Neutral Citation Number: [2019] EWHC 459 (Ch)

Case No: CR-2016-006347

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

Rolls Building
Royal Courts of Justice
7 Rolls Buildings
London EC4A 1NL

Date: 1st March 2019

Before :

ICC JUDGE MULLEN

- -

IN THE MATTER OF ST JOHN LAW LIMITED

AND IN THE MATTER OF
THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986

B E T W E E N :

THE SECRETARY OF STATE FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY — **Claimant**

- and -

RAYMOND ST JOHN MURPHY — **Defendant**

- -

Ms Anna Lintner (instructed by **Womble Bond Dickinson**) for the **Claimant**
The Defendant appeared in person

Hearing dates: 29th – 31st January 2019

- -

Approved Judgment

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

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ICC JUDGE MULLEN:

Introduction

1. This is an application for a disqualification order under section 6 of the Company Directors Disqualification Act 1986 ('the CDDA 1986') to be made in respect of Mr Raymond St John Murphy ('Mr Murphy'). The application follows the administration and subsequent liquidation of St John Law Limited ('St John' or 'the Company'), of which Mr Murphy was the sole director.

2. The statement of matters determining unfitness required by Rule 3 of the Insolvent Companies (Disqualification of Unfit Directors) Procedure Rules 1987 is contained in the first affirmation of Mr Robert Sheils, dated 5th October 2016. There are two allegations. The first is trading to the detriment of HM Revenue and Customs ('HMRC') and is referred to by the Secretary of State as 'the HMRC Allegation'. It is as follows:

> '9. Raymond St John Murphy ("Mr Murphy") caused St John Law Limited ("St John") to fail to comply with obligations to file and pay taxes as and when due, to the detriment of HM Revenue & Customs ("HMRC"), over the trading period May 2012 to 9 October 2014, in that:
>
> - St John commenced trading in May 2012 and ceased at the date of Administration on 9 October 2014.
>
> PAYE, NIC, Corporation Tax ("CT") and Schedule D
>
> - Schedule D Stamp Duty of £14,049 was due and payable on 9 December 2012 but remained outstanding at Administration
>
> - PAYE & NIC of £193,278 due for the year 2012/2013 should have been paid in full by 19 April 2013, £152,434 remained outstanding at the date of Administration
>
> - PAYE & NIC totalling £107,504 was due and payable monthly under Real Time Information ("RTI") reporting for the year 2013/2014, £98,159 of which remained outstanding at the date of Administration
>
> - PAYE & NIC totalling £98,180 was due and payable monthly under RTI for the year 2014/2015, £96,180 of which remained outstanding at the date of Administration, an employment credit of £2,000 having been given

- CT of £15,228 for the period ended 3 November 2012 was due for payment by 4 August 2013 and £1,308 for payment by 1 September 2013, none of which had been paid

- With the result that at the date of Administration, HMRC were owed a total of £386,074 in respect of PAYE, NIC, CT and Schedule D Stamp Duty, including interest and penalties

VAT

- VAT returns and any payment due thereon were due in respect of the period ended July 2012, by 7 September 2012 and in respect of every quarter thereafter. However, the quarter ended July 2012, on which £36,420 was due and the quarter ended October 2012, on which £18,318 was due, were not filed until 3 May 2013. The quarter ended January 2013 on which £11,875 was due and quarter ended April 2013 on which £17,135 was due, were not filed until 23 July 2013. No further returns were filed prior to Administration.

- No payments were made in respect of VAT throughout.

- With the result that at the date of Administration, a total of £196,255 was due to HMRC in respect of VAT.

Comparative treatment

- St John's Financial Statements show turnover of £649,752 in the period to 30 November 2012 and £1,292,535 for the year ended 30 November 2013. St John's bank statements show income of £1,176,796 in the period 1 December 2013 to Administration.

- Only £50,189 had been paid to HMRC over the entire trading period, none which had been in respect of VAT

- Over the same period, Mr Murphy had received repayments totalling £241,003 against his director's loan and St John had made payments totalling £75,818 to a person who was not a director, shareholder, employee or creditor of St John

- With the result that at the date of Administration, £582,330 was owed to HMRC. Other creditors were owed £404,341, £94,466 of which was to the Redundancy Payment Service, funded by HMRC'

3. The second allegation relates to the making of payments out of St John's account after presentation of a winding-up petition by HMRC, which payments were outside the scope of a validation order obtained on 29th August 2014 (referred to as 'the Validation Order Allegation'). That allegation is as follows:

> '10. Between 27 June 2014 and 09 October 2014 Raymond St John Murphy ("Mr Murphy") caused St John Law Limited ("St John") to make payments to himself of £24,400 and to make further payments in excess of those agreed by virtue of the schedule to the Validation Order dated 29 August 2014 totalling £200,752 at a time when he knew that the company was insolvent and were therefore to the detriment of creditors… In that:
>
> - On 27 June 2014, HM Revenue & Customs ("HMRC") filed a Winding-Up Petition in the High Court against St John
>
> - Before 04 July 2014 and 18 August 2014 Mr Murphy caused St John to make payments to himself totalling £24,400.
>
> - On 29 August 2014 St John made an Application to the High Court for a Validation Order pursuant to Section 127 of the Insolvency Act 1986 *"for an Order that payments made out of and into the Law Firm's bank account in the ordinary course of business from the date of presentation of the Petition until the date of judgement on the Petition or further Order in the meantime shall not be void by virtue of the provisions of section 127 of the Insolvency Act 1986."*
>
> - On the same date the High Court granted the Order, that payments in the Schedule attached to the Order and totalling £129,616 (additional professional fees of £15,000 were later allowed) shall not be void by virtue of the provisions of Section 127 of the Insolvency Act 1986. This Schedule specifically excluded Mr Murphy from the Staff Salaries total and did not include any specific payments to him.
>
> - Over the period 27 June 2014 to the date of Administration on 9 October 2014, payments totalling £370,481 were made out of St John's bank account. These included the payments totalling £24,400 to Mr Murphy.'

I have omitted those parts of this allegation that are no longer relied upon by the Secretary of State.

4. Mr Murphy opposes the application and has summarised his case in a skeleton argument dated 25th January 2019. He states that he carried out his duties as a director honestly and responsibly and, in particular, caused the Company to maintain proper accounting records. He states that he:

> 'denies that he permitted the Company to continue trading when it could not pay its debts'

and that:

> 'D maintained proper company accounting records and the records which are now found to be missing would demonstrate that he had made appropriate arrangements to discharge liability to tax, that there was an offset in respect of monies due by C to D and that he did not appropriate company money or assets for personal benefit.'

The reference to missing records is a reference to records of the Company stored on a cloud-based record-keeping system called 'Osprey' and are said to have included emails, client ledgers and other financial records. I shall refer to the information stored on the Osprey system as 'the Osprey Records'.

5. Mr Murphy contends that he cannot have a fair trial in the absence of the Osprey Records. These were deleted from Osprey on or about 20th July 2015, six months after the Company's subscription to the system lapsed during the course of the administration. These proceedings have come to trial nearly five years after the administration of the Company and Mr Murphy says that it is unconscionable for the trial to proceed in circumstances where these records are not now available for him to prove his defence. Indeed, Mr Murphy says that he was not told of the lapse of the Osprey subscription until April 2017, by which time it was too late for him to seek to recover the Osprey Records himself.

6. His position on the allegations is set out more particularly in his written evidence. He relies principally on three matters in defence of the HMRC Allegation –

   i) The first is that a substantial sum was owed by HM Treasury to him in relation to a costs order made in criminal proceedings brought against him in about 2011 ('the Costs Order') and that this would have been sufficient to discharge the tax liabilities in due course ('the Costs Order Defence').

ii) The second is that the Company's fee income from unbilled work and conditional fee cases would have enabled it to meet its liabilities to HMRC in due course ('the Work in Progress Defence'). He contends that St John was therefore not insolvent.

iii) The third is that the Company's payments in the trading period, which have been shown as credits to his director's loan account, were proper and represented modest remuneration to him ('the Proper Payments Defence').

In respect of the Validation Order Allegation he states that the payments made after presentation of the petition were also proper. They represented liabilities that he was required to discharge on behalf of the practice. Though it is not readily apparent from his written evidence, he also contends that many of the payments out of the Company's office account after presentation of the petition were payments of monies held on trust for clients and did not amount to dispositions of the Company's property in any event.

7. The Secretary of State was represented by Ms Lintner of counsel. Mr Murphy represented himself during these proceedings. Although Mr Murphy is an experienced solicitor he does not specialise in cases of this sort. He conducted himself with courtesy, cross-examining the Secretary of State's witnesses and making submissions on his own behalf effectively.

Applicable principles

8. Section 6 of the CDDA 1986, as it applies in this case and is material, provides as follows:

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

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

Section 9, again as it applies in this case, provides:

> '(1) Where it falls to a court to determine whether a person's conduct as a director of any particular company or companies makes him unfit to be concerned in the management of a company, the court shall, as respects his conduct as a director of that company or, as the case may be, each of those companies, have regard in particular—
>
> (a) to the matters mentioned in Part I of Schedule 1 to this Act, and
>
> (b) where the company has become insolvent, to the matters mentioned in Part II of that Schedule;
>
> and references in that Schedule to the director and the company are to be read accordingly.'

9. The Schedule requires that the following, in particular, be taken into account:

> '1. Any misfeasance or breach of any fiduciary or other duty by the director in relation to the company, including in particular any breach by the director of a duty under Chapter 2 of Part 10 of the Companies Act 2006 (general duties of directors) owed to the company.
>
> …
>
> 6. The extent of the director's responsibility for the causes of the company becoming insolvent.
>
> …
>
> 8. The extent of the director's responsibility for the company entering into any transaction or giving any preference, being a transaction or preference—
>
> (a) liable to be set aside under section 127 or sections 238 to 240 of the Insolvency Act 1986'.

The duties under the Companies Act 2006 include, at section 172, a duty upon a director to act in the way that he or she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. This is subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company. Such a requirement arises where the

directors know, or should know, that the company is insolvent or is likely to become insolvent (see *West Mercia Safetywear Ltd v Dodd* (1988) 4 BCC 30, 33, *per* Dillon LJ, and *BTI 2004 LLC v Sequana SA* [2019] EWCA Civ 112, *per* David Richards LJ, para. 220). Section 174 of the 2006 Act imposes a duty upon a director to act with reasonable care, skill and diligence.

10. In relation to transactions liable to be set aside under section 127 of the Insolvency Act 1986 it is sufficient for present purposes to note that section 127(1) provides:

> 'In a winding up by the court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void.'

The Court may, on application, validate dispositions of a company's property prospectively or, less usually, retrospectively.

11. The provisions of the schedule are not exhaustive and the Court can consider any misconduct on the part of the director when considering whether his conduct makes him unfit for the purposes of the CDDA 1986 (see *Re Amaron Ltd* (1998) B.C.C. 264 at 268 F-G). In *Re Bath Glass Ltd* (1988) 4 BCC 130, 133, Peter Gibson J said as follows:

> '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.'

The Court must focus exclusively on the allegations set out by the Secretary of State. In *Re Grayan* [1995] Ch 241, 253, Hoffman LJ said:

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

12. There is authority as to how an allegation of trading to the detriment of HMRC is to be approached. Non-payment of Crown debts is not, in itself, sufficient to justify disqualification (see *In Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch. 164, 183 per Dillon LJ). There must be a policy of unfair discrimination between creditors. Ms Lintner has helpfully drawn my attention to the summary of the principles set out in the judgment of Mr Registrar Jones (as he then was) in *Secretary of State for Business, Energy and Industrial Strategy v Sahar Khan* [2017] EWHC 288 (Ch). In that case, he said as follows:

> 'The following legal principles are primarily to be found in the decision of *Re Structural Concrete Ltd* [2001] BCC 578, a decision approved by the Court of Appeal in *Cathie v Secretary of State for Business, Innovation and Skills (No2)* [2012] EWCA Civ 739, [2012] BCC 813:—
>
> 1) The starting point is to establish a discriminatory practice of paying other creditors with the result that the company is trading at the expense of the creditor who is discriminated against. This may constitute unfit conduct.
>
> 2) The evidence required to establish a policy of discrimination can be direct but can also be inferred from conduct; for example, the fact of withholding payment for a significant period in contrast to the payment of others. Such practice is normally found in cases where the company is insolvent, cannot pay all its creditors when the debts falls due and the director decides to pay those creditors who press and not those who forbear (whether intentionally or because of administrative problems in pressing for prompt payment of companies in financial difficulty).
>
> 3) If a deliberate policy of non-payment of Crown debts is established, the court asks whether the defendant has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies taking into account any extenuating (not the higher test of exceptional) circumstances. However, the guidance of the court is that a deliberate policy of non-payment over a lengthy period is likely to be misconduct justifying such a finding.
>
> 4) If the Defendant has fallen below the required standards of probity and competence, it is the duty of the court to make a disqualification order. Other matters, such as subsequent conduct and the current position are for mitigation and/or an application for permission to act.

I would respectfully adopt that summary and make one additional point derived from the authorities. In *Verby Print for Advertising Ltd* [1998] B.C.C. 652, 665D, Neuberger J (as he then was) explained that a finding that there was a deliberate policy of discriminating between creditors does not require a conscious decision to that effect on the part of the directors of a company:

> '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.'

13. As to any period of disqualification, if the Court considers that the conduct of a director merits a disqualification order it must disqualify him for between 2 and 15 years. In *Re Sevenoaks Stationers (Retail) Limited* [1991] Ch 164 the Court of Appeal provided guidance as to how the exercise of deciding upon period is to be approached. The potential disqualification period is divided into three brackets:

    i) the top bracket – over 10 years, reserved for particularly serious cases;

    ii) the middle bracket – 6-10 years, for serious cases that do not merit the top bracket; and

    iii) the minimum bracket – 2-5 years, for cases that are not, relatively speaking, very serious.

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

15. The Court may also take into account any light that is thrown upon a defendant's unfitness as a director by the evidence that he gives on the allegations against him, of which he has been given prior notice. This may be taken into account either when considering unfitness or in consideration of the proper period of disqualification (see *Secretary of State for Trade & Industry v Reynard* [2002] B.C.C. 813).

General background

16. The following is uncontentious between the parties for the purposes of these proceedings. Mr Murphy is a solicitor who was admitted in 1972, becoming a partner in the firm of Merriman White in 1975. In 1985 he became principal but, by the 1990s, was once again practising in partnership. The firm specialised in medical negligence claims and also acted for number of construction companies. The medical negligence work diminished from around 2000 and alternative streams of work were obtained from a claims management company. The insolvency of that company in around 2000 had consequences for Merriman White, in that they were unable themselves to meet expenses in ongoing conditional fee cases for which the management company would otherwise have paid. This led, it is said, to liabilities of over £3 million and over 2000 cases to be completed. As a result, Mr Murphy and his then partner were adjudged bankrupt in June 2005 on the petition of HMRC.

17. In the course of the bankruptcy, questions were raised as to the disposal of Mr Murphy's interest in Merriman White. Mr Murphy states in his evidence that his trustee in bankruptcy was instrumental in causing criminal proceedings to be brought against him in relation to this. The criminal prosecution was withdrawn in about November 2010 and the Costs Order was made in Mr Murphy's favour. Those costs were subject to assessment.

18. In the period following Mr Murphy's bankruptcy he had been subjected to practising restrictions by the Solicitors Regulation Authority. Those restrictions were lifted in 2012 and Mr Murphy was able to establish and operate his own practice once more. St John, which had been incorporated on 4th November 2011, began to trade on 1st May 2012, with Mr Murphy as its sole director. It operated from leasehold premises in

London and specialised in litigation. It employed 14 staff members, of whom seven were solicitors.

19. The Company was registered for VAT and its first return should have been filed, and payment made, by 7th September 2012. It is not in issue that the return, showing the sum of £36,420 to be due, and the return for the quarter ended October 2012, showing the sum of £18,318 to be due, were not filed until 3 May 2013. The return for the quarter ended January 2013, showing VAT due in the sum of £11,875, and the return in respect of the quarter ended April 2013, showing the sum due of £17,135, were not filed until 23 July 2013. No further returns were submitted, and the remainder of the Company's liability arises from assessments and surcharges. In total, £196,255.97 was due at the date of administration and nothing was paid at all in VAT over the whole trading history of the Company.

20. Other taxes fell due over the Company's trading period. Schedule D Stamp Duty of £14,049 was due and payable on 9 December 2012. PAYE and NIC of £193,278.86 was due for the tax year 2012/2013 and should have been paid in full by 19 April 2013. Corporation Tax of £15,228 for the period ending 3rd November 2012 was due for payment by 4th August 2013 and a further £1,308 fell due for payment by 1st September 2013. PAYE and NIC of £98,159 was due for the tax year 2013/2014. These liabilities, totalling £386,074, were not met as they fell due and only £50,189 was paid in respect of them. None of these payments related to Corporation Tax.

21. HMRC contacted the Company about its tax liabilities. In the evidence to which I have been referred are print outs of HMRC's electronic records of its interactions with the Company from May 2013. I have also seen letters sent to and from the Company. The first relevant letter is dated 18th September 2012, following correspondence as to whether the Company would be required to give security for payment of VAT. The letter confirmed that HMRC would not require security but that the return for the period ending July 2012, and payment, were outstanding and should be submitted to avoid further action. An assessment in the sum of £14,208 was in fact raised on 12th September 2012. A cheque was received by HMRC for this amount but failed to clear. A further letter dated 30th January 2013 put the Company on notice that its VAT returns for the period ending July 2012 and October 2012 were outstanding and that, if these were not submitted, security might be required.

22. An anticipated payment from HM Treasury was relied upon by the Company in its interactions with HMRC in respect of its tax liability. It is not in dispute that this is the payment due under the Costs Order. The HMRC records shows that, on 3rd May 2013, a telephone call was made to Mr Murphy who:

> 'advised should be able to pay in full within 2 weeks once the treasury paid over the money.'

A follow up conversation took place on 17th June 2013 in which Mr Murphy is recorded to have:

> 'advised money will be coming in soon, have a letter that he would forward to me from treasuary [*sic*]. Advised returns are o.s too, he stated they should have been submitted but will check with the acc.'

On 20 June 2013 there was another telephone call between a representative of HMRC and Mr Murphy. HMRC's note says as follows:

> 'spoke to DIR who advised all the info has been sent over to the court service so should have the money paid by the end of next week. the vat returns are being completed and the PAYE is being received from the acc.'

On 1 July 2013, HMRC's records show a conversation with Mr Murphy, who said that he had should have some more information in relation to payment in the following week. A follow-up phone call on 15 July 2013 is recorded, showing that Mr Murphy stated that he should have 'an idea about money soon and will endeavour to make a payment by fri.'

23. In due course St John agreed a time-to-pay agreement with HMRC and this was confirmed in a letter from HMRC dated 24 July 2013. This set out that the total amount due from the Company at that time in respect of PAYE was £174,446.98 and that the total amount of VAT due was £84,606.87. The agreement was that £15,000 would be paid each month and the first payment would be made by 1st August 2013. Again, it is not in dispute that no instalments were paid pursuant to that agreement.

24. Following the failure to abide by the terms of the arrangement Mr Murphy wrote on behalf of St John to a Miss Bishop of HMRC on 20 January 2014 and said as follows:

> 'This is not a case of failure to comply with a payment arrangement. I am not indebted to HMRC because HM Treasury owes me some substantially in excess of your claim.
>
> You will see from your file the sum of £546,759.88 is outstanding and due to us pursuant to a costs order made in our favour dated 24th November 2010. Statutory interest of 8% from 24th November 2010 to date amounts to £142,000 making a total liability to me of £688,759.88. To date payments on account of £258,827.29 have been assessed leaving a total sum outstanding to us £429,932.59, exclusive of costs.'

Later in that letter Mr Murphy said as follows:

> 'I note from your letters that you intend to issue a petition on the grounds that our company is unable to pay its debts. This is not the case. We have a good defence by way of a set off until HM Treasury discharge the liability to us. The delay in dealing with settlement of a claim by HM Treasury has prevented us from complying with the repayment arrangement.
>
> We are not insolvent. There is a good defence to the claim and presentation of the petition would not be a proper use of the process. In these circumstances can you please confirm that you will not present a winding up petition without giving sufficient notice to apply to the court for an injunction to restrain presentation as an abuse of process.
>
> I note from your letters that you have suggested that we instruct an insolvency practitioner. As we are entitled to offset the amount due to us from HM Treasury is unfair to force us into an insolvency process when the reason for the problem is delayed due to government cutbacks in settling outstanding costs claim.'

One can see that by this stage the Costs Order was being relied upon not simply as a source of funds becoming available to St John but as a sum of money due to the Company operating as a set-off defence to a claim for unpaid tax. It is accepted by Mr Murphy that the Costs Order was not made in favour of the Company.

25. On 16 June 2014 HMRC received a call from Mr Murphy. According to the record, Mr Murphy informed HMRC's representative that the Company was still:

> 'waiting for the judge's decision on the case held last week but they are confident that they have won. I advised that as they haven't got the judge's decision I cannot sit on this case any longer. I cannot justify giving them anymore time especially when they do not know if they have won the case or not. I will

> be instructing sols today but he may have time as I don't know how long it takes for a petition to be filed.'

A petition was presented by HMRC on 27th June 2014. On 14th August 2014 HMRC's records show that a letter or email was received from the Company that asked HMRC not to advertise the petition and to agree to a twelve week adjournment. HMRC's record states:

> 'They also threatened injunctions & defence of debt claiming that they were not liable for the tax until the funds due to them paid.'

26. On 29th August 2014, the Company applied for a validation order and its application was supported by a witness statement from Mr Murphy of the same date. Mr Chief Registrar Baister granted the application and validated the payments out of the Company's office account that were specified in the schedule to the Order.

27. An administration order was made on 9th October 2014. The application for the order was supported by further statements made by Mr Murphy. In his second statement, dated 19th September 2014, he explained that St John was insolvent on a cashflow basis and that the proposed administrators were of the view that it was not reasonably practicable to rescue the Company as a going concern. The Company exited administration via a creditors' voluntary liquidation on 24th September 2015.

28. These proceedings were issued on 6th October 2016. Directions were given by Registrar Derrett for the filing of evidence in opposition on 30th November 2016 and a further directions hearing was listed for 22nd March 2017. On that date the matter came before Mr Registrar Briggs, as he then was. He directed the filing and service of evidence by the Secretary of State as to the client ledgers of St John, specifying whether those ledgers existed, what searches to be made for them and whether the liquidators had ever had those ledgers in their possession or control.

29. In response to that order the Secretary of State filed the affidavit of Kate Merriman, dated 19th April 2017, which set out the correspondence with the liquidators and explained that they had confirmed that the entire email and electronic files of the Company had been maintained on Osprey. 'Pracctice Ltd', which provides the Osprey system, confirmed to Ms Merriman that the final subscription payment made by St John

was in October 2014 and that data tended to be removed from their servers six months after termination of their service. They stated that the records maintained on Osprey were no longer available.

30. When the matter was next before the court on 25 October 2017, Registrar Derrett directed that Mr Murphy was to make any application to strike out the claim as an abuse of process by 22nd November 2017. An application was indeed made on that date, supported by a witness statement from Mr Murphy which relied on the deletion of the Osprey Records. On 15th June 2018 that application came before Deputy ICC Judge Baister. He dismissed the application and directed that Mr Murphy could file and serve further evidence in answer to the claim by 16th July 2018. Mr Murphy did not take the opportunity to put in any further evidence.

The witnesses

31. I heard from Mr Robert Thomas Sheils, a senior examiner in the Investigations Directorate of the Insolvency Service. Mr Sheils has made four affirmations in these proceedings, which are dated 5th October 2016, 25th April 2017, 31st May 2017 and 11th May 2018. Mr Sheils has no direct knowledge of the facts leading up to the Company's insolvency. He gave his evidence on the basis of the documents available to him. Much of Mr Murphy's cross-examination of him concerned St John's records and what those records might have shown, given the Company's obligations, as a solicitors' practice, to keep such records in accordance with professional rules. My impression of Mr Shiels was that he was a careful and straightforward witness. He accepted the existence of any gaps in the information available to him when these were put to him by Mr Murphy. His evidence was directed at placing the information received by the Secretary of State before the court and there was no real challenge to his credibility.

32. The Secretary of State also relied upon the oral evidence of Mr Chi Ho and Mr Sean Bucknall, who are both employees of Quantuma LLP. Mr Bucknall is a partner in Quantuma and had conduct of the administration and liquidation of the Company on behalf of the joint liquidators. He made a witness statement on 10th May 2018 (although the date is not noted on the document itself) in which he gave evidence as to the maintenance of the Company's records and, in particular, the Osprey Records. His evidence was that the Osprey Records did not contain details of the Company's work in progress. The practice management system was not used by the Company as a whole;

individual fee earners recorded time in their own ways, with some costing a file by reference to correspondence held on the hard copy of the client file and others keeping records in Word files or Excel spreadsheets. He noted that he wrote to Mr Murphy on 25th August 2015 to explain that he considered that the value ascribed to work in process of £900,000 was unreliable as the practice management system had not been used, but that he had no response to suggest that a system for recording time was used by the fee earners. He explained that Mr Murphy had referred to two cases, referred to as the 'Ashcroft' and 'Celtic' cases, which Mr Murphy had stated to have sufficient work in progress to discharge the Company's tax liability if successful. As far as he was aware, neither case had been successful.

33. Mr Bucknall was cross-examined by Mr Murphy about the Osprey Records and the information as to work in progress contained in them. He could not recall when Mr Murphy had been told that the Osprey subscription had not been kept up. He maintained that the practice management system had not been used by the fee-earners at the Company and that he could not say whether all time had been recorded. He was also asked about the payments out of the Company's office account made after presentation of HMRC's winding-up petition. He was unable to express a view whether certain of these payments were payments made on behalf of clients, such as counsel's fees, or payments of monies held on behalf of clients, such as payments that clients had been awarded in litigation. He conceded that he was unable to say that records had not been properly maintained as he was not charged with looking at individual client account records.

34. Mr Ho is an assistant manager at Quantuma and made a witness statement dated 10th May 2018. He gave evidence as to the Company's records, the availability of the Osprey system and Mr Murphy's requests for, and inspection of, documents. His evidence was that Mr Murphy had visited Quantuma's office on 12th September 2016 and was given access to the physical books and records held but did not ask for client ledgers. An accountant instructed to prepare a 'cease to hold' report for the Company then asked to review the records and was told that the physical records maintained might or might not contain the client ledgers. He states that the Osprey subscription lapsed on 20th January 2015 when it was no longer required for the purposes of the administration and he cannot recall Mr Murphy ever having requested access to it.

35. Mr Ho was cross-examined by Mr Murphy as to the records maintained by the Osprey system. He said that was not aware of the extent of the records or of specific client files and he was not involved in the transfer of live cases to other solicitors following the administration. It was put to him that various records had been lost, including wills. Mr Ho had no knowledge of this and said that Quantuma had been asked to transfer will files and these had in fact been transferred.

36. Both Mr Bucknall and Mr Ho gave their evidence in a measured and thoughtful way and they accepted the limitations of their knowledge of the Company's records. Again, I am satisfied that they were seeking to assist the court.

37. Mr Murphy has made two statements in these proceedings, the first being an affidavit sworn on 16th January 2017 and made in answer to these proceedings and the second being a statement made on 22nd November 2017 in support of his application to strike out the proceedings. He was cross-examined over the course of a day and a half by Ms Lintner.

38. Mr Murphy was a confident witness. He tended to ignore Ms Lintner's questions, using them as an opportunity to make the points he wanted to make, rather than answering the question directly. While Mr Murphy was straightforward in some respects – for example in accepting that tax was not paid because the Company could not afford to do so – he was not a satisfactory witness. As I shall note below, his evidence was inconsistent on a number of points and he sought to take the Secretary of State by surprise in his evidence as to the purpose of certain payments and the identity of the paying party in the proceedings that led to the Costs Order. His contentions that the Company was in fact solvent and his statements to HMRC about the Costs Order are simply unsustainable. At best they show a troubling willingness to say what seems convenient at the time without proper consideration for accuracy.

A fair trial and the availability of the Company's records

39. The question of whether Mr Murphy can receive a fair trial has already been considered by the Court. In his witness statement in support of his application to strike out the proceedings, Mr Murphy referred to the records that St John was obliged to maintain by reason of the Solicitors' Accounts Rules 2011. He pointed to the Company

accountant's report which confirmed that, as at 30th May 2014, its accounts were compliant with these rules.

40. In September 2016 Mr Murphy made arrangements to inspect St John's financial records in connection with the production of a 'cease to hold' report – that is to say an accountant's report confirming the date on which a closing solicitors' practice ceased to hold client monies. He stated in his evidence that he was told that the client ledgers were not available but that he was given no explanation for this. Mr Murphy stated that these records would show his efforts to satisfy the Company's liabilities to HMRC and that sums due in respect of unbilled work and work in progress would have been sufficient to discharge those liabilities.

41. There is no transcript of Deputy ICC Judge Baister's extempore judgment, but it has been agreed that a note prepared by Ms Lintner's instructing solicitors at the time accurately reflects what he said. There remains a dispute as to what the effect of the judgment was. The Secretary of State contends that the question of a fair trial has been determined. Mr Murphy's submission was that the deputy judge declined to strike out the claim because it would be for the trial judge to determine whether or not he could have a fair trial.

42. The deputy judge considered that Mr Murphy's contention that the Company was insolvent was likely to be unsustainable in the light of the admission that no tax was paid and the administration order. As to the HMRC Allegation, he noted that (I paraphrase), while the Company's records might enable Mr Murphy to make good his allegation that work in progress and the Costs Order would enable HMRC to be paid so that St John was solvent on a balance sheet basis, if not cashflow solvent, it did not address the specifics of the allegation that HMRC were unpaid or treated unfavourably. At best those points went to the question of whether Mr Murphy was unfit or to mitigation. Similarly, in relation to the Validation Order Allegation he stated that it was open to Mr Murphy to consider which of the payments out of the office account were payments of trust monies and which were payments of Company monies and to outline this in a witness statement and gave him the opportunity to do so.

43. It seems to me that the Ms Lintner is correct as to the effect of the judgment. Deputy ICC Judge Baister concluded that Mr Murphy could have a fair trial. It is not now open

to Mr Murphy to contend that he cannot. The deputy judge did however make it clear that it was for the trial judge to weigh the evidence (again I paraphrase), bearing in mind the availability and relevance of the records. He said that absence of records could 'cut both ways.' I respectfully agree. It is for the Secretary of State to make out his allegations and, if I were to consider that Mr Murphy's evidence on an issue to be credible, then the Secretary of State might be at a disadvantage in being unable to adduce the Osprey Records to undermine that evidence.

44. Though the matter has been determined by Deputy ICC Judge Baister and cannot be reopened I should say that I respectfully agree with his conclusion. It would indeed have been possible for Mr Murphy to identify, for example, payments made after presentation of the petition which he says were payments of monies held on trust for clients and to set out his case as to the likely recovery from the Company's work in progress in some detail. He chose to do this in the witness box, however, rather than taking the opportunity to put in a further witness statement.

The HMRC Allegation

45. I have already explained that over its trading life, the Company accrued liabilities to HMRC in respect of PAYE income tax, National Insurance Contributions, Corporation Tax, and Schedule D Stamp Duty in the total sum of £386,074. The Company also accrued over the same period liabilities for VAT totalling some £196,255. It is not in issue that the Company paid just £50,189.32 to HMRC over its entire trading period. No payments at all were made in respect of VAT. The overall effect of this is that the total amount owed to HMRC at the date of administration was £582,330. Other creditors, on the face of the documents, were owed £404,341 of which £94,466 was owed to the redundancy payment service funded by HMRC. A further £222,364 related to staff claims, including £104,750.46 in respect of bonuses and commissions for work introduced. Mr Murphy suggests that this sum is overstated by reason of agreements he reached with employees. If that is so, it has the effect of reducing the amount due to creditors other than HMRC further. I do not have to decide if that is so.

46. Over the Company's trading period, payments of some £241,003 were debited from Mr Murphy's director's loan account on the face of the documents. Mr Murphy was taken to two schedules prepared by the Company's accountants, Foxley Kingham, and sent to the Insolvency Service under cover of a letter of 6th November 2015 –

i) The first shows transactions on the director's loan account to 30th November 2012, beginning with the credit to the account of £373,000, introduced to the Company by way of a loan from sums derived from Mr Murphy's pension on 1st May 2012. At the end of that financial year £139,687.92 is shown as being due to Mr Murphy.

ii) The second schedule shows further credits to the account in the financial year ending 30th November 2013 amounting to £183,566.57. It also shows numerous debits, reducing the amount owed to Mr Murphy to £204,096.98 as at 30th November 2013. This is the amount shown to be due to Mr Murphy in the statement of affairs dated 9th October 2014.

Included in the payments debited from Mr Murphy's loan account up to the year ending 30th November 2013 is a total of £75,818 to Mr Murphy's daughter-in-law, Ms Lucie Murphy, who was not a director, shareholder, employee or creditor of the Company.

47. Mr Murphy was also taken to Mr Shiels's analysis of the Company's bank statements, showing payments directly to him for the period 23rd February 2012 to 18th June 2014, which total £145,138. Payments totalling £72,100 were made after the year ending 30th November 2013 and, if treated as credits to the director's loan account, would reduce it further to £131,996.98.

48. Mr Murphy does not challenge the sums due and said to have been paid to HMRC. He accepted that there was a systematic failure to pay it. The reason for this, he said in cross-examination, was that the Company was not able to pay. In respect of VAT he again acknowledged that no payment had ever been made and the Company was not able to pay the VAT due. He accepted that he was well aware of the sums owed and that he was the person who would decide who was to be paid. In his first affidavit he stated that his primary duty was to ensure access to justice and put the interests of his clients first. He has accepted that there was a decision to use the Company's income and resources to continue to trade, rather than to pay tax. That is quite clear from the evidence that I have seen. He relies, however, on the defences that I have referred to above and I will now consider these.

(1) The Costs Order Defence

49. The fact that a company might hope to be able to pay tax at some point in the future does not mean that it is not operating a policy of unfair discrimination against the Crown. If a decision has been taken to withhold tax due to HMRC, or monies due to another non-pressing creditor, over an extended period in order to continue to pay staff and other creditors then the policy is made out. A genuine intention and realistic prospect of paying, albeit late, might provide some degree of mitigation.

50. I have already set out how the Costs Order was deployed by Mr Murphy in the course of his interactions with HMRC. It was represented both that money was imminently due and that the Costs Order could be set off against tax, affording a defence to the threatened petition. There is no evidence that Mr Murphy's representations to HMRC that these monies would be paid imminently had any foundation in fact. Mr Murphy has provided no evidence of efforts to obtain such evidence. While he said in submission that he had been told the records had been shredded by the court, there is no evidence of this and nor does he appear to have contacted the paying party to fill in any gaps in the documentation to which he might not have access. He withheld details about the proceedings and chose to wait until this trial to claim that the paying party had in fact been the Department for Business, Energy and Industrial Strategy, as it is now called, thus denying the Claimant a sufficient opportunity to check its own records. He was asked by the Insolvency Service as long ago as 1st February 2016 to provide details of the department involved in the criminal proceedings and give details of the name and contact details of the person in the 'debtor department' and, if more than one department was involved, to provide all contact information. He did not do so.

51. Nor has he provided any details to show that the costs, once assessed and paid, would have been be sufficient to enable the tax to be paid, as represented to HMRC. Mr Murphy does not appear to have sought to obtain his own banking records. The only evidence of a payment to Mr Murphy was obtained on behalf of the Secretary of State from the Ministry of Justice website. This shows a payment to Mr Murphy of £96,234.28 on 19th November 2014. The paying party is shown to be HM Courts and Tribunals Service and the payment is said to have been made in respect of court costs. That is plainly insufficient to have discharged the Company's tax liabilities and there is no evidence of any other sum being paid pursuant to the Costs Order.

52. I have set out the exchanges with HMRC above and I do not need to repeat them. It is clear that the Costs Order was used to stave off action by HMRC from quite early in the Company's trading life, first, on the basis that it was a source of funds and, secondly, on the basis that it operated as a defence to HMRC's claim. Mr Murphy stated in his letter of 20th January 2014 that 'we', that is the Company, 'have a good defence by way of a set off until HM Treasury discharge the liability to us.' It is apparent from Mr Murphy's use of those words that he was representing to HMRC that the Company itself was due a payment from a government department that it was entitled to set off against tax. That was untrue. Mr Murphy is an experienced litigation solicitor and he accepted that he understood the difference between money owed to him personally and money owed to his company. Indeed, at paragraph 4.6 of his second witness statement in support of the Company's administration application he stated that the Costs Order was owed to him personally. That being so, this letter can only be read as a distortion in order to stay HMRC's hand. Regrettably, his distortion of the true nature of the Costs Order was relied upon in the application for the validation order. Mr Murphy again stated at paragraph 10.3 of his statement in support of the validation application that the Company had a 'counterclaim' in respect of the petition debt. He continued to contend that the Cost Order created an 'offset' in his skeleton argument prepared for this trial.

53. The correspondence with HMRC with regard to the Costs Order does not lead me to conclude that there was a *bona fide* intention to discharge the Company's liabilities to HMRC. It certainly provides no defence to the allegation. On the contrary it shows that Mr Murphy was prepared to mislead HMRC in order to try and prevent it from taking action for payment and to gain more time. He has not offered any submission as to how a payment due to him could properly be said to operate as a set-off in favour of the Company and I cannot see how Mr Murphy, with the benefit of his legal background, could have genuinely considered that it could.

(2) The Work in Progress Defence

54. This is relied upon by Mr Murphy in two ways. First, it is said that the Company's records would demonstrate that fees attributable to work in progress totalled more than £2 million and would be sufficient to discharge the debt to HMRC. Mr Murphy also says that fees were due to the Company from a football league club in the sum of £150,000 and in a sum of £250,000 in respect of an insurance case. This represented

work completed but unbilled. Secondly, he contends that this evidence would show that the Company was not in fact insolvent. Had the Company not been placed into administration, he maintains, it would have completed its cases and realised the fees. Again, this seems to me not to offer a defence to the HMRC Allegation. Tax was not being paid in order that the Company could continue to operate its business. At best it provides mitigation.

55. The further difficulty with the submission is that the work in progress was conducted on a conditional fee basis – that is to say a 'no win, no fee' basis. This is what Mr Murphy said in his first statement –

> '36. I will wish to produce the records when they are available to me to show that we were committed to provide services to clients who would not otherwise have had access to justice. In particular, I will refer to a number of high profile claims we were conducting for clients who had been disenfranchised against banks, local authorities and government organisations.
>
> 37. The records will show these cases were initially conducted on a full fee paying basis and that the clients, often as a result of the drain on their resources caused by the litigation, were no longer able to maintain payment for our work.
>
> 38. In order to prevent grave injustice and ensure they were not deprived of their right of recourse I made a conscious decision to work for them without payment. The cases in question had the benefit of positive advice on success from Leading Counsel and in order to assist my clients pursue their access to justice I agreed that our work would be conducted on a success basis, namely that our fees would be recovered from the opposing party on a conditional fee basis.
>
> 39. The work in progress carried on these cases for the work undertaken by St John will be recorded in the records of the practice when they are available to me. The figures exceeded £2m. These records will also show that due to circumstances outside our control the cases were delayed which meant a corresponding delay in our potential recovery.'

It is to be noted here that Mr Murphy is quite clear in his written evidence that these are 'conditional fee agreements' in which payment was to be made 'on a success basis' and 'potential' recovery was unexpectedly delayed. I highlight those words because Mr Murphy said during cross-examination, for the first time, that a fee in respect of those cases was recoverable whether or not they were successful and that a payment would

have been made by a legal expenses insurer. I reject that. Mr Murphy is an experienced litigation solicitor and had the two cases to which he referred in his evidence been conducted on the basis that fees, at some level, would be payable whether the case was won or lost he would have said so. He did not. Instead, he made it perfectly clear that these were cases where payment was dependent upon success.

56. The joint administrators' estimate of the Company's financial position was set out in their proposals dated 2nd December 2014 and paints a rather different picture to that relied upon by Mr Murphy. At paragraph 5.3, they dealt with 'deferred income' work in progress. They stated that it was difficult to quantify this in the absence of a practice management system for the electronic recording of time but that they had been informed by the director that deferred income work in progress was in the region of £1.5 million. They noted that one of the matters was due to be decided in the next few weeks and, if successful, could be expected to lead to a payment of £500,000. The remainder of the work in progress they described as speculative. The Company's unbilled work was estimated to realise £74,589.

57. By the progress report dated 30th September 2015, invoices to the Company's clients of £78,216 had been sent and £22,365, plus VAT, had been received. The progress report of 22nd November 2016 stated that the liquidators had realised £40,000 from the estate of a former client and that no other recoveries were likely to be received.

58. Mr Murphy maintains that details of the Company's work in progress, in particular time recorded by fee earners, was maintained on Osprey and that this would vindicate his account of its value. The evidence of Mr Bucknell and Mr Ho was that time-recording information was not maintained electronically on a practice management system. This is consistent with the statement of Ms Gemma Kaplan, made in an application by Mr Murphy to set aside a statutory demand served upon him by the liquidators. Ms Kaplan is a solicitor employed by Pinsent Masons LLP, who were appointed as the solicitor managers of St John Law. Ms Kaplan's evidence is also that that the Company did not use a central practice management system. Mr Murphy has adduced no evidence from fee-earners employed at St John to suggest otherwise.

59. I should also say, in relation to the Osprey Records, that Mr Murphy's evidence has been inconsistent. He has asserted with great particularity the nature and extent of the

records maintained on the system that he says would support his case and also relied upon his responsibilities for ensuring compliance in this regard in his role as the financial compliance officer. He has similarly asserted that all of his personal records, particularly in relation to the Costs Order, were held on the Osprey system. Yet he also stated twice in cross-examination that he did not even know what Osprey was until the Company went into administration. That being so, I am not satisfied that Mr Murphy's account of the records kept on Osprey is accurate.

60. Mr Murphy's evidence does not give me any cause to doubt the Administrator's approach to the valuation of the Company's work in progress. He received the administrators' proposals and progress reports and I have not been taken to any contemporaneous challenge to it by him. The first of the two CFA cases was lost. It was said to be subject to appeal in Mr Murphy's affidavit in support of the administration order. Mr Murphy confirmed that the second of these cases was also lost. While he asserts that a successor practice nonetheless realised £400,000 from insurance in one of these cases, no evidence of this has been provided, and indeed it is at odds with the evidence given in Mr Murphy's first affidavit that these were 'no win, no fee' cases. Even Mr Murphy's claim were correct, as Ms Lintner points out, it would not follow that the Company would have been entitled to that sum if it had not been placed in administration and had continued with the case. The case was of long standing and the entitlement to costs would have needed to have been apportioned between the Company and Merriman White. There is nothing to suggest what the Company's share might have been.

61. The fact is that, whatever the value of work in progress under conditional fee agreements might have been, it was speculative. It depended, first, on success and, secondly, on the ability to recover the monies then due from the losing party and/or the solicitor's own client under the agreement. At best, Mr Murphy was gambling that these cases would come good and enable him to pay some or all of St John's liabilities to HMRC.

62. I can deal with the suggestion that the value of the Company's work in progress meant that it was solvent shortly. Whatever the value of that work, the Company was unable to pay its debts as they fell due. This was expressly stated to be the case at paragraph 2.2 of Mr Murphy's second witness statement in support of the administration

application. He said that the Company 'is unable to pay its debts and is insolvent on a cash flow basis'. It was reflected in his evidence in these proceedings that the Company was simply unable to pay the tax due. Mr Murphy's evidence in support of the administration application similarly relied upon the prospective administrators' opinion that it was not reasonably practicable to rescue the Company as a going concern. Mr Murphy's contention that the Company was in fact solvent is unsustainable and his willingness to change his evidence in that regard is troubling.

63. In my judgment, the Work in Progress Defence offers neither defence nor mitigation in respect of the HMRC Allegation.

(3) The Proper Payments Defence

64. Mr Murphy expressed some bemusement at the figures contained within Foxley Kingham's schedules and said in his oral evidence that most of the entries were nothing to do with him. In particular, he said that he did not understand why payments to 'Santander mortgage' were shown as a debit to his loan account. Later in cross-examination he disclosed that the payments to Santander were in respect of his ex-wife's mortgage.

65. He suggested that payments made to "L. Murphy" or "Lucie Murphy" and totalling £75,818.57 between 23rd February 2012 to 15th March 2013 were in fact sums due to his son Dominic Murphy for work done for the Company and said that he had paid those sums to Lucie Murphy because his son was bankrupt. He later changed his evidence on that point and stated that he had made the payments to Lucie Murphy because his son, although discharged, did not have a bank account.

66. The schedules were exhibited to the first affirmation of Mr Shiels dated 5th October 2016 and both the schedules and the bank account analysis prepared on behalf of the Secretary of State are referred to at paragraph 88 of that affirmation. In his affidavit in answer to the HMRC Allegation Mr Murphy stated that payments for the benefit of himself or his former wife were not improper and were paid from remuneration or living expenses that Mr Murphy was entitled to withdraw from the practice. In his second statement, he stated that he did not make any wrongful withdrawals from the practice account and all payments were made either in respect of remuneration or in relation to

funds properly withdrawn, either to repay expenditure incurred on behalf of clients or to reimburse him for payments made on behalf of clients.

67. There is no evidence to show that Mr Murphy was entitled to a salary, nor was he entitled to a dividend. He has produced nothing to show any expenditure on behalf of clients. While he continues to rely upon the information that he says is contained in the Osprey Records, it is plain that he could have adduced evidence from his own financial records or bank statements to show the expenditure that he says was being reimbursed.

68. Mr Murphy was taken to the draft accounts for the year ending 30th November 2013 in which sums due in respect of his director's loan account are shown as at the financial year end in 2012 and 2013. The figures are consistent with those that appear on the Foxley Kingham schedules. Mr Murphy said that these were only draft accounts and that he couldn't remember whether he had seen them. They were, however, relied upon by him in his second witness in support of the administration application and he did not suggest that they were not accurate at the time.

69. I do not see any reason to consider that the schedules prepared by Foxley Kingham are anything other than substantially correct. The schedules show payments having been made to Mr Murphy, Mr Murphy's daughter-in-law, Mr Murphy's ex-wife, Mr Murphy's ex-wife's mortgagee, barristers' chambers with the reference 'Dominic' (that is to say Mr Murphy's son) and to doctors with the reference 'DSM' (again Mr Murphy's son). While it might be that some entries might have been mis-categorised I can be satisfied on the balance of probabilities that these schedules, which have been prepared by the Company's own accountants, accurately reflect the transactions for the benefit of Mr Murphy or made at his direction and show repayments of his director's loan at a time when the Company was failing to meet its payment obligations to HMRC.

70. Even if it were correct that the sums debited to Mr Murphy's loan account represented either remuneration or the repayment of expenses by the Company it does not in my view make any difference to the allegation. Mr Murphy and others were being paid while HMRC was not, and they were only being paid because HMRC was not.

Conclusion

71. In my judgment the HMRC Allegation is amply made out. Substantial payments were being made towards the debt owed to Mr Murphy at a time when HMRC was not being paid and the Company continued to pay other trading debts. This began as long ago as September 2012 when the first payment of VAT fell due and remained unpaid. Mr Murphy caused the Company to operate a deliberate policy of unfair discrimination whereby other creditors, including himself to a very substantial extent, were paid while HMRC was not. He misled HMRC by representing that the Company had a counterclaim in the form of sums due to it from the Treasury in an attempt to stave off action by it. In my judgment, Mr Murphy has fallen significantly below the standards of probity expected of a company director, particularly one with significant legal experience. The court must therefore make a disqualification order.

The Validation Order Allegation

72. On 29 August 2014 the validation order was made by Mr Chief Registrar Baister on the application of the Company. The order directed that, notwithstanding the presentation of the petition by HMRC, payments made into the Company's bank account (sort code 30-93-84 and account number 20369060) and the payments out of that bank account that were listed in the schedule to the order would not be void.

73. The schedule set out the various payments that were validated by the order and included staff salaries (expressly stated to exclude any payments to the director). No payments of remuneration to Mr Murphy were within the scope of the validation order. Mr Murphy accepted that the effect of the order was not to validate transactions in the course of the Company's business generally but to validate specific transactions.

74. He was taken to a schedule prepared on behalf of the Secretary of State which summarises the payments made out of the Company account from the date of the petition to the date of the administration order. The schedule is divided into four columns:

    i) the first shows the total payments made out of the office account;

    ii) the second shows the payments made out of the office account which were authorised (or not otherwise required to be authorised);

iii) the third shows those payments which are said not to fall within the scope of the validation order;

iv) the fourth shows those payments which were not within the scope of the validation order but were made prior to the application for that order and thus could have been validated at the time the order was made.

75. Mr Murphy accepted that the payments were made but denied that they were payments that required validation. Although his explanation in his first affidavit simply stated that the payments 'related to liabilities I was required to discharge on behalf of the practice', by the hearing before Deputy ICC Judge Baister his case was put another way. That is that certain payments were paid not from the assets of the Company but were client monies that had been transferred from the client account to the Company's office account for onward payment. They were at all times impressed with a trust and were thus not a disposition of the Company's property at all. He gave greater detail while giving evidence. He pointed, for example, to a payment with the reference 'Bayfield' and stated that those were monies due to a client due by way of damages awarded in litigation to which it was a party. He pointed to other payments made to leading counsel, to sets of barristers' chambers and to HM Land Registry, which, he said, were similarly made out of trust monies. Mr Murphy said in evidence that, of the £176,399.14 set out in the 'unauthorised' column, only about £8,000 were to Company creditors and the remainder were payments out of assets held on trust for its client to meet disbursements.

76. I have to say that I find it somewhat extraordinary that Mr Murphy waited until giving evidence to attempt any explanation of specific transactions. It is plain from the note of the hearing before Deputy ICC Judge Baister that the judge contemplated that Mr Murphy would offer an explanation of these payments in a further witness statement. He gave him permission to file such evidence. That opportunity was not taken by Mr Murphy. Yet he felt able to go through the list while giving evidence and make assertions as to the origin and purpose of various of the payments listed. I can only conclude that this was intended to take the Secretary of State by surprise and prevent enquiries from being made in respect of those payments.

77. It does appear from the schedule prepared by the Secretary of State that certain payments have been treated as being 'authorised' even though they were not set out in the schedule to the validation order. These include a payment to leading counsel of £45,000 and various payments to barristers' chambers. I am told that those sums were indeed included in the 'authorised' column because it was considered that they were not dispositions of the Company's property. It would have been simple for Mr Murphy to set out which of the other payments he contends were payments of trust monies (and indeed those which he could not recall) in a statement. He has not done so.

78. I am satisfied that a good number are payments of Company liabilities out of Company assets. These include payments of:

    i) £1,058.11 by way of bank charges;

    ii) £2,589.12 to BUPA;

    iii) £392.47 to Thames Water;

    iv) £513.60 to Xerox Finance;

    v) £1,503.46 to Jordans legal publishers;

    vi) £4,500 to Foxley Kingham.

    More significantly, £24,400 was paid to Mr Murphy himself. I accept in Mr Murphy's favour that many of the 'unauthorised' payments were in fact payments of client monies. That seems to me to be an inherently probable claim. On any footing, however, I can be satisfied that payments were made out of the Company's own monies and that Mr Murphy received £24,400 personally.

79. Although it has been said in various documents in these proceedings that the payments were made 'in breach' of the validation order, the order did not forbid the Company from making them. The order was not 'breached'. The complaint is that payments were made other than as validated by the order. Similarly, a number of documents refer to payments made otherwise than as provided for by the validation order being void. As I have noted above, the effect of section 127(1) of the Insolvency Act 1986 is to render void payments made after presentation of petition in the event of a compulsory

liquidation being ordered. The position here is that there was no compulsory liquidation: the Company entered administration and exited it via a creditors' voluntary liquidation. In the event, the payments were not void.

80. The allegation itself does not rely upon the payments being in breach of the validation order or being void. Instead the allegation is that the payments were made at a time when Mr Murphy knew the Company to be insolvent and that the payments were to the detriment of creditors. The fact that a validation order was applied for adds context to the allegation. It shows that Mr Murphy recognised that St John was facing winding up and that an insolvency event was likely to be imminent.

81. The payments to the creditors that I have listed at paragraph 78 were irresponsible in circumstances in which Mr Murphy appreciated that the Company was facing insolvent liquidation and that trading expenditure should be validated by the court. The making of such payments might, of itself, be insufficient to a lead to a disqualification order. The payments to Mr Murphy himself after presentation, however, show a disregard for his duty to consider the interests of creditors and a significant element of personal benefit. In my judgment the Validation Order Allegation is made out in relation to the payments that I have set out above and to the payments to Mr Murphy and demonstrates a sufficiently serious failure to comply with his duty as a director so that the court is required to make a disqualification order.

Period of disqualification

82. On reserving judgment at the end of the trial I invited Mr Murphy and Ms Lintner to tell me whether, in the event that I considered that a disqualification order must be made, they would prefer me to list the matter for a further hearing to consider what period of disqualification would be appropriate. Both expressed a preference for the period to be determined without the need for a further hearing.

83. The period suggested in the section 16 letter was 10 years. As a result of the amendment of the Validation Order Allegation a period of 9 years is proposed. In my judgment a period of 8 years is justified. I take into account the fact that the Company deliberately operated a policy of discrimination against the Crown from the outset of its trading and that Mr Murphy misled HMRC in suggesting that the Company had a debt due to it from HM Treasury that could be set off against tax. Mr Murphy is a solicitor of long-

standing. There is no basis on which he can have believed that to be true. It is quite clear that he knew that the payment was due to him personally and he has set out no proper basis on which he thought it could operate as a set off in favour of the Company. That representation can only have been made in order to try and stay HMRC's hand and allow the Company to continue to trade at its expense. He continued to cause payments to be made for the benefit of himself even after the presentation of a winding-up petition. Those payments were substantial.

84. I also bear in mind that Mr Murphy has previously been disqualified for a period of three years on the basis of a failure to pay tax due. This was a long time ago and I do not think the fact of this previous disqualification justifies consideration of the top bracket. It does however demonstrate that Mr Murphy was well aware of the potential consequences of trading to the detriment of the Crown. In my judgment Mr Murphy's conduct cannot be said to warrant the lower bracket reserved for less serious misconduct. It is a sufficiently serious case to justify a disqualification period squarely in the middle bracket. I have given credit for the fact that I am not satisfied that all of the payments out of the Company's office account after presentation of the petition were payments of Company monies, but in my judgment the Validation Order Allegation is subsidiary. At the heart of the misconduct running through both allegations is a deliberate and prolonged policy of unfair discrimination and a very substantial level of benefit to Mr Murphy personally, even after presentation of the petition.

85. Mr Murphy has shown no recognition of his misconduct and I cannot see any other grounds for mitigation. While Mr Murphy's age may well mean that he is unlikely to wish to be a company director during the full period that I have imposed in any event, it is important that the court mark the seriousness of his conduct.

Order accordingly.