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Case No: G90BS302

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: 14/06/2021

Before :

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

- -

Between :

THE OFFICIAL RECEIVER	**Claimant**
- and -	
DAVID PHILIP ARRON	**Defendant**

- -
- -

Stefan Ramel (instructed by **Womble Bond Dickinson (UK) Ltd**) for the **Claimant**
The Defendant in person

Hearing dates: 25-27 May 2021

- -

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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HHJ Paul Matthews :

Introduction

1. This is my judgment on the trial of a claim by the Official Receiver under CPR Part 8 for an order under section 6 of the Company Directors Disqualification Act 1986, disqualifying the defendant for being a director or otherwise concerned in the management of a limited company. The claim is made in relation to a company called Mid Cornwall Metals Ltd ("MCM", or "the company"), of which the defendant was the sole director and shareholder during the whole of its relatively brief commercial life, between May 2015 and August 2017.

2. The claim form was issued on 31 May 2019 in the County Court at Truro, the claimant having previously served a notice under section 16 of the 1986 Act on the defendant on 23 March 2018. After a number of directions and other orders had been made in Truro, the matter was transferred to the High Court, Business and Property Courts in Bristol, by order of District Judge Middleton on 4 September 2020. A deputy official receiver, Peter Wildish-Jones, made three written reports on behalf of the claimant to the court, dated 23 May 2019, 27 March 2020, and 21 July 2020. The defendant made two affidavits, one on 28 February 2020 and one on 10 June 2020. No other written evidence was filed.

3. The trial was heard before me remotely by MS Teams on 25, 26 and 27 of May 2021, when I reserved judgment. When the claim form was originally issued, the claimant was acting in person, but subsequently Womble Bond Dickinson (UK) Ltd were instructed for the claimant, and at the trial the claimant was represented by Mr Stefan Ramel of counsel. Originally the defendant instructed solicitors, who drafted a number of important documents and assisted him generally. However, they came off the record shortly before trial, and by the time of the trial the defendant was acting in person.

4. At trial, the only witnesses tendered for cross examination were Mr Wildish-Jones, the deputy official receiver, and the defendant himself. Submissions on behalf of the claimant referred to the fact that other persons who might have been expected to give evidence to support the defendant's version of events had not supplied any written evidence, nor had they been called to give oral evidence. I will come back to the evidence of the witnesses and this further submission in due course.

Background

5. It was common ground that MCM had been incorporated on 8 May 2015, and that it commenced trading on 1 August 2015. It was registered for VAT as from that date, the application having been made on 22 July 2015. In December 2015 the firm of Chapman Pugh, accountants, was engaged to advise the company. During its life, the company had filed only one set of accounts, those for the period 2015-2016, which were approved on 30 March 2017. These showed a profit after tax of £4,608 for the period, on a turnover of £816,128, fixed assets of £31,770, current assets of £187,046 and creditors for amounts falling due within one year of £207,148.

6. The company ceased trading in June 2017, just under two years after commencing trading, following the presentation on 21 June 2017 of a petition by HMRC to wind it

up. The company resolved to go into creditors' voluntary liquidation on 27 July 2017, and Mr Peter Harold of Refresh Recovery Ltd was appointed voluntary liquidator. However, at the hearing of the petition of HMRC on 7 August 2017, the court made a compulsory winding up order. Mr Harold was also appointed liquidator in the compulsory winding up.

7. The liquidator's first report to members and creditors is dated 4 December 2018. This reported that the fixed assets had been valued in the voluntary liquidation at £5,500 by independent surveyors, and that they had been sold back to the defendant by the voluntary liquidator for that sum. The compulsory liquidator had received funds totalling £2,991.58, and had made payments out of £11,136.96 in various fees. According to the liquidator, there were no preferential or secured creditors, but unsecured creditors had made substantial claims. Trade and expense creditors claimed £57,672.60. HMRC claimed £168,555.46 (in respect of unpaid PAYE and NIC) and £103,023.95 (in respect of unpaid VAT), totalling £271,579.41. Lastly, the defendant himself submitted a claim for £118,000 for funds invested in the business. This made a total for unsecured claims of £447,252.01. I should make clear, at this early stage, that the figures for the claims by HMRC are not accepted by the defendant. He makes a number of points which he says go to reduce or even eliminate the claims made. I will come back to these questions in due course.

Preliminary points

8. At the outset of the trial two preliminary points were raised by the defendant. The first of these related to the fact that Bond Dickinson, a predecessor firm of the claimant's solicitors, in 2015 had given professional advice to another company of which the defendant had been a non-executive director. As a result of that company's insolvency, however, Bond Dickinson had not been paid. The defendant therefore submitted that the claimant's solicitors had a conflict of interest in acting for the claimant in the present case. He considered that the claimant's solicitors have pursued these proceedings partly because of their concern that their predecessor firm had not been paid for work done in 2015 for a company with which the defendant was connected. The defendant did not adduce any evidence, and in particular any written evidence, in support of this allegation, and I rejected it at the hearing, for reasons then given. As I understood it at the time, the defendant indicated that he accepted my decision.

9. The other matter related to the loss of records for MCM which were contained on a memory stick supplied by the defendant to the claimant at the claimant's request. It appeared that the defendant had been asked during an interview to supply copies of the financial records of the company. These were held on a company computer, within Sage accounting software. Following the interview, these records had been downloaded onto a memory stick, which had been sent by post to the claimant, in accordance with his agreement to supply them to the claimant.

10. The defendant said that, once the claimant had acknowledged receipt of the memory stick, he (the defendant), acting on the advice of the liquidator, who had cited data protection concerns, had asked his IT consultants to wipe all the company's computers and destroy them. He therefore no longer had a copy of the financial records of the company. Unfortunately, it subsequently transpired that the claimant had lost the memory stick. The defendant accordingly complained that he was

hampered in the preparation of his defence by the loss of these records, and that it would not be fair for the proceedings now to go ahead.

11. Counsel for the claimant, whilst accepting that the memory stick had gone missing whilst in the claimant's possession, submitted that there was no evidence of negligence on the part of the claimant in mislaying it, and in any event the paper records of the company, including all the trading records were still with the liquidator, but it appeared that the defendant had not sought to examine or consider those in his preparation for the trial. Moreover, the memory stick did not contain, for example, copies of the email traffic sent and received by MCM during its life. All that had been lost were the Sage accounting records. The defendant replied that what he needed were the payment certificates, which has been saved with the accounting records. Moreover, he no longer had access to the email accounts of the company, because when the company stopped trading and paying its bills, the IT company which hosted the accounts deleted them.

12. I gave a short ruling at the time, in which I held that, although the loss of the accounting records made things more difficult, it did not make it impossible for there to be a fair trial, The defendant still had access to other forms of evidence, including his own recollections and the paper trading records, and the fact that the email accounts had subsequently been deleted could not be laid at the door of the claimant. Accordingly, I did not think that the trial was unfair and ought not to continue. However, I said that there was a question as to whether there should be any presumption against the claimant by reason of the claimant's action having made it impossible for the defendant to adduce any of the information in the accounting records in evidence. But this could be considered at a later stage. In the meantime, the trial would go ahead.

13. A further point made by the defendant in his submissions was that the loss of the memory stick should have been reported to the Information Commissioner's Office. The claimant said that it did not meet the threshold for such reporting. But that issue is not before me, and it does not affect my decision in this case. Whether it is reportable or not is not relevant to the issues before me.

Issues in the case

Legal issues

14. As I say, this claim is brought under section 6 of the Company Directors Disqualification Act 1986. This section relevantly provides as follows:

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

> [(1A) In this section references to a person's conduct as a director of any company or overseas company include, where that company or overseas company has become insolvent, references to that person's conduct in relation to any matter connected with or arising out of the insolvency.]
>
> (2) For the purposes of this section […], a company becomes insolvent if—
>
> > (a) the company goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up,
> >
> > [(b) the company enters administration,]
> >
> > (c) an administrative receiver of the company is appointed [.]
>
> […]."

Factual issues

15. This means that the claimant must identify the conduct on which it relies as justifying the order. Indeed it is a requirement, under rule 3 of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, that this be set out in the evidence filed for the claimant. In the present case, the conduct alleged (sometimes called the 'charge') against the defendant by the claimant is as follows:

> "1. From December 2015 to cessation of trading in June 2017, David Philip Arron ("Mr Arron") failed to ensure that Mid Cornwall Metals Ltd ("MCM") made payments to HM Revenue & Customs ("HMRC") as and when due, and MCM traded to the detriment of HMRC. Of payments made out of MCM's bank account over the period from December 2015 to liquidation totalling £2,291,212, only £15,148 was paid to HMRC against total liabilities by the date of liquidation of at least £263,220. In that:
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> 2. MCM commenced trading on 1 October 2015 and its first VAT. As for the quarter ended 10/15, due for payment by 7 December 2015.
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> 3. MCM made only two successful VAT payments over its entire period of trading, the first in the sum of £5000 received by HMRC on 12 August 2016 and the second in the sum of £2000 received on 27 April 2017. Both (late) payments were allocated in part payment of the initial 10/15 VAT quarter. An earlier cheque payment made in May 2016 did not clear on presentation.
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> 4. By the date of liquidation, MCMs VAT liability totalled £103,024 (including surcharges of £6011 raised as a consequence of MCM's default), and had accrued from its first VAT quarter onwards.
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> 5. MCM made only one PAYE/NIC payment over its trading period, that payment in the sum of £8148 being allocated to meet the liability for month 6 of the 2015/16 tax year.
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> 6. PAYE/NIC due by the date of liquidation, less Construction Industry Scheme ("CISS") deductions suffered by MCM, totalled at least £160,196.

> 7. The allocation of credits allowed in respect of CISS deductions suffered to MCM's oldest PAYE/NIC arrears would leave arrears in relation to the 2016/17 tax year covering months 2 (part paid) to 12 at the date of liquidation, together with the full liability for the 2017/18 tax year, months 1 to 3.
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> 8. Of payments made out of MCMs bank account over the period from December 2015 to liquidation totalling £2,291,212, only £15,148 was paid to HMRC; two payments totalling £7000 being made in relation to VAT against liabilities totalling £103,024 (including VAT surcharges of £6011) and one payment of £8148 being made in relation to PAYE/NIC against liabilities (less CISS deductions suffered) totalling at least £160,196.
>
> 9. HMRC are the single largest creditor in the liquidation, (trade creditor claims totalling £57,673 in comparison)."

16. It will be seen, and in fairness to the defendant I should emphasise, that there is nothing here to allege *dishonesty* against the defendant. And, indeed, counsel for the claimant was at pains to make it clear that such an allegation was no part of the claimant's case. And, as the defendant submitted, there are no allegations that he allowed the company to trade whilst insolvent, to the detriment of creditors generally, or that there was any other kind of misconduct, or regulatory breach. Nor are there any allegations relating to any other company than MCM.

Decision-making

17. The court therefore has to decide, first of all, whether these facts alleged by the claimant are proved or not. Second, the court will have to decide whether such facts as may be proved make the defendant 'unfit' within the meaning of the section. Thirdly, but only if so, the court will have to decide what period of disqualification would be appropriate for the facts of the case. Largely for the benefit of the defendant (because the claimant and the claimant's advisers will know this already), I will say a few words about the way in which judges in this country decide civil cases, including this kind of case. I draw the following words in large part from similar statements that I have made in other judgments in the past.

18. First of all, judges decide civil cases by looking carefully at all the oral and written material presented, with the benefit of forensic analysis (including cross-examination of oral witnesses), and the arguments made to them, and then make up their minds. In commercial cases, in which there are typically many more documents available than in purely domestic cases, where witnesses give evidence as to what happened mostly from their memories (which may be faulty), civil judges nowadays often prefer to rely on the documents in the case, as being more objective, even though oral evidence and cross-examination are still important. This is a commercial case, and there are many such documents here.

19. Secondly, where there is an issue in dispute between the parties in a civil case, one party or the other will bear the burden of proving a relevant fact. This is usually the person who asserts it. If that person does *not* satisfy the court that the fact happened, then for the purposes of the case it did *not* happen. The claimant has set out his allegations against the defendant, and the claimant has the burden of proving them. This is a civil case, and not a criminal case. The standard of proof in a civil case is *the*

balance of probabilities. This means that, if the judge considers that a thing is more likely to have happened than not, then, for the purposes of the decision, it *did* happen. However, the more serious the allegation, the more cogent will need to be the evidence in order to persuade the court on the balance of probabilities that it did in fact happen.

20. Thirdly, where a party could give or call relevant evidence on an important point without apparent difficulty, a failure to do so without explanation may in some circumstances entitle (though not compel) the Court to draw an inference adverse to that party, sufficient to strengthen evidence adduced by the other party or weaken evidence given by the party so failing. Lastly, a court must give reasons for its decisions. That is what I am doing now. But judges are not obliged to deal in their judgments with every single point that is argued, or every piece of evidence tendered.

21. So decisions made by civil judges are *the judge's* own assessment of the *most likely facts* based on the materials which *the parties have chosen* to place before the court, taking into account both the fallibility of memory and to some extent also what the court considers that the parties should have been able to put before the court *but chose not to*. This means that the judge's conclusion is the best available from an impartial and objective process, rather than necessarily the objective truth.

Witnesses

22. As I have said, only two witnesses were tendered for cross-examination, Mr Wildish-Jones and the defendant himself. I give here my impressions of them both. Mr Wildish-Jones was a careful and precise witness, who did not seek to exceed the ambit of his knowledge (which was in any event limited, as he had no personal knowledge of any of the matters concerned). He was undoubtedly seeking to assist the court, and transparently truthful. I accept what he says without reservation. I will only add however, by way of qualification, that by the answers that he gave, and the way in which he gave them, he seemed to me not to be a person who knew anything about running a business and the taking of risks that that involves. His world was the world of the civil service, of precise, written rules. That is not a criticism, of course, but is intended to indicate the context within which his evidence can be best understood.

23. The defendant, on the other hand, though undoubtedly more entrepreneurial in his approach, was unfortunately a poor witness. I bear in mind that he was on his own, conducting his own defence without legal background or training, perhaps for the first time in his life, and that the outcome of the trial could make a considerable difference to him personally. I bear in mind also that he was doing this remotely, using computer technology with which he may not have been totally familiar. Nevertheless, I must record that he displayed a poor memory, especially of key events, and frequently responded that he did not know or could not remember something which it was frankly hard to believe the sole director and shareholder of the company would not have known or remembered. Sometimes his oral evidence was inconsistent with his affidavit evidence, and sometimes, I am afraid, his oral evidence was evasive. That said, I do not believe that his evidence was dishonest, or that he was telling deliberate lies. Overall, however, my view was that his oral evidence was such that I was reluctant to accept it where this was not corroborated from an independent source.

Facts found

24. In addition to the matters referred to in paras 5-7 above, I find the following facts. The defendant is an engineer by trade, who became involved in company turnarounds from about 2007. He even worked as an adviser, subsequently a specialist adviser, for Business Link, a government body set up to assist businesses. He has had no formal training in business rescue or insolvency, but has acquired experience in both areas from working with insolvency specialists. By 2015 he had some knowledge and experience of insolvency. Before becoming involved in MCM he had been involved as a director in at least three insolvent companies, and had experience of both administration and liquidation.

25. One of the businesses which the defendant advised as a business rescue adviser was carried on by a Mr Michael Wilton as a sole trader. When it became apparent that this business could not be saved, the defendant formed a company, of which he became the sole director, called Mid Cornwall Metals Fabrication Ltd ("MCMF") to acquire and continue Mr Wilton's business in October 2014. But that company went into creditors' voluntary liquidation on 8 September 2015. The defendant personally acquired the assets of MCMF from the liquidator. He then incorporated MCM, and permitted that company to use the assets he had acquired from MCMF in order to carry on a similar business.

26. As I have already said, MCM itself went into creditors' voluntary liquidation in July 2017, and the defendant formed a yet further company, D & R Industrial Ltd, in order to complete contracts which MCM had entered into. He did this because he had personally guaranteed these contracts, and they contained significant penalty clauses. D & R employed three of the staff of MCM, and used steel that was already there, so there was no need of further supplies.

27. The defendant accepted that he was in charge of the general management and day-to-day running of MCM, and was ultimately responsible for the company's books and records. These included bank statements, purchase invoices, sales invoices, payment applications, statutory filings, VAT returns, PAYE filings, and emails. Some of these (for example bank statements and purchase invoices) were in hardcopy, and others were electronic only. Some were both. The electronic records were kept on Sage software, which would be accessed on the accounts computer using a password. The company had five computers in total. One was used by the defendant, a second by the bookkeeper, Janet Connolly, a third by the estimator and a fourth by the workshop supervisor. The fifth was spare. The company's electronic records were backed up to an external drive, and there was also cloud storage space.

28. After MCM went into liquidation the paper records remained at the company's trading premises. The external accountants (Chapman Pugh) retained none of them. During an interview with the official receiver in August 2017 the defendant was asked to supply a copy of the electronic records, and he posted a memory stick to the official receiver containing copies of the documents held in the Sage software system. This memory stick had been loaded with the relevant electronic documents by Janet Connolly. Once the official receiver had confirmed receipt of the memory stick, the defendant instructed his IT consultant to wipe the hard disks of the computers clean and destroy them. He said he did this on the advice of the liquidator, who had apparently said that this was what data protection legislation required. Because MCM stopped paying its IT bills, the email accounts were subsequently cancelled and the contents deleted. Therefore it was not possible to recover the emails thereafter.

Unfortunately, and as I have said, the official receiver subsequently mislaid the memory stick, and it has not been found. Accordingly, there is no longer a copy available of all of the electronic records that was on the memory stick and before that on the company's accounts computer.

29. But there were still the paper files. In January 2018 the defendant recovered them from the premises and sent them to the liquidator, Peter Harold. In April 2018 Mr Harold emailed the claimant's solicitors with a list of the files concerned.

30. The company's accountants, Chapman Pugh (Chapman Gain from September 2017), operated the company's payroll. They did not however deal with VAT or the CIS returns. These were dealt with by Janet Connolly, the company bookkeeper, who input all the information to the Sage software, and used it to prepare and file the VAT returns. However, she was not part of the management team, which consisted of the defendant and the employee who supervised the workshop. But Ms Connolly had access to the defendant if she had any questions. There were weekly meetings dealing with financial and business matters, although the defendant maintained that there was no need for in-depth financial discussion, and that Janet Connolly gave merely verbal reports of the finances, including PAYE and NIC (on a weekly basis) and VAT (on a two weekly basis), but did not have printouts of current liabilities. There were no minutes kept of these meetings.

31. The company made a voluntary application for registration for VAT, to commence on 1 August 2015. Janet Connolly was responsible for submitting the VAT returns, which was done by giving an instruction on the computer using the Sage software. There was an opportunity to review the data in the return before it was filed. The defendant was aware that under the applicable VAT regulations the company had to file VAT returns quarterly and had to pay tax on the returns. As for PAYE/CIS, the defendant maintained that it was for the company's clients, as "employers" of the company, to file the CIS returns, which would show that CIS had been deducted in sums sufficient to cover any liability to PAYE.

32. The company's first VAT return, for the quarter ended October 2015, showed tax to be paid as £13, 645.52. MCM did not pay this on time, because it did not have the money, though it did make two smaller payments, of £5,000 and £2,000 respectively. It said it would make payment by bank transfer, but did not. MCM continued to make quarterly returns during the rest of its trading life, but did not make a single further payment towards VAT. There were contacts with HMRC, but always instigated by HMRC, mostly by their attending in person at the company's premises.

33. The defendant said that he thought that the company had made enough zero-rated and reduced rate supplies that there would be repayments due from HMRC to cover the outstanding VAT liability. But he accepted that the company never filed any corrective returns (which would have reduced any overstatement of output tax, and thus reduced the VAT liability). He said he had been advised not to do so until he had received payment certificates from customers. He said that according to his figures, instead of having a liability for VAT for £55,000 at the end of the first year, the company was owed £35,000. But he accepted that the legal liability depended on the figures in the returns and any corrections that were made (though none were).

34. The position got steadily worse, quarter by quarter. By April 2017 the defendant was telling HMRC when they visited him that he was going to see his external accountant to get the matter resolved. In fact his external accountants, Chapman Pugh, were never instructed to deal with the VAT issue. Instead, after a petition to wind up MCM was presented by HMRC on 21 June 2017, he took advice from an insolvency practitioner, Peter Harold, and on 26 June 2017 instructed Chapman Pugh to put the company into liquidation.

35. As for PAYE, as I have already said, Chapman Pugh carried out the payroll management function. But MCM itself had the legal obligation to file monthly returns, and to pay over PAYE deductions to HMRC, unless it could show that these were offset by CIS deductions by customers. In practice the accountants were instructed to do this. Nevertheless, liabilities began to accrue. Over the trading life of MCM, it only made one payment in respect of PAYE, in the sum of £8,148.

36. On 30 March 2017, MCM authorised Chapman Pugh to deal with HMRC regarding the PAYE issue. MCM also engaged CIS Tax Advice Ltd, a specialist tax consultancy in the construction industry, to advise on the same matter. Their letter of engagement is dated 26 May 2017, and was signed by the defendant on 30 May 2017. Although CIS Tax Advice Ltd were engaged very late in the day, at this time all the company's records, paper and electronic, still existed, and they had access to them. Their letter of advice dated 22 June 2017 was to the effect that the only possible claim which the company had to offset CIS deductions against PAYE was for £8,097.33 for the year 2015-16, and as a result MCM owed HMRC at least £40,000 in unpaid PAYE for that year. They also advised that there appeared to have been a significant *over*-claim in respect of the year 2016-17, of about £12,000.

37. As the defendant accepted at the hearing, the letter of advice did not say "no certificate, no CIS deduction". On the contrary, it advised that HMRC usually needed to see copies of invoices and bank statements, but ultimately it was a matter for HMRC as to what evidence they would accept to demonstrate that there was a CIS deduction to take into account. The defendant accepted that he bore the responsibility of leaving the matter so late.

38. The defendant made his own claim in the liquidation, originally in the sum of £118,091, but by the time of the hearing in the sum of £175,000. The original claim of £118,091 was in respect of what the defendant called his loan account with the company. But there was no sufficient evidence (for example, the defendant's own bank statements) to substantiate such a large sum owed. At the end of March 2016, it appears that the loan account had stood at only £44,745. In addition, the defendant claimed £27,140 as arrears of salary, and £30,000 as arrears of rent.

39. As to the salary, there was no satisfactory evidence of an agreement between him and the company for him to be paid at the annual rate of £35,000. Indeed, the defendant accepted that the advice given to him by the accountants had been (as was not uncommon in such situations) to pay himself only a very low salary and take the rest of what he would otherwise have earned as dividends, thus saving on national insurance contributions. But of course there was no scope for any such dividends to be declared in 2016-17, and none were. In relation to the rent, it appeared on the evidence that the lease had actually been vested in the previous insolvent company, namely MCMF (with an annual rate of £28,800 and not £30,000), and there was no

evidence of any assignment to MCM. In those circumstances, there could be no claim *against MCM* for rent.

40. The fact is that, during its corporate trading life, MCM paid £2,291,212 out of its bank account, but of that only £15,148 went to HMRC, which submitted a final proof of debt in the sum of £271,579. This compares with a debt to HMRC as at 31 March 2016 of £84,959. The sum of £271,579 was made up of £103,023.95 in respect of VAT, and £168,293.26 in respect of PAYE, together with £262.20 in interest. This made HMRC the largest creditor in the liquidation by a long way. Trade creditors were much lower, at about £57,000.

41. Before me, the defendant maintained his view that, when the zero-rated and low-rated work was taken into account there was no VAT liability to HMRC, and that, when the CIS deductions made by customers were taken into account there was no PAYE liability, either. Therefore, the company owed nothing to HMRC. But the issue of liability to HMRC was an issue before the court on the hearing of the petition to wind up the company, and yet the court held that the petition succeeded. The company had an opportunity on that occasion to demonstrate that it owed no money to HMRC, but it failed to take it. Since the company had a single shareholder and director, the defendant, I do not see why the defendant should have a second opportunity to argue the point again. But even assuming that he could, he could still not have shown that the *legal* liabilities accrued by filing returns both for VAT and PAYE had been discharged. This is because the relevant corrective returns were never filed. So in law the debts were always due.

42. Even if I look behind the *legal* liability, and I take the matter as one of what *might* have been proved, had the corrective returns been made, I saw no documents sufficient to persuade me that there ever were enough zero- and low-rated supplies, and enough CIS deductions by customers to have wiped out the accrued legal liabilities. I accept that the defendant did not have access to the electronic files on the missing memory stick, but I bear in mind that there was no reason why he should not have kept a backup for himself, and also (and more importantly) that he made no attempt to consult the paper records in the hands of the liquidator. I also take into account the fact that neither Chapman Pugh nor CIS Tax Advice Ltd, when they had access to the company's records, advised that there was no tax liability. In these circumstances, I do not think that there is any question of making a presumption against the claimant because of the loss of the memory stick.

43. Then, even if I forget about documents entirely, and just look at the bare assertions made by the defendant in his affidavits without any documentary support, those assertions themselves only account for *a part* of the liabilities claimed by HMRC. The defendant's first affidavit says (at [53]) that £62,613 should have been credited for CIS deductions, and (at [68]-[69]) that £30,644 of VAT liability was the result of over-statements in the returns. However, that would still have left over £100,000 owing in respect of PAYE and over £70,000 still owing in respect of VAT. (In his written skeleton argument, indeed, the defendant accepted that the company owed HMRC *at least* £130,885.27.) Thus, *even on the defendant's own figures*, the company would still have owed substantial sums to HMRC.

44. What this means is that, for the purposes of the present claim, in the first instance I have to proceed on the basis that MCM *was* insolvent at the time of its liquidation and

that it *did* owe the sums claimed. Moreover, even if '*morally'* it did not owe all of them, then in the second instance it still owed at least a substantial part, and was still insolvent. Despite the defendant's claims, this is not a case where there was no liability at all. On the contrary, the company owed a serious amount of money to HMRC, and far more than to anyone else. Although there is no dishonesty in this case, it is evident that something has gone seriously wrong.

45. The defendant puts the blame for MCM's failure on a combination of matters, including (i) the requirement by trade suppliers to be paid up front, (ii) the failure by customers (some of whom went into insolvent liquidation) to provide all the payment certificates that they should have done, or to supply ones that were accurate, and (iii) the law fixing legal liability for PAYE and VAT on figures put into returns, whatever the economic reality of the situation. I am not impressed by any of this. The first and third of these were, unhappily for MCM, the conditions of doing business at all. The first was a function of the market, aggravated by the previous insolvencies that the defendant had been involved in, and the third was simply what the law required. The second was a problem (explained in some detail in the defendant's two affidavits) which the company and its director had to grapple with in this sector of the market, but regrettably did not master. Yet all MCM's competitors in this sector would have had to deal with the same problem.

46. If you choose to trade in the construction business, you must take the business as you find it, with all its problems, including those inherent in the operation of the CIS scheme. These include getting the paperwork in order. If you have not the skills to run a business with such problems, then the legal and commercial reality is that you should not be doing it. What is even more remarkable in the present case is that the defendant in fact had considerable experience of advising companies on 'turnarounds', and also had experienced similar problems in earlier, failed ventures. What happened in this one was undoubtedly unwelcome to the defendant, but he was not a novice, and it cannot have come as a complete surprise to him.

47. I asked the defendant at the hearing whether, if the company had been better capitalised, so that it would have been better able to overcome cashflow problems, for example those caused by the CIS scheme, it would have survived. He answered Yes. To my mind, this underlines the point. If you are having cashflow problems because you incur liabilities to HMRC before you get the cash (or credits) to discharge them, you should *either* solve the cashflow problem by having systems in place that ensure you can secure the necessary offset against liability as it is incurred, *or* you should provide the extra capital needed to bridge the cashflow gap. The defendant did neither, and carried on trading. In my judgment, this was a serious management failure.

48. My conclusion on the facts is that all of the factual allegations set out in paragraph 7 of Mr Wildish-Jones's first report have been proved to my satisfaction. In these circumstances it is not necessary to consider further the claimant's submission that the defendant could have been expected to call evidence from other witnesses to support his case, but without any explanation did not do so. The next question is accordingly whether these factual allegations demonstrate the defendant's unfitness to be a director. This is a question of mixed fact and law.

The law

49. So far as the law is concerned, I have already set out part of section 6 of the Company Directors Disqualification Act 1986. I set out another part below, and also other relevant provisions from the Act. The claimant referred me to a number of authorities on this section, including *Re Bath Glass Ltd* [1988] BCLC 329, *Re Lo-Line Electric Motors Ltd* [1988] Ch 477, *Re Sevenoaks Stationers (Retail) Ltd* [1991] BCLC 325, CA, *Re Grayan Building Services Ltd* [1995] Ch 241, *re Verby Print for Advertising Ltd* [1998] BCC 652, *Re Structural Concrete Ltd* [2001] BCC 578, *Re Finelist Ltd (No 2)* [2005] EWHC 603 (Ch), *Cathie v Secretary of State for BEIS (No 2)* [2012] BCC 813, CA, *Re UKLI Ltd* [2015] BCC 755, *Re CQH1 Ltd* [2018] EWHC 1331 (Ch), *Re Ixoyc Anesis (2014) Ltd*, *Secretary of State for BEIS v Zannetou* [2019] BCC 404. The defendant (quite understandably, being a layman and not a lawyer) did not refer me to any authorities.

50. The question is whether the conduct proved to have been committed makes him unfit to be concerned in the management of a company. So first of all the focus is on *the conduct specified*. In *Re Grayan Building Services Ltd* [1995] Ch 241, 253E, Hoffmann LJ, with whom Neill and Henry LJJ agreed, said:

> "The court is concerned solely with the conduct specified by the Secretary of State or official receiver under rule 3(3) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987."

51. The question is therefore whether *that* conduct makes the defendant unfit to be concerned in the management of a company. As Dillon LJ (with whom Butler-Sloss and Staughton LJJ agreed) said in *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164, 176C, these are ordinary English words, and it is important to hold to them. In addition, as Dillon LJ said (at 176F), referring to statements about unfitness in earlier decided cases,

> "Such statements may be helpful in identifying particular circumstances in which a person would clearly be unfit. But there seems to have been a tendency, which I deplore, on the part of the Bar, and possibly also on the part of the official receiver's department, to treat the statements as judicial paraphrases of the words of the statute, which fall to be construed as a matter of law in lieu of the words of the statute. The result is to obscure that the true question to be tried is a question of fact, what used to be pejoratively described in the Chancery Division as 'a jury question'…"

52. Nevertheless, and bearing in mind that warning, I think it right to mention two particularly helpful examples of judicial comment about unfitness. First, in *Re Bath Glass Ltd* [1988] BCLC 329, 333, Peter Gibson J (as he then was) said:

> "To reach a finding of unfitness the court must be satisfied that the director has been guilty of a serious failure or serious failures, whether deliberately or through incompetence, to perform those duties of directors which are attendant on the privilege of trading through companies with limited liability."

53. And, in the more recent case of *Re UKLI Ltd* [2015] BCC 755, Hildyard J said:

> "171. … (8) Although the touchstone of unfitness should reflect the public interest in promoting and raising standards amongst those who manage

companies with the benefit of limited liability, the test is always whether the conduct complained of makes the defendant unfit, and not whether it is more generally in the public interest that a person be disqualified: thus, for example, the question is whether the present evidence of the director's past misconduct makes him unfit, not whether the defendant is likely to behave wrongly again in the future."

54. Section 12C(4) of the 1986 Act provides that:

> "(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."

55. Schedule 1, as amended and so far as material, provides as follows:

> "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.
>
> 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."

56. The core of the specific allegations made in this case is that the defendant "failed to ensure that [MCM] made payments to [HMRC] as and when due, and MCM traded to the detriment of HMRC." As I say, I have found this proved. There have a been a number of cases where similar conduct has been relied on in support of an application for a disqualification order. I shall refer to two of them.

57. The first point to make clear is that there is no special significance in the fact that the debts in relation to which the defendant is 'charged' under the 1986 Act are debts owed to the Crown rather than to ordinary trade creditors. Thus, in the *Sevenoaks* case, after considering the relevant case law, Dillon LJ said (at 183A-B):

> "The official receiver cannot, in my judgment, automatically treat non-payment of any Crown debt as evidence of unfitness of the directors. It is necessary to look more closely in each case to see what the significance, if any, of the non-payment of the Crown debt is."

58. In that case, Dillon LJ went on to say (at 183E-G):

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

59. In the recent decision of Richard Spearman QC, sitting as a deputy judge, in *Re Ixoyc Anesis (2014) Ltd, Secretary of State for BEIS v Zannetou* [2019] BCC 404, the judge accepted

> "94. … that there is no evidence either (a) that [the director] formed a fixed and settled intention from the outset not to make payments to HMRC as and when they fell due or (b) that he caused or permitted the Company to carry on trading after he realised that it would be unable to make those payments, and intending they would never be made."

60. However, he went to hold:

> "95. Nevertheless, the decision was made to pay only those creditors who pressed for payment and who needed to be paid to keep the business of the Company going. That decision was made by [the director] or with his express knowledge and approval. That decision was conscious (and therefore, in my view, deliberate), and not inadvertent (in the sense of arising from accident or oversight – although I accept that it was not pre-planned, and was the product of the Company's parlous financial circumstances which meant it could not pay all its creditors in full). Its implementation effectively persisted throughout the entire life of the Company; and it unfairly discriminated against HMRC."

Discussion

61. Judges dealing with claims for disqualification orders are necessarily looking at matters after the event. A company has gone into insolvent liquidation, creditors have lost out, and a director or directors is or are in the firing line. Journalists and others often (but erroneously) assert that it is unacceptable that no one is responsible for what has happened. Yet indeed it is sometimes the case that no-one is "at fault". Judges dealing with such cases must therefore be acutely aware of the bewitching power of hindsight. It is too easy to be wise after the event. It is therefore necessary for me to stick closely to the proven facts.

62. In the present case, the company failed to meet its obligations to the Crown because it did not have the money to pay. It had to pay trade creditors supplying materials, who insisted on payment in advance of supply, otherwise it could not carry on business at all. But it only paid HMRC as and when it was pressed to do so (and rarely even then). All this was the result of conscious decision-making by the defendant, the company's sole director and shareholder. The company did not have a sufficiently robust system for ensuring that what were returned to HMRC from time to time as tax liabilities were capable of being met by input tax (in the case of VAT) and CIS deductions (in the case of PAYE) within the statutory timeframes. Nor, in the absence of such a system, was the company adequately capitalised in order to bridge the resulting cash flow gap. Both of these again flowed from decisions made by the defendant.

63. In my judgment, it is simply not enough to say, for example, that the company had no choice but to do this if it was to carry on business. The company – and its sole director – always had the choice of ceasing to trade. But the defendant did not make that decision until it was far too late. Nor is it enough to say that HMRC was not discriminated against *deliberately*. The *Zannetou* case shows that discrimination can be the result of a series of smaller, deliberate decisions as to what to do in changing circumstances. As the company lurched from unpaid debt to unpaid debt, that appears to have happened here.

64. The great encouragement that is given to entrepreneurial risk-taking by the provision by the law of corporate vehicles with limited liability through which to trade is tempered by the risk that such limited liability poses to the general public and to those who do business with such companies. Accordingly, those who are concerned in the management of such companies have heavy responsibilities which are, or at least should be, well known. These responsibilities are the price that entrepreneurs pay for limited liability, and they ought not to lose sight of this.

65. I accept that the defendant himself has also lost money put into the company, even if it is not as much as he asserts. In particular, I do not accept that he is the largest creditor, but, even if he were, that would not mean that he was any the less incompetent, or that, where the company owed the same amount overall, but owed it exclusively to other creditors, he somehow was the less culpable. The *Sevenoaks* case is just one where the director concerned lost his own money, but the disqualification order was both made at first instance and upheld on appeal.

66. In the present case, I am entirely satisfied that the defendant, though not dishonest, was seriously incompetent in the way that he ran the company, so that it ended up trading to the detriment of HMRC, which has proved to be its largest creditor. I am also satisfied that this incompetence justifies a finding by me of unfitness to be concerned in the management of a company. It is not just commercial misjudgment. It is not right for companies to trade, whilst discriminating between creditors as to which shall be paid. In my judgment, the defendant's conduct fell significantly below that required to protect the company's creditors and the general public. Accordingly, I am required by section 6(1) of the 1986 Act to impose a period of disqualification on the defendant. I must therefore go on to consider the appropriate length of such disqualification.

Disqualification period

67. Section 6(4) of the 1986 Act provides:

> "(4) Under this section the minimum period of disqualification is 2 years, and the maximum period is 15 years."

In the *Sevenoaks* case, Dillon LJ divided disqualification cases into three broad categories, as follows (174F-G):

> "(i) the top bracket of disqualification for periods over 10 years should be reserved for particularly serious cases. These may include cases where a director who has already had one period of disqualification imposed on him fall to be disqualified yet again. (ii) The minimum bracket of two to five years' disqualification should be applied where, though disqualification is mandatory, the cases, relatively, not very serious. (iii) the middle bracket of disqualification for from six to 10 years should apply for serious cases which do not merit the top bracket."

68. In the present case, the claimant submits that the appropriate bracket is the lowest, and asks for an order for disqualification for four years. I agree with the claimant that this is a case within the lowest bracket. It is not, however, in my judgment at the top of that bracket, when it would be bordering on the middle bracket. At its core, this is a case of incompetence, exacerbated by poor decision-making. On the other hand, it is not the slight incompetence such as might justify the minimum period of two years. On the contrary, the defendant is a person with experience in advising and running companies in financial difficulty, and in this particular industrial sector too. The incompetence was significant, and aggravated by the effective discrimination against HMRC when it came to payment of debts. I therefore agree with the claimant that the appropriate period of disqualification is four years.

Conclusion

69. I will make a disqualification order accordingly. I should be grateful to receive a draft minute of order from counsel for the claimant for this purpose, copied to the defendant for his information. If there are consequential matters which cannot be agreed, then I will deal with them in the first instance on paper. In that case, I would be grateful to receive written submissions from each side by 4 PM on 16 June 2021 (copied to the other side), and written submissions in reply by 4 PM on 18 June 2021 (again, copied to the other side).