Neutral Citation Number: [2024] EWHC 2188 (Ch)

Case No: CR-2023-001387

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST

IN THE MATTER OF FINNO MEDICAL LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 13/08/2024

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

- -

Between:

PK INVESTMENTS LIMITED	**Applicant**
- and -	
(1) SEBAJEEVAN SABARATNAM	**Respondent**
(2) ALEKSANDRA PODLASKA	

- -
- -

Gary Pons (by direct access for the **Applicant**
Sebajeevan Sabaratnam appearing in Person
The second Respondent not appearing

Hearing dates: 29 July 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 13 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief ICC Judge Briggs:

Introduction

1. PK Investments Limited seeks summary judgment of a claim made against Mr Sabaratnam issued on 9 January 2023. The claim form and particulars of claim plead that Mr Sabaratnam acted in breach of his duties owed to a company known as Finno Medical Limited (the "Company"). The breach, it is claimed, caused loss to its creditors as a whole.

2. The application for summary judgment, dated 10 October 2023, is resisted by Mr Sabaratnam on the ground that there are significant factual disputes that necessitate a full trial. His position is that his defence, dated 23 February 2023, discloses a factual basis that has a real prospect of success.

The substantive proceedings

3. Mr Seberatnam was appointed director of the Company on 19 October 2015. The Company imported medicines into the UK from the EU. It repackaged, relabelled and sold the medicines to UK wholesalers for a profit.

4. A compulsory winding up order was made on 12 December 2018. The estimated deficiencies, according to the Official Receivers' report of 23 January 2019, is £2,645,486.61.

5. PK Investments is a Maltese company and legal assignee of the claims vested in the Company. The assignment in favour of PK Investments is made by deed dated 1 June 2021. It was negotiated and executed by the liquidator of the Company acting as its agent. By clause 2.1 of the deed the Company as assignor:

> "unconditionally, irrevocably and absolutely assigns to [PK Investments] all the Assignor's rights, title, interest and benefits in and to the Assigned Claims with effect from the Assignment Date."

6. The Assignment Date is the date of the deed: 1 June 2021.

7. PK Investments is a creditor of the Company having provided a loan facility to it dated 16 December 2015. The total sum advanced by PK Investments is €1,819,300. Mr Kullman, a director of PK Investments explains in his supporting witness statement:

> "The loan facility agreement provided a loan facility from the Claimant of up to €2,500,000. Subsequent to the agreement, drawdown payments were made between 21 December 2015 and 19 May 2016, of a total of €1,819,300 which at the time was £1,395,356.73. The Claimant also entered into a share transfer and shareholder agreement on 18 December 2015 with both the First and Second Defendant. The First Defendant failed to register the relevant share transfers and provide share certificates to the Claimant."

8. Mr Kullman says that PK Investments received monthly management accounts from the Company until April 2017. After that date no management accounts were provided. The request for the financial statements and the failure to provide financial information from April 2017 led to an arranged meeting in July 2017 when Mr Sabaratnam was to provide the Company's QuickBooks. Mr Sabaratnam failed to attend the arranged meeting, and the QuickBooks were never provided.

The Particulars of Claim

9. The pleaded case is that the interests of the Company's creditors intervened by 31 January 2017 as the company was insolvent or bordering insolvent. At this date, Mr Sabaratnam should have had regard to the interests of the Company's creditors as a whole, and balanced their interests with other stakeholders.

10. The claim made by PK Investments is that by March or April 2017 Mr Sabaratnam knew or should have known that the only way the Company could repay the sums due under the loan facility was to sell the Company or find a new investor. It is said that Mr Sabaratnam agreed, in interview with Louise Brittain, the liquidator of the Company, that PK Investments would only be repaid by selling the business of the Company or by finding a new investor.

11. It is claimed that Mr Sabaratnam did not recognise that his duties included ameliorating financial risk to creditors. Without regard to the creditor interests he made hasty, undocumented and high-risk investment decisions. Those decisions, made after 31 January 2017, involved payments to third parties and an associated company known as Idiosys Technologies Ltd which resulted in a loss of Company assets with no corresponding benefit to the Company.

12. Paragraphs 15 and 16 of the Particulars of Claim state:

> "[15] The Company made a number of payments to Hafiza Traders Limited ('Hafiza") and Zait Com HK Limited ("Zait"). A list of these payments and the dates upon which they were made is appended to these Particulars of Claim marked Schedule 1. In summary:
>
> (a) £245,000 was paid to Hafiza between 21 March 2017 and 13 June 2017.
>
> (b) £546,705.36 was paid to Zait between 27 February 2017 and 21 August 2017
>
> [16] Hafiza and Zait are companies that were incorporated in Hong Kong. The Company had no prior trading relationship with either of these companies and the First Defendant conducted limited due diligence into Hafiza and Zait."

13. It is admitted by Mr Sabaratnam that the payments had been made. His position is that the payments were made in the best interests of the Company. He says that the payments were advances to foreign companies that were to supply medical devices and equipment to customers of the Company. Dealing in medical devices to customers outside of the

UK was a departure from the trade the Company had been involved in, albeit within the same sector, when the loan facility was made.

14. The case advanced by PK Investments is Mr Sabaratnum caused the Company to make payments:

    i) [17] in advance of receiving and without seeing the medical devices.

    ii) without written agreements with the receiving party. There being no primary and secondary obligations agreed in writing.

    iii) [21] to foreign companies without first carrying out any or any proper due diligence.

    iv) [18] after it became clear that the Company received nothing in return.

    v) [20] to entities in China where the risk of enforcement would have been complicated.

    vi) [19] without safeguarding the interests of the Company and its creditors.

15. The Company paid €48,760 to Mr Rasameejan in the period 20 February to 16 March 2017 [24]. Mr Rasameejan had, according to Mr Sabaratnum, a business in India which acted as an intermediary. It sourced products and provided the products to the end purchaser.

16. PK Investments make similar points to that set out in respect of the payments to Hafiza and Zait (paragraph 12 above). The Particulars of Claims state [25]:

> "The purchase and sale of medical devices is a high risk strategy. The lack of any information about this transaction means nothing supports the assertion that they are trade based rather than a simple disposal of the company property."

17. The Claim includes payments to unknown parties totalling £126,171.07 made between 11 May 2017 and 2 March 2018. These payments include sums transferred to Golden Wing Corporation in Hong Kong, Focus Exo Limited in Hong Kong, Amarnath Trading Company in Bangkok and JTWY Technology in Hong Kong. The Applicant says there is no records to justify the payments to entities that had not previously been associated with the Company [29].

18. Lastly it is pleaded that Mr Sabaratnam caused the Company to make payments totalling £35,857.91 to Idiosys in the period 14 February 2017-22 August 2017 for no commercial benefit [33-35].

Defence

19. Mr Sabaratnam has filed a defence against the claim. It pleads:

    i) PK Investments did not provide the Company with a loan. The money lent to the Company was lent by an individual at PK Investments [1-3].

ii) Mr Sabaratnam invested £430,000 of his own money and worked without salary for the Company and thus acted in its best interests [5].

iii) The cause of the Company's failure was "Brexit" as it resulted in an exchange rate fall of 20% making the business unprofitable from the time of the referendum result in June 2016 [6].

iv) A plan was devised to apply for licences in Scandinavia and import medical devices from the "Asian Market" [8]

v) All documents, contracts, invoices and communicates were saved to the Company's Server (in the custody of the liquidator) [16]

vi) All contact details were provided to the liquidator at interview. The liquidator asked for password access to documents and the server which was provided [17] and the liquidator has all records and information [16].

vii) The liquidator has examined the Company records and found no evidence that Mr Sabaratnum failed in his duties as a director [19].

20. In his skeleton argument Mr Sabaratnum says that the payments were made to "help Finno" [5b] which is a triable issue. He says he visited the premises of Hafiza and had a previous business relationship with Kwnajira Rasameejan. The due diligence was "knowledge" of the past relationship [5g]. His position in writing and before the court is [7]:

> "Contrary to the Applicant's assertion, the Defendant has a genuine prospect of successfully defending this claim. The Defendant reiterates that he has always acted in the best interests of Finno and deserves to have the matter dealt with at trial."

Legal framework

Summary Judgment

21. Mr Pons provided a summary of the law relating to summary judgment in his skeleton argument. Mr Sabaratnum referred to CPR 24.2 and CPR 24.3 in his skeleton argument and did not challenge the legal summary given by Mr Pons at the hearing. I shall therefore deal with it shortly.

22. The court may give judgment without the need for trial if a party has no real prospect of succeeding on the claim, defence or issue, and there is no other compelling reason why the case or issue should be disposed of at a trial: CPR 24.3.

23. Guidance of the test is provided by Lewison J (as he was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]:

> a. The court must consider whether the Applicant has a "realistic" as opposed to a "fanciful" prospect of success. Whilst it refers to the Applicant, it applies equally to the defendant.

> b. A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.
>
> c. In reaching its conclusion the court must not conduct a "mini-trial". This does not mean that the court must take at face value and without analysis everything that a defence says. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.
>
> d. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial
>
> e. Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgement. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge And so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceuticals Co 100 Ltd* [2007] F.S.R

24. There are two further points to make in respect of *Doncaster Pharmaceuticals Group Ltd*. First, a claim (or defence) will not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; and/or (b) the respondent to the application does not have material to support at least a prima facie case that the allegations are correct; and/or (c) the pleading fails to plead sufficient facts to support the case to entitle the court to make the necessary inferences: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. Secondly, and following on from *Patel*, once the summary judgment applicant provides sufficient evidence to support its case the evidential burden to persuade the court that there is a real prospect of success, or there is some other reason for a trial, falls on the summary judgment respondent: *Vistra Trust Corporation (UK) Ltd v CDS (Superstores International) Ltd* [2023] EWHC 3382 (Ch).

25. Lastly, the courts have faced respondents who claim that evidence, although not available at the time of the summary judgment hearing, will become available between the hearing and trial. In *Korea National Insurance Corporation v Allianz Global Corporate & Speciality AG* [2007] EWCA Civ 1066, Allianz filed no evidence in opposition to the summary judgment application and for the purposes of the application the court was bound to accept the statements set out in the defence [11]. The Court of Appeal explained that a party cannot complain if, accepting his evidence at face value, the court adopts a rigorous approach when considering what, if anything, that evidence

amounts to [13] and although the statements in the defence were bound to be accepted, the court was not bound to accept as correct:

> "…the many inferences, assertions of law and matters of comment which it also contains. More importantly, perhaps, the course which Allianz has chosen to adopt means that the court does not have the benefit of a general account of the critical meeting from any of those present which might have enabled it to understand more clearly the nature of the exchanges and the context in which they occurred."

26. Lord Justice Moore-Bick explained [14]:

> "In the present case Allianz criticised the judge for having failed to make allowance in its favour for the likelihood that additional evidence relating to various aspects of this defence would be available at trial to cast a more benevolent light on events, but in my view that criticism is unfounded. It is incumbent on a party responding to an application for summary judgment to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial. If it wishes to rely on the likelihood that further evidence will be available at that stage, it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time in the hope that something will turn up. It is not sufficient, therefore, for a party simply to say that further evidence will or may be available, especially when that evidence is, or can be expected to be, already within its possession, as is the case here. Allianz was quite entitled, if it so chose, to confine its evidence to the factual allegations in the defence, but having done so, and having failed to give any indication of what other evidence can be expected to be available at trial, it cannot complain that the court has not speculated about whether there might be any such evidence, and if so what its nature might be."

27. Allianz chose to base its arguments on the facts alleged in the defence and counterclaim. In this case, Mr Sabaratum does the same, except there is an important distinction. Mr Sabaratum's position is that the supporting documents are not in his possession but in the possession of a third party namely, the liquidator.

Directors' Duties

28. The law on the duties owed by a director to a company is principally contained in Chapter 2 of Part 10 of the Companies Act 2006. The primary fiduciary duty relied upon by PK Investments is that set out in section 172 of the 2006 Act. In addition, PK Investments relies on section 174 of the 2006 Act:

> 172. 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.
>
> …
>
> 174 Duty to exercise reasonable care, skill and diligence
>
> (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"

29. In my judgment section 174 of the Companies Act 2006 does not introduce a fiduciary duty whereas section 172 does. The core elements that give rise to a fiduciary duty was summarised by Butcher J. in *Iranian Offshore Engineering and Construction Company v Dean Investment Holdings SA* [2019] EWHC 472 (Comm), at 144:

> "144. There are two key aspects of fiduciary duties, which are reflected in this summary, which may be described as the no-conflict and no-profit rules. As Lord Neuberger stated in FHR

> European Ventures v Cedar Capital Partners LLC [2015] AC 250 , a fiduciary '"must not make a profit out of his trust" and "must not place himself in a position in which his duty and his interest may conflict"-and, as Lord Upjohn pointed out in Phipps v Boardman [1967] 2 AC 46 , 123, the former proposition is "part of the [latter] wider rule"'. Further, as Cockerill J noted in FM Capital Partners Ltd v Marino [2018] EWHC 1768 (Comm) : '77. Because a director's duty of loyalty requires him to act in what he in good faith considers to be the best interests of his company (see s.172 CA 2006), he is required to disclose his own misconduct: Item Software (UK) Limited v Fassihi [2004] BCC 994 at [41], [63-68].”

30. Where there has been a breach of fiduciary duty the remedy is an account or where appropriate equitable compensation which is to be calculated by reference to the loss caused to the beneficiary. Thus the beneficiary is to be placed in the same position as he would have been in but for the breach. This may involve restoring the value of something lost by the breach or making good financial damage caused by the breach: *AIB Group (UK) PLC v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 [64-65].

31. On the other hand, the remedy for a breach of duty of care and skill is damages. The compensation for loss applies the common law rules of causation, remoteness of damage and measure by analogy.

32. There may be similarities with this case and *Re D'Jan of London Ltd; Copp v D'Jan* [1994] 1 BCLC 561 where the court found that a director failed in his duty of care by not reading an insurance proposal before signing it. Hoffmann LJ said that it may be reasonable to take a risk in relation to your own money, but it would be unreasonable to take a risk with someone else’s. The court declared Mr D'Jan to be liable to compensate the company for the loss caused.

Lack of documentation

33. The question that arises is how should the court treat evidence of a director unsupported by the company’s books and records? In *Wetton v Ahmed; Re Mumtaz Properties Ltd* [2011] EWCA Civ 610 Lady Arden said [15]-[17]:

> “15. That was the predicament in this case. The liquidator could not show that Munir and Zafar were de facto directors from the Company's books and papers because the directors had not handed over the necessary documents to the administrators. The judge held, in the context of Munir's denial that he was a de facto director despite the fact that he had acted as chairman of the meeting convened to pass a resolution for voluntary liquidation, that, had it been necessary to do so, he would have been entitled to draw adverse inferences against the respondents to the proceedings
>
> 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."

34. The lack of books and records to support a defendant director's case is not just an issue on an application for summary judgment. Owing to the nature of the proceedings a defendant director without books and records to support his case but who says they will be available at trial must demonstrate to the satisfaction of the court that (i) the books and records exist; (ii) that they are readily accessible and (iii) the books and records are relevant to the issues.

The evidence

35. Mr Sabaratum does not contest that the Company was insolvent or bordering insolvent in January 2017.

36. Mr Sabaratum attended two interviews with the liquidator. The first, on 14 March 2019 soon after the Company was wound up. The Company's affairs would have been reasonably fresh in the mind of its directors. The interview was recorded and transcribed.

37. It is likely that the recording is an accurate record of the questions and answers, however Mr Sabaratum said that he challenged some of recorded responses. He read to the court an e-mail stored on his mobile phone. It was, he said, addressed to the liquidator. It is not clear from the e-mail he sent what was being challenged. I note that in parts of the transcript the transcriber has stated "several inaudible words". I infer that Mr Sabaratnum intended to assist with the "inaudible words". The relevant passages for the purposes of this hearing do not include "inaudible words" so, it appears to me, there is nothing to correct.

38. In the interview Mr Sabaratnum informed the liquidator that the Company was trading at a loss from "the beginning of 2017, March/ April 2017".

39. Mr Sabaratnum informed the liquidator that the QuickBooks had been given to the Company accountant, JR Financials Limited; that he had no access to the QuickBooks and possessed no access codes. He did not mention the meeting arranged in July 2017 when he was to provide the QuickBooks to PK Investments.

40. He explained that he tried to sell the business to investors from India but that there was a difficulty with transferring funds to this jurisdiction. There is no evidence of a sale or negotiations leading to a sale.

41. Mr Sabaratnum informed the liquidator that he had made payments to some creditors following the cessation of trade and that the information was on "the server, my computer was actually broke". He took the computer he used to a repair shop called "Man On It" as it had a broken fan. The liquidator contacted "Man On It" and

established that the computer had not been provided by Mr Sabaratnum as the repairers only dealt with websites. Mr Sebaratnum did not have an answer. However he provided some hard copy company records that are not relevant to this case. He was asked about access to the server he responded he did not have access codes and the only way he was able to access the server was via the lost computer.

42. The liquidator reminded Mr Sabaratnum that he was under a duty to "cooperate and deliver-up" and he responded that there was "no documentation or anything" and "definitely there is no paperwork or any assets" to take.

43. In respect of Idiosys (a company associated with Mr Sabaratnum that received money from the Company) he explained that it was used as "a sort of back office in India", but it was not doing any business.

44. As regards Hafiza and Zait Mr Sabaratnum informed the liquidator that the Company paid it for stock and accepted that the payment was made at a time when he knew the Company was "not doing very well". He said that these entities supplied medical devices to customers of the Company. He could not recall the name of the customers but knew that the Company had not been paid: "It was high risk and it's high margin on product", he explained.

45. As regards documentation in the hands of the liquidator and Mr Sabaratnum's contention that the liquidator has "all" the books and records of the Company, the first interview proceeded:

> "MS NATHWANI (of the liquidator's office): they want to also try it. So I try it in the same way, and to their permission also, but to hear it didn't went well. So we actually lost the money on that. So, these companies, Hafisa and Zeit supplied you with medical products -- devices? You sold them on to another company, who didn't pay?
>
> MR SABARATNAM: Yes.
>
> MS NATHWANI: Right. We need to know who that company is.
>
> MR SABARATNAM: I will email you the details I have. Yeah.
>
> MS NATHWANI: And any invoices; anything you have.
>
> MR SABARATNAM: Yeah.
>
> MS NATHWANI: I mean are these invoices likely to be in the company records?
>
> MR SABARATNAM: Not really after that, no this was actually done out of the box really, and this invoice was to make quick money to pay PK Investment. So, maybe it's not on the record. So I'm not quite sure. I've given all the information to -- they

> asked, but not sure whether they take into account or not what's happening.
>
> MS NATHWANI: Okay. We do need copies of these invoices please, as soon as possible, and details of all the companies.
>
> MR SABARATNAM: I'll find it. Yeah."

46. Mr Sabaratnam informs the liquidator that documents relating to Hafisa and Zait were not in the books and records provided to the liquidator. Any invoices in relation to transactions between the Company and Hafiza and Zait were "out of the box" and he was going to obtain and provide them to the liquidator. The information was never produced to the liquidator. They have not been produced in these proceedings.

47. Specifically in respect of Zait, Mr Sebaratnum explained that he had caused the Company to pay it in advance, Zait sourced stock, sold it to customers of the Company, and Zait received payment from the customers direct. The role of the Company appears to have been to pay for the stock and in return it received no commercial benefit. He was asked how Zait could profit at the expense of the Company. Mr Sebaratnum's response is telling:

> "Yeah. Because we didn't have any sort of agreement or sort of contract in place."

48. The obvious observation is that the liquidator would not have any contractual agreement because there was no contractual agreement.

49. The second interview took place on 14 January 2020. Louise Brittain conducted the interview. She started:

> "What I want to focus this on is the money that was sent to Hong Kong. Because it's about -- it's just -- well it's almost £900,000. And there is no evidence in the books and records, other than one invoice that we can see, that showed that actually any devices were ever purchased… There's absolutely no evidence at all. And the trouble is, there's £900,000 that's gone out to two companies in Hong Kong; there's no evidence of any medical devices; there's no evidence of any payments being received back the other way. And we've contacted the companies, and neither of --one of them doesn't exist anymore, Zait Communications Hong Kong, Limited. And the other one, Hafiza Traders, aren't responding to us. So at the moment, Mr Sabaratnam, it looks as if you've just sent money off to Hong Kong, and there's nothing been paid to the company -- no consideration been paid to the company for that money."

50. It is clear that Mr Sabaratnum was being told in January 2020 that the liquidator, having investigated Hafiza and Zait and found that one of them does not exist anymore and one of them is unresponsive, holds no evidence of a commercial arrangement between the Company and Hafiza and Zait.

51. Louise Brittain has offered Mr Sabaratnum access to any and all of the Company computers in her possession. Mr Sabaratnum said in interview that he would go to the liquidator office in February 2020 and find any relevant documentation. Mr Sabaratnum did not attend in February 2020 or at all. He will know that Louise Brittain's position is that Hafiza and Zait either do not exist or are unresponsive and uninterested. There is no evidence in any of the records delivered up, on the computer or server, that there was a commercial relationship between these companies and the Company.

52. Mr Sabaratnum said he had discovered the Hong Kong companies through LinkedIn. He had not done "much" due diligence because "it's a bit difficult". He said in interview that he could find a telephone number for one of the contacts he had met in Hong Kong. He has never supplied it to the liquidator. He accepted in interview that he had not met any representative of Zait.

53. Mr Sabaratnum informed the liquidator that the customers who were supplied with the medical devices were based in India. This is a contradiction of what he had previously said in the 2019 interview. In that interview said the customers were in China. He did not know the names of the customers. He said their names should be recorded on the server. Later, and in contrast to his earlier interview, Mr Sabaratnum said that the company's customers did not receive any medical devices.

54. The following exchange took place before the interview ended:

> "LOUISE BRITTAIN: The trouble with all of this, Mr Sabaratnam, is there's not a shred of evidence to support what you're saying here.
>
> SEBAJEEVAN SABARATNAM: The evidence is actually my emails being actually saved on the computer.
>
> LOUISE BRITTAIN: Well, we can't find it.
>
> LOUISE BRITTAIN: You never delivered up your laptop to us.
>
> SEBAJEEVAN SABARATNAM: I don't have the laptop. I lost the laptop, the company laptop, I lost it in Paris.
>
> LOUISE BRITTAIN: You lost the laptop in Paris.
>
> SEBAJEEVAN SABARATNAM: Yes.
>
> LOUISE BRITTAIN: Okay. All right.
>
> SEBAJEEVAN SABARATNAM: It was a long time ago.
>
> LOUISE BRITTAIN: Right. Okay. Well, you need to find some evidence, Mr Sabaratnam, because at the moment, it looks like there's £900,000 that has gone off to Hong Kong potentially.
>
> SEBAJEEVAN SABARATNAM: Yeah, I'll find the information to you.

> LOUISE BRITTAIN: Yeah, so you need to find all this evidence you're talking about, because there isn't any that we can find."

55. The current position is that Mr Sabaratnum has produced no evidence to support his case. There is no laptop as it (according to Mr Sabaratnum) was lost in Paris. It is not on the server that was delivered up to the liquidator and Mr Sabaratnum has done nothing since 2018 to provide the liquidator with evidence of a commercial relationship to support the impugned payments.

Discussion

56. Mr Sabaratnum says that he acted in the best interests of the Company but is unable to explain why sending money to companies outside of the jurisdiction as advance payments for the supply of medical devices without ensuring there was a contractual relationship reduced to writing, or some security, pending receipt of profits, was in its best interests.

57. Mr Sabaratnum has produced no evidence of the gross margin on the purported transactions, the numbers of units purchased, the customers to whom the units were sold or the anticipated profits. He undertook no, or scarcely any due diligence in respect of new trading partners, has no invoices to explain the transactions and no evidence of any negotiations.

58. I have treated the transcripts of the interviews with some caution however they do tell a story of inconsistent answers and Mr Sabaratnum has not sought to counter any of the important information he provided the liquidator in respect of the Company's books and records.

59. The interviews demonstrate Mr Sabaratnum's knowledge that the liquidator did not have "a shred of evidence to support what you're saying here", a failure to provide the Company's books and records over a long period and a failure to take steps to provide any information to the liquidator or in these proceedings.

60. Mr Sabaratnum's current position is that PK Investments knew of the plan to enter the medical device market and approved the high-risk strategy. This is an assertion only.

The defence statements taken at face-value

61. Taking the statements of the defence at face value, Mr Sabaratnum does not: (i) contest insolvency as at January 2017 and the intervention of the creditor duty; nor (ii) that money was paid at a time the Company was insolvent.

62. The defence does not plead to the impugned payments, why they were made, why they were in the best interests of the Company and the decision-making process undertaken to ensure he was exercising reasonable care, skill and diligence, in making these impugned payments.

63. There is a failure to describe or account for the transactions in any detail, and a failure to explain why they could have benefited the Company.

64. The defence fails to plead to the allegation that there was a lack of due diligence before making the impugned payments. The known extent of the due diligence process is a LinkedIn discovery followed by an internet search. He also visited the premises, he says, of Zait.

65. There is a failure to engage in the reason for the payments made to JTWY Technology Limited; Goldwing Corporation; Amarnath Trading Company; Focus Exo Limited or Idiosys Technologies Ltd.

66. One piece of documentary evidence has come to light. An e-mail from Mr Sabaratnum to Nitesh Patel and Kapock Ltd (associated with PK Investments) sent on 2 October 2017:

> "The failure of the entire situation is fully at my fault. The business was running last 6 months at very minimal margin hence the exchange loses and further expenses the business forced us in a bad position therefore I was trying to convince the Indian party to step in to take over the business so that we can settle our borrowing to PK plus maximum level of interest payment based on the amount we were getting from the Indian Party. The business risk has been already disclosed to the Indian parties, I do understand you will not believe that normal business transaction is not proceed the way it has been dealt with Indian party. There are weakness from their side too therefore I have helped them to step in to uk market with my anticipation their takeover finno with the current loses. I have no doubt that you will question me why the financial position and the risk had not been disclosed to you both, I do accept my failure I should have been discuss the situation and should have put right measures to recover the losses. I had a strong believe that the indian deal will complete by end of July and finno will settle PK to come out from the loan agreement but the entire situation went into wrong direction due to delay from Reserve bank of India and my health issues. I really don't know whether it's my bad luck or curse *that* I am seeing in front both of you as a liar or fraud because of my absent. Its hard to believe what was going around me but I haven't done anything intentionally to be out of contact or don't want disclose information…If you are willing to proceed with court against Finno and to me I do accept entire liability for the failure and willing to face any consequences however I am 100% confident within a week PK will receive your entire loaned amount."

67. It is clear from the e-mail that Mr Sabaratnum had not been in contact with its largest creditor, PK Investments. That Mr Patel had not known of the risk Mr Sabaratnum was taking with PK Investments' money. Their knowledge does not, in any event, ameliorate Mr Sabaratnum's failure to act in accordance with the duties of a director.

Conclusion

68. Mr Sabaratnum claims that the "liquidators took control of the complete record, each and every documents" (sic). The content of the interview in January 2020 makes serious inroads into this assertion. I would have expected him to have explained why his position is different today than it was at the time of the January 2020 interview.

69. I would have expected him to have provided an explanation as to why the server had not been accessed by him to retrieve important documents to support his case. I would have expected him to explain why Louise Brittain stated that there was not a "shred of evidence" to support his assertions and what he had done to rectify the position if what she had said was inaccurate.

70. Mr Sabaratnum knew that he needed to find evidence to support the impugned payments: "it looks like there's £900,000 that has gone off to Hong Kong", "you need to find all this evidence you're talking about, because there isn't any that we can find."

71. Nothing has changed since January 2020.

72. PK Investments have claimed that the impugned payments were made negligently and in breach of duties. The impugned payments were for no commercial benefit to the Company at a time the Company was insolvent.

73. It is incumbent on Mr Sabaratnum to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial. He has failed to do so. He has failed to demonstrate to the satisfaction of the court that (i) the books and records exist. There is no evidence from third parties such Hafiza and Zait or Mr Rasameejan with whom Mr Sabaratnam says he had a long business relationship. The liquidator says the books and records do not exist; (ii) Mr Sabaratnum has identified two places where books and records may be stored. First a computer which has been lost and second a server which has been searched by the liquidator. There appears to be another server that Mr Sabaratumn took to a repair shop. He had done nothing to retrieve it and has produced no receipt from the repair shop to demonstrate that it is held by the shop.

74. The liquidator's position is that evidence to justify the impugned payments has never been delivered up. This was put to Mr Sabaratnum who did not challenge the liquidator's assertion. He informed the liquidator he would provide the evidence and has not.

75. It follows that there is no material to support at least a prima facie case that the impugned payments were for the benefit of the Company.

76. If this case were to go to trial the court would apply *Wetton v Ahmed* and be bound to make adverse inferences due to a failure to produce documentary evidence.

77. In my judgment, for the reasons I have given, there is no real prospect of successfully defending the claim that Mr Sabaratnum breached his duty of care to the Company causing it loss, and there is no suggestion that there is any other reason why the claim should proceed to trial.

78. I shall give judgment for PK Investments.

79. Given that this case was presented on the basis that Mr Sabaratnum had breached his duty as prescribed by section 174 of the 2006 Act, I shall order, that Mr Sabaratnum shall compensate the PK Investments for the losses caused to the Company by causing or allowing the impugned payments to be made.

80. I invite the parties to agree an order.