Amended pursuant to CPR 40.12 20th October 2020

Neutral Citation Number: [2020] EWHC 2778 (Ch)

Appeal Ref: CH-2020-000091
Case Number: CR-2019-004846

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS LIST (CH)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
ICC JUDGE PRENTIS

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 20/10/2020

Before :

MR JUSTICE MILES

- -

Between :

MR GABRIEL GATHERU RWAMBA	**Claimant/ Appellant**
- and -	
THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY	**Defendant/ Respondent**

- -
- -

Hugh Sims QC (instructed by **Kaur Maxwell**) for the **Appellant**
Hannah Thornley (instructed by **the Insolvency Service**) for the **Respondent**

Hearing date: 15 October 2020

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30 am on 20 October 2020.

Mr Justice Miles :

1. Mr Rwamba applied to the court under section 17(3) of the Company Directors Disqualification Act 1986 for leave to be a director of Match Options Limited and Match Options Franchising Limited ("the Companies") notwithstanding his disqualification. ICC Judge Prentis dismissed the application by his order of 25 February 2020. Mr Rwamba now appeals (with permission of Fancourt J).

2. The judge heard the application at two hearings and gave two judgments, on 17 October 2019 ([2019] EWHC 2669 (Ch)) and 25 February 2020 ([2020] EWHC 352 (Ch)).

3. At the first hearing Mr Rwamba relied on affidavit evidence from Mr Rwamba, his wife, Mrs Kirigo, and Mrs Cameron, a non-executive director of Match Options Limited. The Secretary of State adopted a neutral position and confirmed in advance that he did not wish to question Mr Rwamba, as long as Mr Rwamba agreed certain agreed conditions. The conditions are extensive and stringent, including an obligation on Mr Rwamba to report on his compliance with the conditions, the appointment of auditors with specific responsibilities and solicitors who will monitor Mr Rwamba's compliance.

4. The judge was not persuaded at the first hearing to give Mr Rwamba leave but gave him an opportunity to supplement his evidence and return for a continued hearing. At the second hearing, there was further evidence from Mr Rwamba, Mrs Kirigo and Mrs Cameron. I shall come back to this in a moment.

5. Mr Rwamba was represented before the judge and me by Mr Sims QC and the Secretary of State by Ms Thornley.

6. The factual background to the application may be taken from the full and clear history found in the first judgment:

> "The 2009 Undertaking
>
> [5] Mr Rwamba came to the UK from Kenya in 1996. From 1999 he has been involved in the recruitment sector, and from 2000 has specialised in the recruitment of workers in the care and health industries.
>
> [6] On 9 June 1999 Mr Rwamba incorporated and became a director of Eulink (UK) Limited ("Eulink"), which traded in recruitment before entering administration on 14 March 2007.
>
> [7] We do not have a copy of the first disqualification undertaking, given on 16 November 2009, but we do have a copy of the section 16 letter dated 20 February 2009, and Mr Rwamba's own account in his evidence in support of this application.
>
> [8] The section 16 letter contained a single ground:
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> > "Between 30 June 2003 and Eulink… entering administration on 14 March 2007, you caused [it] to make investments totalling £525,000 to the detriment of Her Majesty's Revenue & Customs".

[9] The particulars identify that whereas liability for PAYE and NIC was stated to be £70,668 in Eulink's annual accounts to 30 June 2003, by administration that liability was put in the statement of affairs at £500,000. HMRC's own claim within the administration was £243,318, but that was estimated because Eulink had failed to file P35s for the year ends 2005 and 2006. Further, while PAYE and NIC payments from 30 June 2003 totalled £160,529, investments recorded in the accounts rose from £45,062 at 30 June 2004 to an estimated £525,000 in the statement of affairs. The administrator realised nothing.

[10] Mr Rwamba tells this Court that the investments were in Kenya; and that he accepts that "[I] had not monitored the financial matters of Eulink in the UK as I should have".

[11] His undertaking was for 4 years, expiring on 17 November 2013 (the "2009 Undertaking").

The June 2010 Permission

[12] Promptly on giving the undertaking, on 30 November 2009 Mr Rwamba made an application under section 17 for permission to remain a director of Match Options Limited (company number 06118219) ("MOL1"). MOL1 had been incorporated shortly before Eulink's administration, on 20 February 2007. Mr Rwamba had been appointed a director on 1 June 2007, and after two others had been appointed for short periods he was joined from 3 January 2010 by Peter Kihara Kihoro (the spelling of the surname is taken from Companies House). Mr Rwamba was a 40% shareholder in MOL1, his brother Simon Wachira Rwamba holding the balance; and he was managing director. MOL1 had purchased the assets and goodwill of Eulink from its administrators in 2007.

[13] It can be inferred from the section 17 order made by Registrar Derrett on 18 June 2010, (the "June 2010 Permission") that interim orders permitting Mr Rwamba to act had been granted. Her order was subject to eleven conditions. Condition 6.2 was that Mr Rwamba "shall procure that [MOL1]… files returns due to HM Revenue and Customs on time, and makes payments due to HM Revenue and Customs in accordance with the schedule of repayment set out in the letter of Peter Kohoro [sic] to HM Revenue and Customs dated 14 January 2010 and makes all other payments due to HM Revenue and Customs on time".

The failure of MOL1

[14] On 11 October 2012 Close Invoice Finance Limited appointed administrators over MOL1. On 1 November 2012 MOL1's name was changed to MO Realisations Limited. The administration continued until 10 April 2013, when MOL1 entered creditors' voluntary liquidation; and on 16 January 2019 MOL1 was dissolved.

[15] In his evidence Mr Rwamba provides considerable detail about the appointment of the administrators and how he regards it as unjust because MOL1 was in his view a solvent company. Given that he accepts that he breached the June 2010 Permission I cannot see the relevance of those points. They were not insisted on by Mr Sims, who fairly draws my attention to the undertaking which

Mr Rwamba gave in 2015 (which I will describe in a moment) acknowledging a deficiency in MOL1 of about £445,000.

The incorporation of MOL2 and MOFL

[16] Again, steps were taken to purchase the business from administration. On 17 October 2012 Eulink Recruitment Ltd (company number 08257332) was incorporated. It changed its name on 5 November 2012 to Eulink Resources Ltd, and then again on 12 November 2012 to its current style, being another Match Options Ltd ("MOL2"). From incorporation Ms Lucy Rumanura has been a director of MOL2, and also took the initial issued share. I will describe other directors and shareholders later.

[17] The re-adoption of the "Match Options" name and change in MOL1's style were doubtless consequent on MOL2's purchase of the business and assets of MOL1 which completed on 22 October 2012. The consideration of £38,500 was met by £6,500 on completion and then 8 equal monthly instalments. The administrators' proposals disclose that of the purchase price £31,995 was attributable to goodwill, and elaborate as follows:

> "The goodwill of the business has been built up over several years by the director and represents a significant asset of the Company. As the Company is providing a service, the business is reliant on the reputation and continuing involvement of the director, therefore justifying the value apportioned to it".

The director must be Mr Rwamba and not his wife, Purity Kirigo, because she had become a director of MOL1 only on 9 October 2012. 21 permanent employees of MOL1 were transferred by the sale to MOL2.

[18] The June 2010 permission allowed Mr Rwamba to act only in relation to MOL1 and not MOL2. Notwithstanding the goodwill attached to him at the point of sale in October 2012, neither on the expiry of the 2009 Undertaking on 17 November 2013 nor since has Mr Rwamba become a director of MOL2.

[19] The company of which he did become a director on the expiry of the 2009 Undertaking, and that briefly, was Cap Global Limited (company number 07686490). This company was incorporated on 29 June 2011, on which date Mrs Kirigo was appointed its sole director and took the only issued share. Mr Rwamba joined his wife on the board between 28 December 2013 and 15 July 2014. Ms Rumanura was appointed as director from 1 June 2015. Mrs Kirigo, now the owner of the 1,000 issued shares, tells the Court in her evidence that the company was incorporated as "a special purpose vehicle to drive the [Match Options] name as a franchisor. [My husband] wanted me to be involved when he developed the franchising model in 2010". Mr Rwamba's evidence is that while the company was incorporated "on the advice of The Franchising Centre… it was largely dormant, and business transacted… has only really started to grow from 2017". It may be that the growth has been since the company was on 16 March 2017 renamed "Match Options Franchising Ltd" ("MOFL").

The 2015 Undertaking

[20] With effect from 28 May 2015 Mr Rwamba was disqualified again under the Act pursuant to an undertaking (the "2015 Undertaking"). The period this time is 6 years. The matters of unfitness are specified as follows.

> "From at least 7 August 2010 I breached the terms of [the June 2010 Permission]… and as a result acted as a director of [MOL1] whilst I knew or ought to have known that I was disqualified from doing so. In particular:… I breached the s 17 Conditions in that I failed to procure and/ or ensure that MOL1:
>
> - made all payments of VAT which fell due in respect of the periods ending June 2010, August 2010, November 2010, December 2010, February 2011, September 2011, November 2011, January 2012 and July 2012. Payments in respect of 6 of these periods were between 1 and 8 days late and payments in relation to two periods were 18 and 19 days late. The full amount of VAT due for the August 2010 period was not discharged at all.
>
> - filed VAT returns on time in respect of the periods ending February 2011, September 2011, November 2011, April 2012 and July 2012. Returns for these periods were between 4 and 8 days late.
>
> - paid Corporation Tax due for the tax years 31 March 2010 and 31 March 2011 on time. Payments in relation to these last tax years were 26 and 11 days late respectively.
>
> - met its obligations to make payments due to HMRC in accordance with the schedule of repayments set out in the letter of my co-director to HMRC dated 14 January 2010 by falling into arrears in or around October 2010".

[…]

[32] At paragraph 19 above I described the current directors and ownership of MOFL. Before looking at the reasons put forward by Mr Rwamba for permission, I must give more details of the main company, MOL2, which days after incorporation in October 2012 acquired MOL1's business from its administrators and has traded it since then.

[33] It is apparent from the evidence of Mrs Cameron that trading for MOL2 was not initially easy. Mrs Cameron is a chartered management accountant. She first became a director on 11 November 2012, replacing Ruth Kitaka who had held office for only 17 days. Mrs Cameron resigned on 4 February 2013 because of the company's cashflow issues, caused in part by what she describes as the difficult relationship with MOL1's administrators.

[34] Her resignation left Ms Rumanura as sole director until on 1 July 2013 Mrs Kirigo took up office.

[35] After expiry of the 2009 Undertaking, on 27 January 2014 there was an allotment of 999 shares in MOL2, the result of which was that Ms Rumanura held

100, Mr Rwamba 300, and Mrs Kirigo 600. In about August 2014, in two tranches, Mr Rwamba transferred his shares to his wife. In August 2018 Ms Rumanura transferred her 10% shareholding to Franchising, owned as we have seen 100% by Mrs Kirigo. Mrs Kirigo is therefore the effective owner both of MOL2 and of MOFL.

[36] Mrs Kirigo tells the Court that she came to this country from Kenya on 8 August 2011 (about 6 weeks after she became sole director and shareholder of MOFL). Before her marriage to Mr Rwamba in 2010 she was "a manager of a Healthcare Group". She was then company secretary of MOL1, transferring upon the sale of its business to MOL2. There she "worked very closely" with Ms Rumanura until becoming managing director on 1 July 2013. She says: "Though I am not an accountant my experience with accountants and finance professionals have provided me with the knowledge and experience which I consider to be a reason for the current success of [MOL2]".

[37] There can be little question that MOL2 is now trading successfully. Its 31 March 2014 accounts show net current assets of £48,452 and shareholders' funds of £125,664. By the 31 March 2018 accounts the figures are respectively £368,708 and £482,601. The draft 31 March 2019 accounts, which is as far as the evidence goes, show respective figures of £632,136 and £736,026.

[38] As managing director, Mrs Kirigo describes her duties as being "responsible for [MOL2] as a whole and in particular the formulation of operational policies and guidelines, their implementation and staff supervision. As well as dealing with the human resources, I instruct the accountant, make decisions in relation to marketing and have considerable experience in the business, both at operational and strategic level". That account, including the last part, is confirmed by Mrs Cameron and indeed by Mr Rwamba.

[39] Mr Rwamba comments that there is sometimes tension between the spouses because of the 2015 Undertaking: "I cannot get involved with management decisions and this puts a huge responsibility on her which creates stress, which is adversely affecting our family. She would like me to do more".

[40] Mr Rwamba on his own account, reflected in the proposals of MOL1's administrators, remains a man with a considerable reputation in the employment and supply of staff in the care and health industries, and that despite the disqualifications. He is associated with the "Match Options" name. As an employee and consultant to MOL2 (the 2018 accounts record a salary of £83,000 and consultancy fees of £58,115), he is involved in "developing the policies and drafting for the management's consideration", necessary under, for example, NHS framework agreements; and as franchising and training coordinator, he trains both franchisees and the staff as recruitment consultants, and trains franchisees and their employees on running their own businesses, as well as ensuring that MOL2's employees have had necessary training.

[41] Mr Rwamba describes the "fundamental transformation" in MOL2's business model "to allow it to thrive in market conditions which have changed over the past few years. Where before the business comprised 15 branches, all owned and ultimately run from the head office in Langley, now [MOL2]

> franchises the Match Options brand, so that there are at present twelve franchisees, each with exclusive rights to use the Match Options name in a defined jurisdiction". He describes the advantages to MOL2 in the franchise model, not least the passing of employees and associated tax risk which would otherwise be the company's on to the franchisees. Each franchisee is, he says, "carefully vetted by the franchise consultant at the Franchise Centre and trained by me". It is the Franchise Centre which recruits franchisees, having first been contacted by Mr Rwamba in 2010.
>
> [42] Besides Mrs Kirigo and Ms Rumanura, who is operations director, MOL2 has two other directors. Mrs Cameron rejoined the board on 4 July 2015 at Mrs Kirigo's request, as a non-executive. As stated in the minutes of the directors' meeting of 6 July 2015, she "had reviewed the company's recovery and thought it better to rejoin and support its growth". She oversees compliance with statutory filings as well as having real-time access to the online accounts system.
>
> [43] The other director is Michael Ndulue, appointed on 7 November 2016. He holds an MSC in finance, and is the business development director, albeit that he has now taken on part-ownership of a franchise himself."

The first judgment

7. Mr Rwamba applied for leave to act as a director in respect of MOL2 and MOFL until the expiry of the 2015 undertaking on 28 May 2021.

8. The first judgment was given on 17 October 2019. The judge set out the facts as recited above. He referred to a number of authorities and directed himself that the test was whether in all the circumstances permission to act should be granted notwithstanding the disqualification. The circumstances include (but was not limited to) "need" and "protection of the public" but no single factor is decisive.

9. At [29]-[31] the judge said more about his approach:

> "[29] While "need" may be better expressed as "cogent reason" (which may, of course, given the unrestricted discretion vested in the Court, be something unrelated to company or commercial matters), it must always be present because the public protection inherent in the disqualification is an inextricable factor, and leave without a cogent reason would abuse that protection.
>
> [30] From the authorities above can be drawn two aspects to public protection. First, that protection must not be unduly undermined by the giving of a permission on conditions which risk not being met. As Scott VC said, that itself involves a balancing exercise. Secondly, it is not enough for an applicant to show that there is no undue risk, because the grant may nevertheless undermine wider public protection, for example the deterrent effect conveyed by the perception of disqualification proceedings.
>
> [31] As it seems to me, while no different test can be imposed where the permission sought is from a disqualification brought about by breach of a previous permission because, while it could have done, the Act makes no special provision for such application, the second aspect of public protection must

> inevitably weigh more heavily in such a case. Permission given to one who has already been disqualified twice, and the second time for breach of an earlier permission, carries with it the unavoidable additional risk that the disqualification regime is perceived as lax and permissive, a perception which would lead to a lowering of corporate standards contrary to a purpose of the Act. So, the reasons in favour of permission are going to have to be that the more cogent if it is to be granted."

10. From [44] onwards the judge addressed the reasons advanced as justifying the application for leave. The principal reason advanced was that MOL2 wanted to pursue plans to expand and grow the franchising model and that Mr Rwamba had assisted in drawing up the business plan in relation to that. Mrs Kirigo did not wish to pursue the plans without Mr Rwamba becoming a director. She wished to spend more time with their 7 year old child. Mrs Cameron said that it would greatly help MOL2 to have Mr Rwamba as a director now rather than waiting until May 2021. Mrs Kirigo said that Mr Rwamba was seen as "Mr Matching Options" and that it would greatly assist her to have Mr Rwamba as a director. She said that she was unable to devote more time to the business because of their young child. Mr Rwamba gave evidence that there were significant opportunities to expand the Companies' franchising business but that this would require further funding, for which he would be able to use his contacts. He explained that, as a test, he had contacted brokers, but they regarded his disqualification as a barrier. He said that some thought had been given to recruiting an outside director but that there was nobody with the same skills and experience as him.

11. The judge said at [48] that these reasons needed to be weighed critically, particularly given the background. This is a reference back to [31] and the idea that the applicant needed to overcome an extra burden because the disqualification was imposed for breach of the conditions of an earlier permission order.

12. He then analysed the evidence concerning the expansion of the franchising model. His reasoning was (in summary) as follows:

    i) Mr Rwamba had not been a director of MOFL since 2010 and had not been a director of MOL2 during the period of its financial success. The evidence did not fully explain why the ongoing expansion and growth of the Companies would be assisted by a Mr Rwamba becoming a director.

    ii) There was no identification of any opportunities for MOL2 which might not exist when the 2015 Undertaking expires.

    iii) There was no sufficient explanation of why the proposed expansion plans could or would not work without Mr Rwamba becoming a director.

    iv) The "business plan" and "projections" for the Companies were stale.

    v) The nature of the business plan was unclear, and it was not explained why additional finance was required since MOL2 had substantial resources of its own.

    vi) The evidence about the difficulties of obtaining finance was also slight and outdated. It consisted of an email of 28 November 2018 which did not

indicate what was sought or whether the position would be any better if Mr Rwamba were to be given leave to act while still disqualified. There was no evidence from any deponent of what other sources of evidence had been investigated.

vii) The relationship between MOL2 and MOFL was opaque, particularly in relation to which was carrying on or invoicing for the franchising business.

viii) The financial position of MOFL did not appear to be nearly as strong as MOL2's. Without more evidence there was concern about the solvency of MOFL.

ix) There was no evidence about the Companies seeking to recruit an outside director who could grow the franchise business and thereby alleviate the pressure on Mrs Kirigo.

13. As to Mrs Kirigo's wish not to undertake more work, the judge was again not satisfied on the basis of the evidence before him.

14. The judge then returned to the balancing exercise. He took account of other factors including that:

i) the breaches of the 2015 undertaking were not dishonest or caused by a desire to prefer one creditor over another;

ii) any leave would embody extensive conditions which would provide protection against future breaches (such as the appointment of auditors, and the attendance of solicitors at meetings). The judge considered that for MOL2 these were appropriate conditions and that there was little chance of Mr Rwamba breaching any conditions or there being a recurrence of the difficulties in paying Crown debts. There was however a greater risk of the latter in relation to MOFL;

iii) the relatively short period left under the disqualification undertaking.

iv) the length of the 2015 undertaking was at the bottom of the *Sevenoaks* middle bracket.

15. The judge stated his conclusions in [72]. He said the grounds for the application were, on the evidence, too fragile to ascribe them much cogency. To give leave would be to undermine the public protection policy within the Act. But, rather than dismissing the application at once, he gave Mr Rwamba the opportunity to pursue the application with further evidence.

The second judgment

16. Mr Rwamba took that opportunity. There were supplemental affidavits from Mr Rwamba, Mrs Kirigo and Mrs Cameron. The Secretary of State remained neutral (subject to the conditions being imposed) but put in an affidavit from Mr Moran, which raised concerns about some of the evidence. Mr Rwamba responded with a further affidavit. The second hearing took place in January 2020. The judge gave the second judgment on 25 February 2020.

17. The judge started by reconsidering the approach he should take. He quoted [30] of his first judgment. He rejected the submission of Mr Sims that if the Court was satisfied that there was no real risk that the conditions of leave would be breached there would be no wider issue of wider public protection, such as deterrence, because the Court would be communicating that there is no risk of harm to the public. He said at [6] that the submission conflated two distinct policies within the public protection, directed at personal risk and public example and referred to the need to weigh the reasons for which leave is sought against both aspects of public protection. The judge said (at [7]) that, in the context of the present application it was of particular importance to bear in mind both aspects of public protection. I read this as a reference back to [30] of the first judgment and the idea that the history meant there was an extra weight tipping the balance against leave.

18. The judge then went on to analyse the further evidence before him.

19. He first addressed the evidence about the trading arrangements between MOL2 and MOFL. These had now been formalised through a Master Franchise Agreement. This had in turn benefited MOFL's accounts which showed a positive balance sheet and profits. The judge said that his concerns about MOFL's solvency were thereby allayed.

20. The judge then turned to the updated evidence about MOL2's business plan and concluded that the Court could have confidence that the company was profitable.

21. The judge then turned to analyse the evidence in support of the contention that MOL2 and MOFL would benefit from having Mr Rwamba as a director. He said at [12] that this interfaced with the second aspect of the public protection policy (i.e. deterrence and public perception). He identified the main reasons for the application as being concerned with the Companies' needs for finance and growth opportunities and whether the Companies would benefit in these respects from having Mr Rwamba as a director; and whether his appointment would enable his and his wife's daughter to receive more home support.

22. As to raising funding, he noted again that MOL2 had healthy resources of its own including a positive balance sheet of more than £616,000 and cash of more than £250,000 and raised the question why outside funding was required. He said that nonetheless the evidence of Mr Rwamba was that more finance was needed and proceeded on this basis. But he regarded the connection between the need for funding and the role of Mr Rwamba as "strikingly slight". He recorded that the evidence had previously consisted of the email from Mr Sankey of 28 November 2018 and that, while Mr Rwamba said that Mr Sankey had recently confirmed that his position remained the same, nothing more had been provided to explain what funding been sought or whether the position would be different if leave were given to Mr Rwamba to act as a director (though still disqualified).

23. The judge also recorded at [15] that while Mr Rwamba said that his contacts in the industry would assist, still no further details were given.

24. The judge recorded at [16] that there had been email communication with Hitachi Capital. The emails appeared to be directed at the position where the disqualification was over, not where leave was given. The judge concluded that there was nothing in

the correspondence to suggest that the funding position would improve if leave were given to Mr Rwamba to act as a director (though still disqualified).

25. The judge observed at [17] that there was no evidence of other lenders' views about Mr Rwamba's being a director. He said that while Mr Rwamba said that funders' questions would continue to be asked until he was given permission to act as a director there was no evidential support for that opinion.

26. The judge then turned to growth opportunities. The new evidence focused on opportunities with a firm called De Poel/GRI ("GRI") which operates in the white collar recruitment area. Mr Rwamba said that this was an area he knew well and in which he had expertise and contacts.

27. The judge said at [22] that the Companies cannot do business with GRI until they can obtain funding for it, but that they had not been able to raise funding.

28. He went on at [23] to describe the evidence showing that the Companies would benefit from Mr Rwamba being a director in connection to the relationship with GRI as exiguous. There was no document between the Companies and GRI addressing any proposed relationship they might establish.

29. At [24] the judge recorded that Mrs Kirigo confirmed that she had not taken any steps to investigate whether there was a suitable outside appointee to take on the role of director.

30. At [25] the judge turned to the question why Mr Rwamba could not continue to assist the Companies in his existing role as a consultant or employee. Mr Rwamba said in evidence that he was able to assist but that there was a fine line between acting as an employee and being seen as a de facto director. The judge said in [26]-[27] that Mr Rwamba had been able to tread that line for almost the whole of the previous decade and that he had been able to do so without crossing it. There was a lack of adequate evidence as to the reasons why he could not still do so.

31. At [28] the judge turned to the more generalised opportunities in relation to franchising. The evidence was that Mr Rwamba had particular expertise in this area, lacked by others including Mrs Kirigo. The judge concluded that Mrs Kirigo was over-modest while Mr Rwamba's evidence was self-serving. The Companies had expanded under Mrs Kirigo's management, with the assistance of Mr Rwamba as a consultant, but without his directorial involvement. As to knowledge of accounting, the judge explained in [31] that Mrs Kirigo's first affidavit had referred to her experience in this area. Mrs Cameron, a director of MOL2 is a chartered management accountant. Mr Rwamba was once but is no longer a member of the Institute of Financial Accountants. The Companies can call on their outside accountants for advice.

32. The judge then turned to consider the position of the daughter. The judge recorded at [32] that she has special educational needs, that Mrs Kirigo wishes to spend more time with her, and that appointing Mr Rwamba as a director would allow that. The judge concluded that the evidence was still lacking in detail. He concluded that "[t]his head does not seem to me to rise above a description of typical pressures on any working parent".

33. The judge stated his conclusions at [34]-[36]. He noted that Mr Rwamba had recognised his earlier errors; the length of the 2015 undertaking; the short period of the proposed permission; the absence of any dishonesty; the Secretary of State's non-opposition; and the absence of risk of breach of the proposed conditions of leave or of wider risks in the management of the Companies. He weighed these matters (which largely favoured the application) in the balance. But he nonetheless concluded that Mr Rwamba had fallen short of establishing sufficiently cogent reasons for an appointment as a director to meet the concerns as to wider public protection, including the perception of the disqualification regime, especially in the particular context of disqualification for breach of a previous undertaking. He therefore dismissed the application.

Legal principles

34. I was referred to a number of authorities including *Re Tech Textiles Ltd* [1998] 1 BCLC 259; *Re Dawes & Henderson (Agencies) (No 2)* [1999] 2 BCLC 317; *Re TTL Realisations Ltd* [2000] 2 BCLC 223; *Re Barings plc (No 3)* [2000] 1 WLR 634; *Re Morija Plc* [2007] EWHC 3055 (Ch); *Haughey v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 3566 (Ch). I draw the following general guidance from these cases and section 17 itself:

i) The court has a discretion under section 17 to allow a person who has been disqualified to be a director of a company or be concerned or take part in the promotion, formation, or management of a company.

ii) The onus is on an applicant under the section to persuade the court to grant permission. The starting point when approaching the jurisdiction is that the applicant has been held unfit to be a director for the period of the order (or has accepted the equivalent when giving an undertaking). Nonetheless leave may be given in a proper case.

iii) It is for the court (and not for the Secretary of State) to be satisfied that it is appropriate to give leave for the applicant to be a director etc.

iv) The discretion under section 17 to give leave is unfettered. It is wrong to seek to add glosses or preconditions. The question for the court is whether in all the circumstances it is appropriate to give leave; and in approaching this question the court balances all the relevant factors.

v) Though it is usual to establish that the Company has a "need" for the applicant to be a director or involved in the management, this is not a precondition. For instance, the appointment may be made to allow the director to obtain a tax advantage.

vi) The court should, among other things, have regard to the nature and seriousness of the conduct that led to the disqualification order or undertaking and the length of the disqualification. Where that conduct was dishonest a court may be reluctant to give leave.

vii) The court should, when deciding whether to give leave for a director to act as a director have regard to the purposes of a disqualification order. These include

(i) protecting the public directly by prohibiting the disqualified person from acting and (ii) deterring both the particular director and others from the kind of conduct that has led to the order.

viii) Leave should not be too freely given as this would tend to undermine the protective and deterrent purposes of a disqualification order. The court would not wish anyone dealing with a director to be misled as to the gravity of a disqualification order.

ix) On the other hand, the power of the court to grant leave under section 17 is inherent in the disqualification regime and in an appropriate case it may serve the public interest to allow a disqualified person to be a director of a specific company.

x) Moreover, the fact that the applicant for leave has agreed to the imposition of conditions designed to ensure high standards of corporate conduct may itself be seen as promoting the policy of deterring misconduct.

xi) Where a judge has decided to give or decline leave under section 17 an appellate court will only allow an appeal where the judge has taken into account irrelevant factors or failed to take into account relevant ones or acted outside the generous ambit of his or her discretion or has come to a conclusion which is plainly wrong.

The grounds of appeal

35. There are two grounds of appeal. The first is (to summarise) that the judge erred in (a) treating the perception associated with granting permission as a free-standing factor in the exercise of the discretion, whereas it is intimately tied in with the question of the need for public protection; alternatively (b) giving public perception undue and disproportionate weight.

36. The second is that the judge was plainly wrong in his approach to the evidence provided by Mr Rwamba, in particular in concluding that there were insufficiently evidenced advantages to Mr Rwamba being permitted to act as a director since: (a) the Secretary of State did not require Mr Rwamba or his witnesses to be cross-examined, nor did the judge require them to be, and the judge made findings not open to him; and (b) he made findings or reached conclusions which were inconsistent with the evidence or involved plain errors of logic or reasoning.

Ground 1

37. The first ground concerns the judge's approach to the public policy aspects of a disqualification order.

38. I have already set out the judge's reasoning in [30]-[31] of his first judgment and [6]-[7] of his second judgment.

39. The authorities show that the public protection policy underlying disqualification orders has two strands or aspects. One is removing the risk of the disqualified person harming the public through the repetition of the corporate misconduct or abuse which

led to the order. It does so by taking him or her off the road for the duration of the order. The second aspect is deterrence. Directors may be expected to maintain higher standards of corporate conduct if they potentially face disqualification for falling below them. The judge highlighted the two aspects of public protection in his judgments. At various points he referred to the second, deterrence, as involving "public perception".

40. Mr Sims did not take issue with deterrence being part of the relevant public policy. His submission was that the judge went wrong in thinking that deterrence has special weight merely because the disqualification was for breach of the conditions of an earlier order for section 17 leave, without more.

41. I accept this submission. The sequence of events (earlier leave order, breach, disqualification, fresh leave application) is no doubt relevant, but it does not justify putting greater weight into the scales against the applicant. Where the applicant has breached earlier section 17 leave conditions, been disqualified as a result, and again sought leave, a court will naturally wish to satisfy itself that there is no material risk of breach of the second leave order, including any conditions attaching to it. Someone who has breached one leave order may be thought more likely to breach a second. But if the court (having considered that point) is satisfied on the second application that there is no material risk of breach of the second order or its conditions, the case is the same as any other application for leave. The court must still consider the impact (if any) of giving leave on the general deterrence of disqualifications, but that is common to all leave applications.

42. Deterrence is baked into the disqualification regime. It must be considered in every case. The court must consider the impact on deterrence whenever it is asked for leave. That is why the court should not be too ready to do so. But there is no reason to augment the weight to be given to deterrence merely because the disqualification arises from breach of any earlier permission. The court must always consider the reasons for the disqualification order but there is no reason to say, generically, that giving further leave to a director who has been disqualified for breach of an earlier permission will (without more) undermine the policy of deterrence. There will also be differences between cases: breaches of earlier permissions may be dishonest, reckless, or innocent, and the culpability of the applicant for what has happened, and the seriousness of the consequences are likely to feature in the court's exercise of its discretion. But these are things that fall to be considered on any application for leave, for the court has always to consider the nature and seriousness of the conduct that led to the disqualification. The judge appears to me to have thrown the blanket too widely and concluded that any application for leave under a disqualification which itself arises from breach of an earlier order leave attracts a higher burden.

43. The judge appears to have considered that the public would perceive the system as unduly lax were the court to give permission in the present case. But any question of perception should be assessed by postulating a fair minded and informed member of the public, and not one who has been told the bare headlines. It may be tested this way: suppose leave were given and the fair minded observer were asked how this would affect his or her views about the seriousness and force of the disqualification regime and orders made under it. The observer would (being informed) understand some general things about the regime and some specific ones about this case. He or she would understand (generally) that leave is an inherent part of the disqualification

regime, that it requires judicial scrutiny, and that it will only be granted where the court is satisfied on proper grounds; and (specifically) that the applicant had carelessly (but not dishonestly) breached the earlier permission order, had apologised, and had offered a series of conditions which imposed stringent controls on the business to minimise the risk of breach, that the Secretary of State did not oppose an order including those conditions, and that the court was satisfied that there was no material risk to the public of future breaches of the conditions or of further corporate misconduct were leave to be given. The observer would also understand that the process of agreeing and putting such conditions in place is time-consuming and costly and is not undertaken lightly. I do not think that the fair minded observer would think that the grant of leave would undercut or weaken the disqualification regime generally, or the disqualification of Mr Rwamba specifically. The observer would not, to my mind, attach special weight to the fact that the disqualification arose out of an earlier permission order.

44. For these reasons I consider that the judge erred in giving special weight to the public policy of deterrence merely because the disqualification arose from the breach of an earlier permission order. As I read the two judgments, this formed a key part of his reasons for dismissing the application. This flaw in the discretionary exercise undercuts the judge's conclusion. The first ground of appeal therefore succeeds. It is therefore unnecessary to consider the second ground of appeal, which involves a challenge to the judge's findings of fact.

45. Since I have concluded that the judge took the wrong approach, it is for me to exercise the discretion afresh.

46. As the judge said, there are a number of points which favour leave. These are: that Mr Rwamba had recognised his earlier errors; the length of the 2015 undertaking; the short period of the proposed permission (which is now even shorter); the absence of any dishonesty; the Secretary of State's non-opposition; and the absence of a risk of breach of the condition or of wider risks in the management of the Companies. I agree with the judge's conclusions on these points.

47. I also agree with the judge's conclusion that both Companies are solvent and trading profitably. I was also given some more recent accounting material which confirmed this.

48. Mr Sims argued that there were three main areas in the evidence which further supported the application. The first was that allowing Mr Rwamba to act as a director would assist in the Companies' efforts to raise external funding. All of the witnesses state that the Companies wish to expand their businesses and that external funding would assist in this. The judge appears to have accepted this evidence but was concerned about the absence of compelling evidence that having Mr Rwamba as a director would assist the Companies in raising finance. Having considered the emails of November 2018 Mr Sankey, the broker, I consider the Companies would stand a better chance of raising funding if they were owner-managed. Mrs Kirigo fits this description, but she has said that she wishes to step back from the business and does not wish to lead its efforts to expand. It would to my mind assist fund raising efforts if Mr Rwamba was a director of the Companies.

49. The second reason for seeking Mr Rwamba's appointment as a director concerns the ability of the Companies to expand their franchising business, particularly in the white collar employee market. The evidence shows that the Companies would be assisted in these efforts by having a director with experience and expertise in accounting (both for internal reasons and to assist with training of franchisees). Mr Rwamba has that experience. Mrs Kirigo does not. It might be possible for Mr Rwamba to continue to promote the growth of this part of the business as a consultant, but I think there is force in the submission that, as this aspect of the business expands, and his own involvement in it grows, it will become more difficult for him to ensure that he does not become involved in the management of the Companies. That may be a difficult line to draw and it is understandable that leave is sought. Mrs Kirigo explains that when she deals with customers and franchisees they often wish to come back to Mr Rwamba, who appears to be seen as integral to the business. I am satisfied that it would assist the Companies' ability to grow their business to have Mr Rwamba as part of their public face as a director. I do not think that it is an answer to this point to say that the Companies have been able to trade profitably in the past using his services as a consultant: see *Re Barings (No 3)* where a similar argument was rejected.

50. The third area of evidence highlighted by Mr Sims was the wish of Mrs Kirigo to spend more time with her daughter, who has special educational needs. Mrs Kirigo has explained that she wishes to spend more time with her daughter and less time working at the Companies. This consideration does not directly affect the business of the Companies, but that does not render it irrelevant: see *Re Dawes v Henderson*. I also note that the Companies have done little to seek an outside director, but that is understandable in light of Mr Rwamba's close historical involvement in the business and the knowledge that has given him. I also note that the Companies are not large businesses. I consider that the wish of Mrs Kirigo as director to step back from the business in favour of Mr Rwamba is a further factor I can take into account.

51. Then there are the extensive and comprehensive conditions annexed to the draft order. These include financial restraints; personal obligations on Mr Rwamba to ensure the filing of tax returns on time; an obligation to instruct independent auditors to report to the board any matters of concern within 7 days and a duty to comply with any such concerns; an obligation on Mr Rwamba to provide a board report confirming compliance with the conditions; a duty on him to instruct solicitors to attend monthly board meetings and to ensure that Mr Rwamba has met his compliance reporting obligations, and to report any matters of concern to the board; an obligation to ensure that the Companies hold monthly board meetings; and a condition that Mrs Cameron shall remain as a director. Like the judge I conclude that there is no material risk, in light of these extensive and prescriptive conditions, that Mr Rwamba will breach the terms of the proposed order or otherwise misconduct himself as a director of the Companies for the duration of the leave order. As well as ensuring that the risk to the public of misconduct is minimised, I consider that these steps should be seen as a positive benefit as they will promote enhanced standards of corporate governance.

52. I come back to deterrence, which was, in the end, why the judge refused leave. As already stated I do not think that a fair minded observer would consider that the grant of leave in the present circumstances would go against the grain of the disqualification regime generally or diminish the seriousness of the 2015 undertaking

by which Mr Rwamba was disqualified as a director. The giving of leave is inherent in the disqualification regime, the public is fully protected by the conditions of leave (which have been considered and commented on by the Secretary of State), and there are good reasons for allowing Mr Rwamba to act as a director of the Companies.

Conclusion

53. The appeal is allowed. I shall grant Mr Rwamba permission to be a director of the Companies subject to the conditions set out in the schedule to the draft order.