

## **Public interest**

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#### **1. What must our agency consider in each case?**

We must consider every disqualification case on its own merits, and apply the legislation fairly and objectively. We must also ensure that our decisions don't discriminate against any particular group of people.

The fact that a case can be made against someone or a company does not mean that we should automatically take proceedings against them: we must also show that it is in the public interest to do so.

Often there is a statutory requirement (for example contained in section 7 CDDA 1986) that proceedings are brought where it is in the public interest to do so. In other cases it is a matter of policy.

This guidance assumes that the facts are such that a civil case can be brought. It deals with why the case should, or should not, be pursued, and is intended to be referred to throughout the life of the case.

#### **2. Who decides if a case is in the public interest?**

The investigator will decide if the submission of a report or affidavit is in the public interest. Where our agency receives reports on directors from IPs, Compliance and Targeting Team will make an initial public interest decision as part of their consideration of director conduct reports.

Where disqualification proceedings are to be brought it is for the Civil Proceedings Team (CPT) (acting on behalf of the Secretary of State) to decide if they are in the public interest.

After an authority to proceed has been given the decision on whether to progress remains with CPT, who will consider any new information received together with the OR/investigator.

When an application to bring proceedings out of time is made, the court will consider if it is in the public interest to grant that permission.

### **3. What is the presumption when there is sufficient evidence to bring a case?**

Where there is sufficient evidence to bring a case the presumption is that it will be brought unless the public interest reasons outweigh that presumption.

Where there are public interest reasons against bringing the case that do not outweigh that presumption these are likely to be reflected in the period of disqualification sought.

In evaluating these concerns and reaching this final decision, the key outcomes of our agency should be considered.

#### **Key outcomes**

Our agency identifies the following areas of impact for actions it takes:

- create and maintain a marketplace that is fair for businesses and individuals maintain confidence in the marketplace
- maintain the structures for viable and sustainable businesses
- create transparency of business ownership
- enable creditors and customers to make informed decisions
- create a fair and open insolvency system that works well for all parties
- ensure that individuals given debt relief through bankruptcy or debt relief orders deal fairly with their creditors

### **4. What is the legislative framework for disqualification proceedings?**

The Company Directors Disqualification Act 1986 contains specific statements that proceedings should only be brought if it appears to the Secretary of State that it is expedient in the public interest to do so (sections 7(1) and 8(1)).

#### **Deterrence and improving corporate standards**

The deterrent element can be said to have two aspects: to deter the individual from doing similar acts in the future and to deter others from doing similar acts.

The principal restriction on the individual operates directly on their ability to run limited companies by criminalising such activity.

### **Protection of the public**

Our agency publishes details of the director, period of disqualification and their conduct on our website for a period of three months following the disqualification order. Sometimes a publicity statement is issued and Companies House maintains a public register of current disqualified directors including their age and address.

These ensure that an individual who is deemed unfit to run a company can be identified. Also members of the public and business community can make an informed decision whether to deal with that individual in the future, and if so, allows them to assess and minimise any potential risks.

A disqualification order directly prevents the individual from abusing the privilege of limited liability. They become personally liable for any debts of the company incurred during a breach (section 15 Company Directors Disqualification Act 1986).

### **Observe the individual's human rights**

When bringing an action against an individual their human rights must be observed and the proceedings must be brought in a just and fair manner.

The most common considerations are:

#### **Timeliness**

If there is a long period between the conduct and the commencement of proceedings it might inhibit both the defendant's ability to access information to properly present a defence and the ability of witnesses to clearly recall events.

As the undertaking regime could be construed as pressuring individuals to offer an undertaking, rather than to enter into costly court proceedings, it is vital that CPT and investigators proceed on the basis that all cases will be defended. There should be no reduction in the quality of evidence within the case simply because it is believed that the case will be settled by an undertaking and not go through the test of court proceedings, as to do otherwise would be unjust and unfair on the individual concerned.

The taking of proceedings, at all times, should be seen by the average person or business to be justifiable and reasonable in the context of the individual case.

Where individuals have particular circumstances, for example ill health then the question must be raised - is the case sufficiently serious such that bringing a case remains just and equitable?

### **Preserve the reputation of the Secretary of State**

Reputation relates to trustworthiness, which is built up over time by the actions of our agency.

At a strategic level reputation is at risk if our agency does not focus its resources on the areas identified in its corporate plan as being supportive of the remit given to it by Government.

If our agency pursues too many marginal cases which are lost, its reputation will suffer over time. Likewise reputation is at risk when a decision is made to pursue, or not pursue, a high profile case.

### **Effectively apply the public purse**

Resources are limited and our agency has the responsibility to make use of taxpayers' money in the most effective way. Our overriding objectives are to promote long-term economic growth by dealing with financial failure and by giving confidence to lenders. Our goal is a fair and open insolvency system that works well, and a market place that is fair for business and individuals; any use of public money should have these goals in mind.

Before bringing a case it must merit public expenditure, and where a case is ongoing or the subject of prolonged investigation then a periodic assessment must be made as to whether continuance of the case is justified both in terms of the likelihood of success and the potential result that would be obtained.

### **5. High profile cases**

Where a case has a high profile the benefits of bringing it need to be considered against the risks. Success may increase the Secretary of State's reputation and provide an increased level of deterrence, whereas failure may have a negative impact on reputation and prove financially costly to the public purse.

The following are indicators that a case may be high profile:

- high street name
- banking business
- major financial institution
- unusually large or unusually complex undertaking
- unusually extensive press coverage
- public are very substantial "victims"
- subject has existing high profile media presence
- high level of political interest
- major involvement of other regulators or prosecutors

### **6. Public interest in bringing disqualification proceedings where there is an existing or imminent section 2 CDDA disqualification**

There are 6 potential scenarios involving section 2 CDDA 1986 disqualifications:

- where a section 2 disqualification has not been requested, the investigator should pursue a section 6 disqualification if applicable. (Legal Services will always refer the judge or magistrates to their discretion to disqualify when they have power to do so.)

- where a section 2 disqualification has been obtained (or refused) and the case is based on the same facts as the section 2 disqualification, there is an overriding presumption that the investigator will not pursue a section 6 disqualification as there has been clear judicial discretion of the matter.
- where a section 2 order has been made but there are additional allegations or a wider set of facts than the criminal conviction, the investigator should pursue a section 6 order provided that the section 6 period is likely to be at least 5 years more than the period obtained on any order under section 2.
- where a section 2 order has been refused, but there is other distinct misconduct that would in itself warrant disqualification, then the investigator should consider whether it is in the PI to bring disqualification proceedings solely on the basis of that distinct misconduct, for example where a crown allegation could be made out.
- where a criminal prosecution is pending, i.e. the suspect has been interviewed and not charged, or has been charged but no timely trial date has been set, the investigator should carry on with a section 6 disqualification unless the civil court has granted a stay. However, in the event that a section 2 order is granted, the case should be re-evaluated following the procedure set out above.
- where a section 2 order has been made or is imminent, arising out of events or facts unrelated to the investigation case in hand, decisions should be made on the individual case facts.

The leading judgment regarding section 2/section 6 considerations is Premier Places (Lettings) Ltd and Premier Places (Redditch Lettings) Ltd; Secretary of State for Business, Innovation and Skills v Weston [2014] BCC 581.

## **Monitoring and recording public interest decisions**

### **7. Overview**

The public interest decision is the reason why our agency does or doesn't act in a particular case. It is important that such decisions and the reasoning behind them are adequately recorded. It is also important that any review of a decision is recorded.

### **8. The initial public interest decision**

Once an investigator has concluded that there is a case to answer, they will need to decide whether it is in the public interest to submit a report or affidavit.

In all cases it will be clear from the case review record (CRR) or the submission minute what the public interest factors were and the decision made.

Prior to receiving CPT's decision the investigator has the responsibility of reporting any additional facts which come to light and which have a bearing on the public interest decision, stating whether it alters their initial decision.

### **9. Multiple defendants**

Where there are two or more directors who are culpable for the same action but the allegation is not being brought against all of them, the reasons for not targeting particular individuals should be detailed. The investigator should also comment on the effect on the public interest decision of that non-targeting.

### **10. What should happen in respect of events that occur after the authority to proceed?**

The investigator should record the impact of events that occur after the authority to proceed even if they do not alter the public interest decision.

If the public interest is affected then the investigator should review the decision and record the results of that review.

Where the case is protracted there should be regular recorded reviews of the public interest decision.

The following list gives examples of events where a review of the public interest should take place:

- on considering any pre-hearing representations by the director
- on considering any formal defence submitted by the director
- after each adjourned hearing
- on receipt of any claim regarding ill health
- on the amendment of any allegation
- on the withdrawal of any allegation where there are multiple allegations
- on receipt of any further evidence
- on the withdrawal of any evidence relied on
- on receiving the result of any other legal actions, e.g. disqualification, bankruptcy restrictions, debt relief restrictions or imprisonment
- on receiving solicitors' advice
- where similar allegations have been made against another director or partner (personal or business) and they have been altered or withdrawn against that director or partner, or a significant event of the type noted above has occurred in that case
- successful recovery

### **Public interest test summary**

#### **11. Summary of the public interest test**

Protection of the public interest must:

##### **Act as a deterrent or improve standards**

- would the planned action deter a potential wrongdoer from doing the same thing if the outcome was publicised?

##### **Afford protection to business and consumers from potential future losses or damage**

- if there is no action, is there a possibility of future losses or other damage?

- how serious is it likely to be?
- at the time of the event, without the benefit of hindsight, why was the behaviour unreasonable

### **Observe the human rights of individuals and the justice and equity of proceedings**

- are proceedings possible in a timely manner within the framework of the legislation?
- do the individual's circumstances and the seriousness of the facts make action just and equitable?
- would the planned action look reasonable to the average person on the street or to business?

### **Observe the reputational exposure of the Secretary of State in bringing proceedings**

- is the planned action within the framework of Government policy?
- is the planned action likely to have a negative impact?
- is there more than 50% likelihood of success?

### **Effectively apply the public purse**

- does the case overall merit public expenditure?
- does the likelihood of success and the ultimate result justify continued public expenditure?
- how does the planned action help the market place or increase competition?