.

6. Mr Weston accepts that this was a deliberate action on his part which he knew was in breach of the legislative requirements, and that it was dishonest. He further accepted before the Crown Court that among the payments effectively funded by use of the deposits were wages of the staff and himself, payments to his pension fund and amounts drawn by him by way of director's loan (of which some £292,000 was outstanding due by him to PPL when it went into liquidation). When the police investigated the matter in February 2009 after complaint by a tenant, they found that

of a total of £521,550 received by way of tenants' deposits (it is not clear from the documents how much related to each company) only £74,351 was held in the appropriate client accounts.

7. Mr Williams procured the issue of the accountant's reports required for the two companies to be registered with NALS. He is not himself a Chartered or Certified Accountant, and so falsified the signature of a suitably qualified member of his staff, Mr Wake, on those documents. Mr Wake had nothing to do with their preparation. Mr Williams accepted before me that he knew that the content of the reports was also false in that it wrongly stated that the companies complied with the accounting standards for holding client money and that the reports were necessary and intended to enable the companies to continue to operate despite the fact they were not complying with the requirements to hold deposits separately.

8. PPL went into creditors' voluntary liquidation on 23 April 2009. It appears that the business of the Worcester office was then sold, or had been sold, to a company controlled by Mr Williams, and that the outstanding deposits due to tenants from that business were paid by the purchaser. According to Mr Weston, he had also negotiated the sale of the Redditch business to a Mr Edwards on terms that would have seen the deposits received from customers of that office also repaid, but this fell through because of the police investigation. PPR did not go through any formal insolvency procedure but was struck off the register in January 2010. It appears also that there was in due course a shortfall found due to depositors of at least £63,000, which was paid by insurers so that the loss fell on them and not the tenants.

The Crown Court proceedings

9. Mr Weston and Mr Williams were arrested in March and April 2009 in connection with the charges on which they were subsequently convicted. Before those charges came on for trial, in 2010 Mr Weston was interviewed by an Investigator for the Insolvency Service, Michelle Thomson, with a view to disqualification proceedings under s6 Company Directors Disqualification Act 1986. On 9 August 2010 she wrote to Mr Weston saying that no such proceedings would be brought, her letter saying as follows:

> "I refer to our previous correspondence in this matter and I would advise that as a result of the current investigation undertaken the Secretary of State does not propose to take disqualification proceedings against you pursuant to section 6 of the Company Directors Disqualification Act 1986.
>
> [*She then set out the relevant wording of that section*]
>
> Accordingly if, in the future, the Secretary of State should learn of any unfit conduct relating to this company it could be included in any disqualification proceedings brought in respect of this or any future company failure.
>
> In the light of the criminal proceedings currently being taken against you, I refer to section 2 of the Company Directors Disqualification Act 1986. This section makes provision for the court to make a disqualification order against a person convicted of an indictable offence. The section allows for a

> disqualification order of up to 15 years and is a matter for the court to decide. The decision not to take action against you under section 6 does not have any bearing on the decision of the court.
>
> I thank you for the assistance provided by you during the course of my investigation. ”

10. This is now portrayed as indicating no more than that the Insolvency Service had decided that the matter could be adequately dealt with under section 2 without the need to start separate proceedings under section 6. But I am bound to say that the reference to the possibility of the Secretary of State learning of unfit conduct "in the future" rather indicates that what was known at that point was not regarded as showing unfitness for the purpose of section 6, although that conclusion would not tie the hands of the criminal court under s2. That is the way Mr Weston says that he took it. On any basis, given the facts as I have outlined them and the perceived limitations on the effective operation of disqualification proceedings under section 2 (to which I refer below) this seems to me to have been an extraordinary letter to have written. The two year limit for commencing proceedings under s6 has now long expired.

11. On 25 October, 2010 Mr Weston pleaded guilty and was convicted on four counts of dishonestly making false representations with a view to gain for himself or causing loss or exposure to risk to another person, contrary to section 1 of the Fraud Act 2006. These charges related to the false representations in the applications made by the two companies to TDS and NALS respectively. He was subsequently given a twelve month suspended sentence of imprisonment, and ordered to carry out 250 hours of community service. Six other charges against him relating to the provision of the accountant's reports were not proceeded with, apparently on the basis of his denial of knowledge that Mr Williams had forged the signatures on them.

12. On 29 June, 2011 Mr Williams pleaded guilty to three counts of forgery, two in relation to the forged signatures of Mr Wake on the reports given in connection with the applications of the two companies to register with NALS and one in relation to a similar forgery on a subsequent annual report confirming continued compliance. There were a number of counts relating to other such subsequent reports that were not proceeded with, for reasons that are not clear. Mr Williams was sentenced to 8 months imprisonment, also suspended, and 150 hours community service.

13. Two charges against both men for conspiracy to defraud by (inter alia) dishonestly representing that the two companies held client monies in separate accounts were also not proceeded with. Again, it is not clear why from the documents before me.

14. Both men were sentenced by HHJ Rundell on 23 September 2011, but on that occasion the judge was not asked to consider the imposition of a disqualification order. This was later accepted to have been as a result of that issue having slipped the mind of prosecuting counsel, although some consideration must have been given to it beforehand because it appears the judge had been provided with relevant authorities and statutory material. When the omission was realised, as I understand it because of the intervention of the investigating police officer, a further hearing was arranged before the judge on 17 November 2011 when he was asked to reconsider his order under the slip rule. I have been provided with a transcript of that hearing. The judge delivered a brief ruling in which he noted the submissions made for the defendants, noted that the order sought was in the discretion of the court and concluded:

> " In all the circumstances, bearing in mind that it is conceded by the prosecution that if I was to impose any disqualification it should be at the lower end of the scale, it seems to me that this is not a case where I should disqualify either of these defendants. Indeed it seems to me it smacks of perhaps kicking a dog whilst he is down. Both of these men have suffered, and suffered significantly, for their dishonesty. And the sooner they rehabilitate themselves, in the eyes of the public, the better it is not only for them and their families, but also (in my principal consideration) for the general public as a whole. "

Issues before this court

15. Notwithstanding that decision, Mr Morgan submits on behalf of the Secretary of State that the High Court can and should proceed to make a disqualification order itself pursuant to section 2 of the 1986 Act. Mr Weston appears before me in person, but relies on the submissions made in the skeleton argument prepared by Mr Daniel White of counsel, who was briefed to appear on his behalf on a previous occasion. The principal point made in those submissions is that in the light of the earlier decision of the Crown Court, the present proceedings are an abuse of process. Mr White submitted that the present application is on all fours with that in the Crown Court where the judge heard argument and had seen and read all the evidence in the criminal trial and decided not to make an order. In contrast to some of the cases referred to, the present court is being asked to exercise exactly the same jurisdiction as the criminal court but to decide the matter the other way. Although the Crown was represented by the prosecution in the criminal case and by the Secretary of State through the Insolvency Service now, the Insolvency Service was in discussion with the prosecutor before the matter went back to Judge Rundell, so that it had the opportunity to have any arguments it wished to raise put before the judge. Right thinking people would regard it as unfair that Mr. Weston should face the same application again, brought by another representative of the state, especially as he has now, it is said, been stripped of his assets and made bankrupt as a result of the failure of his business.

16. A secondary submission was made to the effect that on the evidence Mr Weston poses no risk to the public in acting as a director and accordingly the court should exercise its discretion against making an order. Mr Tabari on behalf of Mr Williams adopted a neutral stance in relation to the abuse of process argument, though understandably saying that if the court were to find the proceedings to be an abuse of process in respect of Mr Weston the same would apply to Mr Williams. Subject to that, he did not submit that the court should exercise its discretion so as to make no order at all, but said that in the circumstances the appropriate order would be for a minimal period of disqualification of no more than two years.

17. Neither counsel submitted that once the Crown Court had exercised its discretion against the making of a disqualification order, the High Court did not have jurisdiction to consider the matter again, although Mr Morgan recognised that this is a question which arises and which is logically separate from the question whether it would be an abuse of process to exercise that jurisdiction, assuming it exists.

The law

18. The relevant provisions of s2 of the 1986 Act are as follows:

> "2 **Disqualification on conviction of indictable offence**
>
> (1) The court may make a disqualification order against a person where he is convicted of an indictable offence … in connection with the promotion, formation, management, liquidation or striking off of a company...
>
> (2) "The court" for this purpose means—
>
> (a) any court having jurisdiction to wind up the company in relation to which the offence was committed, or
>
> (b) the court by or before which the person is convicted of the offence, or …
>
> (3) The maximum period of disqualification under this section is—
>
> (a) …
>
> (b) ..; 15 years."

19. S6 provides as follows:

> "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 … and
>
> (b) that his conduct as a director of that company… makes him unfit to be concerned in the management of a company."

For the purposes of this section "the court" means either the court by which the company is being wound up or the court which would have jurisdiction to wind it up. Schedule 1 sets out a non- exclusive list of matters to be taken into account in deciding whether a director is "unfit".

20. Among the distinctions between the two sections are that under s2 the power to disqualify arises only upon conviction (raising the question how far and for what purpose the court may consider matters other than those necessarily proved or admitted on the charge) and may be exercised either by the convicting court or by an appropriate civil court, whereas under s6 the triggering event is the insolvency of the relevant company (not a requirement under s2), jurisdiction is given only to the civil courts and the matters to be considered include the whole range of his conduct in relation to that company and, potentially, others. The jurisdiction under s2 is discretionary, whereas that under s6 is mandatory once the threshold conditions are found proved (though it must be said that there is a large element of judgment, if not strictly discretion, in the evaluation of "unfitness"). There is a two year limit (extendable by the court) for the commencement of proceedings under s6, but no such

limit under s2. An application under s6 must be brought by the Secretary of State or Official Receiver (s7(1)) but an application to the civil court under s2 may additionally be made by a liquidator of the company, or by any past or present member, or any creditor (s16(2)). Thus once a director has been convicted of a relevant offence there may be a large number of potential applicants for an order under s2 and the possibility, at least theoretically, of multiple proceedings dealing with the same circumstances.

21. I was referred to a number of cases, mostly dealing with the question whether previous consideration, or even the making of, a disqualification order under s2 is a bar to a subsequent application under s6, or likely to make such an application an abuse of process. It is clear that in most circumstances this will not be so. The most detailed consideration to the issues was given by Anthony Mann QC (as he then was) in *Secretary of State v Rayna* [2001] 2 BCLC 48. In that case s6 proceedings had been stayed pending criminal proceedings in which the defendant was eventually convicted of conspiracy to defraud, sentenced to imprisonment and given a two year disqualification order under s2 by the trial judge, at the invitation of the defendants own counsel. The Secretary of State then applied to restore the s6 proceedings, which was opposed on the grounds it would be unjust to do so in light of the order made under s2. It was said that there was such a degree of overlap between the criminal and civil proceedings that to allow the s6 application to proceed would effectively expose the director to double jeopardy. The argument was put in various ways, all of which were rejected by the judge. The arguments and his reasons appear from the passages I extract below:

> "[18] I have been told that (not surprisingly) this sort of situation (criminal and civil disqualification orders potentially overlapping) is not uncommon. There are reported and unreported cases in which it is apparent that civil proceedings have continued after s 2 disqualification orders have been made in relation to the respondents to criminal proceedings (for example, *Secretary of State for Trade & Industry v Tjolle* [1998] BCLC 333, [1998] BCC 282 in which it can be seen that a 10 year disqualification under s 2 was followed by a 15 year disqualification under s 6). However, there is no authority which in terms addresses the points raised by Mr Ayres. Accordingly I have to approach this matter as one of principle. It seems to me that the following principles and factors should be applied and considered in resolving the issues which arise in this case.
>
> (i) I do not think that the doctrine of former recovery is applicable bearing in mind the different parties to the two sets of proceedings, their different natures, the different interests of the two "prosecutors" (for want of a better word) involved and the two different statutory jurisdictions involved. I can see how the doctrine, in its autrefois convict form, might apply if one disqualification under s 2 was sought to be followed by another s 2 disqualification based on the same facts. That, however, is not the case where the clash of proceedings is between criminal proceedings and civil proceedings under s 6...

(ii) Nor do I think that the doctrine of double jeopardy applies. The operation of the doctrine in relation to civil proceedings was considered in *Saeed v GLC* [1986] IRLR 2. In that case an acquittal on a charge of assault did not bar a domestic tribunal disciplinary charge based on the same alleged assault. Popplewell J cited *Connolly v Director of Public Prosecutions* [1964] AC 1254, [1964] 2 All ER 401, where there are dicta which refer to the impropriety of trying a man twice for the same crime and said:

"Mr Geddes points out, and I accept, that double jeopardy cannot apply as between criminal and civil proceedings."

I apply the same principles.

(iii) The correct principles to apply are those relating to abuse of process. That was the basis of the consideration of the Court of Appeal in *Re Barings plc (No [3])* where the alternative proceedings were disciplinary proceedings…

(iv) The burden is on the party alleging abuse to establish it – *Johnson v Gore Wood & Co* [[2001] 2WLR 72].

(v) The jurisdiction to stay or strike out proceedings as an abuse on the footing that a point has been decided in earlier proceedings is not a jurisdiction that will be exercised lightly. I should be looking for circumstances which demonstrate that it would be:

"manifestly unfair to a party to litigation before it, or [it] would otherwise bring the administration of justice into disrepute among right-thinking people,"

if I were to allow the present proceedings to continue – *Hunter v Chief Constable of West Midlands* [1982] AC 529 at page 526, cited by Waller LJ in *Re Barings plc* (No 3) at page 257.

(vi) This point is even stronger where the person who is sought to be debarred in the second set of proceedings was not even a party to the first set. While a non-coincidence of parties is not necessarily a bar to a finding of abuse, it must be an important pointer against it.

(vii) It will be essential to examine:

"whether the issues upon which the court will need to adjudicate in the present proceedings are the same, or substantially the same, as those which have already been investigated and adjudicated upon in the [criminal proceedings]." (per Chadwick LJ in *re Barings plc (No [3])* [1999] 1 BCLC 226 at page 253)

(viii) I must bear in mind that the Secretary of State is the person to whom Parliament has entrusted the task of considering whether to seek disqualification orders in the public interest under s 6. This court is not entitled to substitute its own view as to the desirability of continuing proceedings for the view taken by the Secretary of State – see again *Re Barings plc (No [3])* [1999] 1 BCLC 226 at p 252. I can only intervene if the continuation of the proceedings amounts to an abuse of the process, and the public interest factor must be borne heavily in mind in considering that question. In this context it is again important to remember that the Secretary of State was not a party to the criminal proceedings; nor was he given an opportunity to appear. A finding that the Secretary of State's continued pursuit of proceedings that he considers to be in the public interest is an abuse of the process on the basis of findings in proceedings to which he was not a party would be a strong finding. It might not be absolutely inconceivable; but it would require a very strong and clear case. It is no answer to say, as Mr Ayres says, that the prosecuting authorities and the Secretary of State are both "emanations of the state". That might be an accurate description is some contexts, but they are emanations with different functions and with different interests in mind.

(ix) It is important to bear in mind the difference in focus and emphasis of the criminal proceedings when compared to the civil proceedings. The purpose of the criminal proceedings is to consider the evidence with a view to determining whether the crime has been committed. That will usually involve considering the existence or non-existence of dishonesty. If there is a conviction, then disqualification may be considered as part of the sentencing process, but the focus of the criminal proceedings is such that any detailed consideration of the conduct of the directors in question, so far as it bears on their unfitness to be directors, is unlikely to take place during the trial and will arise, if at all, at the stage of sentencing by which time all the evidence has been given. The disqualification will be considered by reference to the facts germane to the conviction. Civil proceedings under s 6 are different. The whole focus of those proceedings is on the conduct of the directors and what it says about their fitness or unfitness to be directors, and that focus exists throughout the proceedings. One also has to bear in mind the differing standards of proof in the two sets of proceedings. There may be various things not proved to the criminal standard which might be provable to the civil standard in the civil proceedings, so that decisions in the former might justifiably be revisited in the latter.

(x) It seems to me that a combination of the last two points means that in most cases it is going to be unlikely that a disqualification in criminal proceedings will make concurrent civil proceedings an abuse of process. It is likely to be only in

> clear cases, which can clearly be said to be on all fours with each other, that it might be said that the criminal proceedings have covered all the bases in a way which makes the civil proceedings otiose and oppressive…"

22. The Court of Appeal refused permission to appeal, noting that the principles set out by the judge were not contested and that the ground covered in a s6 application went well beyond that considered in relation to s2 by the criminal court ([2004] BCC 77).

23. The decision in that case rests very much on the difference in nature between proceedings under s2, regarded as part of criminal proceedings, and s6 as civil proceedings. The judge in his passage dealing with the doctrine of former recovery expressly recognised that the position might be different in a case of successive applications to the criminal and civil courts under s2 based on the same conviction. Earlier in his judgment he summarised that doctrine as follows:

> "[16] Mr Ayres also … relied on the doctrine of former recovery. This doctrine is apparently an aspect of the doctrine of merger. According to Spencer Bower, *The Doctrine of Res Judicata*, 3rd Edn at page 221, the notions of former recovery in civil cases and autrefois convict in criminal cases are both aspects of the same thing. They prevent a second judgment on the same cause of action, or a second conviction for the same offence."

24. Mr Mann QC described the argument based on former recovery as related to that on abuse of process, and I respectfully agree. Mr White, in the submissions relied on by Mr Weston, did not address separately any issue arising from the doctrine of former recovery and accordingly I will not seek to deal with it separately from issues of abuse of process.

25. As can be seen from the passage quoted, Mr. Mann QC also rejected the argument that there was overlap because both applications were pursued by organs of the state, on the basis that the Secretary of State and prosecuting authorities had very different functions and interests.

26. All these issues however arise much more sharply where as here the second set of proceedings is based on the same jurisdiction and the same facts as the first, even though one is in a criminal context and one in a civil context.

27. *Re Denis Hilton Ltd* [2002] 1 BCLC 302 was a somewhat similar case. A director was prosecuted for the criminal offence of fraudulent trading, and in light of that the Disqualification Unit at the Insolvency Service decided not to pursue its own disqualification application under s6 but to ask the prosecution to seek an order under s2 if a conviction was obtained. That request was made to the police officer in charge of the investigation. However, when the director came to be sentenced the prosecutor failed to ask for an order under s2 and the Crown Court judge did not consider the matter himself. The Secretary of State was by then out of time to bring s6 proceedings but did so under s4 Company Directors Disqualification Act 1986, which (so far as relevant) requires proof of an offence of fraudulent trading, whether or not the director has been convicted thereof.

28. Ferris J also referred to the decision of the Court of Appeal in *Re Barings Plc (No3)* for the principles applied in relation to abuse of process, saying:

> "Chadwick LJ referred ([1999] 1 BCLC 226 at 253) to the decision of the Court of Appeal in *Ashmore v British Coal Corp* [1990] 2 All ER 981, [1990] 2 QB 338 and to certain other decisions, and then stated in his own words the principle. He said:
>
> 'The overriding consideration, as it seems to me, is the need to preserve public confidence in the administration of justice. The court is entitled – indeed bound – to stay the proceedings where to allow them to continue would threaten its own integrity. In the words of Lord Diplock, proceedings should be stayed where to allow them to continue would bring the administration of justice into disrepute among right-thinking people.'
>
> In my judgment Mr Davis-White was correct in saying that the two touchstones in this field are the causing of unfairness to a party and the bringing of the law into disrepute."

29. Ferris J held that the decision not to proceed under s6 was not because it was considered that disqualification was not appropriate but that it was a matter that could be left to the criminal court, and subject to an implied reservation that it might be reviewed after the criminal trial. There was thus no abandonment of disqualification proceedings that it would be unfair to go back on, and nothing that could amount to an estoppel. He accepted (at p310f) that in contrast to *Rayna*, the facts on which the s4 application was based were exactly those that were relied on in the criminal prosecution. That would not of course necessarily be the case in a s4 application; even if there had been a prior prosecution the s4 application might be based on different and/or additional facts, to be proved to the civil standard in the civil court.

30. Noting the reference made by Mr. Mann QC to the possible application of the doctrine of autrefois convict he said:

> "However, this is not precisely the situation which he referred to when he said that the doctrine of autrefois convict might apply if one disqualification under s 2 was sought to be followed by another s 2 disqualification based on the same facts. There has been no s 2 disqualification in this case, and for reasons which I have indicated I do not think it right to infer that there was a positive decision by the criminal court not to impose a disqualification although it is, of course, a fact that the criminal court did not do so."

In this case of course there has been a positive decision by the criminal court to refuse an order under s2.

31. Ferris J said (p311e) that since s4 specifically envisaged that civil disqualification proceedings might follow a prosecution for fraudulent trading there could be no complaint about that. The key issue in that case was the failure to ask the criminal court to consider disqualification, counsel for the director arguing that the police officer who had been asked to relay to the prosecution the request to seek such an order in effect represented the Secretary of State at the criminal trial and either

refrained from seeking such an order or at least failed to obtain it (p311a). Ferris J said that the suggestion that the police officer represented the Secretary of State was 'fanciful' and that although the Secretary of State had relied on the request to that officer to draw the attention of the judge to the power to disqualify and, for whatever reason, that had not happened, that "cannot by any stretch of the imagination debar the Secretary of State from maintaining" the s4 application.

32. Mr. Morgan for the Secretary of State relied particularly on an unreported decision of HHJ Rich QC, sitting as a judge of the High Court, in *Secretary of State v Nimley* and others, 5 February 2002, of which he was able to provide a transcript. That case, he submitted, was effectively on all fours with the present one, and should be followed at least at first instance. HHJ Rich QC held, in an ex tempore judgment determining a preliminary issue, that it was not an abuse of process for the Secretary of State to bring proceedings in the civil court under s2 in circumstances where a criminal court had previously refused to impose such an order. For reasons that he explained, none of the defendants appeared or was represented before him and the Attorney General had declined to appoint an amicus to assist the court. HHJ Rich QC therefore had submissions only from counsel for the Secretary of State, who he acknowledged had fairly put the points that might be made for the defendants.

33. In *Nimley*, the directors had been tried and convicted of offences which could have founded a s2 disqualification order. After they had been sentenced and left the dock, prosecuting counsel said to the judge:

> "Your Honour has made no reference to disqualification under the Act, so I take it your Honour makes no order?"

to which the judge replied:

> "I think, Mr. Henderson, I was concentrating primarily on achieving proper balance on sentencing. I think it seems unlikely, given the time that has elapsed, that any of these defendants is going to be involved in running a company again. I think in all the circumstances I will not make an order, and certainly in the case of these defendants I think it will be no kindness to bring them back to the dock for imposing such an order."

34. HHJ Rich QC said of that passage:

> "I construe those observations… as indicating that at a point in time when he at least thought he had the power to add a disqualification order to the sentence he had just imposed, he considered doing so and determined not to do so."

I think myself the inference from the passage quoted must be that the judge had been previously referred to the possibility of disqualification "under the Act" but that this initially slipped his mind because he had been concentrating on the correct balance of sentence. He no doubt considered the matter when reminded of it, but plainly only in the briefest manner. By then the defendants had left the dock and he must have felt some pressure not to put them through the inconvenience of being brought back, when the possible need to do so arose from his own omission.

35. Counsel for the Secretary of State conceded that the civil application amounted to a collateral attack on the decision of the criminal court, but said that it was not made by a claimant who had the opportunity of contesting the first decision because the Secretary of State was not party to the prosecution. HHJ Rich QC as I read his decision appears to have accepted that point.

36. I extract the following as setting out the reasons for HHJ Rich QC's decision:

> "…the provisions of s2 of the 1986 Act, if they are to mean anything at all, must mean that this court does have jurisdiction to impose a disqualification order at least in circumstances where the convicting court has not. If it does not have power to impose it in such circumstances, it never has power to do so at all, and yet the section makes quite clear that "the court" includes this court.
>
> A possible circumstance where the jurisdiction might be exercised, without [reaching as wide a conclusion] as the one I have just suggested is if it were limited to the case where the convicting court had merely failed to exercise its jurisdiction by oversight or mistake and had not considered doing so. But I reject that as a possible construction of s2 because I cannot think that, without express words, a jurisdiction would be conferred on this court based on the assumption that other courts of competent jurisdiction failed to exercise their duty…
>
> The question of whether [an] application under s4 or s6 may amount to an abuse of process in circumstances where there had been a prior conviction giving rise to the opportunity in the convicting court to impose a disqualification order has been considered in two cases by this court. [In *Rayna* Mr. Anthony Mann QC] came to the conclusion that the matters relied upon under s6 were wider and went further than those that had been considered by… the convicting court under s2… He said at p12 of his judgment that
>
> > "It is likely to be only in clear cases which can be said to be on all fours with each other that it might be said that the criminal proceedings have covered all the bases in a way which makes the civil proceedings otiose and oppressive."
>
> It might be derived from that approach that a proceeding by the Secretary of State under s2 after an order has been made under s2 must necessarily be a proceeding so completely on all fours because both applications must proceed on the basis of the conviction and the facts founding the conviction that the civil proceedings would be, in Mr. Mann's words "otiose and oppressive". He indeed said… that he could see how the doctrine of former recovery "in its autrefois [convict] form" might apply if one disqualification under s2 was sought to be followed by another s2 disqualification based on the same facts… [but] I would not follow his view as formulated for the reasons which I will seek to set out… [I] note [he] was dealing

> obiter with a circumstance which differed not only from the case before Mr. Mann but also from the case before me, where of course no disqualification order was in fact made…
>
> The case which I have to consider differs from [*Denis Hilton*] in two important particulars. First, the application…is made under s2, the same section as that under which [the criminal court had power to make a disqualification order] and secondly, as I have held, I am to treat this case as a case where the convicting court did consider the exercise of its discretion.
>
> For the reasons that I have attempted to give, I do not think that there is a distinction to be made between oversight and refusal so far as the failure to impose a disqualification order by the convicting court is concerned…
>
> …it seems to me that a difference between the two sections [*sc between a subsequent application under s2 or s6*] is a difference which should lead to no distinction as to the appropriate conclusion in regard to abuse of process.
>
> Where the convicting court has not [made a disqualification order], the alternative court, this court, in my judgment clearly has power to do so, and for the reasons which satisfied the judges who considered the similar cases under s6 and s4, no abuse arises.
>
> I take, however, from the words which Mr. Mann used the suggestion that it is, as it appears to me, although it is not [*relevant*?] for my present decision, at least highly arguable that the exercise of the power is to be by alternative courts, and if one court has exercised the power the other [is] no longer entitled to do so…"

37. I confess I have some difficulty in following this reasoning, which I have attempted to set out faithfully although without including the whole text of the transcript. Having noted (a) that the question of abuse would turn in large part on the similarity of the facts and issues before the court in the two successive applications, (b) that a subsequent civil application under s2 must necessarily be on the same basis as the prior criminal application and (c) the difference or potential difference between that and an application under s6, why is it that there should be no difference in the conclusion on the issue of abuse between those two cases? The last paragraph quoted seems to accept that it was at least arguable that if the criminal court had exercised the power to make an order under s2 a civil court would no longer have jurisdiction under the same section, but to say that it was not relevant in the instant case where no order had been made. But if it is accepted that the doctrine of autrefois convict would apply where a criminal court has previously made an order under s2 and a civil court is asked to make a further order based on the same conviction, why should the parallel doctrine of autrefois acquit not equally apply where the criminal court has considered the matter and decided to refuse such an order? How can the question whether a second application amounts to an abuse depend on whether the first application succeeded or failed?

Consideration

38. The answer to the case before me starts, in my judgment, by separating the issue of formal jurisdiction from that of abuse of process. As to jurisdiction, I agree with HHJ Rich QC that the jurisdiction of the civil court expressly given by s2 must necessarily arise after a conviction and so after the opportunity has arisen for a criminal court to make an order under the same section. No words of qualification are given in the section, so the existence of the jurisdiction conferred on the civil court cannot depend on whether the criminal court has or has not exercised its own power or, if it has not done so, how that came about. Thus it makes no difference, for the purposes of jurisdiction of the civil court, whether the criminal court did not make an order because it was not alerted to the possibility of doing so or, if it was, overlooked the matter or considered it and positively decided not to do so.

39. Whether a subsequent application to the civil court to exercise that jurisdiction amounts to an abuse of process is however a separate matter. The court must ask itself whether it would be "manifestly unfair to a party to litigation before it, or [it] would otherwise bring the administration of justice into disrepute among right-thinking people" to allow the proceedings to continue, to cite again the passage from *Hunter* referred to in all the principal authorities. These are two aspects which may have to be considered separately.

40. It will be highly relevant to consider the degree of overlap between the two sets of proceedings in terms of the facts and issues before the court, and whether the second proceedings amount to a collateral attack on the decision in the first, by a person who was party to the first proceedings and had the opportunity to argue his case in those proceedings, see *Rayna*.

41. In the present case, there is necessarily a complete overlap between the two sets of proceedings because this court is being asked to exercise exactly the same jurisdiction under s2 as the criminal court was, founded in each case on the same convictions. There was a strong suggestion in the submissions to me, reflected also in HHJ Rich QC's judgment, that it is perceived that the approach of the two courts to this jurisdiction in practice may differ, with the criminal courts sometimes appearing to regard disqualification as a further element of punishment for the defendant and the civil courts having regard primarily to whether disqualification is appropriate for the protection of the public. Mr. Morgan referred me to the discussion in Mithani: Directors' Disqualification at paras 162ff, where it is observed that the criminal courts seem initially to have regarded disqualification as punishment, but more recently have emphasised the purpose as being to protect the public. He also pointed to the remarks of Jacob J (as he then was) in *Secretary of State for Trade and Industry v Tjolle* [1998] 1 BCLC 333, a case in which he imposed (by agreement) a disqualification of 15 years under s6 on a director who had previously been disqualified for 10 years by the criminal court under s2. Indicating that the *Sevenoaks* approach to the appropriate period of disqualification should be followed in both courts he said :

> "It is highly desirable that the criminal courts should be aware of this guidance, for it is self evident that civil and criminal courts should be applying the same standards: the purpose of disqualification (to protect the public from the activities of persons unfit to be concerned in the management of a company) is the same in both kinds of court."

42. Jacob J was speaking about a commonality of purpose between applications under s2 and s6, where the conditions for exercise of jurisdiction are different. It must be even more obvious that where two courts have jurisdiction under the same provision, ie s2, there can only be one interpretation of the purpose of that provision and the principles on which the jurisdiction should be exercised should be the same in both courts.

43. If there is, or is perceived to be, a difference in practice between the approach of different courts, that is not something, it seems to me, that can make it fair to subject a defendant to exposure to the same claim again in a different court. Mr. Morgan conceded, inevitably, that once the criminal court had made a decision under s2, the matter could not be re-opened before that court. Further, he accepted that if the criminal court had made an order under s2, it would be unsustainable to apply to the civil court for an increased period of disqualification under the same section, based on the same conviction. The same would plainly apply if an attempt were made to bring two identical applications before different judges in the civil court; if refused by Judge A, it would be an abuse to present the same application again to Judge B, who might be thought willing to take a stricter view of the same facts. The position cannot, it seems to me, be different where the two judges exercise the same jurisdiction on the same facts but sit in different courts.

44. This is not to doubt what was said in *Rayna* about the focus and emphasis of criminal proceedings being different from civil disqualification proceedings. Those remarks were made to emphasise the potential difference between applications under s2 in the criminal courts and s6 in the civil courts, and do not indicate that the two courts should, or do, approach s2 differently.

45. What is the relevance of the fact that the two applications are pursued by different arms of the state? Mr. Morgan does not concede that the present application represents a collateral attack on the decision of the criminal court, but submits that even if it could be argued to be so, it is not abusive because it is made by the Secretary of State who was not party to the prosecution and who has a regulatory role distinct from that of the prosecutor. He referred me to a passage in Walters and Davis–White QC: Directors Disqualification and Insolvency Restrictions, at para 7-102 which suggests that a case such as this may be found to be an abuse "not least because… its effect would be to enable the claimant to circumvent the problem that the prosecution either has no right of appeal in… a criminal case or has failed to exercise any such right of appeal it may have" but that counter arguments would include the difference in roles of the two agencies and that disqualification might be regarded as an adjunct to, rather than a true part of the criminal process.

46. There are references to this difference of identity in many of the cases I was referred to. HHJ Rich QC in *Nimley* recorded that the Secretary of State accepted that his application was a collateral attack on the decision of the criminal court, but said that it was not made by a party who had the opportunity to contest the decision in that court, no doubt because the Secretary of State was not party to the prosecution. Mr. Mann QC in *Rayna* said that non-coincidence of parties while not a bar to a finding of abuse was a strong pointer against it. Ferris J in *Denis Hilton* said that it was 'fanciful' to suggest that the police officer relaying the Secretary of State's request to seek a disqualification order in some way represented the Secretary of State in either failing, or deciding not to, make that request at the criminal trial. That I think was directed to the question whether it was unjust or improper for the Secretary of State to go back on a decision made by him or on his behalf not to seek a disqualification, rather than

whether if an application had in fact been made a second one could be later pursued by a different agency.

47. What lies behind all these statements is I think consideration of a particular type of abuse of process identified in many cases in the past. But it is necessary to keep in mind the broad nature of the concept of abuse of process, and avoid over-reliance on particular words or phrases as implying specific tests for, or limits on, that concept. In *Re Barings Plc (No3)* at first instance Jonathan Parker J said this:

> "In *Hunter v Chief Constable of West Midlands* [1981] 3 All ER 727, [1982] AC 529 an attempt by the six men convicted of the Birmingham bombings to relitigate in civil proceedings the issue whether their confessions ought to have been received in evidence before the jury was held by the House of Lords to be an abuse. Lord Diplock began his speech in that case (with which the rest of the House agreed) as follows ([1981] 3 All ER 727 at 729, [1982] AC 529 at 536):
>
> 'My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.'
>
> Later in his speech in Hunter's case [1981] 3 All ER 727 at 733, [1982] AC 529 at 541, Lord Diplock said:
>
> 'The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.'
>
> Thus, it is clear on authority that the court's inherent jurisdiction to prevent abuse of process in civil proceedings extends to cases where, notwithstanding that the doctrines of res judicata and issue estoppel are inapplicable, the circumstances are such that the issue or prosecution of proceedings would be vexatious or oppressive as amounting to an attempt to relitigate a case which has already in substance been disposed of by earlier proceedings – where, to use Lord Diplock's expression, the proceedings amount to a collateral

> attack on a decision in earlier proceedings. This aspect of the court's inherent jurisdiction to prevent abuses of its process is sometimes referred to as 'the double jeopardy rule'. In my judgment, however, the expression 'double jeopardy rule' is misleading in so far as it implies the existence of some absolute rule: as I see it, the question whether proceedings should be struck out or stayed on grounds of double jeopardy must remain a matter for the discretion of the court, in the light of the circumstances of each particular case. Lord Diplock's disavowal of the word 'discretion' in this context makes it clear that once the court has concluded, after weighing all the relevant circumstances, that a particular proceeding is an abuse of its process, it has a duty to act to prevent that abuse continuing. I would prefer to call the relevant principle the 'collateral attack principle', and I will use that term hereafter in this judgment."

48. In *Re Barings Plc (No 3)* the issue was whether disqualification proceedings brought by the Secretary of State were an abuse when based on substantially the same facts as regulatory proceedings brought by the SFA. The judge held that the collateral attack principle was not confined to cases where the prior proceedings were before a "competent court", referring to the decision of Laddie J in *Iberian UK Ltd v BPB Industries plc* [1997] ICR 164, in which the prior decision had been by the European Commission in competition proceedings. Nor does it always require that the party sought to be prevented is identical to one involved in prior proceedings; Jonathan Parker J also referred to *Ashmore v British Coal Corp* [1990] 2 QB 338 in which a tribunal had directed that sample cases from some 1500 potential claims be tried first, but on the express basis that the decision in them was not binding on the other claimants. Nevertheless, when the sample claims were rejected, it was held to be an abuse for another claimant to seek to litigate the same factual issues on the same evidence, relying necessarily therefore on different argument at a second hearing or a different view being taken by a second tribunal.

49. The decision in *Re Barings Plc (No 3)* was that the disqualification proceedings were not abusive, the judge relying particularly on the difference in nature and purpose between the two sets of proceedings, and also on the difference between the two pursuing agencies. Even if the SFA could be said to have a statutory genesis, it could not be regarded as being the same as the Secretary of State simply because on a broad basis they could both be said to be 'emanations of the state'. The purpose and potential outcome of the regulatory proceedings was substantially different from that in the disqualification proceedings. Thus, even though both might be founded on the same misconduct, it was not unfair that such conduct might lead to separate consequences at the instance of separate public bodies.

50. I take from these authorities that the assessment of abuse is a broad judgment based on a combination of factors. The fact that a second claim is brought by a different claimant may be a strong indication that it is not abusive, as Mr. Mann QC said in *Rayna*. That is likely to be so in most situations in private law claims, since separate claimants are likely to have separate causes of action in respect of separate losses. But there may be situations where the overlap of facts and evidence lead to a different conclusion, as *Ashmore* shows. In the present context, it seems to me that the court must also have regard to the fact that the relief sought in a disqualification claim is not

to vindicate a private right, but to impose a restriction on the defendant for the public good. Thus, whoever brings the claim on a given set of circumstances, it is the same claim and leading potentially to the same remedy. Even if it might be said that the second claimant is not responsible for the first claim and cannot be criticised for any deficiencies in the way it was pursued, or for himself seeking to have a second bite of the cherry, the court must also consider whether it is fair for the defendant to be faced with the same claim on a second occasion at the instance of a different claimant. As Lord Diplock made clear in *Hunter*, the court in considering abuse is looking at possible unfairness to the defendant as well as protection of the integrity of the court's own process.

51. This is particularly relevant, it seems to me, in the case of applications under s2 Company Directors Disqualification Act 1986. As I noted earlier, such a claim may be brought in the civil court by any of a wide range of applicants, including any past or present member of the company and any creditor. All such claims must necessarily be founded on the same conviction and seeking the same relief. Even if different applicants might be permitted to place before the court different evidence going to the circumstances, consequences or gravity of the offences for which the defendant has been convicted, all the claims are still ultimately founded on that conviction and whether it shows a need to protect the public from his activities as a director. Fairness to the defendant must mean, it seems to me, that he should not be exposed to the same claim on multiple occasions by different litigants unhappy with the outcome of the earlier claim or claims. The subsequent claims can in my view be fairly described as collateral attacks on the first decision, even if not by a party able to argue its case in the first.

52. Standing back, this claim is no more than an attempt by the Secretary of State to obtain a different decision from this court than was given on identical issues by the criminal court, which had the issues placed before it and made a positive decision to refuse an order. It is in my view unfair that the defendants should be thus exposed to the same claim on two occasions. The unfairness is not relieved by the argument that the claim is being pursued by a different entity; firstly I am not persuaded that in fact there is a complete separation between the two applicants, because it appears that the Insolvency Service was in liaison with the prosecutor when he made his application for HHJ Rundell to consider disqualification, so that even if as Mr. Morgan submits, there are criticisms that can be made of that application, it would appear the Secretary of State was content at the time to allow the matter to be pursued in the criminal court rather than at that stage bringing it to the civil court and to some extent at least participated in the application made. Secondly there is the general point that where the basis of the claim and the relief sought is essentially identical it is just as much unfair to the defendant to have to face it twice at the hands of two applicants as it would be if there were only one.

53. The significant difference between this case and *Rayna* is that the second claim there was brought under s6 and not s2. The court would be likely in a s6 case to be looking at a much wider set of facts than those that founded the conviction. If there had been a s6 claim in the present case, for instance, the court might have been asked to consider the allegations behind the charges that were not proceeded with. The key difference from *Denis Hilton* is that in this case there has been a positive decision by the criminal court so that the civil court is being asked to make a contrary decision, and not to make a first decision on an issue not already decided.

54. Whether there could be some intermediate position, in which the matter had been considered by the criminal court but only on such a slight basis that it would not be unfair to reopen it in the civil court, is not a matter I have to decide, though I am bound to say that if on true analysis a decision has been made it seems to me doubtful.

55. I do not regard this conclusion as unduly tying the hands of the Secretary of State, if he wishes to preserve the possibility of his own application if dissatisfied with the outcome of a criminal trial. He has the option, in future cases, of initiating and staying s6 proceedings pending the outcome of the criminal case, as was done in *Rayna*. It would also be possible in an appropriate case to make a subsequent application under (eg) s4 rather than s2, on a basis sufficiently different from the facts of any conviction (this was not so in *Denis Hilton*).

56. In case the matter goes further and I am found to be wrong on the issue of abuse, I record that if I had decided that in favour of the Secretary of State I would have made a disqualification order of 6 years in the case of Mr. Weston and 5 years in the case of Mr. Williams, being at the borderline of the bottom and middle *Sevenoaks* brackets. The dishonesty both men showed was in my view serious and had the intentional result that very substantial amounts of tenants' money was used for the private purposes of Mr. Weston and his business and exposed to the risk of insolvency of that business. I have no doubt that Mr. Weston was the prime mover and accept that to some extent Mr. Williams may have been drawn along by him under the possible threat of losing his business, but his participation was a serious breach of his professional duties and abuse of his professional position. It is little to the point that it is said that the lettings business was not originally established for any dishonest purpose; the dishonesty arose when Mr. Weston decided that he would circumvent the protection the Housing Act was designed to give to tenants' money and continue to use it for his own purposes. Nor does it seem to me a strong point in favour of either defendant that they expected the business to be able to trade profitably and repay deposits in the ordinary course of that trade; the very point of the statute was to protect tenants against the consequences if that assessment proved wrong.

57. I state this conclusion briefly, but in reaching it I have considered the various other matters put forward in mitigation. In the context of an order primarily for the protection of the public, the most important of these are the period that has elapsed since the offences without any evidence of further unfit conduct and the fact that risk to the public is reduced by both defendants' acceptance of their dishonesty.