

Seeking court permission to become or remain a director despite disqualification

36 frequently asked questions answered



1 Am I ever allowed to be a director whilst disqualified?

Section 17 of the Company Director Disqualification Act 1986 allows a person in certain circumstances to remain as a director (or be involved in the management of a company) despite being subject to a Director Disqualification order.

In order to gain the benefit of the court's permission pursuant to Section 17 of the Company Director Disqualification Act 1986, you will need to make a formal application to court supported by sworn written evidence.

2 Where will an application for permission to act as a director be heard?

Ordinarily this will take place in the court which had jurisdiction to wind up the company, your conduct in which, led to the original disqualification.

3 Can my application for permission be heard in a different court if I want?

You can always apply to have it heard elsewhere (often it is better to have a case heard by a Judge experienced in company matters), but there is no guarantee it will be transferred.

4 Will I have to give oral evidence at court as part of my application for permission?

Whilst technically you might have to give oral evidence, it is highly unlikely. Applications are ordinarily dealt with on the basis of the written affidavit evidence only.

The Secretary of State has the power to give evidence himself on any relevant points or call witnesses as part of its job to protect the public interest. However, this rarely happens. Any issues are often ironed out in correspondence beforehand.

5 What happens if I simply carry on as before without permission?

If you act in breach of your director disqualification order, the penalties can be severe.

- 1. It can lead to imprisonment for up to 2 years and/or a fine [section 13 of the Company Director Disqualification Act 1986].**
- 2. You can be held personally liable for the company's debts for the time you acted in breach of the disqualification order [section 15 of the Company Director Disqualification Act 1986].**

The Secretary of State does check up on disqualified directors from time to time. They can contact staff, suppliers and other people to determine whether a disqualified director is still essentially running a business.

6 What constitutes acting in breach of a director disqualification order?

1. Acting as director.
2. Acting as receiver of property.
3. In any way whether directly or indirectly becomes concerned or takes part in the promotion, formation or management of a company.

7 What happens if someone else acts on my behalf?

That person can be disqualified as acting as a director and can face a fine or imprisonment. It is not a way around a director disqualification order.

8 What happens if I didn't realise I was taking part in the management of a company?

This doesn't matter – you are still liable. The offence is what is known as a “strict liability offence”, meaning that you are liable no matter the circumstances. What you thought you were doing at the time whether innocently or not is of no relevance.

9 Can my disqualification be limited to certain areas/tasks?

No, partial or conditional disqualification is not permitted. The court only has jurisdiction to make a “complete” disqualification order.

In addition, the court cannot unilaterally decide to exclude a particular company from the terms of the order; it is absolute and covers all companies.

10 Do I need a separate application for permission or can I do it as part of my trial in the main disqualification proceedings?

It can be dealt with as part of your trial, but it is not recommended as you will have to demonstrate why it is not practicable to issue a separate application.

11 What can I do if I am not sure if my current job means I am acting in contravention of a director disqualification order?

The Civil Procedure Rules (the court rules governing litigation) allow a person to apply to court for “declaratory relief” (i.e. a ruling from the court) that the activities a person proposes to undertake are not prohibited under the terms of the order.

If this is done, the court considers the question of “justice” to both the claimant and defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why the declaration should not be made.

An application for declaratory relief might for example, be relevant for a disqualified person wanting to be a consultant. We can provide further assistance on this application.

The application needs to be served on Secretary of State (as custodian of the public interest) and it would either comment on or oppose the application.

In reality, if you are considering an application for declaratory relief, it is best done in tandem with a formal application for permission to remain/become a director pursuant to section 17 of the Company Director Disqualification Act 1986.

An application for declaratory relief might for example, be relevant for a disqualified person wanting to be a consultant. We can provide further assistance on this application.

12 How long after being disqualified must I make an application for permission to remain a director of an existing company?

Basically, once a disqualification order is made (or you give an undertaking to be disqualified), you have 21 days to resign your current directorships and/or cease being involved in the management of a company. If you make an application within 21 days and are granted permission, you don't have to resign your directorships or cease to be involved in the management of a company.

13 What can I do if I can't get my application heard within 21 days?

- 1. You resign your position and wait until you can obtain a court date to hear or you could alternatively apply for an extension to the 21 day period whilst you get your application in order.**
- 2. You could apply for a "stay" of the disqualification order pending the application for leave being dealt with (although there is limited jurisdiction by the court to do this).**
- 3. You could invite the court to order that interim permission to act should be granted pending the hearing of the substantive application for permission – to preserve the status quo.**
- 4. You could ask the court to grant permission for a specific purpose for a specific period of time.**

14 What happens if my leave application is refused?

There is the ability to appeal an adverse order in certain circumstances.

15 What does the court consider when granting permission applications?

The court's powers are wide and unfettered due "to the infinite variety of circumstances which may apply to future cases not before the court". Each case depends entirely on its own facts. They will take in to account the following:

- 1. That the regime is designed to protect the public and not be penal. The idea is to protect the public from a recurrence of the conduct which led to the disqualification order being made in the first place.**
- 2. There is no presumption in favour of permission being granted. The onus is on the applicant (i.e. you) to persuade the court, on the balance of probabilities, to grant the order.**
- 3. That the grant of permission is a privilege, not a right.**
- 4. That permission will only ever be granted for specific named companies, not on a general basis.**
- 5. That each case will be looked at on its own merits.**

16 Does it matter if I have been involved in a number of insolvent companies?

It can have a bearing as the court is allowed to consider the number of insolvent companies a person has been involved in when deciding to grant permission. In order to overcome this, it is sensible to offer an explanation as to the other insolvencies to the court which will be done in your affidavit evidence in support of the application.

17 Will the court impose any conditions on me when granting permission?

The answer is almost certainly yes. It will apply conditions it believes are needed to protect the public from what happened before, happening again. A list of potential conditions can be found on our website.

18 What happens if I breach a condition of my director disqualification order?

If a condition in the director disqualification order imposed by the court is breached, the following happens:

- 1. The permission ceases to exist.**
- 2. You would then be in possible breach of the original director disqualification order and subject to the criminal consequences as set out above – either a fine or imprisonment.**

19 What happens if I think I am going to breach a condition of my permission?

If you can foresee a situation where one of the original conditions of your leave will not be possible to continue with, you must make an application to the court in advance of the change to vary or discharge that particular condition.

For example, the original condition might relate to a particular firm of accountants being retained as the company's advisors. If that firm of accountants decides to cease trading or stop acting for the company for any reason – you would have to get permission of the court to alter the original condition to allow another firm of accountants to be appointed in its place. The key is to anticipate any possible problems and seek the court's permission for a change to the original order before the breach takes place.

20 What happens if the breach of condition is not foreseeable?

If you can't foresee the event which would cause a breach happening (e.g. a fellow director of the business dies unexpectedly), the order will normally allow you a certain period of time to rectify the matter. However, you must act promptly to remedy the situation (e.g. appoint another director in his/her place) whilst your application to court is to be heard.

21 Can I remain a sole director of my business when seeking permission?

The answer is no.

The court will require a co-director of sufficient standing to be appointed – normally a qualified accountant or someone of similar standing. The longer the period of disqualification – the more qualified that person needs to be.

22 Can the conditions in my order for permission be varied at a later date?

Yes – so long as the original order is worded in such a way as to allow this.

However, the court is highly unlikely to allow retrospective variations even though the case authorities suggest it is a possibility.

23 Can the court grant permission for a limited period only?

The answer is yes. It may do this because:

- 1. it wants to be convinced that the company can trade on a solvent basis in the future and thus allow permission for a short period of time to allow the person making the application time to convince the court that leave should then be granted for the entire period.**
- 2. it might not be sure if the conditions can be complied with and wants the company to try to implement them and then come back to court.**
- 3. it might just allow it to enable the applicant time to complete a single transaction which is important to the company.**

24 Is there a requirement to demonstrate a "need" to be a director in the business when seeking permission?

The strict answer no, but it is something which the court will undoubtedly look at and it is true that the greater you demonstrate a "need" to be in the business, the more helpful it is for your prospects of success.

Francis Wilks & Jones acted for a director in the case of *Re Aitch Holdings Limited* [2002] all ER (D) 236 when we successfully obtained leave for our client to remain a director for 17 separate companies in a single application. When giving judgement, Justice Lloyd did comment on the obvious “need” for our client to remain a director of all 17 companies and the importance of it in the success of the application.

25 Does it matter how long I have been disqualified for previously?

Bluntly – Yes.

The longer the period of your original disqualification, the harder it is to get leave. This is due to the fact that the court views a longer period of disqualification as more “serious”. Equally, granting leave for someone disqualified for a long period of time is seen as undermining the “deterrence” factor of the Company Director Disqualification Act 1986.

26 At what period of disqualification does seeking permission become impossible?

There is nothing to stop a person trying to seek leave for any period of qualified that person needs to be. However, the courts are extremely reluctant to grant permission to a person disqualified for anything over 7 years. Even at 7 years it was only with very stringent conditions attached and it was an unusual case.

It is more likely that permission will be granted for someone in the “lower bracket” of 2-5 years. If you are being offered an “undertaking” for a period higher than that – you might want to consider trying to bring the period of disqualification down in to the lower bracket of 2-5 years as it will allow you a far better chance if you later decide you want to be a director of a business. To learn more about this, download our handy tips booklet about how to lower your period of disqualification.

27 What if my conduct running other companies before my disqualification was fine?

If a person ran other companies successfully (other than the one which lead to his disqualification), it is possible to draw the court’s attention to this when making an application to remain (or become) a director of a company.

Indeed, if a person has been disqualified and then later wants to obtain permission to act as a director, the court will take in to account the way in which he has run his business as a sole trader or partnership, if that is what he has done.

28 In how much detail will the court examine the company of which I want permission to be a director of?

The answer is that they will look at it very closely.

The court is likely to look at the nature of its business, the size of the company, its financial standing (both past and present), the number of directors, the number of employees, the number of creditors and the risks involved in the company’s business model/market place. These are all taken in to account when considering whether history is likely to repeat itself.

It goes without saying that having a “properly” run business at the time of the application is essential to a person’s chances of success.

29 Is my disqualification public knowledge?

Section 18 of the Company Director Disqualification Act 1986 requires the Secretary of State to maintain a register of disqualification orders and undertakings which must be open to any member of the public upon payment of a prescribed fee. They may also publicise the disqualification by advertising it in the local press where the individual lives, occasionally in the national press and also on the insolvency Service’s website

However, none of this really gets the matter in to public knowledge and on occasion, when granting permission to remain a director, the court can direct that other directors of the business or third parties such as the company’s bankers, suppliers, customers and other people who regularly deal with the company are informed.

However, the courts are also mindful of the prejudice this can cause the rest of the company and the damage it might do to the business – as one judge put it:

“a balance has to be struck between on the one hand publicising the making of orders or the giving of undertakings and on the other hand rubbing the disqualified directors’ noses in the fact of their disqualification”.

30 Can the court order me to pay money back to the creditors of the company as a condition of granting me permission?

The answer to this is no.

However the court can impose indirect financial penalties on an applicant such as preventing a person taking security over company assets, restricting his salary, restricting when dividends are paid, requiring the company to remain adequately capitalised.

31 Will the court consider a person’s general character and reputation when deciding whether to grant permission?

Yes, in so far as it was relevant in the original reasons for disqualification for example, if a person misappropriated company assets or came across as unreliable or dishonest.

It is fairly limited though. As a judge once said, “it would not be relevant in the least whether a director was a good family man or whether he was kind to animals”.

32 Is my age or state of health relevant at all when applying for permission?

The court has been known to look on people more kindly who are nearing retirement age and may otherwise find it hard to gain employment elsewhere. In addition, the court will take in to account that on the whole, an older person will have more “business experience” than a younger person. Health will only be relevant if it means a person will be unlikely to discharge his duties as a director.

33 Will it matter if i have "admitted" my guilt by way of an undertaking?

The court might be more amenable to granting leave to a person who has agreed to be disqualified by way of an undertaking rather than chosen to fight the case all the way to trial and lost. It can be seen by the courts as that person having "learnt his/her lesson".

34 Is it relevant that I would be disadvantaged having to trade as a sole trader or in a partnership?

The answer is yes – if you can show that having to change the corporate structure would have a significant bearing on the profitability of the business. An example of this might be incurring a significant capital gains tax liability as part of winding down the company.

35 What if my suppliers will only trade with a limited company?

This can be used as an argument when seeking permission, but it will be severely tested by the courts to establish that it is indeed the case. The court will look to see whether in fact, the relationships with the clients of the company are in reality personal ones which a director has with them individually and which would continue in any event either in a partnership or as a sole trader.

36 What if the banks will only lend to a company?

This can have a bearing and in the leading case of Re Aitch Holdings Limited [2002] all ER (D) 236 which Francis Wilks & Jones acted on, permission for leave was given in relation to 17 separate companies in a single application, partly due to the fact that each company was a special purpose vehicle set up for separate construction projects as required by the bank as part of a condition of funding.

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