

UPDATE

# Disqualification order granted against Jersey company director

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In the recent judgement of *In the matter of SPARC Group Limited (en désastre)* [2022] JRC 194 (*SPARC Group*), the Royal Court of Jersey considered the appropriate test for the making of a disqualification order against a director, with the stark nature of the facts justifying a lengthy term of disqualification.

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## Background

The application for a disqualification order was made by the Viscount, in respect of Andrew Jeremy Mills (**Mr Mills**), who was the sole director of SPARC Group Limited (the **Company**), a property development business.

The Company was declared *en désastre* on 24 February 2020 (the reasons for that decision being set out in an earlier judgment of the Royal Court: *In the Matter of the Representation of DP9 Limited [2020] JRC 047*). In Jersey, *désastre* is an insolvency process for a Jersey company, whereby the Viscount (the Court's executive officer) is appointed to wind up the company and distribute its assets.

As a result of the declaration of *désastre*, Mr Mills, as sole director and the controlling mind of the Company, was required to cooperate with the Viscount in various respects under Article 18 of the *Bankruptcy (Désastre) Jersey Law 1990* (the **Bankruptcy Law**). Article 18 includes a requirement to provide to the Viscount any information that would assist her in realising a debtor company's property and distributing the proceeds. Under Article 18(2A), if a person fails to provide the Viscount with any such information (or otherwise fails to comply with the requirements of Article 18(1) and (2) of the Bankruptcy Law), without any reasonable excuse, he or she commits an offence and may be liable to imprisonment for 6 months and a fine. If such an offence is proved to have been attributable to an officer of the debtor company, that officer (as well as the company) shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly (Article 18(3) of the Bankruptcy Law).

Mr Mills' conduct in the aftermath of the declaration of *désastre*, which was described by the Court as "evasive", fell far short of what was required. In particular:

- Mr Mills did not respond properly or (frequently) at all to the correspondence sent to him by the Viscount.
- The director's questionnaire was sent to Mr Mills to complete but, after numerous deadline extensions, the questionnaire was finally sent back to the Viscount over 15 months after Mr Mills was first requested to complete it. Even then, this was only partially completed, which led to a further request for information (to which Mr Mills failed to reply).
- The Viscount was forced to engage an English law firm to assist her in contacting Mr Mills and, at one stage, Mr Mills had moved home without notifying the Viscount of his new address and the Viscount was, therefore, forced to instruct an enquiry agent.
- Mr Mills repeatedly sought additional time to reply to the Viscount because of ill health. However, upon request, he was unable to provide evidence of ill health.
- Mr Mills had failed to reply to any substantive correspondence from the Viscount since 25 June 2021.

- Furthermore, in November 2020, the Viscount discovered that Mr Mills had incorporated an English company with a similar name to the Company (namely, SPARC Group Development Limited) just after the Company was declared *en désastre*. Mr Mills' latest correspondence with the Viscount was made in his capacity as the CEO and Managing Director of the new English entity. No explanation was given as to the connection between the two companies.

In these circumstances, the Viscount applied to the Royal Court of Jersey for a disqualification order against Mr Mills.

### Statutory Framework for Disqualification Order

Under Article 24(7) of the Bankruptcy Law, the Viscount may apply to Court for an order in respect of a person who is or was the director of the debtor company and the Court may make any order that it would be permitted to make under Article 78 of the Companies (Jersey) Law 1991 (the **Companies Law**) in respect of such a person. Under Article 78 of the Companies Law, the court may, on an application that "*a person should not without the leave of the court...be a director of or in any way directly or indirectly be concerned or take part in the management of the company*", make the order applied for "*if it is satisfied that the person's conduct in relation to a body corporate makes the person unfit to be concerned in the management of a body corporate*". The maximum period for disqualification under Article 78 of the Companies Law is 15 years.

In terms of the relevant principles to be applied:

- The Court noted that the equivalent UK legislation, namely section 12C and paragraphs 1 to 4 of Schedule 1 to the *Company Directors Disqualification Act 1986*, was a useful reference point in determining unfitness (whilst not being of direct application in Jersey). The terms of Schedule 1 are set out in paragraph 4 of the Court's judgment in *SPARC Group*.
- The Court also had regard to the English Court of Appeal decision in *Sevenoaks Stationers (Retail) Limited* [1991] Ch 164 (**Sevenoaks**), which, although not binding in the Royal Court, had already been referred to and adopted by the Courts of Jersey, for example, in the case of *Dimsey* [2000] JLR 401 (**Dimsey**).
- The Royal Court set out verbatim Dillon LJ's dictum from p.174 of *Sevenoaks*, in which he endorsed the division of the potential 15-year disqualification period in England and Wales into three brackets:
  - (i) The top bracket of disqualification of periods over 10 years should be reserved for particularly serious cases (which may include cases involving a repeat disqualification order).
  - (ii) The middle bracket of disqualification of 6 to 10 years is for serious cases which do not merit the top bracket.
  - (iii) The minimum bracket of 2 to 5 years is for cases where, though disqualification is mandatory, the case is, relatively, not very serious.
- In *Dimsey*, the Court of Appeal had noted that the objective of the relevant provisions of the Companies Law is not punishment but protection of the public.
- The Court also referred to a dictum of Smith JA in *Dimsey* that:

*"The test laid down...is whether the person's conduct... ' makes him unfit to be concerned in the management of a company'. These are ordinary words of the English language and they should be simple to apply in most cases. It is important to hold to those words in each case"*

### The Decision

It was clear to the Court that Mr Mills had not cooperated with the Viscount, as he was required to do under Article 18 of the Bankruptcy Law and he had, on the face of it (albeit that there had not been an investigation or a prosecution), committed an offence under Article 18(2A) of the Bankruptcy Law (as outlined above). The Court described Mr Mills as having "flagrantly breached" the obligations he owed under the Bankruptcy Law.

The Court disqualified Mr Mills, under Article 78 of the Companies Law, concluding as follows (at paragraph 13):

*"Bearing in mind that an order for disqualification is designed to protect the public and bearing in mind the position of Jersey as a finance centre and the need to ensure that directors in the place of Mr Mills*

*comply with their obligations under statute a lengthy period of disqualification is warranted. We have no doubt that Mr Mills is a person unfit to be concerned in the management of a body corporate".*

The Court determined that the appropriate period of disqualification should be 10 years and ordered that Mr Mills may not, without leave of Court:

- (a) be a director of or in any way be directly or indirectly be concerned or take part in the management of a company;
- (b) be a member of the council of a foundation incorporated under the Foundations (Jersey) Law 2009 or in any other way directly or indirectly be concerned or take part in the management of such a foundation; or
- (c) in Jersey, in any way be directly or indirectly be concerned or take part in the management of a body corporate incorporated outside of Jersey.

Mr Mills was ordered to pay the costs of the application on the standard basis and the Court ordered that the notice of disqualification be placed in the Jersey Gazette, the London Gazette and the equivalent publication in Dubai.

## **Discussion**

*SPARC Group*, which follows a series of disqualifications of Jersey directors ordered by the Royal Court in connection with criminal convictions, is notable for its particular insolvency context. In particular, one interesting feature of the case is the firm focus in the judgment on Mr Mills' conduct following the declaration of *désastre* as opposed to his management of the Company prior to the declaration being made (no attention being given to the latter at all). The Bankruptcy Law does place heavy burdens on the directors of insolvent companies, and it is these burdens which were the focus of the judgment in *SPARC Group*. However, given that part of the purpose of a *désastre* is to find out why insolvency of a company has occurred and whether any bankruptcy offences were committed, one can well see that, in another disqualification case, the focus could easily be on the conduct of the director prior to the declaration of *désastre* being made, whilst that director was at the helm of the relevant company.

One can only speculate that there could be an uptick in such cases in view of the likely increased pressures on companies arising from the current economic downturn and impending recession in the UK.

Directors of Jersey companies owe multiple duties and obligations that arise from statutory law (see Article 74(1) of the Companies Law) and common law, and directors owe specific duties when a company is insolvent or facing insolvency. In this regard, the recent Supreme Court decision of *BTI v Sequana [2022] UKSC 25* is likely to prove persuasive in Jersey. The Supreme Court ruled that, where a company is insolvent, nearing insolvency or where an insolvent liquidation is probable and the directors know, or ought to know, that this is the case, the directors' duty to act in the best interest of the company will include the interests of the company's creditors as a whole, which will need to be balanced against the interests of shareholders where they conflict. Where the position is even more stark and an insolvent liquidation is inevitable, the creditors' interests then become paramount because the shareholders have ceased to retain any valuable interest in the company.

There are also strong sanctions for falling short as a director, such as personal liability for wrongful trading, fraudulent trading and, of course, they can be disqualified from acting as a director, for the protection of the public. As *SPARC Group* shows, the Court will not hesitate to disqualify a director from being part of the management of a body corporate if he or she is unfit to so act.

It is critical for directors to take early, professional advice if they are in any doubt as to how to ensure compliance with their duties in the face of particular challenges or decisions required during the course of managing a company. This is particularly important in cases where insolvency is present or in prospect.

By the same token, shareholders should remember that there may be options available to them, should they consider that the director or directors at the helm of a company in which they hold shares are not making appropriate decisions or are otherwise not acting in the best interests of the company. For example, if a shareholder believes that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to them (with or without some other part of its members) or the members of the company generally, it can apply to Court under the unfair prejudice provisions of the Companies Law. In appropriate circumstances, it may also be possible for a shareholder to bring a

derivative claim on behalf of the company against its directors for breach of their duties. Such actions can serve as a last resort to prevent or seek redress for abuse of director power.

In general terms, *SPARC Group* demonstrates that the Royal Court, as one of the guardians of Jersey's stellar reputation as an international finance centre, is prepared to take definitive and long-lasting action, where the conduct of directors of Jersey companies is or has been seriously wanting.

## Contacts

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