

Neutral Citation Number: [2020] EWHC 2890 (Ch)  
IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES  
INSOLVENCY AND COMPANIES LIST (ChD)

CR-2019-006963

The Rolls Building  
The Royal Courts of Justice  
7 Rolls Building, Fetter Lane  
London EC4A 1NL  
Dated: 29 October 2020

**BEFORE: DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE FRITH**

**IN THE MATTER OF WOW INTERNET LIMITED  
AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

**BETWEEN:**

(1) Stephen John Hunt Applicants

(as the Liquidator of Wow Internet Limited)

(2) Wow Internet Limited

(in creditors' voluntary liquidation)

- and -

Qasim Majid Respondent

**Mr Darragh Connell (instructed by Howes Percival LLP) appeared on behalf of the Applicants**

**Mr Nicholas Wright (instructed via direct access) appeared on behalf of the Respondent**

**Hearing date: 31 July 2020**

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**APPROVED JUDGMENT**  
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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

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 29 October 2020 at 11:00 AM.

## **Deputy Insolvency and Companies Court Judge Frith:**

- 1 This is an application brought by Wow Internet Limited (the "Company") acting by its Liquidator Stephen John Hunt (collectively referred to as the "Applicants"). By its terms, the Application seeks the recovery of various sums, which the Applicants assert were wrongfully withdrawn by the Respondent, Mr Qasim Majid in his capacity as the sole director of the Company, from its bank account in breach of his statutory and fiduciary duties.
- 2 The sums claimed in the application were originally stated in the application to amount to £64,897.61. However, at the trial, the amount claimed was reduced to £52,431.30 to reflect the decision not to proceed with certain sums that the Applicants considered legitimate and further, to correct an arithmetical error resulting in an adjustment downwards from £33,738.22 to £29,656.27.
- 3 The hearing of the application took place remotely in accordance with the arrangements brought on by the COVID-19 pandemic. Mr Darragh Connell represented the Applicants. The Respondent was represented by Mr Nicholas Wright. I am grateful to both Counsels for the written closing submissions they both served and to Mr Connell for his skeleton argument.

### **The facts**

- 4 The Company was involved in digital marketing. It was incorporated on 6 April 2010 and entered into creditors' voluntary liquidation on 8 July 2014. Throughout its existence, the Respondent had been the sole director of the Company. The Company itself was modest in size and had three employees in addition to the Respondent. One of the employees had left the Company in November 2013. It was asserted by the Respondent that the employee took a valuable contract with him when he left and this caused significant financial difficulty for the Company, ultimately leading up to its liquidation.
- 5 In addition to his involvement with the Company, the Respondent had also been involved as the managing director of another business which was operated through a Company known as Integrous Limited ("Integrous"). He occupied this role from 2004 until the date of the Company's dissolution on 22 July 2014. The Company was dissolved pursuant to the compulsory strike-off regulations as it had failed to file its accounts since the year ending 31 July 2012.
- 6 Upon the Company's entry into creditors' voluntary liquidation, a Ms Gagen Sharma ("Ms Sharma") was appointed liquidator for the purposes thereof. The statement of affairs verified by the Respondent on 8 July 2014 revealed a deficiency of some £84,468.69 of which the largest creditor was Her Majesty's Revenue and Customs who were owed £71,869.69. No distribution was made to the creditors during the tenure of Ms Sharma. The only realisation that was recorded was a third-party payment in the sum of £4,482 which covered Ms Sharma's costs and expenses in acting as liquidator. The one and only report filed by Ms Sharma and sent to the creditors revealed that the realisation had been made from a third-party who was identified as the Respondent

which had been applied in respect of the costs and expenses of the liquidation. The liquidation was then closed by Ms Sharma and the Company was dissolved.

- 7 On 25 April 2017, District Judge Lambert restored the Company to the Companies Register upon an application issued by the First Applicant. On 25 April 2017, he was then appointed liquidator of the Company by order of Deputy Registrar Garwood.
- 8 The First Applicant became involved in several cases in which Ms Sharma had been the duly appointed office holder. In a Court of Appeal decision in *Top Brands Ltd v Sharma* [2016] B.C.C.1 the Court of Appeal upheld earlier findings of misfeasance and breach of duty against Ms Sharma in an unrelated case. After those proceedings had been concluded, the First Applicant was appointed as office holder in a number of matters in which Ms Sharma has been involved following restoration applications that he made. He has investigated the conduct of the Respondent in this case whilst acting as the sole director of the Company. Specifically, those investigations consisted of analysing the information provided in connection with a business current account maintained by the Company with NatWest. In addition, the First Applicant sought from Ms Sharma, the Company documentation that remained in her possession. This resulted in the delivery up to him of certain documents consisting of a creditor folder which included some invoices; a sales invoice folder for the year 2013 and a bank statements folder again dated 2013 designated as "NatWest 51 118319 600741" being the bank account and sort code of the bank account in question.
- 9 In addition, requests were made of the Respondent for any other accounting records that remained in his possession but had yet to be delivered up. The request for information made it plain that the First Applicant, in his capacity as liquidator, was endeavouring to determine whether or not payments were lawfully made to the Respondent. It was also made clear that if there was any failure to deliver up such books and records, the Court would be invited to draw the appropriate adverse inferences from their absence. The initial request was made on 28 September 2018 and was followed by two subsequent requests on 7 November 2018 and 18 March 2018. In response to these requests, the Respondent maintained that he had already supplied all Sage and other accounting records relating to the directors' loan accounts to Ms Sharma's firm. This was a position he maintained throughout.
- 10 It is the position of the Applicants that the documents that were supplied are incomplete and do not address the question as to whether the expenditure was for proper Company purposes. Whilst the Respondent indicated that there was a Sage accounting system in operation which was delivered to Ms Sharma, this was not included within the information she provided to the First Applicant.
- 11 In addition, the Applicants complain that even after liquidation, the Respondent continued to operate the bank account. The Respondent claimed that, at all material times, he had acted in this regard pursuant to the advice of Ms Sharma. However, the only communication between Ms Sharma and the Respondent that was disclosed took the form of a single email dated 7 October 2014, which referred only to an obligation on the part of the Respondent to pay an outstanding sum of £500 to her firm.
- 12 The Applicants further relied on several alleged inaccuracies in relation to the information supplied on the directors' questionnaire specifically in relation to an understatement of the Respondent's income from the Company when compared with the amount disclosed on his personal tax returns. They relied upon the failure to supply

corroborative evidence from, amongst others, the Company's accountant, which could have explained the cash withdrawals but in spite of the request, no such evidence was forthcoming.

- 13 As a result, it is the position of the Applicants that the Respondent did not maintain accounts consistent with the obligation under section 339(3) of the Companies Act 2006, that is to provide accounting records which would show entries from day to day of all sums of money received and expended by the Company and the matters in respect of which receipt and expenditure takes place. It is said that there were other sources from which corroborative evidence could be obtained. Further, no satisfactory explanation has been provided relating to the Company bank account which took place after the insolvency commenced. Self-evidently the information provided on or around 8 July 2014 provides no evidence concerning their nature or purpose.

### **The witness**

- 14 The Respondent was cross-examined by Mr Connell at some length at the hearing before me. He gave evidence to the effect that he had some experience in relation to the business operated by the Company and further confirmed, under cross-examination, his awareness of his obligations as a director. As will be described, when pressed, he made certain concessions that payments had in fact not been made for company purposes. He failed to provide any further clarification on certain other payments but maintained that certain payments were for genuine Company purposes and indeed, produced an invoice which he asserted supported his position which was disclosed with the closing submissions filed by Mr Wright on his behalf.
- 15 There were plainly some unsatisfactory elements in relation to the evidence he gave before me. It is true that concessions were made, but this took place late and only under cross-examination before me when had the earlier enquiries been more comprehensively addressed, this would not have proved necessary. This betrays either, at best, a certain naivety in relation to the extent of the obligations that he owed or a failure on his part to understand fully the nature and extent of his obligations and the consequences of a failure to abide by them.
- 16 He justified his actions by a reliance on the alleged advice he received from Ms Sharma, but he failed to provide a detailed account of what the advice consisted of. The fact that he self-evidently had control over the Company's bank account, notwithstanding the appointment of Ms Sharma as its liquidator, is obviously a matter of some concern and may reflect upon the way in which the liquidation was conducted by her. However, whilst I was referred to other cases in which her conduct had been scrutinised, these are of limited use in determining the facts of the case that are before me. They are not evidence that I should take account of in this case which I must determine on its own facts. It is the Respondent's conduct alone that I have both to consider and examine in the context of the evidence that he provided before me.

### **The legal principles**

- 17 The appropriate legal principles are set out in a skeleton argument filed by Mr Connell which he supplemented by the detailed closing submissions he provided for the Applicants. Mr Wright, on behalf of the Respondent, did not file a skeleton argument, no doubt due to the shortage of time between his instruction and the hearing, but he did provide me with closing submissions to which I shall turn in due course.

18 I shall adopt the submissions made by Mr Connell as to the applicable legal principles which involved firstly, the evidential burden; second, the nature of the duties owed by the Respondent and finally, the effect of insolvency upon the directors' duties. I shall deal with each of them in turn.

### **The evidential burden**

19 Liquidators are obliged by virtue of the office they hold to investigate the conduct of directors with a view to ensuring that they compensate the Company for any failure to comply with their fiduciary and statutory duties. This necessarily involves full disclosure by the director of any information that is relevant. I was referred by Mr Connell to the decision of Norris J. in the case of *Toone v Robbins* [2018] B.C.C. 728. At paragraph 39 of his Judgment, the learned Judge stated as follows:

"39. *Once the Chief Registrar had decided (as he did) that in the absence of clear evidence one way or the other he had to determine the issue by reference to the burden of proof then (there being no dispute that the company had made the payments to the Directors) the benefit of any doubt had to be given to the Joint Liquidators (not to the recipients of the company's money). This is entirely in accordance with principle. Directors who receive money from the company cannot be heard to say: -*

*"We have received company money: but our record keeping is so bad that the basis upon which we received it is unclear. So by reason of our defaults we ask you to assume in our favour that we took the money lawfully".*"

20 Many of the directors' duties are fiduciary in nature. It is the obligation of the director once payments have been identified for the director to provide a satisfactory explanation as to why those payments were legitimate. As indicated by the Judge in *Toone*, that evidential burden is imposed upon the director who cannot pray in aid a failure to supply appropriate documentary support as in effect an invitation to the Court nevertheless to assume that those payments were in fact legitimate.

21 I was also taken to the Court of Appeal decision in the *Re Mumtaz Properties Limited* [2011] EWCA Civ 610 at paragraphs 14 and 16:

"14. *In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.*

...

16 *The approach of the judge in this case was to seek to test the evidence by reference to both the contemporary documentary evidence and its absence. In my judgment, this was an approach that he was entitled to take. The evidence of the liquidator established a prima facie case and, given that the books and papers had been in the custody and control of the respondents to*

*the proceedings, it was open to the judge to infer that the liquidator's case would have been borne out by those books and papers."*

22 In short, if the directors of a company conduct the business informally and take a lackadaisical approach to supply of contemporaneous documentary evidence, they do so at their own risk. It manifestly does not result in a lower standard being applied as was said at paragraph 17 of *Mumtaz* where the Court went on to say:

"17 *Put another way, it was not open to the respondents to the proceedings in the circumstances of this case to escape liability by asserting that, if the books and papers or other evidence had been available, they would have shown that they were not liable in the amount claimed by the liquidator. Moreover, persons who have conducted the affairs of limited companies with a high degree of informality, as in this case, cannot seek to avoid liability or to be judged by some lower standard than that which applies to other directors, simply because the necessary documentation is not available."*

23 It seems clear to me that there was at least a prospect that there were other documents that could have been disclosed and which have not been put forward by the Respondent. These were enumerated into nine constituent elements by Mr Connell as follows:

23.1.1 any documents evidencing the purpose of cash withdrawals from the Company's bank account including substantial withdrawals immediately preceding the liquidation in May and June 2014;

23.1.2 any petty cash register for the period between 2010 and 2014;

23.1.3 any documents evidencing how the cash withdrawn by the Respondent after liquidation was spent;

23.1.4 any personal bank statements from the Respondent showing when and how he discharged his directors' loan account recorded in the last filed accounts for the Company;

23.1.5 any emails evidencing Ms Sharma's communications with the Respondent;

23.1.6 any evidence from the Company's accountant from whom the Respondent had been in discussions;

23.1.7 the absence of any accounting records whatsoever for the Company beyond 30 September 2012 including the absence of draft accounts;

23.1.8 any confirmed receipt of payment by a creditor namely, the Breuck Consultancy in circumstances where its invoice is dated 21 April 2013 being over a year prior to the date the Company entered into liquidation; and

23.1.9 the absence of the Breuck Consultancy as a creditor listed in the statement of affairs at the time of liquidation.

24 In addition, I would add that there is also the question of the Sage accounting system records which the Respondent asserts were provided to Ms Sharma, but which are apparently no longer available. It is not inconceivable that directors, when supplying

such information may wish to retain a copy of such documentary evidence that may be provided electronically.

- 25 I must therefore consider the documentary evidence that was produced. The question arises as to the position where no corroborative evidence exists as to the absence of any documents or other evidence that could have been produced by the Respondent in the form of accurate contemporaneous evidence that would have supported his position. The cases indicate that if the financial records are deficient in a material way, this is a point that will entitle me to draw adverse inferences against the position adopted by the Respondent with the consequence that it is the Applicants, and not the Respondent, who get the benefit of any doubt.
- 26 This is not to say that this precludes the Respondent from leading evidence from other sources such as his or the Company's accountants or indeed from Ms Sharma herself as to the nature and extent of the documents he provided to her or the advice that she provided to him. However, the authorities cited by Mr Connell make it clear that the absence of satisfactory financial records that would explain the nature of the withdrawals by the Respondent together with a failure to lead evidence from other potential witnesses are not matters that he can pray in aid of his position. The fact that such documents were not present and evidence was not led from other potential witnesses are matters that I am entitled to take into account in deciding whether the Respondent has discharged the appropriate evidential burden that falls upon him.

### **The nature of directors' duties**

- 27 As set out in sections 171 to 177 of the Companies Act 2006 and as summarised in the case of *Northampton Borough Council v Cardoza* [2019] B.C.C. 582 at paragraph 119 in which the learned Judge stated as follows:

"119 *A statement of a directors' duties is now embodied in ss.171 – 177 CA 2006. Directors owe fiduciary duties to act within their powers ( s.171 ); to act in the way the director considers, in good faith, would be most likely promote the success of the company ( s.172 ); to exercise independent judgment ( s.173); to avoid conflicts of interest, whether actual or potential and direct or indirect ( s.175 ); not to accept benefits from third parties ( s.176 ); and, to declare any interest, direct or indirect, in proposed transactions ( s.177 ). The hallmark of these fiduciary duties is acting in the interests of and showing loyalty to the company. There is a further duty to exercise reasonable care, skill and diligence ( s.174 ). In relation to the company's assets the directors are in a position akin to trustees and they must account for any assets they receive."*

- 28 It is further not necessary for a director to be relieved of liability simply because they have not personally obtained a profit as a result of the breach of duty. The stringent nature of those duties was explained by Arden LJ (as she then was) in *Re Annacott Holdings Limited* [2013] B.C.C. 98 at paragraph 23 where she said:

"23 *Moreover, fiduciary duties are stringent. A director is liable to account for a profit that he obtained from a breach of duty even if the company has suffered no loss: see, for example, Murad v Al-Saraj [2005] EWCA Civ 959. This is a harsh result. Equity has not developed exceptions to avoid this because there*

*is a strong deterrent element in the imposition of liability for breach of fiduciary duty."*

- 29 In his closing submissions, Mr Wright sought to excuse the behaviour of the Respondent on the basis that the Respondent seeks to be relieved of liability on the grounds of acting honestly and reasonably in all the circumstances. I shall deal with that submission later. However, the Court of Appeal in *Guinness Plc v Saunders* [1990] 2 A.C. 663 at 689G – 692G made it clear that a director cannot be relieved of any liability on the grounds of acting honestly and reasonably in all the circumstances where the director has received the benefit of a breach of duty unless properly authorised to do so.
- 30 In relation to the assertion made by the Respondent that he acted upon the advice of Ms Sharma, Mr Connell referred me to section 173 of the Companies Act 2006 which imposes a statutory duty upon a director to exercise independent judgment. It is not sufficient for a director to rely upon the advice received blindly. There has to be an independent judgment as to whether or not he should act in relation to such advice. However, as indicated above, the nature of the advice that was given by Ms Sharma is unclear and is simply not set out or corroborated by any contemporaneous documents.
- 31 I am entitled to draw an inference from the absence of any contemporaneous documents. Even if it could be shown that such advice was forthcoming or indeed was appropriate (which I do not find on the facts of this case, particularly in relation to the operation of the bank account after the appointment of Ms Sharma as liquidator), this does not in any event alleviate the basic obligation upon a director to exercise independent judgment consistent with the obligation to comply with the statutory fiduciary duties he owes.
- 32 I was referred by Mr Connell to the decision in the case of *R (Dutta) v General Medical Council* [2020] EWHC 1974 (Admin) at paragraph 42. That case sets out clearly that it would be incorrect to assess the witness evidence from the perspective of whether the witness is to be believed. Instead, the correct approach is to start with the objective facts established from effective contemporaneous documents and use oral evidence to subject that written evidence to critical scrutiny particularly where the events occurred many years previously. That is the approach that Mr Connell encouraged me to take and it also informed the basis he conducted his cross-examination of the Respondent.

### **What is the effect of insolvency on the obligations of directors?**

- 33 Mr Connell relied heavily on the decision of ICC Judge Barber in *Re System Building Services Group Limited (in Liquidation)* [2020] B.C.C. 345, which effectively restated the position that the directors' statutory and fiduciary duties continued after entering into a formal insolvency process. The decision went further to discuss the effect of how the emphasis of those duties change once the Rubicon of insolvency is crossed. In the ordinary case of a company that is trading profitably the director's primary duty is to the shareholders with a view to enhancing the return they may make from their investment to enhance the dividend prospects in relation to their shareholding. After the company runs the risk of being insolvent, it is the interest of the creditors that becomes paramount.



34 The test that has to be applied to the conduct of the director in such circumstances is described in *Re HLC Environmental Products Projects Limited* [2013] EWHC 2876 (Ch) where at paragraph 92, the Judge stated:

"(a) *Where the duty extends to consideration of the interests of creditors, their interests must be considered as "paramount"...*

(b) *...the subjective test only applies where there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective, namely whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company...*

(c) *...where a very material interest, such as that of a large creditor (in a company of doubtful solvency, where creditors' interests must be taken into account), is unreasonably (i.e. without objective justification) overlooked and not taken into account, the objective test must equally be applied."*

35 This applicable test is particularly important in this case by virtue of the points that have been raised concerning the extent of disclosure of documentary evidence. I must consider whether on the evidence, the Respondent gave actual consideration to what was in the best interests of the Company. If there is no evidence of his having done so it is the objective test as outlined above that I should consider in determining specific heads of claim raised by the Applicants.

36 Finally, in dealing with the effect of insolvency, it is important to understand on the evidence when the date of insolvency became known to the directors. The principles of section 123 in terms of the definition of an inability to pay debts are well known. Insolvency can be assessed either on a cash flow or a balance sheet basis. The question for the Court is whether on the balance of probabilities either of these tests is satisfied.

37 In this case, the evidence suggests that the Respondent accepted that the company was insolvent by, at the latest, November 2013 when the employee had departed taking the benefit of a valuable contract with him. This followed receipt of the last filed accounts for the year ending 30 September 2012, which were filed some five months previously on 27 June 2013. Those final accounts revealed an excess of liabilities over assets of £13,102 and a debit balance in respect of the profit and loss account in the sum of £14,102. This, submits Mr Connell, is particularly relevant when considering the nature of the payments made out of the Company's account in the period May 2014 to September 2015. It is during this period that the Respondent ought to have understood the obligation to consider the interests of the creditors as paramount.

### **The heads of claim**

38 Having set out the principles to be applied, I will now turn to the heads of claim. There are five heads of claim identified in the application. I will deal with each of them in turn.

### **Company payments to Thapers Accountants - £851.24.**

39 This head of claim was constituted by four payments made by standing order from the bank account maintained with NatWest which each total £212.81. The payments were

made on 20 December 2013, 20 January 2014, 20 February 2014 and 20 March 2014. The total amount was £851.24.

- 40 The investigations of the First Applicant revealed that in fact, this liability arose due to services supplied by Thapers not for the Company but for Integrous in respect of which, the Respondent was the managing director. Enquiries were made of Thapers who confirmed that they did not do any work for the Company itself and that their client at all material times was Integrous.
- 41 In his witness statement, the Respondent confirmed that the payment was made in circumstances where he was being chased for payment on behalf of Integrous. He explained that he had asked if they could invoice the Company so that he could make payment which was represented by the instalments that were paid. He conceded that this was inappropriate and candidly conceded that he thought that as he was a director of both companies, this would not be an issue. He now accepts that this is not the case. Leaving aside any fiscal implications of such conduct, this was an illuminating admission as it demonstrated that the level of knowledge of the Respondent as to his fiduciary and statutory obligations was not as it should be. On the evidence, the Applicants' claim must succeed in the recovery of the sum of £851.42.

#### **Directors' overdrawn bank account - £5,923.00**

- 42 The second head of claim is based upon an overdrawn directors' loan account recorded in the accounts of 30 September 2012 showing a sum of £5,923. Under cross-examination, the Respondent confirmed that this sum was correctly recorded. The Respondent could not produce any evidence of his having repaid these sums. He asserted that he was owed a sum of £12,000 which he claimed represented a sum due to him by the Company which he could set off against the overdrawn directors' loan account balance. The provenance of that figure he attributed to conversations he had with Ms Sharma around the time he completed the directors' questionnaire. When discussing this with Ms Sharma, he mentioned that the sum was probably around £12,000 because when he delivered the Company documentation to Ms Sharma it included bank statements, invoices and further receipts.
- 43 There appeared to be no substantive review of these documents and they were not received by the Applicants from Ms Sharma. The Respondent described it as a "guesstimate" derived from discussions he had with Ms Sharma during which they agreed that it was about £12,000.
- 44 Mr Connell drew my attention to the Respondent's tax returns which do not reveal any deduction for Company expenses for the period from 2010 to 2014. He also referred me to an understatement of the sums the Respondent actually received from the Company when compared with the amounts he declared to Ms Sharma. The actual amounts received were some £27,960 compared with the £14,500 that he declared to Ms Sharma when preparing the directors' questionnaire.
- 45 There has been no disclosure of any other contemporaneous documents which would have indicated specifically how much the Respondent could legitimately have claimed. For example, there has been no evidence from the Company's accountants who prepared the 2012 accounts. No evidence has been produced to show whether there have been any post balance sheet movements which would have reduced the amount claimed in the manner that the Respondent alleged. There has been no attempt to seek

clarification from Ms Sharma as to the whereabouts of the invoices and vouchers the Respondent claimed to have given her.

- 46 There is no contemporaneous evidence of the advice that she gave in this regard as described by the Respondent in his evidence. It follows that I find that there is no objective evidence that demonstrates that the director's overdrawn loan account has been discharged in the manner postulated by the Respondent. The fact that it appears that there was an informal approach to the recording and maintenance of financial records coupled with a failure on the part of the Respondent to provide any other evidence compels me to give the benefit of the doubt to the Applicants. The Respondent has failed to overcome the evidential burden that is placed upon him by reason of the principles set out in the cases cited above. The Applicants claim succeeds in this regard.

### **Withdrawals after the Company entered liquidation - £5,119.82**

- 47 One of the more striking set of circumstances arose from the First Respondent's examination of the movements on the bank account after 8 July 2014 when the Company entered creditors' voluntary liquidation until September 2015. It appears that in the period of some 14 months after the date of liquidation, at a time when the Company was being wound up under the supervision of Ms Sharma, a sum of £5,119.82 was withdrawn from the bank account.
- 48 The Defence put forward by the Respondent is that these payments were made to "Creditors". The first was in relation to the discharge of an invoice dated 21 April 2013 which was payable to the Breuck Consultancy in respect of services they provided to the Company in relation to certain activities in Dubai.
- 49 However, the statement of affairs verified by the Respondent makes no mention of this organisation as being a creditor of the Company. Even if it was, its right to receive payment was as an unsecured creditor in the liquidation, so the most it could hope for after 8 July 2014 was a right to share in any dividend that may ultimately be declared.
- 50 The Respondent further indicated that payments were made to Ms Sharma in respect of the professional fees that she had incurred in acting as liquidator of the Company. This is however surprising for two reasons. First, Ms Sharma in her report to the creditors indicated that her costs were paid by the Respondent personally. Second, what is difficult to comprehend is that the bank account was an asset of the Company unencumbered by any security. The credit balance would have constituted an asset from which, upon receiving the appropriate approval, her remuneration could be drawn.
- 51 No satisfactory explanation was provided to me either orally, or from the disclosed documents, as to what the true position was in relation to these transactions. It would have been perfectly possible for the Respondent to produce evidence from his personal bank account to demonstrate that he had in fact paid Ms Sharma from his personal resources in the manner that she suggested. Neither the documents nor the explanation provided in cross-examination are persuasive. Instead, payments to Ms Sharma, if indeed they took place at all, were from cash withdrawals made by the Respondent at a time when he was not authorised to make them. I am not satisfied on the evidence that an honest and reasonable man in the position of the Respondent would have considered that he could deal with the Company's assets in the way he claims to have

done. No benefit to the creditors arose on the evidence. I find that the Applicants' claim for £5,119.82 succeeds.

### **Payments other than for legitimate Company expenditure**

52 The Applicants claim a total sum of £10,880.97 paid out of the Company's bank accounts between 28 November 2011 and 30 June 2014. This head of claim is made up of some 133 transactions made from the Company's bank account. As previously described, the evidential burden to demonstrate that these payments were legitimate is placed fairly and squarely upon the Respondent. In his Points of Defence, the Respondent accepted that some of the sums were "*undoubtedly personal*". He stated as follows:

*"Paragraph 4 – I dispute that all these relate to private expenditures. Some of these undoubtedly (sic) do relate to private expenditure, but others were spent on Company matters. Without seeing the details Company records which are in your possession, then it is difficult to separate business expenditure to personal expenses, so I would be grateful if you could please send me copies of all the vouchers in question so I can answer your questions fully.*

...

*I do admit the payment to Thapers of £815.15 is regrettably personal also some of the elements of the retail expenditure, however the statement of affairs shows I am owed £12,000 which will more than cover these personal amounts."*

53 I have already explained and considered the somewhat unsatisfactory way in which the alleged sum of £12,000 was calculated as being due by the Company to the Respondent. He has known for some time that the Thapers sums were not legitimately paid and has, as yet, failed to repay these sums notwithstanding his concession that they were inappropriate. The Applicants claim that there has been ample opportunity for the Respondent to provide further information to justify his position. It was striking that when a bespoke tailoring invoice came under scrutiny, it was provided only upon service of the closing submissions of Mr Wright. Even then, the Respondent did not describe who the beneficiary of the bespoke tailoring was and why such a service would assist in the promotion of the business affairs and dealings of the Company.

54 Furthermore, there were several last-minute concessions made by the Respondent under cross-examination. This betrayed a misunderstanding of the significance and effect of the allegations that were being made against him. I am afraid it only tended to support my view that his approach to the claim was a mixture of disdain and naivety coupled with a misunderstanding of the duties he owed as a director of the Company.

55 The position adopted by the Respondent was to say that Ms Sharma had been supplied with all the documents. That unfortunately was not supported by the documents that had been provided to the First Respondent. The absence of the Sage electronic records was a major omission. However, to adopt the approach promulgated by Norris J. in *Toone* and the decision in *Dutta*, the failure on the part of the Respondent to adopt a proper approach to the accounting records of the Company coupled with the failure to

try to attempt to provide any level of corroboration from other contemporaneous sources does the Respondent's defence to the Application no good.

- 56 In his witness statement, the Respondent asserted that all the information had been provided to the accountants when they were preparing the Company's accounts. It is therefore surprising that no evidence was called from them nor was any documentation belatedly recovered from them which could have supported the Respondent's account. It follows that the contemporaneous documentation was insufficient to support the explanations provided but as I have indicated, that does not relieve the Respondent from liability.
- 57 The result of the cross-examination was that there were three categories into which each of the 133 transactions can be placed. The first were transactions which the Respondent belatedly accepted were items of personal expenditure. The second were transactions which the Respondent maintains were legitimate company expenditure without providing any documentary or independent evidence in support of that contention. The third and final category were transactions to which no explanation was provided beyond a failure to accept that they were items of personal expenditure.
- 58 The first category included sums that amounted in total to a sum of £2,563.55. They consisted of sums paid to a number of retail organisations, payments to a dental practice and a payment for the renewal of the Respondent's passport. Under cross-examination the Respondent conceded that they were all made for his own personal benefit. They should be reimbursed by the Respondent.
- 59 The second and third categories make up the balance of the transactions making a total claimed by the Applicants under this head of claim amounting to £10,880.97. These transactions were notable by the failure of the Respondent to file any written evidence which would justify his position that these were all reasonably incurred. They included a number of other retail outlets such as Amazon Prime and a number of references to Tesco Stores and Asda Superstores.
- 60 I invited the Respondent to explain the position in relation to these payments which he endeavoured to do so by explaining that these were sums extended for the benefit of members of staff. Once again, there has been no corroborative evidence to support this position from any of the members of staff concerned. The amounts referred to were significant in the context of an organisation that was providing cups of coffee and plates of fruit for three or four people. I was unconvinced by the explanation that the Respondent produced under cross-examination. I do not accept that the Respondent satisfied the evidential burden as previously identified. There was simply no persuasive documentary evidence that supported the account provided by the Respondent. Even during my questioning of him, he made further concessions specifically in respect of sums paid to a veterinary practice and other miscellaneous claims for entertainment venues and grocery supplies.
- 61 It is regrettable that the concessions that were made, were not provided much earlier. I was left with the impression that they had not previously been seriously considered by the Respondent.
- 62 The third subcategory of the 133 transactions represented sums that the Respondent was simply unable to account for at all. These included two payments for £341 marked "sport and leisure" and the third concerned hotel expenditure at a luxury hotel chain.

The Respondent failed to provide any explanation for the incurring of those fees and as a result not only is there no documentary evidence to support his basis assumption that these were legitimate expenses but he himself was unable to provide any explanation whatsoever as to why they had been incurred. As a result, the conclusion I draw in respect of the fourth category is that the Applicants' claim succeeds. The Applicants' claim succeeds in the sum of £10,880.97.

### **Unexplained cash withdrawals pre-insolvency - £29,656.27**

- 63 The final element of the Applicants' claim represents several regular withdrawals from the Company's account where no explanation or categorisation has been made. These amounts have been calculated to totalling £29,656.27. The most that cross-examination revealed was that the number 60-03-25 in the bank account statement was reference to cash withdrawals from a bank branch. The Respondent denied that this was a reference to his own personal bank account, which had a different number. The number has 6 digits which would normally be associated with a sort code.
- 64 It would have been appropriate for the Respondent to provide details of his own personal bank account, but no such evidence was forthcoming. It is true to record that on re-examination, he confirmed that he was paid only by way of bank transfer such that the withdrawals in question could not be said to relate to his remuneration. However, this tends to miss the point. It is not sufficient for the Respondent to say that the payments could not be for his benefit. His obligation under the statute is to be able to identify the nature and recipients of the payments in question. The only explanation provided by the Respondent fell into three elements. Firstly, he explained they were disclosed to Ms Sharma and the Company's accountants who were provided with all the details. Second, they represented payments to the Breuck Consultancy and Ms Sharma who were paid in cash by way of the cash withdrawals referred to above and third, they related to cash withdrawals relating to petty cash.
- 65 Significant sums were withdrawn in May and June 2014. It is to be recalled that this was nearly six months after the Respondent conceded that the Company was insolvent. This would therefore impose an obligation upon the Respondent to ensure that the loss to creditors was kept at a minimum, and at all material times, any payments must be looked at in the context of looking at the state of creditors as a whole and their interests being paramount.
- 66 The explanation provided by the Respondent in relation to these sums is that they were all involved in dealing with cash payments to Ms Sharma or to the Breuck Consultancy. The Applicants contest this explanation by virtue of the timing. Ms Sharma was not appointed liquidator until July 2014 and the sums do not correlate with the explanation given by Ms Sharma herself that the payments were made by the Respondent from his own funds. It also fails to take into account the point that was raised earlier namely that Ms Sharma could legitimately have discharged her fees subject of course to obtaining the appropriate approvals from the sums controlled by her in her capacity as liquidator, which would in any event be ranked in priority to any claims of unsecured creditors. It also directly conflicts with the Respondent's contention that post insolvency withdrawals were used to pay Ms Sharma when pre-insolvency withdrawals were paid to her.
- 67 As far as the payments to the Breuck Consultancy are concerned, the only evidence that has been provided is an invoice dated 21 April 2013 which predates the payments

in May and June by over a year. The invoice itself requires a bank transfer not multiple smaller cash payments and the terms of payment required it to be paid within 14 days. There has been no corroborative receipt or acknowledgement of the payment made by the Respondent on behalf of the Company to the Breuck Consultancy. This is more striking when considering that the Respondent was able to produce an acknowledgement of payment in respect of other apparently related expenditure which resulted in the overall reduction of the amount of the claim.

68 There is also an inconsistency between the amount that was due to the Breuck Consultancy which amounted to a maximum of \$14,712.75. This is significantly less than the £19,200 paid. Further, it is inconsistent with the Respondent's other contention that post insolvency withdrawals from a bank account he mysteriously controlled were also used to pay the Breuck Consultancy itself. It should also be borne in mind that in the Respondent's own words upon cross-examination, these payments were being made to a consultancy in Dubai in respect of a Company which he had already "given up on" some months previously and which he had conceded was insolvent at the time. This also is relevant in relation to the remainder of the cash withdrawals which amount to some £10,456.27. No proper explanation has been provided either orally or in respect of the documents other than to suggest that these withdrawals were legitimate.

69 Again, applying the evidential burden, this is insufficient. In his written evidence, the Respondent relies upon the failure on the part of his accountants to advise him properly insofar as at no stage was he ever informed by them that no cash withdrawals should be made. However, this is again a misconception. Cash withdrawals can be paid in circumstances where they are legitimately for the benefit of the Company. That in turn engages an obligation to be able to demonstrate what those payments were for so that the appropriate assessment can be made. The fact that there is no petty cash register is yet again symptomatic of inadequate accounting records.

70 The Respondent manifestly failed to provide a persuasive account as to the reasons for these payments. As with the other heads of claim, there is significant doubt as to the accuracy of his explanations. Applying the principles previously referred to, the Applicants succeed in the final head of their claim.

### **The Respondent's closing submissions**

71 As I have previously mentioned, Mr Wright was instructed late in the day. No skeleton argument was filed prior to the hearing but Mr Wright did re-examine the Respondent and further produced some written closing submissions.

72 Mr Wright refers to the quality of the evidence provided by the Respondent. He drew my attention to the reduction in the overall claim in relation to the sums paid for the business development and consultancy services delivered to the Company between 2012 and 2013 in relation to the UAE and Dubai. Those matters were not pursued by the Applicants in the light of information they subsequently received. The fact that some justification has been provided for some of the claims does not have any effect on the obligation on the part of the director to provide similar contemporaneous documents in respect of the other elements of the claim. Indeed, it should have served to demonstrate that the First Applicant was prepared to take into account cogent evidence that would be taken seriously. That the Respondent failed to respond more comprehensively to the requests for information from the Applicants does not assist

him with regard to the balance of the claims whereas I have found his evidence was deficient.

73 Mr Wright also refers to the litigation involving Ms Sharma and her actions as liquidator. Given that these are matters involved in a different case heard by a different Judge, it is difficult to see what point is being made as to their relevance in the context of the decision I must make in this case. The merits or otherwise of Ms Sharma's conduct as liquidator was simply not a matter that I needed to decide in the case before me. The test I had to apply is to consider the evidence both oral and written for the explanation provided by this director in relation to payments he caused to be made by this particular company. The duty on the part of the director to exercise independent judgment in respect of any professional advice that is received remains and it is not open to a director to rely on it as a complete defence if it proved to be unsatisfactory. It is for the Respondent to satisfy the evidential burden. I have found that he failed to do so.

74 In relation to the director's loan, I am far from convinced by the explanation provided by the Respondent. It seemed clear that the documentary evidence that supported this was deficient if the explanation he provided was incomplete and not substantiated by contemporaneous information. As was forcefully submitted by Mr Connell the evidential burden falls upon the Respondent and not the Applicants to fill the evidential gaps. As far as the retail payments were concerned, the submissions by Mr Wright were with respect to him, contrary to the guidance provided by the cases to which Mr Connell referred. In circumstances such as these, where directors are pursued by liquidators of companies and they have been involved with it, it is up to those directors to justify their actions by reference to contemporaneous documents at the time. The fact that the Respondent had conceded that that the Company was insolvent effectively from November 2013 engaged a principle that, from then on, the interests of creditors were to be considered paramount. It may be that some of those payments were legitimate, but the fact is that there was no evidence before me that they were. The Court is not in a position to take a broad-brush approach and to determine whether it feels that some of the payments appear to be rightly incurred or otherwise. Similarly, the Court may consider that it is possible that some of the payments may have been legitimately incurred. However, for the appropriate test on the balance of probabilities to be satisfied, it falls fairly and squarely upon the Respondent to show that those payments were, more likely than not, to have been in the interests of the Company. The evidence he provided both written and under cross-examination was simply deficient in a number of ways.

75 Finally, Mr Wright submitted on behalf of the Respondent that the provisions in section 1157 of the Companies Act 2006 should assist. This states as possible:

*"1157 Power of court to grant relief in certain cases*

*(1) If in proceedings for negligence, default, breach of duty or breach of trust against*

*(a) an officer of a company, or*

*(b) a person employed by a company as auditor (whether he is or is not an officer of the company),*



*it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit.*

*(2) If any such officer or person has reason to apprehend that a claim will or might be made against him in respect of negligence, default, breach of duty or breach of trust –*

*(a) he may apply to the court for relief, and*

*(b) the court has the same power to relieve him as it would have had if it had been a court before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought."*

76 Mr Wright submitted that this provision was referred to in *Coleman Taymar Limited v Oakes* [2001] B.C.L.C 749 at paragraph 83. Mr Wight asserted correctly that the Applicants had not suggested that the Respondent acted dishonestly and therefore, it is an issue for the Court to decide as to whether he acted reasonably in all the circumstances such that the Court should grant him relief under this provision. The submission was based on a number of factors, which he submitted supported the notion that the Respondent acted reasonably in all the circumstances. They included the following factors. He submitted that the Respondent did act reasonably on the basis that he relied on the advice of a qualified insolvency practitioner. However, that is insufficient as it does not relieve him of liability as against the Applicants. Second, the personal payments were relatively modest, and it would be difficult to argue that those payments were egregious. They were for a total of £10,880.97 over a period of three years from November 2011 and June 2014 consisting of 133 transactions. This submission I again cannot accept, the obligation to comply with the fiduciary duties is not based on a quantitative assessment and there were a number of other payments over and above these sums that are not accounted for. Third, the Applicants referred to a number of payments as "lifestyle payments". There seemed to be an inference of a decadent lavish lifestyle funded by the Company. I am not sure that this expression was used in the sense of identifying payments that were for the personal benefit of the Respondent. Nothing turns on this expression and, in any event, I have based the conclusions I have drawn on the evidence as provided to the Court. Fourth, the Company was not a lucrative cash cow for the Respondent. His salary was no more than £8,000 per annum, which has to be viewed in the context that this was his only business and only source of income for his family. Once again this does not excuse any failure to provide a full a proper explanation for the actions of a director acting in a fiduciary capacity. Fifth, the expenditure was not causative in relation to the Company going into liquidation. The Company's financial plight was caused by the departure of a valuable employee who took a valuable contract with him. The Respondent asserts that it is not part of the pleaded case that the Company became insolvent although submissions were made in the skeleton argument to that effect. This submission I again cannot accept. The application is based upon the manner and extent to which the director performed the obligations he owed to the Company and its creditors. It does not depend on the Court finding that the conduct complained of was causative of the Company proceeding into liquidation.

77 I should mention that reliance on section 1157 of the Companies Act 2006 was not a point that was taken by the Respondent in his points of Defence and only arose upon receipt of the Respondent's closing submissions. However, the essence of directors' statutory and fiduciary duties is to maintain those obligations which were outlined in respect of ensuring that all payments are properly accounted for and can be demonstrated to be for the benefit of the Company. In circumstances where the Company has become insolvent, those obligations are to ensure that the interests of the creditors are to be paramount. It is true that in coming to this decision, there is a subjective element to the test but that is only in cases where there is evidence of actual consideration by the particular director at the particular time that the payments were made. It is up to the directors to persuade the Court from contemporaneous documents that the decisions that were taken fulfil this requirement. If the evidence is insufficient due a failure on the part of the director to produce accounting information up to the appropriate standard, it is difficult to understand how that director can prey in aid a provision that relies upon him acting reasonably. The cases make it clear that it is not the director that gets the benefit of the doubt arising from such deficiencies. It would be an unacceptable outcome if, having found as I have, that the conduct of the Respondent as a director has caused the Company loss, the director could, on these facts, rely on this statutory provision.

78 It is noteworthy that even when the Respondent conceded that the payments were not for the benefit of the Company, no payments or reimbursement were made to it. Further concessions were made, but these were made late in the day and only under cross-examination. The Respondent did produce a document relating to a bespoke tailoring service but again, the evidence he supplied was inconclusive, it was unclear as to who the beneficiary of this staff incentive was and why it was in the interest of the Company and its creditors who should meet the cost, and only then it was disclosed by being attached as an exhibit to Mr Wright's closing submissions. Its late emergence did nothing to inspire confidence that the previous searches for evidence had been assiduously carried out. I do not accept that it is appropriate for the submission, that the Respondent should be excused liability under this statutory provision, to succeed. To do otherwise would cut across the principles set out in the authorities referred to earlier. I therefore do not accept the submission in this regard.

### **Disposal**

79 For the reasons given above, the Applicants succeed in their claim in full. I will hear from the parties as to the terms of any consequential orders that will be made.