*549 Secretary of State for Trade and Industry v Joiner

Re Synthetic Technology Ltd.

Chancery Division (Companies Court)

23 March 1993

[1993] B.C.C. 549

Edward Evans-Lombe QC (sitting as a deputy High Court judge)

Judgment delivered 23 March 1993

Disqualifying unfit directors of insolvent companies—Whether director should be disqualified—Whether Secretary of State should have costs on indemnity basis— *Company Directors Disqualification Act 1986, sec. 6* .

This was an application by the Secretary of State for Trade and Industry for a director disqualification order under sec. 6 of the Company Directors Disqualification Act 1986 , and, if the application was successful, for costs on the indemnity basis.

Held , disqualifying the respondent director for seven years and ordering him to pay the costs on the standard basis only:

1 The director had procured the company to pay debts for which he was personally liable, had wrongly asserted ownership of an asset of the company in the administration, and had drawn remuneration out of proportion to the company's trading success and financial health; the company had failed to file accounts in time or at all and had traded while insolvent, taking unwarranted risks with its creditors' money and trading at the expense of moneys due to the Crown.

2 The case was a serious one of its kind. The company never traded profitably and for long periods traded at a substantial loss. Having regard to the company's size and capitalisation the deficiency revealed by the statement of affairs could only be described as substantial. Throughout its history the director appeared to have behaved in a markedly cavalier fashion with the company's creditors both actual and potential.

3 Where it could be shown that a director had by defending disqualification proceedings, albeit in the end unsuccessfully, substantially reduced the charges made good against him, so that in the result the case with which the court was confronted, albeit one justifying disqualification, was not as serious as that which was opened by the Secretary of State at the beginning of the case, so that the court could take the view that the delinquent director's defence was to that extent justified, then the order for costs should not be on an indemnity basis. The director's defence was justified in that sense.

The following cases were referred to in the judgment:

Astor Chemical Ltd v Synthetic Technology Ltd [1990] BCC 97 .

Bath Glass Ltd, Re (1988) 4 BCC 130 .

Cargo Agency Ltd, Re [1992] BCC 388 .

Euromove Ltd, Re (unreported, 30 July 1992, Evans-Lombe QC) .

Godwin Warren Control Systems plc, Re [1992] BCC 557 .

Keypak Homecare Ltd, Re (No. 2) [1990] BCC 117 .

Sevenoaks Stationers (Retail) Ltd, Re [1990] BCC 765; [1991] Ch 164 .

Representation

Guy Newey (instructed by the Treasury Solicitor) for the Secretary of State for Trade and Industry.

The respondent appeared in person.

JUDGMENT

Edward Evans-Lombe QC:

This is an application by the Secretary of State for Trade and Industry pursuant to sec. 6 of the Company Directors Disqualification Act 1986 that the respondent, Dudley Arnold Joiner, shall be disqualified from acting as a director of a company.

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The relevant facts in this case may be said to start on 28 May 1976 when a company, Yeltaway Ltd, was incorporated. On 11 June, Mr Joiner became a director of Yeltaway and the holder of half its issued shares. Mr Joiner is a businessman specialising in the manufacture and sale of oil-based lubricants and gels. Through the medium of Yeltaway he started trading in this field in 1978. It seems that in 1979 Mr Joiner formed an association with the two brothers Randisi, who were businessmen specialising in the same field as himself in America. From early 1980 their business was conducted through the medium of a company, Synco Chemical Corporation, incorporated in the state of New York in February 1980. On 17 September 1980 Yeltaway registered a change of name to Synco (UK) Ltd. It appears that at about this time it was contemplated by the Randisis and Mr Joiner that Synco (UK) Ltd would become a subsidiary of Synco Chemical Corporation to act as a manufacturing and possibly distributing agent for the American corporation in Europe. However, the relationship between Mr Joiner and the Randisis appears to have broken down resulting in lengthy litigation in the USA which litigation was ultimately settled on terms which have not been disclosed.

On 28 April 1982 Synco (UK) acquired a subsidiary, Syntec Ltd, which had been incorporated on 12 March 1982 as Edon Ltd. I will refer to this company as “Syntec I”. Syntec I became the trading arm of Synco (UK) and took over part of Synco (UK)'s accrued indebtedness. Its business was the packaging and sale of lubricants for the motor industry which it purchased from third sources. Mr Joiner accepts that one of its products was a lubricant of which a constituent part was a chemical gel. Syntec I traded under the name of “Syntec”. As in the case of Synco (UK), Syntec I's trading does not appear to have been profitable for any significant period of time. On 2 May 1984 a petition was presented for the winding up of Syntec I by a creditor which resulted in a winding-up order on 25 June 1984. The statement of affairs of Syntec I in its winding up reveals a deficiency of £197,000. On 15 June 1984 the Midland Bank, under debentures held by the bank, appointed receivers of Synco (UK) and Syntec I.

Meanwhile, on 8 December 1983 Arotel Ltd was incorporated. It was acquired off the shelf by Mr Joiner. On 6 March 1984 Mr Joiner became its director and chairman with four other directors. At about this time it started trading in collaboration with a substantial public company, Standard Telephones and Cables plc, to which I will refer as “STC”, for the development, manufacture and sale of an insulating gel designed to be inserted in fibre-optic cables. It is suggested that Mr Joiner acquired the know-how to produce and market this insulating gel as a result of his association with the Randisi brothers whose company has become an important worldwide producer of such gels. I will refer to the company as “Syntec”. The gels manufactured by Syntec

came to be sold under the name “Rheogel”.

On 16 May 1984, a fortnight after the petition had been presented for the winding up of Syntec I, Syntec was procured to pass a resolution changing its name to Synthetic Technology Ltd, of which name it is to be observed, “Syntec”, the trading name of Syntec I, was a natural abbreviation. This new name was registered on 13 June 1984.

Meanwhile, also, Mr Joiner and two associates and a limited company had acquired, off the shelf, a further company, Amalgamated Industries Ltd, to which I will refer as “Amalgamated”, which had been incorporated on 21 May 1984. Mr Joiner became a director of that company and held a quarter of its issued shares. On the same day that the receivers of Synco (UK) and Syntec I were appointed Amalgamated purchased from those receivers the goodwill, trading names, patents etc. of Synco (UK) and Syntec I in consideration of a payment of £28,000 to Synco (UK) and £10,000 to Syntec I.

The speed with which this transaction was put into effect by the Midland Bank's receivers appears startling. Mr Joiner, in his evidence, described the circumstances in this way: Mr Joiner and his associates had confidence in the prospects of the business of ***551*** Syntec I, which company, together with its parent, Synco (UK) Ltd, had become overburdened with debt as a result of its litigation with the Randisi brothers in America. It was intended in early 1984 that Mr Joiner's associates would introduce more capital into Syntec I so that it could continue to trade. It seems that the Midland Bank were becoming concerned about the company's borrowings from that bank and were threatening to appoint receivers. Notwithstanding discussions with the bank with a view to the introduction of further capital the bank nevertheless took the decision to appoint receivers which it communicated to Mr Joiner a few days prior to their appointment on 15 June 1984. Mr Joiner said that he and his associates' reaction was to produce a company to purchase the goodwill and assets of Synco (UK) and Syntec I from its receivers. This was done in a great hurry by the acquisition of a shelf company, Amalgamated, the price being agreed in negotiation with the receivers on the day of their appointment. Not long after this acquisition Amalgamated assigned to Syntec the right to use “Syntec” as a trade name together with the right to use Syntec I's packaging style and publicity material.

In evidence, Mr Joiner said that once it became clear that the bank intended to appoint receivers of Synco (UK) and Syntec I, he and his associates, who were preparing to put new money into those companies to keep them going, deliberately acquired Amalgamated to purchase from the receivers their assets and goodwill. Mr Joiner did not accept that as a result of these transactions Syntec continued the business of Synco (UK) and Syntec I using the same name and premises but leaving the creditors of those companies out in the cold. His evidence was that the trading premises of Syntec I were repossessed by the landlords and for a period Syntec had to trade from his house. He said that two of his associates, Mr Young and Mr Brewster, who became shareholders and directors with him in Amalgamated, were experts in the lubricant business. The business of Syntec I, he said, was the packaging and sale of lubricants with only limited manufacturing capacity and this was intended to be, and was, passed to and continued by Amalgamated. The business of Syntec was entirely one of manufacture and selling insulating gels.

On 27 February 1985 Syntec's relationship with STC matured into an agreement of that date whereby Syntec assigned to STC its manufacturing patents and rights for its insulating gels in consideration of a payment of £50,000 and received back a licence to manufacture. STC undertook certain marketing duties and obligations to assist in research and development of the product. There was a provision of the agreement whereby STC's licence to Syntec would terminate on the liquidation of Syntec. Prior to entering into this agreement Mr Ridler of STC had written a letter to Syntec giving forecasts of likely production figures for the special gels for the next two years.

Accounts of Syntec for a period of 16 months to 31 March 1985, after taking into account STC's payment of £50,000, showed a loss of £4,720.

In June 1985, in order to meet these increased production figures, Syntec took a new factory in Tunbridge Wells. Mr Joiner said the equipment for this factory took the next 12 months until June 1986 to install.

Meanwhile, the financial state of Syntec was declining. On 13 December 1985 the company's

bankers, Barclays, appear to have stipulated a “debtor formula” whereby the company was required to repay by stages its overdraft facility of £50,000. In that month also Syntec fell into arrears in payment of its rent. Mr Joiner's evidence was that the company's difficult financial position was discussed both with its bankers and its landlords continually. The landlords, Haslemere Estates, were sympathetic since Syntec had moved into its new premises when those premises were empty and the landlords would prefer to have the premises occupied even though they were having to give credit for the rent as it became due.

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However, notwithstanding these apparent financial difficulties it seems that Investors in Industry, to whom I will refer as 3i, were prepared at this time to introduce capital into the company amounting to £125,000 by means of subscribing for 115,000 £1 preference shares and 15 per cent of the issued ordinary shares.

Accounts of Synco for the year to 31 March 1986 showed a loss of £128,000 and an overall deficiency of £132,000. These accounts were not signed until 22 September 1987.

In June 1986 Syntec's bankers started returning cheques unpaid. By the date of the administration order, three years later, this treatment had been given to 96 cheques totalling at face value approximately £120,000. On 11 June the bank wrote pointing out that the “debtor formula” had not been complied with and warning of the dangers of the directors permitting Syntec to trade “wrongfully”. Nonetheless, they appear to have been prepared to continue Syntec's overdraft facility of £50,000 in the short term.

On 14 July 1986, a petition was presented by a creditor with a debt of approximately £4,000 for the winding up of Syntec. It appears that that petition was compromised. On 25 July three of Mr Joiner's four co-directors of Syntec resigned.

It seems that in mid-1986 the trading of STC suffered a marked downturn and this was reflected in the orders placed with Syntec for gel. On 29 August 1986 Syntec entered into a distribution agreement with a company, Astor Chemical plc. By this agreement Astor became the sole distributors of Rheogel outside North America and for that purpose financed the supply of raw materials to Syntec charging slightly more than 22 per cent commission on all sales within the area. Mr Spalton. Astor's managing director at the material time, gave evidence. He said that Astor were concerned at the financial state of Syntec. In order to protect their supply of Rheogel for their customers against Syntec going into liquidation there was inserted into the agreement at cl. 12(a) a provision that, in that event, Syntec would sub-licence Astor to continue manufacture of the product. Meanwhile Astor had made a side arrangement with STC that, in the event of Syntec's liquidation, STC would not exercise their right to terminate Syntec's licence from STC. As consideration for the agreement Astor paid £75,000 to Syntec in two tranches of £50,000 and £25,000, the latter payment being made in February 1987.

Disputes arose between Astor and Syntec as to the conduct of the agreement and on 13 January 1987 Mr Joiner wrote to Astor purporting to terminate the agreement by reason of Astor's breaches of it. Astor's reaction was to launch proceedings against Syntec in which proceedings, on 6 February, they obtained an injunction restraining Syntec from selling their product elsewhere. The proceedings never came to a substantive hearing because the parties compromised, as a result of which there were amendments to the provisions of the distribution agreement.

On 19 February 1987 Syntec's landlords, Haslemere Estates, which company it appears had been taken over by Dutch purchasers who were much less sympathetic to the position of Syntec, issued a writ for the recovery of arrears of rent by then amounting to some £102,000.

Accounts of the company for the year to 31 March 1987 show a loss of £324,000 and a deficit on profit and loss account carried forward of £457,000. The balance sheet shows an overall deficiency of £312,000. The third paragraph of the report of the auditors reads as follows:

> “As stated in note 13 the company is currently negotiating further loan facilities of £100,000; continuation of the company's activities is dependent on a successful outcome to these negotiations and on the continued financial support of the directors, loan creditor and bankers. The financial statements have been drawn up on a

going-concern basis which assumes that adequate facilities will be obtained."

553 Note 13 to the accounts provides:

> **"Post-balance sheet events**
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> Since the balance sheet date a further 69,000 ordinary shares of £1 each were issued at par for cash on 24 July 1987 to provide working capital. A further sum of £45,500 has been provided by one of the shareholders at the same date in the form of a loan which is also to provide working capital. Additionally and subject to agreement between the shareholder and the company, a further £100,000 will be made available to the company."

Note 13 to the 1987 accounts describes an agreement dated 24 July 1987 under which a company, Monteagle Chemicals International Ltd, to which I shall refer as "Monteagle", one of a group of companies to which I shall refer as the "Monteagle group", agreed in terms summarised in the note. Mr Tipton was a director of Monteagle who came to play a substantial part in the subsequent conduct of the business of Syntec.

Prior to this agreement, Syntec had been attempting to raise capital to finance its increasing deficit. In early 1987 negotiations had taken place with Astor with a view to that company increasing its stake in Syntec and making further capital available. Those negotiations had not reached finality when Syntec was first approached by Monteagle.

Mr Spalton produced in evidence a prospectus by Syntec which appears to have been circulated in early March 1987 designed to attract an investor for that company who would produce £350,000. Mr Joiner accepted that the first ten pages of this document indeed emanated from Syntec. He was at pains, however, to point out that the last three pages, which contain a projected profit and loss account for the years to March 1987 and March 1988 and a projected balance sheet as at 31 March 1987, were typed using a different typeface from the remainder of the document. Even disregarding the last three pages this document projects total sales for 1988 of £1.6m with a net pre-tax profit of £132,000, when accounts drawn to 31 March 1987, the time when this document was being circulated, show a turnover figure of £245,000 and a loss of £324,000. When cross-examined about this document Mr Joiner indicated that in his view it was quite reasonable when seeking to raise capital to present forecasts known to be optimistic. Whereas the company's accounts for the year to 31 March 1987 were not signed until 22 September of that year, I am not prepared to accept that the management of Syntec and, in particular, Mr Joiner did not have a very good idea how the company was actually performing as at March 1987. A turn round in performance from that being achieved at that time to that projected for the next year of trading, let alone the figures projected for subsequent years, cannot, in my judgment, have been realistically contemplated at this time by Mr Joiner.

In April 1987 the company received a statutory demand for £12,000 outstanding VAT. On 22 May 1987, Robson Rhodes wrote to the company warning the directors of the risks they ran by trading whilst the company was insolvent. By about this time the company owed approximately £100,000 to its landlords. Documentary evidence was put in which shows that by September 1987 significant numbers of creditors of Syntec were threatening legal proceedings for payment of their debts, some of which had taken their claims to judgment before being paid. On 12 October 1987 a creditors' petition was presented for the winding up of Syntec for a debt of £2,500. Also in evidence were minutes of board meetings held on 12 November 1987 and 7 January 1988 which indicate that Mr Joiner was engaged in negotiations with the Revenue and the Commissioners of Customs and Excise for the payment of arrears of tax and VAT by instalments. On 2 February 1988 the landlords of Syntec levied distress for rent.

Mr Joiner was cross-examined about his conduct of the company's business at this period. He naturally laid great stress on the fact that in the middle of it Monteagle were prepared to enter into the agreement of 24 July 1987 subscribing for shares and ***554*** converting part of their trading debt into a loan and indicating a willingness to advance a further £100,000. He was, however, compelled to admit that in order to preserve Syntec from liquidation, in addition to Monteagle's actual and promised support, the company was compelled to obtain credit by leaving

the payment of its ordinary trading debts to the last possible moment, in some cases paying those debts only after judgment had been obtained in proceedings.

I continue with the outline of the history of Syntec. On 17 February 1988 a further statutory demand was served on the company for outstanding VAT in the sum of £878. That was followed by a further statutory demand on 20 October 1988 by a creditor for £2,500-odd in respect of a debt which had become due in November 1986. Meanwhile, on 5 April 1988 the company's accounts for 1986 and 1987 were filed substantially late and notwithstanding that the directors had signed them on 22 September of the previous year.

There were produced in evidence, from Syntec's records, various management accounts for the company's trading for periods in the years 1985 to 1989. These present a confusing picture. In some instances there appear to be three sets of management accounts for the same period, each showing widely different trading performances by Syntec. The only management account to show a profit was that for the year to March 1988 where a profit of rather more than £6,000 was shown on a total turnover of £818,000. The draft balance sheet drawn at 31 March 1988 showed net current liabilities of £164,000 and an accumulated loss on profit and loss account of £457,000 and an overall deficiency of £167,000 after the introduction of capital by Monteagle in July 1987. Thereafter, the management accounts show a sharp decline in performance caused, according to Mr Joiner, by loss of sales due to strikes at two major customers, which sales could not be replaced. Draft profit and loss accounts for the period March 1988 to February 1989 show a loss of £215,000 on a turnover of £427,000. A draft balance sheet drawn to 28 February 1989 shows net current liabilities of £285,000 and an overall deficiency of £382,000. These figures appear to have been substantially optimistic. The company's statement of affairs drawn to a date approximately one month later revealed current liabilities of £552,000 and an overall deficiency of £740,000.

It seems that in early 1989 Mr Tipton of Monteagle lost his nerve and indicated that he was not prepared to continue with the support which he had been giving to Syntec. It was Mr Joiner's evidence that until that point Monteagle's support had been without limit in the sense that they were committed to providing sufficient finance to ensure that Syntec's pressing creditors were always paid. It is wholly unclear to me to what extent Monteagle was committed to the support of Syntec and to what extent Mr Joiner was entitled from July 1987 onward to place reliance on that support. Mr Tipton appears to have played an active part in the management of Syntec. He is recorded as attending many board meetings. In the end the Monteagle group are substantial creditors of Syntec. Mr Joiner produced in evidence an undated Monteagle document which he said was produced shortly before Syntec went into administration. This document appears to be an assessment by Monteagle of Syntec's future, and finishes by asking the question whether Syntec is rescuable or not. Its conclusion is that such a rescue was possible because Syntec was well placed to exploit what this document presents as a growing market for its products. Mr Tipton did not give evidence.

On 31 March 1989 the directors of Syntec, by this time only Mr Joiner and Mr Bury, procured Syntec to present a petition for its administration. That petition was precipitated by yet a further creditors' winding-up petition presented on 13 February 1989 and by Monteagle's refusal to pay off that petition. Three purposes of the administration are set out in the petition, first, the survival of the company or some part of it as a going concern, secondly, the approval of a voluntary arrangement and, thirdly, a more ***555*** advantageous realisation of assets than would result from a winding up. The petition was supported by a report from Robson Rhodes dated 31 March 1989. I quote from para. 3 and 4 of that report:

> "We have advised that Syntec should petition for an administration order in order to secure its survival as a going concern … we believe there is a real prospect that Syntec will be able to survive as a going concern …"

On 7 April 1989 Robson Rhodes made a further report on the prospects of Syntec if it entered administration. This report is in generally optimistic terms. At para. 3.6 that report reads as follows:

> "An independent market research report commissioned by Syntec estimates the size of the fibre-optic cable market. Using a simple formula it is possible to determine the

> volume of gel that would be needed to satisfy this market. The requirement for the year ending 31 March 1990 is some 3,326 metric tonnes and this is anticipated to increase at a compound rate of ten per cent per annum over the next five years. With increasing specification requirements resulting in the decline in use of the hot melt gels and the fact that there are only three major manufacturers of cold pump gels, Syntec is in a very good position to obtain a sizeable share of the world market. On the assumption of a selling price of approximately £2,800 per metric tonne the world market is worth £9.3m and will increase by 1994 to £14.6m assuming no selling price change. Syntec is forecasting sales of £2m in the year ending 31 March 1990 which represents a market share of 21.5 per cent."

Paragraph 5 of the report refers to Appendix VI where there is set out what is described as the "Directors' trading forecasts for the year ending 31 March 1990". This schedule forecasts total sales for the first three quarters of £1.35m and for the year of just more than £2m. The forecast profit for the first three quarters was £69,000, £66,000 and £114,000, the total forecast profit for the year to 31 March 1990 being £387,000. Within these figures the directors forecast sales of £242,000 in the first quarter, £304,000 in the second quarter and £411,000 in the third quarter, of worldwide sales, excluding North America, for which Astor had sole distribution rights. Astor's revised budgets were £89,000, £88,000 and £94,000 respectively for approximately the same periods. Their actual sales for those periods were £65,000, £194,000 and £130,000 making a total of £390,000 for the three quarters. The report states at para. 6.6(a):

> "The sales forecast has been constructed by reference to specific orders or known potential orders as indicated by Syntec's customers. The sales forecasts for April alone would generate £62,000 gross profit. Furthermore, as is stated in section 5 above, there is an even greater potential for future orders."

At para. 1.6 the report states:

> "We have not carried out an audit and our work should not be relied upon as such. We have not sought to verify the information supplied to us."

Nonetheless, Mr Jacob, in his evidence, did say that the joint administrators had checked the information being given to them by the directors in such ways as were possible and in particular they had spent some time checking the basis of the directors' sales forecasts. At para. 1.4 of the report the future joint administrators state:

> "Our preliminary investigation showed that Syntec is presently unable to pay its debts. Of the options available to Syntec … the most favourable in our opinion is the appointment of administrators. It is our view that administration is likely to allow Syntec to continue trading and survive as a going concern and/or a voluntary arrangement with Syntec's creditors. Should this not be possible an administration ***556*** is likely to provide a better realisation of Syntec's assets than would be effected in a winding up."

On 10 April 1989 an administration order was made against Syntec. It appears that soon after the order the joint administrators were persuaded that the interests of Syntec would be best served by terminating Astor's distributorship agreement notwithstanding that they had described it in their report at para. 3.4 as "a beneficial arrangement". It seems that the joint administrators were advised that they had, by reason of the administration order and their appointment, a right at law to terminate the distributorship agreement and, if that were wrong, they also had a right to terminate it by reason of breaches by Astor of the agreement. On 28 April 1989 the joint administrators wrote to Astor pointing out the breaches and on 5 June wrote terminating the agreement. Astor's reaction again was to launch proceedings and on 12 June 1989 *Peter Gibson* J made an ex parte injunction restraining Syntec, through its joint administrators, from selling Rheogel inconsistently with the provisions of the distribution agreement.

In these proceedings brought by Astor one of the joint administrators, Mr Montgomery, swore an affidavit. At para. 11 of that affidavit he said this:

> "We formed the view that there was evidence of a probable significant upturn in demand for Rheogel, that Syntec had the capacity to manufacture sufficient Rheogel to meet the increased demand and that it was possible to finance trading in administration while setting about the achievement of the objectives for which it was to be sought. We assumed at that stage that the distribution agreement would form an effective conduit between Syntec's productive capacity and the increasing market for its products."

The affidavit then goes on to describe how the joint administrators discovered breaches of the agreement by Astor and their conclusion that the distribution agreement was terminable. The affidavit continues at para. 19:

> "Our projections show that, following termination, Syntec should trade profitably in administration by selling directly to customers in the UK and directly or through intermediaries in overseas territories.
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> 20. The trading can be funded by Monteagle to the extent that income is insufficient to meet expenses."

The affidavit continues at para. 24:

> "I should explain to this honourable court that the trading projections which accompanied my first affidavit reflected a great deal of further work which was carried out by my firm following our appointment. The fact that they are similar to the projections suggested by the directors prior to the administration order does indeed confirm that the directors had formed a reasonable view of the market at that date. Similarity does not, however, in any way invalidate our projections nor does it suggest and it is not the case that Robson Rhodes prepared the forecasts merely by reliance on the directors' assertions."

Mr Joiner produced in evidence various reports on the prospects for the market in fibre-optic cable both in North America and in other parts of the world. Those reports were commented on by Mr Spalton. Those reports would seem to justify the joint administrators' optimistic view as to the future development of the market for Rheogel which they expressed in their reports and in the evidence of Mr Montgomery.

When Astor's motion for an injunction came to be heard inter partes the joint administrators' contention that they were entitled, by force of their appointment, to terminate the distribution agreement failed as did their alternative contention that they were entitled so to terminate it as a result of breaches by Astor (see *[1990] BCC 97*). *Vinelott* J who tried the case concluded his judgment by saying (at p. 111G): ***557**

> "I have come to the conclusion after some hesitation that I ought to grant an injunction and that I should not leave Astor only with the protection of these undertakings. If Astor is left only as a non-exclusive distributor, its business is likely to suffer disruption and its reputation may well be injured. It has appointed sub-agents on the footing that it has exclusive rights of distribution. They may well be dissatisfied if they find that they are distributing the product against competition from Syntec direct or from Monteagle. The precarious financial situation of Syntec, if known, is also likely to affect the confidence of customers. There is evidence that one large cable manufacturer in Germany declined to place an order after making enquiries into the status and financial health of Syntec. This damage will be far more elusive and difficult to quantify than the potential damage to Syntec if the injunction is continued even if it is forced into an insolvent liquidation.
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> There are, moreover, other considerations which I think the court is entitled to take into account. It would, I think, be wrong that Syntec should be allowed to continue to trade with what must be on any view a very speculative expectation of profit at a time when it is hopelessly insolvent and has for some time continued to trade in part with the assistance of moneys for which it was liable to account to the Inland Revenue and under the day-to-day management of a former director who has recently been

> associated with two other insolvent companies. Moreover there must at the very least be considerable doubt whether full disclosure was made when the administration order was made and whether *Peter Gibson* J would have made that order if all the circumstances had been disclosed."

The judge went on to order Syntec to pay the costs of the proceedings. In the result I was informed that these proceedings placed an extra burden of some £200,000 on the assets of Syntec.

On 13 December 1989 the joint administrators entered into an agreement with Astor whereby Astor purchased Syntec's business and assets.

Finally, it seems that on 27 March 1990 Mr Joiner and his wife acquired all the issued shares and became directors of a company, Gel Technology Ltd, which had been incorporated under the name of Reliable Engineering Ltd on 13 March 1990. That company went into insolvent liquidation in 1992.

Section 6 of the Company Directors Disqualification Act 1986 provides as follows:

> "(1) The court shall make a disqualification order against a person in any case where, on an application under this section, it is satisfied-
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> (a) that he is or has been a director of a company which has at any time become insolvent (whether while he was a director or subsequently), and
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> (b) that his conduct as a director of that company (either taken alone or taken together with his conduct as a director of any other company or companies) makes him unfit to be concerned in the management of a company.
>
> (2) For the purposes of this section … a company becomes insolvent if-
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> …
>
> (b) an administration order is made in relation to the company …"

Mr Joiner was a director of Syntec at all material times, which company has "become insolvent" within the meaning of sec. 6(1)(a) .

Section 9 of the Act provides that the court in determining whether the conduct of the director was such as to make him unfit to be concerned in the management of a company shall take into account, in the case of a company which has become insolvent, the matters set out in Pt. I and II of Sch. 1 to the Act.

***558**

Mr Newey, who appeared for the Secretary of State, listed under ten heads the actions and defaults of Mr Joiner which he set out to prove and which he submitted justified the court in coming to the conclusion that his conduct as a director of Synthetic Technology Ltd taken with his conduct as a director of other companies made him unfit to be concerned in the management of a company within the meaning of sec. 6(1)(b) of the 1986 Act.

I will deal with these each in turn but not necessarily in the order in which they were presented by Mr Newey. It is convenient if I start with the ground which he presented as the second ground on his list.

This ground charged that Mr Joiner sought to make Syntec pay for debts for which he was personally liable.

The relevant events occurred in late 1985 and concerned Mr R D Culmer, an electrician trading

as Tunbridge Wells Electrical. Mr Culmer gave evidence. His account was that at the request of Mr Joiner he undertook certain electrical works at Mr Joiner's house, Ashdown Cottage, near Uckfield. The cost of the work was £4,977 including VAT for which sum an invoice was submitted on 16 December 1985 addressed to Mr Joiner personally. A copy of this invoice is in evidence. It was not paid but rather Mr Joiner contacted Mr Culmer and asked him to charge Syntec instead by concealing the amount in invoices which Mr Culmer was submitting to the company for electrical work done to computer installations on the company's premises.

Accordingly, a series of false invoices were brought into existence in which the company was charged for the total of £4,977 for work done at Mr Joiner's house. One of the invoices was paid by the company as a result of which £1,495 was paid actually in respect of that work. The company failed to pay the remaining invoices as a result of which Mr Culmer was compelled to take proceedings in the Tunbridge Wells County Court and in the result he obtained judgment against the company dated 19 August 1986. Mr Culmer said that this judgment proved impossible to enforce against the company because of the existence of floating charges over the company's assets in favour of Barclays Bank. He said that as a result of further advice he then applied to have the judgment set aside which application was successful. He then commenced proceedings against Mr Joiner personally for the balance of the claim. Mr Joiner unsuccessfully defended the proceedings in the course of which he paid £2,000 into court. As a result, judgment was entered against him for £2,750 with costs. Subsequently, Mr Joiner offered a scheme of arrangement to his creditors in which Mr Culmer joined and received some 21p in the pound. Mr Culmer estimates that he has lost rather more than £4,000 together with a considerable expenditure of time and effort.

Mr Joiner's account of these events was that he accepted that the work was done for him personally but asked that the invoice of 16 December be sent to the company so that the company could pay, reducing the credit on his director's loan account. He denied that he had asked Mr Culmer to conceal the amount due in invoices to the company for work that Mr Culmer had done for the company. The difficulty facing Mr Joiner in his account was that at the relevant time his director's loan account was not in credit because it had been capitalised as part of the agreement with 3i in December 1985.

I unhesitatingly accept the evidence of Mr Culmer and reject the account of Mr Joiner. I therefore find this charge proved. This incident, although involving a relatively small sum of money, reflects no credit on Mr Joiner at all.

I turn to the third ground which is that Mr Joiner misled the court in the course of the administration proceedings.

It is submitted that he did so in three separate ways. In the first place he did so by representing in his affidavit evidence that the distribution agreement with Astor was ***559*** beneficial to the company and one which it was important that the company should not permit Astor to terminate by the company going into liquidation. It is then said that shortly after the administration order Mr Joiner changed his tune and sought to persuade the joint administrators that the distribution agreement was in reality a millstone and one which they should terminate if possible.

Mr Joiner's account was that he never faltered in his view that the Astor agreement was beneficial to the company because of its provisions that Astor would finance the purchase of stocks of raw materials in the manufacture of Rheogel, would finance Syntec's debtors and make available its sales and distribution network. He drew attention to a letter of 19 May 1989 which he and Mr Bury, his fellow director, sent to the joint administrators and in particular to para. 3 of that letter. In evidence Mr Jacob conceded that the joint administrators' sales forecasts were drawn on the basis that the Astor agreement should continue. He accepted that the joint administrators' view was that Syntec would trade profitably by continuing to use Astor but would do better if freed from the distribution agreement. It was, he accepted, the decision of the joint administrators to seek to avoid that agreement. In the light of this evidence it seems to me to be impossible to say that this charge is made out.

The second ground upon which it was said that the court was misled is that Mr Joiner failed to disclose that he had been associated previously with two companies which had failed due to insolvency. Mr Joiner's answer was that he was never asked by anybody and if he had been he would have disclosed the failure of Synco (UK) and Syntec I. It is not suggested that anyone did ask Mr Joiner about previous failed companies with which he was associated or that he ever

gave anyone the impression that he had never been associated previously with failed companies. I am unable to find proof that Mr Joiner on this ground deliberately misled the court.

Finally under this head it is said that Mr Joiner misled the court by representing that the principal asset of Syntec was its licence to manufacture Rheogel and to use that trademark which right would be lost if it went into liquidation. By contrast on 20 June 1989 Mr Joiner seems to have written a letter to the joint administrators in which he represented that the rights were in some way personal to him. Mr Joiner's account of the letter was that it was written at a time when he understood the administrators were considering selling Syntec's business to Astor for a consideration which Mr Joiner did not think properly reflected the future prospects of that business. He said he wrote the letter of 20 June in an attempt to make the joint administrators stop short. He was compelled to accept that by the terms of the letter he sought to obtain a personal benefit as consideration for allowing a transfer of the Rheogel trademark.

I will deal with this matter at the same time as the charge that Mr Newey made under his fourth head, namely, that Mr Joiner has wrongly laid claim to an asset of Syntec, that charge arising from the same facts.

It seems to me that Mr Joiner's letter of 20 June can only be read as an attempt wrongfully to assert Mr Joiner's ownership of the Rheogel trademark and accordingly the fourth charge is made out. It was not, however, to mislead the court for Mr Joiner to represent that the right to manufacture Rheogel and its trademark was a valuable asset of the company. At the time that representation was made, such was and now remains the case. I should state, however, that I do not regard the writing of the letter of 20 June in the circumstance in which it was written, and in the light of what the joint administrators must have known from the company's own records, as being a matter of great seriousness.

Mr Newey's fifth charge was failure to pay Crown debts. My attention was drawn to the fact that in the receivership it was found that the company had not accounted for £89,000 of PAYE of which some £64,000 was non-preferential and that the company had failed to account for some £28,000 of VAT going back to March 1987. While accepting ***560*** these figures Mr Joiner drew my attention to the board minutes included in his exhibit in respect of meetings of the board on 12 November 1987 and 7 January 1988. He said that those minutes established that he was at that time seeking to make an agreement with the Revenue and the Customs and Excise for payment of the company's arrears of PAYE and VAT. He was, however, compelled to accept that any agreement which was made by the company at that time was not honoured. Having set out the basic facts, which are not in issue, I propose to delay dealing with this charge until I deal with Mr Newey's charges under his first heading.

I therefore turn to Mr Newey's sixth heading, namely, a failure by the company, under the management of Mr Joiner, to file accounts with the registrar of companies within the time prescribed. Mr Joiner did not contest that the accounts to March 1986 due at the end of January 1987 and those for March 1987 and due at the end of January 1988 were not filed until 5 April 1988. Nor did he contest that the accounts to March 1988, due at the end of January 1989, were never filed at all. It follows that this charge is made out.

The seventh charge is that Mr Joiner permitted the company to pay him excessive remuneration, having regard to its financial position in the years 1986 and 1987 and leading up to the making of the administration order. The relevant figures were remuneration of £30,275 in the year to March 1986, when the company made a loss of £128,000–odd, remuneration of nearly £32,000 in the year to March 1987, when the company made a loss of £324,995, and remuneration at the rate of £34,000 in the period up to the administration order when the company can also be shown to have been making a substantial trading loss. Throughout these periods the company was providing Mr Joiner with a motor car, for most of the time a very expensive motor car. Mr Joiner's answer to these charges was that the joint administrators continued to employ his services and those of Mr Bury after the making of the administration order and in doing so paid them at the same rate (in the case of Mr Bury at a slightly increased rate) as that which they had previously been enjoying.

In this regard my attention was drawn to two decisions of *Harman* J, *Re Keypak Homecare Ltd (No. 2) [1990] BCC 117* , in particular the passage in the judgment at p. 120B, and *Re Cargo Agency Ltd [1992] BCC 388* at p. 391E. In those two judgments *Harman* J concluded that it was not enough for a director, who had an equity stake in the company concerned, to say that he was

being paid no more than the job that he was doing was worth, where nonetheless it was apparent that the total remuneration package of the director, including any benefits of kind, was out of proportion to the company's then trading success and financial health. Syntec's turnover for the year to March 1986 was some £435,000 and for the year to March 1987, £245,000. Management accounts for the year to March 1988 show a turnover of £818,000 and a small profit but thereafter a rapid decline so that its turnover in the year to March 1989 was some £428,000.

Applying *Harman* J's criteria it seems to me that, whereas it might be said that Mr Joiner was not excessive in taking some £30,000–odd and the running costs of an expensive car out of the company in the year to March 1986, a continuation of that level of remuneration in the year to March 1987 was plainly not justified. It may be said that he would have been justified in restoring his remuneration package because of the company's increased turnover and apparent profitability in the year to March 1988 (although the figures contained in the relevant management accounts now seem suspect). He was not however justified in continuing that remuneration level through the final year of the company's trading. The fact that the joint administrators continued the cash remuneration to Mr Joiner after the administration order is no answer, because by then it had been demonstrated that the company was substantially insolvent and could only survive upon the introduction of fresh capital which would have substantially diluted the ***561*** directors' share stakes in the company. For these reasons it seems to me that this charge is partially made out.

I now turn to consider the eighth charge, namely, that Mr Joiner caused Syntec to be brought into existence with the intention of taking over the goodwill of the business of Synco (UK) and Syntec I, while leaving unpaid the creditors of those companies.

In my description of the background facts of this case I set out the circumstances of Mr Joiner's acquisition of Syntec and the failures of Synco (UK) and Syntec I. It seems to me that this charge cannot be made out. There is no evidence that Syntec in truth took over the business of Syntec I, itself the trading arm of Synco (UK). To the extent that Syntec I acquired through Amalgamated the benefit of the trademarks, goodwill and advertising material of Syntec I and Synco (UK), the evidence before me is that those were acquired by Amalgamated by purchase from the receivers of those companies. It seems to me that I cannot treat the circumstances of the acquisition of Syntec by Mr Joiner and its commencement in trade as another example of a “phoenix” company which the public justifiably regards as objectionable. To this extent I feel myself bound to depart from the views expressed by *Vinelott* J in his judgment in Astor's case against the company.

The ninth and tenth charges were admitted by Mr Joiner, namely, that while a director of Lubricants, a subsidiary of Amalgamated, which actually never traded, that company failed to make any returns and that he failed to notify the companies registrar of his appointment as a director of Gel Technology Ltd, which company has also failed to make any returns.

I now turn to deal with the first charge which has caused me the greatest difficulty and, at the same time, to deal with the fifth charge. The first charge was that Mr Joiner had permitted the company to continue to trade whilst it was insolvent. Although this is not expressly made clear in the affidavit of Mr Jacob, Mr Newey, at the outset of this case, made plain that the period in respect of which the allegation is made is from early 1987 until the administration order.

In his judgment in *Re Sevenoaks Stationers (Retail) Ltd [1990] BCC 765* at p. 779F, *Dillon* LJ said:

> “Mr Cruddas made a deliberate decision to pay only those creditors who pressed for payment. The obvious result was that the two companies traded, when in fact insolvent and known to be in difficulties, at the expense of those creditors who, like the Crown, happened not to be pressing for payment. Such conduct on the part of a director can well, in my judgment, be relied on as a ground for saying that he is unfit to be concerned in the management of a company. But what is relevant in the Crown's position is not that the debt was a debt which arose from a compulsory deduction from employees' wages or a compulsory payment of VAT, but that the Crown was not pressing for payment, and the director was taking unfair advantage of that forbearance on the part of the Crown, and, instead of providing adequate working capital, was trading at the Crown's expense while the companies were in jeopardy. It would be equally unfair to trade in that way and in such circumstances at the expense of creditors other than the Crown. The Crown is the more exposed not from the nature of the debts but from the administrative problem it

> has in pressing for prompt payment as companies get into difficulties. As *Peter Gibson* J observed in *Re Bath Glass Ltd (1988) 4 BCC 130* at pp. 133–134 at the end of a paragraph which I would generally approve without limiting it to Crown debts:

'Even if such conduct does not amount to wrongful trading within sec. 214 (of the Insolvency Act 1986), in my judgment it would still be conduct amounting to misconduct and so relevant to sec. 6. Whether in any particular case that ***562*** misconduct, or the various matters of misconduct proved to the satisfaction of the court, will justify a finding of unfitness will depend on all the circumstances of the case.'

> Taking that view of the Crown debts in Rochester and Retail and adding to it (1) that there were never any audited accounts of any of the five companies let alone registered accounts, (2) the inadequacy of the accounting records of Retail, (3) the loan by Retail to Rochester, (4) the payment of debts of Hoo Paper by Hoo Waste Paper, (5) the guarantee given by Sevenoaks Stationers for the liabilities of Hoo Paper, (6) the continued trading while insolvent and known to be in difficulties of Rochester and Retail and, (7) the extent of the deficiency in each company after a relatively short period of trading, I have no doubt at all that it is amply proved that Mr Cruddas is unfitted to be concerned in the management of a company. His trouble is not dishonesty, but incompetence or negligence in a very marked degree and that is enough to render him unfit; I do not think it necessary for incompetence to be "total", as suggested by the Vice-Chancellor in *Lo-Line [Electric Motors Ltd (1988) 4 BCC 415 at p. 419]* to render a director unfit to take part in the management of a company."

From the combined judgments of *Dillon* LJ in the *Sevenoaks* case and *Peter Gibson* J in the *Bath Glass* case it is apparent that a director can permit his company to continue to trade whilst insolvent, while not exposing himself to a charge of wrongful trading under sec. 214 of the 1986 Act, but still be guilty of conduct amounting to misconduct under sec. 6. In the course of his submissions I was flattered by Mr Newey commending to me words which I used in my judgment in the case of Re Euromove Ltd where I sought to define such conduct as the taking of unwarranted risks with creditors' money by continuing to trade.

I have set out in the first part of this judgment a reasonably detailed history of the company's trading. But for two matters, that trading portrayed all the hallmarks of a company trading whilst it was insolvent and in so doing taking unwarranted risks with its creditors' money. I need only draw attention to Mr Joiner's admissions that by mid-1987 he was keeping the company alive by only paying creditors that were pressing and by leaving payment even of these until the last possible minute, in some cases after those creditors had obtained judgment against the company.

The principal countervailing circumstance is Mr Joiner's assertion of his continued belief in the company's ultimately successful future which appears to have been backed by others. In particular, it seems that the Monteagle group were prepared in July 1987 to make available some £200,000 worth of fresh capital to the company by way of subscription for shares and the taking over and postponement of the company's trading debts. In addition, I cannot overlook the fact that the joint administrators were prepared to depose to, in the proceedings against the company by Astor, and set out in their reports about the company, their confidence in the company's trading future in the manner which I have already described.

Nonetheless, I have come to the clear conclusion that Mr Newey's first charge is at least partially made out and that his fifth charge is also made out in the sense that the company, under the management of Mr Joiner, exploited the Crown, together with the company's other creditors, by deliberately pursuing a policy of only paying at the last minute those creditors which were pressing, which the Crown, together with the bulk of the company's other creditors, were not at the material time doing or not with sufficient persistence. It seems to me that Mr Joiner's continuation of the company's trading became culpable by at least September 1987 when it should have become apparent to Mr Joiner that the infusion of capital by the Monteagle group in July was insufficient. I am unable to accept that Mr Joiner was justified in regarding Monteagle's support as ***563*** unconditional. As events proved they were not prepared to bail the company out in all circumstances.

In my judgment, the apparently rosy prospects for the growth in the world market for fibre-optic cable, and so for the gels required to make that cable, did not justify Mr Joiner in continuing the company's trading from that time. It now seems to be clear that the company's management accounts for the year to March 1988 were optimistic, but even if they adequately reflected the company's trading success, it must have been apparent that a profit of somewhat more than £6,000 on a turnover of £800,000 (much more than the company had been achieving previously and which it was to achieve in the future) was quite insufficient to service the company's accumulated debts. In the light of the company's past trading history I can only express my surprise that the joint administrators were prepared to make the forecasts of the company's future trading which they seem to have been prepared to make for the purposes of the administration proceedings. In my view, they must have permitted themselves to be over-influenced by the directors' view of the imminent expansion in the worldwide market for insulating gels and in Syntec's ability to obtain an increased share of that market.

In my judgment, the conduct of Mr Joiner in procuring the company to continue to trade after September 1987, when taken with the other matters which I have found proved, is such as to render him unfit to be concerned in the management of a company. It follows that I am required by the words of sec. 6 to make a disqualification order and it remains for me to assess the seriousness of the case and in consequence the length of the disqualification which I must impose.

In my judgment, I am justified in viewing this case as a serious one of its kind. This company never traded profitably and for long periods during its trading history traded at a substantial loss. Having regard to the company's size and capitalisation the deficiency revealed by its statement of affairs can only be also described as substantial. Throughout its history Mr Joiner appears to have behaved in a markedly cavalier fashion with the company's creditors both actual and potential. I have already drawn attention to the irresponsible nature of the company's prospectus apparently being circulated to potential lenders or investors in March 1987. Having regard to the criteria established in the judgment of *Dillon* LJ in the *Sevenoaks* case, it seems to me that a period of disqualification of seven years should be imposed on Mr Joiner in this case.

Costs

It has, as I know from my own experience, been the practice in this court until recently that where the Secretary of State succeeds in an application to disqualify a director he obtains, save where exceptional facts occur, an order for costs against that director on an indemnity basis.

I have, however, had drawn to my attention the judgment of *Chadwick* J in the case of *Re Godwin Warren Control Systems plc [1992] BCC 557* at p. 569H, where that judge comes to the view that there can be no reason why the Secretary of State in these cases should receive particular treatment and, as a matter of course, obtain an order for indemnity costs. I am told that that judgment was followed in a recent case by Mervyn Davies J. By contrast, it was not followed by the Vice-Chancellor, *Vinelott* J and a deputy judge in other cases of this kind. I am told, however, that the Vice-Chancellor, in particular, did not give a reasoned judgment for why he did not follow what *Chadwick* J said in the case of *Re Godwin Warren* . It follows that I am confronted with two, perhaps, conflicting lines of authority, for one of which reasons are given and for the other of which no reason has apparently been given.

It seems to me that the differentiation should be this. That where it can be shown that a director has by defending the proceedings, albeit in the end unsuccessfully, substantially ***564** reduced the charges made good against him, so that in the result the case with which the court is confronted, albeit one justifying disqualification, is not as serious as that which was opened by the Secretary of State at the beginning of the case, so that the court can take the view that the delinquent director's defence was to that extent justified, then the order for costs should not be on an indemnity basis. In each case, it seems to me it will be a matter of degree as to whether the successful defence was justified in the sense which I have sought to define.

I am satisfied that in this case Mr Joiner's defence was justified in that sense and that, in this case, I should follow the course which *Chadwick* J laid down in the *Godwin Warren* case and make an order for costs but on the standard basis only.

(Order accordingly)

*565