Neutral Citation Number: [2024] EWHC 206 (Ch)

Case No: CR-2023-003812

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF NRLB LIMITED (CRN.12348377)
AND IN THE MATTER OF BROWN AND MASON GROUP LIMITED (CRN.01892133)
AND IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986

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

Date: 08/02/2024

Before :

ICC JUDGE PRENTIS

- -

Between :

NICHOLAS TERRY BROWN	**Claimant**
- and -	
COMPETITION AND MARKETS AUTHORITY	**Defendant**

- -

Christopher Buckley (instructed by **TLT LLP**) for the **Claimant**
Catherine Addy KC and Anna Lintner (instructed by the **CMA**) for the **Defendant**

Hearing dates: 19 September and 10 October 2023

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JUDGMENT

ICC JUDGE PRENTIS:

Introduction

1. Nicholas Brown describes his company, Brown and Mason Group Limited ("BMG"), as "a leading demolition, dismantling and decommissioning contractor, with a particular specialism in the decommissioning and dismantling of power stations, oil and gas plants, and petrochemical and pharmaceutical facilities. This is a niche specialism involving expertise in explosive demolition and asbestos removal". It has "demolished over 60 fossil fuelled power plants in the UK and Europe, far more than any other UK contractor, and as far as I am aware more than any other company in Europe or globally. Over the past 40 years we have also removed over 20,000 tonnes of asbestos". He says "most other demolition contractors have not completed more than one or two power station projects (one of which, at Didcot… ended in tragedy and resulted in BMG being asked to step in…)".

2. In March 2019 the Competition and Markets Authority ("CMA") commenced an investigation under the *Competition Act 1998* into suspected anti-competitive conduct within the demolition and asbestos-removal sector involving 10 firms including Brown and Mason Limited (crn.00686405) ("Brown and Mason"), to which BMG has from January 2020 been the economic successor. As such, by letter of 25 February 2022 BMG admitted infringements in relation to the Shell Building and Lots Road Power Station sites and accepted the CMA's proposed terms of settlement of 11 February 2022 and the imposition of a penalty of £2,400,000. On 23 March 2023 the CMA issued its Decision.

3. On 19 April 2023 the CMA gave Mr Brown notice under s.9C of the *Company Directors Disqualification Act 1986* ("CDDA") of its intention to apply for a disqualification order against him. He had first received warning of its power to disqualify by a letter of 12 November 2019, albeit that stated that "the CMA has not reached any conclusions at this stage as to whether or not competition law has been infringed and has an open mind on this point".

4. On 19 May 2023 Mr Brown offered an undertaking under s.9B CDDA for a period of 7 years commencing on 28 July 2023, as against the 8 years which the CMA would have suggested as an appropriate period at trial. The 10-week commencement period was to allow Mr Brown the opportunity to put his affairs in order and/ or to make an application for permission to act.

5. On 13 July he issued this claim for permission under s.17 CDDA in respect of BMG and its holding company, NRLB Limited ("NRLB"), supported by 16 affidavits, which have been supplemented by evidence in reply to the CMA's. The CMA opposes the application.

6. On 24 July Deputy ICC Judge Shekerdemian KC granted Mr Brown interim permission to act in respect of both companies pending the outcome of his application, which was listed on an expedited basis for 19 September (which in the event allowed only Mr Buckley to make submissions) and then 10 October. By agreement between the parties the Deputy Judge also made an order restricting the use by the parties of the documents within the application, and access to the court file generally, on the basis that some of them may contain "information that is confidential and irrelevant to the present proceedings". It was agreed at the outset before me that this order would be reviewed at the consequentials hearing. While I will say no more about it now, I will repeat what I said then, which is that if this order is to be maintained in whole or in part that will only be following specific justification for each document or class of documents it covers, particularly bearing in mind the public interest nature of this application and its outcome.

7. The conditions which became attached to the grant of interim permission, and which are now adopted by Mr Brown as appropriate to any grant of permission, are both detailed and consistent with previous grants in CMA cases:

> "the Claimant has interim leave to act as a director of, and take part in the management of, BMG and NRLB, subject to the following conditions:
>
> 2.1. the Claimant shall not be or act as a director of any other company;

2.2. the Claimant shall not use the title of "Managing Director" of BMG or NRLB;

2.3. BMG and NRLB shall not act as directors of any company;

2.4. NRLB shall not carry out any trading activities;

2.5. whilst the Claimant may advise BMG in relation to their proposed content, the Claimant shall not approve any tender submission documents or any trade agreements on its behalf or otherwise authorise or cause BMG to submit or enter into the same without the prior written approval of at least two other directors of BMG of such tender submission document or trade agreement;

2.6. the Claimant shall not attend any meeting on behalf of BMG or NRLB with (1) any client or potential client to discuss, submit, approve or enter into any tender submission or trade agreement pre-contract, (2) any competitor of BMG or NRLB, or (3) with any third party that provides financial support to BMG or NRLB, without another director of BMG or NRLB (or alternatively in the case of BMG, Dan Baker) being present;

2.7. no invoices shall be rendered and no payments shall be made on behalf of BMG under the direction of or pursuant to any instructions given by the Claimant;

2.8. subject to condition 2.9 below: (a) Adam Collinson ('Mr Collinson') shall remain a non-executive director of BMG; (b) Ms Morris, Richard Brown ('Mr R Brown'), Lee Brown ('Mr L Brown'), John Payton ('Mr Payton') and Alex Hadden ('Mr Hadden') shall remain directors of BMG; (c) whilst he remains employed by BMG, Charles Buckingham ('Mr Buckingham') shall remain a director of BMG; (d) Ms Morris shall remain a director of NRLB; (e) Mr Hadden shall remain the competition compliance officer for BMG;

2.9. with the permission of the Court or the written permission of the Defendant: (a) Mr Collinson may be replaced as a non-executive director of BMG; (b) Ms Morris, Mr R Brown, Mr L Brown, Mr Payton and Mr Hadden may be replaced as directors of BMG; (c) Ms Morris may be replaced as a director of NRLB; (d) Mr Hadden may be replaced as the competition compliance officer for BMG. Any application for permission from the Court shall be made on notice to the Defendant;

2.10. Mr Collinson, or his replacement, shall: (a) supervise compliance with competition law by BMG and the Claimant; (b) meet with the Claimant no less than four times a year to consider and discuss the Claimant's compliance with competition law, the next meeting being on or around 7 August 2023; and (c) report to the board of directors of BMG every quarter, and the Defendant on reasonable request with no less than 14 days' notice, on compliance with competition law by BMG and the Claimant;

2.11. the Claimant shall procure that face to face (or video, following any relevant government regulations and/or recommendations) competition compliance training is conducted annually for: (a) staff employed by BMG and any consultants engaged by BMG who are identified by Mr Collinson as being at a higher risk of non-compliance; and (b) all directors of BMG and NRLB;

> 2.12. at the discretion of, and under the supervision of, Mr Collinson or his replacement: (a) no less than twice a year, all email servers within the custody or control of BMG shall be searched for high risk terms relating to potential competition law breaches; and (b) no less than twice a year, samples of the electronic copies of the Claimant's text and call records shall be reviewed and all text exchanges identified as being with a competitor shall be reviewed; and if Mr Collinson, or his replacement, has any concerns following their investigations, such concerns shall be reported to the CMA in writing;
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> 2.13. BMG shall hold minuted board meetings at which its compliance with competition law and any concerns raised by Mr Collinson or his replacement are considered on a quarterly basis. In addition, the appointed competition compliance officer shall provide a report to every board meeting of BMG which shall (a) include details of any competition law compliance training undertaken within BMG since the last board meeting and (b) include details of any matters or reports that such officer has become aware of under the applicable competition compliance policy and/or whistleblowing policy;
>
> 2.14. BMG shall maintain a statement on its website underlining its commitment to competition law compliance and acknowledging its involvement in the CMA's investigation, together with a link to its competition law compliance policy;
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> 2.15. Within 2 days of receiving a sealed copy of this Order from the Court, BMG shall publish and maintain a copy of this Order, together with either a copy of or a link to the Disqualification Undertaking on the CMA's website, in a prominent place on its website".

The law

8. s.9B of the CDDA applies if the CMA thinks that (1)(a) "in relation to any person an undertaking which is a company of which he is a director has committed… a breach of competition law", and (b) "the conduct of the person as a director makes him unfit to be concerned in the management of a company"; and if (c) that person offers the CMA a disqualification undertaking. s.9B(2) permits the CMA to accept an undertaking "instead of applying for or proceeding with an application for a disqualification order", which it would do under s.9A. By s.9B(3) an undertaking is that for the specified period, which by s.9B(5) may be up to 15 years (with no minimum), the giver will not, among other prohibitions, act as a director of company, or "in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company". s.9B(4) allows the

undertaking to provide that the prohibitions will not apply "if the person obtains the leave of the court".

9. s.9B(7) imports into the undertaking regime the s.9A(4) definition of a breach of competition law being (materially) where an undertaking "engages in conduct which infringes… (a) the Chapter 1 prohibitions (within the meaning of the Competition Act 1998)…"; and also the s.9A(5)-(8) criteria for unfitness. Materially, the CMA must have regard to whether the person's conduct as a director "contributed to the breach of competition law".

10. s.17 provides the procedure for an application for leave. By s.17(3A), the application where the disqualification is under s.9B is to be made to the High Court; and by s.17(7)(a) the CMA "must appear and draw the attention of the court to any matters which appear to it… to be relevant", and (b) "may give evidence".

11. The first s.9B(4) case to be reported was *Re Fourfront Group Limited; Stamatis v CMA* [2019] EWHC 3318 (Ch), a decision of Deputy ICC Judge Baister (as he by then was) in which the CMA opposed leave (which subject to conditions similar to those in this case was granted). In an approach which was approved in the second case, a decision of Eason Rajah QC (as he then was) in *Sherling v CMA* [2021] EWHC 2463(Ch) (in which leave was granted on conditions, the CMA being neutral provided the conditions were imposed), the judge treated the general principles as no different from other s.17 applications, though subject to certain contextual aspects.

12. By the time of *Sherling* Miles J had given judgment in *Rwamba v Secretary of State for BEIS* [2020] EWHC 2778 (Ch), in which he catalogued conveniently the accepted principles of s.17 applications at [34]. Mr Rajah adopted those in his context of a competition disqualification undertaking permission application, and both sides before me relied on them (with different stresses on parts).

> "(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 to be 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… 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."

13. In *Sherling* at [14], having set out the *Rwamba* general principles, Mr Rajah observed that in the context of competition disqualifications:

> "The powers to impose disqualification orders exist because of the importance of competition law for the day-to-day business activities of all markets within the UK jurisdiction. Breaches of competition law are serious and the importance of the requirement of fair competition is not to be understated".

14. He also adopted a distinction drawn in *Fourfront* at [44] that

> "any competition disqualification based on cover bidding or the like necessarily involves deception; it involves dishonest behaviour that is almost certain to result in real financial damage to others. That applies whatever the disqualification period may be. In run of the mill disqualification cases a lower bracket period will almost always be imposed for a minor or 'technical' wrong. That is not the case here. That indeed requires the court to keep public protection in the forefront of its mind.
>
> [45] Public protection must still, however, be balanced against other relevant factors, one of which is need".

15. Those are not observations which seek to alter the basic test, expressed at *Rwamba* (iv); but they serve to identify factors particular to competition disqualifications.

16. That particular nature also serves as a varnish to the first sentence of *Rwamba* (vi). As Deputy ICC Judge Baister said in *Fourfront*, in which Mr Buckley for the claimant had analogised with the *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164 three brackets (which were applied by ICC Judge Jones in the only s.9A case to come before the courts, *Competition Markets Authority v Martin* [2020] EWHC 1751 (Ch) at [112]), at [19]:

> "The seriousness of the misconduct is another consideration… That is often expressed by reference to the bracket into which the disqualification period ordered or agreed to by undertaking falls, and in that sense is a convenient shorthand to adopt, but in fact it seems to me that it is the seriousness of the conduct to which attention must be paid rather than the period of disqualification per se."

17. That is not to say that the length of disqualification is irrelevant.

18. Before me, Mr Buckley has highlighted the reiteration by Miles J in *Rwamba* of principle (vii) at [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".

19. At [42] Miles J said that:

> "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… The court must always consider the reasons for the disqualification order".

20. He then addressed an aspect of deterrence, the public perception of leave being granted. So, at [43]

> "…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".

21. Particular aspects of that person's knowledge were then set out, ranging from their general understanding "that leave is an inherent part of the disqualification regime" (hence a neutral point in any application), through consideration of the particular conduct involved in that case, the attitude of the disqualified to his disqualification, the agreement to conditions imposing "stringent controls on the business to minimise the risk of breach", the attitude of the Secretary of State (a neutral point there, as she was neutral), and that (in a passage underlined by Mr Buckley, particular to the facts there but he says of weight here) 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"; leading to the conclusion there that the "fair minded observer would [not] think that the grant of leave would undercut or weaken the disqualification regime generally, or the disqualification of Mr Rwamba specifically".

22. In most cases this postulate is no more than the decision-making judge wearing a different set of clothes. However, there will be cases, of which this is one, where there is factual evidence as to the perception in the wider world of the disqualification. More, as here, that perception may be technically wrong in law. Mr Buckley submitted that therefore it cannot be an attribute of our postulate, or in any event could not be considered material to the issue of perception. I cannot accept that. Disqualifications and their effects operate in the real flawed world, not in legal construct. It was not a matter for argument before Miles J as to whether the postulate, being informed of legally-erroneous facts, would in a fair-minded way bring them to the mind of the judge for consideration; or whether in addition to the postulate, the judge would additionally consider the position of the ill-informed but real member of the public; or whether, as they have been, these fall within matters to be addressed

by the CMA in its role under s.17(7), or (in another case) the Secretary of State. For my part I would think that s.17(7) provides the answer to this submission: the CMA has brought facts which it considers relevant to the attention of the court, which must then decide what, if any, weight they should be given. But through whichever basis, the court must be able to weigh real facts. There is nothing in *Rwamba* which determines that they should be excluded through some dominant theoretical construct. As ever, though, the weight and influence which they have depends on their characteristics, and all the relevant matters within the case.

23. Aside from this, Mr Buckley is not, of course, seeking to equate the factual position here to that in *Rwamba*, but rather to draw attention to factors which he says pertain here and have weighed there. Two more examples can be given. At [49] Miles J recorded:

> "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".

At [52] is this, as to the conditions:

> "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".

24. The *Rwamba* principles were drawn from earlier authorities, and did not expressly seek to depart from any of them. Miss Addy has cited from some of these.

25. In *Secretary of State for Trade and Industry v Barnett* [1998] 2 BCLC 64, Rattee J stated at 72c:

> "In a case where the applicant concerned has been disqualified because of dishonesty, it is unlikely that his own needs will weigh very heavily, if at all, and it is unlikely that adequate protection to the public can be provided without the full and absolute operation of a disqualification order".

26. That statement was obiter, *Barnett* not being a case of dishonesty, and it does not directly consider the effect of conditions being imposed; but it is illustrative of dishonesty being a material factor, and one which, depending on the particular case, may prove to be of more than passing weight. The passage followed one which was quoted in *Fourfront*:

> "In my judgement the question I should ask myself is whether it is necessary for Mr Barnett to be a director of a company in order to protect some legitimate interest of Mr Barnett himself, or of any third party, which it is in all the circumstances of the case reasonable that the court should seek to protect. If it is so necessary, then the next question is whether that need can be met without infringing the protection of the public secured by the disqualification order. The extent to which it may be reasonable for the court to seek to protect the interests of the applicant himself in such a case must depend on all the circumstances giving rise to his disqualification. So must the court's ability to continue to protect the public adequately while mitigating the full rigour of a disqualification order".

27. In *Re Dawes & Henderson (Agencies) Ltd (No 2)* [1999] 2 BCLC 317 at 325 Sir Richard Scott V-C stood by dicta of his own in *Re Barings plc (No 4)* [1999] 1 BCLC 262 at 269 balancing an applicant's need against risk of recurrence:

> "It seems to me that the importance of protecting the public from the conduct that led to the disqualification order and the need that the applicant should be able to act as a director of a particular company must be kept in balance with one another. The court in considering whether or not to grant leave should, in particular, pay attention to the nature of the

> defects in company management that led to the disqualification order and ask itself whether, if leave were granted, a situation might arise in which there would be a recurrence of those defects".

28. He continued at 325:

> "In a case where no need has been demonstrated on the company's part to have the applicant as its director or, from a business point of view, on the applicant's part to be a director, there would need, I think, to be only a very small risk to the public which the granting of the leave might produce to justify the refusal of the application. Per contra, if a substantial and pressing need on the part of the company, or on the part of the individual in order to be able to earn his living, could be shown in favour of the grant of leave then it might be right to accept some slight risk to the public if the leave sought were granted".

29. While at 326 he approved the question put by Rattee J in *Barnett*, he cautioned:

> "The emphasis given in a judgment in a particular case on particular circumstances in that case is not necessarily a guide to the weight to be attributed to similar circumstances in a different case".

30. That followed the statement that the s.17 discretion is

> "unfettered by any statutory condition or criterion. It would… be wrong for the court to create any such fetters or conditions".

31. In *Re Tech Textiles Ltd* [1998] 1 BCLC 259 at 267 Arden J said:

> "Leave… in my view is not to be too freely given. Legislative policy requires the disqualification of unfit directors to minimise the risk of harm to the public, and the courts must not by granting leave prevent the achievement of this policy objective. Nor would the court wish anyone dealing with the director to be misled as to the gravity with which it views the order that has been made".

32. In *Barings (No 4)* Sir Richard Scott V-C had also spoken to the point, agreeing with the Secretary of State's counsel at 265 that "s.17 leave should not be granted in circumstances in which the effect of its grant would be to undermine the purpose of the disqualification order", and continuing:

> "The improprieties which have led to and required the making of a disqualification order must be kept clearly in mind when considering whether a grant of s.17 leave should be made".

33. Reminding himself of the *Dawes & Henderson* edict of no statutory fetters, in *Re Morija plc* [2007] EWHC 3055 (Ch) Sir Andrew Park at [33]-[35] provided "some broad principles [which] have emerged from cases over the years".

> "[33] The purpose of a disqualification order or undertaking is not to punish the director for his misconduct. Rather it is to protect the public. Partly it does that by restricting the ability of the person concerned to expose the public to the risk of loss from further misconduct on his part. It is worth adding that the possible further misconduct does not have to be of the same nature as that which has led to the disqualification… Partly a disqualification order or undertaking achieves its purpose of protecting the public by deterring other directors from misconduct which might lead to disqualification proceedings against them. It also seems to me that the existence of the disqualification jurisdiction can have a beneficial effect in the form of maintaining and improving standards of integrity on the part of businessmen who become directors of companies.
>
> [34] Where a leave application is made the court has a balancing process to undertake. In favour of a grant of leave is the 'need' criterion: the need of the disqualified director to earn a living, and (a different matter, and usually more important) the need of some other person, typically another company, to have his services. Against the grant of leave may be the factors which I mentioned in the foregoing paragraph as purposes which the legislation is intended to serve: protecting the public by, to use a familiar metaphor drawn from another kind of disqualification, keeping

> off the road a person whose past conduct has fallen short of the standards to be expected; deterring other directors from similar misconduct; and maintaining and improving standards of integrity.
>
> [35] In the balancing process the degree of seriousness of the misconduct on the part of the disqualified person who is applying for leave is relevant. The relevance seems to me not to rest on the notion that, if a person's misconduct has been serious enough, a refusal of leave serves him right. Rather the point is in part that, in the case of a person who has misconducted himself seriously in the past, the risk to the public of him misconducting himself again if he is granted leave is greater than would exist in the case of a person whose misconduct was less serious. A different aspect of the same point is that, if a disqualified director whose conduct has been significantly bad is seen by others to have been granted leave by the court to continue as a director of another company, the deterrent effect on other directors will be weakened".

34. Finally, and with the caveats already given about extrapolating the facts of one case to another, and about this being an unfettered statutory regime, Sir Andrew Park at [54] on the facts before him described the following as "a consideration which seems to me to have much force".

> "Until 2003 Mr Kluk had been a director of and a shareholder in a company which dealt in work-related textile goods. In 2003, in connection with that company, he did things on account of which he agreed that he should be disqualified from being a director of a company for the long period of ten years. By the time of the disqualification he was a director of another company which carried on a similar business, the shareholders of which were his wife and trustees for the two of them. What message about the disqualification regime would it convey to directors of similar companies if he was given permission by the court to continue running (with two other directors, recently appointed from long term employees) the same sort of company, carrying on the same sort of business, as he had been running (with two other directors) before? The wrong message, I suggest. It would give the impression that the

disqualification regime has no real teeth because, even in cases of serious misconduct, it is not difficult to obtain leave to continue to manage another company".

The permission companies

35. The original company was Brown and Mason. This was incorporated on 14 March 1961, its founders being Alfred Brown and Albert Mason. Mr Mason left in 1968, since when it has been a "family-owned and -run business". Alfred's son Terry joined from school on or shortly after incorporation, and became managing director in around 1984 when his father died. Mr Brown also joined Brown and Mason from school, in 1991; so too did his brothers Richard and Lee, and sister Laura (now Hadden). All started at the bottom.

36. Mr Brown was a director of Brown and Mason from 1 February 1996 until his resignation on 30 June 2020, leaving his father Terry as sole director. From the mid-2000s Mr Brown was operations director, and from 2015 managing director, replacing his father who became chairman. As operations director he was "responsible for managing the day-to-day operations of the business, running contracts and acting as client liaison. I reported solely to my father".

37. Brown and Mason entered administration on its director's appointment on 21 September 2020, with Engin Faik as administrator, consequent on the group's restructure in January 2020 by which the majority of its assets were acquired by BMG, which assumed its secured liabilities to European Metal Recycling Limited ("EMR") and Santander. On 5 April 2022 it changed its name to CBR02 Limited, and on 20 September 2023 moved to dissolution.

38. Brown and Mason's holding company had from about 1993 been Brown and Mason Holdings Limited (crn.01783424) ("Holdings"), incorporated on 17 January 1984 and adopting the name Brown and Mason (London) Limited on 14 February 1984, before on 9 March 1993 adopting its holding company style. It also entering administration on director's appointment on 21 September 2020, with Mr Faik as administrator; changed its name, to CR03

Limited, on 2 March 2022; and moved to dissolution on 30 December 2022. Mr Brown was a director of Holdings from 6 April 1998 until 30 June 2020. Again, from that date his father was sole director. In February 1996 Mr Brown became a 10% shareholder in Holdings, his parents owning the balance; and in April 2005 a 25% holder. In 2008 his parents disbursed part of their holdings to other of Mr Brown's siblings.

39. BMG was incorporated on 5 March 1985 as Brown & Mason Plant Hire Limited, which reflected its then business; it changed to its present style on 27 June 2019. Until 9 January 2020, when ownership transferred to NRLB, Holdings was its parent.

40. NRLB was incorporated on 4 December 2019 with Mr Brown as sole owner, which he remains, and as sole director. He was joined as director by Anita Morris on 20 July 2023.

The grounds of disqualification: the undertaking

41. The schedule to Mr Brown's undertaking contains admissions "for the purpose of the CDDA 1986 and for any other purposes under the provisions of the CDDA 1986".

> "6. As found by the CMA in its Decision issued on 23 March 2023 (the 'Decision') and admitted by BMG in settlement of case 50697, Brown and Mason infringed the prohibition imposed by section 2(1) in the Competition Act 1998 (the 'Chapter 1 Prohibition') by participating in the following agreements or concerted practices (together, 'the Admitted Infringements').
>
> 6.1 Admitted Infringement 3: Between at least 3 June 2013 and 8 July 2013, Brown and Mason and McGee (as defined in the Decision) infringed the Chapter 1 Prohibition by participating in an agreement or concerted practice in the form of an arrangement for Brown and Mason to provide McGee with a cover bid in return for a compensation payment.

> This agreement had, as its object, the prevention, restriction or distortion of competition in relation to the supply of Demolition Services at the Shell Building, Southbank. The contract was awarded to McGee for £18.4 million although, following subsequent additions to the project, it reached the final award value of £21.05 million. The compensation payments received by Brown and Mason amounted to £600,000 excluding VAT.
>
> 6.2 Admitted Infringement 6: Between at least 28 July 2014 and 28 August 2014, Scudder (as defined in the Decision) and Brown and Mason infringed the Chapter 1 Prohibition by participating in an agreement or concerted practice, which had as its object, the prevention, restriction or distortion of competition in relation to the supply of Demolition Services for the Lots Road Power Station. This took the form of a compensation payment arrangement (without cover bidding). The contract was awarded to Scudder for £9.6 million, and Brown and Mason received £100,000 in compensation excluding VAT".

42. Mr Brown accepted that each Admitted Infringement "had the object of restricting competition"; was a breach by Brown and Mason of competition law; and that "for the reasons set out in the Decision, as admitted by BMG (as the economic successor of Brown and Mason) and summarised above, the first condition for a competition disqualification order is satisfied (namely, that the relevant company of which I was a director committed a breach of competition law)".

43. Admitted "Matters of Unfitness" were then set out.

> "11. I admit that my conduct as a director of Brown and Mason was such as to make me unfit to be concerned in the management of a company, since my conduct contributed to Brown and Mason's breaches of competition law. As the person with oversight of day-to-day operations of the business, including contract and client relationship management, I accept that Brown and Mason's participation in each of the Admitted Infringements resulted directly from my involvement.

12. In the case of both of the Admitted Infringements, I took a central role in the conduct. As explained below, I met with Brown and Mason's competitors and agreed the cover bidding arrangement in respect of Admitted Infringement 3 and agreed to fix an element of the tender price in respect of Admitted Infringement 6. In both cases, I agreed the amount and terms of the compensation payment and made the arrangements for their payment. My involvement is summarised as follows:

12.1 Admitted Infringement 3: I was directly involved in agreeing to provide the cover bid that is the subject of this infringement… I was contacted by Brian McGee… after the submission of initial tender bids for the Shell Building Project… I met with Mr McGee in person and discussed the tender with him. Mr McGee explained that he wanted the job, provided me with their tender quote and offered to pay Brown and Mason compensation should we agree to submit a quote higher than McGee's… I had received high quotes from subcontractors for the job and, following the re-scope of the project, I did not believe that Brown and Mason would succeed in the tender. I therefore accepted his offer of £600,000 in compensation for placing a cover bid (although, in fact, the bid that Brown and Mason submitted at the second stage of the tender process was slightly lower than McGee's). At the time I made this agreement, I had primary responsibility for decision-making within the business as my father… was absent for medical reasons.

12.2 …in late 2015, I perceived Brown and Mason to be facing financial difficulty. Recalling my original agreement with Mr McGee, and knowing that McGee had in fact secured the Shell Building Project… I called Brian McGee and requested payment of the compensation. I agreed with Mr McGee that the payment of the compensation would be split into three amounts spread across a 12-month period, and that each of the invoices would be made against other projects at Mr McGee's direction, despite the fact that Brown and Mason was not providing services for any of those other projects.

12.3 Following consultation with Mr McGee, I then instructed employees of Brown and Mason to prepare and send three purported invoices to McGee for a total of £600,000 (excluding VAT) [these were dated 17 December 2015, 2 May 2016, and 6 May 2016]. I directed them to enter those invoices against fictional services and goods that were not in fact ever supplied by Brown and Mason…

12.4 Admitted Infringement 6: On 14 July 2014, Denis Deacy (Scudder) sent me a text message requesting a meeting to discuss the upcoming tender for the Lots Road Power Station project… On 28 July 2014, I met Mr Deacy…

12.5 … at that meeting, Mr Deacy informed me that he wanted the contract and that he would 'buy me off the job'. In other words, he requested that I provide a cover price for him in exchange for a compensation payment, rather than actively compete for the tender.

12.6 I refused to participate in a cover bidding process as Brown and Mason wanted to win the contract. However, following further discussion about the client and the tender process, I agreed to a proposal from Mr Deacy that we would respectively increase the prices of our tenders by a set amount, to be paid to the losing party. My recollection was that the value of the increased price and related compensation payment was £80,000, but I note that the Decision also includes reference to documentary evidence… that indicate that the agreed increase to the price and the related compensation payment was in fact £100,000.

12.7 ... Brown and Mason intended to win the contract and priced the job with this intention. Nevertheless, following Scudder's successful tender for the project I contacted Mr Deacy to request the compensation due under our agreement. I called Mr Deacy to request that Scudder make payment of the agreed amount, and in June 2016 I sent two text messages to Mr Deacy each asking if we could 'sort an invoice'. These messages were sent to ensure that payments due under the arrangement were made.

> 12.8 Having received Mr Deacy's agreement to make the payment, I thereafter corresponded with Scudder employees to agree the terms of the invoice before instructing employees within Brown and Mason to prepare and send four purported invoices to Scudder for a total of £100,000 (excluding VAT) [these were dated 10 November 2015, 22 July 2016, 2 August 2016, and 16 February 2017]. Again, I directed them to enter those invoices against fictional services and goods that were not in fact ever supplied by Brown and Mason…
>
> 14. As a result of my actions… I caused Brown and Mason to engage in conduct which created conditions of competition which did not correspond to the normal conditions of the market.
>
> 15. I understood at the time that my conduct was wrong. Furthermore, it is clear to me now, and should have been clear to me at the time, given my position as an experienced director, that such interactions between competitors to agree cover bids, fix elements of tender prices and receive compensation payments carried unacceptable risks of infringing competition law.
>
> 16. I accept that price fixing (of which cover bidding is one type) is among the most serious forms of competition law breach.
>
> 17. I also accept that cover bidding arrangements in conjunction with compensation payments arrangements have been found to be more serious than arrangements where no such inducement is offered.
>
> 18. My participation in the Admitted Infringements contributed to Brown and Mason's breaches of competition law and was central to BMG being subject to a penalty of £2,400,000 under section 36(1) of the Competition Act 1998, which BMG has agreed to pay under the settlement agreement with the CMA dated 25 February 2022".

44. Those are the admitted grounds for disqualification. On this application it is not open to Mr Brown to go behind those admissions. Mr Buckley underscores that actually Brown and Mason's post-agreement revised tender

bid for the Shell Building was at £16,710,954 less than that of McGee's £16,726,877, and that the Decision records that "Brown and Mason may, in fact, have submitted this bid with the intention of winning the contract", albeit it later did not pursue its bid "due to resource concerns, programme and/ or cost issues". That does not avoid the issue that there was an agreement, which Mr Brown chose to follow up and enforce 2 years later; nor that this point is already factored into the schedule to the undertaking, which admits the agreement "notwithstanding indications in the evidence that Brown and Mason, in spite of this arrangement with McGee, sought to win the contract". For the same reasons, Mr Buckley cannot now fish out of the Decision in relation to Lots Road that Mr Brown never thought that he or Scudder would comply with their agreement.

45. Also relevant to this application is how the penalty of £2,400,000 was calculated, in which the CMA had regard to both the 2018 and the 2021 Penalty Guidance six-step approach.

46. BMG benefitted from a 5% reduction because its "compliance activities demonstrate a clear and unambiguous commitment to competition law compliance throughout the organisation from the top down"; albeit that its steps "in relation to senior management commitment, risk mitigation and review are not as comprehensive as the other parties'", who received a 10% reduction.

47. There was also a reduction from the figure of £3,649,987 to £3,000,000 on the grounds of proportionality, considering the short duration of each infringement, and that they "concerned a single contract, rather than the entirety of BMG's business in the relevant markets; and BMG was neither a leader nor an instigator of the conduct"; and also BMG's size and financial position.

48. A further 20% deduction was granted for admission of the "facts and allegations" constituting the Infringements.

49. For completeness, the penalty has been subject to a time-to-pay arrangement, allowing an initial payment of £1,200,000 in May 2023 and a balance

including interest of £1,297,000 in 2024. The CMA has confirmed that the solvency position of BMG/ NRLB is not in issue in this application.

50. In his evidence in support, Mr Brown has confirmed that he "fully accept[s] the seriousness of the CMA's findings and the penalty that has been imposed". He expresses "my own profound regret in respect of the infringements, and their association with a family-run business established by my grandfather". The investigation and penalty "has shaken BMG to its core and resulted in significant change across the business, specifically focussing on financial processes and how we see competition law compliance… the business now carried out by BMG is very different to that which existed at the time of the infringements".

Mr Brown's role at BMG; the basis for the application

51. As above, from 2015 Mr Brown was managing director at Brown and Mason, which role (save since the undertaking, its description) he has continued at BMG. Also as above, and as we will hear again below, BMG is a long-established, successful company which is a leader in its field (all agree that there are no formal distinctions to be drawn between the trade of Brown and Mason and that of BMG). Since 2015 Mr Brown says its "business has expanded and our clients now include the majority of the blue-chip energy providers in the UK (including Scottish Power, RWE, Uniper, Engie and EDF Energy), Teesworks/ South Tees Development Corporation in Redcar and petrochemical companies (including Saudi Arabia's Basic Industries Corporation and INEOS)". As at July 2023 it was tendering for the "decommissioning of the radioactive part of the boilers adjacent to the nuclear reactor at Dungeness".

52. BMG now has a board of 8, including Mr Brown. Each board member has given evidence. No evidence on either side has been subject to challenge through cross-examination. Mr Brown's evidence is uniformly supportive of his position. The affidavits describe both the roles of the respective deponent, and their view of the role of Mr Brown within the company.

The BMG board, other than Mr Brown

53. Mr Brown's brother Richard was appointed as a director of BMG on 9 January 2020, and was a director of Brown and Mason from August 2004. He is the UK Operations Director, a role he took over from their brother, Lee. He has worked for the business for 31 years, starting in the yard. From 2009 he was Projects Director. As Operations Director he oversees the operations on all UK sites, including the instructing and managing of subcontractors, and assisting Charles Buckingham with the "planning and execution of demolition works". "Put simply, I take care of the work that we have already won. I have no involvement in the pricing or tendering of new work".

54. Lee Brown was also appointed a director of BMG on 9 January 2020. He started in the yard when he was 16, so has been in the business for around 29 years. He too became a director of Brown and Mason in 2004, shortly afterwards becoming Projects Director and then Operations Director. While still on the board of BMG, he is the European Operations Director overseeing two Dutch-incorporated companies, an operations company Brown & Mason BV, and its immediate holding company Brown & Mason Holdings BV, which is itself wholly owned by NRLB. He looks after the sites and manages day-to-day operations in the Netherlands. The applicant Mr Brown is not seeking permission in respect of the Dutch companies.

55. Mr Buckingham was another 9 January 2020 appointment to the BMG board. He has worked for the business for 52 years and is now Demolition Director, producing demolition programmes and overseeing all demolition projects to ensure the structure is removed safely and in accordance with the client's specifications; he is responsible for "the technical aspects of complex projects".

56. The last of these 9 January 2020 appointments is that of John Payton, who began work for Brown and Mason as an estimator in 1985, the year of its incorporation. His role has essentially remained the same, even if he is now Commercial Director. He reviews tender documents; visits sites, including to

value and evaluate scrap metal; he prices demolition costs and completes pricing schedules on tender documents. So "my principal role is as BMG's lead estimator", and "I have limited experience in the current operational side".

57. Alex Hadden was appointed on 8 July 2019. Although it is not in his affidavit, he is Mr Brown's brother-in-law, being married to his sister. Mr Hadden is Safety, Health, Environment and Quality Director. He joined Brown and Mason in 2000 as a safety manager, becoming a board member, as Safety Director, in 2006. He is not involved in the financial side, and his discussions with clients are "generally limited to SHEQ aspects". He has "extensive experience of regulatory compliance matters", and from 24 January 2022 has been Competition Compliance Officer.

58. Anita Morris was appointed on 26 May 2023. She is the Finance Director, having been with Brown and Mason as its Finance Director since 2017. Mr Brown says she was originally brought in to "transform and modernise our finance function", which she did with a new finance team. She has been an Associate of the Chartered Institute of Management Accountants for about 35 years, working for most of her career in the construction industry, although she notes that the BMG business is distinct in its scrap metal revenue stream. She manages the finance team, which processes the everyday financial transactions as well as preparing management accounts, and oversees the statutory accounts. She records that turnover has increased from £15,000,000 in 2020 to £51,300,000 in 2022, and EBITDA increased from £870,000 to £4,200,000 over the same period.

59. In response to the Decision, on 26 May 2003 Adam Collinson was appointed for an initial 3-year term as non-executive director. Mr Collinson qualified as a solicitor in 1990 and has accrued almost 30 years' experience in competition law. He is a former partner at Eversheds Sutherland (International) LLP, retiring in 2017. He has put in place systems which will be discussed below, and supervises compliance with competition law.

60. Although not a member of the BMG board, the other relevant member of the management structure is Dan Baker, who joined in 2019. He is a self-employed consultant with an MSc in Construction Law and Dispute Resolution and is BMG's Contracts Director. He has worked in the demolition industry since 2007, and before that was in construction. He is responsible for the legal and administrative management of BMG's tenders and contracts, including compliance with their terms. He does not deal with the figures, but does ensure matching of a tender to the client's technical requirements.

Mr Brown, his roles, and others' perceptions

61. Richard Brown says that "Nick is the one individual within the business who has oversight of and an understanding of all business operations and commercial relationships".

62. Mr Brown's evidence aligns with that.

63. He has made "all key decisions and act[ed] as the 'glue' for many years". "I pride myself on my hands on approach… I know many of our employees by their first name and they know me by mine… my role touches each and every area of the business and I have a wide understanding of every area… All major decisions come through me and I am often a point of reference for advice when things do not run to plan".

64. He describes how from January 2020 until May 2023 he was involved in all stages of negotiations for 9 contracts worth in excess of £180 million. Although they are not a part of this application, he has also been driving the development of the business into the Netherlands through the incorporation of the Dutch companies (perhaps because of their relative size, it is not suggested that one can extrapolate from his non-involvement in those that he need not be involved in BMG). He has also "worked hard to develop the best [working] practices".

65. It "takes a very long time to learn and fully appreciate how a business such as BMG operates. This is largely a product of the very specialist nature of the work BMG carries out, the niche market in which it operates and the fundamental importance of key relationships with clients, stakeholders and major suppliers", which Mr Brown says he alone holds. The stakeholders include "funders, insurance providers and sub-contractors". He continues: "This lengthy 'apprenticeship' equipped me to understand and appreciate the internal workings of the demolition business now undertaken by BMG, and the necessary knowledge and experience to successfully grow that business". "In a nutshell, I have trained my whole life for my role within… BMG, which means that only I have the necessary knowledge and experience and, in reality, I am the only person who can fulfil my role successfully".

66. So it is his view that there is "no one within BMG who can step into my shoes. This was not my design but that of my father who earmarked me from birth to replace him as the managing director". Save for Ms Morris and Mr Collinson the board members have been with BMG for more than 20 years but none, including his brothers, has "the relevant knowledge, skills or experience to manage BMG or the necessary relationships with key trading partners, clients and funders. Similarly, there is no one within BMG below board level who [is] able to step up to my role". The relationships are Mr Brown's, who "cannot simply introduce another person" to them. They "are heavily influenced by the trust and confidence that our partners have in me".

67. As Mr Buckley says, absent cross-examination the evidence must be accepted; and though he acknowledges that there is always the question of what actually is said, he also observes, in my view correctly, that it would be inappropriate here to pick it over in detail to unearth minor matters which it might have addressed but has not and then hold them against his client. That said, it is plainly not the case that Mr Brown bears no responsibility for his having no successor within BMG despite his importance to it: unlike his forebears, he has not chosen to groom a familial, or other, successor. Neither has he or the board developed any succession strategy, whether before the Decision or after his disqualification.

68. These excerpts also show another characteristic of his evidence, whether from himself or from others, in largely failing to address what would seem an important (and obvious) point, being the reaction of those with whom he has a relationship of "trust and confidence" to the Decision and to his disqualification. Whether they are, as we shall come onto, insurance brokers or banks or other "partners", it would be informative to know what view they take and how (as it must surely have done) it affects their trade and relationship. Without that evidence it is not easy simply to accept Mr Brown's view that the relationships have proceeded unhindered, and that they remain with him alone rather than to any degree with BMG, a market-leader in its specialised field and therefore a company with which others are going to want to do business.

69. As to scrap metal, Mr Brown says he is "responsible for the negotiation and sale of all scrap metal" and holds "all the relationships with the different merchants", its sale being worth around £20,000,000 per year to BMG. "We account for this income when we price the job. There are many ways that these metals can be sold and the global scrap markets are complicated and ever-changing. I have been involved with the sale of scrap metal for over 20 years and it is still one of the most challenging parts of my job". He says that only he has this necessary expertise.

70. Ms Morris confirms that the "scrap metal market is crucial to BMG's operation because in pricing a demolition project we offset the cost of the project against the anticipated revenue from scrap". She says that while metal used to be sold forward, that is no longer the policy as forward sales have been found to reduce profits. "The long-term nature of the projects means that the fluctuations in the price of scrap can have a significant impact on a project's profitability".

71. While Mr Brown deals with its sale, Mr Payton also has a role in the realisation of the scrap metal value as it is he who assesses the quality of scrap metal on site and its value. He describes the valuation as an "art". He and Mr Brown will discuss it in light of fluctuating commodity prices before Mr Brown takes it to EMR or another metal recycler.

72. Although not himself involved in the finances, Mr Baker states that "the vast majority of BMG's revenue is generated from the sale of scrap metal recovered during the demolition". Set against the views of his more informed colleagues, that seems an overstatement, or at least a statement which might only at times be true. Mr Baker also opines that "Mr Brown's input is vital and often reveals alternative strategies… his knowledge in this arena is something that our funders take great comfort in", but given his own role it is not clear how he can speak to that, when others more involved do not.

73. The relationship with EMR is close. In 2015-2016 there was a collapse in the scrap metal/ steel market, which caused Brown and Mason cash flow difficulties. At the end of 2016 EMR provided Brown and Mason with a £10m loan, negotiated between Edwin Leijnse of EMR and Mr Brown and his father. Shen Yap, between 2009 and 2021 the auditor responsible for Brown and Mason, describes the drawdown as "exceptional", being permitted even before the finalisation of the paperwork. This EMR loan remains outstanding and has been novated to NRLB. Mr Yap is therefore of the "opinion… that Mr Brown's ability to continue to act as a director is essential to the EMR relationship… I would have very serious concerns that without Mr Brown at the held of BMG, there is a risk that EMR could pull their funding and walk away".

74. As to the scrap metal sales themselves, Mr Brown says this is a "key partnership", EMR being "one of the world's leading metal recyclers" from whom the best value can be obtained. He believes EMR trusts him and his management, and is concerned that without his being "at the helm" it "would be reluctant to support the business further", because of concerns about securing the new work to fund the £10,000,000 facility. He is also certain that without him at BMG "EMR would seriously consider its position and may call in the outstanding loan".

75. We do have an affidavit from EMR's COO and CEO, Mr Leijnse. It has thousands of suppliers, but stronger relationships with some, and a "very strong relationship with BMG" which is a "material and reliable" supplier of a "significant amount of scrap", although that is in the context of EMR's

turnover of £4.7 billion to year end 2021. The relationship is both trading and strategic, as evidenced by the loan to cover Brown and Mason's temporary cashflow difficulties. EMR "did not want to risk a reliable supplier getting into undue difficulty because of some unusual, largely macro-economic circumstances". The relationship is between the companies, but it "helps a lot" to have a personal relationship, as he does with Mr Brown, to whom he speaks regularly. "It is impossible to say that no one can be replaced; however, people with his knowledge and abilities are very scarce, and I consider him to be a crucial factor in the business" of BMG, which is "very centred around" him. It would be "deeply negative" were he to step down, and unhelpful for BMG's relationship with EMR.

76. So, it would be a serious and prejudicial matter, but for somebody as alive to the actual corporate relationships as is Mr Leijnse, the speculations that they might thereupon be terminated seem erroneous.

77. BMG's insurance position is also discussed. Mr Brown thinks that without him "our current underwriter would be likely to re-evaluate its position and/ or the terms under which it currently provides cover, and… our broker (Verlingue) would struggle to secure adequate and cost-effective insurance cover for BMG". It would hardly be a surprise if the Decision, his disqualification and his removal did not each cause underwriters to reassess their position. On 15 June 2023 Zurich, which insures BMG's plant and equipment "indicated that it would cancel cover as a result of the disqualification"; "the position they will take if my application is unsuccessful is likely… to be quite negative". The threatened cancellation is currently suspended. Mr Brown does not distinguish between his non-obtaining of permission leading to loss of any position with BMG, or it leading to his becoming a consultant or employee. His disqualification also had the effect that the insurer required cash collateral of £563,401 for the provision of a performance bond for West Burton, but if this application is successful, this will be revisited.

78. Verlingue Limited is BMG's insurance broker. There is evidence from its Head of Corporate, Kevin Charman. BMG has been Verlingue's client for 20

years, Mr Charman taking it on as one of his clients 4 years ago. He has occasional contact with Mr Hadden but the relationship is with Mr Brown whom he meets around 6 times a year. The insurance provision includes employers' liability and public liability, operating at high levels because of BMG's hazardous market; and the hazards mean that "only a very small number of underwriters are normally willing to provide the cover"; "these insurers are focused intently on the management of risk" (surely). BMG's primary insurer is Syndicate 2525, which "knows Mr Brown well", and for whom he is a "trusted quantity". BMG has an "enviable claims track record", but a change in its senior management "would be likely to prompt fresh due diligence and a serious re-evaluation of the overall risk", with the danger that premiums "might" increase to non-economically viable levels: its current premiums are "very competitive". He then says that "he is far from confident" that Syndicate 2525 would not "adjust or withdraw cover". He himself would "have great reservations about insuring the company without Mr Brown at the helm" because of anxiety about a "greater vulnerability to claims".

79. Robert Turner, a "Claims Director at Ive Syndicate 2525", in post since 2003, also gives evidence. The Syndicate "underwrite[s] a lot of demolition contractors". Mr Turner meets Mr Brown each year, ahead of renewal. There are "very few companies… [with] a claims record with as few claims as BMG and it is the 2525 Syndicate's view that this is because Mr Brown has been vital as the controlling mind in ensuring that the business fully commits to the highest standard of risk assessment, risk control and employee training in what is a very hazardous environment". The personal relationship "has a great deal of value because we can talk to him about health and safety in the workplace". Were Mr Brown no longer a director or involved in the management "I can only imagine that we would be very concerned that that positive influence was no longer there. There is a very real risk that claims may increase which would lead to a higher premium". If Mr Brown were not involved "we would have to look anew at the risk".

80. There is nothing very surprising here. A change of circumstance means a potential change in risk, which requires evaluating. That change is likely to be

to some degree negative to BMG because of the confidence the brokers have in the abilities of Mr Brown to deal with health and safety, generated by their years of relationship with him.

81. Another partner is Santander. At the outset of Covid it provided favourable terms of borrowing, Mr Brown believes because he was "at the helm". Despite the appointment of Ms Morris, he continues to discuss annual reviews and facility increases with the Santander corporate director. Santander has recently agreed to provide an "extra facility.. in case it is required, given the pressures that the business is currently facing and the uncertainty of my role, which is likely to have a significant impact in the conversion rate of BMG tender proposals". That seems to indicate that the facility is to cover the risk that Mr Brown's application is unsuccessful, but actually Mr Brown says that its being granted is conditional on his obtaining permanent permission to act (as confirmed by Santander in an email of 21 July); so it seems the facility is to cover any hiatus consequent on his having only interim permission.

82. Ms Morris says that "Without the additional £2m overdraft from the bank, we would have to look at other options to assist with cash management such as the forward sale of the scrap, which would be detrimental to the profit of the business and may not, in any event, generate sufficient cash to accommodate our requirements". Unlike Mr Brown who views this additional facility as only potentially required, she has earmarked it as necessary for the provision of working capital for West Burton, "where [BMG] will incur heavy costs up front to enable it to extract and release the scrap from the site, on which it mainly relies to generate revenue", and for the maintaining of specialist employees, even those "not currently fully-utilised". She also notes that the existing £4m overdraft facility is repayable on demand; and if Mr Brown's "application is unsuccessful… and Santander were to call in the overdraft facility, the business would likely be brought to an instant halt with catastrophic consequences". The chances of such action are not identified.

83. Carl Caswell is a director of Omega Environmental Services Limited, a sub-contractor for BMG which is "far and away" its largest client, and which he has known for 22 years. Mr Caswell prices the asbestos-removal element of

tenders for BMG, for whom Mr Brown is 90% of his contact. There "aren't many people in the industry that come anywhere near Nick Brown; I work with other big demolition companies and not many people come close at all"; so some do. In Mr Caswell's view, BMG is the "only one main contractor who can really dismantle power stations in the UK". Without Mr Brown, though, his opinion is that the business is, for unspecified reasons, "very weak".

84. Stephen McCann is managing director of PERSES Group, which now provides "consultancy services and training courses to the specialist demolition and asbestos removal sectors" including "BMG and other large demolition companies such as Erith Group, Keltbray Demolition Limited and the Squibb Group", although it had undertaken demolition itself and provides advice within the field as well. Mr Brown is "key to BMG's success"; "exceptional in identifying the current and future trends and positioning BMG in the correct place to take advantage of these movements" (these are not identified, and no-one else mentions them); "anyone can knock down a bunch of houses. When you're blowing up a 25,000 tonne turbine hall and then in six months you're back doing something else, that is an entirely different game. That is not something that anyone can do but BMG does". "Due to my history and role within the demolition industry, I believe that I have a unique ability to assess BMG's reputation… I consider that BMG has a solid reputation as the 'King of the Power Stations'. I believe BMG… is known as the market leader in this field". Despite that position, without Mr Brown being a director or involved in management there would be "a very negative effect on BMG", which "would potentially lead me to advise the client not to invite BMG to tender". He also says that if Mr Brown were not a director "I would have grave reservations about recommending BMG on complex demolition jobs". Without Mr Brown "BMG is just like any other ordinary demolition company". Particulars of these genuine reservations are not given.

85. Mr McCann also goes on to consider the means and effect of a replacement for Mr Brown. "I believe it would be very difficult to bring someone from outside BMG into the company to manage it in the short to medium term.

Long term, like anything, companies could self-correct as long as they stay afloat, but this is a big 'if'". Even if there were a new managing director, "there would still be problems" as the "worst sign to see outside your favourite restaurant is 'Under new management'". He adverts briefly to outside perception: "Certain clients, such as SGN, are already concerned about Nick Brown's disqualification, and the CMA issue generally… It doesn't take a lot to put one company at a real disadvantage".

86. Before turning back to the evidence of Mr Brown and the BMG directors as to alternatives, there is evidence from the auditors. According to Mr Brown, they have indicated that without him as director "they would have serious concerns about BMG's future viability and their ability to certify BMG as a going concern".

87. Andrew Barnes is a partner at Barnes Roffe who has been "involved in the relationship" with BMG and related entities since 2012, although at that date Mr Yap, another partner, was responsible for the direct relationship. He has been the senior statutory auditor for BMG for its 2020-2023 accounts, and has a "detailed understanding of their business", to which "Mr Brown's knowledge and oversight of all ongoing contracts is invaluable in order to ensure accurate accounting treatment", albeit that Mr Barnes dealt first with Mrs Hadden in the accounts, and since 2017 with Ms Morris with whom, as with Mr Brown, he has weekly contact. Given his "critical role", the loss of Mr Brown as a director "would be a highly relevant factor for the going concern assessment. In my opinion the exit of Mr Brown would give rise to very serious concerns about BMG's future viability, and I would struggle to conclude that the business will be a going concern 12 months from the date the FY23 financial statements are approved". He questions who would take on tendering; the management of "critical relationships with EMR and Santander"; the key trading relationships; the understanding of all areas of the business.

88. "While I do not think anyone is irreplaceable, from my experience of working with BMG over the last 10 plus years, and my understanding of the demolition market more broadly, I consider it would be very difficult to find a suitable

candidate to replace Mr Brown. I am also of the view that were such a candidate identified, it would likely take a lead time of 6-9 months for a suitable individual to be recruited and likely a further 6-9 months to bed into the role".

89. Mr Buckley confirmed that the board of BMG has taken no steps to identify an external replacement.

90. Mr Yap became partner at Barnes Roffe in 2009 and between then and 2021 was responsible for the annual audit of the Brown and Mason group of companies, being succeeded by Mr Barnes. His original prime contact was Terry Brown, who "led the business with his sons (Mr Brown, Richard Brown and Lee Brown) and daughter (Laura Brown) 'in training' behind him. I could see the evolution", Terry increasingly referring matters to Mr Brown. It took Mr Brown about a decade's shadowing "to develop the requisite level of knowledge and experience to take over as Managing Director". Mr Yap now provides "ad hoc strategic business advice", and in that role has dealt with Mr Brown almost weekly.

91. Mr Yap says that without new contracts BMG would be insolvent, as its existing contracts are insufficient to cover its overheads. Although there is an indication from Ms Morris that the additional Santander funding facility is required for ongoing cashflow, neither Mr Brown nor any director has said the same, and as already recorded the CMA takes no issue on the solvency of BMG.

92. Mr Yap continues: "Were Mr Brown to be disqualified, I would expect this to have a very negative impact on any new tender processes".

93. This is a striking sentence, especially from an auditor. It can only mean that if Mr Brown is not successful in this application, new tenders will be negatively impacted. This is therefore direct evidence of perception of the nature of this application: if it fails, Mr Brown is disqualified; if it succeeds, he is not. That gross misperception is held by a professional and highly experienced auditor.

94. Mr Yap is also of the opinions that it would be "impossible for Mr Brown to continue to manage his critical stakeholder relationships without being a director", without giving particulars; and that it "would be extremely challenging to bring in an outsider and, in my view, the lead time for this would in any event put BMG at risk". He does not say what that lead time is.

95. Mr Yap describes Mr Brown's ongoing stewardship as "crucial to [BMG's] ongoing, and future, viability". Again, this seems an unparticularised, though genuinely-held, impression.

96. That stark view of failure of application resulting in failure of BMG is not one shared by the other deponents, including Mr Brown. At his most extreme, and as drawn out in Mr Buckley's submissions, he says that absent him as a director "I believe that there would be a very significant risk that BMG would fail", and he says why: Santander, the insurers, customers and staff would lose confidence in it; and he is concerned that customers "will look for ways to exit contracts". "Most contracts have provisions within them relating to key individuals having the correct level of experience", such that customers might terminate BMG's contracts (specifics are not given). He also believes that "key individuals within BMG would consider their position". It would be interesting to know who he considers to be the other "key individuals". Only Mr Buckingham says he would leave if there were an external appointment, but he must be nearing retirement anyway. As to Santander and the insurers, their evidence does not substantiate a post-Mr Brown loss of confidence of such a degree as to risk BMG's failure; and given the primary reputation of BMG, the long-term nature of those dealing with it, and as comes out from their evidence the primacy of their own business interests, a "very significant risk" of failure seems unlikely. (I observe that there is no evidence as to what if anything has been done to try to mitigate the risks consequent on Mr Brown's application failing, whether in respect of existing projects and relationships or tenders, or the success or otherwise of such steps.)

97. Elsewhere, and in a less extreme way, Mr Brown says "I believe that if BMG was deprived of my experience and contacts the ability of BMG to continue to win work would dramatically reduce". Ms Morris takes the view that

"Without Nick to continue to drive BMG I feel that the growth will stall and ultimately stagnate".

98. As to an outside appointment, Mr Brown says that "it would be extremely difficult to bring someone in from outside BMG and, even if someone was found, they would not have the same contacts that I have (many of which have been handed down by my father and grandfather)". The contacts are, though, for the benefit of BMG which is ultimately owned by Mr Brown, and one may wonder why he would not as a consultant do his utmost to use them for its benefit. An answer is in his second affidavit: "it would be extremely difficult, if not practically impossible, for me to work below board level in a business that I own… there would be a real danger of me inadvertently straying into de facto or shadow directorship". That is often said in s.17 cases, but they tend not to involve companies with large boards and substantial funds to access premier legal advice; advice which could be directed at drafting a tightly-prescribed consultancy agreement. The same point may be made as to Ms Morris's view that it would be "impossible" for Mr Brown to act as a consultant: "to advise the business you need to live and breathe it… be in the thick of [it]".

99. As to the family company point, no doubt it would be difficult for an outsider to come in; but that is an issue faced by most successful family companies at some time.

100. Ms Morris does not believe anyone else at BMG could manage the business, or replace Mr Brown, who is a "unique individual". "I feel the same way about an external candidate. The type of demolition work that BMG does is very technical and structural engineering based. An unknown, external person would not understand the key factors that we need to move forward or to make our margins" (a general and surprising statement); even if an "allrounder like Mr Brown" were found, "which would be a very difficult feat, they would not command the same respect": "BMG is built on his name" (a double-edged statement in this context).

101. Richard Brown agrees that "there's no one in the business who could step into Nick's shoes". "Theoretically, you could bring someone in from outside the business, but this is hard for me to imagine. It's not something that I've ever experienced…". He worries "a lot about what would happen to the business if Nick wasn't there… in my view we wouldn't get the future work".

102. Lee Brown: "hand on heart, I truly believe there is no one else who could do what Nick does within the BMG and in NRLB" (he does not elaborate on the latter, although as he runs its Dutch subsidiaries he is in a unique position to do so). Without him "It would be complete carnage… Some employees would jump ship, and those that didn't… would eventually be out of work".

103. John Payton: "Mr Brown is the one individual within the business who has oversight of all business operations and commercial relationships". "I simply do not believe that there is anyone within the business, or in fact outside the business really, with the requisite knowledge and experience to step into Mr Brown's shoes". If he "could not continue to be a director and manage the companies, it could lead to [their] demise".

104. Mr Buckingham with his 52 years with the business does not believe there is anyone "to step into Nick Brown's shoes"; if he left it would be "catastrophic". "You could argue that there's always the option of looking externally, but I don't see how that would work… BMG is a family business".

105. Mr Hadden gives considered evidence on this point. He sees Mr Brown as "fundamental to the viability of BMG", as the only director whose experience covers every aspect, and who has the personal and professional relationships. "I do not believe that any one person is irreplaceable, however, I do believe there is currently no individual that can be an immediate successor to Mr Brown at BMG… Any successor (from within or outside of BMG) would require a significant amount of time to get up to speed… [which] would have a serious adverse impact on BMG". He then continues "The fact that Mr Brown would be extremely difficult to replace is evidenced by the fact that the Board does not have a succession plan in place in the event that Mr Brown is not able to participate as a director… So far we have not been able to come up with a

back-up plan". He thinks it "would be extremely difficult for Mr Brown to remain in the company in any role other than as a director". Without him "I have serious concerns that BMG would enter into a period of great uncertainty and serious difficulty, with the risk of employees looking to move away from an unstable environment".

106. Mr Baker, a relative newcomer to BMG so someone who has recent experience of the outside world also says that there is no one suitable within the business, and the consequences of Mr Brown's departure "would be severe" because of the project cycles: each takes 3.5-5 years, and BMG is "entering a phase where it needs to negotiate for new work and Mr Brown's reputation is carrying it through that process". "It is hard to see how BMG could bring in someone external… I don't believe there are any other organisations in the UK with our experience in the demolition of steel structures… I cannot think of anyone in the UK or the EU who could match Mr Brown's expertise within the industry or the quality of his client relationships. At the very least, you would need to replace him with more than one person, which would be disruptive and likely to be viewed negatively by clients, funders, and insurers".

107. Mr Brown thinks it would take "at least two years to find and appoint a replacement".

108. The CMA submits that overall this evidence shows a "potentially significant, but likely not catastrophic" effect on the business of the loss of the services of Mr Brown as director or manager. I agree.

109. The CMA submits further that this evidence does not demonstrate a sufficiently "compelling 'need'" for Mr Brown to obtain permission.

110. One aspect of that position is that it doubts the centrality of Mr Brown to the business. Despite his supposedly core role, and despite the risk to it posed by the investigation, BMG has repeatedly filed accounts, for the year ends 30 April 2020-30 April 2022, which do not advert to the longstanding existential risk of the loss of the services of Mr Brown, whether through disqualification or just the hazards of life. Yet s.414A *Companies Act 2006* requires the

preparation of a strategic report which by s.414C(2)(b) "must contain… a description of the principal risks and uncertainties facing the company". Given the directors' shared belief as to the importance of Mr Brown personally to the likely financial state of the company, I agree with the CMA that the company's vulnerability should something untoward happen to Mr Brown ought to have been included; especially so as there are no succession plans (Mr Buckley said on instructions that there is keyman insurance for him, in the order of £4m). However I do not think that this failure upsets the untested evidence put forward on behalf of Mr Brown. Instead, it seems to me that the likely explanation is the one proferred by Mr Buckley on instructions, that this was simply overlooked by both the auditors and the board.

111. Another aspect of the CMA's position as to need is its suggestion that Mr Brown's most important contribution is his personal experience and relationships, which could be provided outside of a directorial or managerial role, as a consultant or employee.

112. As I have already indicated, where there is an existing numerous and experienced board and the ability to fund high-level legal advice I would not find that it was unfeasible for Mr Brown to act under a consultancy contract, although plainly there would need to be a new managing director or directors to guide the business. But given the multiple attestations of his importance and the desirability of his remaining as a director, neither do I find that that ability offsets such weight of evidence. Mr Brown has cogent reasons for wishing to remain on the board of BMG; and his absence is likely to be detrimental to its business. As Mr Brown says, even a reduction as opposed to cessation of BMG's trade would affect "our local communities, including lost jobs, the loss of future employment, upskilling and training opportunities", and its subcontractors and suppliers. There are near 300 full-time staff, primarily employed in the South East, the North East and Glasgow; and staff in the North East would be particularly affected as having greater risk of not finding alternative employment.

Competition compliance improvements at BMG; risk of breaches by Mr Brown

113. These had commenced even prior to the Decision and, to repeat, BMG received a 5% reduction in fine because its "compliance activities demonstrate a clear and unambiguous commitment to competition law compliance throughout the organisation from the top down", even if that was not yet as comprehensive as those parties' who received a 10% reduction.

114. Mr Brown adverts to a "culture change [which] has impacted all areas of the business"; "competition compliance processes in particular have improved immeasurably" since the CMA launched its investigation in 2019. On 11 January 2022 Mr Brown instructed Eversheds Sutherlands to advise on the process, and "help the company roll out best practice competition compliance procedures"; more are being implemented, to "ensure that the circumstances that led to the Infringements cannot occur again". "I am fully committed to this process and if my application is granted will continue to help drive it forward".

115. So on 24 January 2022 the board "passed a resolution confirming its absolute commitment to competition compliance and the implementation of a more robust competition law compliance programme", including its being an agenda item at each board meeting. On the same date Mr Hadden was appointed Competition Compliance Officer.

116. On 28 February 2022 the board had training with Eversheds Sutherland, which is now annual.

117. On 28 March 2022 employees at higher risk had training with Eversheds Sutherland; and those joining in higher-risk roles must complete such training and sign a commitment within 3 months.

118. On 31 March 2022 BMG "introduced a competition law policy and accompanying guidelines", addressing "key areas… [of] risk", which are reviewed annually.

119. On the same date Mr Brown circulated to all staff and directors a communication setting out his commitment to competition law compliance, and his expectation that everyone would engage fully in the programme.

120. There is now a statement on its website of its commitment to compliance.

121. There is a whistleblowing policy, also reviewed annually, with the contact point of Mr Collinson as non-executive director. He was appointed on 16 May 2023 "with specific responsibility to oversee competition law compliance", including a twice-yearly targeted review of the company's electronic data "to detect any instances of non-compliance".

122. Since appointment he has "carried out a deep review of… compliance processes and procedures", contained in a written report of 13 June 2023 with 15 recommendations including a log of all competitor contacts. All recommendations were adopted by the board on 14 June 2023.

123. Eversheds Sutherland's fees are near on £150,000.

124. Other directors have also spoken to the changes.

125. Mr Collinson describes his role as being to supervise compliance with competition law to ensure "BMG's culture reflects high standards of probity and integrity" and that it "'lives' competition law compliance… at all times"; satisfying himself on an ongoing basis that "appropriate risk-based measures" are in place and followed. He attends at least 4 board meetings a year to discuss compliance, and meets with Mr Brown separately at least 4 times a year.

126. Together with Eversheds Sutherland he contributed to a missive from Mr Brown sent to all staff on 22 June 2023 about BMG's "absolute commitment to compliance with competition law" and informing them of Mr Collinson's appointment and role; although it must be said that regrettably the letter refers to BMG having "been involved in two historic and isolated instances" of breach, which fails to take account of the post-Infringement enforcement of those agreements through false invoicing between 2015 and 2017.

127. Ms Morris confirms that the new changes and "robust" systems "make it almost impossible to create a fictional invoice", as her team alone controls the invoice numbers, which are "verified by cross-referencing them with jobs and certificates". Mr Brown has no involvement in invoicing.

128. Ms Morris is not involved in tendering, but does see the finalised tender budgets, which she will scrutinise and if need be challenge.

129. Lee Brown says "I understand now what I would need to do if I ever thought we were involved in doing something anti-competitive".

130. John Payton confirms he is "aware of the need to log anything untoward", and that "the price of any bids… need to make commercial sense". He is also aware that he is "one of the individuals… most likely to come into contact with competitors… as it is not unusual for a client to invite all bidders to the site on the same day as part of the tender process… to carry out their respective estimations".

131. Alex Hadden became Competition Compliance Officer in January 2022, and works "closely with Mr Brown to review and consider how to continuously improve our compliance efforts". "I am confident that the business is increasingly and very well-equipped to identify, report and address potential competition issues".

132. Dan Baker, a recent import, says Mr Brown "does everything by the book", and the "collective tendering approach… would make it very difficult in practice for Mr Brown to try and alter any tender bid unilaterally".

133. As the Decision recorded, there is a "clear and unambiguous commitment" to compliance with the competition regime; which is an appropriately ongoing process. No doubt the impetus for that has been the investigation, the Decision and its aftermath, including the disqualification. These steps are therefore a positive outcome of the CMA's enforcement process, to the public benefit; and the fair-minded and informed observer would appreciate that, and the efforts and expense which have gone into them.

134. But on the facts it seems to me that this is less of a positive to Mr Brown's application than it might be in other scenarios. Frankly, what else would any responsible board do, faced with an investigation into its specialised industry which found multiple counts of competition failure, leading to large fines and disqualifications? As the CMA says, it "expects all companies (and especially those found to have infringed competition law) to proactively and voluntarily adopt the necessary governance structures and compliance measures to ensure they comply with the law". It is to be noted that it has also changed its Penalty Guidance such that "compliance initiatives" no longer attract a discount.

135. The CMA's view is also that despite this catalogue of improvements there remains unacceptable risk of further unfit conduct on the part of Mr Brown as to competition law: "the serious nature of the conduct… is such that Mr Brown has revealed himself to be a continuing risk to the public"; his behaviour was "inherently dishonest", and he went to lengths to conceal the compensation payments by the creation of false invoices; it "has no confidence that Mr Brown will not repeat his dishonest and anti-competitive behaviour during the term of his disqualification and it is difficult to conceive of appropriate conditions that could sufficiently guard against a repeat of such conduct for as long as he remained a director".

136. I do not accept that. There is, of course, always a risk of re-offending whatever cognitory and contrite phrases are used and whatever processes implemented. There is also particular concern in this case because Brown and Mason sent letters signed by Terry Brown in September 2012 and December 2013, and by Mr Brown in Decembers 2014, 2015 and 2016, to, of all people, the UN Secretary-General, confirming its continued support for the UN Global Compact and its 10 principles, including its "zero tolerance towards corruption and bribery", and its having "a number of policies to support this including an anti-corruption policy and ethics policy".

> "We continue to be committed to making the Global Compact and its principles part of the strategy, culture and day-to-day operations of our company, and to engaging in collaborative projects which advance the broader development goals of the United Nations… Brown and Mason

> Limited will make a clear statement of this commitment to our stakeholders and the general public".

This 2013 version (they were all in similar form) then set out each principle, usually setting out how it was complying with it.

137. The serious representations made in each of those letters counted for naught; so too the policies in place. Indeed, without any apparent regard to the letter or Brown and Mason's own policies, Mr Brown, the instigator of the conduct at the firm, has remained in place, unreprimanded, and supported by his board, which has sunk large amounts of money into the investigation and then this application. What sort of "zero tolerance" policy is that?

138. But on the unchallenged evidence I have, I am satisfied that BMG has put in place policies, supported by the specialist Mr Collinson and the other members of the board, which make the risk of undetected re-occurrence very small. Those policies have even driven down to oversight of the tendering processes in which any ill is likely to lie. Moreover, for such time as Mr Brown has permission to act there has been the added protection of conditions preventing him from attending alone meetings which may deal with, for example, tender submissions; or alone approving tender submission documents or other trade agreements. I therefore agree with Mr Brown that these measures "would make it extremely difficult for a future breach of competition law to occur".

Deterrence and perception

139. The CMA has provided detailed, and again unchallenged, evidence on this subject through Jessica Lynn Radke, a Senior Litigation Director. Ms Radke qualified as a solicitor in New York and Maine in 2001, and in England in 2005. She is the Senior Responsible Officer within the CMA for Competition Disqualification Order investigations, and has been involved in this case since the commencement of the investigation in March 2019.

140. "The CMA is an independent, non-ministerial, government department. It has a legal duty to promote competitive markets within the United Kingdom in the interests of consumers. As the UK's principal competition authority, the CMA exercises a number of statutory powers for the purposes of enforcing competition law… Among these, it has powers of investigation and sanction under the Competition Act 1998. The essential purpose of the CA98 is to protect and promote competition".

141. "Weaker competition harms the UK economy both at a microeconomic level, through harm to consumer and businesses (most commonly in the form of higher prices, lower quality, reduced innovation and barriers to entry), and at a macroeconomic level (through low productivity, inefficiency, lack of innovation and poor economic growth)".

142. "Business cartel activity is the most serious type of competition law infringement; and includes price-fixing, market sharing and bid-rigging (including cover bidding). Although there is no defined hierarchy of seriousness, the CMA has often issued public statements indicating that it considers cartel activities… to be the most serious types of competition infringement".

143. Cartel activity is "typically difficult to detect", so investigation and enforcement is "highly resource intensive, with the cost borne by the taxpayer". Investigation is often lengthy, as here: the investigation commenced in March 2019, the Decision being given in March 2023. The leniency policy is intended to incentivise self-reporting and co-operation with any investigation.

144. The "CMA's primary means of sanctioning those involved in business cartel activity is to impose financial penalties on the firms", which may be up to 10% of an undertaking's turnover. These, though, are not in themselves sufficient: a "2014 study found that changes to EU competition law over the preceding decades had no effect on the price-setting behaviour of cartels. That same study found that 'in 67% of the cases the gain from price fixing outweighs expected punishments'".

145. "The overall deterrent effect of the competition enforcement regime is significantly enhanced if individuals understand that there are likely to be genuine personal consequences for them (beyond just financial consequences for the company) if their companies fail to comply with competition law. The reality is that individuals have significant power to control the market activity of their companies, and the possibility that they will personally suffer career and earning-potential limiting sanctions represents a powerful additional incentive to encourage individuals and firms to actively engender a corporate culture that is intolerant of wrongdoing".

146. Since their introduction through the Enterprise Act 2002, "CDOs have… become an important additional tool in the CMA's enforcement armoury, and have played a key role in demonstrating to individuals, businesses and the public the critical need for competition law compliance". Their "effectiveness… as a general deterrent was highlighted in a report prepared by Deloitte for the OFT (the CMA's predecessor) in 2007… Deloitte found that individual sanctions were more effective than fines in motivating compliance with competition law".

147. Mr Brown's undertaking is one of four accepted following this investigation. Mr Cluskey of Cantillon Limited, disqualified for 4 years and 6 months, has obtained limited permission to continue to act.

148. The CDO cases relating to the investigation have caused the CMA to expend "significant resources" since their notification to Mr Brown and the others in November 2019, estimated at over 2000 staff hours.

149. "In competition theory, firms make decisions to break the law… in the same way as they make any other business decision, ie by rationally weighing up the costs and benefits. The benefit is the extra profit that comes from joining a cartel, whereas the cost is the punishment discounted by the possibility of being caught. From an enforcement perspective, the CMA seeks to adopt policies that increase the cost of forming and operating a cartel, or by increasing the prospect of being caught or increasing the likely punishment if the cartel is discovered".

150. "The CMA's review of published studies on general deterrence suggests that the deterrent effect of competition law enforcement is significant. It is estimated that more active cartel enforcement deters cartels in a ratio of between 4.6:1 and 28:1, ie many more cartels are deterred for each one that is caught… It follows that any weakening of the general deterrent effect of the competition enforcement regime may lead to an increase in cartel activity, resulting in deleterious effects for consumers, businesses and the wider economy".

151. "The CMA considers that any decision by the Court to grant an individual subject to a CDU or CDO leave to act naturally and inevitably undermines the general deterrent effect… [given] the public interest in maintaining the full force of its deterrent effect…".

152. So the CMA "whilst fully accepting that the decision as to whether to grant leave is ultimately a matter for the Court... considers that leave should be granted only where an exceptional countervailing interest justifies it and, even then, such leave should be subject to appropriately stringent conditions which are tailored to the particular circumstances of the case to protect the public interest".

153. That is not the legal test, but indicates the extent of its public interest concern and the strength of the case it suggests is necessary to overcome that.

154. This is powerful, rationalised, and unchallenged evidence. Both in theory and in practice the competition regime generates positive public benefit. More, that regime is reinforced and strengthened through individual sanction including disqualification; and put the other way, it is diluted by the granting of leave.

155. The CMA's overarching submission is that permission to act in this case "would seriously undermine the general deterrent of the director disqualification regime in competition cases". It "regards Mr Brown's conduct as a paradigm example of cartel activity that is hard to detect, time consuming and costly to enforce, ostensibly very profitable for the

undertakings involved and deleterious for the consumer and the wider economy".

156. "Given the serious nature of Mr Brown's conduct, the CMA believes that a grant of leave to act in the circumstances of this case would significantly, and potentially irreparably, undermine the general deterrent effect".

157. Again, that is unchallenged evidence from the specialist public body.

158. The CMA also notes that it "has limited resources and must allocate them in accordance with its prioritisation principles"; a "significant resource allocation" has been made to this investigation; and "If the CMA considers that the general deterrent impact of the disqualification regime is hollowed out through the effect of successful applications for leave to act, there is a risk that it will be concluded that pursuing such cases in the future no longer justifies the resource allocation, as a matter of administrative prioritisation".

159. Again, that is unchallenged.

BMG: a balancing exercise

160. This wide public interest must of course be placed in the balance against Mr Brown's individual interests, and the interests of BMG and its staff and those with whom it deals. But it is a public interest which on the evidence is under a degree of threat were this application to be granted. Further, it must be recalled that the burden is on Mr Brown. Here, he has admitted the Infringements, which he brought about and the economic benefit of which he later caused to be pursued through the issue of false invoices. The Shell Building Infringement was one of cover bidding, a dishonest activity. Mr Buckley submits that there have been no breaches since 2014, but on 2 May 2017 Mr Brown was still ensuring Brown and Mason gained the economic benefit of the Shell Building Infringement through the submission of the final false invoice to McGee. Moreover, the Infringements and the invoices were at a time when year on year Brown and Mason was proclaiming to the United

Nations its adherence to the UN Global Compact and its "zero tolerance policy towards corruption and bribery". That proclamation was entirely hollow.

161. It is right to say that Mr Brown's disqualification was "only" in the Sevenoaks middle bracket; but as was said in *Fourfront*, the main consideration is not the period but the reasons for disqualification.

162. I also bear in mind that Mr Brown has demonstrated a cogent reason for his continuance in office; and that there is a likelihood that his exclusion from that office will cause significant if not catastrophic economic harm to BMG and those interested and dealing with it. I am not, though, persuaded that Mr Brown acting as a consultant is doomed to failure; nor that an outsider or possibly outsiders could not be found to fulfil his role.

163. I also recognise, with the qualifications described, that BMG has overhauled its compliance regime and expended considerable sums (including covering the reasonable costs of the CMA) in effecting that regime and agreeing the interim conditions; and that there is nothing to suggest those conditions, in place now for 6 months, have not been and will not be effective (subject always to any desirable adjustments).

164. However, this is also a case, as was *Morija*, in which the self-same Mr Brown is proposed to be left at the head of the entity which offended both against the UN and the UK competition laws, for the entirety of the period of his disqualification. That seems to me an overly great intrusion into the public benefits of this disqualification.

165. I will therefore refuse Mr Brown's application in respect of BMG, subject to a run-off period which will be discussed below.

166. As a cross-check, I do not consider that our postulate member of the public would be offended by that conclusion.

167. That conclusion is reached without consideration of the additional, specific, evidence. One element of that is directly related to Mr Brown: Mr Yap's erroneous belief that disqualification may only be effective at the conclusion

of this application. Another is in the reporting of Mr Cluskey's permission in the trade and other press. Construction News ran an article on 15 May 2023 describing Mr Cluskey's application as an "appeal against his CMA disqualification", and on 30 May reported the decision as a "win" for him, the headline being "Former Cantillon MD wins court case over cover-bidding disqualification". The Global Competition Review of 25 May 2023 had a headline "CMA loses director disqualification case". On 30 May 2023 Building wrote of the "High Court... appeal decision", and, more accurately, of how "while not technically a reversal of his disqualification, [it] will allow him to continue to act".

168. As I have said, this is not evidence which can simply be swept under a lawyer's carpet as erroneous. This is how Mr Brown's disqualification has been perceived by a professional; and Mr Cluskey's in the press. These reactions, consequent on the s.17 applications, themselves erode the public benefit in a strong competition regime, and must therefore tell against the granting of permission; though in this case that is simply an additional element, given the other evidence.

NRLB

169. There is really very little evidence on NRLB, which is a holding company which has also had novated to it the primary debtor obligation under the EMR loan, and which guarantees the Santander overdraft. Mr Brown's concern that as its shareholder his decisions could stray into its management is unelucidated and depending on the issue could either be avoided without much difficulty or be subject to ad hoc permissions (for example, if he wished to replace the board). Certainly, such case as he has put in its respect does not displace the points made above on the basis of disqualification and the deterrence aspects, even bearing in mind that this permission would not be in respect of the trading company. Ms Morris has already become a director of NRLB, and as the CMA says it ought not to be too difficult to find another if required.

An additional permission period

170. Although permission for the 7-year period of Mr Brown's disqualification is refused, it does not follow that some additional time ought not to be allowed to allow BMG to adjust to that situation; and if time is allowed to BMG it seems practical to allow the same time to NRLB.

171. The CMA points out that 10 weeks has already been given for this, leading to the original 28 July 2023 commencement date, and that any further extension is necessarily a diminishment of the public benefits to disqualification.

172. It can further rely on the first raising of the possibility of disqualification on 12 November 2019; its being raised again at Mr Brown's 15 December 2020 interview, also in qualified terms that "The CMA has not yet decided whether to pursue CDOs in these proceedings"; and at the 29 June 2021 update call between the CMA and Mr Brown and his legal adviser, although at this point the "next key procedural step" in the investigation was the statement of objections ("SO") and they said that "although the case team is preparing a draft SO, no final decision has been made whether to issue an SO in this case".

173. On 9 November 2021 the CMA sent a letter to Mr Brown which he did not receive until January 2022, informing him that it was "considering whether to apply" for a CDO. "Upon completion of the CDO Investigation, the CMA will decide whether or not to apply to court for a CDO against you… Please note that no decision has yet been taken whether or not to apply for a CDO against you".

174. BMG's admissions were on 25 February 2022, nearly 2 years ago, by when a real risk of disqualification must have been apparent.

175. The section 9C notice was dated 19 April 2023.

176. Since 2022 BMG has therefore had substantial time to prepare for the risk and since 2023 the eventuality of Mr Brown's disqualification. Yet despite the evidence of its directors that there is no suitable internal candidate, it has

failed to locate an outside replacement, whether that be one or more persons, or apparently even made effort to do so.

177. That is a matter for its board in the context of the auditor Mr Barnes' belief that finding a replacement would take 6-9 months, with a further 6-9 months of bedding in, and Mr Brown's belief that it would take 2 years to find his replacement.

178. But punishment is not the purpose of the disqualification regime. Even taking account of the lack of evidence as to the steps already taken to ensure so far as may be the smooth continuance of BMG's transactions and operations in the event of the failure of this application, I am satisfied that an immediate cessation of Mr Brown's services would do undue harm to BMG and those who deal with it; and that, so long as for a relatively short part of Mr Brown's disqualification, an additional permissive period would not unduly harm the public interest in disqualification.

179. I propose therefore to extend Mr Brown's permission in respect of both BMG and NRLB until 23.59 on 28 July 2024: overall, a permission period of 1 year. Any conditions additional to those already prescribed will be discussed at the consequentials hearing.