Neutral Citation Number: [2021] EWHC 852 (Ch)

Case No: CR-2018-003080

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (Ch D)

IN THE MATTER OF ARISE NETWORKS LTD (IN LIQUIDATION)
AND IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986

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

Date: 08/04/2021

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE AGNELLO QC

- -

Between :

THE OFFICIAL RECEIVER

Claimant

-and-

Mr NDUKA OBAIGBENA

Defendant

- -

Mr Tiran Nersessian (instructed by Gowling WLG) for the Claimant
Ms Daisy Brown (instructed by RadcliffesLeBrasseur LLP) for the Defendant

Hearing dates: 25, 26 and 27 January 2021

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APPROVED JUDGMENT

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 13:00 hrs on 8 April 2021.

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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Introduction

1. This is an application for a disqualification order under section 6 of the Company Directors Disqualification Act 1986 ('the CDDA 1986') to be made in respect of Mr Nduka Obaigbena ('Mr Obaigbena'). The application flows from the compulsory liquidation of Arise Networks Ltd ('Arise' or 'the company'). Mr Obaigbena was the sole director of the company for the majority of the period from its incorporation on 30 October 2012 until it was compulsorily wound up on 22 April 2016. Mr Obaigbena opposed the application made against him and was represented before me by Counsel, Ms Daisy Brown and solicitors, Messrs RadcliffesLeBrasseurLLP. Mr Tiran Nersessian appeared on behalf of the Claimant, the Official Receiver ('the OR') and was instructed by Messrs Gowling WLG.

2. The evidence relied upon by the OR consisted of two reports from Mr Anthony Hanon, the OR, dated 10 April 2018 and 26 February 2019 respectively. Mr Obaigbena filed one witness statement dated 16 November 2018. Included in the exhibits to Mr Hannon's first report is a copy of the company officer preliminary information questionnaire COPIQ which was signed by Mr Obaigbena on 11 May 2016. For reasons which will become apparent when I deal with the evidence of Mr Obaigbena, I considered carefully the contents of the questionnaire alongside the witness statement of Mr Obaigbena but relying more on the questionnaire than all of the parts of that witness statement.

3. The statement of matters determining unfitness required by Rule 3 of the Insolvent Companies' (Directors Disqualification of Unfit Directors) Procedure Rules 1987 is contained in the report of Mr Anthony Hannon dated 10 April 2018. There is one allegation as constituting unfit conduct which is as follows :-

'Nduka Obaigbena ("Mr Obaigbena") caused Arise Networks Ltd to trade to the detriment of creditors from 31 December 2014 onwards with no reasonable prospect of creditors being paid or of the company avoiding insolvent liquidation. This is demonstrated by the following:

- *The company had £nil turnover throughout its trading existence and was wholly dependent upon funds being provided by associated businesses in Nigeria;*
- *At 31 December 2013 the company's liabilities were: Losses of £3,854,112; trade and expense debts of £1,545,883; related company debts of £3,094,260;*
- *In September 2014 the Nigerian Government introduced stringent exchange controls preventing the free-flow of currency from the country and seriously restricting the ability to transfer necessary funding to ARISE. As a consequence :*
- *At 31 December 2014 the company's liabilities were: Losses of £12,922,174; trade and expense debts of £3,737,445; related company debts of £14,407,929;*

- *At 31 December 2015 the company's liabilities were: Losses of £24,913,106; trade and expense debts of £5,636,596; related company debts of £19,681,779;*
- *At 22 April 2016 the company's liabilities were: Losses of £25,671,167; trade and expense debts of £5,850,730; related company debts of £20,313,691;*
- *The company came under increasing creditor pressure from late 2014 onwards in respect of increasing arrears due to creditors as a consequence of the company's inability to pay its debts, as and when they fell due as demonstrated by the evidence of creditor actions and demands for payment;'*

The legal principles

4. There is no dispute in relation to the relevant principles, save that Ms Brown puts a different emphasis on those principles than Mr Nersessian. Pursuant to section 6 of the CDDA1986, Arise has become insolvent within the meaning of section 6 (it was placed into compulsory liquidation on 22 April 2016 and the evidence demonstrates clearly that it was insolvent). Mr Obaigbena was a director of the company. The issue between the parties is whether Mr Obaigbena's conduct as a director is such to make him 'unfit' to be concerned in the management of a company.

5. It is accepted that the question of unfitness is a mix of fact and law, including whether the specific conduct measures up to a standard of probity and competence set down by the court (*Re Sevenoaks Stationers (Retail) [1991] Ch 164 at 176*). In *Re Bath Glass (1988) BCC 130* Peter Gibson J held at 133:-

'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. Any misconduct qua director may be relevant, even if it does not fall within a specific section of the Companies Act of the Insolvency Act.'

6. Mr Nersessian also relied upon a passage from a more recent judgment of Mr Justice Hildyard in *Re UKLI Ltd [2015] BCC 755* at 790:-

'It being a major concern of the CDDA to raise standards and to protect those who deal with companies which have the benefit of limited liability from directors who have in the past departed from such standards, a finding of unfitness does not depend upon a finding of lack of moral probity: the touchstone is lack of regard for and compliance with proper standards, and breaches of the rules and disciplines by which those who avail themselves of the great privileges and opportunities of limited liability must abide…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.'

7. Ms Brown agreed that this was an exercise of fact and law. She also submitted that the task to determine whether the charge is established or not does require the determination of issues of primary fact. I agree that this is effectively my first task. Thereafter, she submits that there is a determination which involves the evaluation of the seriousness of the charge, taking into account all the circumstances including all matters of mitigation and extenuation, to determine if the director is fit or unfit. She was keen to emphasize that ordinary commercial misjudgment is in itself not sufficient to justify disqualification. She also places emphasis on the fact that here the OR relies on just the one charge. She submits that I must be careful to ensure that Mr Obaigbena's conduct is being judged on the basis of the decision he took at the time without being judged with the benefit of hindsight. In particular, Ms Brown referred me to the following passage from *Re Bath Glass* which is part of the shorter passage already referred to above:-

> *"…there is no single specified offence that is the condition to be satisfied for the court to make a disqualification order. What the court must have regard to is the director's conduct; that is a term of great generality and I do not doubt that is was deliberately so chosen. The court must be satisfied that the conduct in question is sufficiently serious to lead to the conclusion that the director is unfit and that is emphasised by the mandatory disqualification for at least two years to be imposed by the court if that conclusion is reached … any misconduct of the respondent qua director may be relevant, even if it does not fall within a specific provision of the Companies Act or the Insolvency Act. Whether in any particular case that misconduct, or the various matters of misconduct, proved to the satisfaction of the court, will justify a finding of unfitness will depend on all the circumstances of the case."*

8. In my judgment, I need to consider the facts, determine any relevant disputes and then decide whether the director's conduct falls into the category of demonstrating a serious failure or serious failures constituting misconduct which justify a finding of unfitness. The question remains, put simply, whether the conduct complained of makes the defendant unfit. The cases demonstrate that no further 'finesse' in relation to the test is needed or indeed advisable. In considering this, I am not persuaded that Ms Brown's submissions really change or alter the test I have summarised by reference to the established case law. I have set out here with the references to the statements from cases. Obviously,

decisions and actions of the relevant director must not be measured on a hindsight basis. I am not persuaded that the emphasis of Ms Brown on extenuating circumstances really alters the principles set out above.

9. As Mr Justice Hildyard stated in *Re UKLI Ltd* at para 171 (referring to Lord Justice Dillon in *Re Sevenoaks*) unfitness is a question of fact, or as stated in *Re Grayan Building Services,*'a value judgment'. A determination of unfitness involves a comparison with a standard of behaviour against which the conduct complained of may be measured. I do bear in mind, as submitted by Ms Brown that ordinary commercial misjudgement is in itself insufficient to demonstrate unfitness. Again, referring to *Re UKLI, '…risks that have eventuated may in retrospect, and with the wisdom of hindsight, appear to have been taken wrongly, but the purpose of limited liability is to provide some protection from risk-taking, subject to proper standards of care and compliance with duty'* (paragraph 171(6)).'

The charge – the case on behalf of the OR

Background facts – pre December 2014

10. These background facts are, in the main, not really in dispute. I will highlight and deal with those issues which are between the parties. Arise traded as a provider of broadcast production services in the UK as part of a larger group of companies operated by Mr Obaigbena relating to television news and media. The plan was to launch and operate its TV network in the UK concentrating on African news and events. According to the evidence given by Mr Obaigbena, the Arise network business in Nigeria was doing well and the plans for what Mr Obaigbena called the 'Arise Network' included a launch in the UK and in the USA as well. Arise was at the pre-revenue stage of its life. A business plan had been prepared in 2012. Mr Obaigbena asserted that the business plan related to what he called the entire Arise Group rather than just relating to Arise, the company which forms the subject matter of the disqualification allegations. Mr Hannon asserted in his report that the business plan related to Arise.

11. Although ultimately, in my judgment, not much turns on this point, I agree with Mr Obaigbena. The business plan appears to relate to more than just the UK company Arise and its business. It was prepared in 2012 when Arise was not as yet incorporated. It refers to revenues from other jurisdictions. The front page of the report referred to 'Arise Networks'. I can see why it appears to be a plan relating to Arise only, but the contents of the same refer to advertising revenues in relation to other jurisdictions. The significance of the plan is, in my judgment, as confirmed by the evidence of Mr Obaigbena (which is not disputed by the OR), that the business of Arise was such that it was not anticipated that it would be capable of making any

profits for, it appears, a period of five years. This was described by Mr Obaigbena as the 'soft launch' stage. The advertising revenue streams which are set out in that report appear to relate to other businesses and companies in the group and not to Arise.

12. During this period, Arise was wholly reliant upon funding provided by associated companies. The company generated no sales revenue during the period of its existence. The funding provided during its existence from other associated companies all originated from Nigeria. According to the accounts of Arise, three companies provided funding to Arise, by way of loans, which were interest free and not repayable on demand. These companies were three associated companies, Arise Media UK Limited ('Media'), Arise TV Limited ('TV') and a Nigerian registered company, Leaders & Company Ltd ('Leaders'). According to its accounts, Media was loss making during its existence and entered insolvent liquidation on 16 July 2017. According to the most recent accounts of TV for the year ended 31 December 2014, it appears to be solvent, but its solvency relies on its book debt owed to TV by Arise which itself has been balance sheet insolvent during its entire existence.

13. According to the evidence of the OR, despite requests, Mr Obaigbena failed to provide any accounts to evidence the financial position of Leaders. This has meant that Mr Hannon was unable to deal with when and how funding was provided by Leaders or indeed any other company to Arise. It also appears that Leaders or another company paid certain liabilities of Arise during the period after December 2014. Mr Hannon explained that he did not have the documentation to verify that the payments made were all relating to liabilities of the company. However even without Mr Hannon being able to deal comprehensively with the liabilities which Mr Obaigbena asserted had been paid in the period after December 2014, there is no real disagreement that payments were made. It may be that it is not possible to ascertain precisely which invoices outstanding of Arise Networks were paid, but I am prepared to accept that many payments which were made related to Arise's liabilities. The OR's case, as is set out below, is that those payments did not cover all the liabilities and during this period, liabilities contined to increase despite the fact that certain payments were made. There is no disagreement between the parties that despite the sums which were paid after December 2014 in order to meet some of the company's liabilities, the liabilities of the company still increased.

14. When being cross examined, Mr Obaigbena sought in many instances to assert that documents had been provided or indeed that the OR had in some way failed to obtain them because Leaders' accounts were, according to Mr Obaigbena, publicly available in Nigeria. I will deal later with my assessment of Mr Obaigbena's evidence, but for current purposes, I accept the evidence of Mr Hannon in this respect which is set out in his two reports. Therefore, there was in my judgment, a failure by Mr Obaigbena to provide documents relating to Leaders despite requests made for him to so do. I also accept the evidence of Mr Hannon that he had asked agents to

seek to obtain the accounts of Leaders and had not been successful. He was asked about this in his cross-examination and I accept the veracity of his replies. I should add that these points do not take the actual charge made against Mr Obaigbena much further. There is no allegation relating to any failure to produce documents. I do not consider this failure one which really has any bearing upon the matters which I need to consider in relation to the charge which Mr Obaigbena needs to defend. At its highest, it relates to the availability of funds from associated companies situated in Nigeria. However, in so far as criticism has been made in relation to a failure by the OR in seeking the relevant information, I have determined that I prefer the evidence of Mr Hannon in this respect. The reality is, as it is agreed and as the evidence demonstrates, that the liabilities of Arise increased from December 2014 onwards and the sums which were received in this period and used towards the debts of Arise fell far short of the continuing increase in liabilities.

15. The evidence also demonstrates that even prior to the period relevant to the charge, being December 2014 onwards, the funding being provided did not always arrive in time to pay the outstanding bills of Arise. At paragraph 36 of his first report, Mr Hannon produced a summary of the replies from employees who responded to the circular enquiry sent. This demonstrates arrears to the employees from November 2014 onwards, with the November 2014 arrears being listed at the sum of £297,569 and in December 2014 at £465,250. Mr Obaigbena explained during his cross examination that restrictions meant during this earlier period that sums would not always be transferred when required from Arise. In an email dated 10 September 2014 from Mr Obaigbena to 'arise workers' as well as to Mr Kevin Fitzpatrick, the company accountant, and others including Mr Rook from TV, Mr Obaigbena addresses, 'Dear Team ARISE'. The email acknowledges that there have been delays in payments which are due to the 'team'. The email proposes to pay 50% of the wages with the balance being on or before the end of the following week. The email states, *'As discussed, we are finalising funding for the whole business such that we will be in good funds and properly resourced from January 2015.'* According to Mr Hannon, these payments which had been promised did not arrive. There is an email dated 16 September 2014 stating that the initial 50% due had not arrived.

16. Having asked for clarification about this from Mr Obaigbena, it appears that this related to late payment of the payroll due at the end of August 2014 which had not been paid. In my judgment, it appears from these emails as well as others which were in evidence relating to other invoices, that there were difficulties in payments being received from the associated companies, effectively from Nigeria, even before the currency restrictions in September 2014. The evidence also shows that funding which had been arranged by Mr Obaigbena, in February 2014 had still not been paid in June 2016. In a letter dated 13 June 2016, addressed to the chairman of THISDAY Newspapers/Leaders & Company Ltd, from Zenith Bank PLC, it is clear that substantial sums which had been approved (being what is said to be 'Form A' approval) had not been paid by June 2016. Mr Obaigbena explained that he used

many different banks to transfer funds from Nigeria to England. However, in setting the scene prior to the period which the OR relies upon the following is, in my judgment, the position:-
(1) the company was entirely reliant upon funding, by way of loans, from associated companies and that it had effectively no income or revenue of its own;
(2) that funding was not always received when it was needed although it is clear that Mr Obaigbena made numerous efforts to receive the funding;
(3) in September 2014, the company was late in paying its August 2014 payroll and had attempted to reach some agreement with the employees and then was late in making the promised 50% payment.

17. Shortly after the email dated 10 September 2014, due to a collapsing oil price, the Nigerian Central Bank imposed restrictions on the country's currency exchange. Mr Obaigbena's evidence, which was not disputed by the OR, is that these restrictions severely curtailed the ability of Mr Obaigbena's Nigerian businesses to send funds to Arise in the UK, or indeed to send funds to any of the associated companies in the UK. Mr Obaigbena described these events as being a 'force majeure'. The OR does not accept this description, but it is accepted that these events were outside the control of Mr Obaigbena and additionally that its effect was a severe curtailment of funds being able to be sent from Nigeria to Arise or to entities to be used on its behalf. From the evidence, it was uncertain how long these restrictions would last when they came into force. In fact, there is no evidence that the position relating to the currency restrictions changed or was due to change during the period from September 2014 until the company was wound up in April 2016. There is no evidence that during that period, there was any potential or possible change in the currency restrictions, either due to some announcement by the Government or because of some change in the economic position.

Facts – December 2014 onwards

18. As submitted by Mr Nersessian, the OR's case is about the conduct of Mr Obaigbena, as the sole director of Arise, from December 2014 onwards. The OR asserts that as from that period, Mr Obaigbena caused Arise to trade to the detriment of creditors, either with no reasonable prospect of Arise paying its creditors and/or avoiding insolvent liquidation. Mr Obaigbena asserts that he always believed that once the restrictions were lifted, sufficient funds would be available and could be transferred to discharge creditors. There is no documentary or other evidence, beyond the assertion of Mr Obaigbena, relating to the funds available in Nigeria to be able to meet the liabilities of Arise during this period. However I am prepared to accept for the current purposes of assessing this case that funds were available in Nigeria. Significant sums had been provided from December 2014 onwards. Certainly, large sums had been provided by way of loans prior to the restrictions imposed in mid September 2014. However, as I set out below, the fact that large sums had been received in the past, or that some funding reached Arise (or was used to pay Arise

invoices) or even that there were funds in Nigeria which could have been sent had the currency restrictions not been in force, does not necessarily provide a defence to the charge of the OR.

19. As is explained in Mr Hannon's first report, although the restrictions came into operation in September 2014, the charge relates to the period from December 2014 onwards. This, according to Mr Hannon, was a reasonable period for Mr Obaigbena to assess whether Arise could continue to incur further liabilities without any indication as to when the currency restrictions would be lifted. As Mr Nersessian submitted, the OR's case is about Mr Obaigbena's reaction to the currency restrictions, to what Mr Obaigbena described as the force majeure.

20. In December 2014, Arise received its Broadcasters Audience Research Report (BARB). This is, as I understand it, in summary, the organisation which measures a broadcaster's audience levels. This encourages advertising being placed with the broadcaster. A lack of adequate ratings means that firms interested in placing advertisements will not select a broadcaster with low audience levels. Mr Obaigbena stated in his statement on 15 May 2016 that Arise had failed its review by BARB. This meant that there was, in my judgment, no possibility of any advertising revenue. When asked, Mr Obaigbena stated that no subsequent BARB reviews were carried out after December 2014 for at least two years. Mr Obaigbena stated that as a result of receiving this review in December 2014, he decided that Arise had to produce and deliver more programming, effectively increasing its production to see if it could attract better audience levels and therefore attract advertising. So, as from December 2014, Mr Obaigbena sought to increase production and programming at a time when, on the evidence before me, the restrictions in relation to currency exchange were in place.

21. The evidence shows that Arise continued to trade from December 2014 onwards. The evidence demonstrates, in my judgment, a failure to meet the debts which arose as and when they fell due. This is not disputed by Mr Obaigbena. His case is that he expected sums would be available. He just didn't know when. When Mr Obaigbena gave evidence, he refused to confirm that the contents of his witness statement dated 16 November 2018 were true and accurate. Instead, he averred that it had been prepared by his lawyers and it was not accurate. It was signed by him with the usual statement of truth at the end before his signature namely, 'I believe the contents of this statement to be true'. Mr Obaigbena stated in giving evidence that he signed it because he trusted his lawyers then. He asserted that he had not been consulted but was asked to sign it which he did. In giving his evidence before me, Mr Obaigbena sought to place blame on his previous lawyers. There was no application before me seeking to rectify parts of the statement, or any application for further evidence from Mr Obaigbena to be filed. It is fair to say that Ms Brown was somewhat at a loss in how to deal with this matter. I will come back to this issue in my assessment of Mr Obaigbena's evidence.

22. The following paragraphs of the witness statement dated November 2018 were put to Mr Obaigbena in cross-examination by Mr Nersessian. Mr Obaigbena accepted these statements as being true:

'25. The collapse in the Oil Price put pressure on reserves available for use abroad, by which companies like "Arise" would fund their operations like ANL overseas; It meant that there were restrictions placed by the Central Bank on the availability of currency. It did not mean that there were no funds available to Arise. Indeed, Arise and associated companies were recipients of large banking facilities, in local currency, in Nigeria which it used to fund operations. There were no guidelines as to What these would be, sufficient for someone in my position to be able to understand what would be available at any given time. The net effect, as I experienced it, was that it was pot luck. Our bankers were applying daily to the Central Bank, as were other Nigerian businesses seeking access to foreign currency (FX).'

'27. Of course, no-one knew who was applying for how much on any given day. The Central Bank decided who was permitted what in their entire discretion. The natural effect of this was that it was impossible for anyone to predict with any certainty when they would be able to remit funds abroad. I would clarify that it was never the case that anyone knew or was led to believe that they would not be permitted funds for export, so it was always a question of when, as opposed to if.'

'29. Exhibited hereto are copies of correspondence in respect of the facility with Zenith bank, and copies of recent correspondence with the Central Bank. It has been difficult to extract any written confirmation from the CBN. The CBN is a government institution and not a commercial enterprise. I sought to find alternatives, through, for example Barclays Bank, but to no avail, as they were in the same position with the currency restrictions. I did not sit on my hands and do nothing. lt took a long time for the situation to ease. I could not have predicted that at the time of the force majeure event, or how long it would be in place for. I had little doubt that this would correct itself, given that there are always fluctuations in commodities markets.'

23. During this period from December 2014, creditor pressure was, it appears, continuous. At paragraph 36 of the first report of Mr Hannon, the arrears in relation to the employees were building up month after month, although it is fair to say payments had been made during the early part of the year which had reduced the arrears. The pattern of the build up of arrears built steadily and significantly.

December 2014	£465,250
January 2015	£501,582
February 2015	£486,085
March 2015	£857,549
April 2015	£952,259
May 2015	£1,274,799
June 2015	£1,598,935
July 2015	£1,783,586
August 2015	£1,881,937
September 2015	£1,970,776
October 2015	£2,131,520
November 2015	£2,344,319
December 2015	£2,459,284
January 2016	£2,486,906
February 2016	£2,525,637
March 2016	£2,575,274
April 2016	£2,597,583

24. I should mention that 'employees', 'contractors' and 'freelancers' are all terms referring to those who carried out work for the company. In almost all cases, these individuals were not 'employees' but appear to have been contractors. Reference to employees in the evidence is to these individuals regardless as to whether their legal position was indeed as an employee or not. In all cases, these are the individuals who worked for Arise regardless of their actual status. Mr Hannon also refers in his first report to particular creditors (many of them whom had worked or were even still working for Arise) who were chasing payment of arrears of sums due to them. Ms Hazel Melville began an exchange of correspondence with Mr Obaigbena in September 2014 and continued into 2015. Promised payments were not made in September 2014. The correspondence with Ms Melville was continuing until April 2016.

25. By email dated 25 February 2015, Arise wrote to its employees offering payments on account of sums due but stating that the part payments would not include the VAT owed on the same. On 3 July 2015, Arise wrote again to its

employees stating that the April payroll would be paid but also stating that the arrears from February and March 2015 would not be paid for another week. On 11 July 2015, by email, Arise stated that those who had ceased work should submit their invoices and payment would be made on a first come first served basis. That email also noted that Arise was cutting costs and moving to an automated studio, 'to ensure the long term sustainability of Arise News'. This was, according to this email, to be a temporary move whilst the premises in New Zealand House were refitted and automated. By email dated 24 September 2015, there were still arrears. This email addressed to 'Team Arise' from Mr Obaigbena committed to paying all the arrears due. So, in September 2015, as the above schedule demonstrates, there were still unpaid arrears. These arrears were mounting even though it appears some of the more recent liabilities were being paid (or a proportion of them). The exhibit to Mr Hannon's first report contains many examples of employees chasing sums and broken promises by Mr Obaigbena. Additionally, some of the emails contain offers to pay additional sums due to the 'late payments'.

26. Another example relates to Ms Vanessa Cuddeford, who entered into an exchange of emails during 2015. I need at this stage only refer to one, dated 5 June 2015, where Ms Cuddeford states, '*Hi Kevin/Nduka, Happy anniversary, I have been working under contract for SIX months at Arise. I've been paid One month's money. February's money is THREE months late. Still nothing, When will I get what is owed?*' In an email dated 10 May 2016 addressed to Mr Sean Dempsey of the Insolvency Service, Ms Cuddeford set out a summary of her dealings with Arise and Mr Obaigbena. She sets out that she had a written contract with Arise which commenced in January 2015. She stated that it was a 'staff contract' for two years and that her rate of pay was £132,000 per annum but she was expected to pay her own tax and national insurance. She worked for five months under her contract and then stopped because, as she states, she couldn't afford to come to work due to the non payment. At that stage she had only been paid for the month of January. In July 2015, she was paid for the month of April 2015. She did not work for certain days in protest about not being paid and she then deducted those days from her invoices. She states, *'Each time Nduka Obaigbena promised me payment, each time it didn't come.*' She began legal proceedings against the company but on advice from her solicitor that the company already had numerous county court judgments against it, she did not pursue those proceedings but instead was one of the supporting creditors in relation to the winding up petition. Mr Obaigbena was also asked about this email and the earlier ones. He really had no answer to it beyond to seek to attack Ms Cuddeford and thereby seek to dispute her invoices or her work. He thought she had been paid at least some of the sums owing, but he did not seek to assert in reality that she was not owed significant sums.

27. It is clear in my judgment that the arrears were building up and despite some payments being made, large sums were outstanding. Additionally, the evidence does not demonstrate that Mr Obaigbena was able to ascertain when these growing arrears would be paid. It was, according to him, not if, but when. A further example of the position of the growing arrears relates to the BECTU emails and correspondence. BECTU is the Broadcasting Entertainment Cinematograph and Theatre Union. By letter dated 23 July 2015, BECTU wrote to Arise, addressed to Mr Obaigbena, on behalf of 29 contractors. The letter sets out a total of £273,913.40 as being owing to the contractors. Some of the outstanding arrears date back to March 2015. The letter seeks confirmation that the outstanding sums will be paid in the next 5 days. Thereafter, by letter dated 28 August 2015, Messrs Thompsons solicitors wrote on behalf of the BECTU members to 'the company directors' of Arise. That letter referred to the earlier letter which, despite a reminder email on 3 August 2015, had not been replied to by Arise. The total sum claimed had risen to £338,048.43. A further letter before action was sent by Thompsons solicitors on 9 November 2015. That letter enclosed the unpaid invoices and claimed an increased total sum of £550,678.52.

28. When these letters were put in cross-examination to Mr Obaigbena, he asserted that he had not received these letters. He asserted that he was seeing the letter of 23 July 2015 for the first time. Mr Obaigbena also asserted that many of those on the list continued to work for Arise. In my judgment, that does not assist Mr Obaigbena. It is clear that substantial sums were outstanding and solicitors were involved in seeking to recover the sums owing. Again, Mr Obaigbena asserted that he was seeing this letter from Thompsons for the first time. He made the same comments in relation to the November 2015 letter. Further letters were sent, each one increasing the sums which were outstanding. By a letter dated 23 November 2015, the outstanding arrears were a total of £702,433.26. By email dated 1 December 2015, Mr Fitzpatrick replied on behalf of the company. That email was copied to Mr Obaigbena. That email disputed the sums said to be outstanding on the grounds that, '...the invoices are invalid, overstated and do not reflect the true cost of the work done.' That email stated that it believed the total outstanding was in the region of £300,000. The email then proposed to pay that lessor amount in 6 equal instalments on the 21st of every month with the first payment being on 21 December 2015.

29. I asked Mr Obaigbena about this email and he accepted that he was aware of this email and the offer made. By an email from Mr Obaigbena dated 3 December 2015, Mr Obaigbena asserted that in relation to all those who were claiming arrears, none of them were entitled to late payment fees. In my judgment this reply of Mr Obaigbena is somewhat disingenuous. The evidence

indicates an accumulation of arrears with promises made by Mr Obaigbena that late payments would be paid with an increase due to late payment. However, when the BECTU correspondence commenced, the company initially did not respond and when it did, it disputed the sums claimed. It is hard to accept when considering the email correspondence as well as the evidence filed which included evidence of offers of late payment increases as well as evidence of failures to pay mounting arrears, that the company really had grounds to dispute such a large proportion of the sums being claimed.

30. However, whatever the true total of the sums outstanding, the offer to pay the 'undisputed' part sought payment by instalments. So the company was clearly unable to discharge its own admitted part of the substantial debt which related to sums which had been outstanding for some considerable time. When questioned, Mr Obaigbena admitted that the company was unable to pay the admitted sum of some £300,000 in December 2015. Again, Mr Obaigbena was adamant that it was a question of when and not if the sums needed would be available from Nigeria. Despite Mr Obaigbena's evidence, in my judgment, he was aware of the BETCU correspondence. This in itself does not make him unfit. However it demonstrates, in my judgment, part of an attempt by Mr Obaigbena not to admit knowledge of material which may well cast him in a poor light before me as regards avoiding payments due for some time to many individuals. In particular, those who were chasing payments of arrears had not agreed to wait to be paid. As agreements with creditors to wait a longer period to be paid is one of the factors relied upon by Mr Obaigbena as to why the company could continue to trade, the evidence I have highlighted above is significant. Although there may well have been agreements with certain creditors, such agreements did not cover many of the creditors and in particular the 'contractors', being those who were working for the company. As I have already stated, some of the arrears dated back to March 2015. Moreover, some of these contractors clearly relied upon promises that they would be paid because they continued to work. These promises were broken, it appears, frequently.

31. The attitude and approach of Mr Obaigbena was not one, in my judgment, of seeking to minimise the potential loss to creditors, or even attempting to pay some of the arrears due. This is apparent from an exchange of emails in 2016, after the company went into liquidation. In an email dated 12 May 2016, Mr Mattia Cabras wrote as follows,

'Dear Nduka and Kevin,

I am not with BECTU anymore as I have mentioned in previous emails.

I know I have missed your call last month, but after that nothing else happened.

I want to deal with you directly.

I am emailing you in regards of payments from last year.

Currently I am owed

A specific amount stated on the March invoice

May

June

July

I have taken off the delayed fees hence what is shown on the invoices it's the honest work I have done, nothing else.

I did honest work at Arise but I haven't bene paid for it, it has been a year now.

…I have sent this email dozens of times with no reply, please keep me informed'

The reply from Mr Obaigbena dated 13 May 2016 was as follows,

'Hello Mattia

You should have acted with the so called delayed fees last year

This is sadly out of my hands

Arise Networks Ltd is now in liquidation'

Mr Cabras replies to that email from Mr Obaigbena by an email dated 13 May 2016,

'As far as I am aware you could have removed the delayed fees like you did for April and keep paying the rest of the invoices since you owe me roughly 13000 pounds!

Also I know that no one got paid really, no matter with or without delayed fees'

32. This exchange was put to Mr Obaigbena. He did not really have a reply beyond asserting that Mr Cabras should have removed the delayed fees. It appeared to me that Mr Obaigbena simply saw the position of Mr Cabras (and probably many others) as not something for which he was responsible. Mr Obaigbena was simply unable to explain or justify the fact that essentially many creditors remained unpaid for a long period of time. This was in my judgment certainly not protecting the creditors or indeed seeking to make every effort to pay creditors. It also demonstrates a complete lack of effort to pay creditors whose debts had accrued a considerable period of time before the company went into liquidation. Sums which came into the company were in my judgment clearly being used to discharge other debts, but Mr Obaigbena was unable to explain why someone like Mr Cabras was left in such a terrible position by reason of the acts of Mr Obaigbena.

33. Other creditors were also pursuing Arise for overdue payments. Riva Media was pursuing Arise from February to August 2015. Riva Media obtained a County Court judgment and thereafter it was paid 50% of the sum due with the remaining being outstanding as at the date of the winding up order. On 16 September 2015, Debbie Williams of Associated Press emailed Mr Obaigbena in relation to three unpaid invoices. DMA Media Ventures Ltd had served a statutory demand dated 20 July 2015 for the sum of £595,200. Thereafter it presented a petition to the Court for the winding up of the company on 28 September 2015. Arise sought to dispute the debt but failed. A winding up order was made on 22 April 2016. The petition was supported by 12 additional creditors with debts totalling £179,571.07.

34. As is set out by Mr Hannon in his report and is set out in the charge, the liabilities increased significantly from December 2014. As at 31 December 2014, the total losses were £12,922,174, with trade creditors (which includes those working for the company) of £3,737,445 and associates being £14,407,929. By 31 December 2015, the total losses were £24,913,106 with the trade creditors (which includes those working for the company) in the sum of £5,635,596 and associates being £19,681,779. By 22 April 2016, the total losses were £25,671,167, trade creditors (which includes those working for the company) £5,850,730 and associated companies £20,313,691. The trade creditors rose by £2,113,285 even taking into account that certain liabilities have been discharged. The associated companies' debt during this period rose by in excess of £5 million.

35. The evidence demonstrates that despite the uncertainty in relation to when funds would be received from Nigeria, Arise continued to trade and incur significant liabilities. After the BARB report in December 2014, Mr Obaigbena stated that he wanted to increase production, which meant increasing the liabilities. Although it is difficult to ascertain whether or not this actually happened, it appears from the evidence, that liabilities increased and easily exceeded any sums which were made available to pay some of the liabilities. So despite the growing arrears and the uncertainty in relation to funds being available from Nigeria to pay the liabilities, Mr Obaigbena caused the company to continue to trade from the end of December 2014 until the company was wound up. Although there may have been some attempt to decrease costs, in my judgment the level of increasing liabilities month on month demonstrates that Mr Obaigbena had no intention of ceasing the operation of the company at any moment during this period.

Mr Obaigbena's evidence relating to his justification for allowing the company to continue to trade from December 2014 onwards.

36. Whilst I have set out above some of the details of the evidence provided by Mr Obaigbena, I need to consider carefully his reasons and the evidence in

support for causing the company to continue to trade from December 2014 onwards. In my judgment, this is important because Mr Obaigbena accepts that the company traded whilst insolvent. The OR asserts that from 31 December 2014 onwards, Mr Obaigbena caused the company to trade to the detriment of creditors with no reasonable prospect of creditors being paid or of the company avoiding insolvent liquidation. As I have stated above, Mr Obaigbena accepts that the company was insolvent and that it relied on external funding. He also accepts, as set out in the passage from his witness statement above, that he was unable to know or ascertain when further funds would be available. He states that for him it was not if, but when. It is also clear as set out above, that the company was already in arrears in September 2014 prior to the currency restrictions being implemented. From December 2014, the position was no different. Some funding may have been provided but it was far short of what was needed. The liabilities were increasing all the time. I have set out the increase of the arrears in the table above.

37. As I have already referred to above, Mr Obaigbena started his evidence before me by asserting that he did not accept what was set out in his witness statement dated 16 November 2018. Some of the paragraphs therein were accepted by him and I have set these out above as they are important to the position taken by Mr Obaigbena as well as to assessing whether effectively he is able to demonstrate that there were reasonable prospects of the creditors being paid or of the company avoiding insolvent liquidation. However, I found many elements of his evidence unreliable. I do not believe that he had not been consulted by his previous solicitors in relation to the content of his witness statement. He was keen to place himself in the best light possible. When an email which demonstrated a clear failure to pay long-standing contractors was put to him, he refused to accept that he was aware of it. Equally, his stance from being one where the contractors agreed not to be paid sums due to them, altered as his cross-examination went on and documents were put to him demonstrating clearly that there were many contractors who were chasing arrears due to them. His stance was then that sums due to them had been overstated and additionally that these creditors had been kept informed. Informing those who are due sums from the company, in some cases for a considerable period of time (see the email from Ms Cuddeford above) is also, in my judgment, not a defence to the charge raised by the OR.

38. As I have already set out, I consider that Mr Obaigbena was well aware of the position of the company and its increasing liabilities. In assessing his evidence, in my judgment, Mr Obaigbena was clearly trying to ensure that he could justify the continued trading of the company. The sudden apparition of the asset known as the EPG which took everyone in the court by surprise, including

his Counsel, is a case in point. I deal with this below. In assessing his evidence, I have taken into account that, in many aspects, I did not find Mr Obaigbena a reliable witness. I do consider that Mr Obaigbena was convinced in his mind that funding would be available and convinced also that the financial difficulties of the company would be resolved. He blamed the liquidation of the company on the dispute with the petitioning creditor seeking to bring a petition. As I set out below, the strong convictions of Mr Obaigbena do not in my judgment necessarily provide a defence to the charge relied upon by the OR. Throughout his evidence, Mr Obaigbena maintained a stance that effectively his actions were such that he was not unfit. He did not accept that there was a problem with the arrears building up as they were doing. He did not seem at all perturbed by the emails written by contractors who were owed arrears over long periods of time. Additionally, he maintained his conviction that funds would be made available and in many respects blamed what he called a force majeure rather than his actions as causing the loss to the creditors. When being cross examined, he stated that in the media business, you need to find your audience. He stated that this takes time and that this is the pre-revenue stage. Later, he described the difficulties of the company as being, 'teething problems'. In my judgment, the attitude of Mr Obaigbena is one of the reasons as to why he caused the company to continue to trade, thereby increasing the liabilities to the extent set out above.

39. Mr Obaigbena did accept as being true the statements he had made previously to the OR when interviewed on 11 May 2015. Mr Obaigbena signed the statement confirming that he had been read section 5 of the Perjury Act 1911 and had understood it. By way of additional reply to the questions, '*when was the company unable to pay its debts when they became due? Did the company continue trading? Were creditors informed of the company's financial position?'* Mr Obaigbena stated as part of his reply to these questions as follows :-

'The Board of Arise Networks Limited considered the solvency of the company on a regular basis. Changes and developments in the foreign exchange regulations of Nigeria were considered by the Board and at all times the decision was there is a fair and reasonable expectation that the company can trade through the current difficulties. This fair and reasonable expectation was based upon:

- *The continued willingness of the proprietor to fund the business through the 5-year business plan.*
- *The agreement of suppliers, freelancers and independent contractors to work with extended payment terms.*

- *The fact that whilst Nigerian regulatory difficulties made it more difficult to fund an overseas business, the funding continues to get through, albeit at a slower rate.*
- *The dispute with the petitioner (OMA) could be resolved.'*

40. When asked about this by Mr Nersessian, it became apparent that no actual board meetings took place. Mr Obaigbena was effectively the sole director. When asked if management accounts were prepared, Mr Obaigbena stated that as there was no revenue, there was no need for management accounts. He asserted he had a budget plan. Later, he appeared to assert that there were management accounts. No such accounts were handed over to the OR. Mr Obaigbena asserted that management accounts were handed to the OR. I have considered the list of the documents which was handed over to the OR. This is exhibited to the first report of Mr Hannon. There is no reference in the list of accounting documents to management accounts. Equally, management accounts were not referred to in Mr Obaigbena's evidence or indeed exhibited. Mr Obaigbena also asserted that he was aware of the fixed costs and that these were being reduced and re-negotiated. In the evidence, it does appear that an effort was to be made in or around July 2015, to reduce costs. There is no evidence of any such reduction or attempts to reduce costs and expenses for the period between December 2014 and July 2015. The evidence of Mr Obaigbena, as I have set out above, is that as a result of the BARB report in December 2014, his intention was to increase production at Arise. This of course would be increasing the liabilities at a time when there was, as he admitted in his witness statement, no indication as to when funds to discharge those liabilities could be received. There is no evidence which enables me to consider whether in fact the liabilities did increase for the period from December 2014 in line with the intention to increase production. Regardless as to whether the liabilities did indeed increase by reason of increased production or not, the fact remains that the liabilities increased during the entire period from December 2014 until the company was wound up in April 2016. This, in my judgment, was not a matter which would have been unknown to Mr Obaigbena. Month on month the liabilities increased. The emails which have been put in evidence satisfy me that Mr Obaigbena was well aware of the increase in liabilities. I did not understand him to maintain that he was not aware of the increase in liabilities.

41. When Mr Nersessian put to Mr Obaigbena that he had no way of properly assessing solvency without assessing income, revenue, turnover as against costs, Mr Obaigbena stated that he did not understand what Mr Nersessian meant by the question. Mr Obaigbena stated that you needed to invest and that it took time to build. He accepted that the sums coming in were not coming in quick enough to pay the debts. Mr Obaigbena stated that he had agreed terms with the creditors. He also asserted that he was confident sums would be available from Nigeria, even if he could

not say when they would be released. He then relied on there being an asset, the 'EPG', which he could realise if need be, to pay the creditors. There was no reference to any such asset, whatever it was, in the company's own records. No reference to any such asset appears in the statement provided to the OR. When asked further by Mr Nersessian, it seemed that the 'EPG asset' belonged to another company and that Mr Obaigbena sought to maintain that it could be realised if needed for the benefit of Arise. I found Mr Obaigbena's evidence in this respect incredulous. It seemed to me that he raised this 'asset' which, in some way he had in mind to realise if he needed to, so that he could justify the continued trading of the company with its ever increasing labilities. I reject his evidence in this regard.

42. When asked about the agreements with creditors, Mr Obaigbena first asserted that creditors had agreed longer payment terms. He then accepted that a minority of them had not accepted payment terms. Mr Nersessian took him to numerous emails and challenged the alleged agreements with creditors. Mr Obaigbena was adamant that he kept the employees informed and that they had agreed. Later in his evidence, he accepted that he had made proposals and if creditors did not want to agree then they were entitled not to agree.

43. As I have set out above, the company received a lot of correspondence from creditors seeking payment. This is clearly evidence that many creditors were chasing sums outstanding to them for some time and this contradicts Mr Obaigbena's assertion that agreements had been reached with creditors. He certainly wanted to give the impression that many creditors had agreed as he relied on this as being one of the reasons that he considered the company could continue to trade after the currency restrictions came into force. Whilst certain creditors may well have agreed to wait on condition that the company would pay extra in consideration of the late payments, in my judgment, the evidence demonstrates that many creditors were chasing for payment. In particular, the correspondence with BECTU is particularly compelling because some of the contractors were claiming for arrears which dated to March and April 2015. However, in my judgement, even if certain creditors were not chasing, that does not provide an entitlement to consider that the company continues to have a reasonable prospect of paying its creditors or avoiding liquidation. Creditors agreeing to wait does not extinguish their liabilities. Those liabilities were increasing all the time. I am not persuaded on the evidence that Mr Obaigbena could rely on there being agreements with the creditors as he asserts. In my judgment, the evidence does not support his assertion relating to there being such agreements with creditors to an extent that it provided some justification for the continued trading of the company from December 2014 onwards.

44. Mr Obaigbena also relied on his belief that the dispute with the petitioning creditor would be resolved. I do not consider that this provides any real justification that there was therefore a reasonable prospect that the creditors would be paid. The

petitioning creditor was only one of many creditors pressing for payment. This is clear from the evidence. However, as I have already explained above, the fact that certain creditors are not pressing for payment does not in my opinion enable there to be a reasonable prospect without there actually being a prospect of funds being available to pay. Mr Obaigbena asserts that the funds would be coming but as he admits, there was no certainty as to when. The difficulty in my judgment is that the factors relied upon by Mr Obaigbena do not amount to there being anything more, in my judgment, than his firm conviction that funds would arrive at some time in the future without there being any certainty as to when.

45. In the above statement given by Mr Obaigbena, he stated, 'Changes and developments in the foreign exchange regulations of Nigeria were considered by the Board and at all times the decision was there is a fair and reasonable expectation that the company can trade through the current difficulties'. In my judgement, there is no evidence before me that supports this statement. Unlike in cases where a company trades on expecting that its revenues during the trading period may provide a better outcome to creditors, in the case of Arise, there was at no stage any trading revenues. So continued trade would not create revenues available to meet creditors' claims. The company was insolvent, it had no revenues and relied entirely upon loans from associated companies to pay its liabilities. The report indicated that no profits were anticipated for a five year period. It had a negative BARB report so needed a positive one before it could have generated any profits. No further BARB report was obtained. There was no evidence indicating that the company was expected to generate any revenues of its own during this period. In fact, Mr Obaigbena was adamant that the company was in its pre-revenue stage. As admitted by Mr Obaigbena, it was he who determined that the company could trade on. It was Mr Obaigbena who believed that the company could trade through the 'current difficulties'. There was also no evidence to demonstrate that the position relating to the foreign exchange regulations underwent any development or change during the period from September 2014 when they were imposed until April 2016 (when the company was wound up). No evidence was presented that demonstrated that the position was anything other than the uncertain one set out in the passages from Mr Obaigbena's statement above.

46. As Mr Nersessian submitted, the question to be asked was whether there was a rational basis for the belief that sufficient funds would come into the jurisdiction and be available to pay the increasing liabilities. In my judgment, as I have set out above, the evidence does not support any rational belief that sums would be available to satisfy the outstanding and ever increasing liabilities. In my judgment, Mr Obaigbena relies upon his belief that at some stage sufficient funds would be released, but provides no evidence to support this belief. There are no real and adequate grounds for this belief. Whilst it is correct certain sums were made available, from December

2014 onwards, there was a complete lack of certainty, which is admitted by Mr Obaigbena, as to when funds would be released and the amount which would be released.

47. Ms Brown submits that there were no grounds for Mr Obaigbena to conclude that, as from December 2014 onwards, that the company had no reasonable prospect of paying its creditors or escaping insolvent liquidation. She submitted that Mr Obaigbena had a reasonable belief that funds would be available and she also pointed to the substantial sums already made available. However, she had no evidence beyond the belief of Mr Obaigbena that sufficient sums would be available. It is not, in my judgment, appropriate for a director to take such a gamble with sums owing to the creditors. Mr Obaigbena admits that the company was insolvent and unable to pay its debts. It relied upon external funding which due to the currency restrictions was uncertain as to when (or even if) it would be available. As a director, Mr Obaigbena clearly owed a duty to the creditors of the company throughout the entire existence of the company. The company was trading to the detriment of creditors. Even in relation to any agreements made with creditors effectively extending the payment periods, this is still in my judgement increasing the liabilities of the company. Moreover, the uncertainty as to when those payments which extended into the future would be paid is not resolved by the extensions. On Mr Obaigbena's own case, there was still complete uncertainty as to when funds would be released and when the currency restrictions would be lifted. Any agreements with creditors were, in my judgment, no more than extending the uncertainty whilst continuing to increase the liabilities of the company. Ms Brown also sought to rely upon it being reasonable for Mr Obaigbena to have taken the decision to allow the company to continue and she relied upon cases where directors had taken the decision to continue to trade a company. However, those cases are not relevant to the facts of this case. This company was unable to trade out of its difficulties because, put simply, it had no revenues. Continued trading merely increased its liabilities.

48. There is, as Mr Nersessian submits, a difference between a belief and a reasonable prospect. I agree. The evidence in this case does not support a reasonable prospect but rather it is a belief. Ms Brown submitted that it was a reasonable belief, but in my judgment this is not borne out. There is no evidence that during the entire period from the end of December 2014 until the liquidation of the company, the currency restrictions would be lifted. There is no evidence that Mr Obaigbena could turn to any other assets to meet this increasing liability to creditors. I do not accept that there was any asset held by a third party called before me the EPG. There was no evidence before me as to what exactly was the 'EPG' which was available and to be realised for the benefit of the company. The reality is that during the entire period from December 2014 until the winding up order, there is in the evidence before me no reference to the availability of any other 'asset' to meet the increasing liabilities. The company failed to pay the petition debt and was placed into compulsory liquidation in April 2016. I therefore reject the assertion made by Mr Obaigbena that there were any

other assets available and this was a reason as to why the company continued to trade. It is not made out from the evidence and appears to be something which Mr Obaigbena sought to rely upon whilst he was being questioned before me.

49. Ms Brown submitted that there was no justification for Mr Obaigbena to take steps after 31 December 2014 for the company to cease trading. She submitted that this would have created a loss to the creditors. However, the difficulty with that argument is that Ms Brown can really point to no justification for the decision of Mr Obaigbena to cause the company to continue to trade from 31 December 2014 onwards. Ms Brown could only rely on Mr Obaigbena's belief that the creditors would be paid, the 'not if but when'. That caused an increased loss to creditors and the increase in liabilities unpaid steadily rose during the entire period from December 2014 onwards. There was no evidence of there being a reasonable prospect of funds being received at a level that the liabilities could be discharged. This was, put at its highest, the aspiration and belief of Mr Obaigbena. In my judgment, in a case where the company is wholly reliant upon external loans to be able to discharge its liabilities, a director needs to be able to justify a decision to cause the company to continue to trade. I do not accept the justification as being a belief that at some stage in the future funds would be released to pay those liabilities. Such an approach is in my judgement effectively trading to the detriment of creditors with no reasonable prospect of the creditors being paid. The only sums which came from other sources to support the company related to VAT refunds. This exemplifies the position of the company being effectively wholly reliant upon external funding in the way of loans. In this case, there was complete uncertainty as to when the currency restrictions would be lifted and how much if any funds would trickle through before then.

50. The charge states that from 31 December 2014 onwards, there was no reasonable prospect of the creditors being paid or the company avoiding insolvent liquidation. In my judgment, the position of the company did not improve during 2015 or even 2016. There is no change in the uncertain position relating to the currency restrictions during the period after 31 December 2014 which would support a decision to continue to trade. Equally there is no credible evidence that the company had any other source for the payment of its liabilities beyond the external funding by way of loans. Here, I do believe the evidence of Mr Obaigbena that there was no way of knowing when the currency restrictions would be lifted. Equally he also stated that he tried to obtain the release of as much as he could from Nigeria despite the currency restrictions. The efforts he made, in my judgment do not prevent a finding of unfitness based upon the charge relied upon by the OR. Despite his best efforts, the uncertainty and the lack of sufficient funds to discharge increasing liabilities was apparent month upon month when he caused the company to continue to trade, which was to the detriment of creditors. The evidence does not in my judgment support there being a reasonable prospect of the creditors being paid or of the company avoiding insolvent liquidation.

51. In my judgment for the reasons I have set out above, I am satisfied that the charge relied upon by the OR is established. I am also satisfied that this is conduct which falls under the concept of unfit conduct pursuant to section 6 of the CDDA 1986. It demonstrates a lack of regard for and compliance with proper standards. There was, in my judgment, no protection for the creditors in relation to the risk-taking of Mr Obaigbena. He may well have believed that at some stage in the future, sufficient funds would be released, but from the end of December 2014 onwards until its liquidation, he caused the company to trade to the detriment of its creditors. The ongoing month by month increase in liabilities did not cause Mr Obaigbena to alter his decision to cause the continued trading of the company. There was in my judgment very little regard by Mr Obaigbena to the risks the company was incurring towards its creditors. I therefore now turn to consider the appropriate disqualification period.

Disqualification period principles

52. Turning to the issue of appropriate period of disqualification, Mr Nersessian referred me to the guidance provided in *Re Sevenoaks Stationers (Retail) Limited [1991] Ch 164* by the Court of Appeal which divides the period into 3 brackets :-

(i) the top bracket – over 10 years, reserved for particularly serious cases;
(ii) the middle bracket – 6-10 years, for serious cases that do not merit the top bracket; and
(iii) the minimum bracket – 2-5 years, for cases that are not, relatively speaking, very serious.

53. In *Re Westmid Packing Services Ltd (No. 2) [1998] B.C.C. 836* the Court of Appeal reiterated that that the primary purpose of disqualification is to protect the public against the future conduct of companies by persons whose past records show them to be a danger to creditors and others. Other factors may also come into play in the wider interests of protecting the public, such as a deterrent element in relation to the director himself and a deterrent element as far as other directors are concerned. The period of disqualification must reflect the gravity of the offence. Matters of mitigation may also be taken into account, such as the former director's age and state of health, the length of time that he has been in jeopardy, whether he has admitted the offence and his general conduct before and after the offence.

54. The Court may also take into account any light that is thrown upon a defendant's unfitness as a director by the evidence that he gives on the allegations against him, of which he has been given prior notice. This may be taken into account either when considering unfitness or in consideration of the proper period of

disqualification (see *Secretary of State for Trade & Industry v Reynard [2002] B.C.C. 813*).

55. The issue of the appropriate period for disqualification is a matter, as Mr Justice Hildyard in *Re UKLI* describes, akin to a sentencing exercise, which requires the court to determine the appropriate period according to a sliding scale of culpability. In *Re Westmid Packing Services*, the Court of Appeal also stated that the citation of cases as to the period of disqualification will, in the great majority of cases, be unnecessary and inappropriate. To my mind previous cases can of course be considered and sometimes may be helpful, but what is required, in my judgment is consideration of the guidelines set out and consideration of the particular facts of the case.

56. Mr Nersessian submits that this is a case which falls into the middle bracket. It is, he submits a serious case by reason of the amount of the deficit and the period of time in which Mr Obaigbena consciously caused the company to continue to trade to the detriment of creditors without there being a reasonable prospect of the creditors being paid. Ms Brown submits that this is a lower bracket case. She submits that similar cases demonstrate that an allegation of trading to the detriment of creditors for a period of one year and 10 months have attracted the lower bracket (*Re Hitco 2000 Ltd [1995] 2 BCLC 63).* In *Re Grayan Building Services Limited [1995]Ch 24*, where there was no dishonesty, the trading to the detriment of creditors was also considered as being a lower bracket case. However, as I have already pointed out, the trading here was carried out in circumstances where (1) the company was insolvent at all times, (2) the company had no revenues and was not expecting any revenues from any continued trading, and (3) the company relied entirely upon external funding provided by way of loans to meet its increasing liabilities. There was in Ms Brown's submission no lack of probity in these cases. Ms Brown also relies upon the settlement agreement entered into by Mr Obaigbena with the liquidators.

57. In my judgment, this is a case which falls squarely into the middle bracket as being a serious case. The conduct of Mr Obaigbena was a gamble which the creditors paid for. There was no evidence to support his belief that there was a reasonable prospect that creditors would be paid. Believing that at some stage in the future sums would be released when month after month the liabilities increased, with many creditors being owed sums dating back some considerable time as the year of 2015 progressed, takes this case well into the middle bracket. In particular, despite the lack of any evidence that the position in Nigeria would be changing at some time in the future, Mr Obaigbena continued effectively to trade to the detriment of creditors with the ever increasing liabilities. The increase in the liabilities during the period from December 2014 until the liquidation was in excess of £2 million in relation to the unconnected creditors and over £5 million for the connected creditors. Directors who gamble with the position of the creditors, in the belief that all will be fine in the end, are not acting in the interests of those creditors and are instead taking risks to their

detriment. The middle bracket is not in my opinion only for those cases where directors continue to trade for more nefarious reasons. I take into account that with the exception of the unreliability of Mr Obaigbena as a witness on certain aspects set out above, I do not consider this is a case of dishonesty. However, this does not mean that the case is any less serious. The public interest is served in this case, in my judgment by disqualifying Mr Obaigbena for a period of 7 years.

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