Neutral Citation Number: [2023] EWHC 2011 (Ch) Case No: CR-2017-004190

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: 31/07/2023

Before :

ICC JUDGE MULLEN

- -

In the matter of Safe Depot Limited

And in the matter of the Insolvency Act 1986

Between :

(1) KATHERINE MERRY and BEN DYER (joint liquidators of SAFE DEPOT LIMITED (in liquidation))
(2) SAFE DEPOT LIMITED (in liquidation) **Applicants**
- and -

SABIR ESA

Respondent

- -
- -

Ms Katherine Hallett (instructed by **Howes Percival LLP**) for the **Applicants**
The Respondent did not appear and was not represented

Hearing dates: 18th to 19th April 2023

- -

Approved Judgment

This judgment was handed down remotely at 10am on 31/7/23 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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ICC JUDGE MULLEN

ICC JUDGE MULLEN :

1. By an application notice dated 10th March 2021, Ms Katherine Merry and Mr Ben Dyer ("the Liquidators"), as joint liquidators of Safe Depot Limited ("the Company"), brought claims against Mr Sabir Esa and a company called Stone Key Limited ("Stone Key"). The application, as it relates to Mr Esa, alleges breaches of duties owed to the Company, including by allowing it to enter into transactions at an undervalue, to give preferences or to enter into transactions defrauding creditors for the purposes of sections 238, 239 and 423 of the Insolvency Act 1986 ("IA 1986"), together with wrongful trading under section 214 IA 1986.

2. The evidence of Ms Merry in support of the application exhibited draft points of claim and, on 15th June 2021, directions were given for the filing and service of points of defence by Mr Esa and points of reply by the Liquidators. On the same date, the application as it related to Stone Key was stayed as a result of that company having gone into creditors' voluntary liquidation.

3. Further directions were given on 11th October 2021. At that stage Mr Esa had failed to file any points of defence but he had filed a witness statement dated 10th August 2021, to which Ms Merry had responded in a further witness statement, dated 7th September 2021. The Liquidators took no issue with the absence of points of defence and it was directed that a list of issues should be filed and served prior to trial, to be agreed if possible, in order to set out the matters in issue between the parties. The order recites that the Liquidators were to keep the need for expert evidence under review and would consider whether it was necessary following disclosure between the parties. In the event, no application for expert evidence to be adduced was made.

4. An order for the sharing of books and records between the Liquidators and the liquidators of Stone Key was made on 16th November 2021. The liquidators of Stone Key took no further formal part in the proceedings and the claim against that company was automatically struck out on 1st January 2022 under the terms of the order for a stay.

5. The matter came on for trial in April 2023. Ms Merry attended to give evidence on behalf of herself and Mr Dyer, as did Mr Donald Adamson, who was a site manager for the Company from around June or July 2008 to September 2013 and then again from December 2013 to December 2016. He also claims to be a creditor of the Company, having not received his redundancy pay or full wages. Mr Esa did not attend. He emailed the court on 14th April 2023 with a doctor's note and said that he was suffering from depression and anxiety and would not be able to attend. He did not ask for an adjournment but this was proposed in his doctor's note. The evidence was inadequate to justify an adjournment and this was conveyed to Mr Esa by an email from the court office, which prompted a further email from him on 17th April 2023 in the following terms:

> "I am writing to clarify my previous email to the court. I wish to make it clear that I was not requesting an adjournment, per se, of the hearing scheduled for the 18th. Instead, I am writing to inform the court that, due to my mental health issues, I am unable to attend the hearing scheduled for the 18th. **I want to stress that my mental condition has deteriorated to a point**

> **where I am not capable of defending myself if I were to attend.** As the court is aware I have been suffering from severe depression and suicidal tendencies for which I have been receiving treatment. I have attached a letter from my doctor confirming my mental incapacity to attend.
>
> I hope that the court can take my condition into account and make the necessary arrangements to ensure that my rights are upheld."

No further evidence that might have justified an adjournment of the hearing was provided.

6. In the absence of Mr Esa, Ms Merry was not cross-examined. Her evidence was limited to confirming the contents of her witness statement and answering a few further questions in evidence in chief as to the extent of the Liquidators' attempts to obtain company documents. I accept Ms Merry's evidence, which is principally based on the documents available to her and the interviews that Mr Esa gave to the Official Receiver and to the Liquidators. I similarly accept that she has explored the lines of enquiry available to her in order to track down the Company's records, of which what she describes as "large tranches" remain missing. Mr Adamson simply confirmed the truth of his short witness statement. It is consistent with the available contemporaneous documents and there is no reason to doubt it. I accept his evidence too.

7. As Mr Esa did not attend for cross-examination, at which point he would have had the documents in evidence put to him, Ms Hallett, who appeared for the Liquidators, took me carefully through the available documents in submission and addressed the points raised by Mr Esa in his witness statement in answer to the application. I also had a list of issues prepared by the Respondent. That, like his evidence, makes some general allegations about the conduct of the Liquidators, together with the accuracy of the transcript of an interview with the Liquidators conducted by Skype on 18th January 2018, and the availability of documents for him to conduct his defence.

8. Ms Hallett raised two points with me about the documents in particular. The first concerned whether privilege attached to "without prejudice save as to costs" documents between the Company and the creditor on whose petition the Company was wound up. I was satisfied that any such privilege had been waived, for reasons that I gave at the time.

9. The second concerned the availability of the books and records of the Company. As I have said, I accept that the Liquidators have made enquiries as to the location of the Company's books and records and that Mr Esa has been given the opportunity to provide any records in his possession. Mr Adamson's unchallenged evidence as to the Company's computer on which certain records may have been kept was that this was removed in around January or February 2017 and taken to the Company's premises in Blackburn. Ms Merry's similarly unchallenged evidence was that the Company's computers had not been provided to her. Mr Esa appears to have continued to have access to Company records as he sent the Liquidators some draft management accounts, printed on 3rd January 2019, which suggests that information was available

to him long after the repossession of the Company's premises and the winding up order.

10. I should say that the evidence before me did not suggest that the Liquidators had documentation available to them that was not available to Mr Esa and nor did it show any properly focused requests for documents by him. A diffuse request was made in February 2022 and was answered by a detailed email of 25th May 2022 and Mr Esa did not refine his requests further as asked by the Liquidator's solicitors.

11. That being so, once the Liquidators have shown that Mr Esa or his corporate vehicle, Stone Key, received property of the Company, it is for him as a fiduciary to show the propriety of that receipt (*GHLM Trading Limited v. Maroo* [2012] EWHC 61, per Newey J, as he then was, at paras 148-9). Once the Liquidators have made out a prima facie case, it is not open to Mr Esa:

> "to escape liability by asserting that, if the books and papers or other evidence had been available, [he] would have shown that [he was] not liable in the amount claimed"

(*Re Mumtaz Properties* [2011] EWCA Civ 610 per Arden LJ, as she then was, at paras.16-17). I bear those principles in mind.

12. I should also say that Mr Esa's complaints about the Liquidators' pursuit of the claim are either immaterial to the claim or are unparticularised. He raises the fact that the solicitors now instructed by the Liquidators also acted for the petitioning creditor in the petition. That does not affect the merits of the claim. He also challenges the accuracy of the transcript of the interview he attended with the Liquidators by Skype in general terms but does not point to any particular inaccuracy in it, despite it having been in evidence since September 2021. I accept the material accuracy of the transcript for the purposes of this case.

Background

13. The Company was incorporated on 8th April 2002. It operated as a provider of storage space for rent operating from three sites in the north west of England:

    i) Unit G, Carlinghurst Business Park, George Street West, Blackburn, Lancashire BB1 1PL ("the Blackburn Premises");

    ii) Units 1 and 3, Bracken Trade Park, Dumers Lane, Bury BL9 9QP ("the Bury Premises"); and

    iii) 1-2 Russell Road, Birkenhead, Merseyside CH42 1RP ("the Birkenhead Premises").

    The Blackburn Premises were also the registered office address for the Company.

14. The Company was wound up on the petition of Mr Geoffrey Carmel, the landlord of the Birkenhead Premises, on 24th July 2017. Ms Merry was appointed as liquidator on 14th September 2017. Mr Dyer was subsequently appointed as liquidator jointly with Ms Merry.

15. Mr Esa was from 1st March 2015 the sole registered director and shareholder of the Company. The Liquidators allege that he was a *de facto* director from incorporation to that date. Mr Esa disputes this but he was listed as a director in the filed accounts for the year ending 28th February 2005 and appeared to accept in interview with the Liquidators that both he and his brother had run the Company together. That is not an issue that needs to be resolved in these proceedings as the matters complained of took place when Mr Esa was the sole registered director. It is not alleged that any other person was concerned in the management of the Company at this time. It is not in dispute that Mr Esa was equal shareholder in the Company with his brother, Mr Ikram Esa, from incorporation until 1st March 2015, when Ikram Esa transferred his shareholding to him. Stone Key was incorporated on 11th June 2015 and Mr Esa was its sole shareholder from 10th September 2015 and its sole director from 19th September 2015. Again, before those dates, Mr Esa was equal shareholder and co-director with his brother.

16. The Liquidators' case is that the Company was suffering from cash flow problems from 2014 and, by late 2015 or early 2016, it was in serious financial difficulties, such that it was cash flow insolvent by April 2016 and balance sheet insolvent by September 2016. In the face of this insolvency Mr Esa caused the assets of the Company to be disposed of as follows –

    i) The customer list for the Birkenhead Premises ("the Birkenhead Customer List") was given to a company called Smart Storage for no consideration in around November 2016, or Mr Esa has failed to account to the Company for any consideration received. Mr Esa, in his evidence, dismisses this claim as "ludicrous".

    ii) In respect of the Bury and Blackburn Premises, in about July or August 2016 Mr Esa caused the Company to transfer away the business conducted from those sites, including the leases of both premises, the accrued trade debtors in respect of the business at the Bury Premises in the sum of £15,753.81 and those in respect of the Blackburn Premises in the sum of £14,061.96 ("the Bury and Blackburn Businesses"). These were said to have been transferred to Stone Key for no consideration. Mr Esa has claimed at interview that Stone Key provided consideration for these assets by paying the Company's creditors directly in the sum of £80,000 and collecting £54,000 of debt on the Company's behalf. The Liquidators say they can find no evidence of this. Mr Esa does not repeat the case as to the collection of debts or payment of consideration in his evidence.

    iii) Trade debtors in respect of the Birkenhead Premises are shown in Company records to have amounted to £16,520 as at 30st August 2016 ("the Birkenhead Debtors"). By the following day they were recorded as zero and are shown as having been "taken over" by Stone Key. This is denied by Mr Esa, who says that this was done with the advice of the Company's solicitors and accountants. There is no evidence of this advice having been given.

17. These transactions are alleged to constitute transactions at an undervalue, or alternatively preferences or, in the further alternative, transactions defrauding creditors and to have been caused or permitted by Mr Esa in breach of his duties to:

i) act in accordance with the Company's constitution;

ii) act in a way which he considered in good faith to promote the success of the Company, whether for the benefit of its creditors or at all; and

iii) exercise reasonable care skill and diligence and to avoid a conflict of interest.

18. A further allegation in respect of certain property at the Birkenhead Premises is no longer pursued.

19. Finally, the Liquidators allege wrongful trading for the purposes of section 214 IA 1986 in that, from 29th September 2016 (or alternatively 21st November 2016), Mr Esa either knew or ought to have known that there was no reasonable prospect of the Company avoiding insolvent liquidation and yet allowed it to continue to trade until it was placed into compulsory liquidation. As at 29th September 2016 the Company's creditors stood at £111,693.56. As pleaded, by 22nd June 2017, they stood at £191,669.92 and, as at the date of liquidation on 24th July 2017, they totalled £509,741. That last figure has since been revised.

Legal principles

Breach of duty

20. A liquidator may bring an application pursuant to section 212 IA 1986 where a director has:

> "misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company."

In such a case, the court may require the director:

> "(a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or
>
> (b) to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just."

21. The general duties owed by a director of a company are set out in Chapter 2 of Part 10 of the Companies Act 2006 ("CA 2006"). The duties relied upon by the Liquidators here are as follows. First, section 171 CA 2006 sets out the duty to act within a director's powers:

> "A director of a company must—
>
> (a) act in accordance with the company's constitution, and
>
> (b) only exercise powers for the purposes for which they are conferred."

22. Section 172 CA 2006 provides the duty to promote the success of the company:

> "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
>
> (a) the likely consequences of any decision in the long term,
>
> (b) the interests of the company's employees,
>
> (c) the need to foster the company's business relationships with suppliers, customers and others,
>
> (d) the impact of the company's operations on the community and the environment,
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f) the need to act fairly as between members of the company.
>
> …
>
> (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

23. Whether a director has acted in accordance with this duty is ordinarily approached subjectively, that is to say by reference to what the director himself believed. Thus in *Regentcrest plc (in liq) v Cohen & Anor.* [2001] BCC 494, Jonathan Parker J (as he then was) said at paragraph 120:

> "The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test."

24. The exceptions to the subjective approach were set out by Mr John Randall QC, sitting as a deputy High Court Judge, in *HLC Environmental Projects Ltd (in liq.)* [2013] EWHC 2876 at paragraph 92:

"However, this general principle of subjectivity is subject to three qualifications of potential relevance in this case:

(a) Where the duty extends to consideration of the interests of creditors, their interests must be considered as 'paramount' when taken into account in the directors' exercise of discretion (per Mr Leslie Kosmin QC in the *Colin Gwyer* case (above) at [74]). Although I note the contrary view expressed by Owen J.in the Supreme Court of Western Australia that although 'the directors must "take into account" the interests of creditors [i]t does not necessarily follow from this that the interests of creditors are determinative' (*Bell Group Ltd v Westpac Banking Corp* [2008] WASC 239 at [4438]–[4439], applying the judgment of Mason J. in *Walker v Wimborne* [1976] HCA 7; (1976) 137 C.L.R. 1), so far as English law is concerned I respectfully agree with Mr Kosmin QC that his use of 'paramount' was consistent with the judgment of Nourse L.J. in *Brady v Brady* (1987) 3 B.C.C. 535 (CA) at 552, where he observed that 'where the company is insolvent, or even doubtfully solvent, the interests of the company are in reality the interests of existing creditors alone'. I also note that this passage from Mr Kosmin QC's judgment was cited with apparent approval by Norris J. in *Roberts (Liquidator of Onslow Ditchling Ltd) v Frohlich* [2011] EWHC 257 (Ch); [2012] B.C.C. 407 at [85].

(b) As Miss Leahy submitted, the subjective test only applies where there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective, namely whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company (*Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch. 62 at 74E–F, (*obiter*), per *Pennycuick J.; Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 B.C.L.C. 598 at [138] per Mr Jonathan Crow).

(c) Building on (b), I consider that it also follows that where a very material interest, such as that of a large creditor (in a company of doubtful solvency, where creditors' interests must be taken into account), is unreasonably (i.e. without objective justification) overlooked and not taken into account, the objective test must equally be applied. Failing to take into account a material factor is something which goes to the validity of the directors' decision-making process. This is not the court substituting its own judgment on the relevant facts (with the inevitable element of hindsight) for that of the directors made at the time; rather it is the court

> making an (objective) judgment taking into account all the relevant facts known or which ought to have been known at the time, the directors not having made such a judgment in the first place. I reject the respondent's contrary submission of law."

The duty to creditors is engaged where the directors know, or ought to know, that insolvency is imminent or that it is probable that the company will enter into insolvent liquidation (*BTI v. Sequana* [2022] UKSC 25).

25. Section 174 CA 2006 provides:

> "(1) A director of a company must exercise reasonable care, skill and diligence.
>
> (2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with—
>
> (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
>
> (b) the general knowledge, skill and experience that the director has."

26. The duty to avoid conflicts of interest is set out in section 175 CA 2006 as follows:

> "(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.
>
> (2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).
>
> (3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.
>
> (4) This duty is not infringed—
>
> (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
>
> (b) if the matter has been authorised by the directors.
>
> (5) Authorisation may be given by the directors—
>
> (a) where the company is a private company and nothing in the company's constitution invalidates such authorisation, by

the matter being proposed to and authorised by the directors; or

(b) where the company is a public company and its constitution includes provision enabling the directors to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution.

(6) The authorisation is effective only if—

(a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and

(b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.

(7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties."

Transactions at an undervalue and preferences

27. Section 238 IA 1986 provides:

"(1) This section applies in the case of a company where—

(a) the company enters administration,

(b) the company goes into liquidation;

and 'the office-holder' means the administrator or the liquidator, as the case may be.

(2) Where the company has at a relevant time (defined in section 240) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section.

(3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.

(4) For the purposes of this section and section 241, a company enters into a transaction with a person at an undervalue if—

(a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or

(b) the company enters into a transaction with that person for a consideration the value of which, in money or money's

> worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.
>
> (5) The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied—
>
> (a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and
>
> (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company."

28. Section 239 IA 1986 provides:

> "(1) This section applies as does section 238.
>
> (2) Where the company has at a relevant time (defined in the next section) given a preference to any person, the office-holder may apply to the court for an order under this section.
>
> (3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference.
>
> (4) For the purposes of this section and section 241, a company gives a preference to a person if—
>
> (a) that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities, and
>
> (b) the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.
>
> (5) The court shall not make an order under this section in respect of a preference given to any person unless the company which gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (4)(b).
>
> (6) A company which has given a preference to a person connected with the company (otherwise than by reason only of being its employee) at the time the preference was given is presumed, unless the contrary is shown, to have been

> influenced in deciding to give it by such a desire as is mentioned in subsection (5).
>
> (7) The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of a preference."

29. The "relevant time" for the purpose of both these sections is set out in section 240 IA 1986:

> "(1) Subject to the next subsection, the time at which a company enters into a transaction at an undervalue or gives a preference is a relevant time if the transaction is entered into, or the preference given—
>
> (a) in the case of a transaction at an undervalue or of a preference which is given to a person who is connected with the company (otherwise than by reason only of being its employee), at a time in the period of 2 years ending with the onset of insolvency (which expression is defined below),
>
> (b) in the case of a preference which is not such a transaction and is not so given, at a time in the period of 6 months ending with the onset of insolvency.
>
> …
>
> (2) Where a company enters into a transaction at an undervalue or gives a preference at a time mentioned in subsection (1)(a) or (b), that time is not a relevant time for the purposes of section 238 or 239 unless the company—
>
> (a) is at that time unable to pay its debts within the meaning of section 123 in Chapter VI of Part IV, or
>
> (b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction or preference;
>
> but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by a company with a person who is connected with the company.
>
> (3) For the purposes of subsection (1), the onset of insolvency is—
>
> …
>
> (e) in a case where section 238 or 239 applies by reason of a company going into liquidation… the date of the commencement of the winding up.

Stone Key is "connected with" the Company by reason of the control of them both by Mr Esa (section 249 read with section 435 IA 1986).

30. Section 241 IA 1986 confers wide powers on the court to require the return of property to the company or the payment of a sum to the company by a person who has received the benefit of a transaction at an undervalue or a preference.

Transactions defrauding creditors

31. Section 423 IA 1986 deals with transactions defrauding creditors as follows:

> (1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—
>
> (a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;
>
> (b) he enters into a transaction with the other in consideration of marriage or the formation of a civil partnership; or
>
> (c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.
>
> (2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—
>
> (a) restoring the position to what it would have been if the transaction had not been entered into, and
>
> (b) protecting the interests of persons who are victims of the transaction.
>
> (3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—
>
> (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
>
> (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make."

Wrongful trading

32. Section 214 IA 1986 provides as follows:

"(1) Subject to subsection (3) below, if in the course of the winding up of a company it appears that subsection (2) of this section applies in relation to a person who is or has been a director of the company, the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.

(2) This subsection applies in relation to a person if—

(a) the company has gone into insolvent liquidation,

(b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and

(c) that person was a director of the company at that time;

but the court shall not make a declaration under this section in any case where the time mentioned in paragraph (b) above was before 28th April 1986.

(3) The court shall not make a declaration under this section with respect to any person if it is satisfied that after the condition specified in subsection (2)(b) was first satisfied in relation to him that person took every step with a view to minimising the potential loss to the company's creditors as on the assumption that he had knowledge of the matter mentioned in subsection (2)(b)) he ought to have taken.

(4) For the purposes of subsections (2) and (3), the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both—

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and

(b) the general knowledge, skill and experience that that director has.

(5) The reference in subsection (4) to the functions carried out in relation to a company by a director of the company includes any functions which he does not carry out but which have been entrusted to him.

> (6) For the purposes of this section a company goes into insolvent liquidation if it 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.
>
> (6A) For the purposes of this section a company enters insolvent administration if it enters administration at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the administration.
>
> (7) In this section 'director' includes a shadow director.
>
> (8) This section is without prejudice to section 213."

33. The expression "every step with a view to minimising the potential loss to the company's creditors" was explained by ICC Judge Jones in *Brooks v Armstrong* [2015] BCC 661 as follows at paragraph 259:

> "What 'every step' which a reasonably diligent person with the knowledge of or attributed to the director will be must depend upon the facts. As a matter of guidance the following factors fall to be considered by directors and kept under review both generally and when considering specific financial decisions assuming the business remains sustainable:
>
> Ensuring accounting records are kept up to date with a budget and cash-flow forecast; preparing a business review and a plan dealing with future trading including steps that can be taken (for example cost cutting) to minimise loss; keeping creditors informed and reaching agreements to deal with debt and supply where possible; regularly monitoring the trading and financial position together with the business plan both informally and at board meetings; asking if loss is being minimised; ensuring adequate capitalisation; obtaining professional advice (legal and financial); and considering alternative insolvency remedies."

34. In *Re Produce Marketing Consortium* (1989) 5 B.C.C. 569, 597, Knox J said:

> "In my judgment the jurisdiction under sec. 214 is primarily compensatory rather than penal. *Prime facie* the appropriate amount that a director is declared to be liable to contribute is the amount by which the company's assets can be discerned to have been depleted by the director's conduct which caused the discretion under sec. 214(1) to arise. However Parliament has indeed chosen very wide words of discretion and it would be undesirable to seek to spell out limits on that discretion… The fact that there was no fraudulent intent is not of itself a reason for fixing the amount at a nominal or low figure, for that would amount to frustrating what I discern as Parliament's intention in

> adding sec. 214 to sec. 213 in the Insolvency Act 1986, but I am not persuaded that it is right to ignore that fact totally."

The insolvency of the Company

35. At interview with the Official Receiver on 17th August 2017, Mr Esa said that his brother left the Company in 2014. He said that he had bought out his brother's interest in another company, Fashionbourne Limited, but that the Company itself "had no value to be shared out".

36. Mr Esa was interviewed by the Liquidators by Skype on 18th January 2018, accompanied by his solicitor. There was the following exchange:

> "KM [Ms Merry] So would that suggest that Safe Depot was having a cash flow issue as far back as 2014? If the rent had to be reduced?
>
> SE [Mr Esa] Yes, we've always faced some cash flow problems ever since the recession kicked in as the records will show. I have spoken to the landlord about it.
>
> …
>
> MG [Michael Green] Ok, thank you. When did Safe Depot start to really struggle financially? When were you in difficulties?
>
> SE I started having serious ongoing problems in Birkenhead, it was Birkenhead branch some of the other two branches were subsidising Birkenhead.
>
> MG Yes, but when did the company start to really get into difficulties?
>
> SE I think the years - late 15/16."

37. That the Company was suffering from financial difficulties as early as 2014 is also shown by the financial statements filed at Companies House –

    i) The profit and loss account for the year ending 28th February 2014 shows a loss of £15,316. Those accounts were approved on 18th September 2014 and signed by Mr Esa as director.

    ii) The position had worsened in the year ending 28th February 2015. The financial statements for that year, signed by Mr Esa on 27th November 2015, show a loss of £66,044.

    iii) The financial statements for the year ending 29th February 2016, approved by Mr Esa on 28th November 2016, show a loss of £333,738. The balance sheet shows net assets of £71,330, a decrease of £345,458 on the previous year. This was apparently attributable in part to the writing off of a loan due from Mr Esa's brother-in-law.

38. The Company's cashflow problems in 2016 to 2017 can also be seen from a summons for unpaid non-domestic rates in respect of the Blackburn Premises, issued on 28th April 2017 and covering rates due for the period from 1st April 2016 to 1st April 2017, in the sum of £26,840. The Company also entered into a payment plan with its landlord on 19th August 2016 relating to outstanding insurance premiums. Shortly afterwards, the Company consulted debt advisers, Justice Goddard Ltd.

39. Justice Goddard gave an account of its instruction by the Company in a letter to the Liquidators' solicitors, dated 6th March 2019:

> "2. We received a series of emails on 24.8.16 from the company seemingly in relation to the lease held by the company at the Birkenhead trading premises. It was clear the company was in arrears on both rent and insurances at various times.
>
> 3. The director's instructions were to place the company into a voluntary liquidation as the company was unable to pay the rent and insurance. As such we sent our engagement letter to the director on 7.9.16 along with a list of documents we would require to assist in this regard. The engagement letter was and remained unsigned.
>
> 4. A response to the email was received on 29.9.16 from the company's advisors which omitted asset values - though it was clear the company was insolvent on a cash flow basis (see point 12 and the creditor list). It appears from point 7 the 'branches' were sold to Stone Key in August 2016 hence the company was no longer trading other than from the Birkenhead premises.
>
> …
>
> 6. A further email was received from the company's advisors on 13.10.16 to which were attached the accounts for the company year ending 28 February 13, 28 February 14 & 28 February 15 which have already been provided to you. Also provided was a list of the assets and debtors report (see enclosed). This report makes reference to fixed assets valued at £5974 of which it has been estimated to realise £4000. Trade debtors appeared to have been taken over by Stone Key Ltd. A further email was sent to the company on 2.11.16 chasing up various missing information."

Mr Esa accepted during his interview with the Liquidators that he had sought restructuring and insolvency advice.

40. Mr Arif Patela of Justice Goddard wrote to Mr Geoffrey Carmel, the landlord of the Birkenhead Premises, on 21st November 2016. He said:

> "I write further to our discussion last week and on behalf of Safe Depot Ltd.

> I understand you are keen to resolve the issues with Safe Depot Ltd who is your tenant at the Birkenhead premises.
>
> I advise in relation to the above as follows -
>
> 1. Safe Depot Ltd is both cash flow and balance sheet insolvent and as such we have advised that the company ought to be placed into liquidation.
>
> 2. In this scenario, a liquidator will be appointed to realise the assets of the company which I understand are fixed assets at the Birkenhead premises and a debtor book riddled with bad debt with low expected realisations.
>
> 3. In our discussion last week, you made reference to a guarantee on the lease provided by Fashionbourne Ltd. I understand Fashionbourne is also insolvent as the assets that have now been sold and they were subject to fixed charges with cross guaranteed loans held in Safe Depot Ltd.
>
> As such, I am instructed to offer you a settlement on the basis of discussions I understand that have taken place between you and Mr Esa.
>
> I am in the process of arranging a valuation of the assets at the Birkenhead premises which I expect to complete by the end of this week. I shall then be in a better position to make an offer to you which represents the best value for all parties concerned.
>
> In the meantime, I have advised Mr Esa to cease trading and that unfortunately involves stopping payments to all creditors/landlords/agents."

41. A winding up petition was presented by Mr Carmel on 30th November 2016 in respect of unpaid rent of £3,076.92 and £2,500 of unpaid insurance premiums. These small sums were paid at the end of December 2016 and the petition was dismissed. A further statutory demand was served on 21st April 2017, again by Mr Carmel, this time for unpaid rent of £6,153.84 and unpaid insurance premiums of £427.86.

42. Two separate debt collection agencies wrote to the Company about two separate, relatively small, VAT debts on 25th and 26th April 2017. On the following day, Mr Carmel obtained a default costs certificate in respect of the unpaid costs of the first petition. He presented the petition on which the Company was ultimately wound up on 2nd June 2017.

43. On 7th July 2017 Mr Carmel quantified a dilapidations claim in the sum of £343,451.97. This claim did not come out of the blue, however, as there had been correspondence in relation to this in 2016 and the Company had obtained its own advice from a surveyor on 20th March 2017, which advice quantified the claim at £266,000.

44. Mr Esa does not address the insolvency of the Company in his evidence. It appears that he does not dispute that the Company became insolvent but does not alight on any particular date by which he accepts that it was insolvent. In my judgment it is clear that the Company was cashflow insolvent from April 2016 and in any event by August 2016, at which point it was at least probable that the Company would go into insolvent liquidation. It was then, against a background of at least two years of declining financial health, that appears to have become unable to pay non-domestic rates. Its financial records for the year ending February 2016 show a marked increase in creditors compared to previous years, which, absent any alternative explanation, is at least consistent with creditors going unpaid. Towards the end of August 2016 it consulted insolvency advisers as to arrears of rent and insurance, which, it would appear from the winding up petition presented later that year, were in modest sums and in respect of which it had proposed a payment plan with its landlord in early August 2016. It is a reasonable inference that at least some arrears fell due prior to August 2016. I shall consider the question of whether, and if so when, Mr Esa should have realised that the company could not avoid insolvent liquidation below once I have considered the transfer of the Company's assets to Stone Key.

The transfer of the Company's assets

The Birkenhead Customer List

45. It was accepted by Mr Esa in interview with the Liquidators that the Birkenhead Customer List was given to Smart Storage in about November 2016 for no consideration. He told the Liquidators that he "moved the customers on to a competitor". He explained this as follows:

> "MG … How did you set about moving the customers on? What did you do?
>
> SE I approached other competitors in the Birkenhead area and I told them basically that Safe Depot is now going to be shutting down and would they be interested in taking over the customers.
>
> MG Right. How many did you approach roughly? One or two or several?
>
> SE Three I think.
>
> MG Ok. Do you remember who they were?
>
> SE The final outcome was Smart Storage took them on.
>
> MG Right. How much did they pay you for the customers?
>
> SE Agreements with them we just did an orderly transfer.
>
> MG Alright. You don't recall when you served notice on the customers that they were – did you tell them they are transferring and say Smart Storage are taking you?

> SE I told them Smart Storage what we agreed Smart Storage was taking over."

Indeed, Mr Esa wrote to customers on 12th November 2016 to say that "the Birkenhead premises of Safe Depot Ltd" were "closing on 20 December 2016" and asked them to vacate the premises and settle their accounts.

46. The occupancy report of 13th November 2016 suggests that there were 78 customers using the Birkenhead Premise at a total rent of £1,349.70 a week. The Liquidators' submission is that the list must have had some value to a competitor. Mr Esa, in his evidence, as well as describing this element of the claim as "ludicrous" says that that Liquidators:

> "could not find a single person to put forward a valuation, any valuation. That is because no professional would put their name to a ridiculous claim of valuation for a handful of customers who were being moved to other storage facilities so that we could empty the depot for hand back and deal with the dilapidations."

47. One might think that the details of these customers represented an asset of more than nominal value. There is however no expert evidence to show what the value might be. There is no basis on which I can ascribe a value to them. I was not asked to direct an inquiry into its value and it appears to me that, if the Liquidators have not yet found a valuer to provide expert opinion evidence as to the value of the customer list they are unlikely to be able to do so. Without some opinion evidence to show that there was some real value to the customer list I see no basis on which to order such an account. While there might be a breach of duty to consider the interests of creditors in giving this asset away for no consideration it seems to me that, in the absence of proper evidence to show that this list had more than nominal value, this element of the claim must be dismissed.

<u>The Bury and Blackburn Businesses</u>

48. Again, there is no dispute that the Bury and Blackburn Businesses were transferred to Stone Key in August 2016. Mr Esa told the Official Receiver at interview that Stone Key:

> "took over the collection of the book debts of Safe Depot Limited in July /August 2016. Safe Depot Limited had a cash flow problem in that its customers were insufficient to meet its running costs. In particular the Birkenhead site was the problem. Its customers were insufficient and very bad payers. The income does not cover the lease and running costs."

49. Mr Esa's account of what then happened, as given at interview on 18th January 2018, is as follows:

> "KM Right, ok. And what about any assets that were at the Blackburn and Bury premises? What happened to those?

SE Those two premises were already sold on. Sold to a different company.

KM So Blackburn and Bury were sold were they?

SE Yes.

KM So who were they sold to?

SE Stone Key Limited.

KM So were they sold as – did you just sell the assets or did you sell those as sort of isolated businesses?

[ ] MUFFLED, VARIOUS PEOPLE SPEAKING

SE Yes, they were sold as isolated businesses.

KM So, as sort of a self-contained business out from Safe Depot?

SE That's right.

KM Ok. So, as part of that, all the chattel assets were sold that were at the premises were they? Did they take on an assignment of the leases or something like that? What happened to the leases? Because presumably they were leased premises as well weren't they?

SE Yes, the Bury premises the landlord then gave us a different lease under Stone Key Limited.

KM Right, ok. So the businesses were sold – so the premises were transferred from Safe Depot to Stone Key?

SE No, the Bury premises –

KM Yes

SE Was leased –

KM Yes

SE And the landlord transferred the lease, gave us a new lease as Stone Key Limited for the premises.

KM So, does Stone Key still lease those premises?

SE Sorry, I don't understand.

KM So, a new lease – so Safe Depot had the lease with the landlord for the Bury premises so when Safe Depot – was that before liquidation?

MG What was the date? Please.

SE It was well before liquidation, I can't remember the date now I will have to check my records.

MG Which year? Was it 2016 or 2017?

SE I think it was around 2016. YP confirmed 2016.

KM So the lease with Safe Depot – did the company just hand the lease back to the landlord and then the landlord granted a new lease to Stone Key did they?

SE I can't remember off the top of my head what we did was talk to the landlord about giving us a different lease.

KM Right, ok. So that lease is – the Bury lease is still now in Stone Key's name?

SE That's right.

KM And what about the third premises? So that was Bury. What about Blackburn?

SE Stone Key Limited bought the Blackburn property.

KM Right, from the landlord?

SE Yes.

KM So what happened to the lease that Safe Depot had with the landlord of Blackburn?

SE Because we traded from there ourselves we didn't worry about the lease side of it.

MG Who owned it?

SE It was Stone Key that had bought it as property.

MG Yes. I know now but who owned it before? Who did they buy it from?

SE Fashionbourne Limited.

MG Fashionbourne again. Ok.

KM So when Stone Key, sorry when Safe Depot were in occupation, say that was the one that Safe Depot was renting from Fashionbourne, is that right?

SE That's right, yes.

> KM Yes, ok.
>
> MG And was that in 2016 as well?
>
> SE Yes
>
> KM So what happened to the company – so Safe Depot's assets that were at Blackburn, are they now owned by Stone Key? Or held by Stone Key?
>
> SE I don't think so.
>
> TS [Tom Smith, Mr Esa's solicitor] They are talking about […]
>
> SE Are we talking about the fixtures and fittings or?
>
> KM Any assets that were at the Blackburn and Bury premises. I am just trying to establish what happened to them. Because you are saying you sold off those as separate businesses so just trying to – were all the assets sold?
>
> SE All the fixtures and fittings came with the property.
>
> KM Right, ok.
>
> KM So, the assets that form part of the sale, was that like the customer list for each premises? What was included in the sale? Was there a sale agreement between Safe Depot and the people that bought them?
>
> SE What was the question sorry?
>
> KM Sorry, so when the Blackburn and Bury sites were sold by Safe Depot, I hadn't had sight of any sale agreements. Presumably there were sale agreements in place from Safe Depot to sell those assets on or to sell Blackburn and Bury? There must have been some agreement where how much was paid and things like that?
>
> SE I think I will have to check with my solicitors how we actually formatted that."

50. The evidence of Mr Adamson too is that he noticed that paperwork related to business at Bury and Blackburn was altered to refer to Stone Key in or around August 2016. Stone Key issued a credit note to one customer on 24th August 2016 for the period 13th August 2016 to 2nd September 2016 and it appears that the Company's PayPal account was diverted to Stone Key.

51. The dispute is whether any consideration was received for the transfer and, if so, what happened to it. At interview with the Liquidators Mr Esa explained this as follows::

MG Do you remember how much was paid for the business? By Stone Key?

SE The property was transferred and we took over the debtors of Safe Depot. And we carried on paying some of the bills for Safe Depot

KM So the debtors due to Safe Depot were taken by Stone Key?

SE Yes. [..]

KM How much were they? Do you know how much they were?

YP Fifty something

KM So fifty odd thousand.

TS Just clarify this point Just clarify this point on the debtors.

SE Fifty four thousand pounds

KM So fifty four thousand pounds of debtors

[ ] MUFFLED VOICES

TS Sorry for interrupting, my understanding and certainly not wishing to put words in anybody's mouth, we have discussed this beforehand. The point about these debtors is that effectively Stone Key administered the recovery of these debts on behalf of Safe Depot and remitted those monies to Safe Depot.

KM Oh, so the fifty four thousand was collected in and then paid across to Safe Depot was it?

TS That's what I understand the position to be.

SE Yes

KM So that was paid into the company's bank account was it?

SE Sorry?

KM Into Safe Depot's bank account? So what sort of period would that have been over?

TS We touched on this before.

MUFFLED VOICES… all different dates

SE It was ongoing, we didn't have it in one lump sum.

KM Right, ok. So was that from sort of 2016 onwards? What date did Stone Key take over the collection of those debts?

YP [Yakub Patel, the Company's bookkeeper] We kept paying September/October 2017.

KM Right.

YP Paid over £80,000

KM So those debtors were collected and paid across. So how much

TS A point worth going back to I think it might be the end when, correct me if I am wrong, I understand it those debtors had been paid back over the course of a period of about middle of 2016 through to the period of 2017 and then, but also during that period, Stone Key paid over around £80,000 by way of assistance to Safe Depot for running expenses.

SE That's right yes.

KM So effectively, you are saying you have paid £80,000 for the business, is that what you are saying?

TS I can't comment on that, but I have certainly have to spend a bit more time to do with that transaction.

KM Ok, so what was the £80,000 for then? Just collecting debts of £54,000.

TS Sorry, you just went quiet at the end of that question.

KM So, the £80,000 you are saying Stone Key effectively incurred £80,000 on behalf of Safe Depot for running Safe Depot. So what was Stone Key running then? Just collecting debts of £50,000 and charging £80,000?

SE Because we took over both the businesses and paid the rent back in Stone Key sorry, Safe Depot, in order to pay the landlord and the debtors sorry creditors

KM Ok. So was there a sale agreement drawn up between Safe Depot and Stone Key? Sorry for the sale, for the £80,000 or is there any paperwork? That's what I am trying to get to. What that deal was.

SE No, I don't think there is, just book keeping and bank statements.

KM So, did Stone Key raise invoices for those amounts? To Safe Depot?

SE No.

TS I don't think, it wasn't services provided by Stone Key as far as I'm aware I think it was more effectively money into the business to assist with its running costs.

KM So what did Stone effectively pay for the business then?

SE We were helping to sort Safe Depot out to pay the bills.

KM Yes.

TS The landlords, banks and anything else.

KM Yes. So but Stone Key have ended up with the assets and the customer list and the goodwill and everything of that business effectively? So are you saying effectively the running of the business paid for it? Is that what you are sort of saying?

SE No.

KM So no money – I mean you paid, so you are saying that Stone Key paid liabilities on behalf of Safe Depot, have you got a list of those payments that were made?

SE Yes.

KM So you will be able to give us that and is there any other form of documentation in connection with the transfer of that business to Stone Key?

SE Some paperwork will be in my records. Whatever documentation I have I will gladly send to you.

KM Ok. And was that Blackburn and Bury?

SE Yes.

KM So both effectively were transferred to Stone Key?

SE Yes.

52. Thus it appears that Mr Esa's case at interview was that the consideration for the transfer of the business was the payment of £80,000 by Stone Key to the Company's creditors and its collection on behalf of the Company of £54,000 of debt. The information in the Company's accounting software lists three payments to the Company's landlord totalling £4,615.38 which are marked "Pd by Stone Key" or "Pd by S Key", but the underlying documents have not been made available and whether these payments were in fact made by Stone Key and, if so, why is not clear. In any event this does not evidence a payment of £80,000 to the Company's creditors. Nor is it clear why Stone Key is shown as a creditor of the Company in the sum of £80,323 in Mr Esa's Preliminary Information Questionnaire dated 10th August 2017. It is

unlikely to have been both consideration for the business of the Company and a loan to the Company. I am not satisfied that there was any consideration paid by Stone Key for the transfer of the Bury and Blackburn Businesses. I am similarly not satisfied that it collected any debt on behalf of the Company. No evidence of this has been provided at all.

53. There is limited information as to the value of the businesses. While they are said to have included the leases of the Bury Premises and the Blackburn Premises and the goodwill, there is little evidence as to the value of these. There is also a lack of clarity as to what happened to the leases of the premises. The official copy of the Land Registry entries show that a lease of the Bury Premises remained registered in the former name of the Company as at 19th February 2020. The entry for the freehold of the Blackburn Premises shows the proprietor to have been Fashionbourne Limited prior to 15th January 2016 when Stone Key was registered as proprietor. There is no indication of a long lease held by the Company in the papers that I have. However that may be, there is no evidence as to the value of either the Company's goodwill or to any leasehold property that it might have disposed of.

54. The best evidence as to the value transferred to Stone Key was provided by the Company's bookkeeper, Yakub Patel. This information was supplied in an email of 29th September 2016 forwarded to Justice Goddard. He said:

> "7. Safe Depot Ltd is in trading from Birkenhead Branch. Blackburn and Bury Branches were sold to Stone Key Ltd on 01/08/2016."

A Company document also provided by Mr Patel set out the assets said to have been transferred to Stone Key. Trade debtors shown as "Values held at Safe Depot as at 30.8.16" are:

"Blackburn	Bury	Birkenhead
£14,061.98	£15,763.81	£16,520.00"

Trade debtors shown as "Values taken over by StoneKey 31.8.16" are:

"Blackburn	Bury	Birkenhead
£14,061.98	£15,763.81	£0.00"

In the absence of evidence to the contrary it appears to me that the sums of £14,061.98 and £15,763.81 represent the value that can be said to have been transferred to Stone Key in respect of these businesses.

55. There is simply no evidence of any consideration having been given for this transfer. It took place at a time when the Company was unable to pay its debts and within two years of the winding up order. There is no evidence of the transfer discharging an existing debt for the purposes of section 239 IA 1986. It follows that this amounted to a transfer at an undervalue for the purposes of section 238 IA 1986. There is nothing to suggest that Mr Esa considered the interests of creditors, or indeed considered his duties under section 172 CA 2006 at all. That being so the court has to consider the exercise of the duty objectively, applying the standard of the reasonable and honest director. He similarly placed himself in a position of conflict between his interests as

a director and shareholder of Stone Key and his duty to the Company for the purposes of section 175 CA 2006. Although Mr Esa has maintained that he followed professional advice in his dealings with the Company property, there is no evidence of this. I cannot see that he could have been given advice to the effect that he could abstract value from the Company for no consideration for his own benefit and to the detriment of the Company's creditors. Had he properly had regard to his duties a transaction that denuded the Company of a significant asset for no return could not possibly have been approved.

Birkenhead Debtors

56. Again, there does not seem to be a dispute that the benefit of the debtors of the business carried on at the Birkenhead Premises were "taken over" by Stone Key in August 2016. These totalled £16,520 according to the Company's records. There is no evidence of any consideration for this or of any advice as to the propriety of the transfer. For the reasons that I have set out in respect of the transfer of the Bury and Blackburn Businesses such a gratuitous transfer was a transaction at an undervalue for the purposes of section 238 IA 1986 and was in breach of duty under section 172 and 175 CA 2006.

Transaction defrauding creditors

57. While I am satisfied that the transfers to which I have referred to above were both transactions at an undervalue and in breach of Mr Esa's duties as director, the evidence does not quite establish that the transactions were entered into for the purposes of putting assets beyond the reach of a person making, or who might make, a claim against the Company or otherwise prejudicing the interests of that person, though that was the result. While the Company was evidently under pressure from creditors, the impression created by papers is of an ill thought out "informal winding up" of the Company's affairs on the basis of what Mr Esa considered to be justified rather than one carried out with either of the prohibited purposes in mind.

Relief under section 1157 CA 2006

58. Ms Hallett quite properly drew my attention to section 1157 CA 2006. This provides as follows:

> "**1157 Power of court to grant relief in certain cases**
>
> (1) If in proceedings for negligence, default, breach of duty or breach of trust against–
>
> (a) an officer of a company, or
>
> (b) a person employed by a company as auditor (whether he is or is not an officer of the company),
>
> it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought

> fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit."

59. There is no basis to grant relief here. Mr Esa did not act reasonably. While he has maintained that he followed advice he has provided no evidence of such advice. There is no evidence that he have any real consideration to the propriety of the dispositions of the Company's property at all.

60. As Ms Hallett also pointed out, in *In Re Marini* [2003] EWHC 234, at para. 57, His Honour Judge Richard Seymour QC, sitting as a judge of the High Court, noted that he would have the greatest difficulty in thinking it ever likely that it would be right for a defaulting director to be granted relief if the consequence of doing so would be to leave him enjoying benefits at the expense of creditors which he would never have received but for his default. The benefit of the Bury and Blackburn Businesses and the Birkenhead Debtors was here transferred to Stone Key, of which Mr Esa was sole director and sole shareholder. There is no basis on which it can be said that it would be fair to relieve him of the consequences of his breach of duty.

Wrongful trading

61. The Company's creditors as at 29th September 2016 stood at £111,693.56. By 22nd June 2017 the creditors stood at £191,669.92 and, when the Company entered into liquidation on 24th June 2017, there were debts of £545,657.66, excluding claims by HMRC and Birkenhead Borough Council, which have not proven so far. The Liquidators thus say that creditors increased by at least £433,964.10.

62. Mr Esa contends that the company ceased to trade in July 2016, but it seems to have continued to incur liabilities –

    i) Its liabilities for unpaid rent in respect of the Birkenhead Premises increased between July 2016 and July 2017 when the lease was forfeited by the landlord.

    ii) It instructed Justice Goddard and RHF Solicitors after July 2016, thus incurring their fees, in order, among other things to negotiate with the landlord

    iii) The Company resisted both winding up petitions, paying the first petition debt in full.

    iv) The transfers of the Company's assets took place after July 2016.

    v) The Company continued to incur liabilities between July 2016 and liquidation. By way of example, it instructed Lea Hough to consider its liability for dilapidations in about February 2017. Again, Mr Esa's interview with the Official Receiver suggests that both PAYE and VAT continued to accrue between October 2016 and May 2017.

63. The creditor position is shown in the evidence as at three dates. I reproduce the debts shown on each date below, showing only those debts for which proofs have been received in the last column to indicate the position set out at the date of liquidation, as updated at the hearing.

Name	**29/9/16**	**22/6/17**	**24/7/17**

Blackburn With Darwen BC	£1,060.07	£1,060.07	-
Fashionbourne Ltd	£33,132.72	£1	£46,697
Stone Key Ltd	£29,714.03	£1	£80,323
United Utilities (Water)	£1,690.81	£1,690.81	-
Premier Pension Fund	£3,927.93	£139,436.90	-[1]
Wirral Borough Council	£26,840.00	£26,961.00	-
Bury Council	£15,328.00	£15,328.00	£24.82
Lea Hough Surveyors	-	£1,920.00	£2,073.63
Donald Adamson	-	-	£17,544.29
HSBC	-	-	£19,175.63
Geoffrey Carmel	-	-	£379,819.29
Total:	£111,693.56	£186,398.78[2]	£545,657.66

There is no explanation as to why the debts due to Fashionbourne and Stone Key were recorded as £1 in the Company's records in June 2017.

64. It is clear to me that Mr Esa knew, or ought to have known, by the end of September 2016 that there was no reasonable prospect of the Company avoiding insolvent liquidation. He had by that stage transferred much of its business to Stone Key. The Company was not paying business rates nor its rent in full, despite having apparently agreed a payment plan with the landlord in respect of the latter. This had apparently triggered Mr Esa's instruction of Justice Goddard with a view to putting the Company into creditors' voluntary liquidation. There is nothing to suggest any possibility that the Company might be rescued. On the contrary, as Ms Hallett submits, Mr Esa's conduct is consistent with an "informal winding up" whereby the profitable parts of the business were passed to Stone Key. The requirements of section 214 are made out as at 29th September 2016. By that date the Company should have stopped incurring liabilities and been placed in an insolvency process, as contemplated by the instruction of Justice Goddard. There is nothing to suggest that Mr Esa took any of the steps contemplated by ICC Judge Jones in *Brooks v Armstrong*, or took any step to minimise loss to creditors at all. It follows that he should be liable to make good the losses caused by the continuation of trade after the end of September 2016 in accordance with the approach adopted by Vinelott J in *Re Purpoint Ltd* [1991] BCC 121.

65. The figure due to Mr Carmel as at the date of liquidation includes a dilapidations claim of £343,451. That claim was intimated by the end of 2016 and, on the face of it, arises from the Company's occupation of the Birkenhead Premises prior to the point at which its winding up became inevitable, although it is conceivable that some

[1] This figure is incorporated into the figure shown as due to Mr Carmel.
[2] This excludes the HMRC debt for which no proof has been provided.

element of it might have arisen as a result the Company's occupation thereafter. For current purposes however I must assume that this is a liability that would have arisen in any event given that it relates to the Company's occupation of the premises throughout the term of the lease. It seems to me that this liability must be excluded. The increase in the deficiency as regards creditors is £90,513.10. That appears to me to be the sum for which Mr Esa is liable to compensate the Company.

Disposition and conclusion

66. I am satisfied that the Company was unable to pay its debts as they fell due by April 2016. Mr Esa was plainly aware that it faced insolvent liquidation and transferred the profitable part of its business to Stone Key in breach of his duty to the Company. I am unable to attribute a value to the Birkenhead Customer List but on the evidence that I do have it appears that the benefit of the Company's accrued debt was taken by Stone Key in the total sum of £46,345.79. Mr Esa must compensate the Company in this sum. Further, the deficiency to creditors increased by £90,513.10 between 29th September 2016, when Mr Esa should have known that there was no real prospect of the Company avoiding insolvent liquidation, and the date of liquidation on 24th July 2017. He must similarly compensate the Company in that sum. I see no basis on which he could be fixed with liability for the whole deficiency to creditors as pleaded in the points of claim. The total that he must pay is therefore £136,858.89.

67. I will hear counsel as to any further orders that cannot be agreed between the parties.