Neutral Citation Number: [2023] EWHC 2735 (Ch)

Case No: CR-2016-003727

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: 03/11/2023

Before :

ICC JUDGE MULLEN

- -

In the matter of Bodystretch (UK) Limited (in liquidation)

And in the matter of the Insolvency Act 1986

Between :

(1) THE OFFICIAL RECEIVER
(liquidator of BODYSTRETCH (UK) LIMITED)
(2) BODYSTRETCH (UK) LIMITED
(in liquidation) **Applicants**

- and –

OMAR SHAHZAAD NADEEM **Respondent**

- -

Miss Katherine Hallett (instructed by **Clarke Willmott LLP**) for the **Applicants**
Mr Ben Channer (direct access) for the **Respondents**

Hearing dates: 27-28 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3rd November 2023 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 his application notice dated 9th March 2021 the first applicant, the Official Receiver, as liquidator of Bodystretch (UK) Limited ("Bodystretch" or "the Company"), brought proceedings against the respondent, Mr Omar Shahzaad Nadeem, pursuant to sections 212, 238 and 239 of the Insolvency Act 1986 ("IA 1986"). The proceedings concern payments made to Mr Nadeem prior to September 2015 and the disposition of the proceeds of sale of the Company's principal asset, its trading premises at Unit 1, Genesis Business Park, Rainsford Road, London NW10 7RG ("the Property"), in September 2015.

2. Bodystretch was incorporated on 7th June 2002 and manufactured and sold women's clothing to well-known high street retailers, including C&A and the Arcadia Group. Mr Nadeem was the Company's sole director and was its sole shareholder until June 2011 when his wife became the holder of one half of its issued share capital. A petition was presented for its winding up on 2nd March 2016 and Bodystretch was placed into compulsory liquidation on 10th May 2016. The Company had however ceased trading at around the end of September 2015, shortly after selling the Property for £725,000, receiving £426,382.82 by way of net proceeds of sale on 21st September 2015.

3. The application notice was supported by the witness statement of the Deputy Official Receiver, Mr Peter Joicey, dated 8th March 2021, which exhibited draft points of claim. On 10th June 2021 an order by consent was made by Deputy ICC Judge Frith directing the filing and service of points of claim in the form of the draft, followed by points of defence and points of reply. The same order provided for disclosure, a stay for alternative dispute resolution and, if attempts at settlement were unsuccessful, exchange of witness evidence. In the event, Mr Nadeem did not disclose any documents or file or serve any witness statements. He has said that he has had insufficient access to the Company's documents to defend the application.

4. The Official Receiver's complaint is in four parts. First, he says that Bodystretch was insolvent in the two years prior to the presentation of the winding up petition, having suffered the loss of at least two important clients. During this period payments ("the Pre-September Payments") were made to Mr Nadeem as follows:

Date	**Amount**	**Total**
18 March 2014	£1,000.00	
19 March 2014	£1,000.00	
02 April 2014	£1,000.00	
15 April 2014	£2,000.00	
16 May 2014	£1,000.00	
19 May 2014	£1,000.00	
02 June 2014	£9,000.00	
08 July 2014	£2,000.00	
23 July 2014	£2,000.00	
20 August 2014	£1,000.00	
22 September 2014	£1,000.00	
30 September 2014	£1,000.00	
02 October 2014	£1,000.00	
15 October 2014	£2,000.00	

27 October 2014	£1,000.00	
29 October 2014	£2,000.00	
05 November 2014	£10,000.00	
20 November 2014	£2,000.00	
05 December 2014	£4,025.44	
11 December 2014	£7,227.16	
24 December 2014	£2,000.00	
31 December 2014	£784.15	
21 January 2015	£800.00	
11 February 2015	£3,025.45	
03 March 2015	£7,000.00	
04 March 2015	£3,000.00	
13 March 2015	£2,000.00	
17 March 2015	£1,500.00	
10 April 2015	£2,025.44	
15 April 2015	£2,000.00	
20 April 2015	£500.00	
27 April 2015	£1,000.00	
22 June 2015	£4,000.00	
08 July 2015	£2,191.75	
08 July 2015	£10,000.00	
23 July 2015	£1,000.00	
		£95,079.39

5. Secondly, he says that following the receipt of the sale proceeds of the Property, the Company made further substantial payments to Mr Nadeem as follows ("the September Payments"):

Date	**Amount**	**Total**
21 September 2015	£3,889.50	
21 September 2015	£6,175.00	
21 September 2015	£89,475.0	
22 September 2015	£41,400.00	
		£140,939.50

6. Thirdly, he complains of payments to third parties following the sale of the Property ("the Third Party September Payments"):

Date	**Payment**	**Recipient**	**Total**
21 September 2015	£103,170	Mina Fashions Limited	
21 September 2015	£10,000	Taxwise Limited	
21 September 2015	£12,645.10	Mohammed Latif Nadeem	
22 September 2015	£3,000	Ahmed & Co Limited	
22 September 2015	£11,188	Gem Travel	
22 September 2015	£30,150	Eurostyles	
			£170,153.10

7. Fourthly, he says that the remainder of the sale proceeds of the Property, amounting to £133,840.32, were paid away to employees and small creditors, the vast majority of which took place on 22nd September 2015. £7,197.01 remained in the account but was paid away by 4th April 2016, when the Company's account was closed.

8. The points of claim also raised a claim in respect of payments to American Express in the sum of £173,312 between 22nd January 2015 and 11th August 2015. That claim is no longer pursued.

9. The Official Receiver's claim alleges, first, a breach of Mr Nadeem's duties as a director by conducting an "informal winding up" of the Company, dissipating the sale proceeds of the Property by making the September Payments to himself, the Third Party September Payments to six others, and paying away the remaining sums to others at a time when the Company was undoubtedly insolvent. This resulted in there being some £1,837,428.35-worth of creditors outstanding in October 2015. The making of these payments are pleaded as breaches of the duties owed by Mr Nadeem to the Company by reason of sections 171 to 177 of the Companies Act 2006 ("CA 2006") and causing the Company to enter into transactions at an undervalue or to give preferences within the meaning of sections 238 and 239 IA 1986.

10. Insofar as the Pre-September Payments and the September Payments were payments of salary and redundancy pay, as Mr Nadeem has contended, it is said that he was not entitled to these, there being no contract of employment between the Company and Mr Nadeem and no resolution of the Company for him to be remunerated pursuant to article 82 of its articles of association. Insofar as they are said to be reimbursement of expenses, to which a director is entitled pursuant to article 83 of the articles, there is no evidence of expenses being properly incurred. Mr Nadeem further alleges that part of the September Payments represented repayment of a loan by him made to the Company for the purchase of the Property in 2005. The Official Receiver replies that there is no evidence of such a loan and such a repayment would constitute a preference in any event.

11. The Official Receiver therefore seeks an order that Mr Nadeem repay the sums paid out in respect of the Pre-September Payments to the Company, together with the proceeds of sale of the Property paid away in and after September 2015.

Legal principles related to directors' duties, transactions at an undervalue and preferences

Breach of duty

12. 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."

13. The general duties owed by a director of a company are set out in Chapter 2 of Part 10 CA 2006. The duties relied upon here 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."

14. Section 172 CA 2006 provides the duty to promote the success of a 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."

15. Whether a director has acted in accordance with this duty is ordinarily approached subjectively, in other words the court looks to see whether the director genuinely considered himself to be promoting the interests of the Company. 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."

16. The exceptions to this subjective approach were set out by Mr John Randall QC, sitting as a deputy judge of the High Court, 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).

17. Section 174 CA 2006 then 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."

18. 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

19. Section 238 IA 1986 concerns transactions at an undervalue:

"(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."

20. Section 239 IA 1986 deals with preferences:

> "(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."

21. The "relevant time" for the purpose of both of 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."

Mr Nadeem, as a director, is "connected" with the Company by reason of section 249 IA 1986. Mr Mohamed Latif Nadeem, who is Mr Nadeem's father and who received one of the Third Party September Payments, is also "connected" with Bodystretch as he is an "associate" of Mr Nadeem by reason of section 249 IA 1986, read with section 435 IA 1986.

The evidence

Mr Joicey

22. I heard first from Mr Joicey. He was asked why he had in the points of claim, the statement of truth to which he signed, stated that the Company was unable to pay its debts as they fell due "since at least April 2015". He was not immediately able to answer that in detail, saying that he thought it was because of the non-payment of Crown debts. In re-examination he confirmed this to be the case, having been taken to the terms of the letter before action written on 25th November 2019, in which the solicitors for the Official Receiver noted unpaid PAYE had accrued for the year 5th April 2014 to 5th April 2015. It is also true to say that the points of claim in fact refer to a number of alternative dates of insolvency, positing:

> "March 2014, alternatively April 2015, alternatively June/July 2015, alternatively September 2015"

What is evidently meant by "since at least April 2015" is "by April 2015 at the latest".

23. Similarly, Mr Joicey was questioned as to why the points of claim stated that the Property had been sold "in an attempt to alleviate the Company's cashflow difficulties", when Mr Nadeem had said in his preliminary information questionnaire that he had taken the decision to "downsize", as the Company was not making use of the full extent of the Property. As I shall explain in the context of the Company's insolvency below, it was a reasonable inference that the decision to sell was occasioned by the Company's financial position.

24. The third point raised by Mr Channer as to the robustness of the Official Receiver's examination of Company's financial background was the claim in relation to the American Express payments. These were explained as payments to a foreign exchange service used by Bodystretch to make payments in foreign currency to suppliers. The reply suggested this amounted to the payment of "some [one] else's credit card bill". Mr Channer described this as a "doubling down" on the allegation and queried why it

was only now being withdrawn having been asserted as recently as April 2023. Mr Joicey explained that the Official Receiver's officers were not sure what the payments had been for but that the explanation was now accepted. It had been very carefully considered and Mr Joicey had taken the decision to accept it. That is an explanation that I accept. It seems that the Official Receiver's staff were not initially satisfied that there was a foreign exchange service under the American Express trading style. It would certainly have been desirable if this point had been resolved sooner, but it does not call into question the Official Receiver's evidence more generally.

25. In my judgment Mr Joicey was an honest and fair-minded witness seeking to assist the court on the basis of the documents seen and interviews conducted by the Official Receiver's staff. I accept his evidence.

Mr Nadeem

26. Mr Nadeem did not produce any formal witness statements, putting in various, rather diffuse, documents commenting on the case. They were not verified by statements of truth. The Official Receiver took the pragmatic approach of accepting that these documents could be treated as witness statements and their truth could be confirmed in the witness box. Mr Nadeem therefore confirmed under oath the truth of some eight documents that he had served.

27. As Mr Channer submitted, Mr Nadeem is an intelligent and articulate man and he gave evidence with a quiet confidence. I did not, however, derive much assistance from it and I am unable to accept parts of it. He attempted to explain away inconsistencies, such as his failure to mention in his early interview with the Official Receiver's examiner that he and his father had made a loan of £200,000 to the Company to allow it to acquire the Property, as being the result of a lack of preparation. I am however satisfied that he is an astute business man who would have remembered such a significant detail, at least in general terms. He placed reliance on the fact that he had not been able to access the Company's records. It would easily have been possible for him to arrange for access to the Company records had he wished to do so and I am unable to accept that those records would have contained evidence which would have demonstrated the propriety of the payments of which the Official Receiver complained. Mr Nadeem was all too ready to say that there was a document that would vindicate his case. During the trial for example he said that he thought that he had an email that would demonstrate that part of the monies which had been paid to a third party were then paid on to Barclays Bank to reduce the Company's liability to that bank. That email had not been produced by the end of trial. He also on occasion avoided answering Ms Hallett's question. For example, she put it to him that he was relying on monies being paid by Arcadia to meet, at least in part, the Company's liabilities to creditors after paying away the proceeds of sale of the Property. He appeared not to follow this straightforward question.

28. I am unable to accept Mr Nadeem's evidence at face value. Had it been true I have no doubt he would have applied himself to examining the Company's records when the opportunity was given to him so as to find documentary evidence to support his case. He did not do so.

Access to the Company's records and approach to the evidence

29. That is a convenient point at which to set out the exchanges between Mr Nadeem and the Official Receiver's staff and solicitors with regard to the Company's records prior to issue of this application. Mr Nadeem accepted that lockdown as a result of the COVID-19 pandemic in spring of 2020 had been a factor in preventing him from being able to review the records but said that he had asked for them prior to this point. It is clear however that he was repeatedly offered an appointment later that year. A Ms Ahmed of the Insolvency Service sent an email to Mr Nadeem on 7th December 2020 in which she said as follows:

> "Afternoon Mr Nadeem,
>
> I have noted your concerns regarding communications from Clark Wilmott. May I suggest we make an appointment in the New Year for you to review the books and records - covid restrictions permitting.
>
> Please do let me know and I shall arrange an appointment for you."

The offer was repeated on 15th December 2020 when Ms Ahmed wrote to Mr Nadeem again:

> "Afternoon Mr Nadeem,
>
> I have received your email and have noted your concerns regarding Clark Wilmott. The Official Receiver has a statutory duty to perform to ensure all possible recoveries are made to creditors. Clark Wilmott act as our agents and are instructed to make these recoveries.
>
> I would like to invite you to view the books and records in January. I will ensure they are sent to our offices at 1 Westfield avenue, Stratford and I will then send you an appointment to come and view these, if the pandemic restrictions permit.
>
> I hope this helps."

Mr Nadeem's reply to that was not to make an appointment but to complain of Ms Ahmed's "infernal nerve" in telling him what the Official Receiver's role was. He said that he would not correspond with her office again, other than to look at the Company's books and said that he had "made a complaint". He did not seek to make an appointment and said in his evidence that this was because he had only been offered one date. He did not, in the correspondence that I have seen, suggest any other date or dates.

30. On 15th January 2021 he sent an email to a Ms Main of Insolvency Complaints. He said:

> "Dear Sirs
>
> I attach the History of Events with attachments.

> My previous emails state why I am not going to The Stratford Office to look at the books once registrations are lifted. The details being asked, once again, after 5 years of the books being passed over, is not only irrelevant but impossible for me to answer other than information already given.
>
> If the OR decides to take action against me and my father, or the reverse, the attached shows there was, and is, no reason for any questions being raised legally or otherwise because me and my father were not doing anything illegal.
>
> As records confirm, the real cause of BSUK going into compulsory liquidation in 2016, was due to Arcadia and Barclays. A fact the OR has openly ignored giving instructions to Clarke Willmott to do just that, ignore.
>
> And that at the time of the sale of the property and distribution of funds, and the reasons for the latter, BSUK was not insolvent.
>
> Thank you"

31. In answer to Ms Hallett's questions he repeated that he did not arrange an appointment because he had only been offered one day. His later emails suggest otherwise. He wrote to the Official Receiver on 23rd March 2021, shortly after these proceedings had been issued, and said:

> "I have spoken to a firm of solicitors. I am passing over the detailed information including your and Clarke Willmott's refusal to address questions that are relevant to the matter in hand. And your office's refusal to pass over the accounting books and other information that I asked your office to do in early 2020. Your office under Deputy Peter Joicey (the person who signed a Witness Statement) and Ms. Nosheila Ahmed refused to do so saying I had to come to the Office but that as Covid-19 regulations stood I could not do so until they were lifted.
>
> It is impossible for me, not an accountant nor book-keeper, to go through all the necessary items at your offices. If those books could be sent to Clarke Willmott there is no reason why they could not be sent to me. Please Note your office took over the Liquidation of Bodystretch UK Limited in May 2016, it is now March 2021."

32. Ms Ahmed wrote to Mr Nadeem again on 24th March 2021 as follows:

> "Afternoon Mr Nadeem
>
> I write to you in regards to the above named case, I understand that you would like to review all books and records held by the Official Receiver in this matter.

> As the pandemic restrictions are now lifting I would like to invite you to review the books and records in our offices. As there is a large number of records - 27 boxes these will have to be transferred to our Southend Office for you to review.
>
> Please provide me with dates that you would like to review these records from 19th April onwards and I will arrange the records to be made available for your viewing."

33. Mr Nadeem still did not make any constructive suggestions as to how they might be provided to him. He replied on 26th March 2021:

> "If Clarke Willmott received the information from The Official Receiver via email there is nothing whatsoever to stop your Office doing the same to me. How did Clarke Willmott receive the 'records' and to what extent.
>
> Those 'records' should have been made available to me and/or the Accountant at the time I asked for them. It was essential at the time for your office to have told me there were 27 boxes of records. It is incomprehensible that your office and Clarke Willmott 'expect' me to remember events over 5 years.
>
> As said in my 23 March 2021 letter to Ms S. Rose I cannot go through 27 boxes of records at a Southend Office in months, let alone 1 day. When it took The Official Receiver and Clarke Willmott 5 years to purportedly do so.
>
> Is your office, or Clarke Willmott, going to pay for a solicitor/accountant to go through the records at their own offices either with the boxes or via email. It is obvious from correspondence that Clarke Willmott made errors, ignored my responses, whether selectively or by negligence, continuing its threats to me and my father in questionable circumstances.
>
> I will be sending this email and other correspondence to my solicitor."

Ms Ahmed replied to set out the Official Receiver's position on 29th March 2021:

> "Afternoon Mr Nadeem
>
> Thank you for your email, I have noted the points you have raised.
>
> The books and records currently comprise of 27 boxes, as mentioned in my previous email I would be happy to arrange a time and date for you to review these records at the Southend Office from 19 April 2021. When you attend at the office to view the records you will be accompanied by a member of staff that will supervise the visit.

> If you decide that you require additional time to review the records, then I will ensure arrangements are made for you to do this. However the Official Receiver has a responsibility to ensure all books and records remain in his possession and under his control. The records can only be viewed at our offices and we are unable to send them to third parties.
>
> Please be aware that a fee is attached to any copies of documents that are requested.
>
> Please do let me know when you would like to view the records so that I can make arrangements for them to be sent to the Southend office.
>
> If you require any more information or if I can be of further assistance please do call me or email me."

Mr Nadeem's reply was to repeat his enquiry:

> "With respect you have not answered my email of 26 March 2021 in that, how, when and what did your office send to Clarke Willmott for them to make the allegations. Please respond, your files should have the answer immediately to hand. I must have the answers please.
>
> As my previous email 26 March 2021 states my solicitor will be dealing with the matter of the allegations made against me in dubious circumstances."

Ms Ahmed answered this enquiry by saying that the books and records that had been sent to Clarke Willmott were those held by the Official Receiver in relation to the Company. She attached an inventory of the books and records for Mr Nadeem's review and, once more, invited him to make an appointment.

34. Mr Nadeem's reply on 8th April 2021 again pressed his question as to how the records had been provided to Clarke Willmott:

> "Thank you for your email. Your response seems to suggest that all the 27 boxes were sent to Clarke Willmott as scheduled on your attachment, is this correct if so when and how were they sent. Please just answer the question.
>
> May I please remind your Office that from early 2020 I requested to see the records that I passed over, on behalf of Bodystretch (UK) Ltd, because your Office and Clarke Willmott continually ignored my factual answers to the accounting questions raised making mistake after mistake in questionable circumstances.
>
> In any event these books were not available until after the 19 April 2021, your email refers. Despite this from 10 March 2021

> the matter is now involved in Court proceedings therefore my solicitor will be handling *all* matters from now on."

35. That is how matters were left and no further reference to the records was made by Mr Nadeem until May 2023. Clarke Wilmott did however make a further proposal on the part of the Official Receiver on 3rd March 2023:

> "If you wish to inspect the 27 boxes of Company books and records, as previously advised, you will need to attend upon our client's office to do so. Alternatively, we can arrange for the documents to be copied but you will have to meet the cost, which is likely to be substantial due to the volume.
>
> As previously advised, if you wish to rely on documents which were not disclosed by the deadline of 4pm on 25 October 2021 (please see clause 5 of the Order), it appears you will require the Court's permission to do so pursuant to CPR 31.21."

He was also asked if he wanted sight of the documents in the Official Receiver's disclosure list, none of which he had asked to inspect.

36. Mr Nadeem said that by this point it was too late and copies should have been offered before. In fact they had been, albeit obliquely, in Ms Ahmed's email of 29th March 2021. Mr Nadeem had offered no alterative proposals for inspection and nor did he ask for sight of any particular documents, or classes of document, despite having been provided with an inventory describing the contents of the boxes held by the Official Receiver in general terms.

37. What the correspondence shows is that Mr Nadeem was willing to engage assertively with the Official Receiver's staff, who made reasonable proposals for him to inspect Bodystretch's records. Mr Nadeem, in my judgment, was more than able to arrange to inspect the records at a location convenient to him, or to identify categories of documents to be copied for him. He conspicuously avoided doing so, preferring instead to express a degree of indignation at the Official Receiver's approach.

38. In those circumstances, Ms Hallett reminds me of the observations of Arden LJ, as she then was, in *Re Mumtaz Properties* [2011] EWCA Civ 610:

> "16. The approach of the judge in this case was to seek to test the evidence by reference to both the contemporary documentary evidence and its absence. In my judgment, this was an approach that he was entitled to take. The evidence of the liquidator established a prima facie case and, given that the books and papers had been in the custody and control of the respondents to the proceedings, it was open to the judge to infer that the liquidator's case would have been borne out by those books and papers.
>
> 17. Put another way, it was not open to the respondents to the proceedings in the circumstances of this case to escape liability by asserting that, if the books and papers or other evidence had

> been available, they would have shown that they were not liable in the amount claimed by the liquidator. Moreover, persons who have conducted the affairs of limited companies with a high degree of informality, as in this case, cannot seek to avoid liability or to be judged by some lower standard than that which applies to other directors, simply because the necessary documentation is not available."

39. Here, I cannot infer that there is anything in the records of the Company that would assist Mr Nadeem or undermine the Official Receiver's case where Mr Nadeem has had ample opportunity to inspect those records and identify the documents available that would support his case. He has chosen not to do so.

The insolvency of the Company

40. As I have mentioned above, Mr Joicey was challenged on two aspects of the Official Receiver's case in particular. The first point was as to the basis for the assertion in the points of claim that the Company was insolvent by April 2015. Again, the points of claim allege that Mr Nadeem decided to sell the Property in early 2014 to alleviate "cash-flow difficulties".

41. Mr Channer took Mr Joicey to the record of Mr Nadeem's interview with the Official Receiver's insolvency examiner on 7th March 2017. Mr Nadeem said:

> "I decided to sell the freehold property in early 2014, in view to downsize the property. At that time, the company was not utilising the first floor and was only using half of the ground floor.
>
> The plan was to use the proceeds to put back into the business, move out and rent offices in central London.
>
> It took a long time to sell.
>
> …
>
> It eventually got sold around September 2015 but he sale offer and negotiations took around 5 months before that. On 7/5/17 due to the business problems I decided to cease the company's trading."

Mr Nadeem did not say in that passage that the sale was to alleviate cash flow problems, although it is fair to say that in the same document he told the examiner that the Company had been experiencing financial difficulties for some time before the sale:

> "The group was trading well until 2014.
>
> Our C&A client who had a 50% of turnover purchased goods in euros. The euro significantly dropped against the pound sterling and the company began to lose money.

> In 2014 Jane Norman went into administration and we lost £100,000.
>
> The company was optimistic with good client base and significant orders to move into profit again, however orders volume declined with C&A and then July 2015 Acadia Group missed invoice payment of £235,000, and later declined to pay the invoice due and cancel orders schedule of delivery of £217,000.
>
> The company initially seeked [*sic*] legal advise [*sic*] due to Arcadia Group action which was later taken up by Barclays on account of the factoring of invoices.
>
> Due to lack of cash flow it was not possible to continue trading and we stopped in Sept 2015."

42. Mr Joicey thought that the points of claim had referred to April 2015 as the point by which Bodystretch had become insolvent because Crown debts had gone unpaid by this point. In the letter before action dated 25th November 2019, the Official Receiver's solicitors had indeed alluded to Crown debts as the reason for thinking the Company was insolvent. The letter said:

> "You advised the liquidator's office at interview that the Company started experiencing financial difficulties in early 2014 due to a combination of bad debts, cash flow issues and the fluctuation of the Euro. To improve its financial position, you advised that you decided to sell the Company's business premises… for the sum of £725,000.00."

The letter went on to say:

> "You advised in your [Preliminary Information Questionnaire] that the Company first became unable to pay its debts when they fell due in August 2015. That is clearly untrue as you had advised at interview that the Company was in financial difficulties in early 2014. Her Majesty's Revenue & Customs have submitted a proof of debt in the Company liquidation in the sum of £143,653.59 (the 'HMRC Debt'). The HMRC Debt includes unpaid PAYE for the period 6 April 2014 to 5 April 2015. This supports our client's contention that the Company was insolvent in 2014. It simply cannot be the case that the colossal deficiency to creditors of £1,837,428.35 accrued within approximately two months of you ceasing trading (September 2015)."

43. The debt due to HM Revenue & Customs is not the only indication that the Company was unable to pay its debts in 2015. On 5th October 2015, judgment in default was entered against the Company in a claim by a creditor, SDV Ltd, in the sum of £14,561.23. The list of invoices annexed to the claim shows that the Company had failed to make payments due in April and May 2015. Another creditor commenced proceedings in November 2015, seeking payment of £23,284.87. The annexed

statements of account showed the invoices from May and June 2015. Mr Nadeem, for the first time, said that such claims were retaliatory for claims made by the Company, though the claims in evidence do not appear to be counterclaims and my attention was not drawn to any claims by the Company.

44. Mr Nadeem accepted the proposition, as set out in the letter before action, that the debt due to HM Revenue and Customs included unpaid PAYE for the period 6th April 2014 to 5th April 2015. The Company also suffered a loss of between £73,000 and £100,000 as a result of the administration of Jane Norman in June 2014. Finally, in July or August 2015 Acadia Group failed to pay £278,000 of invoices and cancelled £197,000 of orders, which were to have been delivered in September 2015. His Preliminary Information Questionnaire however stated that the Company became unable to pay its debts only in August 2015 and the Company became aware of this because Arcadia Group "refused to pay us and also cancelled its orders with us".

45. The effect of this on the Company is evident from the contemporaneous documents. On 4th September 2015 solicitors acting for the Company wrote a letter before action to AG Clothing Limited, which was part of the Arcadia Group, and said:

> "On 25th August 2015, our client attended a meeting with you. In that meeting our client has repeated his request for immediate payment of the outstanding invoices. However you have confirmed to our client that you will not pay the outstanding balance owed to our client. You have stated that you have taken this action due to the fact that some of the purchase orders you have placed were late and you will be making a loss accordingly. You also confirmed that you will not accept those goods (which were late) any more and have now cancelled those orders. During the meeting our client has made all their efforts to settle this matter, however you did not agree for any settlement terms and confirmed your position that you will not pay the outstanding money owed to our client. Our client never received any correspondence for non payment of the debt owed by you other than what has been confirmed by you at the meeting on 25 August 2015.
>
> You may be aware that you are liable to pay the outstanding balance owed to our client as per the contract terms. Our client believes that your unilateral action for settling the payment for 19 invoices against the nominal losses, if at all any, you have incurred is arbitrary and unreasonable. The same is unfair and in breach of the contractual terms. Our client is in serious financial difficulties due to the non payment of these invoices and urges you to pay the outstanding balance of £238,668.83. The Debt is payable immediately and does not include costs."

46. Mr Nadeem also criticises the conduct of Barclays as the Company's debt factor and mortgagee. He complains that, after the sale of the Property had been agreed, Barclays required payment of all sums due to it both under the mortgage and under the factoring agreement, although it ultimately modified its position and required only those sums due in relation to C&A under the factoring agreement to be paid. Mr Nadeem maintains

that had Barclays not required payment of sums to settle the factoring account, the Company would have been able to continue to trade. This is pure assertion on Mr Nadeem's part and it is not clear why he did not ascertain precisely what would be necessary to redeem the mortgage in respect of the Property. The charge was an "all monies" charge, with the result that it was almost inevitable that all monies due would have to be paid before the security would be released.

47. I am satisfied that the insolvency of the Company was not triggered by the dispute with Arcadia or the stance of Barclays, whether or not the latter should have been anticipated by Mr Nadeem, although the non-payment and threatened claim by Arcadia may have sounded the final death knell for the Company. Plainly Bodystretch could not pay its debts as they fell due prior to this point. Mr Nadeem himself accepted that Bodystretch began to experience cash flow difficulties in 2014 and an element, though I do not know how much, of PAYE was unpaid for the tax year 2014/2015 was unpaid. The claims brought against the Company in 2015 similarly demonstrate insolvency earlier in 2015. The claim brought by SDV Ltd shows payments been made until 1st April 2015, when they ceased. The other claims made against the Company, insofar as they particularise the date on which the debt accrued, are all after this point.

48. I am satisfied that the Company was insolvent by April 2015. It is similarly clear from the correspondence in respect of the Arcadia Group debt that there was no realistic prospect of payment or further orders from the Arcadia Group so as to allow the Company to receive payment to allow it to fulfil further orders. Indeed, there is nothing to show any clear intention that the Company was intending to continue trading at all after the sale of its premises in September. There is no draft lease of premises or any particulars of Bodystretch's plan to trade in the future.

49. I am satisfied that the Property was sold at a time when the Company was insolvent and that the disposition of the net sale proceeds denuded it of the principal asset that would otherwise have been available to the general body of unsecured creditors. I shall now consider the dispositions of the sale proceeds.

The September Payments

Repayment of an alleged loan to Company to purchase the Property

50. Mr Nadeem's case is that he and his father made a loan of £200,000 to the Company when the Property was purchased in 2005, with £130,000 being provided by Mr Nadeem. No loan agreement has been produced, although Mr Nadeem said that something had been written down and documented. He could not remember where it was. There was no particularisation of the loan and nor was it referred to in the Company's accounts. He was taken to the accounts for 2014, signed by Mr Nadeem on 15th August 2014, which makes no reference to such a loan. Only £781 is shown as due by way of director's loan. It was accepted on his behalf that the filed accounts for 2005 made no such reference to such a loan either.

51. Nor did Mr Nadeem mention the loan in his Preliminary Information Questionnaire following the Company's liquidation. This form includes an express question about loans in these terms:

> "Have you or have any of the other officers made loans to the company including any which have been repaid".

This question could not be more widely framed and the form provides two alternative tick boxes to record the answer. Mr Nadeem had ticked "No".

52. At interview with the Official Receiver on 7th March 2017, however, Mr Nadeem had said:

> "I used to lend the company funds via bank transfers to the company's main bank account ending 4079. In total I lent around £78k. My father also lent the company funds over the years. His name is Mohammed Lateef Nadeem. He lent around £78k+"

Mr Nadeem said that the loans to which he referred there were different loans to that in respect of the Property. As Ms Hallett noted, if that was so then he did not mention a loan to purchase the Property at all. Mr Nadeem agreed that he had not. That is most surprising. Mr Nadeem said that he and not been prepared at the time of the interview and the interview had been fast paced – "chop, chop, chop" as he put it. He said that he would have mentioned the Property loan had he been asked. Nonetheless, I find it difficult to reconcile that with the able business man that Mr Nadeem palpably is. Had such a loan been made I am satisfied that he would have mentioned it.

53. Again, he has not produced evidence from his father or his accountant to corroborate the making of the loan, and said that he did not know that he could. Nor has he produced any bank statements, which would have been the most obvious way to evidence the alleged sums being paid. I am satisfied that, had this loan been made, Mr Nadeem would have been able to produce some evidence of it. There is simply none.

54. I do not accept that there was an outstanding loan due to Mr Nadeem, or indeed his father, in respect of the Property purchase. Nor do I accept that any payment towards its acquisition was made by them. Mr Nadeem's alterative case on the alleged payment to acquire the Property – that the payment gave him and his father an interest in the Property under a trust so that they were entitled to a share of the proceeds, which does not sit comfortably with his primary position that he and his father made a loan, cannot therefore succeed in any event.

Salary, expenses and redundancy pay

55. There is no evidence of a salary having been approved for Mr Nadeem by a resolution of the Company as required by article 83 of the articles of association. Mr Nadeem stated that drawing a salary was "for work that you do for a company", but that is to misunderstand the position. A director, while an officer of the company, is not necessarily its employee. Where, as here, the director is also a shareholder, it may be that he or she will received dividends out of distributable profits. That has not been said to be the arrangement here.

56. No evidence has been adduced from Mrs Nadeem, as her husband's fellow shareholder, to show that she assented, whether formally or informally, to the remuneration of her husband. There are no minutes of members' meetings to evidence such assent and no contract of employment has been produced or otherwise evidenced. Indeed, the

amounts and dates of payment since March 2014 do not suggest a regular payment by way of salary. They instead appear to be *ad hoc* payments, presumably taken as and when Mr Nadeem wished. It follows that in the absence of a relationship of employee and employer between Mr Nadeem and Bodystretch, or other entitlement to remuneration, that Mr Nadeem was not entitled to redundancy pay.

57. Mr Nadeem also says that he was due to be reimbursed expenses incurred on behalf of the Company. While the reimbursement of expenses is provided for in the articles of association there is simply no satisfactory evidence of such expenses being incurred in the first place. Mr Nadeem has not explained what these related to. In the absence of any evidence from Mr Nadeem, as a fiduciary, to show the propriety of these payments, they fall to be repaid to the Company.

Conclusion on the September Payments

58. The payment of "salary", if that is what it was intended to be, was paid in breach of the articles of association and thus in breach of Mr Nadeem's duty to act in accordance with the Company's constitution provided for by section 171 CA 2006. These payments, and the payment of "expenses", appear to have been made without any genuine consideration of the Company's creditors as whole. The Company was hopelessly insolvent by this point. As to how creditors were to be paid, he told the Official Receiver's examiner:

> "I was expecting for other creditors and suppliers to be paid with the repayment by Arcadia. Arcadia owed the Company around £380K. Of which Barclays had a part charge as they were paid some monies. I cannot recall the figures."

He said that, at that stage, the Company was still trying to recover from Arcadia Group and was holding orders worth £3 million. If there had been some prospect of the Arcadia Group dispute being settled on terms favourable to the Company, which might have allowed it to continue trading, that was wholly speculative at best. In my judgment, it was entirely unrealistic given the terms of the correspondence with Arcadia's lawyers. That this is so is made clear by the absence of any plan to enable the Company to trade after the sale of the Property. There is no evidence of new premises being found and the staff were made redundant. Mr Nadeem's explanation of how other creditors might be paid seems to be no more than an attempt to justify his actions after the event. I am satisfied that did not in fact consider the interests of the general body of creditors at all at a time when they should have been considered to be paramount. Considering the matter objectively, a reasonable and honest director would not have allowed those payments to be made denuding the Company of £140,939.50 of assets that would otherwise have been payable to creditors. It was plainly unreasonable for Mr Nadeem to throw the risk of a settlement with Arcadia not coming to pass on the creditors, while paying substantial sums to himself.

59. Even were I to accept that such payments were payments of salary, expenses and a loan otherwise properly due to Mr Nadeem, those payments would have amounted to preferences in any event. The Company was undoubtedly insolvent. The total creditors as at 31st October 2015, after the disposition of the sale proceeds of the Property, amounted to £1,794,301. Mr Nadeem accepted that the vast majority of these liabilities were owed in September 2015 too. There was no realistic prospect of paying them. No

explanation for paying these other than a desire to place Mr Nadeem in a better position than he would have been in the event of an insolvent liquidation has been offered, and such an intent is presumed by virtue of his connection with the Company.

The Third Party September Payments

60. Mr Nadeem maintains that he took a business decision to pay six third parties from the proceeds of sale of the Property. At his interview on 7th March 2017 he explained these payments as follows.

Ahmed & Co Limited

61. The payment to Ahmed & Co was said to be a payment to "the company accountants for outstanding fees". When Mr Nadeem completed his preliminary information questionnaire, he was asked to give the names of the company accountants, past and present. He identified Taxwise Limited as the company accountants from 2012 to 2015 and Ahmed & Co as having been the accountants between 2002 and 2012.

62. Mr Nadeem said in evidence that Ahmed & Co were still working for the Company doing the day-to-day bookkeeping, while Taxwise prepared the annual accounts. He said that he needed to obtain paperwork from Ahmed & Co which required payment of the fees. It is not clear what those documents were and I cannot be satisfied that that was the reason for the payment.

Gem Travel

63. The Company booked travel through Gem Travel and the were owed monies relating to travel expenses, flights and similar. Mr Nadeem told the Official Receiver on 7th March 2017 that he paid this because the directors of Gem Travel came to him "begging" for the monies to be paid or Gem Travel would be shut down. Mr Nadeem said in evidence that an additional reason was that the Company needed to book more travel in future. What travel might have been booked by the Company, rather than any other entity with which Mr Nadeem might be concerned, in circumstances where it was insolvent and had made its staff redundant is not clear. Again, I cannot see a legitimate commercial reason, at least one which would benefit the Company and its creditors, for this payment.

Eurostyles

64. Similarly, Mr Nadeem told the Official Receiver that Eurostyles was "desperate" for money and its employees were owed wages. He felt that he had to help them out. In oral evidence he said that they also had goods for the Company but accepted that, in the event, Eurostyles did not release any goods. This reason for the payment is again unevidenced.

Mina Fashions

65. In relation to Mina Fashions, Mr Nadeem told the Official Receiver at interview that, if he did not make the payment, Mina Fashions would be wound up. He said in oral evidence that he had also paid it £80,000, bringing the total paid to £183,170, and Mina Fashions then paid £168,000 to Barclays on the Company's behalf. No evidence has

been provided that Mina Fashions paid anything to Barclays on the Company's behalf or otherwise and it is difficult to see why it would so if the payments made to it were necessary to address its own financial difficulties. There is nothing to suggest that Barclays was paid via Mina Fashions rather than from the sale proceeds of Property. As I have noted, Mr Nadeem said that he believed there to be an email evidencing this payment but had not been able to produce this email by the end of trial.

66. Mina Fashions is also said to have been holding back stock that was necessary for the Company to fulfil orders for C&A. Both C&A and Arcadia Group were significantly outside their payment terms a matter of days before the sale of the Property. This is evidenced by an email to that effect from Barclays to Mr Nadeem on the morning of 18th September 2015 regarding the facility. A Mr Siddiqui wrote:

> "Hi Omar
>
> BSF balance remains unchanged this morning at £397k against a gross ledger value of £493k. With the reserve in place for the expected debit note from C&A of c.60k Euro's, facility is currently £54k overpaid. You will need to pay them this amount from the property sale proceeds. Are you able to do that?"

He followed up with an email in the afternoon of the same day to say:

> "Ok
>
> Can you please NOT move the sale proceeds away from your account until your meeting with C&A on Wednesday?
>
> We really need Arcadia payment confirmation by close on Monday to avoid BSF taking a larger chunk from property sale funds."

67. The meeting with C&A did not take place as scheduled and on 29th September 2015 Mr Pitt of Barclays followed up with a further email. He said:

> "The position with the CID facility is now the subject of very considerable concern, and is also under very close scrutiny by various senior managers within business who all remain very concerned at the currently unacceptable position with our facility — understandably I am sure you will agree — and there is now the very real risk of some very serious draconian measures being implemented in the next few day if we cannot clear sight of the current position with both C&A and Arcadia.
>
> To summarise the position, we very urgently need confirmation — backed by evidence such as emails, copies of self-bills etc. — as to the exact amount each debtor (both C&A and Arcadia) is going pay and when as both are very significantly outside payment terms, and why the payments are being withheld."

68. Mr Nadeem accepted that Barclays was referring to liabilities beyond the sum required to redeem the mortgage, which would also need to be paid from the sale proceeds. As at the 21st September 2015, Mr Nadeem must have been aware that the Company was not going be able to fulfil its orders. Arcadia had made it clear that it was not prepared to pay so that the Company was unable to complete its order from C&A. Mr Nadeem maintained that the Company was looking for monies from other sources, though, again, there is no evidence of this, or of any other reason to think that stock released by Mina Fashions would enable the order to be fulfilled. I am not satisfied that there was any genuine commercial reason for this payment, as far as the Company was concerned.

Mr Nadeem senior

69. There is no evidence to substantiate that Mr Nadeem senior was owed any monies by the Company. I have already dealt with the contention that he and Mr Nadeem made a loan and nor is there any evidence that he was employed by the company. No other reasons are offered for this payment.

Conclusion on the Third Party September Payments

70. These payments plainly constituted preferences. It is self-evident that the six parties who received monies from the Company were bettered by the payments, assuming that they were creditors at all. They received payment while other creditors were left to await the outcome of a recovery from Arcadia Group, which was wholly unrealistic. Mr Nadeem knew, as indeed he accepted, that Arcadia was not going to pay the Company and it was therefore not going to be in a position to meet further orders. There was no commercial basis to pay these creditors given that the Company could not continue to trade, having disposed of its trading premises, dismissed its staff and having, it seems, no plan to allow it to continue in business. The only inference is that these creditors were selected in order to place them in a better position than the general body of creditors on an insolvent liquidation, and indeed such an intention is presumed in the case of Mr Nadeem senior. Again, I cannot accept that Mr Nadeem considered the interests of the general body of creditors at all. A reasonable and honest director could not have come to the conclusion that these payments could have been made. The only proper course would have been to enter an insolvency process so as to enable creditors to be paid *pari passu*.

Remaining proceeds of sale

71. The remaining payments to small creditors and to employees out of the sale proceeds of the Property have not been explained by Mr Nadeem but neither have they been pursued by the Official Receiver. The Official Receiver's primary case is limited to the recovery of the net proceeds of sale of the Property, which, when one accounts for the September Payments and the Third Party September Payments, would limit this element of the claim to £115,290. This is not the total sum said to have been paid out of the Company accounts in respect of the employees and small creditors as set out in paragraph 11 of the points of claim and the reason for this is unexplained. It is not alleged that these payments were transactions at an undervalue or preferences and Mr Nadeem was not cross-examined on them. Limiting his claim in this way, without explanation, leaves me unable to determine whether the Official Receiver accepts that some part of the remaining payments were proper and, if so, how I am supposed to distinguish between payments which are accepted as proper and those which are not.

While it is incumbent on a fiduciary to account for his dealings with the property entrusted to him, I do not consider that the Official Receiver has done enough to put these payments in issue. They are not particularised in the very full way that the other payments, on which the claim focused, have been. It may be that some of the payments are self-explanatory. It would have been straightforward for the Official Receiver to illustrate payments that he says must have been made in breach of duty so as to call into question this element of the disposition of the sale proceeds. As the case is put however, this is so obscurely set out that Mr Nadeem would have been justified in thinking that these were not in issue.

Pre-September Payments

72. While I am positively satisfied that the Company was insolvent from the beginning of April 2015, the Official Receiver's claim includes payments to Mr Nadeem dating back to March 2014. Here, Mr Nadeem, as a fiduciary, is obliged to explain these payments. He claims that they are salary and expenses, but nothing has been produced to justify this at all. I have explained above that no evidence that the Company employed or approved the remuneration of Mr Nadeem has been produced and it has not been suggested that these payments were made by way of dividend.

73. On the basis that no entitlement to these payments has been shown to my satisfaction it follows that they were made for no consideration and paid in breach of the duty to act within the terms of the Company's constitution as provided by section 171 CA 2006 and to promote its success as required by section 172 CA 2006. No basis for an equitable allowance has been offered. Mr Nadeem is liable to compensate the Company for these payments.

74. In the absence of a proper reason for these payments, they similarly constitute transactions at an undervalue for the purposes of section 238 IA 1986. They were made within the two year period prior to the commencement of the winding up, that is to say the date of the presentation of the winding up petition. Insolvency of the Company is presumed by reason of Mr Nadeem's connection with the Company. That presumption is rebuttable and the Company's filed accounts for the year ending 30th June 2014 show that it was trading profitably and had a positive asset balance sheet position. If I am wrong as to Mr Nadeem's liability by reason of breach of duty I would have found that the Pre-September Payments from 8th July 2014 to 23rd July 2015 were repayable to the Company as transactions at an undervalue.

Relief under section 1157 of the Companies Act 2006

75. Section 1157 CA 2006 provides:

> "(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."

76. I cannot find Mr Nadeem to have acted reasonably here. On no basis can it have been reasonable in the face of the insolvency of the Company and inevitable cessation of business to have dissipated the proceeds of sale to a group of creditors and to himself. Even if one were to accept that there was some prospect of a recovery in relation to Arcadia Group or C&A, and even if that would have allowed for full recovery by those creditors, Mr Nadeem's actions had the effect of throwing the risk of there being no recovery onto those creditors. That is not so much an "informal winding up" as a wholesale subversion of the principle of equal treatment of creditors on an insolvent winding up. As I have said, I was not given any evidence that might justify an equitable allowance to reflect an appropriate level of remuneration for Mr Nadeem that might similarly allow a partial relief from liability. In my judgment there is no basis on which to grant relief, in whole or in part, to Mr Nadeem.

Conclusion

77. In the result, Mr Nadeem is liable to repay to the Company:

i) £95,079.39 in respect of the Pre-September Payments;

ii) £140,939.50 in respect of the September Payments;

iii) £170,153.10 in respect of the Third Party September Payments.

Those sums will carry interest from 21st September 2015, but I will hear counsel as to the appropriate rate if this cannot be agreed.