Neutral Citation Number: [2021] EWHC 1239 (Ch)

CASE NO: F30BM170

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN BIRMINGHAM

COMPANIES AND INSOLVENCY LIST (CH.D)

Trial dates: 20 April – 23 April 2021

IN THE MATTER OF JAVAZZI LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986

BETWEEN:

THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Claimant

and

VIPUL RAJGOR

Defendant

BEFORE HIS HONOUR JUDGE MITHANI QC, SITTING AS A JUDGE OF THE HIGH COURT, remotely at the Birmingham Civil Justice Centre, Priory Courts, 33 Bull Street Birmingham, B4 6DS

Mr Christopher Buckingham (instructed by the Insolvency Service, Legal Services) for the Claimant

The Defendant, Mr Vipul Rajgor, appeared in person.

Judgment handed down remotely on 11 May 2021

Approved Judgment

THE CLAIM AND THE BACKGROUND CIRCUMSTANCES

1. This is an application by the Secretary of State for Business, Energy and Industrial Strategy for a disqualification order against the Defendant, Vipul Rajgor, pursuant to ss. 1 and 6 of the Company Directors Disqualification Act 1986 ("CDDA 1986"), arising as a result of his conduct as a director of Javazzi Limited. I will refer to Javazzi Limited in this judgment either as "Javazzi" or "the Company".

2. The application for the disqualification order ("the Claim") is based on a single allegation of failing to keep and maintain adequate accounting records of the Company or to preserve those records (if they were kept and maintained) or to deliver them up (if they were kept, maintained and preserved) to the Joint Liquidators of the Company or the Insolvency Service, which brings the Claim on behalf of the Claimant.

3. Before it was incorporated, the Defendant and his wife, Mrs Manita Rajgor, ran what appears, on all accounts, to be a successful business, selling home-made sandwiches to hospitals and small shops in the Stanmore, Harrow (and subsequently) Bedford area. The success of this business led to the Company being incorporated on 4 July 2011. It was incorporated as a franchisor, selling sandwiches, beverages and other food products to franchisees with whom it had entered into franchise agreements. The franchise agreement provided that the franchisee would be entitled to use the brand name "Javazzi" in its shop and would be entitled to receive the supply of various food products and services from the Company, as specified in the franchise agreement, in return for the franchisee, among other things, paying an initial franchise fee of £35,000 and complying with the other obligations set out in the franchise agreement. Pages 401 onwards of the trial bundle contain a specimen copy of the franchise

brochure and what a typical franchise store or shop (which the Defendant called a "concept" franchise) would look like.

4. The Company went into creditors' voluntary liquidation on 25 August 2016. The joint liquidators of the Company are Richard Frank Simms and Carolyn Jean Best ("the Joint Liquidators"). I have not seen the last progress report filed by them in relation to the Company. However, the progress report dated 12 October 2018 which is exhibited to the first affirmation of Martin Gitner ("Mr Gitner"), deputy head of Insolvent Investigations at the Midlands & West Region of the Investigations Directorate at the Insolvency Service, dated 24 May 2019, which was furnished in support of the Claim, states that the Joint Liquidators had, as at that date, made realisations of some of £4,200 against liabilities of over £245,141.39. There is, therefore, a deficiency, as regards the creditors of the Company, subject to the Joint Liquidators' costs, expenses and remuneration in the winding up, of a sum in excess of £240,000.

5. The sole director of the Company was the Defendant. His wife, Mrs Manita Rajgor, worked in the Company with him. It is not clear what her roles and responsibilities were in the Company. I tried to ascertain this from the Defendant in a series of questions I asked him when he was giving evidence. However, as with all the answers he gave, he was either evasive or gave completely inconsistent answers to the questions that were put to him. She plainly had some important function in the Company because her signature appears on several important company documents, such as the declaration contained in the business plan prepared by Franchise Finance Ltd for the Company: see pages 175-214 of the trial bundle. There were two or three other personnel who worked at the Company. However, none of them was an employee. They all contracted their services to the Company on a "self-employed" basis.

6. The Claim is supported by the affidavits or affirmations of Mr Gitner, Katie Marshall (formerly Katie Legge) ("Ms Marshall"), an investigating officer, at the Insolvency Service, Adrian Joseph ("Mr Joseph"), whose

company, Fearless Hawks Limited, had a franchise agreement with the Company and Ashwin Patel ("Mr Patel") who worked for the Company from 2011 to 2014 as a "contractor" – i.e., introducing customers to the Company who might have been interested in taking franchises from the Company. There is a dispute between the Defendant and Mr Patel about why Mr Patel left the Company. Mr Patel says it was because the Company stopped paying him. The Defendant says that Mr Patel left of his own accord. There are a number of other matters which are in dispute between them, such as whether the Company had made payments to Mr Patel in relation to a motor vehicle that he had hired to perform his functions for the Company and whether the information which Mr Patel gives in paras. 6 to 11 of his affirmation dated 9 December 2020 is correct. So far as the Defendant suggests that Mr Patel was guilty of misconduct in the performance of his duties while working for the Company, it is open to him to provide information to the Joint Liquidators about such misconduct with a view to the Joint Liquidators taking action against him. It does not seem to me to be material for the purpose of the determination of the Claim. The issue in this case is not how Mr Patel behaved but whether the allegation made against the Defendant is proved and whether it shows him to be unfit in the management of the Company. The same applies to the criticism he makes about the failure of the Insolvency Service to undertake investigations into Mr Patel and Mr Joseph's conduct, particularly in relation to an anonymous malicious email (see page 613 of the trial bundle) which he claims Mr Joseph could have sent to his customers that caused the ultimate demise of the Company. It is important to point out, in this context, that the Claim made by the Claimant is against the Defendant and not against any other person. The written and oral evidence upon which the Claimant relies in support of the Claim is plainly relevant in determining the veracity of the overall evidence which the court has seen and heard in this case. However, it cannot be a defence to the Claim for the Defendant to say that there were others who also behaved badly but against whom no proceedings have been brought or investigations conducted by the Claimant, particularly where "directorship" is an essential ingredient of

any claim which the Claimant would be able to bring against them under the CDDA 1986 – at any rate under s. 6 or s. 8 of the CDDA 1986.

THE LAW

7. It is appropriate that before I deal with whether the charge brought by the Claimant is made out, and whether it demonstrates that the Defendant is unfit to be concerned in the management of a company, I give a short summary of the legal position which applies in the present case.

8. I have already referred to s.6 of the CDDA 1986 under which the Claim is brought. The relevant provisions of s. 6, for the purpose of their application to the Claim, state as follows:

> "(1) The court shall make a disqualification order against a person in any case where, on an application under this section, it is satisfied:
>
> (a) that he is or has been a director of a company which has at any time become insolvent [within the meaning of s. 6(2) of the CDDA 1986] (whether while he was a director or subsequently), and
>
> (b) that his conduct as a director of that company (either taken alone or taken together with his conduct as a director of one or more other companies or overseas companies) makes him unfit to be concerned in the management of a company."

9. Section 6(2) of the CDDA 1986 defines what is meant by the expression "become insolvent". The meaning of the expression does not require elaboration. That is because there is no issue that the requirements of that provision, and the additional requirement under s. 6(1)(a) that the Defendant must have been a director of the Company, are plainly satisfied: the Defendant was the sole director of the Company and the Company became insolvent within the meaning of s. 6(2)(a) of the CDDA 1986 by entering into a creditors' voluntary liquidation on 25 August 2016. The decision for the court is

whether, pursuant to s. 6(1)(b), the charge (in other words, the single allegation referred to above) made by the Claimant against the Defendant can be proved and whether it makes him unfit to be concerned in the management of a company.

10. In deciding, pursuant to s. 6(1)(b), whether a person's conduct as a director makes him unfit to be concerned in the management of a company (and, if so, the period for which a disqualification order should be made against him), s. 12C of the CDDA 1986 specifies, by reference to Schedule 1 to the CDDA 1986, those matters to which the court is required to have regard. For the purpose of the Claim, the matters in Sch. 1 which are most relevant are the following:

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

11. It is clear from the provisions of s. 12C that the matters referred to in Sch, 1 are not exhaustive; the court can consider any misconduct of the director in deciding whether he is unfit: see, for example, *Re Amaron Ltd* [2001] 1 BCLC 562 at 568.

12. The test to be applied in determining unfitness has been variously stated in different cases. One exposition of the test is to be found in *Re Grayan Building Services Limited, Secretary of State for Trade & Industry v Gray* [1995] 1 BCLC 276. Hoffman LJ (as he then was) said (at p 284) that the function of the court was "to decide whether [the defendant's] conduct, viewed cumulatively, and taking into account any extenuating circumstances, has fallen below the standards of probity and competence appropriate for persons to be directors of companies."

13. The approach that the court needs to adopt in determining whether the requirements of s.6(1)(b) have been met were summarised by Blackburne J in *Re Structural Concrete Limited Official Receiver v Barnes* [2001] BCC 578 at 596. He mentioned that the determination involved a three stage process: first, do the matters relied upon against the defendant amount to misconduct; second, if they do, do they justify a finding of unfitness against him; and third, if they do, what period of disqualification, being not less than two years, should result.

14. The burden of proving that the charge against the Defendant is made out and that it makes the him unfit to be concerned in the management of a company lies on the Claimant. The standard of proof is the usual civil standard of proof, the balance of probabilities. This standard should not be elevated into a heightened civil standard of proof because disqualification proceedings involve allegations of serious misconduct: see the decision of the House of Lords in *Re B* [2008] UKHL 35 and of the Supreme Court in *Re S* [2009] UKSC 17. However, given the penal or quasi-penal nature of disqualification proceedings, the court needs to ensure that the evidence upon which

the Claimant relies clearly establishes that the defendant is unfit to be concerned in the management of a company. As Jonathan Parker J (as he then was) observed in *Re Barings plc (No 5), Secretary of State for Trade and Industry v Baker* [1999] 1 BCLC 433 at 483 to 484: "the burden on the Secretary of State in establishing unfitness … is a heavy one. The reason for that is the serious nature of a disqualification order, including the fact that (subject to the court giving leave under s. 17 of the Act) the order will prevent the respondent being concerned in the management of any company."

15. However, it is appropriate for me to mention one further point about the burden of proof. Although the primary burden of proof in a disqualification case will always lie with a claimant, there may be situations where the onus of proving certain facts and matters on which reliance is placed by a defendant will lie upon the defendant and would also need to be proved on the balance of probabilities: see *Re Deaduck Ltd, Baker v Secretary of State for Trade and Industry* [2000] 1 BCLC 148 at 157. In the context of this case, it is arguable that this means that if the records and other documents of the Company, which were delivered by (or on behalf of) the Defendant to the Joint Liquidators or the Insolvency Service, are accepted by him not to have included all the accounting records of the Company, it is for him to prove, on a balance of probabilities, that accounting records were kept, maintained or preserved by the Company in compliance with s. 386 of the Companies Act 2006. In addition, it would also be necessary for him to prove, on a balance of probabilities, what happened to the missing records and documents and why his failure to deliver them up was not unjustified or unreasonable as to warrant a finding of unfitness being made against him. This also appears to be the tenor of the defence specified in s. 387(2) of the Companies Act 2006, afforded to a defendant to a criminal charge, for failing to keep or maintain adequate accounting records relating to a company in compliance with s. 386 of that Act. However, for the reasons which are referred to below, my factual findings are not based on the niceties of whether it is for the Defendant to prove any part of his case but on the basis that

wherever the burden lies, the evidence supporting the findings I have made is clear.

16. In *Re Sevenoaks Stationers (Retail) Limited* [1991] Ch 164 at 176, Dillon LJ stated that the words "makes him unfit to be concerned in the management of a company" were "ordinary words of the English language…[that] should be simple to apply in most cases and that "it was important to hold to those words in each case." The Court of Appeal decision in *Re Grayan* makes it clear that a judge having to consider whether a defendant is unfit is deciding a question of mixed fact in law. What this means, as Lewison J (as he then was) said in *Secretary of State for Trade & Industry v Goldberg* [2004] 1 BCLC 597, was for the court to take a broad brush approach in making a "value judgment" about a defendant's fitness or otherwise to be a director by applying the facts of the case to the standard of conduct laid down by the court appropriate to be a person fit to be a director. The making of that value judgment requires no more than for a court to come to a common sense decision about whether the facts of the case, when applied to the standard of conduct laid down by the courts, should result in a finding of unfitness being made against the defendant: see, by way of examples, *Official Receiver v Key* [2009] 1 BCLC 22, [2009] BCC 11 and *Re SAS Fire & Security Ltd, Official Receiver v McVey* [2014] EWHC 3723 (Ch), at [50].

17. In determining unfitness, the court can only look at the specific allegations that have been made by the Claimant in his written evidence in support of the Claim, though the allegations themselves need not be framed with the precision of criminal charges. It is not appropriate for the claimant to rely on conduct, or allegations, not made in that evidence: see for example, *Re Grayan Building Services Limited, Secretary of State for Trade & Industry v Gray* [1995] 1 BCLC 276 at 284.

PROCEDURAL MATTERS

18. It is also necessary for me to deal with various procedural matters which arose in connection with the Claim.

19. On the basis that the Defendant was in person, I considered it appropriate to raise any technical or other points in his favour in resisting the Claim in case it provided him with a complete defence to the Claim or provided him with some mitigation in relation to the charge brought against him if I found him to be unfit to be concerned in the management of a company. I did so in line with CPR 3.1A, which I construe to apply not just to case-management and similar hearings but also to the case-management of the trial of a claim, and para. 65 of the Equal Treatment Bench Book (February 2021 Edition). I am grateful to Mr Buckingham for raising no objection to this. A number of the points I make below have been raised by me entirely for the benefit of the Defendant in the hope that he appreciates that I have considered all the points which benefit or could have benefited him.

20. As I know Mr Buckingham and the Claimant fully appreciate, the Claimant has a duty to act fairly towards the Defendant. This means that the Claimant must not seek to obtain a disqualification order against the Defendant at all costs but must present his evidence (both written and oral) against the Defendant in a fair and even-handed way. The duty of fairness also extends to the trial process. As a result, and in order to assist the Defendant, I asked the deponents of the affidavits or affirmations relied upon by the Claimant, who were called to give evidence, a number of questions to ensure that the matters about which the Defendant appeared to be seeking information from them could be properly understood and challenged by him. This, too, was not objected to by Mr Buckingham.

21. The Claimant is required to serve a ten-day letter under s. 16(1) of the CDDA 1986 notifying the Defendant of the bringing of the Claim prior to the issue of the Claim. Paragraph 9 of the first affirmation of Mr Gitner states that the letter was served upon the Defendant at his last

known address. I do not know if the Defendant still disputes that he received the letter. Even if he does, given that the service of a ten-day letter is directory, rather than mandatory, it does not affect the validity of the Claim or the substance of the matters which arise in it: see *Re Cedac Ltd, Secretary of State for Trade and Industry v Langridge* [1991] Ch 402.

22. The Defendant also complains that he was not afforded the opportunity of an interview with the Insolvency Service before the Claim was issued. The need to interview a target director before a disqualification claim is issued is important, not just because of the reasons given in *Re Finelist Ltd (No. 1)* [2003] EWHC 1780 (Ch), [2004] BCC 877 but also because disqualification claims are governed by the Practice Direction – Pre-Action Conduct and Protocols, issued under the CPR, which provides that the proposed parties to a claim will be expected to exchange information and documents relevant to the claim and generally to try and avoid the necessity to bring proceedings.

23. However, on the facts, there is no substance in the Defendant's complaint for several reasons. First, the Insolvency Service's letter dated 10 April 2018, and subsequent communication, expressly stated that the Defendant could make either written or oral representations about why a disqualification order should not be made against him. It is possible that the Defendant did not receive this letter, though it appears he did and did nothing about it – see his email to the Insolvency Service dated 4 June 2018 and the subsequent communication passing between him (and Mrs Rajgor) and the Insolvency Service. However, whether or not he did, an offer of an interview was given to him in compliance both with the Claimant's duty to act fairly towards him and the Practice Direction.

24. Second, to provide him with the opportunity of an interview at the stage when he responded (which, understandably, was much later than he would have wished because of his ill-health) without issuing the Claim might have meant, if there was a delay in setting up the

meeting, that the Claimant would not have been able to issue the Claim on time under s. 7(2) of the CDDA 1986.

25. Third, given the Defendant's position concerning the allegation made against him, it was unlikely that the meeting would have achieved any resolution, or even the narrowing of any issues between him and the Claimant. That is because at an interview which he had with Ms Marshall of the Insolvency Service on 8 June 2017, he was informed that the accounting records that she had in her possession relating to the Company, which were received from the Company's accountant, a Mr Jitender Thind, were not adequate and was asked to deliver up any records that he might have in his possession to her. He provided her with some documents, but these were neither sufficient to demonstrate that the Company had kept adequate accounting records nor satisfied Ms Marshall that the Defendant had delivered all the records which he had in his possession to her or to the Joint Liquidators. On that basis, it is difficult to see what a further meeting would have achieved.

26. Fourth, it was open to the Defendant to make any representations he wished to make to the Claimant in writing, without a meeting. He did not avail himself of that opportunity.

27. Finally, once the Claim was issued against him, it would have been open for him to have come to an agreement with the Claimant about the disposal of the Claim by, for example, either persuading the Claimant not to proceed against him or entering into a disqualification undertaking for the period proposed by the Claimant or some other period which he could negotiate with the Claimant. The former situation was unlikely to apply because, on the evidence, the Claimant would not have agreed to it but, if he did, the Claimant would have been responsible for the Defendant's costs for discontinuing the Claim. The latter situation might have been possible if the parties could have agreed a disqualification undertaking for a period which was acceptable to both. In that eventuality, the only issue for the court to determine

would have been the costs of the Claim and if the Defendant had been able to persuade the court that the Claim had been issued precipitately without regard to the need to interview the Defendant, the court might have exercised its discretion on the costs of the Claim against the Claimant, if necessary by disapplying the presumption specified in para. 25.1 of the Practice Direction on Disqualification Proceedings. The plain fact is – as is clear from the communication passing between the parties from page 1153 onwards of the trial bundle – that every opportunity was given to the Defendant to avoid the need to bring the Claim. His inability or failure to avail himself of that opportunity cannot be laid at the door of the Claimant.

28. The Defendant sent an acknowledgment of service to the Claim on 29 October 2019. The Defendant did not tick the box in the acknowledgment of service which said that he intended to dispute the allegations made against him, though he did tick the box which said that he disputed that his conduct made him unfit to be concerned in the management of a company. Mr Buckingham suggested, in his skeleton argument, that this meant that the Defendant did not dispute the allegations made against him but only disputed whether they made him unfit to be concerned in the management of a company. I indicated to Mr Buckingham that I did not agree with that view and referred him to the detailed treatment of that point in *Mithani: Directors Disqualification*, at IV[48A]. Mr Buckingham appeared to accept the substance of this view and informed me that the Claimant withdrew that argument, particularly as he accepted that by furnishing written evidence in opposition to the Claim, the Defendant had made it clear that he disputed those allegations.

29. The Claim was issued in the County Court in Luton and transferred to the County Court in Birmingham. The Claim is not subject to the provisions relating to the automatic transfer of proceedings set out in paras. 3.6 and 3.7 of the Practice Direction on Insolvency Proceedings. That is because, other than for certain limited purposes (which do not apply to the Claim), disqualification proceedings are not "insolvency

proceedings" within the meaning of the Insolvency (England and Wales) Rules 2016 or the that Practice Direction. The Claim was transferred to the County Court at Birmingham on the basis, as appears from the transfer order dated 25 November 2019, that it was thought to be business and property work which had to be heard in a specialist County Court hearing centre. Paragraph 4.4 of PD 57AA, which governs Business and Property work, states that judges specialising in the County Court Business and Property work must spend a minimum of 20 percent of their time handling Business and Property work, either in the Business and Property Courts or in the County Court. As I do not do the requisite percentage of work required to be classed as a "specialist" judge, but am authorised to sit as a judge of the High Court in the Chancery Division, I thought it appropriate to transfer the Claim to the High Court so I could deal with it in that capacity. Another reason for transferring it was to avoid any appeal against my judgment (or any respondent's notice served by the respondent to the appeal) being dealt with by a High Court Judge (rather than the Court of Appeal) who, though it would have to be a full High Court Judge, would nonetheless have roughly the same standing as I do when I sit in the High Court. The transfer does not prejudice the Defendant in any way.

30. On the first day of the trial, I allowed the Defendant to rely upon a further affirmation which he had furnished in draft form to the court on 19 April 2021, exhibiting various documents which he claimed to have found in his house a day or so previously. I gave him relief from sanctions to rely upon it on the basis that although I was not satisfied that he had demonstrated the first two limbs of the *Mitchell* (i.e., *Andrew Mitchell MP v News Group Newspapers Ltd* [2013] EWCA Civ 1537) and *Denton* (i.e., *Denton and others v TH White Ltd* [2014] EWCA Civ 906) test, I should nonetheless exercise my discretion in his favour under the third limb of the test, on the basis that the Defendant claimed that he did not know what was in the box which he had collected from the premises of the Company until he and his wife had decided to go through it a day or so earlier. I also felt that I should

exercise any element of doubt I had about this reason in his favour (despite the point correctly made by Mr Buckingham that the Defendant was not in a special position by the fact that he was in person, as a result of the application of the decision of the Supreme Court in *Barton v Wright Hassall LLP* [2018] UKSC 12), particularly given that these proceedings were quasi-penal in nature, having serious restrictions on the Defendant's ability to be involved in the corporate sphere and there was some suggestion that the documents exhibited to that affirmation could answer a number of the points which were raised by the Claimant in the charge. I should add that I also made it clear that this latter reason should not make it necessary for such an application to be allowed in every case where a defendant faced disqualification or analogous proceedings. It is just one of the factors to be taken into account under the third limb and I felt that if the documents had only just come to the attention of the Defendant, as he claimed (but which, having heard his evidence I do not accept), he should be allowed to rely upon their contents.

31. Finally, I should like to record that I allowed Mrs Rajgor to speak on behalf of the Defendant when he felt that he needed her assistance. This was in line with the guidance set out in *Practice Guidance (McKenzie Friends: Civil and Family Courts)* [2010] 1 WLR 1881. The Defendant has had several retinal detachments of one of his eyes in the past few months and needed the assistance of his wife to have the contents of various documents read out to him and needed the support of his wife from time to time to speak for him. I considered this a suitable case for me to allow her to speak on his behalf when he was not giving evidence.

THE CHARGE AND THE INGREDIENTS OF THE CHARGE

32. The charge against the Defendant is set out in para. 8 of the first affirmation of Mr Gitner in the following terms:

> "Vipul Rajgor (Mr Rajgor) failed to ensure that Javazzi Limited maintained or preserved adequate accounting records or In the

alternative has failed to deliver up accounting records on behalf of Javazzi Limited for the period October 2013 to liquidation on 25 August 2016. As a result it has not been possible to ascertain or verify:

- The number of franchisees that signed up with Javazzi. A business plan provided to prospective franchisees suggested that 24 franchisees were due to open 60 stores, while documentation within the company records shows 10 franchisees had signed up and were due to open a total of 12 stores.
- How expected turnover and profit figures provided to prospective franchisees was calculated
- Whether funds totalling £59,853.87 allegedly spent in respect of the franchise of a customer were used for the purposes stated by Mr Rajgor.
- Whether funds totalling £40,700 allegedly loaned to a franchisor were actually used for this purpose
- Whether goods for which funds totalling £67,247.73 were received from finance companies providing loans to a franchisee were actually purchased by the company, or the whereabouts of those goods if they were purchased."

33. The duty on the part of a company to keep, maintain and preserve adequate accounting records for the Company is set out in s. 386 of the Companies Act 2016. The relevant provisions of s. 386, for this purpose, state:

"(1) Every company must keep adequate accounting records.

(2) Adequate accounting records means records that are sufficient—

(a) to show and explain the company's transactions,

(b) to disclose with reasonable accuracy, at any time, the financial position of the company at that time, and

(c) to enable the directors to ensure that any accounts required to be prepared comply with the requirements of this Act …

(3) Accounting records must, in particular, contain—

(a) entries from day to day of all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place, and

(b) a record of the assets and liabilities of the company.

(4) If the company's business involves dealing in goods, the accounting records must contain—

(a) statements of stock held by the company at the end of each financial year of the company,

(b) all statements of stocktakings from which any statement of stock as is mentioned in paragraph (a) has been or is to be prepared, and

(c) except in the case of goods sold by way of ordinary retail trade, statements of all goods sold and purchased, showing the goods and the buyers and sellers in sufficient detail to enable all these to be identified."

34. Section 387 of the Companies Act 2006 provides that any "officer" of a company (which includes a director) who is "in default" (as defined by s. 1121 of the Companies Act 2006) in ensuring that the company complies with the requirement of s. 386 is guilty of a criminal offence. In addition to committing an offence, a director who fails to ensure that the company complies with those requirements will be liable to be found to be unfit to be concerned in the management of a company and be subject to disqualification under the provisions of s. 6 or s. 8 of the CDDA 1986: see, for example, *Secretary of State for Trade and Industry v Arif* [1997] 1 BCLC 34.

35. Section 387(2) of the Companies Act 2006 provides an officer in default with a defence to criminal proceedings if he can demonstrate that he acted "honestly and that in the circumstances in which the company's business was carried on the default was excusable." Even if that defence is available to a director who faces a criminal charge, it does not exculpate him from a finding of misconduct under s. 6 unless there are extenuating circumstances relating to the misconduct which make it possible for the court to conclude that the director's overall conduct has not passed the test of unfitness.

36. Various provisions of the Insolvency Act 1986 (such as ss. 208 and 234) make it necessary for a director or other officer of a company to deliver up any documents in his possession or custody to which the company is, or may be, entitled to the liquidator of the company.

37. The Defendant's response to the charge was inconsistent and unclear. He appeared, at times, to be suggesting that the Company had kept proper accounting records and that these had been delivered to the Joint Liquidators or the Insolvency Service and, at other times, to be saying that the responsibility for keeping and maintaining them rested with others and it was not his fault that they were not kept.

38. As Mr Buckingham rightly observed, relying on the following passage in *Mithani: Directors Disqualification*, at III[640]-[650], at footnote 4, a charge of failing to keep, maintain, preserve or deliver up adequate accounting records will be made out if there is no reasonable explanation about why the records delivered to an office-holder or the Insolvency Service did not include all the accounting records which the Company should have kept:

> "It will be no defence to a charge of failing to maintain and preserve accounting records and to deliver them up to the duly appointed office-holder of the company for the defendant to assert that the company has complied with its obligation to maintain and preserve the accounting records if he has not delivered them up to the office-holder. Indeed, a failure to deliver up the accounting records may be evidence of the fact that they were never maintained and/or preserved in the first place."

39. It is also important to note that the consequences of the failure to keep, maintain, preserve or deliver up adequate accounting records, are not essential ingredients of the charge. They are usually included in the charge to demonstrate either why continued trading on the part of the company was wrong or how the office-holder has been impeded in discharging his proper functions of collecting, realising and distributing the assets of the company: see, for example, *Secretary of State for Trade and Industry v Arif* [1997] 1 BCLC 34 at 42. In *Re Devonshire Business Services Ltd, Secretary of State for Business, Innovation and Skills v Williams and Hyde* (15 January 2013, unreported), there was no evidence that the liquidator had ever complained about the lack of records produced. However, Chief Registrar Baister accepted that this was not fatal to the Secretary of State's case, since:

> "[i]t was not simply a question of whether the liquidators had been prejudiced; the court also had to take into account whether the Insolvency Service had been or might have been hampered in complying with its obligation to investigate the affairs of the company. Plainly the absence of books and records necessarily hampered it, so the question of the liquidators' stance was not determinative of the matters on which Mrs Covell relied."

It follows that the issue which the court has to determine is whether the charge of failing to maintain accounting records and/or deliver them up to the office-holder is made out against a director. The consequence of the failure is unlikely to have any or any material significance on whether the charge is made out, although it may be relevant to whether the director has crossed the line of unfitness and will have an important bearing on the period for which the defendant should be disqualified.

OVERVIEW OF THE EVIDENCE IN THE CLAIM

40. I heard oral evidence from Mr Gitner, Miss Marshall, Mr Joseph and Mr Patel on behalf of the Claimant. The Defendant gave evidence and was cross-examined on the contents of his two affirmations.

Mr Gitner

41. The most that an investigator in the Insolvency Service can do in a case like this, on behalf of the Secretary of State, is to place before the court the facts which he has established from the enquiries which he has made and draw to the attention both of the court and of the defendant those matters upon which he relies in support of his allegation that the conduct of the defendant warrants the imposition of a disqualification order.

42. Mr Gitner did just that. He did it both professionally and ably. I wholly reject the Defendant's assertion that Mr Gitner's affirmations were "full of lies and facts which were not true". It is correct that there were minor errors in his first affirmation. However, he corrected those errors in his second affirmation. I accept the substance of Mr Gitner's account given in his affirmations and oral evidence.

Ms Marshall

43. The same is true of Ms Marshall's evidence. She, like Mr Gitner, carried out her duties professionally and ably. There is no substance in the attack made by the Defendant upon Ms Marshall that she refused to accept documents from him on the date of his interview with her or (so far as it concerns Ms Marshall) that the Insolvency Service had lied or withheld evidence.

Mr Joseph

44. The Claimant relied upon Mr Joseph's evidence primarily to make good some of the consequences set out above which arose from the Defendant's alleged failure to keep, maintain, preserve or deliver up the accounting records of the Company.

45. Mr Joseph cannot, and cannot be expected to, comment upon the charge. He can only provide evidence about his company, Fearless Hawks Ltd's dealings with the Company. The Defendant asked him several questions about the "malicious email" sent to the Company's contacts and customers, suggesting that Mr Joseph was likely to have sent it. Whether or not he did, it has no relevance to the charge brought against the Defendant. The real issue, as regards Mr Joseph's evidence, was whether, as the Claimant claimed, the £59,853.87 and the £40,700 can be accounted for from the accounting records of the Company. The Defendant dealt with at length why Mr Joseph's evidence concerning the dealings of Fearless Hawks with the Company was false but nowhere either in his affirmations or his oral evidence was he able to explain how those amounts had been recorded in the books of account of the Company. That still remains the position: see paras. 51-62 of Mr Gitner's affirmation.

46. So far as it is necessary for me to determine whether the account which Mr Joseph was giving was true in order to decide whether the charge is made out, I accept that the substance of it was true.

Mr Patel

47. There were substantial disputes between the Defendant and Mr Patel about the account each gave concerning Mr Patel's roles and responsibilities in the Company. It seems to me of little significance whether Mr Patel left the Company because, as he claims, the Company stopped paying him or because of the reasons which the Defendant gave. There were three points in his evidence which were important in terms of whether the charge against the Defendant was made out: first, whether he acted as the Company's accountant or bookkeeper; second, whether the confidential and other documents belonging to the Company which he is alleged by the Defendant to have removed may have contained certain of the accounting records of the Company; and third, the position concerning the number and state of the various franchises which had opened or due to open at the point in time when he left.

48. Mr Patel said that he worked on a subcontract basis for the Company from 2011 until 2014 when he left. He worked as what he described as a "senior sales contractor". He was an accountant by profession (having previously run his own accountancy practice) but said that he did not undertake any accounting or bookkeeping services for the Company. His job was to introduce new franchisees to the Company.

49. Mr Patel said that during his time at the Company, there was only ever one trading franchise in Crawley, which shut after 8 months. He had introduced that franchisee to the Company. The franchise shut because Mr Patel claimed that the franchisee did not get what he was promised from the Company and ended up losing his house. Mr Patel also stated that the Company was not a genuine franchising operation, and by the time he had left, it was clear to him that "it was a con. The business model appeared to be to sign up 3 or 4 franchisees, make some money, and say goodbye."

50. At paras. 9 and 10 of his affirmation dated 9 December 2020, he went on to say:

> "I understand that it has been suggested by Mr Rajgor at interview that I provided information to Franchise Finance (FF) in a business plan that Javazzi had three trading franchises. This is not true. There were never three trading franchises as far as I was aware, and the business plans were approved and signed off by either Mr Rajgor or his wife Manita Rajgor, who I understand signed off that particular business plan to FF. I dealt with some communications with FF, factfinder forms and applications, but not Javazzi business plans. I worked at Javazzi when Crocsnacks Limited (Crocsnacks) attempted to set up a franchise. Javazzi did not purchase equipment for the store. Javazzi took the money, and I do not believe that goods for which funds totalling £67,247.73 were received from finance companies providing loans to a franchisee were ever purchased. No goods or equipment ever arrived. I understand that Mr Rajgor has made allegations, without evidence, that the director of Crocsnacks, Mr Kundalia, and I somehow removed the goods or equipment. This is plainly not true, as also confirmed by Mr Kundalia, and there is no evidence that goods or equipment were ever ordered, delivered, fitted or removed. The store was repossessed, which was not in Mr Kundalia's interests, and no equipment had been installed in the store."

51. I accept the substance of his account on those three points. I do so not just because what he said was supported by the contemporaneous documents in the trial bundle but also because, as I set out below, the evidence of the Defendant on these points and generally was largely untruthful.

The Defendant

52. The Defendant had said very little about the accounting records of the Company in his two affirmations. I considered it appropriate to ask him questions about that in the hope that I could ascertain what accounting records the Company had kept and whether they had been delivered up to the Joint Liquidators or the Insolvency Service. I had thought that my questioning would not last more than a few minutes and might elicit information about the whereabouts of the accountings records in the hope that – if there had been a misunderstanding between him, the Joint Liquidators and the Insolvency Service about their whereabouts and the balance of the accounting records were available to the Joint Liquidators or the Insolvency Service – it might have been possible for me to determine the Claim accordingly. In the event, the Defendant failed to give a straight answer to any of the questions I

asked and what should have taken a few minutes of questioning took a very long time.

53. The Defendant's answers to questions were often long, convoluted and evasive. He continually sought to refer to how badly everyone who worked for the Company had behaved towards him, rather than giving straightforward answers to even the most simple and basic questions which he was asked. He often sought to deflect attention away from the question he was asked so he did not have to answer it. He also avoided answering perfectly simple questions which were put to him when it appeared to him that the answers that he might give would not support what he was saying.

54. I found the evidence which the Defendant gave, for the large part, to be untruthful.

55. There were many examples of this. It suffices if I mention a few.

56. The Defendant was reluctant to accept that he had been a director of other companies in the past. He initially indicated that he had held no directorships in other companies at any time previously. However, on further questioning, he accepted that he had been a director of two companies, Xpress Carparks Ltd and Sahara and Rome Ltd, both of which he said had done "no trading" and had been struck off the Register of Companies. The statement by him that the companies had done no trading cannot be correct as a number of payments to Fearless Hawks can be seen to be coming from Sahara and Rome Ltd – see page 1047 of the trial bundle – though it is possible that that company did not trade for the purpose for which it had been formed. I should add that the Claimant makes no allegations in relation to those companies. They have not been included in the Claim, which they should have been done as "collateral companies" if they had not become "insolvent" (within the meaning of s. 6(2) of the CDDA 1986) if the Claimant wished to make allegations in relation to them.

57. The Defendant's defence to the charge was based primarily on the four bags of documents which he said he took with him to his meeting with Ms Marshall on 8 June 2007. In his first affirmation, he provided the following account of this:

> "Please look at the video evidence of the day I had my interview with Katie Legg at the offices of the Insolvency services in Birmingham on 8th June 2017. It show that between myself and Manita, my wife, we took over four big bags worth of Information to give to Katie Legg which would have helped them with the investigation but she did not want to see it. The bags in question contained printouts of everything we had which would have helped them, including the information which I have attached. The bags consisted of three supermarket strong bags which each must have weighed at least seven to ten kilograms each and a pull-a-long which must have weighed more, hence the need to have-a pull-a-long. The information consisted of all the information I had access to on the Javazzi email system as the liquidator FA Simms were going to tell British Telecom to disconnect the account as part of them liquidating the company. Based on what I can recollect Both myself and my wife were interviewed separately from about 10.30am till about 4pm with an hour for lunch and the most vivid memory I have is Katie Legg showing me a £100,000 invoice payable by Crossnack Limited."

58. The Defendant also maintained that Ms Marshall refused to take possession of the bags. If that was true, then it has to be questioned where those documents are because those bags or the documents in them have not been available to the Insolvency Service at any time since that date.

59. The Defendant was asked what was in the bags. His response (according to the note I made) was that it contained:

> "copies of franchise agreements – email conversations – procedures such as for sandwich tastings – procedures for looking at different products – what a franchise store needed to look like – there may have been invoices – one or two – bank statements – Private equity files with names of people who were looking at entrepreneurial visas and the like – and printouts – I cannot remember".

60. He was asked how it would have helped the Insolvency Service to know what documents were in the bags if he himself did not know what was in them. He did not have any answer to that question. So far as the Joint Liquidators or the Insolvency Service did not have all the accounting records of the Company at that stage, I am satisfied that there were few, if any, of the Company's accounting records in the bags.

61. Having initially said that there were only one or two invoices in the bags, he was then asked where the rest of the invoices were. His response was to say they were also in the bags. He then changed his account again later on in his evidence, stating that the vast majority of the documents were franchise agreements and that they also included emails. He did not mention invoices.

62. There were no bank statements or invoices included in the bags (or handed to Ms Marshall even if they were included), as is clear from page 160 of the trial bundle which contains an extract of the record (signed by the Defendant) of the interview which took place on 8 June 2017. In fact, as Ms Marshall correctly observes in her affirmation, she had specifically requested sight of bank statements and the Defendant had agreed to provide them to her (having indicated that he "had no other invoices") but had failed to do so. It follows, therefore, that the Defendant's assertion that all the accounting records of the Company were delivered up and that the charge brought against him was "utter trash" (page 3 of his first affirmation) is simply untrue. It is plain that he had not, as he alleges in the same part of the affirmation, "brought all of the information [he] had on the day of [the] interview …" and that Ms Marshall "did not take it."

63. Nor was there any truth in the evidence of the Defendant about when he came across the box of papers that he or his wife claimed to have found in their garage. He said that the box had originally come from the Company's offices, which begs the question why he removed it from those offices. He claimed that he had to do so because the Company had ceased trading and he did not want the box to fall in the wrong hands. He said that he had informed the Joint Liquidators about this. They had asked him to hold on to it and save the documents on a dongle or separate dongles and that they would contact him when they needed the box but they never had. However, he had neither provided the box nor the dongles to the Joint Liquidators at any stage previously because the box had only been discovered in the last two or three

days. He made no mention of any of this in his second affirmation and changed his account continuously in the course of giving evidence.

64. He gave untruthful evidence when he was asked about the remuneration he received from the Company. He said he had received none and that his sister paid for their daily living expenses and mortgage. He was asked how this could be correct, given that the summary of the accounts of the Company included in the estimated statement of affairs of the Company which he had furnished to the Joint Liquidators showed that he had received director's remuneration in the sum of £6000 in 2012, £7000 in 2013 and £7500 in 2014. He initially suggested that this was the information his accountants had included and sought to distance himself from it. Later in his evidence, he changed that account (at one stage, claiming that he did not understand the questions being put to him), stating that the Company paid £3500 per month towards bills, and yet later (after he had finished giving evidence when he was making his closing remarks), stating that the Company did pay his living expenses, mortgage payments and other expenses, other than the insurance and maintenance of his motor vehicle which was paid by his sister. He said that the payments made to him were reflected in the items "administrative expenses" which, for 2014, was £233,677. Nor could he explain the turnover figures in the summarised accounts included in the statement of affairs. In addition, as paras. 19 and 24 of Mr Gitner's affirmation state, no information about the remuneration and benefits received by the Defendant from the Company was ever provided by him to the Insolvency Service.

65. The inconsistencies in the Defendant's evidence were many and varied. He continually contradicted what he had said in his written evidence and previous answers which he had given in his oral evidence, including, after having given evidence, contradicting what he had said in his evidence when he made his closing remarks. After he had finished giving evidence, Mr Buckingham indicated that the Claimant intended to apply to add further charges to the Claim. However, he

abandoned that application after having taken instructions from his client overnight.

IS THE CHARGE MADE OUT, I.E., IS MISCONDUCT PROVED?

66. The starting point is what accounting records the Joint Liquidators say they have in their possession or custody. Paragraph 9 of the second affirmation of Mr Gitner dated 8 December 2020 summarises this.

67. The accounting records (or such of them as Mr Thind had in his possession) were delivered up to the Joint Liquidators prior to 31 December 2016. A full schedule of what documents were delivered up to them is contained at pages 171-174 of the trial bundle. These were plainly not all the accounting records of the Company or at any rate all the accounting records which the Company should have kept, maintained or preserved in compliance with the requirements of s. 386 of the Companies Act 1986 or delivered up to the Joint Liquidators under the above-mentioned provisions of the Insolvency Act 1986.

68. As the summary in para. 9 of the second affirmation of Mr Gitner shows, numerous requests were made to the Defendant for the outstanding records to be delivered up both by the Joint Liquidators and the Insolvency Service both before and after his meeting with the Insolvency Service. The Defendant did not do so and the delivery of those records still remain outstanding.

69. As I have already explained, it does not matter that the Company kept adequate records if those records have not been delivered up to the Joint Liquidators. The Defendant would still be guilty of misconduct on the basis of the formulation of the charge against him.

70. It is plain that the Defendant did not deliver to the Joint Liquidators or the Insolvency Service accounting records of the Company which complied with the requirements of s. 386. Whether this was because it did not keep them in the first place or whether it did but the Defendant

did not deliver them up is difficult to say. Either way, the charge against the Defendant is made out.

71. The evidence of the Defendant about what accounting records the Company did keep was wholly inadequate. He appeared to think that the Company had a manual accounting system but did not seem to know how and who recorded the transactions in the books of account of the Company. He explained how purchase invoices which were received by the Company were passed for payment and also referred to a manual book into which everything the Company was buying was "jotted down" but could not say who "jotted" these down. Nor could he explain how sales invoices were entered into the Company's books of account.

72. I find it difficult to accept that the Company had a manual accounting system. Whether or not that is true, it is astonishing that the Defendant, as the sole director of the Company, had no idea about who at the Company was responsible for entering information concerning the financial transactions undertaken by the Company in the Company's book of accounts.

73. The Defendant suggested that it was Mr Patel who kept the books of account of the Company. This was palpably untrue as nowhere in either of his affirmations does he say that. In the course of his final observations, he then said that Mr Patel had put in place the accounting system of the Company and that he trusted "Ashwin [i.e., Mr Patel] to do it". He said that he believed that "everything [meaning all books of account] was in the filing cabinet". This was simply untrue.

74. When he was asked who took over the bookkeeping work from Mr Patel when Mr Patel left in 2014, he gave a remarkable explanation. He said it was Sushmita Subedi, Mr Joseph's partner, who had joined the Company (the circumstances in which she joined being a matter of dispute between him and Mr Joseph). At page 17 of his first affirmation, and at times during his interview, he also appeared to

suggest that it was Mr Thind, whom he claimed he saw periodically about the Company's finances, who kept the books of account of the Company. He seemed to content to blame everyone about the lack of the accounting records, apart from himself. Even if I accepted the entirety of his explanation that others, not he, were responsible for keeping and maintaining the accounting records of the Company, it is, to say the least, extraordinary that he cannot explain who was, in fact, given that responsibility, and what supervision he undertook to ensure that the accounting records were properly maintained and kept up-to-date in compliance with the duty of the Company under s. 386.

75. It has long been established that it is not usually necessary for the claimant to establish that the consequences of the acts or omissions, alleged by the claimant did occur: see, for example, *Re Bunting Electric Manufacturing Ltd, Secretary of State for Trade and Industry v Golby* [2005] EWHC 3345 (Ch). A defendant's unfitness is determined primarily by reference to his acts and omissions, not by the consequences of those acts and omissions, although such consequences may have a bearing in deciding whether a person is unfit and will be important in determining the period for which the defendant should be disqualified. This position is expressly recognised by s. 12C(1)(a) of, and para. 4 of Schedule 1 to, the CDDA 1986, which require the court, in determining unfitness and deciding the period for which a disqualification order should be made, to take into account both the nature and extent of any loss or harm caused as a result of the acts or omissions of the defendant and also "any potential loss or harm which could have been caused, by the person's conduct in relation to a company … ."

76. Nonetheless, in the present case, the Claimant relies upon several matters which he says demonstrate that the Joint Liquidators were severely impeded in carrying out their functions. Most notably that they say that they have not been able to ascertain or verify:

(a) the number of franchisees that signed up with the Company;

(b) How expected turnover and profit figures provided to prospective franchisees was calculated

(c) Whether funds totalling £59,853.87 allegedly spent in respect of the franchise of Fearless Hawks Ltd were used for the purposes stated by the Defendant.

(d) Whether funds totalling £40,700 allegedly loaned to Fearless Hawks were actually used for this purpose.

(e) Whether goods for which funds totalling £67,247.73 were received from finance companies providing loans to a franchisee were actually purchased by the company, or the whereabouts of those goods if they were purchased.

77. The Defendant sought to provide an explanation about the information which the Claimant stated could not be ascertained from the accounting records of the Company. Whether or not that explanation was correct – and it is plain to me that it was not – the crucial point here is that the information should have been included in, and ascertainable from, the accounting records of the Company. That simply was not possible and nowhere in his written or oral evidence is the Defendant able to say where in those records, or in the records delivered to the Joint Liquidators, that information can be ascertained. On the basis that his knowledge about how and who kept the accounting records of the Company was so limited (in fact, almost non-existent), that is hardly surprising.

78. It is not necessary, in the circumstances, for me to explain why I do not accept the explanation provided by the Defendant about the

matters referred to in the preceding two paragraphs. However, I do so briefly.

79. Paragraphs 32-42 of Mr Gitner's first affirmation set out the Claimant's position concerning the number of franchises. The Defendant sought to respond to this in his first affirmation which does not answer any of the points made by Mr Gitner in that affirmation or Ms Marshall in hers.

80. Whether the Defendant has subsequently been able to prove that there were 24 franchisees as he claimed (by reference to the documents at pages 724 onwards of the trial bundle) or fewer than that number (as appears to be the case), the point that the Claimant makes – which I accept – is that there is no proper information concerning how the expected turnover and profit figures provided to prospective franchisees was calculated.

81. Nor could the Defendant explain whether (and how it could be demonstrated by him from the documents included in the trial bundle) that funds totalling £59,853.47 allegedly spent by the Company in respect of the franchise of Fearless Hawks Ltd were used for the purposes stated by the Defendant.

82. Page 1046 of the trial bundle set outs the payments made from Fearless Hawks Ltd to the Company. In addition, pages 298-302 of the trial bundle contain a spreadsheet and other documents which were sent by the Company to Fearless Hawks Ltd's solicitors. However, no information is available in the documents included in the trial bundle about how funds totalling £59,853.87 allegedly spent in respect of the fitting out of the Fearless Hawks shop were utilised. The Defendant provided a convoluted explanation about this, essentially reiterating that the funds had been spent towards the Fearless Hawks franchise but could not support what he was saying by reference to the documents included in the trial bundle, including the documents produced on the day of trial. Nor could he provide any explanation about the loan of £40,700 which the Company is alleged to have made

to Fearless Hawks Ltd, other than to say that the agreement for the loan was not reduced to writing. He sought to refer to the payments made by Sahara and Rome Ltd to Fearless Hawks Ltd (see page 1057 and 1058 of the trial bundle) but that was made by a separate company and, in any event, only accounts for some of the payments made to Fearless Hawkes Ltd.

83. The Company received the sum of £67,243.73 from four finance companies for goods allegedly supplied by it to Crocsnacks Ltd, one of the franchisees. None of the documents included in the trial bundle include invoices for the purchase of any of the items specified in the invoices. Mr Patel says that that the Company "never purchased equipment for the [Crocsnacks franchise]. Javazzi took the money, and I do not believe that goods for which funds totalling £67,247.73 were received from finance companies providing loans to a franchisee were ever purchased. No goods or equipment ever arrived. I understand that Mr Rajgor has made allegations, without evidence, that the director of Crocsnacks, Mr Kundalia, and I somehow removed the goods or equipment. This is plainly not true, as also confirmed by Mr Kundalia, and there is no evidence that goods or equipment were ever ordered, delivered, fitted or removed. The store was repossessed, which was not in Mr Kundalia's interests, and no equipment had been installed in the store."

84. Whether or not Mr Patel's statement is correct, the plain fact is that how this amount was spent is still unexplained.

85. The Defendant's explanation about this was inconsistent and incomprehensible. The Defendant initially stated (in his 7 June 2017 interview with the Insolvency Service) that he had bought the goods in the UK and in India and that he would find the receipts for them. He also said that some of the items had been stored in the upstairs of the Company's Crawley premises and some at the Company's head office. However, in his email dated 14 June 2017 to the Insolvency Service,

he said that the items had been delivered to Mr Kundalia of Crocsnacks at the site of the proposed finance. In his email dated 14 July 2017, the Defendant attached an image of an invoice dated 25 March 2013 with a delivery address for the Company's address in Crawley. However, neither the amount of the invoice nor the items shown on the invoice match the items shown on the invoices issued by the Company to the finance companies. Nor in his lengthy and convoluted explanation was he able to provide an explanation for this discrepancy.

86. It is clear from what I have said about that the misconduct specified in the charge – and the consequences of the misconduct relied upon by the Claimant (though not required to be demonstrated by the Claimant) – are fully made out against the Defendant.

IS UNFITNESS AGAINST THE DEFENDANT PROVED?

87. It is plain that the misconduct for which the Defendant is guilty fully warrants a finding of unfitness being made against him.

88. I have already referred to how important it is for a company to keep, maintain and preserve adequate accounting records and to deliver them up to an office-holder when the company goes into liquidation, administration or (now rarely the case) has an administrative receiver appointed in relation to it. The requirement to do so is, of course, statutory. However, the importance of the requirement can never be overstated, as is clear from the authorities, particularly the decision in *Arif*. It is no surprise, therefore, that even a single allegation of a failure to keep, maintain, preserve or deliver up accounting records will be sufficient for a finding of unfitness to be made against a director, particularly where, as is the position in the present case, it has been demonstrated to have seriously or significantly impeded an office-holder from ascertaining the true state of affairs of a company: see, for example, *Re Commercial Driving Services*

Limited, Official Receiver v Elliott and another (29 November 2007, unreported), His Honour Judge Roger Kaye QC, sitting as a Judge of the High Court.

89. In the present case, the matters to which I have made reference above are, by their own, sufficient for a finding of unfitness to be made against the Defendant. It gives the Defendant no defence to the Claim to demonstrate (even if he could, which he is unable to in the present case) that he left the keeping, maintaining and preservation of the accountant records to another individual in the Company. This line of defence is only likely to exculpate a director from a finding of unfitness if the Company puts appropriate accounting systems in place, employs a competent book-keeper to make sure that the accounting records are adequate and kept up-to-date and the director ensures that the bookkeeper does their job and regularly undertakes the supervision and monitoring of the activities of the bookkeeper. Even in such a case, it still remains the duty of the director to provide the bookkeeper with information to enable the records to be maintained accurately. If the director fails to provide adequate information and explanations, and there is no proper excuse for his failure, he remains responsible for the deficiencies in the accounting system even after the appointment of the person designated to maintain the records.

90. But there are several serious aggravating factors, to which I refer below, about the Defendant's conduct which amply warrants a finding of unfitness being made against him. The Defendant had no idea who in the Company was responsible for the accounting records to be maintained accurately and up-to-date. He was content to blame everyone in the Company for letting him down. Even if it could be demonstrated, as the Defendant suggested, either that Mr Patel or Ms Subedi (or Mr Thind) was responsible to do this, he should have ensured that

he properly supervised and monitored the carrying out by them of those functions, particularly as he was the sole director of the Company. He did not. Indeed, what is really concerning about his conduct was the fact that he did not even know what proper books of account were and why it was important to maintain records of purchases and sales made by the Company and payments made and received by the Company.

91. Nor is there any substance in the Defendant's assertion that the accounting records delivered to the Joint Liquidators were incomplete because Mr Patel had removed (or, as he put it "stolen") them from the Company's premises. He refers to Mr Patel having removed certain documents from the Company's premises but even if that is true – which I do not consider it is – it might explain why some documents relating to certain franchisees were missing but would not explain what happened to the rest of the documents which the Joint Liquidators had indicated they needed to be delivered up to them. Nor would it explain why the Company could not have obtained duplicates of those documents or the absence of relevant records after Mr Patel had left the Company.

92. A finding of unfitness against a director will be readily made even where the books of account of a company have not been written up for a short period of time. In *Re Firedart Ltd* [1994] 2 BCLC 340, the cash book, sales and purchase day books and sales and purchase ledgers of a company had not been written up for a period of five weeks prior to liquidation, and it was held as a consequence that none of the requirements of s. 221(2) of the Companies Act 1985 (now s. 386 of the Companies Act 2006) had been met. As a result of the company's sales and purchase ledgers not being fully written up to date, it was difficult for the liquidator to clarify the amounts due to creditors or owed to the company. Moreover, it was not possible to verify and explain all of the company's expenditure due to a lack of

supporting vouchers and explanations. Although a number of allegations against the defendant were established, the failure to keep proper accounting records was one of three separate allegations of misconduct which were regarded by Arden J (as she then was) as matters which would lead her to the conclusion that the defendant was unfit to be a director. With specific reference to that allegation, Arden J stated (at 352c-d):

> "When directors do not maintain accounting records in accordance with the very specific requirements of s. 221 of the CA 1985, they cannot know their company's financial position with accuracy. There is therefore a risk that the situation is much worse than they know and that creditors will suffer in consequence. Directors who permit this situation to arise must expect the conclusion to be drawn in an appropriate case that they are in consequence not fit to be concerned in the management of a company."

93. This was what Mr Buckingham was alluding to when he asked the Defendant whether the Defendant, as sole director of the Company, regularly monitored the financial position of the Company by considering the management accounts relating to the Company on a regular basis, and to act upon any information that is contained in them. Although it is not part of a director's statutory or other duty to produce or procure a company to produce regular management accounts, nonetheless it is good practice for him to do so in order that he can keep abreast of all financial matters relating to the company on a regular basis. The Defendant – as he continuously sought to do with any question which was asked that he struggled to answer – sought to avoid answering it but then said that his staff provided him with weekly reports about what was happening in the Company, particularly as he was abroad for a lot of time. The Defendant was able to refer to one or two of these weekly reports: see pages 977 onwards of the trial bundle. They do not provide anything like the information that one would see in a set of management accounts. When asked how this could provide him an overview of how well the Company was doing, he disingenuously suggested that he would have a rough idea of the likely turnover of the Company by

reference to how many new franchisees the Company had signed up and would multiply that by the franchise fee that the Company would expect to receive from those franchisees. This would enable him to make some sort of forecast about the Company's expected turnover, subsequently stating that he relied upon the Company's accountants "for all of that".

94. A failure to maintain proper books and records may be regarded as indicative of a serious lack of care with regard to the management of the company as a whole and this is clear from the Defendant's attitude to the charge brought against him: there was no appreciation on his part about why it was important for the Company to maintain proper books of account; no serious attempt made by him to ensure that he employed a suitable person to maintain those books of account and keep them up-to-date; no concept of how important it was for him to supervise and monitor the person employed to undertake that task; no willingness on his part to accept responsibility for the failure of the Company to comply with its statutory duty; no thought given by him to periodically consider the financial state of the Company by extracting (or causing to be extracted) management accounts of the Company; no evidence of what discussions he had with his accountant (Mr Thind) about how well the Company was doing; and every attempt being made by him to excuse his misconduct (and blaming others) when confronted with how badly he had conducted the affairs of the Company which led to the demise of the Company.

95. Looking at the relevant Schedule 1 guidelines, it seems to me to be clear that each of the following are engaged:

- para. 1: the Defendant is solely responsible for the causes of the contravention by the Company of the requirements of s. 386. of the Companies Act 2006.

- para. 2: the Defendant is solely responsible for the causes of the Company becoming insolvent.

- para. 4: the consequences of the Defendant's misconduct are all too clear to see by reference to the inability of the Joint Liquidators to verify the information set out in the charge.

- para. 6: in the context of the Claim, the effect of s. 387 of the Companies Act 2006 is to place the responsibility for the breach of s. 386 solely on the Defendant.

96. The Defendant is plainly unfit to be involved in the management of a company.

PERIOD OF DISQUALIFICATION

97. It follows from the above that the Defendant should be disqualified for a period of not less than 2 years and not more than 15 years.

98. On behalf of the Claimant, Mr Buckingham asserts that the conduct of the Defendant falls towards the midrange of the middle *Sevenoaks* (i.e., *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164, claiming (correctly in my view) that this is an "extraordinary case", meaning essentially that the Defendant had no concept of the importance of keeping proper accounting records and no appreciation whatsoever of his responsibilities as a (in fact, the sole) director of the Company to ensure that the Company kept proper books of account. The failure to do so or to deliver them up has seriously impeded the Joint Liquidators in undertaking their statutory functions. He suggests that the Defendant should be disqualified for a period of 7 years.

99. I have already referred to the aggravating features of the Defendant's conduct. It is not necessary for me to repeat them. The only mitigating circumstance that I thought might apply was the possible ill-health of the Defendant, which in *Re Westmid Packing Ltd* [1998] 2 All ER 124 was considered to be a factor that the court could take into account in mitigation.

100. I, of course, sympathise with the Defendant's loss of vision in one eye as a result of the several retinal detachments he has had to have to that eye. However, this is an insufficient mitigation to reduce the period for which he should be disqualified.

101. The approach of the court to the fixing of the period of disqualification in a case like this is summarised in *Mithani: Directors Disqualification*, at III[1492] *et seq*. The two cases cited in the commentary contained in those paragraphs, which may be used as a comparator in the present case, are *Official Receiver v Hubbard* (26 June 2007, unreported) and *Re Commercial Driving Services Limited, Official Receiver v Elliott and another* (see above). In the former case, a single allegation of failure to maintain and/or preserve and/or deliver up adequate accounting records resulted in the imposition of a disqualification period of 9 years. This was because the Official Receiver had, *inter alia*, been unable to verify the exact nature and extent of the company's liabilities, establish the remuneration the defendant received, ascertain the true value of the company's assets, ascertain the cause of the company's failure and verify the exact trading activities of the company. In the latter case, a disqualification order for a period of 7 years was made against a defendant (in his absence) where the failure to maintain and/or preserve and/or deliver up accounting records in respect of two companies had made the task of the Official Receiver of obtaining information relating to the affairs of the companies difficult.

102. I am not bound by any suggestion made by the Claimant about the proposed period of disqualification. I can make a disqualification order for a lengthier or shorter period than the period suggested by the Defendant. My own view, after I had heard the Defendant's evidence, was to disqualify him towards the top of the middle *Sevenoaks* bracket, i.e., a period of 8 or 8 ½ years. However, having thought about this carefully, I consider that the period of disqualification should be 7 years, as suggested by the Claimant.

103. A disqualification order for a period of 7 years will, therefore, be made against the Defendant.

MATTERS ARISING

104. Issues relating to costs and any other matter arising from this judgment (such as the date of the commencement of the period of disqualification) may be dealt with when judgment is handed down. I will ask my clerk to list the matter for a hearing, with an estimated length of 30 minutes. The hearing may take place remotely.

105. In due course, it will be necessary for Mr Buckingham to lodge an approved minute of an order to reflect the orders I have made. However, that can await the further hearing when I hope it will be possible for all ancillary matters to be determined.

106. I express my deep and sincere gratitude to Mr Buckingham and Mr and Mrs Rajgor for their assistance and cooperation throughout the trial.