

# Reducing a period of disqualification

14 frequently asked questions



## 1 Is it possible to reduce my period of disqualification?

The answer is Yes, but only where the disqualification has commenced by way of an undertaking offered under Section 1A of the Company Directors Disqualification Act 1986 (a “Disqualification undertaking”).

## 2 What are the statutory provisions dealing with this?

This aspect of the director disqualification regime is governed by Section 8A of the Company Director Disqualification Act 1986.

Section 8A states:-

- 1. The court may, on application of a person who is subject to a disqualification undertaking -**
  - a. reduce the period for which the undertaking is to be in force, or**
  - b. provide for it to cease to be in force.**
- 2. On the hearing of an application under subsection (1), the Secretary of State shall appear and call the attention of the court to any matters which seem to him to be relevant, and may himself give evidence or call witnesses.**

It is important to understand therefore that Section 8A can only be used by people who have been disqualified by having given a voluntary undertaking.

## 3 How far can my period of disqualification be reduced?

For disqualification undertakings entered into following the insolvency of a company (under Section 7(2A) of the Company Directors Disqualification Act 1986), It is important to understand that the court cannot vary a period of disqualification below the statutory minimum which is currently 2 years.

However, as an alternative, if less than two years have passed since the disqualification undertaking was entered into, an individual can apply under Section 8A (1)(b) for it “to cease to be in force”.

For all other disqualifications (Sections 2, 8, 9B) a disqualification undertaking can be reduced to any period (but not nil, as the disqualification undertaking cannot be annulled or rescinded – see below).

## 4 Can this procedure be used to overturn my disqualification undertaking completely?

The answer is No.

This procedure will never enable an individual to rescind or annul a disqualification undertaking; it can only reduce the period of the original disqualification.

## 5 If it doesn't overturn my disqualification undertaking, why would I make the application?

A successful application can lead to a person no longer being subject to disqualification.

For example, if a person has "served" 7 years of a 9 years disqualification period, that person still has 2 years left to run before he/she can act as a director again. If that person makes a successful application under Section 8A and 2 or more years or more is "knocked off" the original 9 year period – the effect is that the original disqualification has now expired as that person has already served 7 years of the disqualification.

However as stated above, it is important to understand that this procedure will not have the effect of the original disqualification never having existed in the first place.

## 6 Isn't it more straightforward just to apply to court for permission to be a director if I now want to get back in to business?

There is the ability for a person to apply for permission from the court to act as a director despite having been disqualified. This is allowed under certain circumstances by the court pursuant to Section 17 of the Company Director Disqualification Act 1986. The procedure for this is covered elsewhere on our website.

However, the courts are very reluctant to grant permission for a person to act as a director of a business if his/her original disqualification is over 8 years. Indeed, anything between 6-8 years is difficult.

There is also the difficulty that the Secretary of State is required by the court to raise public interest concerns and effectively acts to "vet" such applications. This can make the burden of satisfying the Secretary of State and the court very heavy and potentially expensive. Alternatively, an application under Section 8A is a more straightforward matter which is dependent on evidence, although great importance will still be placed on the Secretary of State's concerns by the court.

Therefore, if you find yourself disqualified for 8 years or more, your only option if you want to get back into business at director level is to try and get the original period of disqualification reduced to a period where the court will not automatically refuse an application for permission to be a director – i.e., you need to aim to get the original disqualification down to no more than 6 years if possible. Then you can make a subsequent Section 17 application without it automatically getting rejected due to the length of the disqualification.

## 7 Can I challenge the original allegations referred to in the disqualification undertaking?

The answer is no.

Section 8A cannot be used to amend the reasons cited (and agreed to) in the original undertaking and which gave rise to the disqualification. It is simply a mechanism to reduce the overall period of disqualification where the undertaking may have been entered into under oppressive circumstances.

## 8 Is it possible to vary the original disqualification undertaking by agreement?

The answer is no.

It is not possible for a disqualification undertaking to be discharged or varied by agreement between the parties. It has to be something ratified by the court and the Secretary of State has no discretion to authorise this even if he agrees with the reduction sought.

## 9 What is the court's general view on these applications?

Section 8A is not a well-trodden path in terms of legal applications. The main case on the subject is called *Re: INS Realisations Limited v Jonkler and Spencer-Jonkler*.

In that case, the court made it clear that variation of a disqualification undertaking would only be permitted in "special circumstances". The court was very clear that on the whole, it is reluctant to go behind the disqualification undertaking and was mindful not to be seen to be leaving the door open to disqualified directors to essentially circumvent the effect of a voluntary undertaking by then later applying to reduce the period it was given for. It needs to be remembered that the courts are there to ensure that the public interest is protected pursuant to the disqualification regime and they do take this role seriously.

However, the legislation exists for a reason and subject to a satisfactory explanation of the grounds for seeking such a reduction, there is no reason why this should not be available to you.

## 10 On what grounds will a court reduce the original period of undertaking?

The court may be willing to reduce the original period of disqualification on the following grounds:-

- 1. where the consent of the person giving the original undertaking was in some way vitiated so that he/she never really consented to the undertaking period. This section would cover, for example, undue influence, duress or mistake in signing the undertaking.**
- 2. some fundamental mistake was made and discovered after the disqualification undertaking was accepted.**
- 3. that new information has become available to the person who gave the undertaking that was not available to that person at the time when the disqualification taken was entered into.**
- 4. when a review of other case law relating to similar grounds for the original disqualification demonstrate that the original disqualification period offered by the Secretary of State was excessive.**
- 5. where the Secretary of State has acted in a deliberately oppressive manner in obtaining the undertaking.**

## 11 What if I didn't have or couldn't afford proper legal advice at the time I gave the original undertaking?

In the Jonkler case mentioned above, the Judge made it clear that this is something they will rarely take in to account – mainly due to the number of cases which would fall in to this category.

## 12 Is the procedure complicated?

The application is relatively straightforward.

The main part is drafting affidavit evidence (i.e. written statements). These need to cover both the reasons for the original disqualification in detail and then set out the grounds why the original period of disqualification should be reduced.

That evidence is served on the Secretary of State and it is likely it will then be referred to one of his panel solicitors to deal with. They may respond with their own written evidence or simply attend the hearing before the Judge to make comment.

The length of the hearing will depend on the volume of evidence the Judge has to consider. Normally you could expect the hearing to last no more than half to one day. You would also need to instruct a barrister to attend the hearing to present the case to the Judge and deal with the legal argument.

## 13 Does the court have to reduce the period?

The answer is no.

It might refuse to do so, on the basis of the evidence presented. However, we would not advise you to proceed with an application if the grounds fell short of that required to justify an order under this section.

## 14 How long will the court reduce the period for?

Each case is based on its own individual merits. As such, it is impossible to know firstly whether it will be successful and secondly, how long the Judge might reduce the period of disqualification for.

For some people nearing the end of the disqualification period, it might simply be best to “wait it out” rather than make an application.

Another word of warning is that even if a court does reduce the period of disqualification, it might only do so for a short period – e.g. 6 months or a year. Whilst this is better than serving the entire period of the original disqualification, you need to assess the cost / benefit of such a reduction.

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