



# Director Disqualification

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In the matter of The Secretary of State for Business, Energy and Industrial Strategy v Rosenblatt [2016] EWHC 2821

## In summary

This case concerned the conduct of a director of Brand Management Services Limited ("the Company") which was involved in transactions connected to VAT fraud.

His Honour Judge Hodge QC in the Chancery Division held that as a result of the director knowing or wilfully shutting his eyes to the transactions, coupled with his lack of recognition as to his involvement in facilitating the transactions, he should be disqualified from acting as a director for 13 years pursuant to section 6 of the Company Directors Disqualification Act 1986 ("CDDA 1986").

## The Facts

The Company traded as a broker in wholesale alcohol and operated from early 2009 until late 2011.

On investigation by HMRC it was found that the Company had conducted a total of 43 transactions which resulted in a loss to HMRC exceeding £319,877.00. It was discovered that the Company had participated in these transactions despite prior warning from HMRC regarding VAT fraud, both in writing and during face to face meetings.

The Secretary of State subsequently issued an application against the director pursuant to section 6 of the CDDA 1986 seeking an order that he be disqualified from acting as a director, alleging that he knew or ought to have known that the transactions were connected with the fraudulent evasion of VAT.

## The Law

When considering an application under section 6 of the CDDA 1986, the court must consider:

- 1) Was the defendant a director of the relevant company?
- 2) Did that company become insolvent?

- 3) Does the director's conduct as a director of that company make him unfit to be concerned in the management of a company?

The first two matters were not in dispute.

The court was accordingly concerned principally with determining the third question which necessitates a two-stage process:

- 1) The Secretary of State must first establish as facts the matters on which the allegation of unfitness is founded.
- 2) The court must determine that the conduct that has been established is sufficiently serious to justify a finding of unfitness warranting at least two years disqualification (the minimum period of disqualification).

In determining the matter the court considered the relevant authorities in relation to VAT fraud.

In particular, the European Court of Justice determined in *Kittel v Belgium* [2008] STC 1537 that where a person *knew or should have known* that a particular transaction was connected with the fraudulent evasion of VAT they will be deemed to be a participant in the fraud. On the particular facts of *Kittel* an individual was denied the right to reclaim or deduct input tax on the basis that he was found to be a participant in the fraud.

This principle was subsequently considered in cases before the Court of Appeal: see *Moblix Ltd (in administration) –v- Revenue and Customs commissioners* [2010] STC 1436 and *Fonecomp Ltd v Revenue* [2015] EWCA Civ 39. The *Kittel* test was confirmed as applying to director disqualification cases concerning VAT fraud in *Secretary of State v Warry* [2014] EWHC 1381 (ch).

In this case, whilst the director conceded that he was aware that the Company had entered the relevant transactions, he denied that they were fraudulent or that he had any knowledge of the fraudulent activity.

**However the court held that:**

- The director did know, or wilfully shut his eyes to the fact that all 43 transactions were connected with the fraudulent evasion of VAT or that it would occur at some point in the course of the transactions.
- The lack of due diligence carried out by the company of its suppliers and customers was "*pitiful*" and was undertaken by the director purely as "*window-dressing*".
- On the balance of probabilities, the court was satisfied that the director displayed a lack of "*candour and honesty*" both as regards his dealings with HMRC and his evidence before the court
- Taking its findings and all of the evidence into account, it had no hesitation in finding that the allegations of unfitness were sufficiently serious to merit disqualification.

## Period of disqualification

The Secretary of State had initially proposed that a period of 11 years disqualification for the director (together with his brother) was appropriate. However, counsel acting on behalf of the Secretary of State submitted that a longer period was appropriate particularly in light of evidence that had come out at trial.

In *Warry* it was found that the disqualification in the top bracket of over 10 years should be imposed where a director had been knowingly involved in and played a significant role in VAT fraud, which included cases where a director had wilfully closed his eye to the fraud.

Applying this, whilst the court accepted that a longer period of disqualification would not be imposed upon a director simply because they had contested allegations of unfitness, in this case the director's continuing denials were relevant when assessing the potential threat and danger that he may represent to the public. The director had fought the allegations to the bitter end and his lack of recognition as to his part in the VAT fraud was such that the court ordered a disqualification period of 13 years.

The team at Blake Morgan LLP has extensive experience of dealing with defending directors who are facing disqualification proceedings. If you'd like to discuss a specific issue or case please call 029 2068 6199 to speak to Sophia Farmer or 029 2068 6181 to speak to Paul Caldicott.



**Sophia Farmer**

Solicitor

t: 029 2068 6380

e: [sophia.farmer@blakemorgan.co.uk](mailto:sophia.farmer@blakemorgan.co.uk)



**Paul Caldicott**

Partner

t: 029 2068 6181

e: [paul.caldicott@blakemorgan.co.uk](mailto:paul.caldicott@blakemorgan.co.uk)

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### CARDIFF

t: 029 2068 6000  
f: 029 2068 6380

### LONDON

t: 020 7405 2000  
f: 0844 620 0402

### OXFORD

t: 01865 248 607  
f: 0844 620 3403

### PORTSMOUTH

t: 023 9222 1122  
f: 0844 620 3403

### READING

t: 0118 955 3000  
f: 0118 955 3210

### SOUTHAMPTON

t: 023 8090 8090  
f: 0844 620 3401

[www.blakemorgan.co.uk](http://www.blakemorgan.co.uk)  
[info@blakemorgan.co.uk](mailto:info@blakemorgan.co.uk)

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