[2024] UKPC 26
Privy Council Appeal No 0076 of 2022

JUDGMENT

Karen Allen and 2 others (Respondents) *v* Registrar of Companies and another (Appellants) (Montserrat)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Montserrat)

before

Lord Reed
Lord Briggs
Lord Hamblen
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON
5 August 2024

Heard on 4 July 2024

Appellant
Renee Morgan
Claire Colonnese
(Instructed by Signature Litigation LLP)

Respondent
Laura Newton
(Acting pro bono)

LORD BRIGGS:

Introduction

1. This is an appeal by the Registrar of Companies (the first appellant) and Financial Services Commissioner of Montserrat (the second appellant), with the special leave of the Privy Council, from an order of the Court of Appeal of the Eastern Caribbean on 14 January 2022. That order allowed in part an appeal against the order made by Morley J on 7 May 2019 for the disqualification of three persons, Steven Fagen, Marie Carole Lidbetter and Karen Allen, who are the respondents to this appeal, from acting as directors of any Montserrat company for periods of four years, three years and one year respectively.

2. The Court of Appeal varied Morley J's order in two respects: first, by providing that Mr Fagen and Ms Lidbetter should only be disqualified from acting as directors of three named companies, Montobacco Ltd, Emerald Metal Co Ltd and 888 International Ltd, and second, by setting aside altogether the order for the disqualification of Ms Allen. On 10 February 2022 the Court of Appeal stayed its order pending the Registrar's appeal to the Privy Council, for which it granted permission on conditions. The first appellant did not comply fully with those conditions within the time specified, and the first appellant's application for an extension of time was refused by the Court of Appeal on 6 July 2022. But the appellants then obtained special leave to appeal from the Privy Council subject to the proviso that the respondents be at liberty to apply to set aside that leave on the hearing of the appeal.

3. On the hearing before the Board the appellants were represented by Ms Renee Morgan and Ms Claire Colonnese. Having acted in person in the courts below the respondents were at a late stage represented before the Board by Ms Laura Newton, acting pro bono. While grateful to all counsel the Board would like to pay particular tribute to Ms Newton, whose thorough preparation and well-crafted submissions were of substantial assistance.

4. The appeal raises three discrete issues. Logically the first is whether the special leave to appeal granted by the Privy Council should be set aside, the respondents having through Ms Newton availed themselves of the liberty to submit that it should be. The second relates to the restriction by the Court of Appeal of the judge's order against Mr Fagen and Ms Lidbetter to one of disqualification from acting as a director only of the three named companies. The Court of Appeal felt constrained to do so by the terms of section 66(1) of the Montserrat Companies Act (Cap 11.12) (2019 revision). This raises a short but rather puzzling question of the construction of section 66, read with section 65(2) of that Act. The third issue is whether the Court of Appeal was right to identify, as errors undermining his disqualification of Ms Allen, (i) the weight which the judge

placed upon a court-appointed inspector's report and (ii) his supposed failure to have regard to the need to find serious incompetence as the basis for a finding of unfitness, in a case where he acquitted Ms Allen of dishonesty. Ms Newton submitted that the third issue, in particular the attribution of excessive weight to the inspector's report, also affects the outcome as against Mr Fagen and Ms Lidbetter but, as will appear, the Board respectfully disagrees. It is therefore convenient to address those issues separately, and in turn, after a brief recitation of the key facts.

The facts

5. The three named companies (which the Board will call Montobacco, 888 and Emerald) were incorporated in Montserrat in 2012 and 2013. All three respondents had been directors of Montobacco at different times. Ms Lidbetter was also a director of 888 and Emerald. Montobacco had been engaged in the manufacture and sale of cigarettes from premises in Montserrat let to it by 888, which itself leased the premises from the Governor at a much lower rent. Emerald carried on a scrap metal business, funded to some extent by Montobacco and 888. The business and financial affairs of the three companies were found by the inspector (referred to below) to have been intertwined, but largely incapable of being unravelled due to the failure of any of them to keep proper financial records.

6. The three companies were funded to a substantial extent by investments made in Montobacco exceeding US$2 million, of which a little over US$900,000 was provided by two brothers named Andrianakos, their joint investment being substantially the largest made in Montobacco.

7. In March 2018 the first appellant obtained an order from the Montserrat High Court that the affairs of the three companies be investigated by a court-appointed inspector pursuant to sections 518 and 519 of the Montserrat Companies Act. Mr Kenneth Krys was appointed as inspector by the court. He delivered his written report ("the Report") to the court on 18 June 2018, in which he expressed his opinion that (inter alia):

a. The business of the three companies had been carried on with an intent to defraud.

b. Mr Fagen, Ms Lidbetter and Ms Allen should be disqualified as directors.

c. Montobacco and 888 were probably insolvent, and Emerald may also have been insolvent.

8. Upon considering the Report, the appellants applied to the High Court both for the winding up of the three companies, on the ground of insolvency and in the public interest, and for the disqualification of the respondents as directors. Both applications were heard successively by Morley J, in July 2018 and April 2019 respectively. Both applications were vigorously opposed by the respondents. At the winding up hearing Mr Krys was cross-examined on his Report. Ms Allen also gave evidence and was cross-examined during the disqualification hearing. Mr Fagen and Ms Lidbetter made submissions but did not give oral evidence.

9. It is plain that the judge reviewed not only the Report, but also the voluminous documentation underlying it (which he described as running to hundreds of pages) and the oral evidence (including cross-examination) both of Mr Krys and Ms Allen. In the light of that review, he concluded that the Report was broadly reliable. The Board will describe the judge's findings about the conduct of each of the respondents in due course but, in outline, he found that each was unfit to be a director and the periods of four, three and one year's disqualification which he imposed reflected his views about the relative seriousness of the misconduct of each of them. To put those periods into context, the maximum period for which a person may be disqualified as a director under the Montserrat Companies Act is five years. In outline the judge found that both Mr Fagen and Ms Lidbetter had acted dishonestly, whereas Ms Allen, while not dishonest, had acted with a lack of probity, and incompetently.

10. The order made by the judge appears originally as paragraph 21 in his reserved judgment, and then in an Order sealed by the court on 14 July 2019, as follows:

> a. Steven Fagen is disqualified on Montserrat as a director of any company for four years, as being unfit to be concerned either directly or indirectly with the management of a company incorporated within Montserrat for that period;
>
> b. Marie Carole Lidbetter is likewise disqualified for three years;
>
> c. Karen Allen is likewise disqualified for one year.

The judge also disqualified another person, also for one year, but he has not appealed. The content of the Court of Appeal's order has already been noted, at paragraph 2 above.

Setting aside leave to appeal

11. The appellants did not have an appeal as of right from the Court of Appeal's order, but the Court of Appeal granted conditional leave to appeal, under section 3(2) of the Montserrat (Appeals to Privy Council) Order 1967 (SI 1967/233), on the ground that the appeal raised a question of general public importance. Under section 5 of the 1967 Order the Court of Appeal was bound to impose a condition as to the provision of security for costs, and entitled to impose conditions as to the time for the preparation of the record. The Court of Appeal imposed both conditions. As to security, it was to be provided by payment of the EC$ equivalent of £500 at the court office within 90 days. The same period was specified as the time for the appellant to take the necessary steps for the preparation of the record and its settling with the other parties. The conditions were imposed on 10 February 2022 and the 90 day period expired on 10 May.

12. In the event, after a mix-up as to the amount of the payment required, it was paid in full in two tranches by 10 May, but the payment was only verified by a journal voucher signed by the High Court Registrar, rather than by the required signed certificate. Meanwhile the record was not sent to the respondents for their comment until 7 June, in respect of which the appellant sought an extension of time, which the Court of Appeal refused at an oral hearing on 6 July 2022. In its summary reasoning the court took the view that neither condition had been complied with on time, and that the default could not be "made right" by an extension of time. So the appellant made an application for special leave from the Privy Council, which was granted subject to the preservation of the right of the respondents to apply to set it aside described above. There is no record of the deliberation of the three member panel of the Judicial Committee which explains its reasons, but it may fairly be assumed that it considered that the appeal raised one or more points of law of general public importance, not only for Montserrat but also for other Caribbean jurisdictions with similarly worded statutory schemes for the disqualification of directors.

13. Ms Newton's main submission in support of the revocation of special leave was that it would undermine relations between the Privy Council and local courts of appeal if, by granting special leave, the Privy Council were to subvert a discretionary decision by the lower court that because of breach of condition the appellant should be penalised by being deprived of the right of appeal which the appellant would otherwise have enjoyed. How, she asked, could the case-management power of the lower court to ensure that rules and conditions were obeyed be effectively deployed if the party penalised for breach were free just to go and get leave from the Privy Council?

14. This was an initially attractive submission, and the rights or wrongs of the decision of the Court of Appeal to refuse the appellant an extension of time were debated at length between counsel. On analysis the Board is not persuaded by it, for the following reasons. First, the jurisdiction of the Privy Council to grant leave, which dates

back to the Judicial Committee Act 1833, is entirely separate from the parallel jurisdiction of the local court of appeal under the 1967 Order and arises specifically where, for whatever reason, the appellant has not succeeded in obtaining leave to appeal from the lower court. Secondly, the jurisdiction of the Privy Council to give special leave to appeal is by no means so closely hedged about with requirements for the imposition of conditions as is that of the local court of appeal, although of course conditions and case management directions can be imposed. Thirdly, while the discretionary decision of the lower court, in this case to refuse an extension of time to comply with the conditions for leave, will not lightly be overridden by an appellate court, this is not an appeal from that refusal. It is a separate exercise of a discretion to grant leave, as to the merits of which the Privy Council may perfectly properly reach a different decision, without thereby implying that the Court of Appeal erred in its refusal. It is simply that different courts exercising a similar but separate discretion on the same facts may legitimately disagree. Finally, it is apparent from the transcript of the extension of time hearing before the Eastern Caribbean Court of Appeal that it was perfectly comfortable with the prospect that a party which failed in an application for leave was free to go and try to obtain special leave from the Privy Council. The result is that the Board does not consider that, in granting special leave in this case, it is, or is likely to be regarded as, showing any disrespect to the Court of Appeal, or undermining that court's case-management powers.

15. Ms Newton did not directly attack the exercise by the Privy Council of its discretion to grant leave on any other ground. The remainder of this opinion will sufficiently show that this appeal does raise questions of law of general public importance, and that it has real merit. There is no way of telling to what extent the panel which granted leave took into account the first appellant's breach of condition for the grant of leave by the Court of Appeal. But it could not possibly be said that that consideration should so plainly have outweighed the reasons for granting special leave that the decision to do so was in any way beyond the ambit of the panel's discretion. The respondents' application to set aside the grant of special leave to appeal therefore fails.

Construction of sections 65 and 66 of the Montserrat Companies Act

16. In the form in force at the material time, the relevant parts of section 66(1) of the Montserrat Companies Act provided as follows:

> "(1) When, on the application of the Registrar, it is made to appear to the court that an individual is unfit to be concerned in the management of a company, the court may order that, without the prior leave of the court, he may not be a director of the company, or, in any way, directly or indirectly, be

concerned with the management of the company for such period-

(a) beginning-

(i) with the date of the order; or

(ii) … ; and

(b) not exceeding five years ..."

17. Pausing there, as the Court of Appeal observed, the two references to "the company" appear to contemplate that the order will be confined in its effect to being a director, or concerned in the management of, one or more specific companies, rather than companies in general or even companies incorporated in Montserrat. The phrase does not expressly indicate which company or companies is or are intended to be referred to, and it does not appear to mean the company or companies selected by the court as a matter of discretion.

18. The perhaps obvious answer (again alighted on by the Court of Appeal) is that "the company" means the company or companies the mismanagement of which by the individual concerned led to the finding of unfitness. But this triggers a small host of practical objections. Most disqualification orders are made in relation to the mismanagement of companies which (as in the present case) will already have been put into liquidation by the time when the disqualification order comes to be made. A winding up order will permanently disable the directors and managers of that company from any further role in its management. So it may be asked whether the legislature really thought it sensible to provide for the disqualification of former directors, limited to five years, from acting as directors of, or being concerned in the management merely of such a company.

19. It may well be that the company in question has been struck off and dissolved by the time the court is asked to make a disqualification order. Can an order sensibly be made in relation to "the company" if it has ceased to exist? Must it be restored to the register for that purpose?

20. For present purposes many of these difficulties are resolved, on the then text of the Act, by section 65(2), which provides that:

> "When an individual is disqualified under section 66 from being a director of a company, that individual may not, during that period of disqualification, be a director of any company."

It does not appear that the Court of Appeal took section 65(2) into account, in reducing the scope of the judge's order just to the three named companies, unless it is to be assumed that they thought that section 65(2) would restore the practical effect of the disqualification to all companies, without this having to be mentioned in the order for disqualification. The Board was informed that the Court of Appeal took the section 66(1) "the company" point of its own motion without receiving or calling for any submissions about it.

21. However that may be, section 65(2) does not resolve all the problems arising from the section 66(1) "the company" point. First, it only provides for the individual to be disqualified from being a director, not from being concerned in the management of companies, as section 66(1) does. Secondly, it does not resolve the problem of the dissolved company. How can section 65(2) be triggered if there is no company capable of answering the description of "the company" in section 66(1)? Thirdly, the power of the court to grant leave to the disqualified individual to be a director of, or concerned in the management of, "the company" is not, expressly at least, extended to any other company. But usually applications for leave relate to different companies than the one the affairs of which have been mismanaged. This outcome greatly reduces the scope of the power to grant leave from that contained for example in the comparable English legislation.

22. It is tempting, but the Board thinks wrong, to treat the use of "the" rather than "a" company in section 66(1) as an accidental infelicity in legislative expression with no consequences. If "the" company meant any company, then section 65(2) would be redundant.

23. It might have been hoped that this puzzling problem would have been ironed out when, after the relevant events in this case, section 66 was wholly replaced by what is now section 166 of the Montserrat Companies Act 2023, to which we were helpfully referred by Ms Morgan SC. But unfortunately the puzzle gets worse. Section 166(1) preserves the "the company" language of section 66(1) but without any replacement or re-enactment of section 65(2) to come to the rescue. So a disqualification order can only prohibit the individual from being a director, or concerned in the management of "the company", which presumably has the same restricted meaning as it did in section 66(1), which is replicated word for word. Then section 166(6) makes it a criminal offence for a person disqualified under section 166(1) to act as a director or be concerned in the management of "a company", which presumably means any Montserrat incorporated company. It is strange indeed to find the scope for the commission of the offence being wider than the scope of the relevant prohibition.

24. Faced with these puzzling difficulties, the Board will confine itself to what is strictly necessary to bring the orders of the courts below into conformity with the provisions of sections 65 and 66 as they were before 2023, while highlighting the serious ongoing problems as something which the legislature might wish to iron out both in Montserrat and any other Caribbean countries which have adopted disqualification legislation in the same form. In the Board's view the preferable course is for a disqualification order to identify "the company" (or companies) to which the order under section 66(1) relates, here the three named companies, but also to contain a declaration that, by reason of section 65(2), the disqualified individuals may not be a director of any other company incorporated in Montserrat for the relevant period. That may unfortunately lead individuals to think that they are free to be concerned in the management of other Montserrat companies, but they would need to avoid the risk that they might thereby become directors even if not named as such (see section 543(1)) or de facto directors, and so infringe the prohibition.

25. Subject to the question whether Ms Allen should have been disqualified, in our view an appropriate order for the judge to have made would have been as follows:

(i) For the periods set out below, and without the prior leave of the court, each of Steven Fagen, Marie Carole Leadbitter, Karen Allen and Reuben Meade may not be a director of, or, in any way, directly or indirectly, be concerned with the management of any of the following companies, namely Montobacco Ltd, Emerald Metal Co Ltd and 888 International Ltd.

(ii) The periods referred to in paragraph (i) above are, for Steven Fagen, four years, for Marie Carole Lidbetter, three years and for Karen Allen and Reuben Meade, one year.

(iii) It is hereby declared that, by reason of section 65(2) of the Companies Act of Montserrat (2019 revision) each of Steven Fagen, Marie Carole Lidbetter, Karen Allen and Reuben Meade may not, for the periods set out in paragraph (ii) above, be a director of any company in Montserrat.

(iv) The periods referred to in paragraph (ii) above commenced on 7 May 2019.

26. Neither the judge's order nor the Court of Appeal's revised order quite followed that course. But that is, in the Board's view, what should have been ordered.

Should Ms Allen have been disqualified?

27. As already noted, the Court of Appeal reversed the disqualification of Ms Allen because of two perceived errors of law in the judge's treatment of the case against her. The first was placing excessive weight on the inspector's Report. The second was, having acquitted her of dishonesty, in failing to ask himself whether the level of incompetence displayed by her mismanagement was sufficiently serious to render her unfit.

28. The first supposed failing could in theory have affected the reliability of the judge's order for the disqualification of Mr Fagen and Ms Lidbetter, and Ms Newton submitted that it did. She said that it was reflected in the confinement by the Court of Appeal of the effect of the disqualification order just to the three named companies. The Board has no doubt that this is an incorrect analysis of the Court of Appeal's reasoning. The judge's main reason for imposing relatively substantial periods of disqualification on Mr Fagen and Ms Lidbetter was that he had found both of them to have acted dishonestly in the management of the three named companies. Applying excessive weight to the Report did not, in the view of the Court of Appeal, undermine that finding, because it reached the same conclusion. If the Court of Appeal had thought that the judge's over-reliance on the Report had led him to an excessively harsh conclusion about their unfitness, then the natural response would have been to shorten their periods of disqualification. But the Court of Appeal left them untouched. It is true that the Court of Appeal thought that it could avoid an injustice by confining the effect of their disqualification to the three named companies, but this was because of the court's perception that this was what section 66(1) always required. As already explained, in this the Court of Appeal was right as a matter of construction of section 66 but should have included a declaratory reference to the wider effect of section 65(2).

29. So the Board addresses these two criticisms of the judge's reasoning as relevant only to the disqualification of Ms Allen. They are quite distinct supposed errors of law, and need to be addressed separately. The Court of Appeal directed itself as to the weight properly to be attributed to the Report by reference to *Rogers v Hoyle* [2014] EWCA Civ 257; [2015] QB 265 ("Hoyle"). At paras 64-67 Theodore JA(Ag) said that since the report was not compliant with CPR Part 32 (requirements for expert's reports) *Hoyle* required it to be given limited weight, and that since the serious nature of disqualification proceedings placed a heavy burden upon the applicant of establishing unfitness, the judge had been wrong to conclude that the evidence of Ms Allen and Mr Meade had not dented the conclusions in the Report.

30. In the Board's respectful view there are two errors of law built into the Court of Appeal's criticism of the judge. The first is that reports to the court by inspectors appointed to report to the court under sections 518 and 519 of the Companies Act are a well-recognised exception to the rules as to both admissibility and weight of hearsay

and opinion evidence. The Court of Appeal accepted this in relation to admissibility, but not weight. In *Secretary of State for Business, Enterprise and Regulatory Reform v Aaron* [2008] EWCA Civ 1146; [2009] Bus LR 809, paras 22-29, Thomas LJ gives a full explanation of how and why inspectors' reports of this kind came to be an established exception to the ordinary rules of civil procedure about admissibility and weight, initially when deployed in winding up proceedings and later in directors' disqualification proceedings, for which, see in particular *In re Rex Williams Leisure plc* [1994] Ch 1. In both types of case the rationale is that Parliament must have intended, in enacting in primary legislation a regime for the obtaining of such reports by the court, that such reports could then be relied upon by the court in subsequent proceedings.

31. The dicta collected by Thomas LJ then show that, upon the deployment of such a report, the respondents to the proceedings may call their own evidence in rebuttal, and the applicant may wish to call further evidence to support that in the report, but at the end of the day the weight to be attributed to the report as evidence is a matter for the court in each case, having reviewed the evidence as a whole.

32. The Court of Appeal referred to the *Aaron* case as authority for the admissibility of such reports, but regarded dicta in *Hoyle* at para 66 as decisive in establishing a requirement always to give such evidence limited weight: see paras 64 and 66 of, and footnote 14 to, the judgment of Theodore JA(Ag). The Board considers that para 66 of the judgment of Christopher Clarke LJ in *Hoyle* comes nowhere near establishing any such general principle. It was a comment about hearsay opinion evidence in reports of construction engineers deployed in an earlier case, *Humber Oil Terminals Trustee Ltd v Associated British Ports* [2012] EWHC 1336 (Ch), [2012] L & TR 28, far removed from the context of reports to the court in disqualification proceedings. As the Court of Appeal noted, *Hoyle* was itself about a report by the Air Accident Investigation Branch. They are simply not about the established exception constituted by Companies Act reports to the court.

33. The second error of the Court of Appeal in the present case was to regard the applicant for a disqualification order as being subject to a "heavy burden": see para 67 of the judgment of Theodore JA(Ag). No-one doubts that disqualification proceedings are a serious matter, with significant consequences for anyone disqualified, but the burden of proof of unfitness is the same as in civil proceedings generally, namely the balance of probabilities.

34. For the respondents Ms Newton did not seek to defend the Court of Appeal's view that inspectors' reports should generally be given limited weight. Rather she pointed to aspects of the Report which, she submitted, justified a limited weight conclusion in the present case. Her main examples were, first, a criticism of what the Report concluded about Mr Fagen's employment contract and second, a supposed general weakness in the Report's conclusions about insolvency. But neither of those

aspects of the Report bore directly upon the judge's reasons for finding unfitness as against Ms Allen.

35. The Board considers that there was no error of law in the judge's appraisal and use of the Report. He correctly directed himself by reference to the *Aaron* case. He considered the Report's findings against all the other evidence, including Ms Allen's oral evidence. He had heard Mr Krys being cross-examined on the same subject matter in the winding up proceedings. Above all he was careful not just to adopt the inspector's opinion about unfitness. Rather he merely noted it, and then conducted his own analysis of that question, based upon the primary facts about the respondents' conduct which he had found to be proved.

36. The second criticism by the Court of Appeal of the judge's reasoning is that the judge made no assessment of the seriousness of the incompetence which he attributed to Ms Allen on the question of unfitness. Its starting point was a view that in a case where dishonesty is not established, a high degree of incompetence must be demonstrated to justify a finding of unfitness against a director. This assumption as to the law was gathered from the apparent approval by Morritt LJ of dicta to that effect by the trial judge in *In re Barings plc (No 5)* [2000] 1 BCLC 523, para 35. Morritt LJ said:

> "Thirdly, where the allegation is incompetence without dishonesty it is to be demonstrated to a high degree. … This follows from the nature of the penalty. Nevertheless the degree of incompetence should not be exaggerated given the ability of the court to grant leave … notwithstanding the making of such an order."

37. *Barings* was a case of pure incompetence. The Secretary of State's case was that the bank had been brought low by the failure of senior management to monitor or supervise the fraudulent activities of a trader, Nick Leeson. Not only was there no allegation of dishonesty, but none of want of probity either, such as a breach of fiduciary duty. While there are numerous valuable dicta particularly in disqualification cases to guide the first instance judge on the question of unfitness, each must be set against the facts of the case concerned. In the end the question of unfitness, in Montserrat as much as in England, is one of fact, to be arrived at by applying the clear words of the Companies Act.

38. The starting point is that identified in the following well-known passage in the judgment of Dillon LJ in *In re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164, 176:

> "The test laid down in section 6 - apart from the requirement that the person concerned is or has been a director of a

> company which has become insolvent - is whether the person's conduct as a director of the company or companies in question 'makes him unfit to be concerned in the management of a company.' These are ordinary words of the English language and they should be simple to apply in most cases. It is important to hold to those words in each case.
>
> The judges of the Chancery Division have, understandably, attempted in certain cases to give guidance as to what does or does not make a person unfit to be concerned in the management of a company. Thus in *In re Lo-Line Electric Motors Ltd* [1988] Ch 477, 486, Sir Nicolas Browne-Wilkinson V-C said:
>
>> 'Ordinary commercial misjudgment is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although I have no doubt in an extreme case of gross negligence or total incompetence disqualification could be appropriate.'
>
> Then, at p 492, he said that the director in question:
>
>> 'has been shown to have behaved in a commercially culpable manner in trading through limited companies when he knew them to be insolvent and in using the unpaid Crown debts to finance such trading.'
>
> Such statements may be helpful in identifying particular circumstances in which a person would clearly be unfit. But there seems to have been a tendency, which I deplore, on the part of the Bar, and possibly also on the part of the official receiver's department, to treat the statements as judicial paraphrases of the words of the statute, which fall to be construed as a matter of law in lieu of the words of the statute. The result is to obscure that the true question to be tried is a question of fact - what used to be pejoratively described in the Chancery Division as 'a jury question.'"

39. Now is not the time for a review of the cases which seek to explain unfitness in more detail. The language of section 66(1) differs only slightly from that used in the English Act. The question (again in ordinary English language) is whether the

individual "is unfit to be concerned in the management of a company". That requires the court to decide what facts about the conduct of the individual respondent (including acts and omissions) have been proved by the applicant and then to decide whether those facts demonstrate unfitness to be concerned in the management of a company.

40. It is to be noted, for example from the reference to probity in the *Lo-Line* case, that the relevant conduct is not to be forced into a straitjacket consisting only of dishonesty or incompetence. Directors and senior company managers are fiduciaries, with duties of loyalty, duties to avoid conflict of interest and not to make secret profits, which may be infringed with or without dishonesty, and the infringement of which may well amount to a want of probity. The present is just such a case, in the light of the judge's findings of fact about the conduct of Ms Allen. Much the most serious is described in paragraph 13(b) of the judgment of Morley J as follows:

> "Concerning Allen, note para 6.2, 6.9, 6.28, and 6.30. It is clear Frank with Peter invested over US$1m and as at 25.09.17 were listed at the Registry as having 2500 and 500 shares each in Montobacco. On an investment basis, in theory they could claim entitlement to 44% of the shares in Montobacco, namely 4480 shares. Bizarrely, when unease began in the relationship between Montobacco and the brothers, at the hand of Allen acting as Montobacco company secretary, in early 2018 they were stripped of their shares by her simply re-filing at the Registry an adjusted list of shareholders, excising them, on the illogical, perhaps bad-minded, and possibly fraudulent basis the shares had been 'allocated' but not 'issued', and could therefore be rescinded at whim, notwithstanding share certificates were granted in their names, with tear-off sections should they sell them on. In evidence on 03.04.19, it is with regret I observe Allen was wholly unpersuasive her actions concerning the brothers' shares was in keeping with the probity expected of a director."

By way of explanation, Frank and Peter were the Andrianakos brothers, noted above as the single largest investor group in Montobacco, whose interests as major stakeholders were simply overridden by what Ms Allen did by, in substance, forfeiting their shares.

41. At paragraph 14(c) the judge continued:

> "Allen worked closely with Fagen and Lidbetter, perhaps too closely; she has acted as in-house counsel, though is unqualified, and this has been in conflict with in parallel being

> company secretary; she has sought remuneration by share issue for legal work she has not been qualified to do; and she improperly rescinded the brothers' shares."

42. At paragraph 20 he concluded:

> "As to Allen, I am troubled by her handling the brothers' shares, but in light of how she has presented herself, impressing the court, including knowing now of her earlier military service, which to my mind militates against shady practice, showing instead her background is hard-working and reliable, I will not place her work at Montobacco in the category of seeming dishonest, but instead as over-eager, lacking competence, and without appropriate leadership from Fagen."

43. Reading those passages together, although the judge eventually acquitted Ms Allen of dishonesty, he did not in the Board's view depart from his earlier finding that she had acted in relation to the forfeiture of the brothers' shares with a lack of probity, and that she had caused Montobacco to remunerate her for carrying out legal work while unqualified to do so.

44. In the Board's view Ms Allen's conduct in relation to the brothers' shares plainly involved a want of probity sufficient on its own to justify a finding of unfitness against her, even without bringing into account her obtaining remuneration from the company for unqualified legal work. It was not necessary on the facts of this case to rate her incompetence (if that is what it was) on a scale of seriousness to see whether her forfeiture of the brothers' shares rendered her unfit.

45. It follows that the judge did not, in disqualifying Ms Allen for one year, make the error of law for which he was criticised by the Court of Appeal. The consequence is that Ms Allen's one-year disqualification should stand, albeit that it should be expressed in a way that complies with sections 65 and 66 in the way which the Board has already described.

46. The Board will therefore humbly advise His Majesty that this appeal should be allowed.