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Case No: CR-2020-001518

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

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

Date: 14/10/2022

Before :

ICC JUDGE MULLEN

- -

In the Matter of Kazitula Limited

And in the Matter of the Company Directors Disqualification Act 1986

Between :

The Secretary of State for Business, Energy and Industrial Strategy	**Claimant**
- and -	
Shafique Uddin (aka Sofiq Uddin)	**Defendant**

- -
- -

Mr Francis Ng (instructed by **The Insolvency Service**) for the **Claimant**
Mr Christopher Brockman (instructed by **ASW Legal Limited**) for the **Defendant**

Hearing dates: 16th to 23rd June 2022

- -

Approved Judgment

This judgment was handed down remotely at 10am on 14th October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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ICC JUDGE MULLEN

ICC JUDGE MULLEN :

Introduction

1. This is my judgment following the trial of the claim of the Secretary of State for Business, Energy and Industrial Strategy ("the Secretary of State") for a disqualification order to be made in respect Mr Shafique Uddin pursuant to section 6 of the Company Directors Disqualification Act 1986 ("the CDDA 1986"). The claim arises from his alleged conduct as the director of Kazitula Limited ("Kazitula" or "the Company") between April 2010 and January 2017.

2. The Company was incorporated on 26th June 2003 and operated the business of a restaurant at Goring Road in Worthing, under the trade name "Shafique's". Mr Uddin was at all material times its sole director. Kazitula ceased trading in April 2017 and entered creditors' voluntary liquidation on 13th April 2017. The statement of affairs stated that the Company owed £14,551 to the Crown.

3. HM Revenue and Customs ("HMRC") has however lodged a proof of debt in the liquidation for £847,245.13. The circumstances leading to that proof being lodged are set out in the "statement of the matters determining unfitness" contained in the first affidavit of Mr Lawrence Paul Zussman, made on 25th February 2020. Such a statement is required by Rule 3(3) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987 and is the allegation relied upon by the Secretary of State that the court must consider.

4. The allegation is as follows:

> "8. Between April 2010 and January 2017 he caused or allowed Kazitula Limited ('the company') to file inaccurate VAT returns with HMRC, which resulted in the company under-declaring and underpaying VAT and Corporation Tax in the assessed sum £319,587, in that:
>
> • During the period June 2016 to January 2017, HMRC officers carried out an inspection of the company's books and records, made three unannounced visits to the company trading premises and also undertook two separate days of test purchases.
>
> • On 22 February 2017, HMRC issued Notice to provide information and produce documents under Schedule 36 to the Finance Act 2008 with which the company failed to comply.
>
> • Upon conclusion of the investigation and in the absence of evidence to the contrary, HMRC considered that the company had been suppressing its sales figures over the periods investigated and considered that this action had been deliberate.
>
> • On 7 April 2017, HMRC raised a VAT assessment for £201,615, plus interest, covering the periods ending April 2010 to January 2017.

> • On 30 June 2017, HMRC issued a Personal Liability Notice for £134,073 in relation to the VAT assessment.
>
> • HMRC further calculated Corporation Tax owed amounting to £117,972 and also issued personal penalties of £78,432.44.
>
> • On 13 April 2017 the company entered Liquidation with HMRC being owed in excess of £561,000.
>
> 9. HMRC's proof of debt dated 22 May 2018 is in the amount of £561,191. HMRC have subsequently recalculated their claim and the liquidator has received an amended final proof of debt in the amount of £847,245.13, dated 22 August 2019. The liquidator has made a copy available to The Insolvency Service."

5. The detail of the allegation is given in the remainder of the affidavit, which sets out the evidence on which the Secretary of State relies. In summary, it is said that Kazitula underdeclared its sales in its VAT returns by suppressing those receipts paid otherwise than by credit card. This came to light during HMRC's investigations. Though HMRC sought delivery up of the Company's records, they were not provided, though there is a dispute as to the reasons for this. HMRC therefore obtained information from the merchant acquirer that provided credit card services to the Company, showing its receipts from credit card payments. It is said that these showed that, as a percentage of the total sales declared, card sales amounted to, on average, 85.4%. Some 14.6% of Kazitula's declared total receipts would thus have been sums paid otherwise than by credit card. During three unannounced visits conducted in 2016 and 2017 ("the Unannounced Visits") non-credit card receipts were observed to form a much higher percentage of sales. HMRC inferred that such receipts had therefore been underdeclared over the previous seven years of Company's trading life. Somewhat confusingly, HMRC refers to these non-card receipts as "cash" receipts, thought they include a small amount of payments made via a delivery app called Just Eat and other payment methods such as vouchers.

6. In the absence of the provision of the Company's records, HMRC exercised its power to raise a VAT assessment on the basis of its "best judgment" pursuant to section 73(1) of the Value Added Tax Act 1994. It did so by taking the average of the proportion of "cash" receipts that it observed over the course of the Unannounced Visits, which amounted, on HMRC's calculation, to 46% and assuming that this reflected the level of non-card takings over the years covered by the Company's VAT returns. That assessment led to a corresponding assessment to additional corporation tax and penalties, along with the issue of personal liability notices against Mr Uddin, making him personally liable for the penalties. It is not in issue that there are some inaccuracies in HMRC's calculations but have led to the average cash receipts being slightly understated. The Secretary of State contends that, adjusting for these inaccuracies, the "cash" element of the Company's takings over the three Unannounced Visits was an average of around 49%.

7. Mr Uddin denies any wrong-doing and he says that the HMRC could not properly form such a judgment on the basis of three visits to the restaurant in the latter part of its trading life. In the event that there was an under-declaration, he contends that he

relied upon the company accountant, Mr Shiraz Najefy of Najefy & Company Chartered Accountants, to prepare and submit VAT returns to HMRC. He has sought to appeal HMRC's assessments to the First-tier Tribunal (Tax) and I shall discuss the course of those appeals below.

8. His position as to whether the Company's returns were in fact accurate and whether the proportion of "cash" sales comprised in its stated sales is as alleged by the Secretary of State has shifted. Until the trial it appears to have been accepted that the merchant acquirer data was as described above and thus an average of 14.6% of sales were referable to non-card payments. In his skeleton argument, Mr Uddin's counsel, Mr Brockman, raised the complaint that the merchant acquirer data had not been disclosed and had not been examined by the Secretary of State, who relied instead on what HMRC had said about it. HMRC's analysis, or part of it, was therefore obtained on the second day and provided in the form of an Excel spreadsheet.

9. Again, until the trial, Mr Uddin had sought to rely upon a spreadsheet produced by his son, Sami Uddin, in about November 2018, which purported to be a reconciliation of the Company's records to confirm its receipts and the proportion attributable to non-card payments based on the Company's records from 2nd January 2011 to 23rd October 2016 ("the Spreadsheet"). Mr Uddin filed an affidavit dated 8th September 2020, which exhibited the Spreadsheet and a report from Mr Alex Marsden of BDO LLP, an accountancy firm, dated 2nd September 2019 ("the BDO Report") as to the accuracy of the Spreadsheet. As to these documents, Mr Uddin stated in his affidavit that BDO's opinion was that:

> "on the whole, the Spreadsheet fairly reflects the Underlying Documents and that the true percentage of cash sales is between 21.5% and 27.9%. I believe that this confirms that the VAT Assessment was materially inaccurate, and the Company did not significantly underdeclare cash sales in its VAT returns."

The "Underlying Documents" was the term used during the hearing to refer to some 77,339 of company documents that were provided to the Secretary of State during the course of the proceedings. One question is whether the documents provided to Mr Marsden to verify the accuracy of the Spreadsheet were the same as those provided to the Secretary of State or, indeed, whether the version of the Spreadsheet considered by him was that now relied upon.

10. At the hearing, however, Mr Brockman did not seek to rely upon the Spreadsheet, no doubt because, if it is accepted at face value, it also shows a significant under-declaration of cash sales, which were on average 24.5% of turnover. This is lower than that estimated by HMRC but still significantly higher than sales declared in the VAT returns. Nonetheless, it was relied upon the Secretary of State as showing that, even on the best case advanced by Mr Uddin, there was a significant under-declaration in the Company's VAT returns.

11. Much of Mr Brockman's submissions went to process. He submitted that the Secretary of State was adopting a "win at all costs" mentality and steaming ahead with the disqualification while the VAT and corporation tax assessments were under appeal, failing to scrutinise the Underlying Documents properly and simply seeking to

rely on HMRC's inferences and opinions, which are inadmissible. His criticisms extended to the conduct of the hearing too. He submitted that Mr Uddin had been ambushed with questions about the inconsistencies between the Spreadsheet and the Underlying Documents. He also took issue with documents produced by Mr Ng, counsel for the Secretary of State, which sought to provide comparisons of the figures that appeared in the returns, the Spreadsheet and other documents. Before I can address these arguments it seems to me that I must set out the procedural history and the evidence so that Mr Brockman's submissions can be understood in context.

The course of the claim

12. As required by section 16 of the CDDA 1986, the Secretary of State issued a notice of intention to commence disqualification proceedings against Mr Uddin on 6th July 2018, setting out the alleged misconduct in identical terms to the allegation in paragraph 8 of Mr Zussman's first affidavit. As is usual, it also set out the period of disqualification that the Secretary of State considered appropriate at the time. Six years was proposed and it was stated that the Secretary of State would accept an undertaking for a reduced period of five years if the undertaking was offered immediately. Mr Uddin was asked if he wished to make any representations and instructed solicitors. A number of extensions of time were granted for this, though beyond informing the Insolvency Service of the tribunal appeals and inviting the Secretary of State to agree a stay, no substantive representations were received.

13. The claim was issued on 2nd March 2020, supported by Mr Zussman's first affidavit, sworn on 25th February 2020. Directions for the filing and service of evidence in answer and in reply were given by ICC Judge Burton on 5th May 2020. It appears that ICC Judge Burton was invited to stay the proceedings at the hearing before her on the basis of the appeals to the tribunal but declined to do so.

14. Mr Uddin did not file evidence in answer but, on 16th June 2020, made a formal application to stay the proceedings to abide the outcome of the tribunal proceedings or for an extension of time in which to file his evidence. ICC Judge Prentis refused the stay application on 28th July 2020 and made an unless order requiring Mr Uddin to file evidence in answer to do so by 8th September 2020, in default of which he was to be debarred from relying on such evidence. Mr Uddin did file his affidavit in accordance with this deadline, exhibiting the Spreadsheet and the BDO Report.

15. The Secretary of State filed evidence in reply in the form of:

    i) an affidavit, sworn on 7th December 2020 by Mr Paul Addison, the officer of HMRC in the Individual Small Business and Compliance directorate who had conducted the unannounced visits in 2016 and 2017 and investigated the affairs of the Company leading to the issuance of the VAT and corporation tax assessments; and

    ii) a second affidavit of Mr Zussman, sworn on 8th December 2020.

16. When the matter returned to court on 19th January 2021, it was accepted on behalf of Mr Uddin that the BDO Report was not a CPR-compliant expert report. ICC Judge Barber gave permission for Mr Uddin to make an application to adduce CPR-compliant expert evidence by 4th May 2021. She also directed him to make any

application to stay the proceedings by the same date. She gave him permission to rely on documents belonging to Kazitula, namely invoices, receipts, cash register Z-totals, and weekly account summaries, in other words the Underlying Documents, which were to be exhibited to a witness statement by 2nd March 2021. The 77,399 pages of Underlying Documents were provided with a statement by Mr Uddin's solicitor, Mr Matthew Whyatt, dated 1st March 2021.

17. No application was made to adduce expert evidence but, on 4th May 2021, Mr Uddin again applied to stay the claim to abide the outcome of challenges to the assessments raised against the Company and the Personal Liability Notice against Mr Uddin in the First-tier Tribunal (Tax). I refused that application on 8th June 2021. At that point the Company's application for permission to appeal the assessments out of time had been struck out and, although it had subsequently been reinstated it had not been heard and permission to proceed with the appeal had thus not been granted. Mr Uddin's application to appeal the personal liability notices out of time had also been dismissed. Neither appeal to the tribunal therefore had permission to proceed out of time.

18. Having dismissed the application for a stay, I extended the time for the Secretary of State to file further evidence in reply having considered the Underlying Documents and gave directions for trial. This reply came in the form of the third affidavit of Mr Zussman, sworn on 24th August 2021. In this affidavit he set out his consideration of the Underlying Documents.

19. At the pre-trial review on 21st April 2022 Deputy ICC Judge Schaffer directed Mr Uddin to file and serve by 10th May 2022 an affidavit exhibiting a maximum of 1,500 pages from the Underlying Documents on which he proposed to rely, together with an explanation of the proposition he proposed to rely on them for. The reason for this is that the documents were said by the Secretary of State to have been disclosed in no coherent order and, if put before the court would run to 129 lever arch files. Although the Secretary of State sought to limit reliance to 1,000 pages, Deputy Judge Schaffer allowed a little more leeway. Mr Uddin also successfully resisted the Secretary of State's submission that the BDO Report should be removed from the bundle.

20. On 20th May 2022, Deputy ICC Judge Barnett extended the time for Mr Uddin to file his further affidavit setting out the documents on which he sought to rely to 25th May 2022. In fact, Mr Uddin's third affidavit set out only four such documents, which were NatWest Bank service charge summaries, relied upon to show cash banked, card sales and on-line sales. In accordance with Deputy ICC Judge Barnett's order, the Secretary of State's evidence in reply to this came in the form of a witness statement, again made by Mr Zussman, dated 13th June 2022.

21. I should finally mention a further statement from Mr Whyatt, dated 19th June 2022, served during the course of the trial as to custody and form of the Underlying Documents, which had been scanned and provided to Mr Zussman for review in the form of ten PDF files. No objection was taken by the Secretary of State to this evidence being admitted.

The course of the First-tier tribunal proceedings

22. Mr Uddin made applications on 19th November 2018 to the First-tier tribunal (Tax) for permission to appeal the assessments and penalties ("the Company Appeal") and the personal liability notices ("the Personal Appeal") out of time.

23. The Company Appeal was made without the consent of Kazitula's liquidator, Mr Roberts. An unless order was made providing that the appeal would be struck out unless the liquidator provided consent by 4th November 2019. No such consent was given and the appeal was struck out. An attempt by Mr Uddin to stay the appeal was dismissed because the strike out took effect before it could be considered. He applied to reinstate the appeal and that application was stayed pending his application to replace Mr Roberts as the liquidator. Mr Uddin withdrew that application and, on 5th January 2021, the liquidator authorised Mr Uddin to pursue the Company Appeal.

24. The application to bring the Company Appeal out of time was therefore reinstated on 29th March 2021 but dismissed on 10th December 2021. The Defendant has now been given permission to appeal that dismissal by the Upper Tribunal. Thus, if that appeal is successful, and the Company Appeal is allowed to proceed out of time, it will then require a substantive hearing. If that appeal is unsuccessful, the matter proceeds no further.

25. The application to bring the Personal Appeal out of time was dismissed on 25th March 2021 and permission to appeal against this decision was refused on 14th October 2021. It seems that this decision was not communicated to Mr Uddin's representatives and so it may be open to Mr Uddin to renew his application orally.

26. The position at the date of trial was thus that, some five years after the assessments were issued, and more than two years after the disqualification claim was issued, neither the Company nor Mr Uddin has permission to appeal the assessments or personal liability notices out of time. Mr Brockman did not renew the application for a stay but noted the court was in "an invidious position in that it is being asked to make a disqualification order based on HMRC's findings which may be overturned" without access to the evidence that would before the tribunal.

Applicable legal principles

<u>Disqualification under the CDDA 1986</u>

27. Section 6 of the CDDA 1986 provides:

> "(1) The court shall make a disqualification order against a person in any case where, on an application under this section
>
> (a) the court is satisfied—
>
> (i) that the person is or has been a director of a company which has at any time become insolvent (whether while the person was a director or subsequently)…
>
> …

> (b) that his conduct as a director of that company (either taken alone or taken together with his conduct as a director of one or more other companies or overseas companies) makes him unfit to be concerned in the management of a company.
>
> (1A) In this section references to a person's conduct as a director of any company or overseas company include, where that company or overseas company has become insolvent, references to that person's conduct in relation to any matter connected with or arising out of the insolvency.
>
> (2) For the purposes of this section, a company becomes insolvent if –
>
> (a) the company goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up…
>
> …
>
> (4) Under this section the minimum period of disqualification is 2 years, and the maximum period is 15 years."

28. In relation to conduct relied upon that took place before 1st October 2009, section 106 of the Small Business, Enterprise and Employment Act 2015 and Schedule 1 of the Small Business, Enterprise and Employment Act 2015 (Commencement No. 2 and Transitional Provisions) Regulations 2015 require the court to apply section 9 of the CDDA 1986, and consider the factors set out in Schedule 1 thereto, as they stood prior to 1st October 2015. The factors said to be relevant here are:

> "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"

29. In relation to conduct by a director on or after 1st October 2015, section 12C of the CDDA 1986 requires the court to have regard the following factors in the amended Schedule 1 to that Act:

> "1 The extent to which the person was responsible for the causes of any material contravention by a company or overseas company of any applicable legislative or other requirement

> 2. Where applicable, the extent to which the person was responsible for the causes of a company or overseas company becoming insolvent
>
> 3. The frequency of conduct of the person which falls within paragraph 1 or 2
>
> 4. The nature and extent of any loss or harm caused, or any potential loss or harm which could have been caused, by the person's conduct in relation to a company or overseas company
>
> 5. Any misfeasance or breach of any fiduciary duty by the director in relation to a company or overseas company
>
> 6. Any material breach of any legislative or other obligation of the director which applies as a result of being a director of a company or overseas company
>
> 7. The frequency of conduct of the director which falls within paragraph 5 or 6".

Those principles are very familiar in this case and were not in dispute.

"Causing or allowing"

30. The meaning of "caused" and "allowed" has been considered in a number of cases, which is unsurprising given that it is an expression often used in allegations of this sort. In *Re Pure Zanzibar Limited* [2022] EWHC 971 (Ch), ICC Judge Barber considered the meanings of these terms at paragraphs 41 to 45 of her judgment as follows:

> "41. The Claimant maintains that the Defendant 'caused or allowed' the Company's contravention of the regulations addressed above.
>
> 42. In this regard both parties referred me to the guidance given in the cases of *Kappler v Secretary of State for Trade and Industry* [2006] EWHC 3694 (Ch) and *Re X E Solutions Ltd: The Secretary of State for Business, Energy and Industrial Strategy v Selby & Ors* [2021] EWHC 3261 (Ch).
>
> 43. In *Kappler*, a central issue on appeal was the scope of the word 'caused' in the first allegation of unfitness. At [88]-[90], Judge Roger Kaye QC, sitting as a deputy high court judge, reasoned thus:
>
> > '[88] I entirely agree with Mr Bamford that the word "causing" is normally to be given a proactive interpretation as meaning "to bring about, to be the cause of, to produce, induce, or make".

> [89] But in the context of this case I do not see at all why the Secretary of State should not have been entitled to advance the case or argument in closing he did. A director who knows about a state of affairs and appreciates it and its consequences may, if he fails to do anything about it at all, depending obviously on the circumstances, be just as much "causing" the consequences as well as "allowing" them. This may be particularly pertinent in a small company where there are only one or two directors who together control and conduct the affairs of the company and where one (or both) of them has (or have) an intimate knowledge of the company's affairs.
>
> [90] The crucial factor in this case, in my judgment, is knowledge. Counsel for the Secretary of State below made it plain that if Mr Kappler knew about the invoices and their consequences (ie that they were fraudulent) and did nothing to stop them then that would support a case that he had "caused" the invoices and… in my judgment this knowledge was a conclusion the district judge was entitled to make on the evidence'.
>
> 44. In the later case of *Selby*, the formula 'caused or allowed' was used for a certain key allegation. Commenting on this, ICC Judge Prentis stated:
>
> '[29] Mr Selby, Mr Sayed and Mr Awan are said to have "caused or allowed" the Company's participation in such transactions. The addition of the concept of allowing avoids the dispute in issue … in *Kappler*…, being whether causing required positive action, to be sidestepped. While, as the judge found, causing may be made out through inaction, when known or obvious facts are ignored, allowing makes the allegation of inaction in the face of duty, if not actual knowledge, plain'.
>
> 45. It was conceded by Mr Roohani in closing that 'known or obvious facts … being ignored can be causation, and inaction in the face of duty can be said to constitute allowing….'"

31. Thus a director may "cause" a thing to happen by deliberately bringing it about but may similarly be said to "cause" a thing to happen by knowing of a state of affairs and its likely consequences and failing to take the steps that he ought properly to take to prevent those consequences from happening. To "allow" something to happen requires culpable inaction, short of inaction with full knowledge, such as failing properly to acquaint himself with the affairs of the company in breach of the duty to exercise reasonable care, skill and diligence contained in section 174 of the Companies Act 2006. The expression "caused or allowed" offers a degree of flexibility in drafting the claimant's allegation in circumstances where the facts may be opaque and it must be recalled that the statement of matters determining unfitness

is not to be read as if it were a criminal indictment. As noted by Judge Roger Kaye QC in *Kappler v Secretary of State* [2008] 1 BCLC 120 at paragraph 84:

> "The key question in all cases is whether or not the defendant fairly knows and understands the substance of the allegations he has to meet."

Nor should semantic arguments obscure the court's focus on whether the conduct of a director is such as to render him or her unfit to be concerned in the management of a company. The court must be satisfied that the director's conduct displayed a lack of probity or incompetence of a sufficiently high degree to justify the making of a disqualification order.

32. I should briefly mention another principle. The first is that a director cannot discharge his or her obligations towards a company by outsourcing them but reasonable reliance on professional advice can negative a finding of unfitness or be a mitigating factor in a particular case (see *Secretary of State for Business, Innovation and Skills v Marley* [2018] EWHC 236 (Ch) at paragraph 73, per Edwin Johnson QC, as he was then, sitting as a Deputy Judge of the High Court). Whether a director has "allowed" a company to file inaccurate returns will require consideration of the extent to which the director supervised the completion of the returns or abrogated his responsibility and, where the director relied on professional advice, whether that advice was self-evidently wrong so that the director should not have been content to follow it unquestioningly.

Evidential matters: the admissibility of HMRC's findings

33. The interplay between the disqualification claim and the tax tribunal proceedings needs a little explanation. These are proceedings between the Secretary of State and Mr Uddin. The tax assessments establish the liability of the Company to HMRC as a statutory debt but they do not bind this court to find that the Company underdeclared its income or that Mr Uddin caused or allowed it to do so in this disqualification claim. Similarly, the personal liability notices create a liability on the part of Mr Uddin to the Crown but similarly does not bind this court in these proceedings.

34. Mr Brockman submitted that the Secretary of State was impermissibly seeking to rely upon the inferences drawn by HMRC as a result of its investigations as evidence of fact in relation to the conduct of Mr Uddin. He referred me to the opening sentence of the chapter 33, "Opinion and Expert Evidence", of Phipson on Evidence (20th Ed.) which says:

> "The general reputation prevailing in the community; and the opinions, inferences or beliefs of individuals (whether witnesses or not), are inadmissible in proof of material facts. Evidence of this nature is sometimes said to be excluded by the hearsay rule; but it is, in general, inadmissible whether delivered on oath or not."

HMRC's approach and conclusions as to the receipts of the Company and to the conduct of Mr Uddin in choosing to impose personal liability on him are no more than inadmissible opinion evidence.

35. Mr Ng took me to a number of cases in which the Secretary of State's evidence in disqualification proceedings has been held not to be circumscribed by strict rules of evidence. In *Re Barings plc and others (No 3)* [1999] BCC 146, Evans-Lombe J considered the admissibility of hearsay evidence in the proceedings under section 6 of the CDDA 1986. The hearsay evidence in that case was an affidavit of a chartered accountant instructed by the Secretary of State to collate certain documents relating to the running and collapse of Barings group. He said at 149:

> "I was referred to the two cases in the Court of Appeal which I have already spoken of. Those two cases are *Re Rex Williams Leisure plc* [1994] 2 BCLC 555, [1994] Ch 350; and *Secretary of State for Trade and Industry v Ashcroft* [1997] 3 All ER 86, [1998] Ch 71. I wish to refer to a passage in the judgment of Millett LJ in the *Ashcroft* case. I think I should pause before reading this passage to point out that the *Ashcroft* case concerned an appeal from an order of the judge at first instance in a s 6 case striking out an application of the Secretary of State. That passage starts at the top of the page under the heading 'The present case', and runs as follows ((1997] 3 All ER 86 at 94-95, (1998] Ch 71 at 81-82):
>
> > 'The judge held that *Re Rex Williams Leisure plc* was concerned solely with applications by the Secretary of State under s 8 of the 1986 Act, not with applications by him under s 7 [which derive from s 6]; and he refused to extend it to the latter. In my judgment, there is no material distinction between the two kinds of case. A logical distinction might have been made between cases where the Secretary of State was seeking a winding-up order and cases where he was applying for a disqualification order; but this court refused to make it. A similar distinction might alternatively have been made between cases where the Secretary of State was acting upon a formal report by outside inspectors, where s 441 of [the Companies Act 1985] covers the situation, and information obtained by officials appointed under s 447, where there is no comparable provision; but the court refused to draw it. Once the last step was taken, I can see no discernible distinction between an application for a disqualification order by the Secretary of State based on information gathered for him by his officials and one based on information supplied to him by an office-holder. In both cases the information is obtained by a professional man or an official acting in pursuance of statutory powers to compel the provision of information. In both cases the information will necessarily include hearsay but it will be the material on which the Secretary of State decides that a particular regulatory response is necessary. In both cases it would be nonsensical if the court could not take it into account at least unless and until it is challenged by direct evidence to the contrary.

> The safeguards, in my opinion, are threefold: first, the information is obtained by a professional insolvency practitioner or an official in the Department of Trade and Industry, who must have judged it prima facie worthy of credence; secondly, it is considered by the Secretary of State, who must have judged it sufficiently credible to form the basis of his own opinion and to base an application to the court on it; and thirdly, the respondent whose conduct is impugned has every opportunity to rebut it and, if the evidence is not later supported by direct evidence, to invite the court to reject it.'"

Evans-Lombe J went on at 150:

> "I move to counsel for the respondent's second submission. Examination of the Court of Appeal's judgments in the *Rex Williams* and *Ashcroft* cases, does not reveal in either case that the court is prescribing as a rule that only evidence gathered pursuant to relevant statutory powers is capable of being given in the affidavit sworn by the provider of the information to the Secretary of State. For my part I can see no reason why there should be such a limit. It seems clear from the judgment of Millett LJ, that the criterion in his mind - as in those of the Court of Appeal in the *Rex Williams* case - is 'what was the information upon which the Secretary of State took the decision to launch the proceedings?' When that question is answered, that is the information which the Secretary of State is entitled to put before the court, albeit as hearsay evidence, as the basis of his application to disqualify.
>
> …
>
> I have to accept, as counsel submitted to me, that this conclusion means that the hearsay rule does not apply to evidence sought to be adduced by the Secretary of State in support of an application under this Act. I draw attention to the fact that that was clearly something which was being borne in mind by Millett LJ when he gave the judgment to which I have referred, because he is, at letter D on p. 642, concerned to set out the safeguards which acted in his view as a protection to a respondent against abuse of what would otherwise be a freedom from the hearsay rule."

36. On the more direct question of the admissibility of opinion evidence I was referred to *Secretary of State for Business Enterprise and Regulatory Reform v Aaron* [2008] EWCA Civ 1146 in which the Court of Appeal considered the admissibility of the report of Financial Services Authority investigators and various decisions of the Financial Ombudsman Service. The defendant sought to exclude it on the basis that it was inadmissible opinion evidence. It was held that the implied exception to the strict rules of evidence in CDDA proceedings extended not only to hearsay evidence but to evidence of findings and opinions obtained as part of the investigative material obtained under the Secretary of State's statutory powers. The material was no more

than *prima facie* evidence, which the court could take into account with all other relevant evidence in reaching its own conclusions. Thomas LJ, as he then was, said:

> "19…. It is common ground the statements of witnesses set out in the report and in the transcripts are hearsay, but admissible under section 1 of the Civil Evidence Act 1995 . However, it is also common ground that the findings of fact and the conclusions on the conduct of the defendants are ordinarily inadmissible on the basis that they constitute findings in other proceedings and are excluded under what is commonly referred to as the rule in *Hollington v Hewthorn* [1943] KB 587.
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> 20. Despite criticism of the rule in *Hollington v Hewthorn* (as for example in the opinion of Lord Hoffmann in *Arthur J S Hall v Simons* [2002] 1 AC 615, 702 d and the observations of Toulson J in *Lincoln National Life Insurance Co v Sun Life Assurance Co of Canada* [2004] 1 Lloyd's Rep 737, para 92), the rule remains a clear rule of evidence…
>
> 21. The Secretary of State contended that the findings of fact and the opinion set out in the report were admissible under an implied exception to the strict rules of evidence developed in disqualification proceedings-referred to by Mr Newey as the *Armvent* principle after the decision of Templeman J in *In re Armvent* [1975] 1 WLR 1679. The defendants contended that the exception no longer had any relevance. It was concerned with hearsay only and had in that respect been replaced by the 1995 Act. It had never enabled a court to rely on findings of fact or opinions of other courts or persons. It is therefore necessary to examine in a little detail the scope of implied exception developed in the cases."

37. He considered *Secretary of State for Trade and Industry v Ashcroft* [1998] Ch 71 as follows at paragraph 25:

> "It was held that there was no distinction which could properly be drawn between an application for a disqualification under section 8 and section 6 and between information supplied to him under statutory powers by his own officials and information supplied to him by others such as inspectors. The court held that, although a distinction could have been drawn between relying on such evidence in a winding up petition and in disqualification proceedings or between the evidence of outside inspectors and information obtained by officials under section 447, none had been drawn. There was no logical distinction between applications under the different sections of the CDDA."

38. He referred to Millett LJ's judgment at page 81 of *Ashcroft*, which I have quoted as part of the extract from *Re Barings plc* above and continued:

> "29. In my view therefore, it is clearly established that in disqualification proceedings whether brought under section 8 or under section 7 for an order under section 6 that there is an implied exception to the strict rules of evidence on hearsay evidence, opinion evidence and the rule in *Hollington v Hewthorn*. This was developed from the scheme of the Companies Acts on the basis that Parliament must have intended that a court should have regard to the materials produced under clear statutory procedures on which the Secretary of State had relied in bringing the proceedings. There was no real disadvantage to a director. It was no more than prima facie evidence and the director was entitled to adduce evidence to contradict the findings and conclusions in the report. The court would reach its own conclusions.
>
> 30. Although it is no longer necessary to rely on the implied exception in relation to hearsay evidence, it is still necessary to do so in relation to findings of fact and conclusions in the report so long as the rule in *Hollington v Hewthorn* remains good law. The principle of the statutory scheme under the Companies Acts, although broadened to include provisions of FSMA, remains the same and the reasons for the implied exception remain valid. On an examination of the rationale for the decision in *Hollington v Hewthorn* and the Law Reform Committee's reasons for recommending its retention in civil proceedings, it is clear that the exception does not offend the underlying purpose of the rule. It is clear from the decisions to which I have referred that the implied exception has been developed in the context of the specific rules relating to disqualification and not in the context of rules pertaining to the use in subsequent litigation of a decision in prior litigation where the issues on which evidence is required in each of the sets of proceedings are delineated by pleadings. The primary objective of the implied exception is to put before the court material obtained under the statutory scheme on which the Secretary of State relied in making his decision and which forms the basis of the case against the defendant. It enables the defendant to know the case made against him and to put in the materials on which he relies in response."

While he held that material obtained outside the scope of the investigation into the director's conduct was inadmissible he concluded at paragraph 37:

> "It may be that in a diverse regulatory system within the UK and in a globalised financial and banking services industry, it is necessary to rely on investigative reports carried out by other regulators or under statutory authority in other states and that by analogy, such material can be relied on in disqualification proceedings. That was the effect of the decision in *Barings* [*(No 5)*] and, although the point does not arise on the present

> appeal, I accept that an argument can be made along those lines and the merits of the argument can be decided when it arises, unless Parliament takes the preferable course of amending the CDDA."

One would have thought that the opinion of the officers of the sole administrator of tax collection would fall within this principle. However that might be, the Secretary of State did not urge the findings of HMRC on me as binding, although I am asked to take the same approach to assessing whether the Company, on the balance of probabilities, had supressed its cash receipts. HMRC's investigations and account of their findings as to the proportion of "cash" sales disclosed by the merchant acquirer data are at least admissible hearsay evidence and were not, until this hearing, challenged, save to point out certain limited errors that I shall refer to in due course.

39. I am not considering whether the HMRC assessments are sustainable as a question of the exercise of the "best judgment" test or what the precise amount of tax might be found to be due if the assessments are set aside, which is of course a question for the exclusive jurisdiction of the tribunal. My task is to consider whether the Secretary of State has, on the balance of probabilities, made out any cash suppression and, if so, whether that is at such a level to satisfy me that, if Mr Uddin caused or allowed it to happen, he is unfit to be concerned in the management of a company. If that threshold is crossed I am obliged to disqualify Mr Uddin for a minimum period of two years. Whether a longer period should be imposed will depend, in part, on whether the Secretary of State can satisfy me that the level of suppression elevates the seriousness of the case.

Secretary of State's duty of fairness

40. Mr Brockman raised the Secretary of State's duty to act fairly. He referred me to *Re Finelist Ltd (No 1)* [2004] BCC 877 in which Laddie J referred to the serious consequences of a disqualification order and said:

> "It is the seriousness of these consequences and the fact that such orders are sought by the [Secretary of State] on behalf of the public which should inform the way in which the proceedings are commenced and how the [Secretary of State] carries out her functions."

More recently, in *Re Keeping Kids Co (formerly Kids Co) (No 2)* [2021] EWHC 175 (Ch) Falk J emphasised the need for balance and fairness in presenting the claimant's case "warts and all". As is noted in *Mithani: Directors' Disqualification,* at Chapter 8, paragraph 22A, the Secretary of State should not adopt a "win at all costs" approach to the litigation.

The witnesses

41. I heard first from Mr Zussman for the Secretary of State. He is Deputy Head of Investigations in the Investigations and Enforcement Services directorate of the Insolvency Service. He was defensive under cross-examination and was on a number of occasions not sufficiently focused on the questions put to him. There were two areas in particular on which he was challenged by Mr Brockman. First, and most

seriously, it was put to him that his written evidence was misleading. At paragraph 25 of his third affidavit Mr Zussman stated in relation to his review of the Underlying Documents:

> "25. During the review, I have not been able to identify any record of any cash being banked for the years 2010-2017. As noted above at paragraph 16(c) above, the Underlying Documents only included bank statements covering the period 1 November 2010 to 1 November 2012 but none for the years covering 2013 to 31 January 2017."

42. Mr Zussman said he had looked at documents for those years and seen no evidence of cash being paid into the account save for one document showing cash being banked in one week. He was taken to the NatWest service charge statements, four of which Mr Uddin had highlighted in his third affidavit, which show:

    i) for the period 2nd July 2011 to 29th July 2011, cash paid in at branches in the sum of £1,479;

    ii) for the period 3rd December 2011 to 30th December 2011, the sum of £2,661 being paid in;

    iii) for 3rd March 2012 to 30th March 2012, the sum of £610 being paid in;

    iv) for 5th May 2012 to 1st June 2012, the sum of £633 being paid in; and

    v) for 1st September 2012 to 28th September 2012, the sum of £1,164 being paid in.

    It was put to him that he had given the misleading impression that he had reviewed all the documents when he had not. Mr Zussman said that there were 77,339 pages document to review, which he had reviewed to the best of his ability. His account of his review certainly contributes to the impression of a thorough examination of the documents. This is reenforced by the identification of 1,373 pages of handwritten documents and a detailed account of duplicated and inconsistent documents. It is therefore surprising that the documents showing payments of cash into the account were not identified.

43. Secondly, it was put to him that he has adopted a "win at all costs" mentality by including a number of irrelevancies in his evidence that were little more than mudslinging. He had, for example, referred to the absence of a bookings diary in the Underlying Documents, which he said would show how many customers were in the restaurant. A booking diary might be of some relevance to the number of bookings but is unlikely to be of relevance to the question of cash suppression.

44. Similarly, there are references in his third affidavit to evidence of a payment to an entity referred to as Shafiques Sikber Ltd, which Mr Zussman was unable to find on the Register of Companies, forms from the Child Support Agency, electricity bills addressed a company called Thanaglow Ltd, which Mr Zussman was similarly unable to find on Register of Companies, and a payment to an outside caterer. None of these shed any direct light on the allegation, though Mr Zussman defended reference to

them as part of the "basket of evidence" available to him. This was a phrase to which he returned repeatedly in his oral evidence. Similarly, when challenged about reference to document with the sum of £17,863.60 noted on it he accepted that he was not asking the court to infer that these were the takings for that week but said that this simply showed that the documents could not be relied upon.

45. There is force in the point that, in setting out the range of documents that were included in the Underlying Documents, Mr Zussman was seeking to illustrate his impression that they were not a coherent set of company records. As he explained, in the electronic form they were provided to him, the Underlying Documents appeared "thrown together" and many of the documents that are said to have underpinned the Spreadsheet, such as weekly summaries, were not amongst them. Nonetheless Mr Zussman, in his written and oral evidence, did raise matters which seemed to me to be irrelevant to this case, such as the absence of a diary, to which I have already referred, and the fact that, on one of the unannounced visits, on 11th August 2016, the restaurant appears to have been open for a quarter of an hour longer than its advertised opening hours. The impression that I formed of him leads me to conclude however that these were examples of a lack of focus on the relevant issues in the case rather than an intention to engage in mud-slinging.

46. While his evidence gives the impression of a comprehensive review being undertaken, I do not think that Mr Zussman intended to mislead. His statement at paragraph 25 means what it says. He was not able to identify the documents showing payments into the account and, as he explained, he was looking through them as best he could in between his other work. He describes the incoherent organisation of the documents supplied to him in PDF format. I accept what he says. He should have explained the limits of his review with greater accuracy but, in the context of his evidence as a whole, I am satisfied that his failure to identify the bank service charge statements was an honest mistake in the context of a review of tens of thousands of pages. Mr Zussman was at bottom telling the truth as he understood it to be and accepted Mr Brockman's propositions as to the limits of his knowledge. He accepted, for example, that he had not asked HMRC for the Company's VAT or corporation tax returns or examined these. In relation to those returns it has, however, never been suggested that they are not as alleged. I accept Mr Zussman's evidence, which is principally directed to the putting before the court the information obtained during the investigation into the Company.

47. Mr Paul Addison gave evidence as to the conduct of HMRC's investigation into the Company and in particular the Unannounced Visits, the requests for information made thereafter and the raising of the assessments thereafter. Mr Addison accepted that there were mistakes made in each of the visits, which he characterised as minor. For example, in case of the 13th October 2016 visit the card sales figure included online sales, rather than as a non-card payment, that is to say, the non-card payments were understated. He accepted that, as the original figure had been used to calculate the average estimated cash understatement, this might need to be adjusted. He was a fair-minded and straightforward witness, whose evidence I accept.

48. Mr Matthew Whyatt is a solicitor at ASW Solicitors. His evidence went to the condition in which the ten boxes of Underlying Documents went to BDO for examination and then to a reprographic company for scanning into electronic format. He records that they were received from Sami Uddin on or around 25th February 2019

and were sent on to BDO on 7th March 2019. BDO returned them on 25th November 2019 and they were sent to the reprographer for scanning in February 2021. He describes the contents of the boxes as "generally neat with various documents bundled together when sent" for scanning. He exhibits pictures of the boxes and their contents. The photographs do show documents bundled together with rubber bands. He does not give any more detailed evidence of the contents of the individual bundles and in particular whether they included weekly summaries of takings. Nor does he give evidence of the appearance or accuracy of the PDF bundles supplied to Mr Zussman but I accept Mr Whyatt's evidence as far as it goes.

49. Finally I heard from Mr Uddin. He is a quietly spoken gentleman of 63 and he explained that he came to this country at 15 and went to school for one year, leaving without any qualifications. Even while he was as school he worked part-time. He explained that he did not understand accounts and so was unable to say whether he accepted that his returns, when considered against the merchant acquirer data, showed 14.6% of takings were non-card takings. He accepted, however, that that had been the position of HMRC since 2017 and he agreed that he had never challenged HMRC's case in this regard.

50. I shall consider his evidence in more detail in due course but at present I can say that, while Mr Uddin's oral evidence was given in a thoughtful and seemingly straightforward manner, there are certain inconsistencies in the account given by him that are at total variance with the available contemporaneous documentation. He similarly sought in his written evidence to create the impression that the liquidator of Kazitula had behaved in an unreasonable and oppressive fashion, which is not at all borne out by the evidence, and to tar the reputation of the company accountant on scanty evidence in order to bolster his case that responsibility for any inaccuracies lay with the accountant.

51. What was conspicuous by its absence, however, was any admissible evidence from Mr Marsden of BDO, or any evidence from Mr Sami Uddin, who prepared the Spreadsheet, or from Mr Najefy, who, on Mr Uddin's case, was intimately acquainted with the Company's tax affairs and ultimately responsible the preparation of its returns. The court can draw adverse inferences from such failure applying the principles summarised in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 at 340 by Brooke LJ:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

52. No explanations were offered as to why Sami Uddin was not called, despite omissions in the Underlying Documents underpinning the Spreadsheet prepared by him and inconsistencies between the Underlying Documents and the Spreadsheet having been flagged up in the Secretary of State's evidence. Nor was an explanation offered for Mr Najefy's absence other than that Mr Uddin no longer had a good relationship with him. I accept that, given that Mr Uddin blames Mr Najefy for any errors, it is unlikely that he would have willingly given evidence in support of this proposition, but given Mr Uddin's case one might have expected there to be some effort to obtain his attendance. As it is, Mr Uddin accepted that he had not even complained to Mr Najefy.

HMRC's enquiries and the assessments

53. I turn now to the events which led to the insolvency of the Company and the allegations made against Mr Uddin. HMRC looked into the affairs of Kazitula in 2016. Test purchases were carried out by HMRC on 2nd June 2016 and 3rd June 2016. Officers were authorised to order from the restaurant and paid in cash, in order to see if the meals ordered were included in the VAT returns for the relevant periods. That exercise proved fruitless. Mr Addison's account of the reason for this is simple – his requests for the Company's VAT and other records to be delivered up were not complied with so that he was unable to check whether the test purchases were declared. Mr Uddin has not produced any evidence to show how these were dealt with.

54. There were then the Unannounced Visits on:

i) Thursday, 11th August 2016;

ii) Thursday, 13th October 2016; and

iii) Friday, 13th January 2017.

I will summarise these briefly from the contemporaneous notes exhibited to Mr Addison's affidavit.

<u>11th August 2016</u>

55. On the first of these occasions, Mr Addison's note records that the premises were entered at 22:45. He observed the cashing up process and discussed the Company's business with Mr Uddin. Mr Uddin estimated that the day's take was between £1,200 and £1,300, possibly more. The note continues:

> "Asked about his break even figure for the week, [Mr Uddin] did not know. [Mr Sheikh of HMRC] attempted to rephrase it. [Mr Uddin] confirmed that his staffing cost (wages) were between £1,600 and £1,700 a week. He stated that the purchase

> of supplies fluctuated depending on how busy the restaurant was."

There was an older, non-functional till on the premises, which was reported to be used as a cash drawer, and a single PDQ machine for taking card payments, provided by Barclaycard. As to record-keeping the note states:

> "PA asked SU what records he kept on the premises. SU informed him that he kept purchase invoices, sales receipts and meal slips. He further advised that at the end of the day, while at home, he calculated the total value of all sales and wrote the daily gross takings for each day on a weekly gross takings sheet which he gave to his accountant. Asked whether this specifically recorded cash takings for any given day, SU stated that it did not: the weekly sales records simply provided a total of all sales."

56. Mr Uddin estimated that cash sales were about 30% of takings and that use of cash was in decline. He explained that the Company had been registered with Just Eat for two years and customers could also use PayPal. HMRC's officers also took copies of various documents including "meal slips", being the order forms or customer bills, and receipts, including receipts from Just Eat orders.

57. As to the completion of VAT returns, Mr Uddin is reported as stating:

> "SU advised that his accountant was Najefy and Co. He advised that they completed the company's VAT returns and that in order to do so, SU sent them Purchase Invoices, bank statements, Just Eat statements and the weekly gross takings conciliation sheets."

58. As to staff, Mr Uddin is recorded as informing HMRC's officials:

> "[Mr Uddin] advised that there were three front of house staff on that night (each paid £8 per hour) and four chefs (each paid a salary of £400 per week). He stated that staff get payslips and that the accountant"

It is accepted that this is wrong in that the Company did not employ four chefs, but only one. It is not clear whether this error represents a misunderstanding of what HMRC were told by Mr Uddin or whether Mr Addison understood what Mr Uddin had said but then did not record it correctly.

59. That is not the only error in the note, which identifies a discrepancy of £64.75 in the cashing up record. In fact HMRC's note incorrectly recorded the Just East sales figure and £121.55, rather than £56.80 as noted by HMRC, should have been attributed to this. This error was identified on a subsequent review. Mr Zussman was also taken to three receipts for Just Eat orders on that night, two of which have till receipts with the words "Order is PAID" and one of which, for £64.75, states "Order is NOT PAID". It also appears likely from this that cash was paid on delivery, rather than a payment

being made via the Just Eat website, and that the sum of £64.75 should have been attributed to cash receipts on that day.

13th October 2016

60. On the second occasion, on 13th October 2016, Mr Uddin advised that there had been no changes to the Company's business, but some further detail was given on staff payments. Mr Addison's colleague, Mr Nicholas Hilton, asked how the Company paid its staff:

> "SU replied head chef and manager by cheque or bank transfer all other staff are paid by cash. Uses cash taken from weekend trading to pay staff. SU drawings are £3.5k per month. SU showed his cheque book stub which revealed payments to SU of £3.5k on 05/09/16 and 04/10/16. Only on one occasion has the business not taken enough cash for staff to be paid when cash was withdrawn from the bank to meet the shortfall
>
> …
>
> SU showed NH & PA Staff payment summary prepared by Najeffy for week 28 2016. PA asked if he had to hand the latest staffing rota SU produced a rota dated 11/09/16. PA asked if he may take a picture of both, SU agreed."

Mr Uddin thought that the trading that night had not been as busy as on the first visit and repeated his assessment of the range of an average Thursday's takings as being £1,200 to £1,300. A "very good" Thursday would have takings of £1,600. Again, the cashing up process was observed and a staff payment summary, dated 16th October 2016, was copied together with other documents. As I have explained, Mr Addison accepted a small error in the allocation of payments on this occasion.

13th January 2017

61. The third unannounced visit took place on 13th January 2017. Mr Uddin was not present on that occasion, but Mr Sami Uddin was at the restaurant. He described the evening as "not bad" and "normal". The cashing up process was again observed. The note tabulated the meal slips in greater detail than the record of the two previous visits. The payments were shown to have been made by a mixture of methods – cash, card and via the Just Eat system.

Follow up by HMRC and the issuing of assessments

62. That concluded the Unannounced Visits and Mr Addison spoke to Mr Uddin by telephone on 30th January 2017. He sent a letter to him on the same day. In it he said:

> "I should like to view your records, I propose to call and collect them from you and then return them at a later date. Please can you telephone me within the next 14 days so that we can agree a mutually convenient time for me to collect your records."

He identified that he would be checking the VAT periods from 1st November 2012 to 31st October 2016 and set out the records he required, including annual accounts and bank statements, records of daily gross takings (being till rolls, "Z" readings from the till, meal bills, daybooks and cashbooks).

63. These records were not produced and, on 22nd February 2017, Mr Addison issued a notice pursuant to paragraph 1 of Schedule 36 to the Finance Act 2008 requiring the production of those documents. The notice is in very clear and simple terms. It says:

> "I have not received any of the items I asked for. Because of this, I am now issuing this notice. The attached schedule shows what I still need.
>
> This notice means that by law the company must let me have the information and the documents I have asked for by 22 March 2017. Please send the documents to me at Crown House, 11 Regent Hill, Brighton, BN1 3ER. I am issuing this notice under Paragraph 1 of Schedule 36 to the Finance Act 2008."

It went on to state that a £300 penalty would be imposed if the Company did not comply with the requirement by the stated date and further penalties of £60, could be payable thereafter.

64. Mr Uddin's first affidavit says that he dealt with this notice promptly:

> "On 22 February 2017, HMRC served the Company with a Notice to provide information and produce documents… On the same day, I visited Mr Najefy at his office and provided him with the Notice. Mr Najefy assured me that this was 'all in hand' and that it was HMRC's responsibility to make arrangements with him to collect the relevant documents. I therefore assumed that Mr Najefy would ensure that the Notice would be complied with."

It is surprising that Mr Uddin should have accepted that it was HMRC's responsibility to collect the documents given that Mr Addison's Schedule 36 notice so clearly stated that the records were to be sent to his professional address and the consequences that would follow if they were not.

65. Despite the clarity of the Schedule 36 notice, the records were not produced and, on 29th March 2017, Mr Addison wrote again, notifying the Company of the imposition of the penalty of £300, to be paid by 28th April 2017, and continuing penalties of £60 a day if the required records were not produced by that date. Again, the records were not produced and the Company proceeded to voluntary liquidation, advice in respect of which was apparently first sought on 27th March 2017.

66. This course of action was apparently also pursued on the advice of Mr Najefy given on 22nd February 2017. Mr Uddin's account is:

> "Mr Najefy further advised me that if HMRC did issue an assessment, the Company would be unable to meet the liability

> created thereby or the costs of appealing against it. He therefore suggested that I should take immediate steps to place the Company into creditors' voluntary liquidation. Mr Najefy recommended that I instruct Sterling Ford to assist with this."

This is also surprising given that HMRC had not, at this stage, stated that it regarded the Company's VAT returns to have understated receipts, still less intimated a six figure liability. At this stage, HMRC were simply requesting sight of the company records to see if they confirmed the figures stated on the Company's returns. While there might have been some expense in assembling the records and sending them to HMRC, Mr Addison was not asking the Company to put itself to great effort but to send him the records that Mr Uddin continues to maintain vindicate the accuracy of its returns. Moreover, Mr Najefy did write on the Company's behalf on 5th May 2017 and promised a substantive response by 30th June 2017.

67. On 7th April 2017 Mr Addison wrote again, noting that he understood that the Company was entering creditors' voluntary liquidation. He said that the company records that he had required to be produced had still not been provided to him. He explained that he had obtained details of payments made by card in the VAT periods from July 2011 to January 2016 from the merchant acquirer providing the Company's card payment system. Assuming that the VAT returns disclosed the Company's true turnover, card sales would have accounted for 85.4% of the sales, with the remaining 14.6% being "cash" sales. As I have explained "cash" is somewhat misleading in that it really means "non-card" payments and includes payments made via delivery apps such as Just Eat. This average did not tally with card/non-card payment split observed on each of the Unannounced Visits. These he tabulated as follows:

Visit date	**11th August 2016**	**13th October 2016**	**13th January 2017**
Card sales	£730.85	£802.40	£2,186.80
Cash sales	£1,002.40	£731.50	£1,075.00
Total	£1,733.25	£1,533.90	£3,261.80
Card sales as a percentage	42.2%	52.3%	67.4%
"Cash" sales as a percentage	57.8%	47.7%	32.6%

He highlighted that he was not aware of factors such as "opening times, menu changes, price increases, special offers or other matters" that might have affected the proportion of "cash" sales at the time of the unannounced visits. His view was that the Company's returns did not accurately state the "cash" payments received and that these had been underdeclared. He took an average figure based on the three visits and stated that he has determined that "cash sales" would have accounted for 46% of total sales over the period into which he was inquiring and calculated the further VAT payable on the additional sales that it ought to have declared, which he set out for each VAT period. He stated that he would issue an assessment for the VAT periods April 2010 to January 2017, although he understated the total amount of the assessment. This error is immaterial given that the correct amount is shown in the table immediately above the paragraph containing this error.

68. He also stated that he proposed to issue penalty notices too. He explained his reasoning as follows:

> "• Based upon the information gathered during our enquiry and as a result of our visit we have demonstrated, using best judgement, the daily gross takings figures are incorrect and cash sales have been omitted
>
> • We have also demonstrated that the records from which the VAT returns have been based upon do not include a significant proportion of cash sales. It is our understanding that the sales turnover for the Corporation Tax return have also been based upon the self same daily takings sheets.
>
> • We have gathered information from our unannounced visits that show that either the prime takings figures which are transferred on to the daily takings sheets have either been re-written to exclude cash sales or written up before all cash sales have been properly recorded.
>
> • I am unable to check to see whether the test purchases have been declared on your VAT Returns as you have not provided me with VAT account and other records I have asked for in my Information Notice.
>
> • In summary, it is probable that you knew that the takings upon which the VAT returns were based were incorrect. As the sole director, you have the ultimate responsibility to ensure that the prime records from which the company tax returns are based, are correct and includes all takings information.
>
> • Therefore it is our view, based on the balance of probabilities, that it was a deliberate behaviour which lead to the under declared sales for VAT periods 04.10 to 01.17."

Finally, he stated that he believed the Company's corporation tax returns were inaccurate on the same basis and therefore had asked a colleague to issue Discovery Assessments.

69. The notice of assessment to VAT under section 73 of the Value Added Tax Act 1994 was sent separately on the same day and stated that the total VAT due was £201,615.00. This letter advised of the Company's right to seek a review of the decision to issue the assessments or to appeal directly to the tribunal within 30 days. Corporation tax Discovery Assessments were raised on 10th April 2017 in the sum of £117,943.55. Mr Uddin says that these documents were also given to Mr Najefy, who assured him that he would resolve the matter. As I have said, Mr Najefy did write to Mr Addison on 5th May 2017 in respect of the VAT assessment.

70. On 13th June 2017 HMRC wrote to the Company to notify it that they intended to charge a penalty of £78,432.44 in respect of the inaccuracies in the corporation tax returns. On 16th June 2017 HMRC wrote to Mr Uddin, referring to the corporation tax

assessments and penalties chargeable, and informed him that they intended to issue a personal liability notice against him. A penalty assessment was issued to the Company on 26th June 2017 in the sum of £134,073 in respect of VAT and, on 30th June 2017, HMRC issued a personal liability notice to Mr Uddin requiring him to pay that sum by 30th July 2017. Again, Mr Uddin says that he supplied this to Mr Najefy, who again assured him that he would resolve this. Indeed, on 19th July 2017 Najefy & Company sent to HMRC a copy of its personal liability notice dated 30th June 2017, annotated in manuscript saying, in summary, that the relevant records were being gathered and they hoped to reply substantively by 15th August 2017. Mr Addison accepted the request for an extension to that date and said that, if he did not hear from Mr Najefy by that date he would consider the matter closed. Aside from a revision to the corporation tax charged on 24th August 2018 it appears there was no further correspondence between Mr Najefy and HMRC in respect of the assessments.

The Spreadsheet and the BDO review

71. It does seem that Mr Uddin understood what was meant by company records and what their significance was because he gathered these together, not for the purpose of delivering them to HMRC or the liquidator but to give to his son to prepare the Spreadsheet. At paragraph 44 of his first affidavit he said:

> "On or around November 2018 (at or around the time when I issued the Company Appeals and the PLN Appeal), I collected the available invoices, receipts, cash register Z-totals and weekly account summaries for the Restaurant for the period 2 January 2011 to 19 March 2017 ('the Underlying Documents') from Mr Najefy. At my request, Sami reviewed these and prepared a spreadsheet which demonstrates that over that period the average percentage of cash sales was 24.5% (as opposed to the 46% calculated by HMRC) ("the Spreadsheet"). I believe that this is considerably more accurate that the exercise undertaken by Mr Addison and demonstrates that the Company did not significantly under declare cash sales in its VAT returns. After Sami had produced the Spreadsheet, I returned the Underlying Documents to Mr Najefy."

This is somewhat mysterious as, appended to the director's questionnaire, dated January 2018, are three pages of a spreadsheet in the same format as the Spreadsheet, showing the same figures. How this abbreviated spreadsheet came to be produced nearly a year before the records were provided to Sami Uddin is not explained. I do not see how the abbreviated spreadsheet could have been produced without the records. It is also striking that these pages cover a short period in which the returns were broadly close to the cash percentage disclosed by the Company.

72. The Spreadsheet was sent to BDO to review in July 2019, together with documents underpinning it. The BDO Report explained that they carried out testing of a random sample of the entries on the Spreadsheet. This was carried out first by checking the existence of the supporting records:

> "The objective of the first test was to check each line/week of the spreadsheet to the weekly takings records prepared by the

> restaurant. During our checking, we made the following observations:
>
> a) There were no weekly takings records supplied for 19 weeks in the period. The missing weeks are set out at Appendix 1. We are not aware of why these weekly takings records are missing.
>
> b) 8 of the weekly taking records were too faint to be legible."

The second part of the test was to check the summaries against the supplied documents. 18 out of 28 checked matched the Spreadsheet.

73. BDO's conclusion was that the Spreadsheet was broadly correct in showing that cash totals averaged at 24.5%, within a range of confidence of 21.5% and 27.9%. If that is right, the position is that the cash takings of the Company were 9.9 percentage points higher than those disclosed by the returns.

74. It is not possible, however, to know whether the documents provided to BDO to underpin the Spreadsheet were themselves accurate or if the version of the Spreadsheet seen by Mr Marsden is the one now in evidence. Mr Marsden says that he saw weekly summaries. Mr Zussman says that he did not see weekly bundles in the Underlying Documents provided to him (though this may be because of the electronic format in which they were provided to him) or weekly summaries, save for one. While Mr Whyatt has given evidence as to the safe custody of the boxes that his firm sent to BDO since they were returned from BDO, Mr Uddin has been given ample opportunity to identify and rely upon such weekly summaries so as to show what weekly figures he provided to Mr Najefy. He had Mr Zussman's third affidavit in which he gives his account of his review of the Underlying Documents since August 2021 and was given the opportunity to particularise documents from the Underlying Documents on which he sought to rely. He chose only four, none of which were weekly summaries which could be compared to the Spreadsheet or the Company's declared sales in any relevant VAT period.

75. Mr Uddin was unable to comment on Mr Ng's suggestion that the version of the documents provided to the Insolvency Service did not include weekly bundles or weekly summaries. While Mr Marsden of BDO maintained that he saw such summaries in the BDO Report there is no evidence from Mr Marsden himself and, indeed, it is thus not possible to assess the material that Mr Marsden saw in seeking to verify the Spreadsheet. Indeed, Mr Marsden states that the Spreadsheet that he saw went up to March 2017, while the version in the bundle ends in 2016. It is thus not clear if the version of the Spreadsheet seen by Mr Marsden is the version now relied upon by Mr Uddin.

76. Leaving that aside, there are a number of inconsistencies in the Spreadsheet. The wage payment summary provided to HMRC by Mr Uddin must be for the week of 11th July 2016 (as it is described as week 28 of month 7 on a print out bearing the date 14th October 2016). It is the only one in evidence. It shows, leaving aside the two staff who were paid by bank transfer, cash wages of £1,488.52 net. The Spreadsheet shows cash wages of £1,128.04 for the same week, which is shown as beginning on 10th July 2016. In other words, it understates the cash wages paid when compared to the document used to calculate staff PAYE. If it is right that cash wages were as shown

on the wage payment summary and totalled £1,488.52, then the cash receipts shown on the Spreadsheet would have been insufficient to pay this sum and the cash expenses shown. Mr Uddin's evidence was that only once or twice were cash receipts insufficient to meet cash wages so as to require money to withdrawn from the bank. The Spreadsheet shows cash being banked in this week. Nowhere in the Spreadsheet are cash wages at the level of £1,488.

77. Net cash wages were calculated from the Company's returns by HMRC for the relevant period ending 31st October in each year. These are shown as follows in HMRC's letter of 24th August 2018 and have not been challenged:

i) 31/10/11: £49,500.52

ii) 31/10/12: £57,457.09

iii) 31/10/13: £64,015.87

iv) 31/10/14: £56,797.92

v) 31/10/15: £46,064.16

vi) 31/10/16: £57,863.97

vii) 12/04/17: £28,712.69

Where the Spreadsheet sets out cash wages, the figure is considerably lower. It does always not cover quite the same period but, for 30th October 2011 to 27th October 2012, the cash wage figure is £46,286.66 as opposed to the figure based on the returns of £57,457.09; for 1st November 2015 to 31st October 2016 the Spreadsheet figure is £42,112.68 as opposed to £57,863.97. I agree with Mr Ng that the figure derived from the PAYE returns is likely to be correct. If the PAYE returns overstated misstated staff wages it is possible that this would be identified by the staff themselves.

78. Mr Uddin could not say why these figures did not match the PAYE returns. Nor was he able to comment, for example, as to why the Spreadsheet gave the same figure for weekly wages for weeks in a row if, as he put it, "every week was different" in terms of staffing requirements and staff were paid by the hour.

79. Similarly, where the Spreadsheet account of cash banked can be checked, the cash is understated. The Spreadsheet figure for 4th December 2011 to 31st December 2011 records cash being banked in the sum of £1,692.52. The NatWest service charge statement shows cash being banked in the sum of £2,661 between 3rd December 2011 and 30th December 2011. There appears to be no explanation for this discrepancy, other than the very slight difference in period. Even adding in all of the cash said in the Spreadsheet to have been banked in the week before and the week after to that period would not bring the total up to the amount set out in the service charge statement.

80. Another stark example is the period 3rd March 2012 to 30 March 2012, for which the service charge statement shows £610 to have been banked. The Spreadsheet mostly shows withdrawals over the period 4th March 2012 to 31st March 2012, with a net payment in of £91.37. This is entirely impossible to reconcile with the service charge

statement for the period. Each of the five available service charge statements show more cash having been banked than is shown in the Spreadsheet. The inference must be that the Spreadsheet understates the cash banked.

81. Although Mr Brockman disavowed the Spreadsheet, it has stood since November 2018 as Mr Uddin's challenge to the best judgment assessments of HMRC. It has been put forward as representing a more accurate reflection of the Company's sales over the assessed period and, on the face of it, Mr Uddin went to lengths of having it audited to some extent by BDO Report. As I have said, the Secretary of State's attempt to have the BDO Report excluded from the bundle was resisted successfully at the pre-trial review. The only basis for doing that was to place reliance upon the accuracy of the Spreadsheet. It is the only attempt made to rebut HMRC's assessment.

82. Nonetheless, it discloses significantly greater cash sales, and thus greater receipts, than shown by the VAT returns. For the quarter ending April 2011, the VAT return disclosed sale of £66,460.91 and the Spreadsheet shows sales of £85,149.99 for the same period, a difference of £18,689.08. The merchant acquirer data provided for the quarter showed card sales of £56,784.20, which would have meant that only £9,676.71 of the declared sales would have been non-card payments. The majority of the quarters covered by the Spreadsheet show five figure sum differences between the declared sales and the sales disclosed by the Spreadsheet, often in the region of £20,000 or £30,000, although on occasion only a few thousand pounds.

The request for records following liquidation

83. Mr Uddin denies any failure to provide records to the liquidator of the company. While he primarily seems to blame the liquidator for not collecting them, he again says that Mr Najefy advised him in this regard. His first statement says:

> "Mr Zussman repeatedly asserts that the Company's books and records have not been delivered up to the Liquidator. Although he does not explicitly say this, I believe that he seeks to imply that I have failed to deliver up the books and records which are in my possession and control. This is untrue. Following the meeting, I provided all of the books and records which I had to Mr Najefy, who assured me that it was the Liquidator's responsibility to make arrangements with him to collect them. The Liquidator has not subsequently requested any documents from me. I understand from ASW that the Liquidator has wide statutory powers to assist him to collect in the Company's books and records. To the best of my knowledge, the Liquidator has not made any attempt to exercise those powers."

84. So, again, following the creditors' meeting on 13th April 2017, Mr Uddin says that all of the records were in Mr Najefy's control. Contrary to Mr Uddin's claim that no request was made by the liquidator for the records subsequently, the liquidator wrote to Mr Uddin on 16th June 2017, apparently not having received a reply to an earlier letter, to say:

> "Finally, Mr Najefy, your accountant, was asked to bring the Company's records to the creditors' meeting on 13 April 2017,

> but no records were actually delivered. Accordingly, I would ask you to arrange the delivery of the Company's books and records to this office as soon as possible, between the hours of 9.30 am to 5.30 pm, Monday to Friday."

85. Even by the date of the completion of the director's questionnaire on 19th January 2018, the records were described in answer to question 6 of the form as being "in the process of being delivered to the Insolvency Practitioner". Mr Uddin said in evidence that they were ready to be collected from the accountant. That is not the same as "in the process of being delivered" and is inconsistent with the "not applicable" answer he gave to question 7 of the form, which asks whether the records were held by third parties "for example the director, bookkeeper, accountant etc". He says, and I accept, that the form was completed by Mr Najefy but it is not suggested that he did so without Mr Uddin's knowledge or approval.

86. It does not seem that that the records were produced thereafter, though Mr Uddin had obtained them to allow his son to prepare the Spreadsheet in November 2018 and apparently returned them to Mr Najefy thereafter. On 25th January 2019, the liquidator wrote to Mr Uddin's solicitors and in reference to Mr Uddin's late appeal to the First-tier Tribunal said:

> "I refer to the above proceedings and as you will note from the copy letter attached, I have asked the Tribunal to adjourn the Appeal for a period of 60 days to allow your client a final opportunity to deliver up the Company's accounting records etc., so that HMRC can be provided the relevant records to enable them to formulate their claim for the pre-liquidation accounting periods…
>
> As liquidator, I am not prepared to assist or allow an appeal by a director who has failed to cooperate with me in my enquiries. As stated, your client has 60 days, which will end at 5pm on 26 March 2019, to deliver up the records and provide all explanations, records and information in response to Mrs Marsh's letter of 24 August 2018, failing which, I shall ask the Tax Tribunal Judge to dismiss the Appeal."

87. Again, the liquidator wrote to Mr Uddin on 12th February 2019 and set out a table of HMRC's correspondence from May 2017 to August 2018, of which he provided copies. He went on:

> "as indicated in my letter to you of 10 October 2018, I wish to reach a conclusion as regards HMRC's claims in this liquidation and a determination of whatever sums may be due from you. I have invited you to engage in this process, which requires you to deliver up the Company's records and provide any explanations and information you have in response to HMRC's claims by no later than 4 pm 15 April 2019."

By 11th September 2019 the liquidator's stance had softened. A member of his staff emailed Mr Uddin's solicitors and said:

> "The Liquidator shall be prepared to consent to the Main Appeal continuing, on the strict understanding that he will receive copies of all communications between you/your client and the FTT, and between you/your client and HMRC with regard to their claim in the liquidation, including all submissions and witness evidence."

That did not lead to any progress in the provision of information and on 4th November 2019 his office wrote to Mr Uddin's solicitors again:

> "Further to the emails sent to you on 1 November 2019, below and on 11 September 2019, as attached, your failure to respond and provide the requisite confirmation of your client's agreement to the liquidator's terms for consenting to the Appeal continuing in the Company's name and a copy of the application for the Main Appeal, has left the liquidator with no option but to allow the application to be struck out in accordance with the Unless Order of 21 October 2019."

88. I cannot characterise Mr Uddin's statement that the liquidator did not ask for the records as an honest mistake. Though he said in oral evidence that he did not understand "these complicated letters" they are not complicated at all. They are quite plain statements that Company's records had to be delivered up. Mr Uddin's evidence more generally seeks to paint the liquidator as unreasonable and obstructive and to blame him for the initial failure of the tax tribunal appeal. He says in his first affidavit:

> "I believe that the Liquidator had no intention of complying with the Unless Order because he wishes to bring proceedings against me based on the liabilities purportedly created by the Assessments."

The wording of the liquidator's letter is quite clear, however. He was willing to allow the appeal to proceed if the outstanding records were provided and he provided Mr Uddin with more than adequate opportunity to do so. The liquidator's stance, far from being obstructive, appears to me to be entirely reasonable. The striking out of the tribunal proceedings was entirely attributable to the failure to produce the company records.

The responsibility for producing the VAT returns

89. Although Mr Uddin's response answers to the director's questionnaire stated that he carried out bookkeeping and that he was "responsible for all financial and taxation requirements" it will be apparent from what I have said above that Mr Uddin placed significant reliance on the role of Mr Najefy in the Company's affairs. At the outset of his written evidence he said:

> "From the date of incorporation of the Company (i.e. 26 June 2003), the Company engaged Mr Najefy to prepare and file all necessary accounts and tax returns. In order to assist Mr Najefy to do this, I provided him with all invoices, sales slips and other

> relevant documentation and information on a quarterly basis. He then used this documentation to prepare the relevant accounts and returns and advised me how much the Company was liable to pay to HMRC. I would then cause the Company to transfer the relevant sum to Najefy's & Company's client account and he would use those monies to make the necessary payment to HMRC."

90. Mr Ng asked Mr Uddin if Mr Najefy was provided with the weekly summaries prepared by him, to which Mr Uddin replied "of course" but he did not know if Mr Najefy checked the underlying meal slips. Mr Ng took Mr Uddin to HMRC's note of the first of the unannounced visits which recorded that he sent "Purchase Invoices, bank statements, Just Eat statements and the weekly gross takings conciliation sheets" and, in the same note, that he "calculated the total value of all sales and wrote the daily gross takings for each day on a weekly gross takings sheet which he gave to his accountant" There is no mention of provision of meal slips there, but Mr Uddin said that they "100% went to Mr Najefy" and that there were mistakes in the notes.

91. As Mr Ng pointed out, if the Company's VAT returns did not accurately state its receipts, as both HMRC's observations on the Unannounced Visits and the Spreadsheet would suggest, one possibility is that Mr Najefy had simply added up the figures given to him in the weekly summaries prepared by Mr Uddin and that those summaries understated the Company's weekly receipts. It would be unlikely that an accountant could consistently fail to add up correctly. The more likely explanation is that he accurately calculated the figures given to him by Mr Uddin and the figures given to him were wrong. An alternative explanation is that he was given accurate information with the supporting underlying documents and himself decided to understate the Company's receipts. He would have no reason to do so and every reason not to. It would be serious professional misconduct and a criminal offence.

92. It is regrettably clear to me that, rather as he has sought to do with the liquidator, Mr Uddin is once again seeking to shift blame for the Company's failings to Mr Najefy. He hints at improper conduct. In his second affidavit he says this:

> "I do not like to tarnish anyone lightly but on or around the summer of 2019 Najefy & Co had their offices raided by HMRC. I did have the link to the website in the Brighton Gazette/Argus, but recent searches shows that this has been removed [pages 31 - 33]. My son sent my solicitor confirmation of the HMRC raid upon Najefy & Co on around 18 August 2019 and so it must have happened shortly prior to that date. This more than proves that Najefy & Co were worthy of being raided, and I have no idea what the outcome was."

The only account of this "raid" available has been obtained from the Wayback Machine, which is an online archive of webpages, and is taken in fact from the Worthing Herald. It is exhibited to Mr Zussman's witness statement. It does not refer to a raid in terms. The headline is "HMRC officers seen at Worthing accountancy firm" and describes a "visit" by HMRC officers at 7am. It is accompanying by a photograph of HMRC officers in official tabards. According to the report, neither Najefy & Company nor HMRC offered any explanation to the newspaper. It appears

from the picture and the account of the time that this was an official visit. There is nothing to suggest it was a "raid" or what the purpose of the visit was.

93. I cannot know whether a report in the Brighton Gazette or Argus would have been expressed in different terms but certainly there is no evidence before me of any wrongdoing alleged against Najefy & Company or of disciplinary action before a regulator. Mr Uddin's characterisation of an unexhibited article as "more than proving" that Najefy & Co were "worthy of being raided" is an attempt to besmirch by insinuation. It was not a proper statement to make in an affidavit. I have no information as to the propriety or otherwise of Mr Najefy's professional practice. If he was to be accused of a gross level of negligence or of dishonesty he should have been called to answer that case. In the absence of evidence from Mr Najefy or clear evidence of impropriety or incompetence on his part I cannot ascribe it to him.

94. There is no such evidence. In my judgment, Mr Uddin's account of his reliance on Mr Najefy is not credible. He maintained that he continued to rely upon him, on his case, despite his clear and repeated failures to do what he said he would do in relation to the provision of records to either HMRC or the liquidator. He accepted that he had not complained to Mr Najefy and the fact that Mr Najefy was not called speaks volumes as to what Mr Uddin feared he might say.

Fair conduct of the proceedings

95. I have set out the procedural history and the evidence and that provides an appropriate backdrop to address Mr Brockman's submission that that the Secretary of State has not pursued these proceedings fairly. I am satisfied, on the contrary, that the proceedings have been fairly conducted and that Mr Uddin has had every opportunity to address them.

96. As I have explained, I do not think that Mr Brockman's criticisms of Mr Zussman's evidence point to a "win at all costs" mentality. Nor is there anything in the point that the Secretary of State has improperly pursued these proceedings in the face of an appeal to the tribunal. As explained above, the tribunal proceedings were struck out as a result of Mr Uddin's failure to cooperate with the liquidator by supplying him with the Company's records. The tribunal proceedings will not be determinative of the question in these proceedings. The question there is whether there was a proper evidential basis on which HMRC could exercise best judgment. Mr Uddin's best evidence, thus far, is that the Spreadsheet reflects the true position. It shows significant understatement of cash in any event. These proceedings cannot be postponed indefinitely to abide an appeal for which Mr Uddin does not have permission to bring out of time in any event.

97. There is no doubt here as to what the Secretary of State's case was. It was set out in the section 16 letter. I will turn to the Secretary of State's statement of the appropriate period later, but the nature of the case that Mr Uddin had to meet is clear. On the contrary it is Mr Uddin's case that has shifted. The clearest example of this relates to what was shown by the merchant acquirer data. Mr Zussman's first affidavit sets out that, when the merchant acquirer's data was considered by HMRC, it found that the Company's returns appeared to show that, on average, only 14.6% of the Company's receipts were cash receipts. That figure was given to the Company in Mr Addison's letter of 7th April 2017. The basis of the Company's and Mr Uddin's grounds of

appeal to the tribunal, dated 19th November 2018, exhibited to his first affidavit, accept this figure. Paragraph 5 thereof says:

> "The returns submitted by the company show that payments by credit/debit cards account for 85.4% of the overall turnover and there is no proper evidential basis to replace the percentage of cash takings of 14.6% (comparing the VAT returns with the banking/merchant acquirer material obtained by HMRC) with one of 46% as contended for by the assessing officer."

98. It was not until the trial itself that it was stated for the first time that it was not accepted that this was the cash figure shown by the returns and a copy of the merchant acquirer data requested. This, or some of it, was provided overnight in the form of an Excel spreadsheet prepared by HMRC from the information it received. As far as I can see, there is no suggestion in Mr Uddin's evidence that the 14.6% figure, which is repeatedly stated in the documents, did not reflect the card/cash split in the returns. It would have been open at any time for Mr Uddin to request this data. He did not. Mr Uddin cannot complain that he had not had time to consider data that did not go to an issue in dispute in the case and which was not asked for until trial.

99. Mr Brockman attempted to place reliance on what are described as "Health Warnings" on the Excel spreadsheet provided at trial, which appear to be in the nature of general disclaimers as to why certain factors might affect the accuracy of the data. None of them appear give rise the risk that the data is materially inaccurate in this case. It is true that the spreadsheet refers to the merchant acquirer data accounting for an average of 81.56% but it only covers the period 1st May 2011 to 31st January 2014. Mr Uddin has had more than five years to request an opportunity to examine the data, which was first relied upon in Mr Addison's letter of 7th April 2017.

100. The Secretary of State has agreed to multiple extensions of time, including relief from sanction, and agreed to giving Mr Uddin the opportunity put in evidence in relation to the Underlying Documents in response to the Secretary of State's reply evidence. No objection was made to Mr Whyatt giving evidence as to the form of the Underlying Documents in a statement made on 19th June 2022, during the course of the trial. It appears to me that the Secretary of State has afforded Mr Uddin every opportunity to put in the evidence that he wished to adduce to meet the Secretary of State's case.

101. Nor do I accept that the Secretary of State's case has changed to include an allegation of dishonesty. Mr Zussman in cross-examination accepted that there was no allegation of "deliberate misconduct" but what the allegation says is a matter of simple construction, giving the words their ordinary meaning. As I have explained above, the use of the words "cause or allowed" embrace, in the case of the former word, positively making something happen and also the failure to intervene in the full knowledge of what will happen absent intervention. In the case of the latter word, it embraces the failure to prevent something in breach of duty. The meaning of "cause", in the context of this allegation, is quite clear. It includes the deliberate filing of inaccurate returns. As *Kappler* makes clear, what is essential is that substance of the allegation is understood and that he has the opportunity to meet it. Mr Uddin's evidence was that he understood allegations of dishonesty to have been made against him. He says this expressly in his second affidavit at paragraph 5. It is hard to see how the allegation here could be construed otherwise than including, at its highest, an

allegation of deliberate misstatement of the Company's sales. I am satisfied that he understood the nature of the allegation against him. He similarly accepted that he understood that the Secretary of State's case was that the Company's corporation tax returns were understated.

102. I am satisfied that Mr Uddin, who has been represented throughout these proceedings, understood the claim he had to meet and that the information and evidence on which the Secretary of State based his case was clear from the outset. In the case of a contested allegation, any unexhibited evidence could easily have been requested. Instead, he accepted the Secretary of State's case, only to change his position at court and complain of inadequate disclosure on the point.

103. There was some criticism of the cross-examination of Mr Uddin as to the inconsistencies in the Spreadsheet. I cannot see what objection there can be in relation to this. It was a document offered by Mr Uddin in support of his own case as to the accuracy of the returns, which he has repeatedly sought to rely upon. There is nothing surprising that a witness should be asked why a document on which he has relied is inconsistent both internally and when compared to other documents which he has disclosed. Mr Uddin, as the sole director of the Company was well placed to answer such questions.

104. Finally, I should note that Mr Ng produced a number of summary documents for the purposes of cross-examining Mr Uddin. Mr Brockman also criticised this. They were not tendered as any sort of evidence, which of course they were not, but they did serve as a convenient distillation of the figures in the Spreadsheet, which otherwise would have had to have been added up and compared in the witness box. The figures were put to him entirely fairly and, as Mr Ng noted, Mr Brockman similarly required Mr Zussman to consider mathematical inaccuracies, although without the benefit of worked calculations.

Discussion and decision on unfitness

105. No challenge had been made to HMRC's calculation that non-card sales represented 14.6% of declared sales during the course of those proceedings until trial. Indeed, that figure has been positively averred. Nor have the VAT return figures in the Secretary of State's evidence been challenged on the basis that they do not accurately reflect the figures on the returns lodged by the Company.

106. There are inaccuracies in HMRC's calculation of percentage of non-card sales observed on the Unannounced Visits, but I agree that they are minimal in the context of the days observed, although they will have had an effect on the average percentage of non-card revenue calculated for the three visits. That operated slightly in favour of the Company. Adjusting for these errors, the Secretary of State says that the true figure is likely to be nearer 49%. While it is said that it is unfair to extrapolate the Company's likely non-card sales over the course of seven years from three visits in 2016 and 2017, no evidence has been put in to suggest that these nights were unrepresentative. Indeed, Mr Addison raised the absence of anything to suggest that these days were unusual in his letter of 7th April 2017 and this did not prompt any submission to the contrary on behalf of the Company.

107. The only indications given as to how representative these nights were are recorded in the unchallenged notes of HMRC from the Unannounced Visits in which is was said that they were about average. Cash was reckoned by Mr Uddin to be about 30% of takings and to be in decline. I bear in mind that Mr Uddin would have been referring to cash in its conventional sense, rather than non-card payments, but the internet payment element of receipts via Just Eat appears to be modest and the Company had only used the facility over the two years prior to the visits. Similarly other forms of non-card payment, apart from cash, appear to be minimal.

108. There was no response to Mr Addison's repeated requests for the Company records. I do not accept that Mr Uddin believed Mr Najefy to have this in hand. Mr Uddin is a man who understands business and I am satisfied that he would have understood, if he really believed Mr Najefy to have matters in hand, that Mr Addison had required the provision of the records to him, they had not been provided and the Company was subject to a fine as a result. In my judgment, the records were not sent because they would not have supported the accuracy of the Company returns. For that reason, instead of providing records, the Company moved to liquidation. There has similarly been a marked reluctance to produce documents to the liquidator or to place before the court a coherent rebuttal of the prima facie case that cash takings were supressed in the VAT returns or that the returns did not reflect the information provided to Mr Najefy.

109. The nearest thing to such a rebuttal is the Spreadsheet, which itself appears to understate the use of cash wherever this can be checked. Sami Uddin was not called, either to seek to uphold its accuracy or alternatively, explain why, on reflection, it itself overstated the Company's receipts. I am satisfied that the Spreadsheet represents the Company's best effort to minimise the extent of its cash suppression but that it also understates the cash available to the Company. There can be no other reason why it understates cash banked and cash payments to staff.

110. In my judgment cash takings were understated between 2010 and 2017. It may not have been precisely at the level determined by HMRC and it might be that it did not occur every month but, given that:

    i) the Spreadsheet was prepared on behalf of the Company to provide a "more accurate" account of the Company's sales and the cash/card split;

    ii) the Spreadsheet shows cash turnover, on average, to amount to 24.5% of turnover and sales to be higher than the figures given in the returns;

    iii) where it can be checked, the Spreadsheet seems to understate the use of cash by the Company;

    iv) Mr Uddin himself told the HMRC officers that cash takings were around 30% in 2016, having declined over the years; and

    v) the cash takings identified on HMRC's visits were consistently over 40% and no explanation has been offered to explain why the cash/card split might have unrepresentative on those nights,

I am satisfied that sales were understated at least by the level shown by the Spreadsheet. I am further satisfied that the cash/card split observed during the cashing up process on the Unannounced Visits is likely to represent, broadly, the cash/cards split over the Company's trading life. It follows that the reason that card sales were shown by the merchant acquirer data to make up 85.4% of the Company's declared sales is because a portion of the non-card sales were not declared. It is entirely probable that the corporation tax returns would similarly have misstated the Company's turnover. That is evidently the conclusion reached by HMRC and it is simply not credible that corporation tax returns would have stated the correct figure when the VAT returns did not. No evidence has been adduced to the contrary.

111. Mr Uddin was the sole director and responsible for the preparation of the weekly summaries. He is a numerate businessman. Even if were one to take the Spreadsheet at face value the sales declared were very significantly lower than ought to have been declared. In the case of the first available period the under declaration would have been £18,000. While Mr Uddin maintained that the Spreadsheet was derived from the information given to the company accountant, Mr Najefy, and that "whatever he asked I paid", I agree with Mr Ng that it would have been impossible for Mr Uddin not to realise that the sum being declared was lower than the Company's takings and that the VAT payable was significantly below what could be expected on the basis of those takings. The figures are so significant that this could not have gone unnoticed. It is simply not credible that he would not have noticed such significant disparities any more than it is credible that he continued to rely upon Mr Najefy to provide documents to HMRC and the liquidator in the face of consistent evidence to the contrary.

112. It has been open to Mr Uddin, in setting out the documents on which he relied in accordance with the order of Deputy ICC Judge Schaffer, to exhibit his weekly summaries that he said were sent to Mr Najefy to show that Mr Najefy did not properly calculate these. He did not. The only inference that I can draw is that Mr Uddin knew full well that the VAT returns understated the Company's sales and that the reason why the returns did so was because they reflected the weekly summaries provided to Mr Najefy. It appears to me to be more probable than not that the way in which VAT returns were prepared is as Mr Uddin is reported to have informed Mr Addison – that he sent "Purchase Invoices, bank statements, Just Eat statements and the weekly gross takings conciliation sheets". Mr Uddin was perfectly able to add up the daily takings and prepare the weekly summaries. I see no reason why he should ask Mr Najefy to duplicate that work by providing the meal slips too. In contrast, it is understandable that he should send invoices and statements that evidenced purchases, costs and input tax to Mr Najefy for the purposes of the preparation of VAT returns.

113. I am satisfied that Mr Najefy carried over the figures given to him into the returns and that Mr Uddin "caused" the filing of the inaccurate returns in the primary sense of that word that he brought them about or induced them. Even if I am wrong about that, and Mr Najefy understated the Company's sales in the face of accurate information provided by Mr Uddin, the differences are so stark that they cannot have gone unnoticed before filing with Mr Uddin's authority. Either way it seems to me that Mr Uddin "caused" the understatement of the Company's VAT. Were all that wrong, it is a plainly a breach of Mr Uddin's duty to act with reasonable care, skill and diligence not to examine the returns and identify the significant discrepancy between the

weekly summaries he calculated and the figures stated on the returns. He was, as director, ultimately responsible for the Company's returns. He was well able to check that the turnover figures on those returns were accurate.

114. On any of those footings, the misconduct is sufficiently serious to satisfy me that Mr Uddin is unfit to be concerned in the management of a company. A person trading with the benefit of limited liability must ensure that accurate returns are submitted. To submit significantly inaccurate returns over a prolonged period, whether deliberately or by negligent omission, is inconsistent with the responsible management of a company. In causing the inaccurate VAT returns to be so filed, Mr Uddin was responsible for the inevitable insolvency of the Company when the inaccuracies were discovered and assessments were raised and penalties imposed. Even if I were to have found that he merely "allowed" inaccurate VAT returns to be filed, the glaring nature of the understatements over a period of seven years would lead to the same conclusion. It should have been self-evident to any reasonable director that the returns were inaccurate. No special skill was required to recognise the understatement of the sales. It would have amounted to a total abdication of his duty to exercise reasonable care, skill and diligence simply to approve whatever was put in front of him. If that were the case it would demonstrate incompetence in a sufficiently marked degree to warrant disqualification.

Period of disqualification

115. I am satisfied that Mr Uddin caused the filing of inaccurate returns in the sense that he deliberately brought them about. The period of disqualification must be assessed on that basis.

116. The purpose of a disqualification order is to protect the public by keeping unfit directors "off the road" and by a deterrent effect, both in respect of the individual director and the public at large. In *In re Sevenoaks Stationers (Retail) Ltd*, Dillon LJ endorsed the division of the potential 15-year disqualification period into three brackets, which he described as follows –

    i) The top bracket of disqualification of periods over 10 years should be reserved of particularly serious cases. These may include cases where a director who has already had one period of disqualification imposed on him falls to be disqualified again.

    ii) The minimum bracket of 2 to 5 years' disqualification should be applied where, though disqualification is mandatory, the case is, relatively, not very serious.

    iii) The middle bracket of disqualification for from 6 to 10 years should apply for serious cases which do not merit the top bracket.

117. Here, Mr Uddin caused the Company to file inaccurate tax returns over nearly 7 years, leading to the insolvency of the Company as a result of the imposition of the assessments to the unpaid tax and penalties. It is impossible to avoid the conclusion that this was for personal gain. No other reason for concealing sales is offered. Mr Ng stated that, in this event, the case must "nominally" be in the top bracket, while if I

had been satisfied only of negligent omission the bottom end of the middle bracket would have been appropriate.

118. The notice given under section 16 of the CDDA 1986, warning Mr Uddin of the intention to bring disqualification proceedings, stated that the Secretary of State considered a period of six years to be appropriate – that is to say the bottom of the middle bracket. It offered a discounted period of five years if a disqualification undertaking was offered. The Secretary of State's assessment of the period of disqualification is not binding on me. I am, however, troubled by the disparity between the period set out in the section 16 letter and the period urged upon me in the event that the most serious element of the Secretary of State's case were made out.

119. The period set out in a section 16 letter is not plucked from the air. Those representing the Secretary of State, both within the Insolvency Service and the external lawyers instructed in such cases, have long experience of them and form a judgment as to the appropriate period. It can never be an exact science and presents difficulties where the allegation, as here, embraces both deliberate conduct and negligence. If Secretary of State's most serious allegation merits the top bracket, and the section 16 letter proposes, as here, a period at the bottom of the middle bracket and offers a discount of year if an undertaking is offered, the acceptance of an undertaking could mean that an unfit director is disqualified for a far shorter period than would be appropriate in order to protect the public. There are considerations of fairness for the defendant too. He or she should know what period of disqualification the Secretary of State is likely to press for, absent factors casting a different light on the case.

120. Ultimately, however, I must impose a period on the basis of the evidence that I have seen and heard. I am satisfied that the understatement of the Company's sales was significant and broadly in the region of the HMRC assessments. It took place over an extended period of time. It led directly to the Company's insolvency. Mr Uddin was the sole director and responsible for the suppression of the Company's sales in its returns. The misleading statements in his affidavit as to, for example, the liquidator's requests for documents and his reliance over the course of the proceedings on the Spreadsheet that self-evidently discloses significant understatement but nonetheless appears to underplay the level of cash being paid to the Company, demonstrate a clear lack of recognition of what he has done and a certain brazenness in attempting, without proper cause, to blame others.

121. This is undoubtedly a serious case. The deliberate nature of the misconduct over a period of years and the level of sales concealed, on the face of it, merit a period towards the top of the middle bracket in my judgment. I will impose a period of eight years. That slight discount from the top of the bracket takes into account Mr Uddin's likely remaining working life – he will be 71 when the period expires, and also takes account of the fact that it must be recognised that there is room for uncertainty as to the precise level of the understatement in the VAT returns. Mr Ng drew my attention to *Re Moorgate Metals Ltd* [1995] 1 BCLC 503, in which the judge saw no reason to reduce the period of disqualification simply because it would end when the defendant there was 80. That was a case where the judge regarded the defendant as "a thoroughly dishonest, irresponsible and unscrupulous person" and one can well understand why no allowance was made for age. A defendant's age is, however, something that the court can take into account (see *Re Westmid Packing Services*

[1998] 2 BCLC 646) and I see no reason not take into account Mr Uddin's likely working life in this case.

122. I am satisfied that in the circumstances a period of eight years provides adequate protection to the public. That is the period I impose.