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Grand Committee

Monday, 19 January 2015.

Small Business, Enterprise and Employment Bill

Clause 103: Determining unfitness and disqualifications: matters to be taken into account

Amendment 60C

Moved by ***Lord Mendelsohn***

60C: Clause 103, page 84, line 5, leave out from "to" to end of line 6 and insert "the affirmative procedure"

Lord Mendelsohn: My Lords, I will speak also to Amendment 60D. First, I want to set out our support for the introduction of this clause. I will then briefly set out our amendments and raise some of the recommendations of the Delegated Powers and Regulatory Reform Committee that we support.

The Government are to be congratulated on bringing these matters forward. They address a number of weaknesses that have been identified as individuals have used ever more sophisticated ways either to continue to operate while in breach of the intent of the current law or to operate in ways that avoid it. There are some very difficult drafting challenges in these clauses and we may wish to return to these matters later with some more considered amendments. Today, we would like to raise a number of issues and get the Government's view and a temperature check.

During our examination of the clauses for this Committee and in our discussions with small businesses, we were struck by the concern expressed by some about the problems of rogue traders. While this affects some sectors more than others, there was a much stronger feeling than we expected that this matter required strong legislative action. This does not mean that there is any appreciation of the scale of the problem or much evidence that the situation is acute or even getting progressively worse. Yet small businesses expressed the view, based on the risks that consumers take, that consumer confidence would be higher if the regime against rogue traders was seen and understood to be stronger than it currently is. In other words, small businesses sometimes feel the impact of rogue traders to be far greater than the actual consequences of them; they cast a shadow over some small businesses. If there was much greater and stronger consumer confidence that the regime available would deal with rogue traders, small businesses would be better off.

It was only when my attention was drawn to the *Mail on Sunday* this Sunday that this matter became very live. It is interesting from this side to say the "*Mail on Sunday"*,

but anyway. There is a piece in the financial part of the paper written by Tony Hetherington, who is,

> "Financial Mail on Sunday's ace investigator".

He covers a number of important matters. This Sunday, he identified a number of issues relating to rogue traders. I draw noble Lords' attention to two stories. In one particular case, an individual ran a company,

> "whose proper title was Palm Oil Investments Limited, but in June last year he changed its name to Quick Payroll Solutions. It still appears to be in business, but for how long is anyone's guess".

He,

> "failed to file accounts that were legally due in 2013, let alone accounts due more recently for 2014. These are offences and it will be not surprise if Companies House strikes off his business".

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Tony Hetherington writes:

"I do not suppose this will bother",

him.

> "He was a director of a rip-off diamond investment company, Elite Gems Limited, which went bust in 2013. And he was also a director of scam carbon credit company Charles Stratton Limited, which has not filed any accounts since it was set up in 2011. It is about to be struck off".

He writes:

"It would be nice to think that at some point the authorities will catch up with,

him,

> "and either disrupt his activities or ban him from running future businesses, however I am not holding my breath".

In relation to another series of companies—this is an important point—he identifies:

"Four companies involved in selling investment land with false claims about its development prospects".

These companies,

> "wound up in the High Court after they cheated investors out of £3.3 million. Complete Building Systems Limited, Rawtenstall CBS Limited, Evesham CBS

> Limited, and Hounslow West London Limited were linked to an earlier business, The Property Partnership".

Hetherington had previously warned that this was,

> "part of a network scam land firms that included Nationwide Land Developments, Burnhill Land, Portfolio Land Acquisitions, and Elite Land Developments. All have ceased trading and five bosses have been disqualified from acting as company directors."

The four companies were able to cheat investors out of £3.3 million, but a lot of that money went into commission payments to sales staff, including a number of central figures behind a scam carbon credits investment company, Carbon Green Capital. These individuals were also behind a wine investment business, DS Vintners. The registered director of all four of the latest scam companies is another individual, who also pocketed a large sum. He was the named director when the others were unable to be, based on their previous conduct. Current measures do not seem to be effective or to deal with some of the ways in which people get round them.

6.30 pm

In relation to the Bill, we are very keen to know about a number of clauses and how they would operate. We are particularly interested in how the Government see Clauses 104 and 107 relating to reporting on the officeholders of insolvent companies and the operation of compensation orders, and in particular to what extent they see the use of these provisions, at least in the short term. We warmly welcome the review from the Delegated Powers and Regulatory Reform Committee of the matters to be taken into account when determining fitness to be a director. Clause 103 replaces the provisions of the Company Directors Disqualification Act 1986 and allows for the Secretary of State to modify the schedule which would identify the factors taken into consideration in disqualification. The Government chose the negative procedure to lower parliamentary scrutiny on the basis that the power would be used only to highlight certain factors and behaviours that the court would in any event have discretion to take into account. Interestingly, the affirmative procedure is kept, without any explanation, for Northern Ireland.

At the heart of the Government's argument is that courts have discretion over many things. However, we believe, as did the committee, that it is important to

establish that they are required to take these matters into account. Amendment 60D broadens the matters to which the court must have regard when determining whether a person should be disqualified as a director. It asks that the court makes a judgment if the person holds the position of non-executive director. This suggestion looks at a situation where an individual may have multiple directorships with very different characters. There is a difference between the role and function of directors of small private companies and that of directors of large listed and other entities. Indeed, the role of non-executive director has a very particular character.

I make it clear that we are not trying to make being a non-executive director less attractive. In general we make the observation that non-execs play an essential role. They should be properly supported by companies and their remuneration should be commensurate with the duties that they hold, but we believe that there need to be appropriate tools to ensure that the responsibilities are undertaken appropriately. However, there is a difference between being an executive director and a non-executive director. As the Bill currently stands, there may be grounds and circumstances where it is appropriate for a disqualification to be considered in relation to the role of individuals as non-executives, and this should be treated and considered separately from other roles. Many noble Lords have seen many examples in the past but there is a powerful one in relation to the banking sector, where a number of people took on non-executive responsibilities, different from the executive responsibilities that they had in other businesses, and they did not perform their duties with a great deal of honour or credit.

There is some crossover with other provisions—none of which is a reason not to do this but all of which should be considered, as each has its own distinctive approach. For example, non-execs in the financial sector are also looked at under the FCA regulatory regime. As we saw from the criticism levelled against the FCA for the way it handled the banks, there is a strong issue of public confidence in these matters that should be taken into account in relation to directors' disqualifications and the processes around that.

There were some drafting challenges with bringing forward a statutory regime that prevented directors being non-exec directors of a public company but left them free to be directors of a private company. It may be the case now that they would be and should be—certainly where it is appropriate and in most cases —disqualified from both, but there should be a more flexible option where a particular set of circumstances can be appreciated; for example, where a hugely capable and successful business leader by dint of the characteristics and business approach and possibly style that has made them successful is not able to act effectively within the role of governance. We would hope that this approach would also have a chilling impact on the selection of such individuals as non-executives.

There could be a case to add the facility to this legislation to ban a director specifically from taking public appointments where the view is that, because of their incompetence as a non-executive, they are not fit to take on such a role for a particular period. We

would be very interested to hear from the Minister her impressions of the principles and potential practice of such amendments. I beg to move.

Baroness Neville-Rolfe:I thank the noble Lord for the amendments in this group. He will perhaps be interested to know that we had a sweepstake to try to work out what he was getting at with these amendments. I am afraid we were not particularly successful, so I will make two or three comments on the amendments, which we looked at objectively in terms of the way that they had been drafted, and may take the opportunity to write to him afterwards to pick up some of the points, including the

good points he made about rogue trading, which is a concern. The examples he drew our attention to were new to me. He asked what the Government are doing about repeat offenders in this area. The short answer is lots, including taking account of previous failures. The effect of Clause 103 will be to require the court to take misconduct and previous failures into account when deciding whether a director is unfit, especially where it demonstrates a pattern of unfit conduct through a number of companies.

Amendment 60C is in line with the recommendations made by the Delegated Powers and Regulatory Reform Committee, to which I would like to express my gratitude for the consideration it has given this long and complex Bill in a timely manner. We must thank it for the great work it does in aiding scrutiny in this House. I will consider this amendment and will return to it on Report.

Amendment 60D would restrict the consideration a court must give to the loss or harm that a person's conduct has caused to a company solely to non-executive directors when deciding whether to disqualify a director. The concept of non-executive director is not recognised within the Companies Act 2006 or the Company Directors Disqualification Act. The noble Lord, Lord Mendelsohn, will know only too well that for the purposes of companies legislation, all de jure directors are considered equally, whatever their role on the board may be. Any individual who acts as a director of a company, in whatever capacity, owes duties in respect of the running of the company to, for example, shareholders, employees and creditors. Accordingly, if the actions of any director, executive or not, have caused demonstrable loss for which they are culpable, it is right that they should be liable to be disqualified and that the period for which they are disqualified should take account of the resulting loss to creditors.

To try to change the law on directors fundamentally and to bring in a new definition of non-executive director without extensive consultation would be quite a big ask. I am not sure whether that is being sought in this probing amendment, but perhaps we can discuss the matter further. In the mean time, I commit to study the points that have been raised and to write to the noble Lord, and I ask him to withdraw his amendment.

Lord Mendelsohn: I thank the Minister for her helpful reply. We, too, had a sweepstake on what her responses were likely to be. I have not done badly on some and lost quite badly on others. We also had a sweepstake on what the further replies might be, although

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I shall not reveal them for fear of putting anyone in a difficult position. In view of the current circumstances and the very helpful replies, we look forward to discussing these matters further. I beg leave to withdraw the amendment.

Amendment 60C withdrawn.

Amendment 60D not moved.

Clause 103 agreed.

Clauses 104 to 108 agreed.

Schedule 7 agreed.

Clause 109 agreed.

Schedule 8 agreed.

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Clause 110: Disqualification as director: bankruptcy, etc in Scotland and Northern Ireland

Amendment 61

Moved by ***Baroness Neville-Rolfe***

61: Clause 110, page 90, line 21, at end insert—

"(2) In section 24 of that Act (extent), for subsection (2) substitute—

"(2) Subsections (1) to (2A) of section 11 also extend to Northern Ireland.""

Amendment 61 agreed.

Clause 110, as amended, agreed.

Clauses 111 to 113 agreed.

Committee adjourned at 6.40 pm.