Neutral Citation Number: [2018] EWHC 3190 (Ch)

Claim No: CR-2017-005613

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT (CHANCERY DIVISION)

IN THE MATTER OF IXOYC ANESIS (2014) LIMITED
AND IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION ACT 2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 November 2018

Before:

RICHARD SPEARMAN Q.C.
(sitting as a Deputy Judge of the Chancery Division)

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Between:

THE SECRETARY OF STATE FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY	**Claimant**
- and –	
DAMIEN LEE ANDRE ZANNETOU	**Defendant**

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Christopher Buckley for the Claimant (instructed by Gowling WLG (UK) LLP)
Rory Brown (instructed by Brandsmiths) for the Defendant

Hearing dates: 29, 30, and 31 October 2018

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Judgment

RICHARD SPEARMAN Q.C.:

INTRODUCTION

1. This is an application under s6 of the Company Directors Disqualification Act 1986 (as amended) ("the 1986 Act") by the Secretary of State for Business, Energy & Industrial Strategy ("the Secretary of State") to disqualify a former director of Ixoyc Anesis (2014) Limited ("the Company"). The defendant is Damien Lee Andre Zannetou ("Mr Zannetou").

2. s6(1) of the 1986 Act provides:

> "The court shall make a disqualification order against a person in any case where, on an application under this section, it is satisfied-
>
> (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 … makes him unfit to be concerned in the management of a company."

3. Accordingly, if the requirements of sub-sections (a) and (b) of s6(1) are satisfied in relation to Mr Zannetou, the court must make a disqualification order against him.

4. A disqualification order is defined in s1(1) of the 1986 Act as being:

> "… an order that he shall not, without leave of the court-
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> (a) be a director of a company, or
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> (b) be a liquidator or administrator of a company, or
>
> (c) be a receiver or manager of a company's property, or
>
> (d) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company,
>
> for a specified period beginning with the date of the order."

5. By virtue of s6(4), if the court makes a disqualification order under s6, the specified period is between two and 15 years.

6. In the present case, it is not in issue that the requirements of s6(1)(a) are satisfied. Having been incorporated on 20 September 2012, the Company changed its name from Anesis TV Limited on 30 January 2014, registered for VAT on 1 March 2014, and began trading on 21 March 2014 when it acquired the assets of Ixoyc Anesis Limited following the liquidation of that company. The Company carried on business as a general provider of beauty treatments. The Company went into insolvent voluntary liquidation on 27 August 2015. The current estimated overall deficiency is £213,377, which is made up of £213,373 in respect of creditors, and £4 in respect of the issued and paid up share capital. Mr Zannetou was a director throughout.

7. Accordingly, there are two issues which now arise for determination. First, whether the conduct of Mr Zannetou as a director of the Company was such as to render him "unfit to be concerned in the management of a company". Second, if the first issue is resolved against Mr Zannetou, the appropriate period of disqualification. However, in the present case it was common ground between Mr Buckley, who appeared for the Secretary of State, and Mr Brown, who appeared for Mr Zannetou, that the second issue (if it arises) should be dealt with separately following judgment on the first issue.

8. As to the first issue, the essence of the Secretary of State's case against Mr Zannetou, as advanced by Mr Buckley, is that Mr Zannetou caused the Company to trade to the detriment of HMRC. The essence of Mr Zannetou's defence, in the words of the opening Skeleton Argument of Mr Brown, is that his was "a case of inadvertence in extenuating circumstances, not of the level of incompetence deserving of disqualification". As to the second issue, the Secretary of State accepts that there are elements of mitigation in the present case, and therefore suggested a period of disqualification of 3 years and 6 months. On Mr Zannetou's behalf, the submission of Mr Brown was: "In all the circumstances of this case, and in light of the long minimum period for which the court would have to disqualify Mr Zannetou, the court is humbly invited to exercise its discretion not to make an order". It seems reasonable to infer that, if that submission were to fail, he would argue that the minimum period would suffice.

THE FACTS

9. So far as concerns VAT, the Company filed VAT returns for the quarters ending in April, July and October 2014, and January 2015. An assessment of VAT due was made in respect of the quarter ending in April 2015. The Company was also subject to two surcharges, dated 13 March 2015 and 12 June 2015. From the start of trading to liquidation no payments at all were made in respect of any of these VAT liabilities. The cumulative total rose, without let up, over time, and eventually reached £74,945.13.

10. So far as concerns PAYE, the Company made six payments in all, amounting in total to £14,496.74. Taking into account credits and allowances, the Company's outstanding liability to HMRC was reduced by further amounts, bringing its total credit for that

purpose to £22,937.18. The total due from the Company, based on its returns and an estimated liability for the period from 6 August 2015 to 26 August 2015, is £62,509.86. The shortfall of £37,784.67 includes small amounts in respect of student loan deductions and a payment treated by HMRC as having been made in respect of the same. The oldest unpaid tax, as opposed to interest, relates to the 2014/15 tax year, and this sum was due for payment by no later than 22 April 2015. The total amount of £37,552.57 which was due for payment in respect of that tax year was reduced to £21,562.12 as a result of a number of payments, allowances, and credits. Payments amounting in total to £11,460.26 were made between 14 January 2015 and 24 April 2015 pursuant to a time to pay agreement which was made on 18 December 2014.

11. While these events were unfolding, substantial payments were made to the Company's other creditors. Between 8 June 2014 (the day after the Company's first VAT return was submitted) and 27 August 2015 (the date of liquidation) a total of £731,165.47 was paid out of the Company's bank accounts. During the same period, only £14,496.74 was paid to HMRC in respect of the Company's tax liabilities: £3,036.48 in September 2014; and a further £11,460.26 in total as described above.

12. In addition, an aged creditor analysis discloses that the Company's oldest non-HMRC debt was £105.83 owed to a supplier in respect of an invoice dated 21 November 2014. That analysis further shows that, save for a further £107.98 owed to the same supplier, all the Company's other non-HMRC debts owed at liquidation were incurred in 2015.

13. Mr Brown submitted that juxtaposing the total sum expended from the Company's bank accounts with the Company's failure to pay more than about 2% of that sum to HMRC is "a dramatic way to present this information". He further submitted that the Company's total liabilities included other substantial creditors in addition to HMRC, and that the discrepancy as to the timing of the debts owed to HMRC in comparison to the debts owed to other creditors relates to only "a few months". However, those submissions do not really grapple with the narrative provided by the figures. Whichever way the matter is viewed, it seems to me impossible to resist the conclusion that HMRC were treated less favourably than other creditors in both absolute and relative terms. Indeed, in his closing submissions Mr Brown realistically accepted that, as a matter of actual fact, the Company treated HMRC differentially in comparison to other creditors.

14. When the time to pay agreement was made, the Company's liabilities amounted to £71,416.35. According to HMRC's records, it was agreed that the Company would make a payment on account of £1,416.35 by debit card, and payment of £1,460.26 was in fact made on 14 January 2015. The balance of £70,000 was to be paid as to £1,000 on 27 January 2015, and then by payments of £3,000 per month commencing on 27 February 2015, to be credited first to PAYE and then to VAT. HMRC's documents further record that Mr Zannetou was informed that "future [payments] must be made on time". In the event, however, following payment of the sums due in January 2015, only

three monthly payments of £3,000 were made, in February, March and April 2015; and no payment was made, either on time or at all, in respect of future sums which fell due.

15. It was the evidence of Mr Zannetou that, at the time when the time to pay agreement was made, there was some discussion between him and a Mr Gomez on behalf of HMRC about future amounts owed by the Company to HMRC. In his witness statement, Mr Zannetou states that "it was my understanding that if I continued to make the monthly payments, HMRC would be willing to consider including those amounts" and that "I made the monthly payments in March and April with the hope that HMRC would consider including all amounts owing, present and future, in the TTP Arrangement". As I believe this language reflects, this was an inchoate hope or expectation, which fell short, and was understood by Mr Zannetou to fall short, of any sort of binding representation, commitment or agreement on the part of HMRC. In my judgment, this is entirely consistent with HMRC's documents, which record that in a telephone call on 19 March 2015: (a) Mr Zannetou asked that a further sum which had by then become outstanding should be included in the time to pay agreement and (b) Mr Zannetou was advised that there would be "no agreement or discussion" about that until the next VAT return was in and payment proposals had been given to HMRC.

16. In fact, it is improbable that HMRC would ever have agreed to future liabilities being added to the time to pay agreement, at least without substantially revising the terms of that agreement. Otherwise, the almost certain consequence of including future liabilities would be that the Company would have an ever-increasing indebtedness to HMRC.

17. During the course of the hearing, it emerged as common ground that the material history could sensibly be considered by breaking it down into four different periods.

18. In the first period, from March to June 2014, the Company had started trading and Mr Zannetou was in England. During this time, to the knowledge of Mr Zannetou, the Company gave greater priority to the payment of other creditors over the payment of sums due to HMRC. In the words of Mr Brown's closing submissions, Mr Zannetou "dealt with the fires that were burning most brightly, and paid the debts that needed to be paid to keep the salon open". The creditors who were paid included employees, suppliers, finance companies, and the landlord of the Company's premises. These payments were made by various means, including a business debit card and online banking. In cross-examination, Mr Zannetou candidly admitted that he would have been aware that there were VAT and PAYE liabilities accruing (although he also said that his father was the Company's accountant, that he relied on his father's work and his support, and that he could not recall what his father told him or what he asked his father). The oral evidence of the Company's bookkeeper, Roger Brian Edward Gay ("Mr Gay"), was that up to Easter 2014 all debit card payments were made by Mr Zannetou, and that between Easter and November 2014 "[i]t is likely that I made

payments at the request of the manager, and I would check with Mr Zannetou if it was OK to make them" - although it is possible that by "Easter" Mr Gay meant "June".

19. Starting in this same period, but extending beyond it, HMRC's records show that requests for payment were sent to the Company in May, June, July and August 2014.

20. Furthermore, Mr Brown's closing submissions, which I understood to include reference to this period, included that Mr Zannetou "was not ignorant of, or casual as to, responsibility as such; knew his duties; and candidly admits that he has failed in them."

21. In the second period, from June to September 2014, Mr Zannetou was in Cyprus. His grandmother was ill, and his father had flown out to be with her, and Mr Zannetou travelled to join them. His grandmother died in June 2014, and his father, who had some longstanding health problems, then became seriously unwell, and died on 29 August 2014. This was, obviously, a highly distressing time for Mr Zannetou, and Mr Buckley very properly accepted that different considerations applied during this period.

22. Mr Zannetou explained in his witness statement: "My father was my best friend and business mentor. He was my support system." He also explained that it was necessary to bring his father's body back to England for cremation, and that he then had to return to Cyprus to scatter his father's ashes, which it seems he did on 15 October 2014.

23. In addition to all these problems, in March 2014 the Spanish owner of the "Anesi Beaute" brand notified trademark and copyright objections to the Company using the name "Anesis", and this dispute continued until a notice of opposition was filed on 23 December 2014, which the Company was ultimately unsuccessful in defending. Costs were awarded against the Company, although it seems those costs were never paid.

24. Mr Buckley nevertheless submitted that, during this second period, Mr Zannetou took no steps to supervise the Company's affairs or check the position of the Company. This criticism gains some support from Mr Zannetou's own evidence. Speaking of the period from June to December 2014, he explains in his witness statement that upon his return from Cyprus in September or October 2014 he had to provide emotional and financial support to his widowed mother, who had her own serious health issues and was also facing financial difficulties, that these months "left me broken", and that he had to have mental health therapy twice a week for 6 months. His evidence continues: "My family had to take priority over my business [which] naturally suffered, and, whilst I know I was ultimately responsible and do not shirk that responsibility, those I trusted and relied upon to support me and manage my business during this difficult time let me down."

25. However, that is not the full picture. The evidence of Mr Gay is also significant.

26. Mr Gay explains in his witness statement that Mr Zannetou's father was the Company Secretary as well as the Company's accountant, but that after Mr Zannetou's grandmother became ill around Easter 2014 and his father spent more and more time in Cyprus to be with her, his father took most of the Company's financial information and paperwork with him to Cyprus. This caused difficulties for Mr Gay when he was asked to manage the accounts of the Company in the absence of Mr Zannetou and his father with effect from June 2014, and indeed after Mr Gay began acting as Company Secretary (following the death of Mr Zannetou's father) with effect from 2 September 2014, in particular with regard to "compiling the HMRC returns as and when they fell due". Mr Gay states: "I feel guilty that I was unable to advise [Mr Zannetou] effectively during this time. I did not press [Mr Zannetou] as much as I should have in warning and advising him in relation to the financial issues the Company was facing. This caused certain issues relating to VAT returns and mounting VAT payments to spiral."

27. Mr Gay further explained in his oral evidence that, during this period, although payments were made by him or authorised by him (for example, if the manager said that stock was needed, and that if a supplier was not paid the Company would not get it): "I would always check whether payments could be made with Mr Zannetou."

28. Mr Gay also gave evidence that he tried not to contact Mr Zannetou while Mr Zannetou was in Cyprus so as to allow Mr Zannetou to concentrate on his family affairs and that: "I probably did not keep him as up to date as I should have." Nevertheless, Mr Gay stated that he sent Mr Zannetou emails at least once a month (probably amounting to 4 or 5 in all during this period) and that: "The Company was making a loss, so plainly there was juggling of payments. The payments that were prioritised were those that were necessary for the Company to carry on trading… VAT and PAYE arrears were accumulating. I tried to keep Mr Zannetou aware of how much was due."

29. A distraint call was made by HMRC on 17 September 2014. This appears to have precipitated a payment of £3,036.48 which was paid by Mr Zannetou by telephone on 18 September 2014, and allocated by HMRC to the Company's PAYE/NIC liabilities.

30. It seems to me that, so far as concerns Mr Zannetou, the position disclosed by this evidence is both better and worse than as submitted by Mr Buckley. It is better in that Mr Zannetou was not divorcing himself from the affairs of the Company and leaving them to be run entirely by someone else. But it is worse in that Mr Gay's evidence makes clear that Mr Zannetou (1) was aware of the pattern of payments that the Company was making, (2) was aware that the Company had insufficient funds to pay all its creditors, (3) was aware that there were increasing liabilities to HMRC which were not being paid, and (4) gave the instructions which resulted in only such payments being made as were needed for the business to continue and in HMRC not being paid.

31. In the third period, from October 2014 to April 2015, Mr Zannetou was back in England and was forced to confront the issue of non-payment of VAT and PAYE. Also, during this period, the time to pay agreement was made, and the Company made a number of payments pursuant to that agreement up to and including 24 April 2015.

32. On 1 October 2014, a request for payment was sent to the Company, which neither responded nor made any payment to HMRC. Accordingly, on 14 October 2014, HMRC wrote to the Company demanding payment of £27,175.79 and warning of enforcement action. This elicited a detailed letter in response from Mr Zannetou, dated 31 October 2014. In that letter, he rehearsed the difficulties that he and the Company had been experiencing, including the loss of his father who "would normally communicate and respond to you and letters such as these". Mr Zannetou further explained that he was in the process of instructing a new accountant, that the Company was suffering cash flow difficulties, that he was negotiating a sale of 65% of the Company, and that "We anticipate closing the deal before Christmas which means that everything in relation to HMRC for both PAYE and VAT will be resolved". Accordingly, he asked for time to enable HMRC to be paid in full, while also saving the business and its employees.

33. A distraint call was made on 5 December 2014. According to HMRC's records, Mr Zannetou asked for time to pay, including in relation to VAT for the quarter ending October 2014, "because of lack of funds", and an appointment was arranged for 18 December 2014. On that date, the time to pay agreement was made, as set out above.

34. In spite of that agreement, none of the Company's future liabilities were paid. These comprised payments that became due in respect of PAYE/NIC for the months ending on the 5th day of January, February, March and April 2015, and a VAT payment of £13,963.41 that was due in respect of the first quarter of 2015. That outstanding VAT liability was the subject of the telephone call on 19 March 2015 discussed above.

35. Mr Buckley submitted that Mr Zannetou had no satisfactory answer as to why no payment was made in response to the demand dated 14 October 2014, and that the reality was, as Mr Gay said in evidence, that the Company simply did not have enough money to pay everyone. It chose to prioritise trade creditors, and it did not pay HMRC because there was no money left to do so after the trade creditors had been paid.

36. This is, in substance, what Mr Zannetou said in his witness statement, in which he put forward two matters, not by way of excuse but as part of the picture of the difficulties that he was facing. First, that he "had the responsibility of trying to protect my staff and prevent the business from going into receivership at Christmas." Second, that "at the same time, those I trusted around me took advantage of my situation and the business suffered as a result."

37. Mr Brown submitted that the appropriate finding is that Mr Zannetou believed that the Company would trade out of insolvency. Mr Brown also suggested that Mr Zannetou hoped that he would be able to include future liabilities in the time to pay agreement. However, I consider that this latter suggestion can only have substance in relation to the period from about 18 December 2014. In any event, Mr Brown accepted that, even putting it at its highest, this was no more than a "hope of a prospect".

38. In the fourth period, from May 2015 to August 2015, the Company did not make the payment of £3,000 that was due on 27 May 2015 in accordance with the time to pay agreement. Nor did it make any other payments in respect of either PAYE or VAT. In the result, by letter dated 3 August 2015, HMRC cancelled the time to pay agreement, and demanded payment of the outstanding debt of £103,300.14 which was by then due to HMRC, and stated that unless action was taken within 7 days the Company would be wound up on the basis of this debt. That triggered the liquidation of the Company.

39. The evidence in Mr Zannetou's witness statement relating to this period focuses on two matters, which are related. First, the failure to make the payment that was due on 27 May 2015. Second, the problems which flowed from the Company changing banks from HSBC Bank plc ("HSBC") to National Westminster Bank plc ("Natwest").

40. According to that evidence, the closure of the HSBC account was unforeseen. The genesis of that closure is not apparent from the documents, but a letter from HSBC dated 1 April 2015 states that the closure date has been extended to 5 May 2015.

41. Mr Zannetou states that a new bank account was opened with Natwest on 5 May 2015, but that Natwest opened it, incorrectly, in the name of Aenea Group Holdings Limited ("AGH"). In support of that evidence, Mr Zannetou exhibited a letter from Natwest dated 30 December 2016 which states: "we can confirm that Natwest changed the name of [the Company] bank account to [AGH] in error prior to the account being closed".

42. Mr Buckley submits that this letter does not, in fact, support Mr Zannetou's evidence. It does not refer to an account for the Company being opened, in error, in the name of AGH. Instead, it refers to an account in the name of the Company being changed in error to an account in the name of AGH at some later date, before the account was closed. I agree with that submission. Nevertheless, I accept Mr Zannetou's evidence on this point. I consider it unlikely, both in terms of the overall probabilities and having had the advantage of seeing him give evidence, that he would fabricate the version of events that he put forward in his witness statement, or that he is mistaken about what happened. In light of those considerations, when faced with a choice between Mr Zannetou's evidence and the text of a letter written by a complaint handler employed by a bank which, as it now accepts, was incompetent in its dealings with the relevant bank account, I prefer Mr Zannetou's evidence to the recitation contained in the letter.

43. HMRC's records show that in two telephone calls on 8 June 2015 Mr Zannetou stated: "HSBC have now closed their account and [the Company] have had to open [a] new Bank account with another Bank and will need to amend DD with new instructions", that the Company had switched banks, and that the time to pay agreement direct debit for May had "failed". None of that seems inconsistent with Mr Zannetou's evidence, although it is fair to say that there is no record that he referred to an error by Natwest.

44. However, that is not the end of the matter. The log produced by HMRC shows that Mr Zannetou was told on 8 June 2015 that the individual who was speaking to him on behalf of HMRC was unable to set up a new direct debit as "I have no access to the system". Further, the log shows that another employee of HMRC recorded later on the same day "I am unable to set up [the time to pay agreement]". At one stage Mr Zannetou seemed to rely on these references to suggest that the failure to make the payment due on 27 May 2015 (and maybe later payments) was attributable to HMRC.

45. However, Mr Zannetou's case was put differently in his witness statement. He states there that (1) there were sufficient funds in the Natwest account to make payment on behalf of the Company, (2) however, he did not consider it sensible to make payment from an account in the name of AGH (a) because HMRC was unlikely to allocate such a payment to the Company and (b) because that "would have an adverse effect on my internal accounting procedures", (3) he called to advise HMRC of "the issue" on 8 June 2015, (4) he had to wait for Natwest to rectify the matter before any payment could be made to HMRC, (5) by the time Natwest had admitted liability and rectified the name on the bank account, the time to pay agreement had been cancelled and the debt had been called in, (6) had he made payment from the AGH account the Company might well have been "in the very same situation", and (7) "I do not recall the person at HMRC recommending that I make payment of £3,000 in the interim, but had they done so, I wouldn't have considered this sensible for the reason already explained".

46. In fact, the HMRC log for 8 June 2015 records: "I adv[ised] [taxpayer] to make other methods of [payment] in the meantime … to make sure [the time to pay agreement] [is] not cancelled" and, further: "[Taxpayer] to pay £3,000 into PAYE account today".

47. In addition, in his second affirmation made on behalf of the Secretary of State, Christopher Matteo Leo ("Mr Leo") "do[e]s not accept" that HMRC would have been confused by a payment from a third party bank account or that a payment from an account in the name of AGH would not have been allocated by HMRC to the amounts owed by the Company. Further, Mr Leo exhibits a letter from HMRC to the Insolvency Service which states (among other things): "If HMRC receive any correspondence quoting a reference (HOD [i.e. Head of Duty] ie PAYE, VAT, Self Assessment, National Insurance) with payment attached HMRC will allocate this payment to this HOD. If a payment is made via bank giro it would be allocated to the HOD quoted on the bill. If HMRC receive a payment with no HOD on the correspondence but a [sic]

address HMRC will write out to the address asking what HOD payment is this for or the name of the company. If only a payment arrives with no address & no HOD reference on this they will try to contact the bank it possibly came from."

48. Mr Leo was not cross-examined on his evidence. Accordingly, Mr Buckley submitted that his evidence had to be accepted, and that it amounted to a clear statement, which the court could not go behind, that there was no risk that a payment emanating from a bank account in the name AGH would have caused confusion to HMRC, and that such a payment would certainly have been credited towards the liabilities of the Company. I accept that the evidence was unchallenged, although I do not consider that it goes as far – or indeed that the Secretary of State needs to go as far - as this paraphrase suggests.

49. At one time I was inclined to the view that, assuming Natwest made a mistake in opening in the name of AGH what was intended to be a bank account for the Company, it would not or should not have taken long for Mr Zannetou to get Natwest to correct the error. I was also inclined to the view that there would be or should be more of a paper trail relating to his attempts to get matters put right. However, Mr Zannetou answered the first point by explaining (perhaps ironically, in view of his case that the situation was of Natwest's own, and incompetent, making) that Natwest did not accede to the requested change of name lightly because it involved an account in the name of a corporate entity. He answered the second point by saying that he conducted his dealings with Natwest by way of telephone banking. I am prepared to accept those explanations.

50. Nevertheless, I consider that Mr Zannetou was at fault in the way in which he dealt with HMRC in light of the problems arising from Natwest's mistake. The contemporary documents show that, contrary to his recollection, one of the individuals to whom he spoke on behalf of HMRC *did* advise him of the need to make payments to ensure that the time to pay agreement was not cancelled; and, indeed, that Mr Zannetou agreed or indicated to HMRC on 8 June 2015 that a payment of £3,000 would be made that day.

51. In my opinion, Mr Zannetou's reasons as to why he "wouldn't have considered this sensible" do not withstand scrutiny. I find the suggestion that this was perceived as being likely to "have an adverse effect on … internal accounting procedures" unconvincing. Further, the belief or concern that HMRC were unlikely to allocate to the Company a payment that emanated from an account which had been opened in error in the name of AGH was not one that Mr Zannetou explored with HMRC and, on the evidence before me, was in fact without foundation.

52. In any event, it seems clear to me that the most that the Company would have paid to HMRC is the £3,000 payment due under the time to pay agreement on 27 May 2015, and perhaps the further payments in the like sum that fell due in succeeding months. There was no evidence that Mr Zannetou would have ensured that the full terms of that agreement were complied with, and the earlier history strongly suggests the contrary.

53. In his closing submissions, Mr Brown, while arguing in favour of Mr Zannetou that he was trying to put in place a mechanism for payment with HMRC, realistically conceded that Mr Zannetou could have procured payment to HMRC by other means.

54. With regard to Mr Zannetou's attempts to bring about payment to HMRC, Mr Gay's answers in cross-examination concerning the history of the Company generally (and not limited to the fourth period) included the following: "Without Mr Zannetou or another source providing money it wasn't possible to pay HMRC or some other suppliers (including me – I was never paid by the Company at all). He was using the money to keep the Company afloat. Not every month, but probably on 8 occasions, he himself paid in a substantial sum of money. He was progressing several methods to raise money: a Saudi Arabian franchise; a group of investors; and talking to the landlord to see if he would take an equity stake. He was aware that HMRC were not being paid. He set up a payment plan that he thought he'd be able to honour, and that he did honour."

THE AUTHORITIES

55. The following summary is taken, in substance, from the judgment of Pill LJ (with whom Sullivan and Kitchin LJJ agreed) in *Cathie v Secretary of State for Business, Innovation and Skills (No 2)* [2010] EWCA Civ 739, [2012] BCC 64. This is, by some years, the most recent in time of all the cases to which I was referred by either side.

56. *Cathie* is also a case with similarities to the present case on the facts. The sole ground upon which disqualifications were sought against two directors in that case was that the company failed to comply with the obligation to make payments to HMRC, with the effect that the company traded at the risk and to the detriment of HMRC. The company went into liquidation with an overall deficiency of £680,000 of which £193,000 represented arrears of payments due to HMRC. The company was 15 months in arrears when it ceased trading. The directors were disqualified for periods of 2 years and 6 months and 2 years by the district judge, and that decision was upheld on appeal by Henderson J and on further appeal by the Court of Appeal. The headnote further states:

> "The district judge held that there was a significant period in which the appellants discriminated against HMRC by making no payments when no other creditor in a similar position was treated in the same way. He further held that there was a policy of not paying HMRC and that there had been times when funds were available and payment could have been made. The district judge considered the communications between the company and HMRC and concluded that it could not be said that the company had kept HMRC fully informed of the position; in particular HMRC had not been told about a contract under which the company received commission of £221,000. Citing dictum of Blackburne J in *Re Structural Concrete Ltd; Official Receiver v Barnes* [2001] BCC 578, the district judge found that where the type of misconduct alleged was proved there needed to be exceptional circumstances if a disqualification order was not to be made. He considered all the circumstances and concluded that there were no exceptional circumstances and accordingly made

disqualification orders. The decision of the district judge was upheld on appeal by Henderson J, who held that the district judge was entitled to make a finding of misconduct based on the factors summarised by him. He had reviewed all the evidence, and taken into account the mitigating factors, before deciding that the statutory test of unfitness was satisfied. The district judge's reference to exceptional circumstances, based on its use in *Structural Concrete* (above), did not disclose any material error. [The Court of Appeal dismissed the directors' further appeal.]"

57. In *Re Lo-Line Electric Motors Ltd* [1988] Ch 477, (1988) 4 BCC 415 Sir Nicholas Browne-Wilkinson V-C stated, at 486, 419:

> "Ordinary commercial misjudgement is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although I have no doubt that in an extreme case of gross negligence or total incompetence disqualification could be appropriate."

58. In *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164, [1990] BCC 765, Dillon LJ, with whom Butler-Sloss and Staughton LJJ agreed, referred to the words of s6 of the 1986 Act which he described as "ordinary words of the English language", and to other judicial comment, and added, at 176F, 773F:

> "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'."

59. In *Re Grayan Building Services Ltd (in liq.)* [1995] Ch 241, [1995] BCC 554, Hoffmann LJ, with whom Neill and Henry LJJ agreed, defined the task of the court:

> "It must decide whether that conduct, viewed cumulatively and taking into account any extenuating circumstances, has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies."

60. In *Sevenoaks*, Dillon LJ also considered the situation where an allegation of misconduct is made, as in *Cathie* and as in the present case, by way of unfairness between one creditor, or class of creditors, and others. Dillon LJ stated at 183E–F, 779F–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."

61. I pause there to interpose in the synthesis of Pill LJ in *Cathie* that in this passage in *Sevenoaks* the Court of Appeal was alluding to a difference of approach towards the significance of Crown debts which had emerged from earlier cases. On the one hand, some Chancery judges, including Sir Nicolas Browne-Wilkinson V-C in *Lo-Line* and Harman J at first instance in *Sevenoaks*, had taken the view that it was a greater or clearer badge of commercial immorality to fail to pay to the Crown moneys which had been taken from third parties by compulsion of law for the express purpose of being paid over to the Crown than it was to fail to pay trade creditors. On the other hand, a different view had been expressed by Hoffmann LJ in *In re Dawson Print Group Ltd* [1987] BCLC 601, to the effect that it was no more culpable to use moneys which should have been paid to the Crown to finance the continuation of the business of an insolvent company than it was to use for that purpose moneys which were owed to commercial creditors. As this passage reflects, the Court of Appeal in *Sevenoaks* preferred this second approach. Accordingly, that is the approach that I must follow.

62. The synthesis in *Cathie* continues as follows. Confirming that the burden of proof is on the Secretary of State when he seeks a disqualification order, Neuberger J in *Re Verby Print for Advertising Ltd* [1998] BCC 652, stated at 658G:

> "I would accept the grave nature of an allegation of unfitness under s6(1)(b) of the 1986 Act must be borne in mind when considering whether that allegation is made out."

63. In *Structural Concrete*, Blackburne J reversed the finding of a district judge that there was no unfitness. Having cited the judgment of Morritt LJ in *Secretary of State for Trade & Industry v McTighe (No.2)* [1997] BCC 224, Blackburne J stated at 588:

> "I do not think that [Morritt LJ] was intending to lay down, as a proposition applicable in all cases, that a policy of deliberate non-payment of a class of debt, whether Crown or otherwise, necessarily gives rise to a finding of unfitness although I find it difficult to envisage circumstances in which such conduct, if carried on over a lengthy period and if the non-payment is at the risk of the creditors in question, will not constitute misconduct justifying a finding of unfitness."

64. Having referred to the facts, which included a long period of time in which the Revenue had received nothing and a substantial and increasing amount was becoming due, Blackburne J stated at 589H–590D:

> "Those being the facts (either undisputed or as found by the district judge) it would, in my judgment, require exceptional circumstances to justify a finding that this did not amount to misconduct justifying a finding of unfitness on the part of those responsible. In reaching her firm conclusion that unfitness had not been demonstrated, the district judge appears to have laid emphasis on the fact that the directors' intention

was ultimately to pay the Revenue debt in full and on the fact that the length and depth of the recession and the number of contract disputes which they could expect to be raised far exceeded their reasonable expectation. At the heart of her decision appears to have been her view that the course of action pursued was a 'commercial one' taken by the respondents in good faith (i.e. with no attempt to benefit personally or conceal the company's true state of affairs) and with thought and proper advice (from Mr O'Brien 'who had once worked for the Revenue'), that the directors were being 'realistic and prudent in relation to their projections as to income and payment', that the choice was between immediate liquidation and deferred payment to the Revenue and that the directors were encouraged to take this action 'having had direct experience of Inland Revenue debts before' and, acting on Mr O'Brien's advice, believing they could negotiate payment of the Revenue's claim by instalments. With every respect to the district judge, whose experience in these cases (to which she drew attention in her judgment) I accept, I do not consider that these matters, even when coupled with the particular matters to which [Counsel] drew my attention (e.g. the fact that the respondents acted in good faith in reliance on the advice of Mr O'Brien, whose experience and competence they had no reason to question and that the company's bank and auditors did not question the course which SCL was pursuing), justify the conclusion that the directors' conduct `does not cross the threshold of even a marked degree of incompetence or negligence, let alone a very marked degree'. In my judgment, making every allowance for their good faith and reliance on the advice of others, their conduct clearly did cross that threshold. It would be to send out entirely the wrong message if it were to be thought that a deliberate policy, followed over very many months, of not making any payment of a Crown debt of this kind, allowing it to rise to £460,000-odd and making no attempt to secure the Crown's agreement to this course of action, while at the same time paying the company's other pressing creditors, could not lead to a finding of unfitness and therefore to disqualification. The district judge's error lay not in failing to identify the correct test to be applied but in failing correctly to apply that test to the facts as she had found them."

65. In *Cathie,* Pill LJ set out the reasoning of Blackburne J in some detail because Blackburne J's use of the expression "exceptional circumstances", repeated by the district judge in *Cathie,* gave rise to one of the principal grounds of appeal. Pill LJ discussed this issue, and its relevance to the appeal in *Cathie,* at [46]-[49]:

> "46 I do not consider that in *Structural Concrete*, Blackburne J was departing from the correct and traditional test. Having found misconduct of a type not dissimilar from the alleged misconduct in the present case, Blackburne J was stating that, upon such findings, it would require exceptional circumstances to justify not making a finding of unfitness. Blackburne J carefully analysed the conduct of the directors and, on the facts found by the district judge in that case, came to the conclusion that the threshold leading to a finding of unfitness was crossed.
>
> 47 The district judge performed a very similar exercise in the present case. The evidence and findings of fact were carefully set out. The district judge concluded, following *Structural Concrete*, and as he was entitled to conclude, that where he had found misconduct "of this type" exceptional circumstances would be required to avoid a finding of unfitness. The district judge then

carefully set out … the points in the appellants' favour and set against them … the points demonstrating misconduct, which had been established on the evidence. He reached his conclusion on the evidence as a whole, or to borrow [Counsel's] word, on the totality of the evidence. He was justified in concluding that unfitness was established and disqualification required.

48 When Henderson J stated that he failed to see how the appellants "can have been prejudiced in any way by the judge's error on this point, if error there was", he was in my view intending to acknowledge that the district judge had considered the evidence and taken an overall view in accordance with the statutory requirement.

49 While the district judge was not in error, the use of the expression exceptional circumstances, even in the narrow sense intended, is better avoided. In *Grayan*, Hoffmann LJ used the expression "extenuating circumstances". The task of the fact finder, as Hoffmann LJ stated, is to consider the evidence as a whole, including extenuating circumstances, and decide whether the director has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies."

66. Pill LJ also referred to a submission of Counsel in *Cathie* that the Secretary of State needs to conduct himself fairly in making the application, and cited *Secretary of State for Trade and Industry v Hickling* [1996] BCC 678, HH Judge Weeks QC at 690:

> "At this stage I want to say a little about the applicant's duties. It is accepted that these are not ordinary adversarial proceedings but have an element of public interest and may entail penal consequences. It follows that there is a duty on the applicant to present the case against each respondent fairly."

67. Moving on from *Cathie*, Mr Buckley relied on the judgment of Neuberger J (as he then was) in *Re Park House Properties Ltd* [1998] BCC 847 in support of the proposition that it is sufficient to establish unfit conduct if a director causes a company to pay trade creditors but not to pay HMRC in the manner that Mr Zannetou did in the present case.

68. In that case, the company was incorporated in April 1992 and commenced trading in October 1992. The company took over the business of Mr Carter, which involved leasing and sub-letting industrial buildings, and he and his wife, son and daughter became directors and shareholders. None of them received payment for their services as directors. From September 1993 the company had difficulty meeting its VAT quarterly payments and made no VAT payments after February 1994. In July 1994 a bank issued a statutory demand for repayment of its loan against Mr Carter, which was secured on those industrial buildings. He almost secured refinancing from a new source, but because of last-minute conditions by the proposed new financier could not raise the sum to meet the demand. His son and daughter resigned their directorships at different times in 1994, before the company effectively ceased trading in September 1994. The company went into insolvent voluntary liquidation in November 1994 with creditors owed approximately £159,500 of which over £117,288 related to VAT and over

£19,000 related to unpaid PAYE tax deductions and national insurance contributions. Mr Carter was disqualified for 4 years and his wife, son and daughter for 2 years each.

69. Neuberger J said at 547b-548a:

> "So far as the position between the beginning of March and the end of July 1994 is concerned, it is fair to Mr Carter to mention that he expected all to come right as a result of being able to re-finance his borrowing, and to obtain further money to put into the company, from replacing the secured loan from Barclays with a new secured loan from Bristol. However, as an intelligent man and as a person experienced in business, he must have known that there was no guarantee that he would be able to raise money from Bristol, or, that if he could, the terms would be wholly acceptable to him. Any optimism he had had in the past on this point must have been somewhat dented by his difficulties in raising finance during 1992 and 1993. He was carrying on business through the company in manner a which is unfortunately rather familiar in these sort of cases, namely paying creditors who were either pressing or who had to be paid in order for the company to carry on its business, but not paying the Customs & Excise Commissioners, who were not pressing for the money due to them to a sufficient degree to make it necessary for him to cause them to be paid in order to enable the company to carry on its business. In this connection, it seems to me that [the] passage in the judgment of Dillon LJ in *Sevenoaks* (at p779F–G; 183E–G) is apposite …
>
> I add at once that there are obvious dangers if a court in one case proceeds on observations made by a court (even the Court of Appeal) on the facts of another case: the facts of each case are different. One notes in particular the reference to 'a deliberate decision' and the fact that the conduct of the sort described by Dillon LJ ' *can well* … be relied on as a ground for saying that [a person] is unfit'. In the present case, I do not think that there was any deliberate decision to favour other creditors over the Customs & Excise Commissioners during 1994. There was, in practice, a policy but it was not a conscious one: it was attributable to the difficulties in which the company found itself and the failure of Mr Carter to get a grip on things, and, in particular, his failure to ensure, in accordance with his statutory duty and good commercial sense, that the accounts of the company at the end of its first year of trading were finalised and the amount of rent it had to pay was conclusively determined. Nonetheless, the effect was the same as that described by Dillon LJ: the company traded with insufficient working capital and was accordingly trading at the Crown's expense."

70. To like effect, and unsurprisingly (since the two cases were decided by the same judge, and moreover very close together), is the slightly earlier decision of Neuberger J in *Verby Print* at 665:

> "It is accepted on behalf of the Secretary of State that a policy of unfair discrimination between creditors must be established before a finding of unfitness can be justified in a case such as this. I consider that that concession is right if the word 'policy' is given its normal meaning. That is because the concept of a policy involves some sort of decision; the decision may be conscious or subconscious, and the reasons for it may

be conscious or unconscious. Without there having been a policy of discrimination, it is difficult to see how the discrimination could be unfair, and it is necessary for the discrimination to be unfair, as I read the judgment of Dillon LJ, before it can give rise to a finding of unfitness.

… However, once the court finds, as it has done in the present case, that there has been what in normal language could be called a policy of unfair discrimination, it is not, in my judgment, possible to say that it is for some reason incapable of being a policy for the purposes of deciding whether a person is unfit under the 1986 Act because it continued only for a short time. In other words, once one finds a director permitting a company to engage in unfair discrimination between creditors, the only question for the court is whether, taking into account all the relevant factors relating to the policy (including the period for which the policy continued), that finding justifies the conclusion that the person concerned is unfit to be a director of a company."

71. Mr Buckley also relied on the decision of HH Judge Roger Kaye QC (sitting as a Judge of the High Court) in *Secretary of State for Trade and Industry v Thornbury* [2008] BCC 768, which includes the following passages at [28] and [51]-[52]:

"The Secretary of State's case against Mr Thornbury is that the failure to file the VAT and P35 returns resulted in the company continuing to trade at the expense or detriment of the Crown, and … whether this was deliberate or not it matters not … If there was no deliberate policy, such consistent failure over such a period of time could not be described as mere inadvertence. The analysis of payments and receipts, particularly from April 2002 onwards, shows the company trading profitably and paying trade creditors and remuneration, but not the Crown debts …

Accordingly, I am satisfied that the Secretary of State's case is made out. I consider that Mr Thornbury's failure to get to grips with the financial affairs of IMG in the manner I have described does fall so far below the level of competence to be expected of a director in the circumstances as to amount to unfitness within s6(1) of the 1986 Act. It follows that I have a duty, regrettable as it is, because I can discern no lack of probity or integrity in Mr Thornbury, to impose a disqualification order by reference to his past conduct. I do so, appreciating also the likely professional and commercial consequences and difficulties for him. Mr Thornbury struck me as a decent, hard-working, well-motivated man, who was doing the best for his clients. Unfortunately, he failed to look over his own shoulder.

Having regard to the policy of the 1986 Act that I have explained, to the periods covered by the undertakings accepted by the other two directors, and to the relative degrees of responsibility involved, not least that Mr Thornbury was not directly responsible for the failures to make the appropriate returns but, as the allegations of unfitness alleged, allowed it to happen by reason of his failure to get to grips with the company's affairs, I consider that a fair and proper reflection of his share of the responsibility for the inappropriate action in this case is to impose a disqualification order for the minimum period of two years."

72. Mr Brown relied on what he described as 6 key cases: *Re Cubelock Ltd* [2001] BCC 523; *Re Pamstock Ltd* [1994] BCC 264; *Re Peppermint Park Ltd* [1998] BCC 23; *Re Funtime Ltd* [2000] 1 BCLC 247; *Re Bath Glass Ltd* [1988] 4 BCC 130; and *Secretary of State for Trade and Industry v Hickling & Ors* [1996] BCC 678.

73. In *Cubelock* at [56], Park J referred to the desirability of having a consistency of approach between different courts as to what sort of conduct does or does not attract disqualification. I naturally accept the correctness of that principle, although whether and to what extent it assists Mr Zannetou in the present case is a separate question.

74. At [51], Park J considered the degree of incompetence which is required for disqualification, and referred to earlier case law to the effect that the burden on the Secretary of State in establishing unfitness based on incompetence is a heavy one.

75. At the same time, as Park J accepted in [52], there is guidance from the Court of Appeal that "the degree of incompetence should not be exaggerated given the ability of the court to grant leave, as envisaged by the disqualification order as defined by s1 [of the 1986 Act], notwithstanding the making of such an order." This ability of the court is a matter to which Mr Buckley made reference in the present case, in the context of Mr Zannetou's current cosmetics business, which operates through a company called Aenea Cosmetics Limited, which was incorporated on 25 September 2014, and which he states to be trading with a measure of success and industry recognition, including having won the 2016 and 2017 Wealth and Finance Business Awards for best manufacturing product company for health and beauty. Mr Buckley's points were to the following effect: first, for the purposes of the present application, the court is constrained to consider Mr Zannetou's conduct as a director of the Company alone; second, this means that account cannot be taken of his conduct of other companies, such as Ixoyc Anesis Limited (the business activities of which preceded those of the Company) or Aenea Cosmetics Limited (the business activities of which followed those of the Company); but, third, it does not follow that if a disqualification order is made he will necessarily be prevented from continuing as a director of Aenea Cosmetics Limited.

76. Mr Brown also referred to what Park J said with regard to wrongful trading at [72], and argued that this applied by parity of reasoning in the circumstances of the present case:

> "The law has to leave room for cases where it was acceptable for directors to take the view that their company, though insolvent in balance sheet terms for the present, was going to trade its way back into profit so that all the creditors would be paid. Further, there has to be room for cases like that even if in the event the directors turn out to have been wrong, so that the company does not succeed in trading out if its difficulties, and as it turns out the creditors, or some of them, are not paid."

77. In answer to that argument, Mr Buckley submitted, and I agree, that these words of Park J were spoken in relation to a different question than that which arises in the present case, and accordingly are of no real assistance to the questions I have to decide.

78. In *Pamstock*, the company of that name was incorporated in 1982 and went into insolvent liquidation in 1989, with a total indebtedness of almost £200,000, and the director was involved throughout that time. Mr Brown submitted that these facts are, on the face of it, more serious than those of the present case. Nevertheless, Vinelott J made a disqualification order only after "very anxious consideration", and for the minimum period of 2 years. In my judgment, this was very much a decision on its own particular facts, which are far removed from those of the present case, as appears from 265:

> "… The unusual feature of the case is that the respondent specialises in assisting small and in many cases newly formed companies by providing financial advice and obtaining outside finance. The companies he assists are frequently companies which invite subscription for shares in companies formed under the Business Expansion Scheme. In this field, the provision of, in broad terms, venture capital, the respondent is often asked or required to accept a directorship. It is also a field in which there are inevitably a proportion of casualties - companies which are forced into insolvent liquidation not as a result of culpable misconduct or even a want of skill and care but because an expected market does not materialise or because of adverse circumstances which could not reasonably be foreseen.
>
> The complaint made by the official receiver relates to the conduct of the respondent in relation to ten companies over a period of fifteen years. During that period he has also been associated with a large number of successful, some very successful, companies. Moreover, the consequences for the respondent of a disqualification order are bound to be exceptionally severe. In most cases which come before the courts the effect of a disqualification order is that the respondent is deprived of the privilege of carrying on business through a company with the protection of limited liability unless the court is satisfied that a company of which he proposes to be appointed a director is on a sound financial footing and that the public dealing with it will not be put at risk. In the instant case the stigma of disqualification will make it difficult for the respondent to continue in his chosen field; moreover, it is likely to be impracticable for the respondent to apply to the court for leave to act as a director of every company which he may be asked to advise or for which he is instrumental in obtaining financial support from third parties and of which he may be required to act as a director.*"*

79. In *Peppermint Park*, after trading for 20 months the company went into insolvent liquidation with a deficiency as regards creditors of almost £665,000. The three directors were disqualified for periods of 9 years, 2 years, and 2 years and 6 months. Mr Brown submitted that a number of flagrant characteristics were present in that case, which are not present in the case of Mr Zannetou. These included, for example, what HH Judge Levy QC found to be *prima facie* fraudulent preferences in favour of both the director who was disqualified for 9 years and the mother of that director.

80. While I accept that submission, it is clear from *Sevenoaks*, *Park House*, *Verby Print*, *Structural Concrete*, and *Cathie* (at least) that a finding of unfitness such as to warrant a disqualification order can properly be made on the basis of conduct which lacks the features which were present in *Peppermint Park*. It therefore takes matters little further.

81. In *Funtime*, Mr Nicholas Strauss QC (sitting as a Deputy Judge of the High Court) decided that a director's conduct in connection with a number of improper preferences in favour of himself and others was sufficiently serious to render him unfit to be a director, but he deferred the fixing of the period of disqualification pending the determination of the case against other directors. At 255, Mr Strauss QC said "I do not think that the evidence establishes that Mr Ford pursued a deliberate policy of paying other creditors or discriminating against the Crown because it did not press for payment". In these circumstances, the facts of that case are quite different to those of the present case. I derive no assistance from this decision for the purposes of this case.

82. In *Bath Glass*, Peter Gibson J dismissed an application seeking disqualification orders against two directors of a company which had gone into insolvent liquidation with a deficiency for creditors of £128,000 (equal to about £270,000 in present day terms). The directors were also directors of another company, Collective Leisure Limited ("Collective"). At 137-138, Peter Gibson J referred to two of the four matters which were relied upon by the official receiver in support of the application, as follows:

> "They are that Mr Elliott and Mr Sharp caused Bath Glass to continue to trade whilst insolvent to the detriment of its creditors, and that they were responsible for Bath Glass retaining over £106,000 due to the Crown. The incurring of debts to the Crown is in itself not significant of unfitness unless the court can draw the inference therefrom that the directors knew or ought to have known that the company was trading whilst insolvent at the risk of its creditors and improperly using to finance its trading, in the case of VAT, moneys received from its customers, and in the case of PAYE tax and National Insurance contributions, moneys deducted from the wages of its employees, for which moneys it had to make returns and to account regularly. In the present case, Collective was paying the moneys needed for payment of the Crown debts to Bath Glass, but Bath Glass was failing to account to the Crown. It is plain that the directors knew that they were retaining such moneys: they explain their conduct on the ground that, unlike other creditors, the Crown did not press for payment.
>
> Mr Charles submitted that the directors knowingly allowed Bath Glass to trade for a substantial period at the risk of its creditors, benefiting themselves thereby because in the last six months of trading they reduced the borrowing from the Midland and so reduced their liability under the guarantees which they had given the bank, but increased the indebtedness owed to creditors other than the bank and in particular to the Crown …
>
> I return to Mr Charles's main criticisms of the conduct of Mr Elliott and Mr Sharp. In my judgment they can be rightly criticised for certain aspects of their conduct of the

affairs of Bath Glass as directors. By the middle of 1982 Bath Glass was insolvent, its liabilities exceeding its assets. The position grew worse in the next two years, as year after year forecasts and budgets were not achieved. They knew that Bath Glass could only survive with the support of the bank, but that Midland could call in its debts at any time. They knew that, even with that banking support, they were in arrears with the payment of Crown debts and that for a substantial period. They further knew that they were using amounts representing tax received from Collective to carry on business. In particular, they knew in the last six months of trading that the Crown debts were going unpaid and indeed increasing while the bank borrowings went down. There was an increasing risk that creditors would be left unpaid if the bank could not be persuaded to grant substantial overdraft facilities. In my judgment, that is improper conduct and a wrong way in which to conduct business. They must have known that they were trading at the risk of creditors."

83. Peter Gibson J continued, however, at 138: "In weighing in the scales those justified criticisms I must, however, take into account certain countervailing points". Having addressed those points, Peter Gibson J concluded at 139: "Imprudent and indeed improper in part although I think the directors' conduct to have been, in all the circumstances I am not satisfied that their conduct as directors of Bath Glass alone is so serious as to make them unfit to be concerned in the management of a company."

84. In my view, this is another decision on its own particular facts, including a number of countervailing points to which Peter Gibson J attached considerable significance.

85. Mr Buckley submitted that *Bath Glass* could be distinguished from the present case on two grounds: first, it was a wrongful trading case; and, second, it pre-dated the decision of the Court of Appeal in *Sevenoaks*. I am not persuaded that either of these points is correct. Taken in isolation, the suggestion that "the incurring of debts to the Crown is in itself not significant of unfitness unless the court can draw the inference therefrom that the directors knew or ought to have known that the company was trading whilst insolvent at the risk of its creditors and improperly using to finance its trading … VAT … and … PAYE", would appear to lend support to them. However, *Bath Glass* was cited with approval by Dillon LJ in *Sevenoaks* at 183. Moreover, in my view Peter Gibson J did not regard the case as being a wrongful trading case, and he was alert to the prospect that disqualification could properly result from the type of misconduct that was in issue in *Sevenoaks*, as appears from the following passage in *Bath Glass* 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 of the respondent qua director may be relevant, even if it does not fall within a specific section of the Companies Acts or the Insolvency Act . For example, the authorities under the previous disqualification legislation show that the court will regard as relevant misconduct the fact that a director, as he knew or ought to have known, caused a company to trade at the expense and jeopardy of moneys which the

company has received, for instance in the form of VAT, from customers or which has been deducted from the emoluments of employees in the form of PAYE tax and National Insurance contributions and for which he ought to have accounted to the Crown on a regular basis. The director ought not to allow the company to use such moneys to finance the company's trade (see *Re Stanford Services Ltd & Ors* (1987) 3 BCC 326, at p334). Even if such conduct does not amount to wrongful trading within s214 [of the Insolvency Act 1986], in my judgment it would still be conduct amounting to misconduct and so relevant to s6 [of the 1986 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."

86. In *Hickling*, Moonlight Foods (UK) Limited ("Moonlight") was incorporated in April 1990 and receivers were appointed in February 1992, and the statement of affairs showed a deficiency for creditors of just under £700,000. In fact, the assets realised less than they were estimated to realise. In the result, (among other things) trade creditors who were owed £300,000 and the Inland Revenue which was owed £37,000 were wholly unpaid. HH Judge Weeks QC held that one of the respondents was not a director of Moonlight. With regard to the other two directors the charges were, in summary: (1) that they caused Moonlight to continue trading to the detriment of third party creditors when they knew or ought to have known that Moonlight was unable to pay its debts (in respect of which HH Judge Weeks QC said at 692 "This is the most serious charge but it is accepted that the charge is not properly framed … The charge should better be framed as 'trading without reasonable prospect of meeting creditors' claims' or … 'taking unwarranted risks with creditors' money'."); (2) that they caused Moonlight to issue cheques to creditors without due regard to the prospect of their being honoured on presentation; (3) that they failed to ensure that the accounting records for Moonlight were sufficient for the type of business carried on by it and that they complied with the requirements of s221 of the Companies Act 1985; and (4) that they failed to give sufficient attention to the financial affairs of Moonlight in that they failed to ensure that accounts were prepared, audited and filed as required by ss 226, 242 and 244 of the Companies Act 1985. Having considered the evidence in relation to these charges, HH Judge Weeks QC concluded with regard to the first charge and with regard to the charges overall at 692 and 693 respectively:

"The two directors of Moonlight were clearly faced with difficult decisions after the loss of the Safeway contract. They met in February 1991, after the presentation of the Exeter Micros petition and again in March 1991 when the BHS position had worsened. On both occasions they considered whether to continue trading. They did the right thing in the sense that they consulted a trusted, experienced accountant, Mr Cotterill, and had him make forecasts which they thought they could rely on. They consulted solicitors who gave advice which was reported to them in an encouraging way…

It is submitted that the directors should have realised that these projections were unreliable because they had not been tested against management accounts, which

were never available to the board after 1 September 1990. No lack of probity is suggested, and in my judgment the conduct of these directors in continuing to trade on what, with hindsight, may be seen to be inadequate information is not reprehensible enough to justify a finding that either of them is unfit to be concerned in the management of a company …

In this case I have found no dishonesty, no breach of common standards of commercial morality, no cynical disregard for others' interests and no gross incompetence on the part of either Mrs Dean or Mr Tilly. At worst they were guilty of naivety, over-optimism and misplaced trust. In my judgment, their conduct as directors of Moonlight was not such as to make them unfit to be concerned in the management of a company. Accordingly, the summons will be dismissed."

87. I consider that *Hickling* involved different charges than the charge relied upon by the Secretary of State in the present case, and, moreover, involved very different facts. For these reasons, I do not regard it as pertinent to the issues which I am required to decide.

88. Finally, I was referred to *Re Westmid Packing Services Ltd (No. 3); Secretary of State for Trade and Industry v Griffiths & Ors* [1998] 2 All ER, [1998] BCC 836. In that case, the Court of Appeal gave general guidance as to what is relevant and admissible evidence for the purpose of determining the length of a disqualification period and for the purposes of any application for leave to act under s17 of the 1986 Act. In light of the agreement of Counsel that in the present case the period of disqualification (if any) should be determined after this judgment has been delivered, this decision is not directly relevant at this stage of these proceedings. In my view, however, it illuminates the underlying purpose of s6 of the 1986 Act, which is relevant in deciding the issue of unfitness. The guidance provided by the Court of Appeal includes the following:

(1) It is of the greatest importance that any individual who undertakes the statutory and fiduciary obligations of being a company director should realise that these are inescapable personal responsibilities.

(2) The power to grant leave under s17 is irrelevant to determining the proper period of disqualification.

(3) The primary purpose of disqualification is to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies showed them to be a danger to creditors and others. Despite the fact that the courts have said disqualification is not a 'punishment', in truth the exercise that is being engaged in is little different from any sentencing exercise. The period of disqualification must reflect the gravity of the offence. It must contain deterrent elements. That is what sentencing is all about, and that is what fixing the appropriate period of the disqualification is all about. In relation to the

period of disqualification the facts of the offence are still obviously important but many other factors ought (and in reality do) come into play.

(4) In the criminal sentencing context there is no room for plea bargaining if by that it is meant some form of agreement as to the sentence if a plea is entered. But there can be negotiation as to the acceptability of an admission on a certain basis of fact, and that would seem to be as sensible in this context as in the criminal context. Furthermore, in the criminal context very little discount is given if there is an admission of what is 'indisputable', but an admission of what might otherwise have taken a great deal of time and expense to prove surely merits some recognition, provided of course that the starting point correctly reflects the gravity of the conduct. It would not send out a wrong message to fix the period of disqualification by starting with an assessment of the correct period to fit the gravity of the conduct, and then allowing for the mitigating factors, in much the same way as a sentencing court would do. It would not, however, be right to allow the question whether a discretion is likely to be exercised under s17 to come into the calculation at all. That question should be considered separately after a period of disqualification has been fixed.

(5) In considering what categories of evidence should be admitted on the three distinct issues of unfitness, period of disqualification and at what stage (if any) of a disqualification, and in respect of what company or companies and on what conditions, should leave be granted under s17, the belief that there is a complicated, arcane and inflexible code of evidential rules applicable in these cases should be discouraged. In most cases the essential thing will be for the court, with the assistance of the parties, to use common sense and to adopt a practical and flexible approach to case management, so as to confine the evidence to that which is probative. While the director's general reputation may be relevant on questions of the appropriate period of disqualification and leave under s17, detailed or repetitive evidence should not be allowed.

(6) When it comes to mitigation (and to applications for leave under s17) the court is not restricted to the facts of the offence.

(7) A wide variety of matters – including the former director's age and state of health, the length of time he has been in jeopardy, whether he has admitted the offence, his general conduct before and after the offence, and the periods of disqualification of his co-directors that may have been ordered by other courts – may be relevant and admissible in determining the appropriate period of disqualification as may any period of de facto disqualification. The same matters may be relevant to an application under s17 together with particulars of the responsibilities which the disqualified director wishes to be allowed to assume.

(8) The appropriate period of disqualification is something which, like the passing of sentence in a criminal case, ought to be dealt with comparatively briefly and without elaborate reasoning. It is obviously undesirable for the judge to be taken through the facts of previous cases in order to guide him as to the course he should take in the particular case before him. The principles applicable to the court's jurisdiction under the 1986 Act are now reasonably clear. The application of those principles to the facts of the particular case is a matter for the trial judge. The citation of cases as to the period of disqualification will, in the great majority of cases, be unnecessary and inappropriate.

(9) What is required and what the court should confine the parties to, is sufficient evidence to enable the court to adopt a broad brush approach. This should be regarded, especially in relation to the period of disqualification, as a jurisdiction which the court should exercise in a summary manner and the court should confine the parties to placing before it the material which is needed to enable it to exercise the jurisdiction in that way.

SUBMISSIONS

89. Mr Buckley submits that, in the circumstances set out above: (1) it is clear that HMRC were treated differently to other creditors; (2) as Mr Zannetou was the Company's sole director, he was, or ought to have been, aware of this evolving state of affairs; and (3) in the result, Mr Zannetou caused the Company to trade to the detriment of HMRC.

90. Much of this is undisputed by Mr Zannetou, who adopted a number of concessions that were made on his behalf by Mr Brown. These were, in sum, as follows: (a) as the sole director, he was ultimately responsible for the Company at the material time, (b) he did not cope well with the Company's financial struggles, (c) he struggled to make the Company profitable, (d) the Company failed, (e) he ought not to have allowed the tax to go unpaid, (f) he should have appreciated that HMRC were being treated differently, (g) he should have dedicated more time to the Company's financial affairs, (h) at a difficult time, he prioritised his family over the business of the Company, (i) his reliance on Mr Gay does not diminish his responsibility, and (j) the Company defaulted on the time to pay agreement.

91. Mr Brown nevertheless advanced a number of arguments on behalf of Mr Zannetou. I have dealt with a number of those points when discussing the facts above. I have also dealt with Mr Brown's submissions to the effect that the conduct of other directors in other cases in which the court has concluded that their conduct did not make them unfit to be directors is relevant or helpful when considering the conduct of Mr Zannetou.

92. Further points made by Mr Brown were as follows:

(1) This is not a case involving fraud, dishonesty, preferences, want of commercial probity, or total incompetence.

(2) Mr Zannetou did not cause the Company to trade beyond a point where it should have ceased trading.

(3) When evaluating the issue of differential treatment, it is relevant to take into account that, on the one hand, the Crown was paid something, and, on the other hand, other creditors were left with substantial unpaid bills.

(4) Further, in the present case the Crown was not treated as differentially as happened in other cases where directors were not disqualified.

(5) Further still, the sums involved in the present case are of relatively low value.

(6) The extenuating circumstances or countervailing considerations in the present case include: (a) Mr Zannetou and the Company were subject to a series of unfortunate events, principally relating to his immediate family, (b) in addition to the filing of returns and the payment of some tax, Mr Zannetou was pro-actively co-operative in that he engaged in communication with HMRC, entered into the time to pay agreement and made some payments thereunder, caused the Company to submit accounts and annual tax returns to Companies House, provided a statement of affairs in August 2015 to facilitate liquidation, and has co-operated in the management of the present proceedings, (c) Mr Zannetou relied on professional advice from both his father and Mr Gay, (d) there was no cover up or hiding of the Company's liabilities – the failures to pay VAT and PAYE were limited in time and number, and Mr Zannetou then put the Company into liquidation when he ought to have done, (e) Mr Zannetou's conduct was inadvertent, not deliberate – both in failing to cause the Company to keep up with payment of its tax liabilities, and in giving priority to paying trade creditors who needed to be paid to keep the business going, (f) further, at all times he reasonably believed that the Company would trade out of insolvency and intended that the Company would meet its liabilities to the Crown, (g) Mr Zannetou put £41,000 into the Company (although it seems from the papers relating to the liquidation that ultimately he may have lost only £10,000), and (h) he is responsible, contrite, and positive about, and invested in, his business future.

DISCUSSION

93. In my opinion, the present case falls squarely within the same class of cases as fell to be considered in *Sevenoaks, Park House, Verby Print, Structural Concrete,* and *Cathie*.

94. I accept that there is no evidence either (a) that Mr Zannetou 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.

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 Mr Zannetou 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.

96. In *Park House*, Neuberger J (as he then was) referred to circumstances where "there was, in practice, a policy but it was not a conscious one: it was attributable to the difficulties in which the company found itself and the failure of [the director] to get a grip on things". Neuberger J went on to point out that "[n]onetheless, the effect was the same as that described by Dillon LJ [in *Sevenoaks*]: the company traded with insufficient working capital and was accordingly trading at the Crown's expense", and to hold that the director in question should be disqualified for 4 years. In *Verby Print*, Neuberger J made clear that once the court has found "a policy of unfair discrimination", or in other words "a director permitting a company to engage in unfair discrimination between creditors", then "the only question for the court is whether, taking into account all the relevant factors relating to the policy (including the period for which the policy continued), that finding justifies the conclusion that the person concerned is unfit to be a director of a company." Accordingly, it makes no difference of substance whether the policy which I find to have existed in the present case, based on the findings which I have made above, is properly termed conscious or unconscious.

97. So far as concerns the four periods discussed above:

    (1) It seems to me that the existence and implementation of the material policy is evident from the time the Company started trading, not least from the facts that (a) no VAT was paid from the beginning, (b) substantial payments were made to other creditors while only limited, and far smaller, payments were made to HMRC in respect of PAYE, and (c) to the knowledge of Mr Zannetou, the Company was giving greater priority to paying other creditors in comparison to HMRC and VAT and PAYE liabilities were accruing.

    (2) In effect, that policy continued by default during the second period while Mr Zannetou was in Cyprus and/or was giving priority to family matters. During that time, although he had less day to day involvement in the running of the Company,

and although he had other significant personal matters on his mind, Mr Zannetou was nevertheless aware that the policy was continuing, and was ultimately responsible for giving the instructions which resulted in it being continued.

(3) During the third period, Mr Zannetou made efforts to address the Company's liabilities to HMRC, in particular by entering into the time to pay agreement. However, and leaving aside altogether that the Company did not at any time comply with the full terms of that agreement so far as concerns future liabilities, the policy continued. As Mr Gay explained: "Without Mr Zannetou or another source providing money it wasn't possible to pay HMRC … He was using the money to keep the Company afloat … He was aware that HMRC were not being paid. He set up a payment plan that he thought he'd be able to honour …"

(4) During the fourth period, the pattern of payments became even more discriminatory. Nothing was paid in respect of either VAT or PAYE. At the same time, the reasons or explanations for non-payment of HMRC changed, revolving around the problems with the transfer of the Company's bank account. However, Mr Zannetou accepted that he could have procured payments to HMRC, and the Company made substantial payments to other creditors during this period: £26,393, £59,605, £77,965 and £19,584 in May to August 2015 respectively.

98. Having regard to the length of time during which this state of affairs continued, the sums involved, and Mr Zannetou's personal responsibility, which he rightly conceded, it seems to me that this is a case in which extenuating circumstances would be required to justify the conclusion that Mr Zannetou's conduct as a director of the Company does not make him unfit to be concerned in the management of a company. However, I am unable to regard the extenuating circumstances put forward by Mr Brown, either separately or cumulatively, as sufficient to warrant a departure from that conclusion.

99. Although a policy of deliberate non-payment of a class of debt, whether Crown or otherwise, does not necessarily give rise to a finding of unfitness, if such conduct is carried on over a lengthy period and if the non-payment is at the risk of the creditors in question, this will typically constitute misconduct justifying a finding of unfitness, and the circumstances in which it does not do so are likely to be rare (see *Structural Concrete*, but compare *Bath Glass*). Applying the test formulated in *Grayan* and approved in *Cathie*, I consider that Mr Zannetou's conduct, viewed cumulatively and taking into account all extenuating circumstances, has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies.

100. There is a tension, or potential tension, between, on the one hand, criticising a director for causing or permitting a company to trade with insufficient working capital and, in the result, trading at the expense of creditors or some class or classes of creditors, while the company is in jeopardy, and, on the other hand, the stifling of business enterprise

and initiative, which benefit from the protection that limited liability provides. It is partly for this reason that, so far as is material to the present case, it is not sufficient to merit disqualification that the director has caused a company to finance its current trading activities by using moneys which it has collected by way of VAT and PAYE and which it is liable to pay over to HMRC. This is so even if, in consequence, those moneys become overdue for payment, and ultimately, because the company is unable to meet its current and accruing liabilities, are irrecoverable on an insolvent liquidation.

101. At the same time, disqualification does not require dishonesty. What is required is "incompetence or negligence in a very marked degree" (*Sevenoaks*, per Dillon LJ at 184) or, for purposes of the present case, "a director permitting a company [by a policy] to engage in unfair discrimination between creditors" (*Verby Print*, Neuberger J at 39).

102. If the conduct complained of in the present case had lasted for only a short period of time, it would not have reached the threshold of seriousness which would justify a finding that Mr Zannetou was unfit to be concerned in the management of a company, and, indeed, it would be hard to describe the pattern of trading, albeit in fact to the detriment of HMRC, as the product of a policy, either conscious or unconscious. If the non-payment of VAT and the underpayment of PAYE had endured for the first period alone, or even for the first period in conjunction with the second period, or even for the first three periods, a finding of unfitness might not have been appropriate. However, the discrimination against HMRC did not last only for all those periods, but throughout the entire trading life of the Company - a period in total of 17 months. Furthermore, and in particular: there was in my judgment no serious engagement with HMRC until about October 2014; although a time to pay agreement was made, it was not fully complied with from the beginning, in that future liabilities were not paid even in part; and payments to HMRC ceased altogether after April 2015, and this persisted until liquidation, although they could have been made, and other creditors were being paid.

103. I am not impressed by the argument that the sums involved in the present case are of relatively low value. This was, in reality, a product of the Company's relatively modest turnover and workforce. If the Company had raised greater invoices or had a larger workforce, it would have collected larger sums by way of VAT and PAYE. It was not suggested that if this had occurred there would have been any different, or any radically different, approach on the part of Mr Zannetou to the treatment of HMRC in comparison to other creditors. Further, the history of the payments that were in fact made – including the failure to pay any VAT at any stage – suggests the contrary. However, it is fair to say, and I accept, that if the Company had been very significantly more successful, it would or might have traded out of insolvency, and, as I have already indicated, I also accept that if there had been enough money available for the Company to pay all its creditors, it would have been Mr Zannetou's intention to pay HMRC.

104. I formed the impression, both from the contemporary materials and from his evidence before me, that Mr Zannetou was not unduly troubled by the Company's failure to meet its liabilities to HMRC. I think his attitude was that, while it was desirable that the Company should meet its obligations to make payment to HMRC, this was not a pressing concern. It was an optional objective, to be attained if and when the Company was doing sufficiently well to make good from profits the sums collected by way of VAT and PAYE and used in the meantime to fund the Company's trading activities.

105. I have already addressed a number of the extenuating circumstances or countervailing considerations advanced by Mr Brown. It follows from what is set out above that I am unable to accept a number of them, or at least to accept them in full. Although Mr Zannetou was not uncooperative, his engagement with HMRC was, in substance, tardy, partial and unsatisfactory. Mr Zannetou's reliance on his father and Mr Gay cannot disguise the fact that, even when he was in Cyprus or preoccupied with family matters, the course that the Company followed with regard to HMRC was one set by him, that its liabilities to HMRC accrued to his knowledge, and that he was ultimately responsible for the fact that the Company continued to trade at the expense and jeopardy of the moneys collected in respect of VAT and PAYE, which were used to finance its business instead of being remitted to HMRC. On the materials before me, I am unable to say whether Mr Zannetou put the Company into liquidation when he ought to have done, or whether he reasonably believed that the Company would trade out of insolvency. But I do accept that he did not carry on trading in circumstances where he thought the Company would never be able to meet its liabilities to HMRC and intending that those liabilities should remain unsatisfied. It is to his credit that he put money into the Company and did not, it seems, use it to make personal financial gains.

106. In my opinion, the factor which weighs most heavily in his favour is that a number of the difficulties which he and the Company experienced were unforeseen, and at least so far as concerns his personal and family circumstances, outside his control. Mr Zannetou naturally deserves great sympathy for the family tragedies and personal difficulties which he suffered, and if the conduct complained of by the Secretary of State had been limited to those significantly disrupted times, then, as Mr Buckley acknowledged, different considerations would apply. However, the Company's trading followed the same overall pattern, of being conducted to the detriment of HMRC, both before and after those events. Moreover, having regard to the inescapable personal responsibilities which are undertaken by any individual who undertakes the statutory and fiduciary obligations of being a company director, and hard-hearted although this may appear, there is a limit to the time during which such events can be said to excuse a director allowing or instructing the continuation of a situation involving unfair discrimination.

107. In short, these matters may provide extenuating circumstances for the second period and perhaps some of the third period, but neither they nor any of the other arguments relied upon by Mr Brown, including Mr Zannetou's acceptance of responsibility and his

contrition, provide sufficient extenuating circumstances in respect of Mr Zannetou's conduct overall to escape the conclusion that it justifies a finding of unfitness.

108. I reach that conclusion with a measure of regret. Mr Zannetou struck me as a personable, enterprising, and in all likelihood fundamentally honest and decent individual, who suffered highly significant personal losses and setbacks during the trading life of the Company, who does not appear materially to have benefitted himself, and who no doubt would have discharged what was due to HMRC and others if sufficient funds had been available. Nevertheless, he was irresponsible in his direction and management of the Company. He should not have allowed his pre-occupation with keeping the business going, and indeed his personal circumstances, to distract from, and to avoid dealing with, the fact that the Company was taking unfair advantage of the reluctance or inability of HMRC to press for payment as other creditors were doing.

CONCLUSION

109. For all these reasons, a disqualification order must be made in respect of Mr Zannetou. It follows that, in accordance with the agreement of Counsel, it will be necessary to decide the appropriate period for disqualification on some other occasion. In accordance with *Sevenoaks*, the potential 15 year disqualification period provided for by s6(4) of the 1986 Act can be divided into three brackets, and the lowest bracket of 2 to 5 years should be applied where, although disqualification is mandatory, the case is, relatively speaking, not very serious. All that I will say at the present time is that, in my judgment, having regard to all the circumstances discussed above, the present case clearly falls within the lowest bracket. That is in keeping with the period of 3 years and 6 months suggested at the outset by Mr Buckley on behalf of the Secretary of State.

110. I ask Counsel to agree an order which reflects this determination of the first issue. I will hear submissions on any points which remain in dispute as to the form of the order, and on any other issues such as costs and permission to appeal, either when judgment is handed down, or else on an adjourned hearing on some other convenient date.