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Case No: CR-2019-BRS-000005

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
INSOLVENCY AND COMPANIES LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 14 August 2020

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY	**Claimant**
- and -	
LUTHFUR RAHMAN	**Defendant**

- -
- -

Simon Passfield (instructed by **Gowling WLG**) for the **Claimant**
John Dickinson (instructed by **Gregg Latchams**) for the **Defendant**

Hearing dates: 28-29 July 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 10:30 am.

HHJ Paul Matthews :

Introduction

1. This is my judgment on a claim brought by the Secretary of State for Business, Energy and Industrial Strategy against the defendant, Luthfur Rahman, for an order under section 8 of the Company Directors Disqualification Act 1986. The allegation against the defendant is that he was a *de facto* director (though not a *de jure* or a shadow director) of a company called Spiceroy Restaurant Ltd ("the company"), and that his conduct as such director makes him unfit to be concerned in the management of a company.

2. The company carried on the business of an Indian restaurant, known as 'Viceroy Restaurant,' in Dunkeswell, Honiton, Devon. The conduct complained of is the employment, in June 2017, of staff who did not have the right to be employed in the UK, contrary to the Immigration, Asylum and Nationality Act 2006. The defendant denies that he was any kind of director of the company. On the other hand, he does not deny that persons *were* employed by the company who did not have the right to work in the UK. Essentially, therefore, the defendant's defence is that he was not a *de facto* director of the company. The sole *de jure* director of the company was a Mr Walie Sharof, who has since given undertakings to the claimant and therefore is not pursued for an order under the 1986 Act.

3. The necessary notice of intention to proceed against the defendant was given under section 16 of the 1986 Act on 18 April 2018. On 14 January 2019, the claim form was issued. This is not a claim under section 6 of the 1986 Act, which only applies where a company has become insolvent. Instead, it is a claim under section 8 of the 1986 Act, which applies where the claimant considers that it is expedient in the public interest that a disqualification order should be made against a person who is, or has been, a director or shadow director of a company. For these purposes, as I say later, a *de facto* director is a director. If the court considers that a disqualification order should be made under this section, the court has the power to make such an order against the defendant for up to 15 years.

Evidence

4. The claim was supported by an affirmation from Mark Bruce dated 3 January 2019, and an affirmation from Gaynor Morgan dated 20 December 2018. Mr Bruce is an investigator in the Insolvency Service, and it is effectively on his recommendation that the claimant brings this claim. Ms Morgan is part of the Home Office's Civil Penalty Collection Team. The defendant made a witness statement in opposition to the claim dated 15 May 2019. By virtue of the Practice Direction for Directors' Disqualification Proceedings, para 8.1, written evidence in a claim under the 1986 Act is to be by affidavit or affirmation, and not by witness statement. At the trial, therefore, I received an undertaking from counsel on behalf of the defendant that the defendant would make an affirmation verifying the contents of his witness statement.

5. In response to the defendant's witness statement, further affirmations were made by Ms Morgan (on 26 June 2019) and Mr Bruce (on 27 June 2019), and also by Benjamin Chacksfield (on 21 June 2019) and Susan Allard (on 24 June 2019). Mr Chacksfield and Ms Allard were two of the five-person Home Office immigration service team that inspected the restaurant without warning on 2 June 2017 and discovered the illegal workers. No evidence was filed (by either party) from the illegal workers or from Mr Sharof.

6. At the hearing, there were tendered for cross-examination the following witnesses: Gaynor Morgan, Benjamin Chacksfield, Susan Allard, and Luthfur Rahman. The defendant did not require Mr Bruce to be so tendered. I will give here my impressions of those witnesses that I saw. Mr Chacksfield was a straightforward and honest witness, at times rather cautious, but obviously truthful. Ms Morgan was perhaps even more cautious, and more self-protective, but still telling the truth as far as she knew it. Ms Allard was a very open and straightforward witness, and again obviously truthful, though, as I say later, not necessarily correct in her recollection.

7. The defendant was a more complex witness. He saw everything in business terms, and looked at the big picture rather than the detail. He accepted fairly those points which went against him, but resisted any suggestion that he had any involvement in running the restaurant. His background and culture were different from those of the other witnesses and I made allowance for that. Overall, I was satisfied that he was telling me the truth, at least so far as he saw it. Again, that does not mean he was always right.

Facts found

8. In this case I find the following facts. The defendant is a restaurateur whose family settled in London, but he moved to the south-west of England, and opened a restaurant called "The Viceroy" in Yeovil. Subsequently he was concerned in other restaurants in the south-west. One of them was also called "Viceroy" (but without the definite article) in Dunkeswell in 2011. The company that originally ran this restaurant was called Bespoke Restaurant Ltd. The defendant gave up his economic interest in this company in 2012 but continued as a director until 2014, and Mr Sharof (whom he knew) was subsequently appointed a director. It appears that the business was carried on for some time, but then Mr Sharof gave it up.

9. From at least 2012 onwards, the defendant organised internet advertising for the restaurants in which he was concerned by gathering details of each restaurant, together with the distinguishing logo on a single webpage under the heading "Viceroy South-West". Initially there were six such restaurants, each with contact details including telephone number, separate website and email address. One of these was "Viceroy" in Dunkeswell. The archived webpages that I was shown, giving a snapshot at various dates through to 2017, show that some restaurants joined the webpage and others left it. But the "Viceroy" in Dunkeswell was always there, even after 2012, when according to the defendant he had given up his interest, and during 2017, when the events the subject of this claim occurred, but the defendant said he had no interest. The defendant explained this as a cheap form of advertising. His evidence was that this did not show that he owned the restaurants, or even that he ran them. Instead it purported to show a group of Indian restaurants in the south-west which might attract customers who had been to one of them to visit another of them.

10. On 15 June 2016, the company was incorporated to carry on the business of the "Viceroy" in Dunkeswell. The sole director shown on the register was Mr Sharof. The defendant's evidence (effectively unchallenged) was that Mr Sharof owned all the shares and also the lease of the premises in Dunkeswell. At that time, those premises did not have a licence to sell alcohol, which would have considerably restricted its ability to trade as a restaurant. The defendant's evidence, which I accept, was that Mr Sharof was struggling, and needed to get an alcohol licence as soon as possible. In order to apply for a premises licence, a person who already has a personal licence must be nominated as the designated premises supervisor for the new premises. The defendant had such a licence. Mr Sharof did not.

11. On 11 February 2017 an application was made in the name of the defendant for a premises licence for the "Viceroy" in Dunkeswell. (Strictly, it was not necessary that it be in his name; it was only necessary that he be nominated designated premises supervisor.) In his evidence, the defendant explained this as a personal favour to Mr Sharof, whom he knew, and with whom he had been in business. He denied that it showed that he had an interest in this business. He explained that this enabled Mr Sharof to open the restaurant more quickly. If this is true, it may be that the defendant was exposing himself to prosecution under the licensing legislation. But I am not concerned with that now. The question is whether I accept his evidence. For the reasons given hereafter, I do accept this evidence. I find that the defendant had no interest in the restaurant at this date, and was merely doing Mr Sharof a favour. On 22 March 2017 (so within six weeks of application) the premises licence was granted.

12. On 2 June 2017, a team of five Home Office immigration officers visited and inspected the premises in the early evening, looking for migrant workers without permission to work. This team included Mr Chacksfield and Ms Allard (who was team leader). They arrested four migrant workers, whose surnames were Ahamed, Hussain, Ahmed, and Uddin. They also spoke to the chef (a Mr Ali) who was a UK national, and indeed gave him certain notices. Neither Mr Sharof nor the defendant was present. I will consider the evidence in more detail in a moment, but I accept that the immigration officers asked three of the four migrant workers who "the boss" was. I also accept that, in summary, Mr Ahamed said it was the chef, Mr Ali. Mr Hussain said it was Mr Sharof. But Mr Ahmed said it was Mr Sharof and Mr Rahman. He also said that he had worked at the Yeovil restaurant and that this was part of the same company. The fourth man, Mr Uddin, was not asked who was "the boss". Of course, the concerns of the Home Office team were with the status of the migrant workers, rather than with policing the corporate governance of the business.

13. Both Mr Chacksfield and Ms Allard spoke to Mr Ahmed. In the witness statement made by Mr Chacksfield on 7 June 2017 (the Wednesday following the Friday of the inspection), he said this, having referred to the questions and answers made at the time in his notebook:

> "I then spoke with Mr Ahmed about his employment at the restaurant and recorded the questions and answers in my notebook which I place below;
>
> Q) How long working at this restaurant?
>
> A) Six months on and off

> Q) What is your job and responsibilities?
>
> A) Head Waiter. I serve customers and deal with any issues.
>
> Q) How much are you paid?
>
> A) Nothing I get free food and accommodation. They give me pocket money as and when I ask for it.
>
> Q) Who said you could work/help out?
>
> A) Mr Rahman and Shuhel they are the owners.
>
> […]
>
> Q) Did you work anywhere else before?
>
> A) Yes I was working/helping out at the Viceroy in Yeovil it is part of the same company."

14. I should also say that the words "Mr Rahman and Shuhel they are the owners" appear in exactly that form in the notebook. It was common ground that "Shuhel" was a nickname for Mr Sharof. In cross-examination, Mr Chacksfield said that there was a pause between the words "Mr Rahman and Shuhel" and the words "they are the owners". He also accepted that Mr Ahmed could have got the name of the defendant from seeing it over the door where the name of the licensee was stated, or from the web advertisement.

15. Ms Allard was the team leader, as I have said. She was responsible for effectuating the entry on the premises, which was by virtue of provisions in the Licensing Act 2003. It is clear from her statement that for this purpose she had been provided in advance with details of the licence for the premises. As I have already said, that licence was in the name of the defendant. In her witness statement made on 5 June 2017, the Monday after the Friday of the inspection, Ms Allard said this (in part):

> "After the second phone call was completed I managed to show Ahmed my personal warrant and explain to him that we were entering the business under the licensing act. He both spoke and understood English. I informed him that we were undertaking checks on the staff and asked him who was the boss. I handed him a Notice to Occupier which set out our power of entry. He stated that the boss was Mr Walie Sharof and also Luthfur Rahman, neither of whom were present."

16. A copy of the relevant pages of Ms Allard's notebook was also exhibited, but although this mentions Mr Ali, Mr Ahmed, Mr Ahamed, and Mr Uddin (in that order), it does not show in any detail what Ms Allard's dealings with them were. In particular it does not record questions and answers, in the way that Mr Chacksfield's statement does. The statement attributed to Mr Ahmed in Ms Allard's statement that "the boss was Mr Walie Sharof and also Luthfur Rahman" does not appear in the notebook.

17. The notebook also contains the words "Luthfur Rahman tel no 07977207219". They actually precede all the names of Messrs Ali, Ahmed, Ahamed and Uddin in the

notebook. Yet these words do not find their way into her statement written up three days later, even though that statement does contain a sentence indicating that the premises alcohol licence was in the name of Luthfur Rahman. I also note that the telephone number given in the notebook is not the same as that given by the defendant in later correspondence with the Insolvency Service. The defendant denied in evidence that it was his number. Ms Allard was not able to help further with this. She accepted that she had taken no steps to call the number she had written down. As a result, I do not accept that the number given belonged to the defendant. That in turn casts doubt on whether the names Luthfur Rahman referred to the defendant at all.

18. As I have already mentioned, no statements were put before me from the migrant workers themselves. Nor was there any evidence of the claimant even having attempted to contact them for a statement. There was a suggestion that they might have left the country, but this was not backed up by any evidence. Nevertheless, despite this gap in the available evidence, I am quite satisfied that Mr Ahmed mentioned the name 'Rahman' when asked about the owner and/or boss at the restaurant. But I am not satisfied that he mentioned the first name 'Luthfur'. Mr Chacksfield does not say that he mentioned it to him. Ms Allard however does. On the other hand, she knew the names Luthfur Rahman as belonging to the licensee, and she has written down a telephone number which I have held is not his. Then she has written up her statement three days later. On the whole, I think Ms Allard is mistaken in her recollection. I therefore find that Mr Ahmed did not mention "Luthfur" in connection with "Rahman" when asked about the boss/owner.

19. The workers were not asked any questions about what Messrs Sharof and Rahman did in running the restaurant or indeed the company. There is therefore no evidence as to their actual activities, if any. Indeed, one of the four workers thought that the chef ran the restaurant. Of course, I do not criticise the Home Office Immigration Officers for the questioning that they carried out. They were concerned to establish illegal migrant working, and that is what they did. They were not concerned to obtain information for the purpose of company directors disqualification proceedings, which are quite different.

20. On 12 July 2017, after considering the material, the Home Office Immigration Civil Penalty Compliance Team issued a request for information to the company to enable it to decide whether to impose a civil penalty and if so in what amount. This does not refer at any point to the defendant or to his name. The request referred to the four suspected migrant workers and explained what information and evidence was sought. It also stated that in order to take the company's information and evidence into account it had to be received by 21 July 2017. There is no evidence as to when the request was actually put in the post. According to records filed at Companies House, Mr Sharof had resigned as a director of the company on 31 July 2017.

21. An email dated 7 August 2017 from the company's email address to the Civil Penalty Compliance Team stated that this request was received only on 4 August 2017, and sought an extension of time for a response. On the information available to me, I do not know who sent this email. By an email sent on 8 August 2017 the Civil Penalty Compliance Team refused to accept that the request for information had not arrived until 4 August 2017. No information was given to confirm when the request had actually been *posted*, as opposed to "issued", and no other reason was given for

refusing to accept that the request had not arrived until 4 August 2017. A request for an extension of time was also refused.

22. On 18 August 2017 a civil penalty notice was issued, but with a "given date" (whatever that means) of 22 August 2017, in the sum of £45,000, calculated as £15,000 for each of three out of the four migrant workers. No penalty was charged in respect of Mr Uddin. The penalty was discounted to £31,500 if paid on or before 12 September 2017. On 14 September 2017 a detailed letter of objection was sent to the Civil Penalty Compliance Team by Novells, a firm of immigration lawyers instructed on behalf of the company. This letter was stated to have been sent "by first class delivery". Not having had any reply, a chaser letter was sent to the same postal address by Novells on 26 September 2017, a copy of which in the bundle is date-stamped "RECEIVED 29 Sep 2017".

23. According to what the Civil Penalty Compliance Team call a "Correspondence Outcome Notice" issued on 5 October 2017 but "given" on 9 October 2017, the letter of 14 September was received only on 29 September 2017. I am afraid that I really cannot accept that a first class letter sent by solicitors on 14 September 2017 can have been received by its addressee only on 29 September 2017. Solicitors normally post letters on the day that they are written, and there is nothing to show that did not happen here. Of course it is possible that it might miss the post on that day and be sent on the next business day. But a delay of more than two weeks is simply not credible. It seems far more likely to me that the Team have confused the original letter of 14 September with the chaser letter of 26 September, which *was* received on 29 September.

24. In any event, there is no evidence as to the processes by which the Civil Penalty Compliance Team received letters posted to them. It may be that the letter arrived at the postal address within a day or two of posting, but then took several business days to reach the desk of the person actually dealing with the matter. If that is indeed what happened, I would not regard it as acceptable to state that the letter was only received on the latter date. It is received on the date that it arrives at the postal address, even if it then takes some time to find the person who is dealing with the case. However, in this case none of this makes any difference to the facts of the case or to the result. The Correspondence Outcome Notice maintained the penalty of £45,000, which was due immediately. On the material presented to me, however, the penalty was never paid in any sum.

25. On 7 December 2017, the Insolvency Service wrote to the defendant setting out the case against him for an order under the 1986 Act. It said that he held himself out to be the owner and operator of six restaurants as set out in the website previously referred to. It also said that he was

> "confirmed by employees interviewed by [Home Office immigration officers] as the owner and 'boss' of the business".

It accused him of being a director of the company at the time of the Home Office visit, and of failing in his duties as such director. It asked him to complete and return an enclosed questionnaire and also two appendices, by 22 December 2017.

26. The defendant's accountants then entered into a limited email correspondence with the Insolvency Service on his behalf. The accountants stated that the defendant had never been either a director or shareholder of the company, and asked on what basis he could be disqualified from office. The email reply said that the letter of 7 December 2017 set out the matters

> "upon which it was concluded he acted in the capacity of a director of the company".

27. The Insolvency Service sent a 'chaser' letter to the defendant dated 28 February 2018. On 6 March 2018 the defendant telephoned the investigator at the Insolvency Service, Simon Beamish, and left a message for him. Mr Beamish called back. The defendant stated that the company was nothing to do with him. He did not know

> "why the workers would name him, there are many Luthfur Rahmans in the world".

He also said that

> "he and Mr Sharof were partners in the business many years ago and that they help each other by stating they are related businesses".

28. He followed this up with an email of the same day in which he said:

> "I categorically state that I am not or have not been the director of Spiceroy Ltd. The business belonged to a restaurant acquaintance of mine. We knew each other through my restaurants at that time and did discuss a collaboration. We linked the restaurants for marketing purposes to look like a bigger group than we were. This is not unusual. I did not go ahead with investing in the business as once I looked properly into this, the company seemed not to be successful enough or indeed the area big enough to expand the business."

29. Mr Beamish responded by email dated 29 March 2018 in which he said that he had reviewed the file and was still of the opinion that it was appropriate to recommend proceedings for the defendant's disqualification. He repeated the point that

> "workers named you as 'boss' or "owner' when they were interviewed. In addition to this, the premises held a licence for the supply of alcohol and you were named as the licence holder and Designated Premises Supervisor. The fact that you have stated that there was some type of relationship between yourself and the restaurant makes it more reasonable to conclude that you are acting as director of the company. The statements made by workers and the fact that you were a licence holder would suggest your involvement in the company was more than just for marketing."

(It will be noted that in fact Mr Beamish was in error in saying that "*workers*" had identified the defendant. *One* worker out of four had mentioned his surname, which, and I am sure I can take judicial notice of this, is a common one today. Two others asked mentioned other people as the boss or the owner, and one was not asked.)

30. On 18 March 2018 the claimant sent a formal notice under section 16 of the 1986 Act, notifying the defendant of his intention to commence disqualification proceedings against him. On 14 June 2018, the claimant accepted an undertaking from Mr Sharof in lieu of proceedings for disqualification. On 18 July 2018 the premises licence for alcohol was cancelled.

Law

31. Section 8 of the 1986 Act (as amended) provides as follows:

> "[(1) If it appears to the Secretary of State ... that it is expedient in the public interest that a disqualification order should be made against a person who is, or has been, a director or shadow director of a company, he may apply to the court for such an order.
>
> (1A) …]
>
> (2) The court may make a disqualification order against a person where, on an application under this section, it is satisfied that his conduct in relation to the company [(either taken alone or taken together with his conduct as a director or shadow director of one or more other companies or overseas companies)] makes him unfit to be concerned in the management of a company.
>
> [(2A) Where it appears to the Secretary of State] ... that, in the case of a person who has offered to give him a disqualification undertaking—
>
> > (a) the conduct of the person in relation to a company of which the person is or has been a director or shadow director [(either taken alone or taken together with his conduct as a director or shadow director of one or more other companies or overseas companies)] makes him unfit to be concerned in the management of a company, and
> >
> > (b) it is expedient in the public interest that he should accept the undertaking (instead of applying, or proceeding with an application, for a disqualification order),
>
> he may accept the undertaking.]
>
> [(2B) Subsection (1A) of section 6 applies for the purposes of this section as it applies for the purposes of that section.]
>
> (3) In this section 'the court' means the High Court or, in Scotland, the Court of Session.
>
> (4) The maximum period of disqualification under this section is 15 years."

32. It will be seen that this section is directed against a person "who is, or has been, a *director or shadow director* of a company" (emphasis supplied). Section 22(3) of the Act provides that

> "'Director' includes any person occupying the position of director, by whatever name called."

And section 22(3) of the Act provides that

> "'Shadow director', in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act",

though with certain important exceptions (not relevant here in any event). However, there is no allegation in the present case that the defendant was a shadow director of the company, and we therefore need not be concerned any more with this definition. Instead this case is based on the allegation that although the defendant was not a *de jure* director, he was a *de facto* director, and therefore falls within the definition in section 22(2) of the Act.

33. In *HMRC v Holland* [2010] 1 WLR 2793, the Supreme Court by a majority held that the director of a corporate director of a company which became insolvent did not act as a *de facto* director of the insolvent company merely by discharging his duties and responsibilities as a director of the corporate director. He was not therefore liable for unpaid tax under section 212 of the Insolvency Act 1986. The Supreme Court referred to the definition of "director" in section 250 of the Companies Act 2006, which is identical to that in section 22(2) of the 1986 Act.

34. Lord Hope said:

> "20. … In *In re Lo-Line Electric Motors Ltd* [1988] Ch 477 , 489 Sir Nicolas Browne-Wilkinson V-C, noting that this definition was inclusive and not exhaustive, said that its meaning had to be derived from the words of the Act as whole.
>
> 21. The definition extends, of course, to persons who are validly appointed as directors. Persons who are not directors de jure may nevertheless be treated as directors de facto. Sir Nicolas Browne-Wilkinson said that in his judgment it was not possible to treat a de facto director as a 'director' for all the purposes of the Companies Act 1985 . But it is not in dispute that de facto directors are within section 212 of the Insolvency Act 1986. […] Mr Knox QC for Mr Holland accepted that, as section 212 of the 1986 Act was concerned with the conduct of directors and their liability for actions or decisions in relation to the company, de facto directors must be assumed to be covered by this expression and treated as directors. As he put in his written case, this is to ensure that the persons with real directorial control but who, for whatever reason, lack a formal appointment are held responsible in law for their conduct of the affairs of the company."

Lord Collins delivered a concurring judgment and Lord Saville agreed with both. Lord Walker and Lord Clarke dissented on the facts of the case. It does not appear that they disagreed with the proposition that a *de facto* director was within section 212 of the Insolvency Act 1986.

35. Mr Passfield for the claimant referred me to a number of authorities. In *Instant Access Properties Ltd v Rosser* [2020] 1 BCLC 256, Morgan J said:

> "217. … There does not appear to be a clear legal test to help one decide whether a person is or is not a *de facto* or a shadow director. For the purpose of deciding that question, it is necessary to focus on what the person actually did in relation to the company."

36. In *HMRC v Holland* [2010] 1 WLR 2793, Lord Collins said:

> "93. It does not follow that 'de facto director' must be given the same meaning in all of the different contexts in which a 'director' may be liable. It seems to me that in the present context of the fiduciary duty of a director not to dispose wrongfully of the company's assets, the crucial question is whether the person assumed the duties of a director. Both Sir Nicolas Browne-Wilkinson V-C in *In re Lo-Line Electric Motors Ltd* [1988] Ch 477, 490, and Millett J in *In re Hydrodam* [1994] 2 BCLC 180, 183, referred to the assumption of office as a mark of a de facto director. In *Fayers Legal Services Ltd v Day* (unreported) 11 April 2001, a case relating to breach of fiduciary duty, Patten J, rejecting a claim that the defendant was a de facto director of the company and had been in breach of fiduciary duty, said that in order to make him liable for misfeasance as a de facto director the person must be part of the corporate governing structure, and the claimants had to prove that he assumed a role in the company sufficient to impose on him a fiduciary duty to the company and to make him responsible for the misuse of its assets. It seems to me that that is the correct formulation in a case of the present kind."

37. In *Smithton Ltd v Naggar* [2015] 1 WLR 189, [33]-[45], Arden LJ considered the earlier authorities and made a number of points, including that the questions were whether the person had assumed responsibility to act as a director, what was the capacity in which the person was acting, what the person actually did, whether the defendant's acts were directorial in nature, whether the company considered the person to be a director and held that person out as such and whether third parties considered that that person was a director. She also made the point that a person does not avoid liability by showing that that person in good faith thought that he or she was not acting as a director. It is a question of fact and degree.

38. Lord Hope also referred with apparent approval to the decision of Timothy Lloyd QC (as he then was, sitting as a deputy High Court judge) in *Re Richborough Furniture Ltd* [1996] 1 BCLC 507, which was a case where a person was alleged to be a *de facto* director and liable to disqualification under section 6 of the 1986 Act. The deputy judge said this:

> "It seems to me that for someone to be made liable to disqualification under section 6 as a de facto director, the court would have to have clear evidence that he had been either the sole person directing the affairs of the company (or acting with others all equally lacking in a valid appointment, as in *Morris v Kanssen* [1946] AC 459) or, if there were others who were true directors, that he was acting on an equal footing with the others in directing the affairs of the company. It also seems to me that, if it is unclear whether the acts of the person in question are referable to an assumed directorship, or to some other capacity such as shareholder or, as here, consultant, the person in question must be entitled to the benefit of the doubt."

39. If it is established that a person is a "director" for the purposes of the 1986 Act, section 12C provides

> "(1) This section applies where a court must determine—
>
> (a) whether a person's conduct as a director of one or more companies or overseas companies makes the person unfit to be concerned in the management of a company;
>
> (b) whether to exercise any discretion it has to make a disqualification order under any of sections 2 to 4, 5A, 8 or 10;
>
> (c) where the court has decided to make a disqualification order under any of those sections or is required to make an order under section 6, what the period of disqualification should be.
>
> […]
>
> (4) In making any such determination in relation to a person, the court or the Secretary of State must—
>
> (a) in every case, have regard in particular to the matters set out in paragraphs 1 to 4 of Schedule 1;
>
> (b) in a case where the person concerned is or has been a director of a company or overseas company, also have regard in particular to the matters set out in paragraphs 5 to 7 of that Schedule."

40. Schedule 1 of the Act provides (so far as relevant):

> *"Matters to be taken into account in all cases*
>
> 1. The extent to which the person was responsible for the causes of any material contravention by a company or overseas company of any applicable legislative or other requirement.
>
> 2. Where applicable, the extent to which the person was responsible for the causes of a company or overseas company becoming insolvent.
>
> 3. The frequency of conduct of the person which falls within paragraph 1 or 2.
>
> 4. The nature and extent of any loss or harm caused, or any potential loss or harm which could have been caused, by the person's conduct in relation to a company or overseas company.
>
> *Additional matters to be taken into account where person is or has been a director*
>
> 5. Any misfeasance or breach of any fiduciary duty by the director in relation to a company or overseas company.

6. Any material breach of any legislative or other obligation of the director which applies as a result of being a director of a company or overseas company.

7. The frequency of conduct of the director which falls within paragraph 5 or 6."

Discussion

41. The claimant's case against the defendant that he was a *de facto* director of the company is based on three matters. The first of these is the statement of Mr Ahmed to the Home Office immigration officers that the defendant was "the owner" and "the boss". The second is that the defendant was (as he admits) the person whose name was on the alcohol licence for the premises as the designated premises supervisor. The third is that by means of the website advertisement the defendant held out the restaurant as under his control. I will deal with each of them in turn.

The defendant was "the owner" and "the boss"

42. As to the first of these matters, I have already held that the statement that the owner or boss was the defendant was in fact a statement by one of four migrant workers, who used his surname – a common surname – alone. Moreover, the worker concerned, Mr Ahmed, said he previously worked at The Viceroy Restaurant in Yeovil, with which Mr Rahman was at an earlier stage concerned. If he thought there was a connection with the Yeovil restaurant, as it bore a similar name, I see good reason why he might think that a Mr Rahman was the owner or boss of the Dunkeswell Viceroy.

43. I remind myself that there is no evidence whatever that the defendant was ever seen at the Dunkeswell premises in 2017. None of the workers said that he was there the day before, or the week before, or whatever. Only one even mentioned his name. None of them said that he actually did anything at the restaurant. None of them could properly be relied on to know what duties an English company director undertakes. This is an extraordinarily slender basis for saying that *the defendant has assumed* the responsibilities of a director of the company running the Dunkeswell restaurant.

Premises licence

44. As to the second matter, this is perhaps more significant. Normally, a person who applies for an alcohol licence for restaurant premises is a person who is concerned in the business. Yet he need not be a director. He may simply be an employee. But it is a fact that in order to apply for such a licence, the person applying has to have a personal licence already. And it is accepted that the defendant had such a personal licence, whereas Mr Sharof did not.

45. Accordingly, if Mr Sharof was in a hurry to open his restaurant – as the defendant says he was, because he was struggling financially – he might be tempted to ask someone who had a personal licence if he could borrow that person's name to make the application. And if the person he asked was a person with whom he was already acquainted, indeed had had business relations with, and moreover belonged to a minority community of restaurateurs which sought to help each other gain business for their respective businesses, it strikes me as quite plausible that that other would say Yes. The defendant says that that is what indeed he did. He helped Mr Sharof out, by allowing his name to be used to make the application for the premises licence.

46. In my judgment, it is more likely than not that that is exactly what happened. It was a wrong thing to do, and it may yet land him with other liabilities, but it does not by itself make him a person who has assumed the responsibilities of the office of director of the company concerned. There is no evidence that the defendant ever supervised the sale of alcohol. It was a straightforward pretence to the licensing authority.

The website

47. Thirdly, there is the question of the website. I regard this as the weakest of the three matters relied on by the claimant. The internet page is not in any sense a homepage for a website. Each of the restaurants has its own website, and the page only gives those details which are necessary for any potential customers to be directed to. Of course it could have been a common page for all the restaurants in a group owned and directed by the same person or persons. But it could also be an advertisement for a loose group of restaurants whose owners were associated in some way with one another, without being in any way responsible for each other's debts or sharing profits. In my judgment, on the material before me, it is at best the latter. It does not show that the defendant was involved in the affairs of the company which ran the Dunkeswell restaurant, much less that he assumed *any* of the duties of a director.

The superficial investigation

48. Over and above these matters, I am struck by the fact that the claimant has simply relied on these three rudimentary pieces of evidence to prove that the defendant was a *de facto* director of the company. The claimant has done nothing to obtain direct evidence from the workers themselves. Three of them did not identify any Mr Rahman at all. The defendant is not registered as a director of this company, whereas I assume he is registered as such a director of the other companies which run restaurants that he accepts are his. At all events the claimant has not sought to show that the defendant habitually carries on business without ever becoming a director. He has adduced no evidence to show that the defendant has profited in any way from the restaurant, *eg* by showing payments from the company to him. Nor has he adduced any evidence to show that the defendant received any management information about the affairs of the business.

49. The claimant says these restaurants are in a group which the defendant owns or controls, but has made no attempt to show that they act together, for example that they buy their food or other supplies from the same wholesalers or suppliers, or have any other dealings in common. He has given no evidence of the person to whom Mr Ali gave the immigration officers' notices. He has adduced no evidence from any third party to show that the defendant assumed the role of director, or that (for example) he was a signatory on the company's bank account. No letters or other communications from him on behalf of the company have been produced to me. No evidence from Mr Sharof himself has been adduced, whether to inculpate or exculpate the defendant, though it is not credible to suppose that Mr Sharof was not asked. No evidence has been adduced to show that any of the defendant's admitted restaurants has any problems of this kind. Why should he put the other businesses at risk for this one, where he is not even a registered director or a shareholder?

50. Mr Passfield cited to me the case of *Re Stakefield (Midlands) Ltd* [2011] Bus LR 457, a decision of Newey J (as he then was). There, defendants to a director's

disqualification claim by the Secretary of State under section 6 of the Act sought to strike out the claims on the basis of alleged breaches of human rights and/or beaches of duty to ensure that a thorough and unbiased investigation was carried out. Newey J said:

> "12. … I do not read the authorities to which I have been taken as establishing any duty on the Secretary of State to interview or obtain documents from third parties, nor to ensure that investigations are carried out. …
>
> 13. It would be dangerous to lay down an absolute rule. However, it seems to me that neither article 6 of the European Convention on Human Rights, nor the Secretary of State's duty to act fairly, will normally extend to requiring the Secretary of State to obtain evidence or to ensure that investigations are undertaken.
>
> 14. If a defendant takes the view that the Secretary of State has failed to investigate sufficiently, it may theoretically be open to him to challenge by way of judicial review a decision to institute or continue disqualification proceedings … . More realistically, he could, in an appropriate case, apply to have the proceedings struck out as too weak to be allowed to proceed. In other cases, the defendant may wish to secure missing evidence himself (including, if necessary, by applying for non-party disclosure or serving witness summonses) and/or to draw attention at trial to the deficiencies in the Secretary of State's investigations and evidence. What the defendant will not usually, in my judgment, be able to do is have the proceedings struck out on the basis that the Secretary of State has committed a breach of duty by failing to obtain evidence or otherwise to investigate.
>
> 15. Where, however imperfect the investigations may have been, the Secretary of State has in fact assembled evidence of a defendant's unfitness to be concerned in the management of a company, it is, as I see it, for the court to determine at trial whether the Secretary of State has made out his case. If, in the event, the evidence proves to be sufficient to establish unfitness, the defendant should be disqualified even if the Secretary of State failed to obtain relevant evidence or ensure a thorough investigation. On the other hand, the defendant may be able to point to the absence of evidence or investigation to cast doubt on the Secretary of State's case."

51. I accept that this decision makes clear that the claimant owes no duty to the defendant to investigate the matter. Instead, it is a matter for the claimant to decide what to investigate and what evidence to place before the court. Then it is a matter of appreciation by the court as to whether the case is proved or not. Although, prior to October 2015, section 8 only applied where "investigative material" was relied on, the claimant may now place before the court any relevant information to prove the case. The claimant could have investigated further, and placed further information before the court, but has chosen not to do so.

Conclusion

52. In the present case there is in my judgment nothing to show that the defendant assumed the duties of a director, nothing to show that he had any role in the

governance of the company, or in fact that he ever did anything for the company (even supervising the sale of alcohol) and nothing to show that anyone else thought he was a director. In my judgment, the evidence presented in this case, properly viewed in its own context, and having regard to the oral evidence given to me, does not demonstrate on the balance of probabilities that the defendant was a *de facto* director of the company. It shows only that there *might* be something further to look into. The problem is that the claimant has not looked into it. And what there is, as I say, does not get him home. This claim must accordingly fail.

Other points

Unfitness

53. In these circumstances, it is not strictly necessary for me to go on and consider whether, if the defendant had been shown to be a *de facto* director of the company, the claimant would have established that the defendant's conduct was such as to make him unfit to be concerned in the management of a company. But I will indicate, in case this matter goes further, that on the further evidence presented, I would have been satisfied that the defendant's conduct did meet this test.

54. A *de facto* company director owes the same duties to the company as would a *de jure* director: see *Instant Access Properties Ltd v Prosser* [2018] EWHC 756 (Ch), [254]. Such a director should ensure that the company complies with its statutory obligations under the immigration legislation, and if it does not, then this can be conduct establishing unfitness for the purposes of the 1986 Act: see *Re 1Boiragi Ltd* [2019] EWHC 692 (Ch). Given the defendant's denial of his status as a de facto director, he has obviously not adduced any evidence to suggest that he delegated these duties to anyone else, or indeed discharged them himself. But what there is shows that there was a serious failure on the part of those running the company. In my judgment that failure shows unfitness to be a company director.

Disqualification

55. If I had found that the defendant was a *de facto* director of the company, and had demonstrated by his conduct his unfitness to act as a director, then I would have made a disqualification order for five years, being at the top end of the lowest bracket. This would be on the basis that the defendant reasonably expected Mr Sharof to deal with day-to-day matters, such as the employment of workers, and therefore his liability would essentially be a liability arising from negligence rather than direct and deliberate breach of immigration law.

56. However, it would be at the top of the lowest bracket. It is a serious matter not to comply with the immigration rules. It gives an unfair advantage to the company which ignores the rules, and hurts those companies which abide by the law. Moreover, it gives an opportunity for the exploitation of migrant workers who are usually in a precarious state to begin with. The claimant says that failing to cause the company to pay the fine is an aggravating factor. Given that I have found that the defendant had no shares in the company and that there is no evidence of his having any financial control over it, or receiving any financial benefit from the company, I do not place any weight on this.

Disposition

57. As it is, however, I dismiss the claim. I am very grateful to counsel and solicitors on both sides for their considerable assistance in dealing with this case. I should be grateful to receive an agreed minute of order, or, if not, written submissions for what that order should contain. In the first instance those submissions should be sent to me by 4 PM on 21 August 2020, with any response to the other side's submission by 4 PM on 28 August 2020. I will then endeavour to decide the matter on paper as soon as possible.