Neutral Citation Number: [2020] EWHC 2360 (Ch)

Case No: CR-2008-000015

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT LIST
In The Matter Of TRUEWOOD LIMITED
And In The Matter Of THE INSOLVENCY ACT 1986

Business Skype Remote Hearing
Date: 03/09/2020

Before :

I.C.C. JUDGE JONES

- -

Between :

(1) JAMES RICHARD DUCKWORTH
(as liquidator of Truewood Limited)
(2) TRUEWOOD LIMITED (in liquidation)

Applicants

- and -

(1) BHAUNA RAMESH PAREKH
(2) RAMESH CHANDRA PAREKH

Respondents

- -
- -

Ms Claire Thompson (instructed by **Clarke Mairs LLP**) for the **Applicants**
Mr Rifat (instructed by **Piper May Solicitors**) for the **Respondents**

Hearing dates: 16 and 23 July 2020

- -

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.

.....CHJ 03/09/20.....

I.C.C. JUDGE JONES

I.C.C. Judge Jones:

A) The Application

1. Mr and Mrs Parekh apply to set aside a 13 August 2014 debarring order judgment which became effective on 10 September 2014 within misfeasance proceedings brought by the liquidator of Truewood Limited ("the company") under ***section 212 of the Insolvency Act 1986***. The misfeasance alleged (in summary) the improper receipt of payments from the company, which carried on business as a "DIY" shop.

2. They make their application on the basis that they were not served with the application or its evidence. Their evidence is that they were first aware of the debarring order and, therefore, the judgment on 9 November 2016. Their application was issued on 18 November 2016. Their evidence in reply includes a request for relief from sanction as an alternative remedy but this was not advanced at the hearing and there is no issued or amended application. The decision is made on the written evidence, neither side asking for cross-examination.

3. Whilst there was initial issue as to the jurisdiction relied upon, Mr Rifat, their counsel, during the hearing accepted Ms Thompson's analysis, as counsel for the liquidator and the Company, that ***Rule 7.47(1) of the Insolvency Rules 1986*** ("the Rules") applies to the application which was issued on 22 November 2016. It follows that Ms Thompson is also correct to refer to ***Rule 7.55***. It may be noted that the superseding Insolvency Rules of 2016 do not alter from those of 1986 (see the ***2016 Rules, 12.59 and 12.64***).

4. The power to review and rescind the judgment under ***Rule 7.47(1)*** is to be exercised in accordance with the guidance of Mr Justice Laddie in ***Papanicola v Humphreys*** [2005] 2 AER 418 at [25] as follows (see also ***Re Broadside Colours and Chemicals Ltd*** **[2012] EWHC 195 (Ch)** at [26-29]):

> *"(1) The section gives the court a wide discretion to review vary or rescind any order made in the exercise of the bankruptcy jurisdiction. (2) The onus is on the applicant to demonstrate the existence of circumstances which justify exercise of the discretion in his favour. (3) Those circumstances must be exceptional. (4) The circumstances relied on must involve a material difference to what was before the court which made the original order. In other words there must be something new to justify the overturning of the original order. (5) There is no limit to the factors which may be taken into account. They can include, for example, changes which have occurred since the making of the original order and significant facts which, although in existence at the time of the original order, were not brought to the court's attention at that time. (6) Where the new circumstances relied on consist of or include new evidence which could have been made available at the original hearing, that, and any explanation the applicant gives for the failure to produce it then or any lack of such explanation, are factors which can be taken into account in the exercise of the discretion."*

5. Mr Justice Laddie also decided that in a case relying upon non-attendance, the applicant should explain:

> *"why he did not attend and what steps he took to bring the matter back speedily to court … the philosophy underlying CPR 39.3(3)-(5) applies".*

That philosophy is based upon the requirements: (i) to act promptly when discovering the judgment; (ii) to have a good reason for not attending the trial; and (iii) to establish a reasonable prospect of success.

6. In addition, applying ***Rule 7.55***:

> *No insolvency proceedings will be invalidated by any formal defect or any irregularity unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court.*

7. It is to be noted that under the case management rules of the CPR and under the court's inherent jurisdiction, the Court of Appeal has stated that whilst each case will turn on its facts, it will almost always be just to set aside a judgment which is irregular for want of service. I refer to paragraph [50] of the judgment of the court in ***Nelson v Clearsprings Ltd*** [2006] EWCA Civ 1252, [2007] 1 WLR:

> *"In a case where the proceedings have not been served on the defendant and service has not been dispensed with before judgment, a court could only properly refuse to set aside a judgment where there is no prejudice to the defendant (or, possibly, to some innocent third party who has acted to his detriment in the belief that the judgment was regularly entered). As we see it, that will ordinarily involve the claimant persuading the court that there is no prejudice to the defendant in dispensing with service and that the defendant is not otherwise prejudiced."*

8. Mr Rifat submits that this is plainly a case satisfying those requirements because Mr and Mrs Parekh had no opportunity to defend the claim. They now face a judgment which will result in net proceeds of sale from a property sold by a ***Law of Property Act 1925*** Receiver appointed by another creditor, a mortgagee, being used for the purpose of the company's liquidation instead of being returned to them. Service should have complied with ***Part 6 of the CPR*** and did not. It is an irregular judgment and one that causes prejudice and substantial injustice.

9. Ms Thompson submits that the judgment is regular. However, whether it is or not, this application was not made promptly, Mr and Mrs Parekh are responsible for the delays which mean that some 4 years have passed since the application was issued. Not only have they no defence with reasonable prospects of success but their delay has prevented the ability to have a trial which would be fair if judgment is set aside.

B) The Requirements for Service

10. The first, and potentially last, issue is whether the application notice was properly served. ***Rules 12A.16 and 12A.17 of the 1986 Rules*** provided that ***Part 6 of the CPR*** applied and that an application notice is to be treated as a claim form for the purposes of service. The Liquidator relies upon postal service under ***CPR Part 6 Rules 6.3(c) and 6.9(c)***. Postal service upon an individual of a claim form, in this case the application notice, must satisfy the following requirement(s) of ***Part 6 of the CPR***:

    a) It must be posted to *"the last usual or last known residence"*. The test of residence being the place where the defendant resided in the settled pattern of his/her life. To establish compliance, it is necessary to satisfy a good arguable case test. This means, in the context of an interlocutory hearing, a much better argument on the material available to the court than the other party (see ***Relfo Ltd (In Liquidation) v Varsani*** [2010] EWCA Civ 560).

b) If the claimant has reason to believe that the defendant no longer resides at that address, reasonable steps must be taken to ascertain the *"current residence"*.

c) If those steps result in the claimant ascertaining the current residence, service must be at that address.

d) If the current address is not ascertained and the claimant considers there is an alternative place where service may be effected including by post, an application for alternative service must be made under ***CPR Part 6 Rule 6.15***. The court has power to order service by an alternative method if there is *"good reason"* to do so based upon evidence supporting the application. ***Practice Direction 6A*** requires the evidence to state (amongst other matters) why it is believed the document is likely to reach the person to be served by the alternative method proposed.

e) On an application under ***CPR Part 6 Rule 6.*15**, the court *"may order that steps already taken to bring the claim form to the attention of the defendant … at an alternative place is good service"*. ***Practice Direction 6A*** requires the evidence to state (amongst other matters) why it is believed the document is likely to have reached the person to be served by the alternative method.

f) If the current address cannot be ascertained and there is no alternative place of service, the Claimant may serve at *"the last usual or last known residence"*.

C) The Evidence Relevant To Service

11. In this case the address for service relied upon by the Liquidator was 21 Kingsdown Avenue, South Croydon, Surrey, CR2 8QG. Service of the application for which judgment was obtained by post at that address was deemed to have taken place on 21 May 2014. However, Mr and Mrs Parekh say their usual and last known address was and remains 97 Pollards Hill South, London SW16 4LS. They say this was known to the Liquidator because they were already engaged in other related proceedings and he used this address to correspond with them and to serve documents. They say they had no knowledge of the claim or judgment until receipt of a letter dated 9 November 2016 sent to the Pollards Hill address. Their evidence is that the Kingsdown Avenue address had been rented out since 2002. Previous engagement between the liquidator, following his appointment on 16 July 2008, and Mr and Parekh involved written enquiries and an application and order for a private examination under ***section 236 of the Insolvency Act 1986***. The examination occurred on 30 August 2011.

12. The liquidator accepts that all documents had been served at 97 Pollards Hill prior to issuing and serving the application. The Liquidator also accepts that he had been informed during his investigations that Kingsdown Avenue had been rented out. However, that was before 26 September 2012 when Mr and Mrs Parekh transferred the freehold title of Pollards Hill to Mehul Parekh and Solil Parekh in consideration for £536,000 odd. The transfer was discovered by the liquidator because of a Land Registry search in March 2013. The liquidator caused enquiries to be made to locate Mr and Mrs Parekh's new residence.

13. This resulted in a search of the Land Registry and the only property registered in the name of Mr and Mrs Parekh was Kingsdown Avenue. The freehold title was registered in their joint names during 2000. As mentioned, the liquidator knew from previous enquiries made of Mr and Mrs Parekh that it had been rented out but that was before the sale of Pollards Hill and they had not bought another property. In those circumstances it was concluded that this must have become their current residence.

14. The transfer is not referred to in Mr and Mrs Parekh's evidence in support of the application. The evidence in answer from Ms Haggie, a solicitor acting for the company/liquidator, refers to her firm having written to Mr and Mrs Parekh at Kingsdown Avenue. Whilst it can be implied that the letter was not returned marked undelivered, it is not said whether there was a response and there are no exhibits relating to that sentence. The evidence in reply states that the transfer was to their sons and they continued to live at Pollards Hill. There is no explanation as to why they would have remained living at Pollards Hill after they had sold it for £536,000 odd. It is said that the Kingsdown Avenue property continued to be rented out.

15. The application having been posted to Kingsdown Avenue was not returned. The evidence of Ms Haggie also refers to service of the 13 August 2014 Order which resulted in the debarring judgment pursuant to its debarring order. It was enclosed with a letter dated 19 August 2014 addressed to Kingsdown Avenue. It can be implied that the letter was also not returned.

16. An interim charging order was obtained over the title Kingsdown Avenue and registered as a restriction. The application and interim order were deemed served at Kingsdown Avenue by post on 13 October 2014. The final order was made on 15 January 2015 and also served by post at the Kingsdown Avenue address. The interim and final orders would also have led to notification from the Land Registry to Mr and Mrs Parekh at that address. They accept in their reply evidence that all Land Registry correspondence would have been sent to that address but state it was not received by them. They state they were never aware of those hearings or orders. It is said they were only learnt about them during the course of the bankruptcy petition referred to below. None of the documents were "returned to sender".

17. The Liquidator also sought to recover the costs awarded against Mr and Mrs Parekh in ***section 236*** applications. Accordingly, in 2015 statutory demands were addressed to Kingsdown Avenue. The demands are limited to the sum of £3,154.80 but clearly refer within the particulars of debt to the judgment debt in issue and to the charging order. A witness statement from a process server concerning their service refers to the inability to serve the demands personally at Kingsdown Avenue. Although there was a person there, the door was not opened. It is stated that enquiries of a neighbour confirmed continued residence by Mr and Mrs Parekh. The demands were posted through the letter box. Mr and Mrs Parekh state in reply evidence that they have identified the neighbour but he denies speaking to the process server. They state the demands were never received. They too were not returned.

18. This led to attempted service of bankruptcy petitions presented on 3 September 2015. Evidence from Ms Haggie states that the process server was unable to serve personally at Kingsdown Avenue and, therefore, went to Pollards Hill. Evidence from the process server of what occurred at Pollards Hill is that he spoke to a person who

first identified himself as *"Ramesh Parekh"* before stating that the petition handed to him was not for him but for his father-in-law. The process server also states that he was informed by that person that Mr and Mrs Parekh *"don't actually live at [Pollards Hill] but do visit quite regularly and would receive all mail sent there for their attention*". The process server states that he undertook investigative enquiries and was unable to find any alternative business or residential address for Mr or Mrs Parekh. The usual appointment letter was posted through the letter box at Pollards Hill resulting in a telephone message from Mr Parekh stating that whilst he would not be present, he could have the documents collected from there.

19. The petitions were left at that address on 27 October 2015. Mr and Mrs Parekh in their evidence accept this service, although not the detailed evidence. They rely upon the fact that whilst the petitions refer to the statutory demands, they do not mention the judgment debt in issue upon this application. They had not seen the statutory demands.

20. Ms Haggie exhibits a solicitor's contemporaneous attendance note of a telephone conversation with Mr Parekh on 27 October 2015. Mr Parekh called about the attempt to serve the bankruptcy petition upon him. He is recorded as stating that he had lived at Pollards Hill in the past but that whilst he still owned it, his son lived there now. It was his son who had told him about the petition. He stated that Kingsdown Avenue was also owned by him but usually rented out. He *"confirmed that he would usually receive post sent to either address"*. When the judgment in issue was discussed he said he did not know anything about it and would need to speak to his solicitors. When told that a copy of the order could be sent, he said he would speak to his sons and call back about a deal for payment of the bankruptcy petition debt. Mr Parekh disputes this record.

21. A contemporaneous attendance note by the advocate appearing for the liquidator at a bankruptcy hearing at Croydon County Court on 17 November 2015 records that Mr and Mrs Parekh attended. There was an application for substituted service at Kingswood Avenue and Pollards Hill. It is also written that outside court Mr and Mrs Parekh informed him that they spent half their time at Pollards Hill and half at their sister's home in Norwich. Mr and Mrs Parekh stated to the court that they had not been served with the statutory demands. The order for substituted service was made as asked.

22. The Petitions were adjourned on 19 January, 15 March and 17 May 2016 for payment. The petitions' debt was paid on 5 September 2016 and the petitions dismissed on 6 September 2016.

23. A demand for payment of this judgment sum was made by letter dated 9 November 2016 posted to Pollards Hill and Kingsdown Avenue and sent by email. Mr Parekh's answer the next day was that this was the first he had heard of a court judgment against them. The application to set aside judgment was issued on 21 November 2016. Mr and Mrs Parekh in reply evidence state they first saw the application notice which resulted in the judgment in December 2017. They instructed solicitors in February 2018 and they requested the evidence. This was received on 29 March 2018.

24. The application was adjourned on 17 January 2017 for short service. It was also adjourned on 22 January and 8 February 2018 because of Mr and Mrs Parekhs' travel arrangements. A consent order made 5 April 2018 provides for further evidence to be filed and for relisting. It was relisted on 11 February 2020 for 16 July 2020. The reason for that is unknown and it is inexplicable that no request was made to the court for an earlier date. This court is always able to provide earlier dates and does so upon request when there is good reason.

25. Mr and Mrs Parekh state in their reply evidence that the judgment resulting from the 13 August 2014 order resulted in the sale of Kingswood Avenue. In fact, it was sold by a receiver appointed under ***the Law of Property Act 1925*** by a mortgagee with a first registered charge, Barclays Bank plc. There is a sum in the region of £47,000 to be paid to the liquidator under the charging order or (subject to further order) to Mr and Mrs Parekh if judgment is set aside.

26. There is rejoinder evidence including a statement from the Liquidator. It is unnecessary to refer to it other than to observe that such evidence is consistent with the matters above.

D) Decision on Service

27. Knowledge of the sale of Pollards Hill provided reason for the Liquidator to believe that Mr and Mrs Parekh no longer resided at that address. That being so, in accordance with ***CPR ule 6.9(3)*** the Liquidator had to take reasonable steps to ascertain the current residence. A reasonable step was to carry out a Land Registry search to ascertain whether Mr and Mrs Parekh owned another property to which they may have moved and be living as their current residence.

28. The fact that the only property identified by the search was Kingswood Avenue produces the possibility that this was that residence. However, it does not ascertain that as a fact. It only identifies legal ownership of a property and in this case there is the additional feature that it was known to have been owned and tenanted since 2000. That does not mean it might not have become the current residence but it does mean that further inquiries were required if reasonable steps were to be taken: for example, attendance at Kingswood Avenue or written correspondence.

29. In other cases, the failure to take reasonable steps may not have mattered because it can be established by other evidence that the property had become the usual or last known residence at the date of service. However, there is no evidence here to sustain a decision that Mr and Mrs Parekh resided in the settled pattern of his/her life at Kingswood Avenue at the time of purported service on 21 May 2014. The current address was not ascertained.

30. The failure to ascertain residence meant ***CPR Rule 6.9(4)(b)*** was engaged. The Liquidator had to consider whether Kingswood Avenue was an alternative place where service might be effected. Plainly, the information from the Land Registry raised that possibility. Taking into consideration the sale of Pollards Hill for a

consideration which reasonably appears to be a market value (£536,000), the reasonable assumption that Mr and Mrs Parekh will have moved and the absence of any other address, this was a case where an application for an order for alternative service *"must"* be made under ***CPR Rule 6.15***. It was not.

31. Even if Kingswood Avenue was not an alternative place where service might be effected, the obligation would have been to serve at Pollards Hill in accordance with ***CPR Rule 6.9(6)***. That was not done.

32. This leads to the liquidator's fall-back position, to ask the court to exercise its discretionary power to order *"that steps already taken to bring the claim form to the attention of [Mr and Mrs Parekh*] *… at an alternative place is good service"*.

33. The White Book refers to many decisions concerning the application of ***CPR Rule 6.15***. Key to them is the decision of the Supreme Court in ***Abela v. Baadarani*** [2013] UKSC 44 [2013] 1 WLR 2043. The principles have been summarised by Floyd LJ in ***Barton v. Wright Hassall LLP*** [2016] EWCA Civ 177. For the purposes of this judgment it is sufficient to state that the starting point is that there has not been service authorised by the CPR. It is in that circumstance that an applicant must satisfy the court that there is *"good reason"* to validate the staps taken to bring the claim form to the defendant's attention. Those steps may constitute an alternative method of service or service by an approved method but at an alternative place. The court exercises a value judgment based upon all the circumstances of the case. A critical factor in deciding whether to validate service under the rule is that the document has come to the attention of the party intended to be served. Although, the mere fact that a defendant learns of the existence and content of the claim form cannot constitute a good reason without more.

34. The problem for this ***CPR Rule 6.15(2)*** application is the evidence from Mr and Mrs Parekh that they did not receive the application notice or the evidence or any other notification before the debarring order judgment became effective on 10 September 2014. It is natural to be sceptical about that. There is evidence to indicate that they would have received post delivered to Kingswood Avenue (see paragraph 20 above) and there is also the feature the application notice, the relevant order and other documentation which had been posted there were not returned. In that circumstances it is reasonable to expect tenants to keep post for their landlord and to hand it over at least when the landlord visited, if not to redirect it. However, there is a plain denial of receipt and knowledge. I cannot conclude that to be untrue on the evidence before me without that evidence having been tested under cross-examination.

35. In this case, therefore, service by an approved method at an alternative place occurred because the liquidator believed it was service permitted by ***the CPR*** even though he did not in fact know whether this was the place of residence and had not taken adequate steps to ascertain that information. This does not establish circumstances which give rise to a *"good reason"* for retrospective authorisation of service. Further, it is necessary, as it would be in any event although more would still be needed, to establish that the application nevertheless came to the attention of Mr and Mrs Parekh.

The liquidator has not established this "critical factor" and in all the circumstances there is no *"good reason"* for authorisation under ***CPR Rule 6.15(2)***.

36. This is not a case where it is or can be argued that the court should waive the requirements of service. It follows that there is good reason to set aside the irregular judgment but subject to considering the application of ***Rule 7.47(1)***, the guidance of Mr Justice Laddie in ***Papanicola v Humphreys*** (above) and ***Rule 7.55***. This consideration introduces the topic of delay and whether any substantial injustice has been caused. Plainly there is injustice to the extent that a judgment was obtained and can be enforced but not, Ms Thompson submits, if there is no defence.

D) The Defence

37. Judgment was obtained in an application under ***section 212 of the Insolvency Act 1986*** alleging misfeasance in a total sum of £38,059.43 arising from the wrongful transfers or payments of: £2,500 transferred to Mrs Parekh; £1,000 transferred to Mr Parekh; £7,750 transferred to the liquidators of Grosvenor Hale, a company owned by Mr Parekh and managed by him and his sons; and £26,809.43 for R1 and R2. The latter figure was broken down into specific payments identified as payments of a personal nature, as follows: £4,662.59 of payments to the London Borough of Croydon; £4,701.42 of payments to Scottish Provident; £773.56 to Health-on-line for health insurance for R2; £798.72 to Nu Life and Pension UK; £2,215.04 to HSBC Life UK Ltd; £5,300 to Interlink Travel; £3,358.10 to Exploratours; and £5,000 to Imperial Ambitions Limited. The evidence in support identifies the accounts for the year end 30 September 2005 as the last accounts prepared. £8,000 was recorded as salary for Mrs Parekh. There was no director's loan account.

38. Ms Thompson submits that the only possible, substantive purported defences are the payments to Grosvenor Hale, Imperial Ambitions Limited and HSBC Life UK Ltd. As she states in her skeleton argument: *"The crux of Rs' argument in respect of the other sums is that they should be set-off against sums due to them by way of salary. There is firstly no evidence at all that they are entitled to a salary, but in any event there can be no set-off against the misfeasance proceedings Millet LJ in* ***Manson v Smith*** *[1997] 2 B.C.L.C. 161"*. The additional or alternative reliance upon the principles of *res judicata* and cause of action or issue estopple are misconceived because the "proceeding" relied upon was the ***section 236*** private examination.

39. As to the three specific payments, Ms Thompson submits that the purported Grosvenor Hale defence that this sum was paid exclusively to purchase some vans which were to be used for the benefit of the Company is incredible because it contradicts the information provided to the liquidator during the ***section 236*** private examination. Mr Parekh previously stated that £5,000 of the sum of £7,750 was paid to Grosvenor Hale on behalf of funds due from Mrs Parekh, on the basis that the Company owed money to Mr Parekh and their sons. On another occasion Mrs Parekh said that the payment was for services rendered. On another she said that it was as a result of a loan. Ms Thompson adds in her skeleton argument: *"There is also no evidence, nor any suggestion that such will be forthcoming, of the vans being owned by the Company rather than R1 or R2 personally."*

40. Ms Thompson's submission in respect of the payment of £2,215.04 to HSBC Life UK Ltd is that whilst it is said to be a payment by the Company for a pension, there is no evidence of any entitlement to that payment or to the payment being to a pension fund set up by the Company, as opposed to a personal private pension. As to the £5,000 paid to Imperial Ambitions Limited, Ms Thompson submits that no explanation was found for that payment in 2011 and none has been produced for this application. She submits for this and the other two payments, the absence of evidence will not alter following the expiry of time and delay.

41. Mr Rifat, subject to his primary submission that merits should not be in issue, submits that the evidence establishes a defence to the allegation of improper withdrawals. He referred to a letter dated 3 (?) May 2018 from accountants, Tamsons, explaining the payments totalling £38,059.43. He submits this is not a case of set off prohibited within a misfeasance claim but an issue whether the payments were a misfeasance or legitimate expenditure by the Company. As a fall back he submits that the court should consider granting relief under ***section 1157 of the Companies Act 2006***. This is a case, he submitted, where it is right and just to set aside judgment to enable the defences to be raised for the first time within the proceedings and explored.

42. The evidence before me includes a Preliminary Questionnaire signed by Mrs Parekh and statements in interviews under oath and subject to section 5 of the Perjury Act by Mr and Mrs Parekh made pursuant to ***sections 235 and 236 of the Insolvency Act 1986***:

a) In the Preliminary Questionnaire it is recorded that the last accounts prepared by the accountants, the Company not preparing management or draft accounts or cash-flow forecasts or budgets, were for the financial year ending 30 September 2006. The Company did not operate a pension scheme for its officers or employees. A £20,000 salary for Mrs Parekh is identified for the year 2007/8. Its trading address was in Upper Richmond Road.

b) On 27 June 2008 Mrs Parekh stated (amongst other matters) that:

> Mr Parekh *"was involved in the business as the buyer [for the shop]. He liaised with the suppliers, bank and accountants. In essence he was the manager. He didn't take any salary. [She] spent the whole day in the shop focusing on customer services, sales etc …. [she] received £15,000 salary from the business [in 2006/07] … in the region of £20,000 [in the period 2007/2008] …. In [200? – the date is unclear] VAT people called and demanded payment for outstanding VAT … We instructed a new accountant on the 29/05/07 to deal with them. HMRC sent us a demand for [@£18k] on the 13 November 2006 … the position of the company was not bad in 2006 but I wasn't able to pay that assessment. It was my opinion [it] was incorrect … The conclusion was that HMRC had made a determination … which had no [?] appealed for 2006. That was the problem. We ceased trading March 2008 … In the 200[?] accounts there are payment for motor vehicles. The company used to have a van … [which] was hired … [it] never owned any vehicles …"*.

c) On 30 August 2011 Mrs Parekh stated:

Mr Parekh was responsible for keeping the papers and documents of the company. She was not sure or did not answer the question whether he husband had been a director of Grosvenor Hale Limited before its liquidation in 2004. However, she explained that the company had traded with it with the company selling materials. The company had taken over hire purchase contracts from Grosvenor Hale Limited for two vans. When Grosvenor Hale Limited was liquidated, Mr and Mrs Parekh were owed £35,000 and the Company £38,500.

Although her witness statement provided a few days before stated otherwise, their sons, "Mehal and Sohil", who were connected with Grosvenor Hale Limited, had given money to the company, it was not lent and they had not provided services to or for the company.

She was unable to answer questions concerning a payment of £2,000 by the Company to Grosvenor Hale Construction Limited in October 2006.

As to payments totalling £26,809.43:
She could not recollect Imperial Ambitions Limited. Payments to the London Borough of Croydon were for rates in respect of their home. She explained:
"we spend money from the company [for our benefit] – I have £3,000 of my loan in my account after end of year, my accountant is adjusting the money because we never get – we never get salary. Whatever we spent they adjust with this money. We still owe you our money from the company because the company never pay us money".

The Company had a pension scheme for which her husband was responsible. She had no knowledge about it and could not say if it was a company scheme or payments made to private pensions put through the company's accounts.

Travel expenses totalling £8,000 could not be explained, although may have been for family travel for which *"They always adjust my salary with everything"*.

d) On 30 August 2011 Mrs Parekh stated:

"I used to manage the affairs with [my wife] of the company and advise whatever, wherever I could …".
Trading with Grosvenor Hale Limited would be at a level of £4-5000 or £5-6,000. At the time of liquidation £38,500 was owed to the Company for materials. £2,750 was paid to its liquidator for vehicles but they were partly still on hire purchase. The sons had *"large deposits"* in the Company to help his wife. The £2,000 paid to Grosvenor Construction Limited would have been paid as part of running transactions at the request of their sons. He did not remember Imperial Ambitions Limited.

Mr Parekh did not have a salary but he would:
"draw [his] service charges at year end … It would depend on how much services we get, we would decide between me and the accountant as to what service charges would be chargeable that year … My wife used to draw the

salary … all private expenses [were] to be adjusted against our salaries". The expenses included *"pensions … HBC Life UK Limited [a stakeholder pension later transferred to Scottish Provident set up for the Company] … Scottish Provident [which] was £200 for [our home] … [a] personal; expenses to be adjusted against our salaries"*.
The travel payments were personal expenditure to be *"adjusted against our salaries"*.

43. The witness statement of Mr Parekh in support of the application, which Mrs Parekh confirms as true, when dealing with merits states (amongst other matters):

a) The payments to HSBC Life were for employee life policies.
b) He was a manager but did not act as a director of the Company.
c) Payment of £7500 to the liquidator of Grosvenor Hale Limited was for 3 motor vehicles required by the Company.
d) The payment to Imperial Ambitions Limited was not for personal benefit.
e) The remaining £19,594.39 is offset against personal loans and outstanding salary *"due to [his] wife and [himself] since we worked in the business without payment … [the] salaries would be reconciled at the end of the year against our personal drawings. This is allowed as an accounting practice according to [his] Accountants. Further the shareholders, Directors and family members infused large sums of money into the company to ensure its survival and these loans have not been repaid … The personal drawing [totalling £38,059.43] should also be set off against personal loans and salary … The Accountants have confirmed that [Mrs Parekh] and I have made a loan to [the Company] of £61,200. Here were also intercompany payments of £10,150 … The Accountants also confirm that it is normal in a small business where expenses paid which were personal in nature may be set off against salaries which were paid to [Mrs Parekh] and [myself] amounting to a modest combined salary of about £7,125 per annum"*.

44. The above-mentioned letter from Tamsons also refers to payments by the company towards personal expenditure being *"usually set off against director fee/wages and dividends"* and states their understanding to be that *"no other salaries were paid to Mr and Mrs Parekh"*. As a result, they propose that the sum of *"£19,594.34 can be allocated against their personal loans and salaries over the period of 33 months. It can only give them a modest combined salary of about £7125.00 per annum"*.

45. That letter for the purpose of establishing payments made for the company and those which may be set off provides the following information from a *"list of payments amounting to £38,059.43 incurred by the [C]ompany"*:
a) That £7,500 was paid to Grosvenor Hale for three second hand commercial vehicles used by the Company.
b) It included drawings by Mrs Parekh totalling £3,500.
c) They had been told that insurance payments to HSBC Life totalling £2,215.04 were for a Keyman insurance policy in respect of Mrs Parekh for the benefit of the Company.
d) £5,000 was a payment to Imperial Ambitions Ltd as a penalty for late completion of works related to 100 Preston Road, Harrow.
e) £19,594.39 can be reconciled against personal loans and outstanding salary:

(i) £37,000 was paid by Mrs Parekh to the Company during the period 15 November 2006 to 4 February 2008.
(ii) £8,100 was paid by their son to the Company between 29 and 30 November 2006.
(iii) £17,200 was paid to the Company by Mr and Mrs Parekh during the period 26 February and 29 February 2008.

E) Decision

46. The starting point is that it will normally be just to set aside a judgment in proceedings which have not been served upon the respondent provided prejudice has been caused because there is an arguable defence.

47. As to an arguable defence, I will deal first with the concept of "set off". There is no doubt that the money Mrs Parekh, a director, received during the year from the Company was a loan. Even on her case she had no entitlement to that sum for services rendered. Her case is that the loan would be set off at the financial year end when she and the Company's accountants addressed the annual accounts.

48. To the extent that Mrs Parekh and the accountant contend this set off arose from an award of salary, they are wrong. A salary is a fixed compensation paid on a regular basis. Mrs Parekh could only potentially justify her entitlement to sums which she may set off against the extant loan if there is a board decision to award her that sum in recognition of her services or to pay a dividend.

49. It cannot have been a dividend. The formalities required by ***the Companies Act 2006*** were not met. As a matter of law, that is fatal even if the statutory formalities and requirements for the existence of profits could have been met.

50. Nor is there any evidence of her having decided, formally or informally, before the Company was placed into liquidation that she should be awarded any sum in recognition of her work as a director. This may be attributable to the Company's financial difficulties and/or to the absence of accounts as admitted within the Preliminary Questionnaire. Whatever the reason, the fact that she was not paid a salary but nevertheless worked as a director is not a ground for entitlement to any sum from the Company.

51. In reaching that decision I have borne in mind that a £20,000 salary is identified in the Preliminary Questionnaire for the year 2007/8. However, it is plain from all the evidence that this figure has no basis as a salary. Even on Mrs Parekh's case that description is at odds with the information from the accountant. Plainly it is the amount the shareholder decided at the end of that financial year that should be awarded to her in recognition of her services.

52. Mr Parekh claims to be in a different position because he was not a director of the Company. He and the accountant for the Company would nevertheless agree the

amount of the charges he would charge for the services he rendered during a financial year. In principle, it is arguable that he had been retained by the Company in consideration for a *quantum meruit* payment and the failure to agree the amount would still leave an unliquidated debt. In practice, however, it is plain from his evidence, the evidence of his wife and of the accountant that he was treated by the Company and he treated himself as though he was a director. The information from Mrs Parekh under oath, concerning his role and knowledge and his evidence which treats himself in the same position as his wife is conclusive. To it can be added the fact that no distinction was drawn by the accountant. The position was, as it would have been if he had been appointed a director, that there would be no contractual liability until the Company and he agreed that he should receive a payment in recognition of his past services. There was no such concluded agreement and no sum potentially to be set off.

53. That means it is unnecessary to decide whether he was a *de facto* or shadow director. However, the reality established by the evidence of Mrs Parekh, the accountant and himself summarised above is that he acted as a director.

54. Moving to the payment to Grosvenor Hale Limited. On the face of the information provided by the accountant, there is an arguable defence in respect of the £7,500 paid for the purchase of three vehicles. That is the reason for the payment he writes he has identified. However, the information from the accountant will have been derived from what he has been told and that is at odds with the information provided under oath (see paragraph 39 above). Mrs Parekh as a director and Mr Parekh in the role he assumed owe a duty to account for the Company's expenditure and for its assets. They have not accounted in any credible way for the expenditure of £7,500, they have not explained or evidenced the need for three vans and they have provided no evidence of any ownership of or other rights to the vans. They have had more than enough time to do so. There is no potential set off.

55. As to the £4,662.59 paid to the London Borough of Croydon, the £5,300 to Interlink Travel and the £3,358.10 to Exploratours. These are plainly loans for personal expenditure.

56. The only purported explanation for the £5,000 paid to Imperial Ambitions Limited is that it was for sums due in respect of 100 Preston Road, Harrow. This is referred to by the accountant but not in the evidence in the witness statements in support of the application. The Company did not carry out building works and no connection with that property has been raised. There is no arguable defence.

57. The position concerning the £4,701.42 paid to Scottish Provident, £773.56 to Health-on-line for health insurance for Mr Parekh; £798.72 to Nu Life and Pension UK and £2,215.04 to HSBC Life UK Ltd turns upon whether this is payment by the company as an emolument or in respect of keyman insurance for its benefit or as a loan to meet a personal expense. This depends upon the subject of the payment and that is a subject of confusion. The HSBC payment is attributed to keyman insurance. The interviews address it as a pension payment but that could be attributable to the passing of time and the pressure of the occasion. I accept this HSBC payment is an arguable defence

subject to the requirement upon a director and those who act as directors to account for the use of a company's money. The onus is upon Mr and Mrs Parekh to identify the pension policy and establish it was a company policy. Otherwise the sums are loans to them, there being no obligation upon the Company to make the payments. They have not fulfilled that obligation. There is no evidence to sustain a case that the other payments are not personal loans and their existence is consistent with the case that loans were made for personal expenditure.

58. That means, there are no defences of potential set off concerning the sums paid/received as personal or otherwise unexplained expenditure. I should add that had I reached a decision that there was an arguable defence in principle in respect of the Grosvenor Hale Limited and HSBC payments I would not have set aside the judgment in any event. That is because of the time that has expired which would make it impossible to achieve a fair trial when the Company through the fault of its director(s) does not have the financial books and records to properly address those issues. It was the director(s) statutory responsibility to ensure the Company kept accounting records sufficient to show and explain its transactions and to disclose with reasonable accuracy its financial position at all times.

59. However, there are also the following sums identified by the accountant as having been paid to the Company: £37,000 by Mrs Parekh during the period 15 November 2006 to 4 February 2008, £8,100 by their son to the Company between 29 and 30 November 2006; and £17,200 by Mr and Mrs Parekh during the period 26 February and 29 February 2008. The letter from the accountant explains that those sums are derived from a reconciliation of the Company's bank statements.

60. The payment from the son does not assist. It leaves a debt to be proved by them in the liquidation insofar as this was a repayable loan.

61. However, the payments by Mr and Mrs Parekh are (at least) arguably either repayment of their existing loans or to be credited to the director's loan account and set off within that account against sums subsequently lent to them. The payments post-date the last accounts, whether those accounts are for the financial year ending 30 September 2005 as the liquidator states or 2006 as Mrs Parekh stated in her Preliminary Questionnaire. The obligation to take an account of mutual dealings and set off the sums due from one against the sums due from the other under ***Rule 4.90 of the Insolvency Rules 1986*** (now ***Rule 14.25 of the 2016 Rules***) will apply subject to addressing the submission that there is no right of set off for a claim of misfeasance.

62. That submission is based upon established law but it assumes this is a case of misfeasance. The fact that money provided by the company was used for personal purposes does not mean payment was a misfeasance. It would not be if lawfully lent. It is legal for a director to borrow money from a company provided the transaction has been approved by resolution of the members and issues of insolvency do not intervene. None are relied upon to address this issue. The same principle is to be applied to Mr Parekh even if he is not to be treated as a director. It was lawful to lend

to him because it was in the interests of the Company to do so when he provided unpaid services to the Company.

63. There is no evidence of any board meeting authorising the loans but authorisation can be assumed from the payments by the Company permitted by its director. It is (at least) arguable that the loans to the Company will have been set off against the loan accounts of Mr and Mrs Parekh when payment was made had accounting records been kept. If not, in any event they should be set off in the liquidation as mutual dealings. There may be insolvency remedy arguments but none are raised at this stage to prevent the existence of an arguable defence.

64. Nor should delay be a reason to avoid the conclusion that this means the judgment should be set aside. On their evidence, they issued this application quickly after knowing for the first time of the judgment. Delay followed but it is far from clear that the responsibility for that delay should be borne by Mr and Mrs Parekh when adjournments were by consent and the court date was not directly a matter under their control. However, the underlying point is that the delay does not appear to cause difficulties for determining whether there is a defence based upon those loans. The bank statements have been reconciled by an accountant and, presumably, this reconciliation can be checked if it has not been already.

F) Conclusion

65. I therefore decide that the judgment should be set aside but only on the grounds of the arguable defence that the debt has previously been repaid by the payments identified in paragraph 59 above or should be set off against those payments being loans made by Mr and Mrs Parekh.

Order accordingly