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COMMENT

Marathon Litigation, Directors' Disqualification and Human Rights:

Re Blackspur Group plc (No.4) [2006] 2 B.C.L.C. 489 and [2008] 1 B.C.L.C. 153

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Introduction

In *Re Blackspur Group (No.4)* the Court of Appeal dealt with yet another stage in the long-running litigation arising out of proceedings brought by the Secretary of State for Trade and Industry ("the DTI") under s.6 of the Company Directors Disqualification Act 1986 against a number of directors of the Blackspur group. One of those directors, E, made a number of applications to various courts, including the European Court of Human Rights, seeking orders to set aside the proceedings because of their length (July 1, 1992 to May 31, 2001) and damages for breach of his art.6 rights. *Re Blackspur Group (No.4)* involved applications for declarations by E which were refused by Lightman J at first instance (reported at [2006] 2 B.C.L.C. 489) and E's appeal against that decision (reported at [2008] 1 B.C.L.C. 153). The Court of Appeal's decision usefully clarified the effect of the House of Lord's decision in *A-G's Reference (No.2 of 2001)* [2004] 2 A.C. 72 on "length of proceedings" cases which result in a breach of art.6.

Background Facts

The procedural background was unusually complex although the actual merits of the s.6

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BUSINESS LAW

proceedings were never dealt with in any detail. E had been appointed a director of four companies within the Blackspur group in May 1989. On July 2, 1990, the group went into administrative receivership with an estimated deficit of £34m and on July 1, 1992, the Secretary of State for Trade and Industry ("the DTI") started disqualification proceedings under s.6 against five of the directors, including E.

In *Re Blackspur Group plc (No.1)* [1998] 1 B.C.L.C. 676 one of the directors, D, had unsuccessfully challenged, before the Court of Appeal, the decision of the DTI to refuse to accept his offer of an undertaking never to be a director and instead to proceed with the disqualification actions. The Insolvency Act 2000 (by introducing s.1A into the 1986 Act) put undertakings onto a statutory footing by allowing the DTI to accept and enforce undertakings in return for not pursuing disqualification proceedings, and permitted the person giving the undertaking to apply to the court to discharge it or to reduce the period for which it was in force.

After protracted delay caused by a criminal trial, in which E was not an accused, and various ancillary applications and appeals, on September 13, 1999, E agreed that he would sign a "Carecraft" statement (the procedure allowing parties to proceedings under the 1986 Act to present to the court an agreement that a disqualification order should be made for a specified period, per *Re Carecraft Construction Co Ltd* [1994] 1 WLR 172) if his application for judicial review of the DTI's decision to refuse to discontinue the proceedings on the ground of delay was unsuccessful.

That application failed on the ground that any argument on delay should have been raised in the disqualification proceedings and not by judicial review (*R v Secretary of State ex p Eastway* [2001] 1 All ER 27). In *Re Blackspur Group plc (No.2)* [2001] 1 B.C.L.C. 653, E, sought declarator before Sir Andrew Morritt V-C in the Chancery Division that by reason of delay the proceedings were in breach of or incompatible with art.6(1) of the Convention, and an order that the proceedings be struck out and that he be released from his undertaking.

The judge dismissed the proceedings and found that a very large proportion of the length of the proceedings had been due to various actions taken by E which had the object of avoiding rather than obtaining a fair and public hearing so that there had been no breach of his art.6 rights, nor had it been incompatible with

those rights for the DTI to proceed.

E, in further proceedings, sought declarator that continuation of the disqualification proceedings would be in breach of art.6 of the European Convention on Human Rights, release from his undertaking of September 13, 1999, dismissal of the proceedings on the basis that the DTI should accept a more limited undertaking and judicial review of the DTI's refusal to accept his more limited undertaking! Those further proceedings were all dismissed (*Re Blackspur Group plc (No.3)* [2002] 2 B.C.L.C. 263, Patten J and Court of Appeal) and on May 31, 2001 E signed an undertaking for an agreed 4.5 year period of disqualification and on June 4, 2001 the proceedings were terminated.

E then successfully applied to the European Court of Human Rights on the ground that the length of the proceedings (July 1, 1992 to May 31, 2001) had violated his art.6 right to a fair hearing within a reasonable time (the Strasbourg court's judgment was dated July 20, 2004, and reported as *Eastway v UK* [2006] 2 B.C.L.C. 361; the Strasbourg court had earlier upheld the same application by E's fellow director D in its judgment dated July 16, 2002, and reported as *Davies v UK* [2006] 2 B.C.L.C. 351). Arden LJ in *Re Blackspur Group (No.4)* at [7] described it as a "length of proceedings" case and as just satisfaction the Strasbourg court awarded E non-pecuniary compensation for the distress, anxiety and frustration resulting from the unreasonable delay and payment of his legal costs of the proceedings to establish the violation both in England and Strasbourg.

Following the successful Strasbourg decision and against a background of disciplinary proceedings brought against E by two professional accountancy bodies to which he belonged, E made three separate applications before Lightman J for (i) an order dismissing the disqualification proceedings, (ii) an order setting aside the disqualification undertaking and (iii) a declaration that the disqualification undertaking should not have been offered by E or accepted by the DTI on the basis that the finding of a violation of art.6 by the Strasbourg court meant that he was entitled to relief which removed the stigma of the disqualification proceedings and which persuaded the professional bodies to disciplinary proceedings.

The judge noted at [34] that the core right protected by art.6 was to a fair trial so a breach of the right to a hearing within a reasonable time would ground a claim to a just and proportionate remedy but would not entitle a

respondent to a stay or dismissal of the proceedings against him unless there could no longer be a fair hearing or it would otherwise be unfair to continue the proceedings against him; where the art.6 breach consisted of the failure to conduct the trial timeously, just recompense was needed for the exposure of the respondent to the undesirable consequences of pending proceedings for longer than he should have been but not in respect of the trial itself nor could the outcome of the trial be impugned (per Lord Bingham at [20] and Lord Nicholls at [40] in *A-G's Reference (No.2 of 2001)* [2004] 2 A.C. 72). He found at [36] that the only complaint which E had pursued was breach of the reasonable time provision which in no way impugned the continuation of the disqualification proceedings in the absence of an additional claim that a fair trial had not been possible. In refusing the relief he vainly hoped that the marathon litigation was at an end.

The Human Rights Act 1998

Although the Convention is not automatically enforceable in domestic UK law, UK courts when dealing with Convention right issues are required to "take into account" the jurisprudence of the Strasbourg courts, s.2(1), and have power to give relief in respect of violations of Convention rights. Section 7 of the 1998 Act creates a statutory remedy for victims of violations by a public authority of Convention rights but the time limit for bringing proceedings under s.7 is one year from the act complained of (with a judicial equitable discretion to extend that time limit) and s.7 is not retrospective so it does not apply to violations taking place before October 2, 2000.

The Issues Before the Court of Appeal

The principal issue was whether, as E argued, the effect of the finding by the European Court that the length of the proceedings constituted a violation of art.6 was to prevent a fair trial of the proceedings and that the English courts were bound to take the decision of the Strasbourg court into account because of s.2(1) of the 1998 Act. At [23], Arden LJ (with whom Rix and Tuckey LJJ agreed) said that, following *A-G's Reference (No.2 of 2001)*, "in a length of proceedings case the finding of a violation of art 6 does not necessarily mean that there cannot be a fair trial of the proceedings or that the proceedings have to be struck out". She accepted that the court had to apply the decision of the Strasbourg court but held that, while the issue of delay was now *res judicata*

between the parties by virtue of that decision, the Strasbourg court had made no finding that there could be no fair trial despite the delay.

The Court of Appeal also dealt with the issue of whether, as Lightman J had found, E ceased to be a victim of the breach for the purposes of s.7 of the 1998 Act once he had been awarded satisfaction by the Strasbourg court. Arden LJ at [51] said that a "person can be a victim under Strasbourg jurisprudence even though the violation has been brought to an end". E would have been a victim for the purposes of s.7 if he had had a seriously arguable claim that a fair trial had not been possible but (with Catch-22 logic) he was not because the court found that his claim was not arguable. As a result the Court did not need to decide whether the claim would have been outside the 1998 Act because of the restriction of the retrospective effect by s.22(4).

Conclusion

Despite the procedural complexity, the clear message from *Re Blackspur Group (No.4)* is that parties claiming a breach of art.6 as a result of the length of the proceedings will obtain very little relief if they do not also claim that a fair trial is no longer possible. If it is not possible to make such a claim then successful proceedings based on the length of delay alone may prove a Pyrrhic victory. However, it is to be hoped that the Blackspur litigation as a whole will dissuade the DTI from any complacency in prosecuting disqualification proceedings.

INSOLVENCY

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Correction to Debt Arrangement Scheme Regulations

The Debt Arrangement Scheme (Scotland) Amendment (No.2) Regulations 2007 (SSI 2007/187) were amended by correction slip in May. The correction slip is available on the OPSI website: <http://www.opsi.gov.uk/>.

Liquidator's accounts

In *Burton, Noter*, [2008] C.S.O.H. 75, Lord Glennie considered the correct procedure to be adopted where a liquidator seeks a waiver of his failure to comply with the statutory provisions relating to accounting periods in liquidation. He noted that it has become commonplace for the liquidator to wait until