Neutral Citation Number [2020] EWHC 768 (Ch)

CR-2006-000006

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF SOIRAM LIMITED AND MEZZANINE GROUP PLC
AND IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986

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

Date: 03/04/2020

Before :

ICC JUDGE BARBER

- -

Between :

MARIOS GEORGALLIDES — **Applicant**

– and –

(1) THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY — **Respondent**

- -

Catherine Doran (instructed by DMH Stallard) for the Applicant
Tiran Nersessian (instructed by Womble Bond Dickinson**)** for the Respondent

Hearing date: 9, 10 and 11 December 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

ICC Judge Barber

1. This is the hearing of Mr Georgallides' application for an order

(1) that the seven year disqualification undertaking accepted on 16 February 2010 by the Respondent ('the SoS') from the Applicant in respect of his conduct as a director of Mezzanine Group Plc ('Mezzanine') and as sole director of Soiram Limited ('Soiram') ('the first undertaking') be rescinded pursuant to the court's inherent jurisdiction with effect from 16 February 2010 or such other date as the court deems appropriate;

(2) that the twelve year disqualification undertaking accepted on 18 November 2015 by the Respondent from the Applicant in respect of his conduct as a shadow or de facto director of Eastzest Limited ('Eastzest') ('the second undertaking') be rescinded pursuant to the court's inherent jurisdiction or the period reduced under Section 8A of the Company Directors Disqualification Act 1986 ('CDDA'); and

(3) that the Applicant be granted permission pursuant to s.216(3) of the Insolvency Act 1986 to use a prohibited name 'Nozomi', such permission to take effect from 23 February 2006 or such other date as the court thinks appropriate.

Overview

2. The application raises a novel issue as to the application of the maxim "fraud unravels all" to disqualification undertakings given pursuant to CDDA and to prohibited names restrictions under s.216 IA 1986.

3. The Applicant maintains that Mezzanine and Soiram were victims of fraud at the hands of the 'highly leveraged' division of the Reading branch of Halifax Bank of Scotland ('HBOS'). The head of the Reading branch, Mr Lyndon Scourfield, and a former banker, Mr David Mills, conspired with a number of associates to take control of a number of distressed businesses with a view to dishonest personal gain. Mezzanine and Soiram both banked at the Reading branch of HBOS.

4. Mr Mills swore an affidavit in support of the SoS's case in the first disqualification proceedings against the Applicant issued on 23 November 2006. Two individuals who often worked with Messrs Scourfield and Mills, Mr Alessi and an accountant called Mr Cohen, also swore affidavits in support of the SoS's case in those proceedings. The Applicant maintains that these affidavits influenced his decision to offer the first undertaking.

5. The first undertaking has now expired. Nonetheless, the Applicant wants the first undertaking rescinded with retrospective effect, for 'fraud'. I will return in due course to how he puts his case on that.

6. The second undertaking is in part based upon breach of the first undertaking. The Applicant contends that, if the first undertaking is rescinded for fraud, he should be permitted to resile from his agreement that he acted in breach of the first undertaking, and that the second undertaking should be rescinded in its entirety. As an alternative, he seeks an order that the period of the second undertaking be reduced under s.8A CDDA to the four years of it already served.

7. In relation to his s.216 application, the Applicant seeks retrospective permission to use a prohibited name, 'Nozomi'. He contends that, but for the fraud of certain individuals, the company Tropeo Knightsbridge Limited ('Tropeo') (which traded as 'Nozomi')

would not have become insolvent, and Nozomi would not have become a prohibited name. He maintains that 'because Tropeo's insolvency was caused by the fraudsters' non-payment of £500,000 it is not right that the Applicant should have been subsequently prohibited from acting in the management of Nozomi, and the court ought to relieve that injustice by granting permission': Applicant's skeleton argument, paragraph 64. In the alternative, the Applicant sought permission to use the prohibited name 'Nozomi' from such date as the court thinks fit.

8. The SoS opposes the application. Whilst the SoS accepts that numerous frauds were committed through the HBOS Reading branch, she contends that there is no proper evidential or legal basis for the same to lead to the rescission of the undertakings or the granting of retrospective permission to the Applicant for use of a prohibited name.

Preliminary Issue ruling

9. On 23 November 2017, Mr Deputy Registrar Baister heard the following preliminary issues:

(1) Whether the court had jurisdiction to order that the first and second undertakings be rescinded or varied with retrospective effect; and

(2) Whether the court had jurisdiction to give permission for the use of a prohibited name with retrospective effect.

10. On 15 December 2017, the learned deputy ruled (1) that the court had no jurisdiction under s.8A CDDA or rule 12.59 IR 2016 to rescind or vary disqualifications undertakings with retrospective effect but that (2) in cases of fraud, the court enjoyed an inherent jurisdiction to rescind undertakings with retrospective effect and to grant retrospective permission to use a prohibited name. He further directed that 'the matter' be listed for trial. No directions for pleadings were sought or given.

Background

11. The Applicant was called to the Bar in 1980 but after a brief period in practice decided to join the family business, working in nightclubs and restaurants in France. The family business was sold in 1989/90. Following this, in 1991, the Applicant and his brother acquired a chain of nightclubs in the UK through a company known as First Continental Limited. First Continental Limited eventually went into administration. Some of its assets were sold to Pembertons Group Plc. By 1998, the Applicant and his brother had gone their separate ways.

12. On 4 December 1998, the Applicant was appointed a director of Pembertons Group Plc, which owned and operated wine bars and restaurants. The company changed its name to Mezzanine Group Plc ('Mezzanine') on 6 November 1999. On 3 December 1999, the Applicant was appointed as its chief executive officer. Under the Applicant's stewardship, Mezzanine made various acquisitions including several nightclubs and the restaurant known as 'Smollensky's on the Strand'.

13. The Applicant's plans for Mezzanine entailed expenditure funded, in significant part, by loans from HBOS.

14. By early 2000, Mezzanine's loan book exceeded £5 million. As this was above its existing bank manager's limit, Mezzanine's account was transferred to the highly leveraged assets division of HBOS, based in Reading and run by Mr Lyndon Scourfield.

15. In or around November/December 2000, the Applicant met with Mr Scourfield of HBOS and applied for a loan facility of £10.5m. This was approved in June 2001 at an interest rate of 1.5% above the Bank of England base rate.

16. In the second half of 2001, the foot-and-mouth outbreak and the terrorist attacks of 11 September had an adverse effect on business. This, coupled with anticipated costs for a new restaurant, led to Mezzanine applying for a further loan from HBOS. HBOS did not grant the increased loan facility immediately. Instead, it commissioned a report by Smith & Williamson. The Smith & Williamson report reached adverse conclusions about prospects for Mezzanine. The Applicant disagreed with the report, however, and, following further discussions, Mr Scourfield agreed to increase Mezzanine's loan facility to £12 million.

17. In January 2002, Mezzanine required further funding. Mr Scourfield agreed, but this time only on condition that Mr Mills was appointed a non-executive director of Mezzanine. Mr Mills was a former banker who claimed to specialise in assisting highly leveraged companies in need of additional capital. Mr Mills was appointed as a de jure director of Mezzanine on 27 February 2002 and a monthly retainer for consultancy services was paid to his company, Quayside Consultants Ltd ('Quayside'). Mezzanine's loan facility with HBOS was increased to £16m.

18. In the summer of 2002, a problem emerged with regard to the tax treatment of remuneration paid to the Applicant by Mezzanine. Both the Applicant and Mezzanine were potentially in the firing line for unpaid PAYE and NIC in respect of the Applicant's remuneration for three tax years totalling £605,135 ('the PAYE issue'). Mezzanine initially deferred action to allow the Applicant time to consult his accountants and provide further information.

19. In or about November 2002, following a deterioration of relations between members of the Mezzanine board, the Applicant decided that he wished to purchase one of Mezzanine's nightclubs, 'Attica', through a corporate vehicle known as Soiram Limited, and focus his energies on that. Negotiations as to the terms of the purchase ensued.

20. By February 2003, the Special Compliance Office of the Inland Revenue (the 'SCO') had commenced an enquiry into the PAYE issue. In or by February 2003, Mezzanine instructed WJB Chilterns to liaise with the SCO and to undertake a detailed review of Mezzanine's operation of the PAYE/NIC system to confirm the issues that needed to be addressed. In the interim, it was agreed that the Applicant, and one other director also affected, Mr Sutherland, should provide indemnities to Mezzanine to cover its potential exposure. In the Applicant's case, a provisional cap of £150,000 was agreed.

21. On 12 March 2003 the Applicant ceased to be a de jure director of Mezzanine.

22. On 26 March 2003, the Applicant's indemnity to Mezzanine was revised to £250,000 and a deed of indemnity in that sum was executed by the Applicant.

23. On the same day (26 March 2003), the Applicant was appointed as sole de jure director of Soiram and became its sole shareholder. His wife, Mrs Kalliopy Georgallides, was appointed as Company Secretary.

24. On 27 March 2003, Attica was purchased by Soiram for £3.4 million through a facility provided by HBOS. Soiram commenced trading on or about 28 March 2003.

25. The inaugural meeting of Soiram took place on 20 June 2003. Mr Mills attended and was described in the minutes as a 'non-executive director' of Soiram. Unlike Mezzanine, however, at no stage was he appointed a de jure director of Soiram.

26. At the request of Mr Scourfield and Mr Mills, the accountancy firm Brett Adams, run by Mr Jonathan Cohen, were appointed as Soiram's accountants. Brett Adams prepared management accounts for the period ending June 2003 and for August 2003 and provided copies of the same to both the Applicant and HBOS. The management accounts for the period ended 31 August 2003 showed PAYE arrears of £52,996 and VAT arrears of £22,192.

27. In October 2003, Ms Shirley Smith started working as a freelance book-keeper for Soiram. She had no prior involvement with HBOS or Mr Mills.

28. In November 2003, HBOS and Mr Mills introduced a Mr Marcello Alessi to Soiram. Mr Alessi worked as a self-employed consultant for Quayside. His expertise was in bars and clubs.

29. According to the Applicant's affirmation of 14 May 2007 (at para 24), Mr Alessi's initial role (as presented to the Applicant at the time), was 'to check the books of account and financial status of Attica and report back to Mr Mills (and from Mr Mills to the Bank)' but 'by the end of January 2004', Mr Alessi 'began to have a more active role in dealing with the 'back office' requirements of the business'.

30. Quite how 'active' Mr Alessi's role became was a matter in issue in the first disqualification proceedings. For present purposes, it was common ground that the functions undertaken by him included the preparation of cashflow forecasts, working from projected sales figures provided by the Applicant and details of anticipated expenditure provided by Ms Shirley Smith, the book-keeper. He also assisted Ms Smith in the preparation of monthly management accounts.

31. In February 2004, Brett Adams, Soiram's accountants, were asked by HBOS to carry out a review of Soiram's financial position. Brett Adams prepared management accounts for the period ended 31 January 2004 and thereafter a report dated 26 February 2004, which included the January 2004 management accounts. The report of 26 February 2004, highlighted, among other things, the following:

(1) an overstatement of profits of £86,000 for the three months ending 31 December 2003;

(2) unpaid VAT of £30,000 for the quarter ended 31 December 2003;

(3) unpaid PAYE and NIC for the entire period of trading from March 2003 to 31 January 2004 of approximately £115,000;

(4) severe creditor strain;

(5) cash payments to suppliers at time of delivery, drawn from unbanked takings, in breach of internal control procedures; and

(6) the Applicant's 'debit loan account' with Soiram, which Brett Adams advised would either have to be repaid by the Applicant or offset against an award of remuneration in his favour.

32. Brett Adams' report of 26 February 2004 concluded that 'Soiram is in breach of all its financial covenants as set out in the facility letter dated 26 March 2003'. The report also stated that Soiram would need an overdraft facility of £550,000 for the next six months and 'stringent controls' on the managing director 'in order to control costs'.

33. The question whether the Applicant was shown the Brett Adams report of 26 February 2004 was a matter in issue in the first disqualification proceedings. As the matter did not go to trial, this issue was never resolved.

34. Following receipt of the Brett Adams report, HBOS decided to continue its support of Soiram. By letter dated 11 March 2004, Mr Scourfield of HBOS wrote to the Applicant stating as follows:

> 'We confirm that the Bank of Scotland will provide sufficient funding facilities to [Soiram], in line with cash flow forecasts submitted, to enable it to pay its creditors as and when they fall due for a period of at least 12 months from the date of this letter.
>
> Said overdraft facilities are on demand and subject to terms and conditions agreed with the company. Loan facilities are subject to terms and conditions agreed with the company.'

35. In or around March 2004, HBOS approved an overdraft facility of £550,000 for Soiram, as recommended by the report of 26 February 2004. The facility documentation was not in evidence.

36. Cashflow difficulties continued nonetheless. In March 2004, a 'time to pay' arrangement was agreed between Soiram and HMCE in relation to VAT arrears of £31,070.05.

37. By 19 April 2004, Soiram was exceeding the agreed overdraft limit of £550,000, with the result that a number of cheques and other payments were being dishonoured. Mr Alessi and HBOS exchanged emails on this issue over the period 16-19 April 2004.

38. In the meantime, PAYE/NIC arrears continued to mount. By letter dated 15 April 2004, Inland Revenue wrote to Soiram with regard to PAYE/NIC arrears of £150,107 for the 11 months ending 5 February 2004. The letter was faxed by Ms Shirley Smith the book-keeper to Mr Cohen of Brett Adams on 21 April 2004. On 27 April 2004 Mr Cohen wrote to the Inland Revenue proposing a time to pay arrangement. This was refused. By letter dated 28 May 2004, the Inland Revenue sought payment in full, threatening enforcement action.

39. In May 2004, a meeting took place between an insolvency practitioner, Mr Paul Ellison of Hurst Morrison, Mr Mills, Mr Alessi, Mr Cohen and Mr Steven Davidson (of Brett Adams) to consider the options for Soiram, with a view to Mr Ellison preparing a report for HBOS, which held a fixed and floating charge over the assets of Soiram. The Applicant was not invited to the meeting. The Applicant maintains that his exclusion from this meeting was significant. Subsequent correspondence suggests that the main objective of the meeting was to explore options for the Bank as debenture holder.

40. As summarised in a letter from Brett Adams to Mr Ellison dated 17 May 2004, the options considered at the meeting were (1) to keep the business of Soiram as it was and to agree terms with the Inland Revenue; (2) to attempt a CVA; (3) to enter into creditors' voluntary liquidation and arrange the purchase of Attica by a new entity; or (4) to enter into administration and arrange the purchase of Attica by a new entity. The letter noted that one of the advantages of selling the business to a new entity was that the proceeds of sale 'could be repatriated to the bank… under the existing debenture'.

41. By letter dated 24 May 2004 from Mr Ellison of Hurst Morrison to Mr Davidson of Brett Adams, Mr Ellison advised on each of the four options outlined in Brett Adams' letter of 17 May 2004. Mr Ellison agreed that a sale was 'the most desirable way forward' and recommended that this be pursued via administration, to enable continued trading pending negotiations for the assignment of the lease and protection from forfeiture in the interim.

42. Thereafter, it appears that in or about mid-2004, HBOS proposed a sale of the business to a Mr Lyons. Mr Lyons was a regular patron of Attica and had been introduced by the Applicant to Messrs Mills and Scourfield socially during one of their visits to the club. The Applicant maintains that he had been taking Christmas bookings for Attica and wished to trade on with a view to realising profits for Soiram, but that Mr Mills and Scourfield wished to press on with a sale of the business to Mr Lyons (Applicant (1) para 27-28). He says that he was 'persuaded by Mr Scourfield and Mr Mills to step aside' (Applicant (1) para 28).

43. By heads of agreement dated 20 October 2004, expressed to be made between the Applicant and HBOS at the request of Mr Lyons, the following terms (inter alia) were agreed:

    (1) the Applicant agreed to complete the transfer of the business and assets of Soiram to a newly incorporated company specified by HBOS as soon as possible, to appoint an administrator if necessary, and to resign as a director '*immediately following the completion of the transfer*';

    (2) the Applicant agreed to act as a self-employed consultant providing services to Quayside, Mr Mills' company, in consideration of payment of £120,000 by Quayside in two tranches of £60,000 payable on 27 October and 27 November 2004 respectively; and

    (3) in consideration of the commitments undertaken by the Applicant by the heads of agreement, HBOS agreed to release a personal guarantee dated 26 March 2003 given by the Applicant to HBOS in respect of Soiram's liabilities on or around 2 January 2004.

44. Attached to the heads of agreement were inter alia

(1) a letter dated 20 October 2004 signed by the Applicant addressed to 'the Landlord and Insurers', confirming that Soiram 'consents and agrees that the management and operation of [Soiram] and [the leased premises] shall be conducted by a company owned by Darren Lyons from the date of this letter';

(2) documents consenting to the transfer of various licences relating to Attica;

(3) a letter of resignation dated 20 October 2004 signed by the Applicant confirming his resignation from office as a director and employee of Soiram;

(4) a draft letter of resignation for Mrs Georgallides to sign; and

(5) a waiver by the Applicant of all claims against HBOS.

45. In the event, Mr Lyons did not come up with the money. The Applicant maintains that Mr Mills and Mr Scourfield then approached him and asked him 'to return to the business', an offer which he says that he declined.

46. In reality however, at all material times up to and including Soiram's subsequent entry into administrative receivership, the Applicant had remained sole registered director of Soiram.

47. On 28 September 2004, Mezzanine was placed into administration following the presentation of a winding up petition in August 2004.

48. Shortly thereafter, on 24 November 2004, Administrative Receivers were appointed by HBOS in respect of Soiram. For some time thereafter, Soiram's main asset (its nightclub, Attica), continued to be run by the Administrative Receivers via Mr Mill's company, Quayside.

The first disqualification proceedings

49. The first disqualification proceedings against the Applicant were issued on 23 November 2006, supported by the first affirmation of Mark Bruce dated 20 November 2006. There were initially three grounds of unfitness, all of which related to Soiram. The fourth ground, which related to Mezzanine and was supported by the second affirmation of Mr Bruce dated 20 September 2007, was added with the leave of the court at a later stage.

50. The four grounds were as follows:

(1) causing Soiram to trade to the detriment of the Inland Revenue over the period 28 March 2003 to 24 November 2004;

(2) causing Soiram to make payments in the aggregate sum of £206,692.35 to the Applicant's benefit or indirect benefit and/or to the detriment of the Inland Revenue over the same period;

(3) causing Soiram to misuse its bank facilities by incurring an aggregate of £6440 in bank charges; and

(4) causing and/or allowing Mezzanine to fail to account to the Inland Revenue for PAYE/NIC in relation to the Applicant's remuneration for the financial years ending June 2000, 2001 and 2002 for the total sum of £605,135.

Initial SoS evidence: Trading to the detriment of the Inland Revenue

51. In relation to the first ground of unfitness, the first and second affirmations of Mr Bruce included

(1) evidence that the Applicant was sole de jure director of Soiram;

(2) evidence that the Applicant was sole authorised signatory on Soiram's bank account; and

(3) a monthly analysis of Soiram's bank account from 28 March 2003 to 24 November 2004, which demonstrated that, while Soiram paid out £9.3m and received £8.07m over the relevant period, only £22,366.85 was paid to Inland Revenue.

52. The SoS evidence showed a clear sustained pattern of non-payment (or significant underpayment) of the Inland Revenue, on a month by month basis, from commencement of trading (March 2003) onwards, culminating in outstanding PAYE/NIC of £278,919.82 (not including interest and charges) at 24 November 2004: Bruce (1) para 74.

53. In contrast, a review of Soiram's individual ledger accounts summarised in Mr Bruce's first affirmation indicated that 'the vast majority' of Soiram's suppliers received 'regular payments': Bruce(1) para 88.

54. The SoS maintained that 'the fact that so little was paid to Inland Revenue compared to other payments out of the account indicated that Inland Revenue were treated detrimentally, with other creditors receiving payments in preference': Bruce (1) 20 November 2006, paras 60-62.

Initial defence: Trading to the detriment of the Inland Revenue

55. The Applicant filed evidence in answer, including his first and second affirmations dated 14 May 2007 and 25 January 2008 respectively.

56. As set out in his first affirmation, the Applicant's defence was that he did not 'cause' Soiram to trade to the detriment of the Inland Revenue, because the decisions as to which creditors to pay were being made by HBOS, Mr Mills, Mr Scourfield, Mr Cohen, Mr Alessi or combinations of the same.

57. The Applicant's first affirmation dated 14 May 2007 included the following assertions:

(1) that from late January/early February 2004 (the year stated is '2003' but in context it is clearly referring to 2004), HBOS 'took a much more direct responsibility for dealing with Soiram's creditors, and this role was effectively removed from my control' (para 23);

(2) that by the end of January 2004, Mr Alessi took on a more active 'back office' function (at para 24), continuing:

> 'Whereas I concentrated on the operational side of the business, he [Mr Alessi] became directly responsible for dealing with suppliers and other creditors so as to enable me to concentrate on running the Club and making it a success';

(3) that Mr Alessi would prepare management accounts and send them to Mr Cohen of Brett Adams, adding (at para 24):

> 'Mr Cohen of Brett Adams then checked that the sums were due and then instructions would be given to the Bank, to make payment';

(4) that 'from January 2004 onwards Mr Alessi himself was authorised by the Bank to make payments by BACS and CHAPS and I also believe that he was given authority (without a formal Bank mandate) to sign cheques as well' (para 26);

(5) that Mr Scourfield and Mr Mills knew that the payments made up to the end of January 2004 were less than the actual amounts required to settle Soiram's liabilities for PAYE and NIC (para 23), but that, (at para 27):

> 'Under Mr Alessi['s] direction Soiram ceased to make any further payments to Inland Revenue from the end of January 2004 onwards and the Bank appears to have concentrated on reducing its VAT liability',

adding:

> 'I believe it was the Bank's policy to pay the VAT liability as it did not want to risk the possibility of HM Customs & Excise issuing a Winding Up Petition for the non-payment of VAT… I was not directly responsible for that change of direction; Mr Scourfield, Mr Mills and Mr Alessi were effectively directing which creditors should be paid…'

(6) that '[a]s to creditors, and how they were dealt with, this was a matter which Mr Alessi was responsible for dealing with in conjunction with Mr Mills and the Bank' (para 34);

(7) that '[f]rom the time Mr Alessi became responsible for dealing with the creditors of the company, the Bank could (or indeed should) have chosen to pay PAYE/NIC and so avoided interest and charges; it chose, however, to pay the suppliers and VAT so as to keep the company 'solvent' and to enable it to continue with its operation (para 39(1));

(8) that 'from January 2004 until the appointment of the Administrative Receivers Mr Alessi, through the Bank and Mr Mills, was controlling the payment of creditors and… the Bank and Mr Alessi must have decided that they would pay the VAT debt and suppliers rather than Inland Revenue' (para 40);

58. The Applicant further maintained by his first affirmation (at para 25) that he was

> 'never consulted by the staff concerning any problem in relation to [Inland] Revenue'
>
> and that he
>
> 'was not aware that [Soiram was] under any pressure in relation to PAYE or NIC'.

59. At paragraph 40, he added: 'Although I was aware of the company's cash flow problems at no point was I consulted as to which creditors would be paid'.

60. He maintained that had he been allowed to trade Soiram through the December 2004/January 2005 period, substantial profits would have been made so as to enable Soiram to settle its indebtedness to Inland Revenue (first affirmation, para 39(3)).

61. By his second affirmation dated 25 January 2008, the Applicant went on to allege a conspiracy of sorts, involving Mr Scourfield, Mr Mills, Mr Alessi and Mr Cohen of Brett Adams. By way of example:

    (1) he described Mr Mills as 'Mr Scourfield's 'man'' and stated that 'Mr Alessi worked under Mr Mills' control'. He also referred to 'their desire to 'control' Mezzanine and Soiram (para 15);

    (2) he claimed that Brett Adams' report dated 26 February 2004 (summarised at paragraph 31 above), was 'prepared with the aim of enabling Mr Mills and Mr Alessi to take over the running of Soiram and to move its control (such as I had at the time) from me, to them, and, effectively, the Bank' (para 16);

    (3) he made reference to a sharing of information between Mr Alessi and the Bank in April 2004 regarding dishonoured cheques and a reference to a list of authorised payments (paras 16 and 21);

    (4) he asserted (at paragraph 23): 'I have learnt during the course of these proceedings, as well, that I am not the only person who has been treated in this manner, by Lynden Schofield and David Mills. I believe that their actions were a 'smokescreen' to seize control of the two businesses with which I was concerned.'

Initial SoS evidence: Payments to the Applicant's direct and indirect benefit and to the detriment of the Inland Revenue

62. In relation to the second ground of unfitness, the evidence initially filed by the SoS (comprising the first and second affirmations of Mr Bruce) included

    (1) wage records showing that the Applicant's wife, Mrs Georgallides, had received a total of £25,186.01 in wages between March 2003 and October 2004 and that a Ms Corro, whose job title according to the terms of her contract with Soiram was 'cleaning and laundry' but whom the Applicant described as his 'personal assistant', had received £21,854.43 in wages over the period March 2003 to October 2004;

(2) confirmation from the Administrative Receivers that they could find no evidence in Soiram's records of any services provided by either individual (Bruce (1) para 90-95);

(3) a letter from Ms Shirley Smith, Soiram's book-keeper, stating that she was not aware of any services provided to Soiram by Ms Corro and that she did not know of any services provided by Mrs Georgallides to Soiram other than dressing a Christmas tree for the company one year; and

(4) cash and bank payments made from Soiram to (or for the personal benefit of) the Applicant each month over the period 1 October 2003 to 24 November 2004 which (after adjustment) totalled £99,541.91.

63. The SoS's case was that these payments were made at a time when the Applicant 'knew or should have known that Soiram had an increasing debt to Inland Revenue culminating in outstanding PAYE and NIC of £286,106.64': Bruce (1) para 101, 108.

Initial defence: Payments to the Applicant's direct and indirect benefit and to the detriment of the Inland Revenue

64. The Applicant's defence to the second ground of unfitness was in broad terms the same as to the first; that Messrs Scourfield, Mills, Alessi and Cohen were in charge. In addition, he maintained that

(1) his wife and Mrs Corro were legitimately employed by Soiram (Applicant (1) para 31); and that

(2) any sums which he withdrew from Soiram himself were drawn against his directors' loan account with the express approval of Mr Mills and HBOS: Applicant (1) para 38.

Initial SoS evidence: causing Soiram to misuse its bank facilities

65. In relation to the third ground of unfitness, the evidence initially filed by the SoS included (1) evidence that the Applicant was the only authorised signatory on Soiram's bank account over the material period and (2) evidence of the frequency and pattern of bank charges triggered by bounced cheques and other returned payments relied upon: see generally Bruce (1) paras 109-119.

Initial defence: causing Soiram to misuse its bank facilities

66. The Applicant did not address this ground of unfitness in any detail in his first and second affirmations. He relied generally on the matters set out at paragraphs 55-61 above. Before me it was common ground that this would not be a free-standing ground of unfitness in any event.

Initial SoS evidence: causing or allowing Mezzanine to fail to account to the Inland Revenue for PAYE/NIC in respect of his remuneration for the years ending June 2000, 2001 and 2002 in the aggregate sum of £605,135

67. In relation to the fourth ground of unfitness, the initial SoS evidence included evidence that, for the years ended June 2000 and June 2001, Mezzanine's annual accounts contained footnotes stating that sums of £112,083 and £160,000 respectively were paid

to Terpsi Kor Ltd (a service company of which the Applicant was sole director) in respect of the Applicant's services as a director of Soiram, when

(a) at all material times, Mezzanine was not making payments to Terpsi Kor, but was paying (and making payments for) the Applicant direct; and

(b) Terpsi Kor Limited was not declaring the emoluments of the Applicant in its own accounts, the last accounts received by Companies House from Terpsi Kor being for the period ended 31 August 1999.

68. The Mezzanine ground of unfitness potentially posed real difficulties for the Applicant. Ms Doran tried to play down the significance of this ground, (citing Re Sevenoaks Stationers (Retail) Limited [1991] Ch 164 at 183), but this was an alleged failure to *account*, not a mere failure to *pay*. By 2002, when the Mezzanine PAYE issue had emerged, the Applicant was already no stranger to Inland Revenue investigations. He had already been the subject of Inland Revenue investigations in respect of his failure to file personal tax returns for four consecutive years, ending 1995/6, 1996/7, 1997/8 and 1998/9 respectively. The Applicant's claim to have had no taxable income for the years 1995/6 and 1996/7 was ultimately accepted by the Inland Revenue, but the years 1997/8 and 1998/9 were different. The Inland Revenue had been informed by the Administrators of the Applicant's former company, First Continental Limited, that the Applicant had received a total of £184,000 in consultancy fees from First Continental Limited over the years 1997/8 and 1998/9. The Applicant disputed these figures but ultimately came to an agreement with the Inland Revenue in 2000, agreeing to be charged tax on consultancy fees (net of allowable expenses) totalling £79,500 over the tax years 1997/8 and 1998/9 and agreeing to file nil returns for 1995/6 and 1996/7. Whilst the tax years 1997/8 and 1998/9 did not form the focus of the first disqualification proceedings, they were potentially unhelpful background, given the grounds of unfitness alleged.

69. The Applicant's initial explanation for the PAYE issue which had arisen in respect of his remuneration from Mezzanine, as set out in his first affirmation of 14 May 2007, was as follows. He said that, when he joined the Mezzanine Group in 1998, it was agreed with the board that he would be paid through a service company, Terpsi Kor Limited. With the introduction of the IR35 rule, the role of directors acting as consultants and using service companies was brought to an end. He claimed that from the introduction of IR35, Mezzanine 'ought to have deducted PAYE/NIC' and claimed that he 'believed this was happening'. He said that he had 'left that to the professionals such as the company's accountants and auditors (BDO Stoy Hayward) and their predecessors (Arthur Anderson) and the company's back office staff'. He further 'refuted' the 'remarks of Dawn Mack and others' concerning his culpability (Applicant(1) para 6).

70. By the time of his second affirmation dated 25 January 2008, the Applicant had changed his account of events in certain respects. By this stage, rather than simply 'refuting' Dawn Mack's comments regarding his culpability, he *actively blamed* Ms Mack for having failed to comply with an *express instruction* to put him on the PAYE payroll.

71. Ms Mack later denied this at some length, in a six-page affidavit sworn on 9 October 2008.

Additional evidence filed by the SoS in the first disqualification claim

72. Following receipt of the Applicant's evidence in answer to the first disqualification claim, the SoS filed further witness evidence, including affidavits sworn by Mr Mills (7 February 2008), Mr Cohen of Brett Adams (23 April 2008), Mr Alessi (11 March 2008), Ms Dawn Mack, the accounts manager at Mezzanine (9 October 2008), Mr Brian Basham, a non-executive director of Mezzanine (13 March 2008), Ms Shirley Smith, Soiram's book-keeper from October 2003 (28 March 2008), Mr Alex Zune (Manager of the Attica nightclub owned by Soiram) and others. A witness summary was adduced in respect of Mr James Roberts of BDO Stoy Hayward (Mezzanine's auditors). Contrary to the Applicant's later assertions, the SoS did not adduce affidavit evidence from Mr Scourfield.

SoS additional evidence: the 'Soiram' grounds

73. In relation to the Soiram grounds of unfitness, in broad summary Mr Mills, Mr Alessi and Mr Cohen each denied that they controlled Soiram or decided what the Applicant should be paid or which creditors should be paid and when. All three stated that the Applicant ran Soiram.

74. Mr Alessi's evidence was that the Applicant would run through the list of creditors with Ms Shirley Smith (the book-keeper) on a regular basis and that it was the Applicant who would decide which creditors to pay.

75. Mr Alessi's evidence on this issue was corroborated by that of Ms Shirley Smith. Ms Smith's evidence strongly supported the SoS's allegation that the Applicant was responsible for Soiram trading to the detriment of HMRC. Paragraphs 9,10 and 15 of her affidavit provide an adequate snapshot for current purposes:

> "(9) I was aware that the Inland Revenue had sent written notices for payment because these would inevitably be included in the list of creditors that I would discuss with the Defendant on a weekly basis. I would often be handed chasing letters from creditors amongst the post which was delivered to the office. I never actually dealt with the creditors myself but sometimes they would phone the office and I would tell the Defendant who had rung chasing their debts. Every week or so I would give him the list of creditors that required paying and I would suggest to him who I thought should be paid usually based on who was pressing for payment the hardest that particular time. Sometimes if the Defendant wasn't there I would leave the creditors list and I would write out cheques to the pressing creditors and leave them for him to sign. However often he then did not sign all of these. The Defendant was completely on top of the creditor list all times and it was entirely his decision who would be paid. I would recommend who I thought should be paid, that is to say, those who had not been paid for quite a long time or who had phoned up chasing, but given the obvious cash flow problems in Soiram, decisions had to be made as to who had to be paid that week, who would be put off until next week etc. This decision was down to the Defendant and was out of my hands. The Defendant

and I would usually sit down and go through the list if he and I were both in the same time. I wouldn't necessarily see him every week, and although I would have preferred to have gone through the list with him face-to-face he wasn't always available to do so. However if he was not available I would, as mentioned above, leave the list of creditors for him instead.

(10) I would occasionally write cheques in favour of the Inland Revenue in an attempt to get the Defendant to meet these liabilities. I explained to him that even if Soiram was not able to pay off the arrears, it would be prudent to pay the current liabilities on an ongoing basis. However, more often than not the Defendant refused to sign the cheques as in his view there were other creditors who were more important and there was only so much cash to go around. I was also aware that the amount to the Inland Revenue was built into the cash flow forecasts and this was another reason why I suggested to the Defendant that he should try to pay the Revenue if at all possible. However, the sales figures forecast by the Defendant often did not reach target and there would never be enough money to pay the Revenue…..

(15) So far as Mr Alessi's role is concerned, I understand that he was asked to .. become involved in Soiram by Quayside Corporate Services Ltd in order to sort out, or at least improve the administration of the accounts. Sometimes we would meet and he would look through the creditors to see if he could make sense of the aged creditor situation to see how old the creditors outstanding were. He provided cashflows on a regular basis, but I am not certain however, whether he reported back to the bank at all or whether the bank expected him to do so. Mr Alessi did not get involved with creditors, although obviously he had an interest in what creditors were outstanding so that he could see what was going on with the company. However, during the period of Mr Alessi's involvement, it was still very much the case that the Defendant ran Soiram. Mr Alessi had no authority to sign cheques or to make any payments on behalf of the company. I know for a fact that he never signed cheques as I would prepare all cheques for signature. He also could not and did not ever tell me which creditors should be paid.'

76. The evidence of Miss Smith flew in the face of the Applicant's defence to the main ground of unfitness alleged in relation to Soiram, which was that he was not in control of the finances of Soiram, which were instead run by Messrs Mills, Scourfield and Alessi, that he was 'never consulted by the staff concerning any problem in relation to Inland Revenue' and that he 'was not aware that [Soiram was] under any pressure in relation to PAYE or NIC' (first affirmation, para 25) and that he was not aware of or responsible for Soiram trading to the detriment of the Inland Revenue.

SoS additional evidence: the 'Mezzanine' ground

77. The additional evidence against the Applicant in relation to the 'Mezzanine' ground came primarily from Mr Basham, a director of Mezzanine and Ms Mack, Mezzanine's accounts manager. There was also a witness summary setting out questions which the SoS planned to ask Mr James Roberts of BDO Stoy Hayward, Mezzanine's auditors.

78. Ms Mack swore a detailed six-page affidavit on 9 October 2005, categorically denying that she had been instructed, whether by the Applicant, Mr Ramchurn (Mezzanine's Financial Controller), or anyone else, to put the Applicant on the PAYE payroll at Mezzanine. Her evidence was that the Applicant would take drawings every month, but not as a one off, fixed sum. Instead, 'he would pay for his personal expenses during the month either using a Mezzanine credit card, by withdrawing cash from cash points, taking cash directly from the premises, or writing Mezzanine cheques for personal expenses'.

79. She stated that at all material times up to July 2002, she would sit down with the Applicant at the end of every month, add up his personal drawings and expenditure from Mezzanine over that month from a Sage printout (an example of which was exhibited), and would agree the total with the Applicant. Her evidence was that she would then be instructed by the Applicant to raise a Terpsi Kor invoice for the final amount agreed, plus VAT, and that 'this exercise occurred at the end of every month, up to and including July 2002' (Mack(1) para 7).

80. Mr Basham, (a non-executive director of Mezzanine from 12 May 1997 until 19 July 2004, who was not alleged to have links with HBOS fraud), gave evidence, consistent with that of Ms Mack in this respect, that the Applicant did not take a specified sum as salary each month from Mezzanine, but instead 'lived on company 'gold cards' and … money in cash from the clubs'.

81. The WJB Chiltern report dated 12 March 2004 in evidence in the first disqualification proceedings was also unhelpful to the Applicant in relation to the Mezzanine ground of unfitness. The WJB Chiltern report summarised Ms Mack's account of the payment arrangements in place for the Applicant on his instructions. The report also stated:

> 'DM [Ms Mack] has advised WJB that the office staff were verbally instructed by MG [the Applicant] to pay pecuniary liabilities relating to him and his family. In order to monitor the emoluments drawn by MG, the office staff operated a loan account for the director. This was necessary, as MG would withdraw money from the company in various forms without notifying DM or the financial controller. Furthermore, it was not uncommon for MG to withdraw more than he was entitled to and voted by the Board, and responsibility for monitoring the position rested with the office staff who tried to keep an up to date record of his emoluments.
>
> WJB consider that MG [the Applicant] did not make any effort to record the amounts he withdrew from the company as emoluments. It is also clear that MG treat[ed] all expenses as 'business related' and would review the records maintained by

> the company for the preparation of the accounts and challenge cash expenditure allocated to him….
>
> The autocratic approach taken by MG was also demonstrated in relation to a trip to Bermuda in May/June 2000. WJB understand that MG claimed the full cost of the trip as a business expense claiming that he had been negotiating the supply of a particular type of rum. It was agreed, after the intervention of the auditors, that this was 50% personal'

82. Ms Mack stated in her affidavit that if the Applicant or Mr Ramchurn had asked her to put the Applicant on the PAYE payroll following the June 2000 meeting (1) Mr Ramchurn would be dealing with the Applicant's salary, as he dealt with senior management salaries (2) the Applicant would have been paid through the BACS system, and would receive monthly payslips (3) the Applicant would be asked to complete a P45/P46 (4) the Inland Revenue would have sent the Applicant notice of his tax code. She claimed that it was 'inconceivable' that the Applicant would not have noticed, for two years, that none of this was happening.

83. Mr Basham gave supporting evidence. He claimed by his affidavit that the Applicant was a highly numerate, intelligent man, who made little secret of the fact that he was a qualified barrister. He stated that in his view, the idea that the Applicant did not know about the tax situation was 'ludicrous'.

84. Ms Mack also stated that, for the 2001 accounts, the Applicant signed a declaration that he was receiving his drawings gross and was meeting his tax liabilities through his service company, Terpsi Kor. Her recollection was that Matthew White of BDO asked the Applicant to sign this prior to the filing of the 2001 Mezzanine accounts in or around April 2002. Mr Basham gave supporting evidence on this issue, stating that the Applicant had assured James Roberts of BDO Stoy Hayward (Mezzanine's auditors) that PAYE was being paid through the Applicant's service company, Terpsi Kor, prior to publication of Mezzanine's accounts. This was a serious allegation which, from the witness summary prepared in respect of James Roberts, the SoS planned to follow up with BDO Stoy Hayward.

85. The Applicant denied signing any such declaration and claimed the credit for correcting the error. His evidence was that it was his own accountants, Alpha Omega, who advised him in 2002 that a problem had arisen in relation to non-deduction of PAYE and NIC from his earnings, and that it was at his instigation that the oversight had been brought to the attention of Mezzanine and the Inland Revenue in 2002 (Applicant(1) para 7). He also adduced evidence from Alpha Omega, in the form of affirmations from Joseph Hadjijoseph and Chatan Shah dated 15 January 2008 and 16 January 2008 respectively. Neither could speak directly to what instructions had or had not been given in 2000.

86. In the event, the matter did not go to trial. The Applicant's potential exposure on the Mezzanine ground, however, should not be under-estimated. Had the ground been found proven, it would demonstrate (at best) a dismissive attitude to honouring tax obligations, not at all assisted by the earlier tax investigations into the Applicant for the four tax years leading up to 1998/9 and only mildly assisted by his agreement to indemnify Mezzanine up to a cap of £250,000 (which of itself did not get the outstanding PAYE/NIC paid and terminated on Mezzanine's entry into administration).

Moreover, whilst the Applicant did ultimately pay the outstanding PAYE on his Mezzanine income personally, this only occurred via an IVA, *after* the Inland Revenue had presented a bankruptcy petition against him. This was not a particularly attractive backdrop to the main Soiram ground, trading to the detriment of the Inland Revenue. Given the Applicant's 'evolved' defence to the Mezzanine ground (that he or Mr Ramchurn *instructed* Ms Mack to put him on the PAYE payroll in 2000), the Mezzanine ground also had the potential to hit the Applicant hard on credibility if his account of events on the Mezzanine ground was rejected.

Further Directions

87. At a directions hearing held on 23 June 2008, it was ordered that the Applicant should file and serve any further evidence in answer by 22 August 2008. No further evidence was filed by the Applicant and the matter was subsequently listed for trial in a three-day window from 1 February 2010 with a time estimate of 12 days.

The HBOS Fraud allegations

88. In the meantime, allegations were surfacing with regard to the activities of Messrs. Mills and Scourfield and certain associated individuals. On 26 May 2009, Channel 4 broadcast an expose on Mr Scourfield. On 2 June 2009, a parliamentary debate took place, in which businesses affected by Mr Scourfield's business practices were discussed. This was reported in Hansard.

89. The following is a sample extract from the debate as reported in Hansard:

> 'My basic contention is that Lyndon Scourfield lent considerable sums to more than 200 businesses and that in many, if not most, cases he required the businesses to engage Quayside as advisers or turnaround specialists. In many cases, he also required that a Quayside appointee be placed on the board. Then Quayside would advise significant increases in borrowing, which Scourfield authorised and in which the business owners acquiesced, as, after all, that was the advice of the bank's appointees. Subsequently, many of the businesses went down for far more than if Quayside had not been involved, and the assets of the businesses were acquired in one way or another by others involved with Quayside.'

90. Mr David Liebeck, the solicitor acting for the Applicant in his defence of the first disqualification proceedings, was aware of these developments in 2009 and discussed them with the Applicant. On 16 November 2009, Mr Liebeck wrote to Ms Scully of ASB Law, the solicitors for the SoS, stating that the Applicant was considering adducing further evidence in relation to reports concerning the activities of Messrs. Mills and Scourfield. In the event, however, the Applicant decided not to adduce any further evidence.

91. On 16 December 2009, shortly prior to trial, the SoS solicitors wrote to the Applicant's solicitor regarding witnesses required for cross-examination. By 5 January 2010, the SoS's solicitors had received no response to their letter.

92. On 25 January 2010, a few days before the trial window was due to open, the Applicant sent a copy of a signed disqualification undertaking by facsimile transmission to Ms Katie Barrett of ASB Law, under cover of a letter which stated (with emphasis added):

> 'I am faxing this undertaking duly signed by me.
>
> Although I do not accept the accuracy of all of the facts referred to in the undertaking, and would have wished to have referred to other relevant facts *including the discrediting of many of the witnesses against me*, I have taken a pragmatic approach, and wish to bring this matter to a close without further costs being incurred by me.
>
> I also wish to make it clear that this undertaking is given only in relation to these proceedings, and as such is not an admission of culpability in any other proceedings, or context.'

93. Following further exchanges as to the terms of the same, the first disqualification undertaking (of seven years) was accepted by the SoS on 26 January 2010. In the schedule of unfit conduct of the first undertaking, the Applicant admitted to the following matters of unfitness:

(1) causing Soiram to trade to the detriment of the Inland Revenue;

(2) causing Soiram to make payments in the aggregate sum of £206,692.35 to the Applicant's benefit or indirect benefit and/or to the detriment of the Inland Revenue;

(3) causing Soiram to misuse its bank facilities incurring an aggregate of £6440 in bank charges; and

(4) causing and/or allowing Mezzanine to fail to account to the Inland Revenue for PAYE/NIC in relation to the Applicant's remuneration for the financial years ending June 2000, 2001 and 2002 for the total sum of £605,135.

94. By his third affirmation in the application before me, the Applicant maintained (at para 109) that

> 'My decision to enter into the [first] undertaking was induced by the fraudulent evidence of [Mr Scourfield, Mr Mills and Mr Cohen] and the circumstances I found myself in relating to the costs consequences of losing a trial. If the true nature of these individuals' conduct had been known (or at least reasonably suspected) I would have contested the charges.'

As previously stated, the SoS had not adduced any affidavit evidence from Mr Scourfield.

95. In May 2010, a few months after the first undertaking was given, a police investigation into the activities of HBOS, known as 'Operation Hornet', began. In due course Mr Mills, Mr Scourfield, Mr Cohen and others were charged with a variety of criminal offences. Mr Scourfield was charged with conspiracy to corrupt, conspiracy to launder the proceeds of crime and fraudulent trading. Mr Mills was charged with conspiracy to corrupt, four counts of fraudulent trading and conspiracy to conceal criminal property. Mr Cohen was charged with fraudulent trading and conspiracy to conceal criminal property.

96. The criminal trial was ultimately listed to commence on 26 September 2016.

The second undertaking: Eastzest Limited

97. The second undertaking was given pending the trial of the criminal proceedings brought against Mr Mills, Mr Scourfield, Mr Cohen and others. It related to the Applicant's conduct as a shadow or de facto director of a company known as Eastzest Limited.

98. There is no suggestion that HBOS, Mr Scourfield, or Mr Mills had anything to do with Eastzest or how it was run.

99. The background to the second undertaking is as follows.

100. Following the failure of Mezzanine and Soiram in 2004, in 2005 the Applicant had set about establishing a Japanese restaurant called 'Nozomi' in Knightsbridge. Nozomi was initially run through a company called Tropeo Knightsbridge Limited ('Tropeo'). The Applicant maintains that Tropeo 'failed because it was starved of capital'. The Applicant blames Mr Mills and Mr Scourfield for this, on the basis that they had promised to pay him £500,000 to buy out his interest in Soiram but had not paid.

101. Following the failure of Tropeo, Nozomi was run through Trophy Restaurants Limited ('Trophy'). Trophy failed.

102. When Trophy failed, Nozomi was run through Lifestyle Restaurants 1415 (Knightsbridge) Limited ('Lifestyle'). Lifestyle failed.

103. The Applicant was a de jure director of all three companies.

104. After the failure of Lifestyle, on or about 1 July 2009, Nozomi was taken over by Eastzest Limited ('Eastzest') of which Marcello Santese ('Mr Santese') was de jure director. Mr Santese had previously acted as general manager of Lifestyle, having been hired by Lifestyle in January 2009.

105. Eastzest commenced trading on 1 July 2009. The Applicant was an authorised signatory on Eastzest's Barclays bank account until 1 March 2011, when he was removed from the account by Barclays. Barclays maintained that he was removed as signatory when they discovered that he was disqualified from acting as a director. The Applicant maintained that he had told Barclays of his disqualification immediately after giving the first undertaking. This issue was not resolved as the matter did not go to trial.

106. Eastzest went into compulsory liquidation on 8 June 2011 on the petition of HMRC with an estimated deficiency as regards creditors of £1,915,343.

107. On 31 May 2013, disqualification proceedings were issued against the Applicant and Mr Santese (the "second disqualification proceedings"). The grounds of unfitness alleged against the Applicant, in summary, were as follows:

(1) that between 16 February 2010 and 8 July 2011, he acted as a director of Eastzest in breach of the first undertaking;

(2) that from 1 July 2009, he caused or allowed Eastzest to trade to the detriment of HMRC with respect to PAYE income tax and NIC totalling £592,529 and unpaid VAT totalling £672,118 (in this regard, the SoS's evidence was that payments from Eastzest's bank account after 1 July 2009 totalled £5,700,782, of which £1,461,773 was paid to trade and expense creditors, £860,585 was paid to individuals and companies associated with or connected to the Applicant, and £111,500 was paid to HMRC);

(3) that from 8 September 2009 to 28 February 2011, the Applicant caused or allowed Eastzest to misuse the company's bank account, resulting in bank charges of £28,420.

108. The Applicant filed an affidavit sworn on 19 November 2013 in response, denying that he had acted as a director of Eastzest. His wife, Mrs Kalliopy Georgallides, also filed evidence in support of her husband's defence.

109. A seven-day trial was listed to commence on 17 November 2015.

110. On 6 November 2015, Mr Santese filed evidence, inculpating the Applicant. On 16 November 2015, an undertaking offered by Mr Santese was accepted by the SoS.

111. The Applicant instructed Mr Oliver White of Counsel to appear on his behalf at the disqualification trial listed to commence on 17 November 2015. On the first day of the trial, Mr White applied for an adjournment until the conclusion of the criminal proceedings by then pending against Messrs Scourfield, Mills and Cohen. Upon this application being refused by the court, Mr White applied for the evidence of Mr Santese to be excluded. The application to exclude the evidence of Mr Santese was also refused.

112. On 18 November 2015 (the second day of trial), following the refusal of the Court to exclude the evidence of Mr Santese, the Applicant offered the second undertaking, which was accepted by the SoS. In the schedule of unfit conduct to the second undertaking, the Applicant admitted to the following matters of unfitness:

(1) breaching the first undertaking by acting as a director of Eastzest;

(2) causing or allowing Eastzest to trade to the detriment of HMRC with respect to the company's PAYE, NIC, and VAT contributions; and

(3) causing or allowing Eastzest to misuse the company's bank accounts, accruing bank charges of £28,420.

Subsequent Events

113. In August 2016, Mr Scourfield pleaded guilty to conspiracy to corrupt, conspiracy to launder the proceeds of crime and four counts of fraudulent trading.

114. On 26 September 2016, the criminal trial against Mr Mills, Mr Cohen and associates commenced.

115. On 30 September 2016, the present application was issued. By the time that this application was issued, the Applicant faced criminal proceedings in Southwark Crown Court on three counts of using a prohibited company name contrary to section 216(4)

IA 1986 and one count of acting whilst disqualified contrary to section 13 of the CDDA. The criminal proceedings brought against the Applicant have been adjourned pending the outcome of this application.

116. On 30 January 2017, after a four-month trial, Mr Mills was convicted of conspiracy to corrupt, four counts of fraudulent trading and conspiracy to conceal criminal property. Mr Cohen, who had been charged with fraudulent trading and conspiracy to conceal criminal property, was acquitted.

The Applicant's case

117. It was difficult to identify quite what 'fraud' the Applicant relied upon for the purposes of his application. No pleadings were directed and a number of possible 'frauds' were raised or hinted at in the evidence and in submission. In broad terms, however, the key allegations were as follows:

(1) Dishonest preparation of witness evidence by the SoS

118. At various points in his evidence, the Applicant implied or insinuated that an unidentified 'draftsman' or 'author' acting for the SoS had prepared the witness evidence filed in the disqualification proceedings in a misleading and dishonest manner (see by way of example the Applicant's fourth witness statement at [11], [18], [30], [33], and [37]).

(2) HBOS Fraud: The 'modus operandi' argument

119. Ms Doran relied upon the 'modus operandi' of the wrongdoers. She submitted that the opening speech in the criminal proceedings brought against Messrs Scourfield, Mills and Cohen and the pleas and convictions resulting from the same served to establish a modus operandi which involved (1) taking control of victim companies (2) engineering increased HBOS and third party lending to the victim companies (3) extracting fees and other disguised payments from the victim companies for their own benefit (4) engineering a transfer of assets of the victim companies to other companies within wrongdoer control (5) efforts to disguise and cover up their actions (6) a general lack of transparency.

120. She submitted that whilst the Crown's case did not expressly mention Soiram, the Applicant's evidence was that Messrs Scourfield and Mills and their associates took control of Soiram's finances, consistent with their actions in other cases.

121. She submitted that the 'fraud' undermined the matters set out in the first undertaking's schedule of conduct. She argued that (1) had the SoS known then what is known now, the SoS would not have pursued the claim or accepted the undertaking; that (2) the 'fraud' influenced the Applicant to offer the first undertaking, and that any reasonable person would have been likewise influenced: Applicant's skeleton argument, para 14. She further argued that 'the Applicant would not have offered the disqualification if he had known the facts of the fraud and that it would be proved beyond reasonable doubt': Applicant's skeleton argument, para 61(v).

(3) HBOS Fraud: The 'credibility' argument

122. A linked argument was that the HBOS Fraud was also relevant to the credibility of Messrs Mills, Cohen and Alessi in the first disqualification proceedings. Ms Doran argued that '[the] Applicant's prospects of success would have skyrocketed if the Respondent had issued the claim after the criminal convictions…': Applicant's skeleton argument, para 39.

(4) Perjury of Messrs Mills, Cohen, Alessi in the first disqualification proceedings

123. By his evidence, the Applicant maintained that Messrs Mills, Scourfield and Cohen had given 'fraudulent evidence' for the SoS in the first disqualification proceedings (Applicant (3) at [107]-[109]) and that Mr Alessi had given false evidence in those proceedings (Applicant (4) at [20]-[32]). He maintained that, whilst he had not believed their evidence, he and his legal team had believed at the time of the first undertaking that the court would prefer their evidence over his.

(5) Perjury of Mr Santese in the second disqualification proceedings as a result of improper pressure exerted by the SoS

124. By his fourth affidavit, the Applicant maintained that in the second disqualification proceedings, Mr Santese had initially given evidence in support of the Applicant but had been persuaded by the SoS to change his evidence in exchange for a lower disqualification period, in order to 'force' the Applicant to offer the second undertaking (Applicant (4) at [82]-[85]).

125. Against that backdrop, I turn to consider the circumstances in which judgments, orders and contracts may be set aside 'for fraud'.

Setting aside judgments obtained by fraud

126. The key requirements considered by the court on an application to set aside a judgment on the grounds that it was obtained by fraud are as follows.

(1) The fraud must be particularised and proved

127. Where a judgment is challenged on the grounds that it was obtained by fraud, save where the fraud in question is admitted or the evidence of it is incontrovertible, the fraud must be properly pleaded and proved by cogent evidence: Flower v Lloyd 1877 6 Ch D 297, Jonesco v Beard 1930 AC 298 and Owens v Noble [2010] EWCA 224 per Smith LJ at [24], [27]; Elias LJ at [42] to [61]: Sedley LJ at [71].

128. A mere generalised allegation that a judgment was obtained by fraud will not trigger entitlement to a re-hearing. As put in Flower v Lloyd 1877 6 Ch D 297:

> "I agree with what has been said by the Master of the Rolls, that in the case of a decree (or a judgment as we now call it) being obtained by fraud there always was a power and there still is a power, in the Courts of Law in this country to give adequate relief. But that must be done by putting in issue that fraud, and that fraud only. You cannot go to your adversary and say "you obtained a judgment by fraud and I will have a re-hearing of the whole case" until that fraud is established. The thing must be

> tried as a distinct and positive issue; "You, the defendants, or "You, the plaintiff" obtained that judgment or decree in your favour by fraud; you bribed the witness, you bribed my solicitor, you bribed my counsel, you committed some fraud or other of that kind, and I ask to have the judgment set aside on the ground of fraud."

(2) The nature of the fraud required

129. The nature of the fraud required was summarised by Aikens LJ in Royal Bank of Scotland plc v Highland Financial Partners LLP [2013] 1 CLC 596 at paragraph 106 (as recently approved by the Supreme Court in Takhar v Gracefield Developments Ltd [2019] 2 WLR 984) as follows:

> 'The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Second, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the questions of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence.'

(3) The 'fraud of a party' rule

130. The fraud must be that of a party. Proof that a 'mere witness' has perjured himself is not enough for these purposes: Re Odyssey (London) Limited [2000] EWCA Civ 71; Cinpres Gas Injection Ltd v Melea Ltd [2008] EWCA Civ 9.

131. The 'fraud of a party' or 'mere witness' rule deserves closer consideration.

132. In Re Odyssey, one of the parties, Orion, called its former director, Mr Sage, as a witness in an action against Sphere Drake. Mr Sage gave material perjured evidence at a trial before Hirst J which led to a judgment in Orion's favour.

133. Sphere Drake later brought a separate action to set aside Hirst J's judgment, on the ground that it had been obtained by fraud. At first instance Langley J found that Mr Sage had not committed perjury and dismissed the action.

134. Sphere Drake appealed to the Court of Appeal. The Court of Appeal concluded that the judgment of Hirst J in the original action had been obtained by Mr Sage's perjured evidence.

135. This, however, did not lead inexorably to the conclusion that Sphere Drake was entitled to have the original judgment set aside. Nourse LJ reasoned as follows:

> 'The legal consequences of Mr Sage's perjury
>
> My conclusion on the perjury issue, coupled with the judge's undisputed decision on the materiality issue, makes it necessary to proceed on the footing that the judgment of Hirst J in favour of Orion was procured by Mr Sage's perjured evidence. But it does not at all follow that Sphere Drake is entitled to have the judgment set aside on that ground. Orion, not Mr Sage, was the plaintiff in the first action. Accordingly, Sphere Drake must establish, as a matter of law, either that it is unnecessary for the perjured evidence which procures the judgment to be the evidence of a party to the proceedings or that Mr Sage's evidence can be treated as having been the evidence of Orion itself…..
>
> Does the perjured evidence have to be that of a party?
>
> For the reasons given in the judgment to be delivered by Lord Justice Buxton, which I gratefully adopt, I agree with him that it is necessary for the perjured evidence which procures the judgment to be the evidence of a party to the proceedings….'

136. Lord Justice Brooke reached a similar conclusion, stating:

> 'So far as the law is concerned, there is nothing I wish to add to the reasons given by Buxton LJ, with which I agree, for his conclusion that nothing less than the fraud (or perjury) of a party will be sufficient to displace the general rule that final judgments should be accorded finality'.

137. Buxton LJ addressed the matter as follows:

> 'Does the fraud have to be that of a party?
>
> Mr Sumption argued that it was not correct that in order to set aside a judgment the fraud or perjury that was the effective cause of that judgment had to be shown, by the rules of attribution adopted by Orion, to be the fraud or perjury of the party that had secured the judgment. It was enough in itself that such perjury had taken place…
>
> Authority
>
> I agree with Mr Sumption's submission that most of the cases, both in this jurisdiction and in the Commonwealth, merely restate the rule without analysing it or needed to analyse it for

> the purposes of their decision. The matter has therefore to be considered as one of principle.
>
> It is agreed on all sides that the doctrine is as originally expressed by De Grey CJ in *The Duchess of Kingston's Case* (1776), reported at page 651 of *Smith's Leading Cases*:
>
> "a direct and decisive sentence on the point...[stands] as conclusive evidence upon the Court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to show that the court was mistaken, it may be shown that they were misled."
>
> The case is the origin of the doctrine of issue estoppel and, as the quotation demonstrates, the possibility of setting aside a judgment on grounds of fraud is an exception to that doctrine. The essence of issue estoppel is, however, that it operates only between the parties to the original suit: it is unreasonable and unjust to permit the same issue to be litigated afresh between the same parties (*New Brunswick Rly Co v British and French Trust* [1939] AC 1 at p 20, per Lord Maugham LC). In that context, it can be seen as *not merely accidental, but as springing from the essential nature of res judicata, that the protection obtained by the successful party can only be taken away by his fault'*. [emphasis added]

138. In Re Odyssey, Buxton LJ was fortified in this conclusion by a decision of the Court of Appeal in the case of *Boswell v Coaks* (unreported, 1892). In Boswell v Coaks, the losing party in a previous action sought to have the verdict against him set aside because of fraud on the part of one (only) of the opposite parties, the defendant Coaks. The action failed in any event because the alleged fraud was found not to have been proved. However, the judgment of the Court of Appeal (Lindley, Bowen and AL Smith LJJ) continued:

> "As regards the point taken...for the other Defendants, viz that the judgment can only be set aside if at all against those who procured it by fraud and it is not suggested that the other Defendants had anything to do with the fraud alleged, this point appears to us to be fatal as regards all the Defendants except Coaks and we think it would be fatal to any further action to set aside the sale of the whole."

139. Rejecting the argument that, as there had been no finding of fraud, this passage was obiter, Buxton LJ continued in Re Odyssey:

> '… it seems clear that the Court of Appeal regarded the failure to allege fraud or procurement of fraud against the defendants other than Coaks as fatal to the case against them, whatever was proved against Coaks himself. That was a distinct reason for the court's decision in their cases, carrying equal weight as, and not

> subordinate to, the finding of no fraud. As such, it was not obiter. And even if on one view of the rules of precedent the Court of Appeal's statement can be argued to have been obiter, it was only such in the most technical sense, and thus, in particular as a judgment of a conspicuously strong constitution of this court, one that I would only be prepared to depart from for very good reason.'

140. In Re Odyssey, Mr Sumption QC on behalf of Sphere Drake argued strenuously against the 'fraud of a party' rule, stressing that there was a

> 'public interest, extending beyond the private interest of the parties to any one action, in the proper administration of justice', adding that 'where the proper function of the courts is perverted by the dishonesty of those appearing before them in whatever capacity, the integrity of the system of civil justice can be vindicated only by treating the resulting decision as voidable.'

141. Addressing that argument in Re Odyssey, Buxton LJ noted (inter alia) (1) that the 'fraud of a party' rule was recognised as a matter of ratio in Boswell v Coaks and therefore bound the court; (2) that it was not correct that corruption of the judicial process by perjury could only be vindicated by treating the resulting decision as voidable. The most obvious way of protecting the judicial process from perjury and deterring those who commit it was by criminal prosecution; and (3) that the logic of Sphere Drake's argument ultimately did not take matters far, as:

> 'Justice might be thought to demand that any judgment that can be shown to be wrong should be set aside, and that a party cannot complain if he is harassed twice for the same cause if the cause had first been wrongly decided; but practicality prevents the carrying through of that logic in all but exceptional cases. The problem is to decide what those cases should be.'

142. Having explored these and other arguments, Buxton LJ later concluded 'that the fraud or perjury must be that of the party himself, or at least be suborned by or knowingly relied on by that party'.

143. On the facts of Odyssey, the Court of Appeal concluded (by majority) that Mr Sage's perjured evidence could be treated, by attribution, as that of the corporate party who called him. There were unusual facts, however; Mr Sage had been a director of Orion at the time of the events about which he had given evidence, but not at the time he gave evidence. Whilst this was not the main factor which weighed with Nourse LJ, the learned judge felt able to conclude that Mr Sage had 'the status necessary to make his evidence the evidence of Orion', placing particular emphasis on the following two grounds: (1) he was its 'vital' witness; 'he was the witness, above all others, on whose evidence the success of Orion's case had come to depend': there was 'nothing fanciful … in treating Mr Sage as having been, for the purposes of the trial, Orion itself' and (2) he had acquired that status not simply because his evidence related to a transaction for which he had been personally responsible as part of Orion's directing mind and will at the time, but also because, in the six months or so before the trial, he had been a

committed member of the team which took decisions as to how Orion's case was to be presented.

144. Brooke LJ broadly concurred, supporting 'the modern trend of liberating principles in company law… pioneered by Lord Hoffmann in Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 1 AC 500 and developed by Nourse LJ in his judgment in the present case.' He added that it would be 'an affront to justice' if Orion was entitled to retain the spoils of its victory merely because its director had retired before the action was tried. It was in these somewhat unusual circumstances that Brooke LJ was persuaded not to 'cling timorously to the coastline' but instead 'to strike out, with Nourse LJ, for the open sea'.

145. The scope of the court's jurisdiction to set aside a judgment obtained by fraud was again considered by the Court of Appeal in Cinpres Gas Injection Limited [2008] EWCA Civ 9. In this case Patent Office proceedings had been brought by Cinpres against Mr Hendry and Mr Ladney under s.12 of the Patents Act 1977. Mr Hendry gave perjured evidence in those proceedings, with the result that Cinpres lost. The patent in issue was eventually granted by the European Patent Office naming Melea (Mr Ladney's alter ego) as patentee and Mr Hendry as sole inventor. Some time later, Mr Hendry told Cinpres that he had perjured himself in the first Patent Office proceedings and Cinpres started entitlement proceedings pursuant to s.37 of the 1977 Act. At first instance Mann J found that whilst Mr Hendry had perjured himself, Mr Ladney had not known that at the time. Accordingly, the perjured evidence of Mr Hendry was not to be treated as that of Mr Ladney. Mann J concluded that, as a matter of law, based on the authority of *Odyssey v. OIC Run-Off* [2000] EWCA Civ 71, Cinpres' claim to the patent must fail by operation of the doctrine of *res judicata*.

146. On appeal, Sir Igor Judge (at paragraph 105 of the judgment of the court) acknowledged the 'fraud of a party rule', stating:

> 'Odyssey decided that a judgment cannot be set aside unless it was obtained by the fraud of a party or procured by a party (*per* Buxton LJ). Perjury by a "mere witness" is not enough'.

147. Counsel for Cinpres sought to sidestep the rigours of Odyssey, arguing, inter alia, that a wider jurisdiction to set aside judgments, known as the 'bill of review', still existed and should be exercised by the court.

148. The 'bill of review' process was helpfully summarised by the Court in Cinpres (at para 78) as follows:

> 'Prior to the fusion of the administration of law and equity in 1875, there was a procedure in the courts of equity for setting aside an earlier decree of a court of equity. It was initiated by a "bill of review." The test which was applied was more liberal than that which applied in the common law courts for setting aside an earlier judgment. For that, as held in *Odyssey,* not only was it necessary to show that the previous judgment had been obtained by fraud, but that fraud had to be that of the party who had obtained the judgment: he could not rely on his own fraud.

> Mr Prescott submits that the more liberal bill of review jurisdiction still exists, and can and should be applied here'.

149. In considering this submission, the Court of Appeal reviewed caselaw spanning back to the Judicature Acts. Along the way, the court considered the case of In *re May* 28 Ch D 516. In that case (at p, 521) Cotton LJ said (Lindley LJ concurring):-

> 'There was a well known mode of proceeding. If a judgment was obtained in a suit against the plaintiff because he had not made out his case as a matter of evidence, he could not any more relitigate the question without coming to the Court [of Chancery] and getting leave to file what was called a supplemental bill in the nature of a bill of review. That was to review the whole judgment by supplemental evidence, brought forward in order to enable the Court or require the Court to come to a different decision. Now what did the Court require under those circumstances? Unless leave was granted, there would be a plea or other proper defence to the suit; but what the Court required was this, that before any such bill could be filed, the person desiring to file it and to bring forward further evidence should come and get the leave of the Court, satisfying the Court not only that the evidence which he proposed to adduce was material, but that he had not got it when he litigated the question on the former occasion, and that he could not by reasonable diligence have acquired that evidence'.

150. The court also considered *Phosphate Sewage v Molleson* (1879) LR 4 App Case 801, where (at p814) Lord Cairns characterised the nature of the new evidence that would be required:

> "I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before".

151. In Cinpres, the Court of Appeal referred to *Re Barrell Enterprises* [1973] 1 WLR 19 as 'of key importance' on the issue whether the 'bill of review' had survived the Judicature Acts. Giving the judgment of the Court of Appeal, Russell LJ had said in Re Barrell:

> "In none of the cases brought to our notice [which included those cited in Cinpres, including *Boswell v Coaks*] has an action to set aside on the ground of fresh evidence succeeded. Indeed there is nothing to show that in the last 100 years any such action has even been brought, though in *Falcke's* case, 57 LT 39 in 1887 there was an unsuccessful attempt to bring one. In so far as any of the dicta tend to show that an action will lie they are obiter. The reason which Sir George Jessel MR gave in *In re St Nazaire Co.,* 12 Ch. D 88 for the view that the jurisdiction to order a rehearing was vested by the Judicature Act in the Court of Appeal and not in the High Court is of equal weight in relation to fresh evidence as to the type of case with which he was

> dealing. Even if, technically, the High Court was at first clothed with this jurisdiction we are of opinion that this cause of action has long since lapsed because applications for rehearing on the ground of fresh evidence have for generations been made only to the Court of Appeal."

152. Reference was also made to Re Odyssey, in which Buxton LJ, with whom the other members of the court agreed, referred to the judgment of the Court of Appeal in *Boswell* and said:

> "The burden of their judgment was, however, that the fraud must either be that of a party or be procured by a party. That in my view remains the law."

153. Having reviewed these and other authorities, the Court of Appeal in Cinpres accepted the submission that it was not open to the court to hold there was any wider rule for defeating res judicata than that laid down in *Odyssey* – the fraud of a party rule (para 97). The rule was the same whatever the nature of the cause of action. At paragraph 99 Sir Igor Judge concluded that the '"bill of review" point' failed 'as a matter of jurisdiction'.

154. Whilst the conclusions of the Court of Appeal in Cinpres on the issue of whether the bill of review jurisdiction has survived were strictly obiter, in my judgment those conclusions, based on full argument and a detailed review of the authorities, must carry considerable weight.

155. On the facts of Cinpres, the Court of Appeal concluded that Ladney had 'adopted' Hendry's perjury. In reaching this conclusion however, the court was at pains to stress that both Hendry and Ladney were parties to the first proceedings and that Hendry was 'more than merely a witness for Ladney – he was Ladney's 'comrade in arms'.. As Sir Igor Judge put it (at para 106):

> 'Hendry was seeking to justify his claim to be the inventor, to be named on the patent as such and to have had the right to have assigned the property in the invention to Ladney. Ladney was claiming to be the owner of the right to apply for the patent by virtue of assignment from Hendry. They had a common foe, Cinpres, and made common, and completely intermixed cause against it. One could not succeed without the other'.

156. It is difficult to see how this conclusion on 'adoption' on the facts of Cinpres is consistent with the reasoning of Boswell v Coaks. It is perhaps for this reason that the decision has recently been described as an 'outlier' in the case of Mayer Corporation Development International Limited v Alliance Financial Intelligence Limited and Ors [2019] HKCA 777). Nonetheless, it is clear from Cinpres that the fundamental principle summarised by Buxton LJ in Re Odyssey, that 'the fraud or perjury must be that of the party himself, or at least be suborned by or knowingly relied on by that party' holds good to this day.

Setting aside contracts for fraud

157. In private contract law, the method for setting aside a contract for fraud is an action for deceit or fraudulent misrepresentation. This method is also employed where it is sought to set aside an ordinary civil (ie non matrimonial) consent order for fraud: see by way of example Zurich Insurance Co plc v Hayward [2017] AC 142. An ordinary consent order derives its authority from the contract made between the parties: Purcell v FC Trigell Ltd [1971] 1 QB 358, CA: Sharland v Sharland [2016] AC 871 at [27].

158. To make out a claim for fraudulent misrepresentation, it must be shown that a materially false representation was made, which was intended to, and did, induce the representee to act to its detriment: Zurich Insurance Co plc v Hayward [2017] AC 142 at [18].

159. As put by Lord Toulson in Zurich at [58] (Lady Hale and Lords Neuberger and Reed concurring):

> 'To establish the tort of deceit it must be shown that the defendant dishonestly made a material false representation which was intended to, and did, induce the representee to act to its detriment. The elements essential for liability can be broken down under three headings: (a) the making of a materially false representation (the defendant's conduct element); (b) the defendant's accompanying state of mind (the fault element); and (c) the impact on the representee (the causation element). Where liability is established, it remains for the claimant to establish (d) the amount of any loss.'

The causation element

160. Zurich was largely concerned with what Lord Toulson referred to as 'the causation element'. The issue before the Supreme Court was whether, for the purposes of making out a claim of fraudulent misrepresentation, it was necessary to prove that the representee believed the representation to be true. The Supreme Court ruled that it was not. Inducement was a question of fact. Lord Clarke accepted the insurers' submissions that 'what is required for there to be inducement is a causal connection between the misrepresentation and the representee making a decision or undertaking a course of action on the basis of that representation. That does not require belief in the misrepresentation itself.'

161. At [32], Lord Clarke reasoned as follows:

> 'As I see it, the representee's reasonable belief as to whether the misrepresentation is true cannot be a necessary ingredient of the test, because the representee may well settle on the basis that, at any rate in a context such as the present, he thinks that the representation will be believed by the judge.'

See too Lord Toulson (Baroness Hale and Lords Neuberger and Reed concurring) at [63], [67] and [71].

The misrepresentation need not be the sole cause

162. It is sufficient for the misrepresentation to be an inducing cause; it is not necessary for the misrepresentation to be the sole cause: Zurich, per Lord Clarke at [33].

The presumption of inducement

163. Whilst some fraudulent misrepresentation cases refer to a 'presumption of inducement', the so-called 'presumption of inducement' is not a 'presumption of law' but rather an 'inference of fact': Zurich per Lord Clarke at [34]. In this regard the following passage from Chitty on Contracts, 32nd ed, vol 1, para 7-040 was referred to with approval:

> 'Once it is proved that a false statement was made which is 'material' in the sense that it was likely to induce the contract, and that the representee entered the contract, it is a fair inference of fact (though not an inference of law) that he was influenced by the statement, and the inference is particularly strong where the misrepresentation was fraudulent.'

164. Whilst noting that 'the authorities are not entirely consistent as to what is required to rebut the presumption', Lord Clarke stated that, in cases of fraudulent misrepresentation, it is 'very difficult' to rebut it (Zurich at [36]), citing Smith v Kay (1859) 7 HL Cas 750 at 759 per Lord Chelmsford LC and Sharland v Sharland [2016] AC 871 per Baroness Hale.

165. As explained by KR Handley in an article entitled 'Causation in Misrepresentation' (2015) 131 LQR 277 (at p284), referred to with approval in Zurich:

> 'The representor must have decided to make the misrepresentation because he or she judged that the truth or silence would not, or might not, serve their purposes or serve them so well. In doing so they fashioned an evidentiary weapon against themselves, and the court should not subject the victim to 'what if' inquiries which the representor was not prepared to risk at the time.'

The misrepresentation must be that of, or known to, a party to the contract

166. The general rule is that a misrepresentation made by a person not a party to the contract cannot give rise to a rescission of the contract: Pulsford v Richards (1853) 17 Beav at p95:

> 'In the case where the false representation is made by one who is no party to the agreement, entered into on the faith of it, the contract cannot be avoided'.

167. The only material exception to this rule is where the other contracting party had actual knowledge of the misrepresentation. For these purposes, the contracting party must be aware that the representation is false: Royal Bank of Scotland plc v Etridge (No 2)

[2002] 2 AC 773 at 144 per Lord Scott; Commission for the New Towns v Cooper (Great Britain) Ltd [1995] Ch 259.

Setting aside matrimonial consent orders for fraud

168. Family proceedings differ from ordinary civil proceedings in two respects. First, in family proceedings, a consent order derives its authority from the court and not from the consent of the parties (de Lasala v de Lasala [1980] AC 546), whereas, in ordinary civil proceedings, with some exceptions (see eg Dietz v Lennig Chemicals Ltd [1969] 1 AC 170) a consent order derives its authority from the contract made between the parties (Purcell v FC Trigell Ltd [1971] 1 QB 358, CA). Second, in family proceedings, there is always a duty of full and frank disclosure, whereas in civil proceedings this is not universal: Sharland v Sharland [2016] AC 871 per Baroness Hale at [27].

169. It does not follow, however, that the parties' agreement is not a sine qua non of a consent order in family proceedings. The court cannot make a consent order without the valid consent of the parties. If the court makes a consent order in family proceedings, and it subsequently transpires that there is a reason which vitiates a party's underlying consent to it, that 'may' be a good reason to set aside the consent order: Sharland at [29]. Whether it is or not will depend upon the nature of the vitiating factor; Livesey [1985] AC 424 at 445-6; Sharland at [24], [30]-[32].

170. In cases of innocent non-disclosure in family proceedings, it seems that the court will only set aside a perfected consent order 'where the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place': Livesey [1985] AC 424 per Lord Brandon at 445-6.

171. In the case of fraudulent misrepresentation or fraudulent non-disclosure in family proceedings, however, it appears from Baroness Hale's judgment in Sharland at [32] that a fraudulent misrepresentation which vitiates a party's underlying consent to the consent order could of itself warrant the setting aside of the order, regardless of whether the court would have made a substantially different order: see generally Sharland at [30]-[32]. The reasoning appears to be that a victim of fraudulent misrepresentation which led her to compromise a claim in matrimonial proceedings should be in no worse position than the victim of fraudulent misrepresentation in an ordinary contract case, including a contract to settle a civil claim.

172. It was strictly unnecessary to put this to the test in Sharland, however, as on the facts, it was in any event clear that the misrepresentation and non-disclosure had been 'highly material' to the decision made by the court at the time that it approved the consent order in July 2012: Sharland para [34]. As put by Baroness Hale 'it is enough that Sir Hugh would not have made the order he did when he did had the truth been known.'

Mr Deputy Registrar Baister's ruling on the Preliminary Issues

173. Having considered the broader jurisprudential landscape, I turn to consider the ruling of Mr Deputy Registrar Baister on the preliminary issues directed in this case.

174. The Applicant's original application notice sought retrospective rescission of the disqualification undertakings pursuant to s.8A CDDA and/or r.12.59 IR 2016. Having

changed his legal team shortly before the preliminary issues hearing, however, the Applicant also advanced an alternative submission that the undertakings could be rescinded retrospectively pursuant to the court's inherent jurisdiction to set aside a judgment or consent order obtained by fraud.

175. From the passages of counsel's skeleton argument quoted in the learned deputy's judgment (at [20] and [30]), it appears that the argument run was, in broad terms, that it would be 'surprising' if the disqualification jurisdiction was exempt from the 'general law' on the effect of fraud. For these purposes, counsel relied on Sharland v Sharland [2015] UKSC 60 as 'Supreme Court authority for the proposition that 'fraud unravels all' in relation to the obtaining of a judgment or consent order' (at [20]).

176. In a judgment handed down on 15 December 2017, Mr Deputy Registrar Baister rejected the submission that the court had jurisdiction under section 8A CDDA or rule 12.59 IR 2016 to rescind or vary the undertakings with retrospective effect, referring to Re INS Realisations Ltd [2006] 1 WLR 3433 at paragraph [35], Re Blackspur Group plc [2006] EWHC 299 (Ch) at [51], Anton David Taylor v Secretary of State for Business Innovation and Skills [2016] EWHC 1953 (Ch) at [29] and Eastaway v Secretary of State for Trade and Industry [2007] EWCA Civ 425.

177. He went on to hold, however, that, in cases of fraud, the court had an inherent jurisdiction (1) to order that the undertakings be rescinded or varied with retrospective effect and (2) to order that the Applicant be permitted to be concerned in the management of a company using the prohibited name 'Nozomi' with retrospective effect.

178. In reaching these conclusions, the judge referred at length to the main case cited to him, that of Sharland v Sharland [2015] UKSC 60.

179. Sharland was a case involving a consent order in matrimonial proceedings between husband and wife, where the husband had been found to have dishonestly misrepresented in his evidence the value of his assets, in the lead up to the parties agreeing the terms of the consent order: see [2015] UKSC 60 at [10].

180. In Sharland, the Supreme Court, at [29] – [34], had endorsed the dissenting judgment of Briggs LJ in the Court of Appeal at [2014] EWCA Civ 95 at [35]-[37]. The material passages from Briggs LJ's judgment in Sharland [35] – [37] read as follows:

> '(35) I consider that the now undisputed fact that the husband's conduct was fraudulent is a cardinal aspect of this appeal. The general principle that "fraud unravels all" is, as far as I am aware, no less applicable to judgments and orders of the court than to contracts. Although there has been long-standing debate about how it should properly be litigated, (for which see the useful summary of this court in Owens v Noble [2010] EWCA Civ 224), it has never been in doubt that once it is established that a judgment or order has been procured by a process involving material fraud, then the interests of justice required that the judgement be set aside. By "material fraud" I mean fraud which, as in the present case, was material in the obtaining of the

> judgements ought to be set aside, in this case the consent order approved by the judge on 25 July 2012.
>
> (36) The fact that nondisclosure or misstatement is fraudulent is not merely relevant to materiality. It means that the process by which the judgment was obtained involved a serious abuse of process. There is a public interest in the protection of the courts processes from fraud which transcends other case management considerations, such as finality, economy and speed. I do not by that mean to undermine or disagree with my Lords' conclusion that nondisclosure in these or comparable circumstances in civil proceedings will almost always involve some abuse of process, but there remains in my view a step change in gravity between that which is shown to be dishonest and that which is not.
>
> (37) I consider that the court should be very slow to depart from that healthy principle. I am aware of no case before this one where such a departure has occurred. In the present case the husband has sought to hold onto an order tainted by material fraud on his part by rearranging his affairs (in this case the affairs of AppSense which he controls) so as to bring them broadly into line, but after the events, with the false picture originally portrayed by him. I have come nowhere near being persuaded that he should thereby have been allowed to do so'.

181. Pausing there, it will be noted that the 'fraud' under consideration in Sharland was that of a party to the proceedings. The 'fraud of a party' rule, as explored in Re Odyssey and Cinpres Gas, was not in issue. Briggs LJ's comments that 'it has never been in doubt that once it is established that a judgment or order has been procured by a process involving material fraud, then the interests of justice required that the judgment be set aside' must be viewed in that context.

182. The learned Mr Deputy Registrar went on to consider the reasoning of the Supreme Court in Sharland at paragraphs 31 to 34, which provided as follows:

> '(31) Although not strictly applicable in matrimonial cases, the analogy of the remedies for misrepresentation and nondisclosure in contract may be instructive. At common law, the general effect of any misrepresentation, whether fraudulent or negligent or innocent, or of nondisclosure where there was a duty to disclose, was to render a contract voidable at the instance of a party who had thereby been induced to enter into it. This has now been modified by the Misrepresentation Act 1967, which empowers the court to impose an award of damages in lieu of rescission for negligent or innocent misrepresentation. This does not, however, apply in cases of fraudulent misrepresentation, where there is no power to impose an award of damages in lieu. The victim always has a right to rescind unless one of the general bars to rescission has arisen.

> (32) There is no need for us to decide in this case whether the greater flexibility which the court now has in cases of innocent or negligent misrepresentation in contract should also apply to innocent or negligent misrepresentation or nondisclosure in consent orders whether in civil or in family cases. It is clear from Dietz and Livesey that the misrepresentation or nondisclosure must be material to the decision that the court made at the time. But this is a case of fraud. It would be extraordinary if the victim of a fraudulent misrepresentation, which had led her to compromise her claim to financial remedies in a matrimonial case, were in a worse position than the victim of a fraudulent misrepresentation in an ordinary contract case, including a contract to settle a civil claim. As was held in Smith v Kay (1859) VII HLC 749, a party who has practised deception with a view to a particular end, which has been attained by it, cannot be allowed to deny its materiality. Furthermore, the court is in no position to protect the victim from the deception, or to conduct its statutory duties properly, because the court too has been deceived. In my view, Briggs LJ was correct in the first of the three reasons he gave for setting aside the order.
>
> (33) The only exception is where the court is satisfied that, at the time when it made the consent order, the fraud would not have influenced a reasonable person to agree to it, nor, had it known then what it knows now, would the court have made a significantly different order, whether or not the parties had agreed to it. But in my view, the burden of satisfying the courts of that must lie with the perpetrator of the fraud. It was wrong in this case to place upon the victim the burden of showing that it would have made a difference.
>
> (34) In my view, the second and third reasons given by Briggs LJ the setting aside the order flowed from the first. Sir Hugh Bennett had been clear that the misrepresentation and nondisclosure as to the husband's plans for the company was highly material to the decision made in July 2012…'

183. Having considered the features of a disqualification undertaking, Mr Deputy Registrar Baister concluded (at [21]) that a disqualification undertaking 'must be a contract, albeit a statutory one.'

184. Reflecting on the passages quoted from Sharland at paragraphs 31-34, Mr Deputy Registrar Baister acknowledged that Sharland was a case about matrimonial orders, which operate in a special way for the protection of those litigating in the family courts, but concluded that much of what was said in Sharland was of more general application, noting the references in Sharland to contracts and agreements.

185. At [24] he continued "I see no reason why that application should exclude this court considering making an order in this jurisdiction which in some way 'undoes' an undertaking, even if I am wrong about its contractual characteristics and a

disqualification undertaking is sui generis. Fraud unravels all, and "all" must also bear its natural contextual meaning.'

186. At paragraph 25 of his judgment, he continued:

> 'Having recognised differences between the jurisdiction under consideration in Sharland and this jurisdiction, I should mention other reasons why the maxim fraud unravels all might arguably not apply here. The maxim itself leaves unanswered the obvious question, 'Between and among whom?' In the majority of cases of the Sharland kind the battle lines are clearly drawn between the fraudster and the victim. This is not so here: there is no suggestion that the respondent was responsible for the fraud or knowingly relied on fraudulent evidence. What Mr Tolley [counsel for the Applicant] says is that the fact of the evidence, coming as it did from a convicted fraudster [Mr Mills] in one case and in another case from a person implicated in that fraud, albeit acquitted of criminal charges [Mr Cohen], tainted the proceedings which led to his client's giving the initial undertaking from which the second flowed, at least in part. For present purposes I accept that proposition. Whether it will be made good must await the final hearing where the facts and their implications will be properly explored.'

187. At paragraph 29 of his judgment, the learned deputy added:

> 'Any submissions on the extent of the 'all' which fraud may or may not ultimately unravel in this case is necessarily contingent on factual findings which are not for me to make now.'

188. At paragraph 35 of his judgment he concluded that the court did have jurisdiction to rescind or vary disqualification undertakings with retrospective effect "on the 'fraud unravels all'/inherent jurisdiction basis". He further concluded, in part on the footing that it was 'arguable.. that fraud will unravel all', that the court had jurisdiction to give retrospective permission to use a prohibited name.

189. What Mr Deputy Registrar Baister does not appear to have been addressed on at the preliminary issues hearing, no doubt because the 'fraud unravels all' argument was introduced late in the day, are the *limits* of the court's inherent jurisdiction to set aside judgments obtained by fraud, and the essential pre-requisites for rescinding a contract (including an ordinary civil consent order) for fraudulent misrepresentation.

190. As demonstrated by the cases of Re Odyssey and Cinpres Gas considered earlier, even where it is proven that a judgment has been obtained by perjured evidence, that of itself is not sufficient to warrant setting aside the judgment. The fraud or perjury must be shown to be that of a party to the proceedings, whether directly, by attribution, or by adoption. The fraud of a 'mere witness' does not suffice. The suggestion that the fraud of a mere witness is sufficient to 'taint' proceedings and to warrant setting aside a judgment was fully argued in Re Odyssey and was roundly rejected by the Court of Appeal. As made clear by the Court of Appeal's decision in the later case of Cinpres Gas, the 'fraud of a party' rule still stands.

191. Similarly, in the case of civil (non-matrimonial) consent orders, the principles of private law contract apply. The general rule is that a misrepresentation made by a person not a party to the contract cannot give rise to a rescission of the contract, unless the other contracting party had actual knowledge that the representation was false: Pulsford v Richards (1853) 17 Beav at p95.

192. The law relating to the setting aside of matrimonial consent orders for fraud, as explored in Sharland, does not take matters any further for current purposes. Ultimately the caselaw in this area suggests a nuanced application of both the principles governing the setting aside of judgments for fraud and the principles governing the setting aside of a contract for fraudulent misrepresentation.

193. I shall return to the implications of this in due course.

What is a disqualification undertaking and how can it be rescinded?

194. While a disqualification undertaking is contractual in its origins, its effect and parameters are modified by statute:

(1) Unlike a normal contract, the parties are unable to modify its terms or agree that it should cease to have effect. The terms can only be varied through application to the court: see Re Morija plc [2007] EWHC 3055 (Ch) at [7].

(2) Unlike a normal contract, breach of a disqualification undertaking has penal consequences.

(3) A disqualification is not an undertaking given to the court. However the court's jurisdiction under s.8A CDDA gives the court the same powers over a disqualification undertaking as an undertaking to the court: Re INS Realisations Ltd [2006] 1 WLR 3433 at [40]-[41].

(4) While under s.8A CDDA the court can discharge an undertaking when 'some ground is shown which would be sufficient to discharge a private law contract' (Re INS at [31]), it does not have the power to rescind retrospectively: Re Blackspur Group plc [2006] EWHC 299 (Ch) at [51].

195. These unique features of a disqualification undertaking, however, do not change the fact that it is essentially a contract between the SoS and the Applicant. In this regard I respectfully agree with the learned Mr Deputy Registrar Baister in his conclusion (at [21]) that a disqualification undertaking

> 'must be a contract, albeit a statutory one… the parties can negotiate its terms (up to a point, at least); the person who is to be disqualified makes an offer which the Secretary of State may accept or reject; once it has been offered and accepted it has legal effect and has consequences for the person who has been disqualified; there is real or implied consideration: the promise of the secretary of State not to bring or continue to prosecute proceedings. It gives rise to legal rights that can be enforced (as it did here in the form of the second disqualification). In short, a disqualification undertaking provides a means by which

> disqualification proceedings can be avoided by agreement. Generally speaking, the court has no role to play: no order is made save, sometimes one which provides for the costs of any proceedings that may have been commenced but been concluded by discontinuing them.'

196. On behalf of the SoS, Mr Nersessian submits that, given that the disqualification undertaking is essentially contractual in form, the court must look to the established mechanism that exists to 'unravel' a contract through fraud: an action for fraudulent misrepresentation. He further submits that if the elements of a fraudulent misrepresentation are not made out, the court does not have a general supervisory jurisdiction to dismantle a contract on general grounds of 'fraud unravelling all'.

197. Having reviewed the caselaw summarised in paragraphs 126-172 of this judgment in some depth, I accept Mr Nersessian's submissions on this issue. In my judgment, where retrospective rescission of a disqualification undertaking is sought on the ground that the undertaking was obtained by fraud, the party seeking rescission must satisfy the Court that the elements of a fraudulent misrepresentation are made out. In this context, disqualification undertakings should be treated no differently to ordinary civil consent orders.

198. On behalf of the Applicant, Ms Doran submitted that this conclusion was not open to the court. She argued that Mr Deputy Registrar Baister has already ruled on the preliminary issues and that there has been no appeal from his decision. The order of 16 March 2017 directing the hearing of the preliminary issues provided that they should be determined on the assumption that the Applicant's evidence was accurate. At paragraph 25 of his judgment, Mr Deputy Registrar Baister stated that, on the case as presented to him, there was 'no suggestion' in this case that the SoS 'was responsible for the fraud or knowingly relied on fraudulent evidence'. He nonetheless went on to rule that the Court had inherent jurisdiction to order that the disqualification undertakings be rescinded with retrospective effect. Ms Doran submitted that it is implicit in that ruling, viewed in context, that the learned judge did not consider the court's inherent jurisdiction to be limited to cases in which the elements of fraudulent misrepresentation are made out. In essence, she argued, the point has already been decided.

199. I reject Ms Doran's submission that the point has already been decided by Mr Deputy Registrar Baister. Read as a whole, it is clear that the learned deputy was not, by his judgment, ruling on the circumstances in which the court's inherent jurisdiction in cases of fraud would or would not be engaged, still less finding that the court's inherent jurisdiction was actually engaged on the facts of this case. He was simply ruling that, as a matter of principle, the court's jurisdiction to set aside judgments, orders or contracts in cases of fraud (whatever that jurisdiction might be) applied equally to disqualification proceedings and disqualification undertakings.

200. Moreover even if I am wrong in that conclusion, it is clear from the learned deputy's judgment that he did not have the benefit of full legal submissions on the limits of the court's inherent jurisdiction to set aside judgments obtained by fraud, or on the essential pre-requisites for rescinding a contract for fraudulent misrepresentation: see paras 126-172 above. In the circumstances, I do not consider myself bound by any ruling he may unwittingly have given on the point.

201. Ms Doran further submitted that to impose such limits on the circumstances in which a disqualification undertaking may be rescinded with retrospective effect for fraud would render the jurisdiction illusory. She argued that in pursuing a disqualification claim, the SoS will have no contemporaneous knowledge of the facts or matters set out in the evidence prepared in support of the claim or in the schedule to a disqualification undertaking. To rule that, for the court's inherent jurisdiction to be engaged, it must be proved either that the SoS dishonestly made a materially false representation which was intended to and did induce the representee to act to his detriment, or that the SoS had actual knowledge of a materially false representation made by a third party, she argued, would pose an almost insuperable hurdle.

202. I do not accept that the limits imposed render the jurisdiction illusory. There are already well-established mechanisms for fixing with knowledge those who hold office in a representative capacity. I also remind myself that the jurisdiction is exceptional. In my judgment it should remain so.

203. Similar issues arise in the context of applications to set aside a judgment on grounds of fraud. In that context the mechanisms of attribution or adoption are employed. The Applicant would be in no stronger position if the test for setting aside judgments obtained by fraud was applied. He would still need to show that the SoS was responsible for the fraud relied upon: see the cases of Odyssey and Cinpres Gas, considered previously. See too Takhar v Gracefield Developments Ltd [2019] 2 WLR 984 per Lady Arden at [93].

204. The common theme which anchors all of the authorities on the principle that fraud unravels all (whether private contract, judgments or consent orders within and outside the context of matrimonial law) is that the fraud or perjury must either be that of the counterparty in the litigation or transaction itself, or must at least be suborned, adopted, or knowingly relied on, by that party.

205. This issue did not arise in Sharland, which was the focus of much of the debate before the learned Deputy Registrar. In that case it was the husband, a party to the proceedings and to the underlying contract on which the consent order was based, who was found to have dishonestly misrepresented the value of his assets in his evidence: see Sharland [2016] AC 871 at [10]. The comments of Briggs LJ with regard to the 'healthy principle' that 'fraud unravels all' must be considered in that context. The husband cleared both the 'party' requirement for fraudulent misrepresentation and the 'fraud of a party' requirement for setting aside judgments obtained by fraud.

206. For all of these reasons, I conclude that the party seeking rescission of a disqualification undertaking on a retrospective basis on grounds of fraud must satisfy the Court that the elements of a fraudulent misrepresentation are made out. This requires a false material representation, dishonestly made, which was intended to and did induce the representee to act to its detriment. The misrepresentation must either be made by the SoS or known to the SoS to be false at the material time.

207. In reaching this conclusion I remind myself that s.8A CDDA already provides considerable protection for those who have entered into disqualification undertakings which they subsequently wish to vary. It is clear from the case of In re INS Realisations [2006] 1 WLR 3433 at [31] that the court's power to vary prospectively an undertaking under that section is not limited to cases where 'some ground is shown which would be

sufficient to discharge a private law contract'. It may be exercised even where no factor vitiating contractual consent is established but where instead 'some ground of public interest is shown which outweighs the importance of holding a party to his agreement'. It is only in cases where retrospective rescission on grounds of fraud is sought that the limitations which I have indicated apply.

208. Having considered the law, I now turn to the evidence.

The Evidence

209. For the purposes of this application, I have read and considered the following written evidence:

(1) the witness statement of Mr Philip Cohen dated 13 January 2017;

(2) the third, fourth, and fifth affidavits of the Applicant, dated 13 January 2017, 10 March 2017 and 24 August 2017 respectively;

(3) the first and second affirmations of Mr David Prince, filed on behalf of the Secretary of State, dated 23 February 2017 and 13 November 2018 respectively.

I have also considered (1) the written evidence filed in the disqualification proceedings giving rise to the undertakings and (2) other documents, as contained in the bundles agreed for use at this hearing, to which reference will be made in this judgment where appropriate.

210. I heard oral evidence from the Applicant and Mr Prince.

Mr Prince

211. Mr Prince is a manager at the Defendant Liaison Team of the Insolvency Service. He was not involved in the original disqualification proceedings giving rise to this application and had no direct knowledge of any of the matters referred to therein. In the application before me Mr Prince's main role was to produce relevant documentation and assist with analyses of the information available. His written testimony was accurate and helpful. In oral testimony he listened carefully to questions put to him and answered the same with clarity and precision. Overall, I am confident in the veracity of his testimony.

The Applicant

212. The Applicant is a former barrister and an experienced businessman. His written evidence focused largely on re-arguing (and in certain self-serving respects, re-writing) his defence to each of the original disqualification claims. It also contained commentary on the evidence of the SoS's witnesses in the original proceedings. Virtually all of the documents referred to by the Applicant in his evidence in this application formed part of the evidence filed in the disqualification proceedings: see by way of example the documents referred to in paragraph 42.4.1, 42.4.2, 43.5, 48 and 50 of Mr Prince's second affirmation and those listed at paragraph 20 of the Applicant's skeleton argument. There was practically nothing new, other than the convictions of Messrs Scourfield and Mills.

213. I shall give three examples of the Applicant's 're-writing' of his defence. There were more.

(1) In the first disqualification proceedings, the thrust of the Applicant's evidence was that Messrs Mills, Cohen and/or Alessi took charge of dealing with creditors in or about January 2004 (see for example his first affirmation, paras 23 & 30). This left the Applicant with the problem of explaining who was to blame for Soiram trading to the detriment of the Inland Revenue from commencement of trading in March 2003 to January 2004. In this Application, the Applicant 'airbrushes' this period by implying in his evidence that (variously) HBOS, Mr Mills, Mr Cohen and/or Mr Alessi were in charge of dealing with creditors from commencement of trading in March 2003 (see for example his third affirmation at paras 88-93; his fourth affirmation at para 73);

(2) in the first disqualification proceedings, the Applicant accepted that PAYE/NIC should have been deducted from his income from Mezzanine but was not deducted (see for example his first affirmation, para 6). In this Application, he insists by his evidence that he was paid 'net', that Mezzanine should have accounted to the Inland Revenue for the PAYE/NIC deducted from his pay, and that it was Mr Mills' fault that it didn't, this being part of the 'modus operandi' of the HBOS fraud (third affidavit, para 54, fourth affidavit, para 72); and

(3) in the first disqualification proceedings, the Applicant expressed a *belief* that it was the bank's policy to prioritise paying VAT over PAYE (first affirmation para 27); in this Application, he states in his evidence that Mr Alessi *actually told him* that the Bank had decided to prioritise paying down Soiram's VAT liability (third affidavit at para 94).

214. In short, the Applicant's written evidence was somewhat disingenuous in certain respects.

215. The Applicant fared little better in oral testimony. He was argumentative, flippant and evasive.

216. When taken to Mr Mills' affidavit and asked to identify the passages which he claimed were 'misrepresentations', for example, he answered: 'paragraph 2 to the end of the statement'. This was an unhelpful, throwaway response; and plainly an untenable position for the Applicant to adopt, given the underlying evidence, even putting the Applicant's case at its highest.

217. When it was put to him that the mere fact that Mr Mills was convicted of a criminal offence did not mean that everything he said was untrue, the Applicant retorted 'of course it does.'

218. When confronted with the logical consequences of parts of his written testimony, such as paragraph 109 of his third affidavit, he distanced himself from that testimony, claiming that it was drafted by someone else, and simply changed his position.

219. He also made unsubstantiated allegations of fraud. These included allegations against the SoS and Ms Shirley Smith.

220. Overall, whilst some of his oral testimony was undoubtedly true, the Applicant did not hesitate to 'posture' and deviate from the truth when it suited his purposes. I have come to the conclusion that his testimony, both written and oral, should be viewed with caution.

The Applicant's case

221. I now turn to consider the allegations of fraud put forward by the Applicant.

Dishonest preparation of witness evidence by the SoS

222. By his written evidence, the Applicant implied or insinuated that an unidentified 'draftsman' or 'author' acting for the SoS had prepared the witness evidence filed in the disqualification proceedings in a misleading and dishonest manner (see the Applicant's fourth witness statement at [11], [18], [30], [33], and [37]). I set out some examples below:

(1) Of Mr Zune, Manager of the Attica nightclub:

'Mr Zune knows very little about the operation of the financial side of the business, despite the author seeking to depict him as having this knowledge' (para 18);

(2) 'the author puts into Mr Allessi's mouth an irrelevant but prejudicial slur to the effect that I was causing Soiram to stay open after its licensing hours' (para 28);

(3) 'similarly, the draftsman sees fit to recount falsehoods from Mr Alessi to the effect that I am staying at the Holiday Inn in Camden and not paying my hotel room' (para 30);

(4) 'It is clear that the author of these statements had no interest in substantiating any of the evidence provided as long as it supported the narrative he was seeking to portray' (para 37).

223. By suggesting that within each affidavit or affirmation relied upon in the disqualification proceedings, there should be drawn a distinction between the 'true' evidence of the witness and the 'improper' evidence of the draftsman, the Applicant sought to imply or insinuate that the SoS by her officers and lawyers had dishonestly propounded their own version of events in the witness evidence filed in the disqualification proceedings, in order to improve their trial prospects.

224. At paragraph 29 of his fourth witness statement, the Applicant further alleged an 'unwholesome collaboration' between Mr Mills and the unidentified draftsman.

225. There was not a shred of evidence to support these extremely serious allegations and I have no hesitation in rejecting them. Whilst, at the hearing before me, Ms Doran rightly distanced herself from the same, for the avoidance of any doubt, I confirm that, on the evidence which I have heard and read, this ground is not made out.

HBOS Fraud: The 'modus operandi' argument

226. The modus operandi argument is summarised at paragraphs 119 to 121 above.

227. In my judgment this argument is untenable. For the court's inherent jurisdiction to rescind a disqualification undertaking with retrospective effect to be engaged, it must be proved (inter alia) either that the SoS dishonestly made a material false representation which was intended to induce the Applicant to act to his detriment, or that the SoS had actual knowledge of a material false representation made by a third party. The 'modus operandi' argument meets neither requirement.

228. I would add that Ms Doran was in no position to speak for the SoS and there was no evidence to support her contention that the SoS would have acted differently had the SoS known of the HBOS fraud at the timing of considering whether to bring disqualification proceedings.

229. The evidence before me fell far short of establishing on a balance of probabilities that HBOS fraud caused the insolvencies of Mezzanine and Soiram, but even if it had, this of itself does not give rise to grounds for retrospective rescission for fraud. As rightly noted by Mr Nersessian in his skeleton argument, the insolvencies of Mezzanine and Soiram cannot in any way be viewed as dishonest misrepresentations of fact by the SoS that induced the Applicant to offer the first undertaking. The insolvencies of Mezzanine and Soiram were a reality.

230. Moreover, whilst Mezzanine was mentioned in the criminal proceedings, it was accepted at paragraph 32 of Ms Doran's skeleton argument that the Applicant's admission of unfit conduct in relation to Mezzanine was 'not related to the fraud perpetrated on Mezzanine.' The fraud explored in the criminal proceedings in relation to Mezzanine related to two loans with Svenska Handelsbanken in 2005, *three years after* the Applicant resigned as a director of Mezzanine. It had no relevance at all to the ground of unfitness relied upon by the SoS in relation to Mezzanine in the first disqualification claim.

231. Soiram, the 'lead' company for the purposes of the first disqualification proceedings, was not mentioned *at all* in the criminal proceedings. Even if it was the target of the same fraudulent modus operandi as that exemplified by the sample companies used for the purposes of the criminal proceedings, Ms Doran could take me to nothing in the Crown opening speech or related documentation to suggest that the wrongdoers' modus operandi included trading to the detriment of the Inland Revenue. The only evidence on this issue comprised the unsubstantiated assertions of the Applicant himself (see for example paragraph 94 of his third affidavit), which I note had evolved in marked and self-serving respects from his original evidence in answer to the first disqualification claim (compare for example paragraph 27 of his affirmation dated 14 May 2007).

232. For all of these reasons, I reject the 'modus operandi' argument.

HBOS Fraud: The 'credibility' argument

233. A linked argument was that the HBOS Fraud was also relevant to the credibility of the Messrs Mills, Cohen and Alessi in the first disqualification proceedings. Ms Doran maintained that 'The Applicant's prospects of success would have skyrocketed if the Respondent had issued the claim after the criminal convictions…': Applicant's skeleton argument, para 39.

234. As rightly noted by Mr Nersessian, ultimately this argument was little more than an assertion that the Applicant would, with hindsight, have felt 'bolstered' in a decision to take the matter to trial and test the evidence had the trial taken place after the convictions of Messrs Scourfield and Mills.

235. This of itself does not give right to the right to rescind the first undertaking retrospectively for fraud: see para 227.

236. Moreover, having reviewed all of the evidence filed in the first disqualification proceedings, I do not accept the submission that the Applicant's prospects would have 'skyrocketed' if the disqualification claim had been issued post-conviction.

237. The Mezzanine ground of unfitness did not involve Messrs Cohen and Alessi at all and barely involved Mr Mills. It was not related to 'HBOS fraud' in any way and was supported by the evidence of Ms Mack and Mr Basham. It was a serious allegation which, if found proven, would of itself have been a sufficient ground to warrant the Applicant's disqualification.

238. Moreover, the Soiram grounds of unfitness did not stand or fall on the evidence of Messrs Mills, Cohen and Alessi, even leaving to one side the facts that (1) Mr Mills' conviction for fraud does not automatically render his evidence 'fraudulent' (2) Mr Cohen was acquitted on all counts and (3) Mr Alessi was not even prosecuted.

239. The SoS evidence also included that of independent third parties, such as the book-keeper, Ms Shirley Smith, who gave clear evidence, based on her own dealings with the Applicant, that it was the Applicant who chose which creditors to pay and when. Her evidence was corroborative of that of Mr Alessi in material respects.

240. In the light of the foregoing, it could not possibly be said that the Applicant's prospects of success would have 'skyrocketed' had the first disqualification claim had been issued after the conviction of Messrs Scourfield and Mills, even if that was the test.

Perjury of Messrs Mills, Cohen, Alessi in the first disqualification proceedings

241. The Applicant also sought to rely upon what he alleged to have been false material evidence dishonestly given by Messrs Mills, Cohen and Alessi in the first disqualification proceedings.

242. For reasons already explored, even if the Applicant could establish that any or all of Messrs Mills, Cohen and Alessi had dishonestly made a material false representation in their evidence in the first disqualification proceedings, that of itself would not entitle him to a retrospective rescission of the first undertaking on grounds of fraud. He would also need to prove (among other things) that the SoS had actual knowledge at the material time that the relevant representation was false.

243. In the present application, Ms Doran has confirmed that it is not alleged that the SoS was involved in any wrongdoing or had actual or constructive knowledge of any false evidence or other wrongdoing. To the extent that the Applicant implied otherwise in his evidence, he has not made out any wrongdoing or actual or constructive knowledge of any false evidence or other wrongdoing on the part of the SoS: see paragraphs 222 to 225.

244. This ground of the application for retrospective rescission of the first undertaking therefore falls at first post.

245. I would add that in any event, on the evidence which I have heard and read, the Applicant has failed to establish on a balance of probabilities that any of Messrs Mills, Cohen and Alessi dishonestly made false material representations in their evidence.

Mezzanine

246. In relation to the Mezzanine ground, Messrs Cohen and Alessi did not give any evidence at all. There was very little that Mr Mills could say in relation to the Mezzanine ground either, given that (1) the ground of unfitness related a failure to account for tax in respect of the Applicant's personal remuneration over accounting years ending June 2000, 2001 and 2002 and (2) Mr Mills had not even been introduced to the Applicant or Mezzanine until 2002.

247. Mr Mills' evidence on this ground (set out at paragraphs 4 to 8 of his affidavit of 7 February 2008) focused largely on a Mezzanine board meeting held on 16 May 2003 which he had attended, at which the issue of tax payable on the Applicant's salary was discussed, and on the circumstances surrounding the Applicant's departure from Mezzanine. His evidence on this ground was inaccurate in certain respects. For example, his evidence was incorrect on the issue of when the PAYE issue was first disclosed to the Mezzanine board (it had been disclosed some months prior to the meeting of 16 May 2003 and by the time of that meeting, the Applicant had left Mezzanine). On the evidence before me, however, I am not satisfied on a balance of probabilities that this (and one or two other errors of a similar nature) were deliberate lies on the part of Mr Mills. Given that all of the relevant meetings were minuted and relevant reports were dated, such lies would be too easy to spot for Mr Mills to have bothered. Save for mis-recalling the timeline in certain respects, his evidence on the Mezzanine ground is corroborated by contemporaneous documentation, including the board minutes of the meeting of 16 May 2003 itself and the WB Chiltern report. It is also lent support by the written witness testimony of Mr Basham and Ms Mack.

248. Naturally I remind myself that I have not had the benefit of hearing Mr Mills tested on his evidence. In the context of this application, however, the burden is on the Applicant. Overall, having assessed Mr Mills' evidence on the Mezzanine ground by reference to objective facts, contemporaneous documentation and the witness testimony of others who worked at Mezzanine over the material period, the Applicant has failed to satisfy me on a balance of probabilities that Mr Mills by his evidence on the Mezzanine ground dishonestly made any material false representations, leaving to one side the question whether any such representations, in context, could sensibly be said to have been made with the intention of inducing the Applicant to act to his detriment, even with the aid of an evidential presumption.

Soiram

249. In relation to the first ground of unfitness alleged in respect of Soiram, (that the Applicant caused Soiram to trade to the detriment of the Inland Revenue), the SoS had adduced cogent evidence of a sustained pattern of non-payment/underpayment of the Inland Revenue and adverse comparative treatment of the Inland Revenue compared with trade creditors spanning back to commencement of trading in March 2003. A

strong prima facie case of a policy of detrimental trading was established on the evidence; the main issue was whether the Applicant had *caused* Soiram to adopt that policy and trade in that way.

250. The thrust of the Applicant's evidence in the first disqualification claim was that HBOS, Mr Alessi, and Mr Mills took over control of creditors in or about January 2004 – almost a year after commencement of trading. Even on his own case, therefore, the Applicant had a period of almost a year of detrimental trading to explain. (As previously noted, the Applicant has since 'airbrushed' that period to an extent in the evidence filed in support of this application).

251. In their evidence filed in the first disqualification proceedings, Mr Mills, Mr Alessi and Mr Cohen each denied that they decided which creditors should be paid and when. All three stated that the Applicant ran Soiram.

252. The Applicant's suggestion that all proposed Soiram payments were run past Brett Adams first for approval (paragraph 24 of the Applicant's first affirmation dated 14 May 2007) was inherently implausible. No company could function on the basis that all proposed payments had to be run by its accountants first. Mr Cohen denied that he undertook such a role, pointing to contemporaneous evidence such as the Brett Adams invoices in evidence to demonstrate the range of work undertaken (Cohen (1) para 15).

253. Other than the Applicant's own testimony, which in this regard I reject, I was taken to no persuasive evidence, documentary or otherwise, to suggest that Mr Mills was routinely involved in deciding which of Soiram's creditors should be paid and when. Mr Mills gave evidence that '[i]n my meetings with [the Applicant] we never discussed which creditors should be paid': (Mills (1) para 19). Even if he was defrauding Soiram (which was not made out on the evidence in any event), there was no obvious reason why he should be involved in deciding which creditors to pay. Other than the Applicant's own self-serving testimony, which in this regard I reject, I was taken to no evidence to suggest, still less establish on a balance of probabilities, that the 'modus operandi' of the HBOS fraudsters involved trading to the detriment of the Inland Revenue.

254. Mr Alessi's evidence was that the Applicant would run through the list of creditors with Ms Shirley Smith (the book-keeper) on a regular basis and that it was the Applicant who would decide which creditors to pay. His evidence on this issue was entirely consistent with that of Ms Shirley Smith.

255. Both Mr Alessi and Ms Smith also gave evidence that, contrary to the Applicant's assertions, Mr Alessi was not an authorised signatory on Soiram's bank account. Ms Smith's evidence was that one of her functions in Soiram was to prepare cheques for signature for the Applicant and that none were ever prepared for Mr Alessi to sign. Ms Smith was also very clear in her evidence that she had never received instructions from Mr Alessi on the issue of which creditors to pay.

256. By his written evidence, the Applicant did not seek to implicate Ms Smith in the HBOS fraud or claim that she was giving fraudulent evidence. His attempts to do so in cross examination were entirely unconvincing.

257. The Applicant's attempts to suggest Messrs Mills, Alessi and Cohen (whether with or without Mr Scourfield) controlled or dictated which payments were *honoured* by HBOS were of little assistance to him either.

258. In this regard, the Applicant relied upon an email exchange between Mr Alessi and HBOS in April 2004 as evidence of Mr Alessi's control over which payments would be honoured and which would not. The email exchange (which formed part of the evidence in the first disqualification proceedings) concerned Mr Alessi's request for a list of recent banking transactions and bounced payments, which Mr Alessi asked HBOS to fax to him. Mr Alessi stated in his affidavit that one of the roles that he undertook for Soiram was to prepare cashflow forecasts and that he probably asked for this information in order to see what the state of Soiram's bank account was at the time (paras 9 and 13).

259. If anything, the email exchange of April 2004 relied upon by the Applicant *undermined* his claim that Mr Alessi had full control over Soiram or its bank account. It was clear from the email exchange that Mr Alessi was seeking to piece together what was happening on the account and did not have ready access to the same.

260. The point was ultimately a red herring in any event, given the clear evidence (set out at paragraph 72 of Mr Bruce's first affirmation dated 20 November 2006) of only *four* bounced cheques in favour of the Inland Revenue over the relevant period: these being a cheque in the sum of £10,229.75 which bounced on 21 June 2003, cheques of £2,409.17 and £1945.62 which bounced on 27 February 2004 and a cheque of £270.73 which bounced on 22 July 2004.

261. In short, this was not a case of the Applicant signing well-intentioned cheques in favour of the Inland Revenue and finding to his surprise that they bounced; this was a case of the Applicant not signing the cheques in the first place – when he was sole signatory for Soiram's bank account at all material times.

262. Overall, on the evidence which I have heard and read, the Applicant has failed to satisfy me on a balance of probabilities that Messrs Mills, Cohen and Alessi dishonestly made any material false representations in their evidence in relation to the first Soiram ground of unfitness, leaving to one side the question whether any such representations, if made out, could in context sensibly be said to have been made with the intention of inducing the Applicant to act to his detriment, even with the aid of an evidential presumption.

263. On the key issue of who was responsible for deciding which of Soiram's creditors to pay and when, the evidence (including that of parties unrelated to HBOS fraud) pointed overwhelmingly in favour of a finding that it was the Applicant.

264. I should add that, on the evidence which I have heard and read, the Applicant has also failed to satisfy me on a balance of probabilities that Messrs Mills, Alessi and Cohen dishonestly made any material false representations in relation to the second and third Soiram grounds either; again, leaving to one side the question whether any such representations, if made out, could in context sensibly be said to have been made with the intention of inducing the Applicant to act to his detriment, even with the aid of an evidential presumption.

265. For the sake of completeness, I would add that the Applicant also failed to satisfy me on a balance of probabilities that, in agreeing to the first undertaking and the schedule of unfit conduct on which it was based, he was influenced by the evidence provided by Messrs Mills, Cohen and Alessi. I reject the Applicant's evidence in this regard.

266. To the extent that the Applicant sought to imply in his evidence that he was advised by his legal advisers that his prospects of success stood or fell on the evidence of Messrs Mills, Alessi and Cohen, I reject his evidence. The Applicant did not waive privilege until day two of the trial and thereafter adduced no documentary evidence setting out (or even evidencing) the legal advice which he claimed to have received in the lead up to offering the first undertaking. His own recollections were partial, self-serving and unreliable. I reject those recollections.

267. On the evidence which I have heard and read, I am satisfied on a balance of probabilities that the Applicant offered the first undertaking because at the time that he offered it (1) he wanted to avoid the costs of trial (2) he believed that he could arrange his business affairs in a way which did not (or did not appear to) require him to be or act as a director and (3) he believed that he was likely to lose at trial anyway, regardless of the evidence of Messrs Mills, Alessi and Cohen. The evidence of Messrs Mills, Alessi and Cohen was not the operative cause, or even one of a number of operative causes, of the Applicant's decision to offer the first undertaking. He would still have offered the first undertaking in the same or substantially the same terms even if Messrs Mills, Alessi and Cohen had not given the evidence that they gave. I so find.

268. I am fortified in these conclusions by the Applicant's letter to the SoS's solicitors dated 25 January 2010, by which he offered the first undertaking stating:

> 'Although I do not accept the accuracy of all of the facts referred to in the undertaking, and would have wished to have referred to other relevant facts including the discrediting of many of the witnesses against me, I have taken a pragmatic approach, and wish to bring this matter to a close without further costs being incurred by me.'

269. I am further fortified in these conclusions by the explanation given for the first undertaking by the Applicant in evidence which he filed in the second disqualification proceedings. By paragraph 57.27 of his affidavit of 19 November 2013, he stated:

> 'I was advised that it would take a long time and potentially cost a lot more money to fight the disqualification proceedings at trial. I did not wish to compound my losses by wasting further time and money given that the work I was doing as an ambassador for Nozomi did not … require me to be able to act as a director.'

270. At paragraph 57.28 of his affidavit of 19 November 2013, he continued:

> 'I therefore considered that giving an undertaking would not restrict the activities I intended to pursue and would bring a regrettable chapter of my business career to a close. I must stress that this was a wholly commercial decision and I neither accept

> that I did anything wrong nor admit that there was any basis for disqualifying me.'

271. For all of these reasons, the application to rescind the first undertaking fails.

The Second Undertaking

272. In so far as the application for retrospective rescission of the second undertaking is predicated on the success of the application for rescission of the first undertaking, that too must fail.

273. I would add that, even if there were grounds for rescinding the first undertaking with retrospective effect, in my judgment this would not lead inexorably to the conclusion that the second undertaking should be rescinded.

274. The Applicant's breach of the first undertaking was an inescapable truth, which he elected not to dispute by giving the second undertaking. The courts have made clear that a variation of leave to act under s.17 CDDA cannot be made with retrospective effect because it would have the effect of decriminalising past conduct and absolve the director from the consequences of his own non-compliance: Brian Sheridan Cars Ltd [1995] BCC 1035 at 1049 per Neuberger QC (then sitting as a deputy judge of the Chancery Division). In my judgment the same principle applies here by analogy. In this regard I respectfully decline to accept the views expressed by the editors of Mithani and those expressed provisionally by Mr Deputy Registrar Baister.

275. Moreover, breach of the first undertaking was not the sole ground for the second undertaking. The second undertaking contained admissions of unfit conduct in relation to trading to the detriment of HMRC, and misuse of Eastzest's bank account.

276. The Applicant's claim that his counsel, Mr White, was unprepared for the trial of the second disqualification claim is irrelevant in this regard. It does not, of itself, engage the exercise of the court's inherent jurisdiction to rescind a disqualification undertaking on the ground of fraud. For the reasons already given, for that jurisdiction to be engaged, the elements of fraudulent misrepresentation must be made out.

277. For the sake of completeness, I should also address an additional matter raised in the Applicant's evidence in support of his application for rescission of the second undertaking.

278. By his evidence, the Applicant maintained that in the second disqualification proceedings, Mr Santese had initially given evidence in support of the Applicant but had been persuaded by the SoS to change his evidence in exchange for a lower disqualification period, in order to 'force' the Applicant to offer the second undertaking (Applicant (4) at [82]-[85]).

279. In support of this contention, the Applicant produced a copy of an affidavit apparently sworn by Mr Santese on 22 September 2014 and pointed out a number of differences between that affidavit and the affidavit sworn by Mr Santese on 6 November 2015.

280. The earlier version was never filed with the court, served upon the SoS, or relied upon by Mr Santese in the second disqualification proceedings, however. Indeed it was clear

that Mr Santese did not intend to rely upon the earlier version as his evidence in those proceedings, as he applied for (and was granted) relief from sanction for failing to file and serve his evidence in defence of the second disqualification claim at a hearing on 1 October 2014, that is to say, *after* 22 September 2014.

281. Moreover, the affidavit of 22 September 2014, whilst apparently sworn, was plainly an incomplete travelling draft. It contained passages in square brackets and comments relating to matters which had yet to be checked. It was telling that an area flagged as one to revisit was the reason why Mr Santese remained on a manager's salary when he had become a director of Eastzest. The explanation given at paragraph 21 of the affidavit was: 'I did not work any more hours once I became the owner and therefore I did not feel the need to remunerate myself with a high salary'. Immediately after this passage, the following was written in bold and in square brackets: 'Should we say this as why is Marcello [Mr Santese] not working greater hours unless he is still just working as an employee?'

282. This enquiry speaks for itself. In the event, Mr Santese clearly did not rely upon the document dated 22 September 2014 as his evidence in the second disqualification proceedings. Instead he decided to 'come clean' by swearing the affidavit of 6 November 2015.

283. There was no evidence to support the allegation that his decision to do so was the result of any improper pressure on the part of the SoS. Mr Prince's evidence was that the SoS did not 'do a deal' with Mr Santese in exchange for evidence favourable to the SoS's case. I accept Mr Prince's evidence on this issue.

284. I would add that the Applicant failed to establish on a balance of probabilities that Mr Santese dishonestly made any false material representations in his affidavit of 6 November 2015 in relation to the grounds of unfitness alleged against himself and the Applicant in the second disqualification proceedings in any event. The Applicant further failed to establish on a balance of probabilities that the SoS knowingly relied upon any materially false representations by Mr Santese.

285. To the extent that the Applicant based his application for rescission of the second undertaking on this additional ground therefore, it also fails.

Variation under s.8A

286. The Applicant further sought variation of the second undertaking pursuant to s.8A CDDA.

287. In Re INS Realisations Ltd [2006] 1 WLR 3433, Hart J set out the two-stage test applied by the court when approaching section 8A cases.

(1) Whether the applicant can resile from the facts in the schedule of unfit conduct; and

(2) How the court should approach the exercise of its discretion in the light of whatever facts may be admissible before it.

288. In relation to the first question, Hart J stated that the schedule would be binding on the applicant unless either some ground was shown which would be sufficient to discharge

a private law contract or some ground of public interest was shown which outweighed the importance of holding a party to his agreement.

289. In relation to the second question, Hart J confirmed that even if the applicant is unable to resile from the matters in the schedule of unfit conduct, the court may exercise its discretion to reduce the period or order that the undertaking cease to apply if special circumstances have arisen of a type or seriousness that were not intended to be covered and were not foreseen at the time that the undertaking was agreed.

290. On the evidence which I have heard and read, the Applicant has failed to establish on a balance of probabilities any ground sufficient to discharge a private law contract. He has further failed to persuade me of any ground of public interest which outweighs the important of holding him to his agreement.

291. It follows that he has failed to satisfy the first limb of the two-stage test laid down in INS Realisations.

292. In relation to the second limb of the INS test, Ms Doran submitted that the convictions of Messrs Scourfield and Mills amount to special circumstances that would justify the court finding that the second undertaking should cease to have effect from the date of judgment.

293. I reject that submission. Messrs Mills and Scourfield had no involvement whatsoever with Eastzest. Eastzest was not even arguably a victim of HBOS fraud. The convictions of Messrs Scourfield and Mills are entirely irrelevant to the insolvency of Eastzest and to the second undertaking.

294. The facts that the Applicant's counsel may not have been prepared for the trial of the second disqualification claim and did not anticipate dismissal of his application to adjourn do not amount to special circumstances for these purposes. It was the Applicant's decision to instruct his counsel, Mr White, at the eleventh hour. I reject the Applicant's rear-guard attempts in oral testimony to suggest that Mr White was fully briefed and put in funds for the full trial in good time before the hearing. He plainly wasn't.

295. Moreover, from the transcripts in evidence, it is clear that the Applicant did not offer a disqualification as a result of refusal of his application to adjourn in any event. It was only after refusal of his subsequent application, for Mr Santese's evidence (which inculpated the Applicant) to be expunged, that he offered the second disqualification undertaking.

296. The Applicant's attempts to suggest that he offered the second undertaking on the basis of legal advice at the time which he felt he had no choice but to follow is not of itself sufficient reason to vary the second undertaking under s.8A in the manner sought. Save for his own self-serving recollections, which I reject as unreliable, the Applicant adduced no evidence as to what Mr White's advice was. From the evidence before the court at the trial of the second disqualification claim, however, it is clear that the SoS had a strong prima facie case on each of the three grounds of unfitness alleged and that such grounds, if found proven by the court, would have warranted a lengthy period of disqualification in line with the period offered by way of the second undertaking.

297. Overall, on the evidence which I have heard and read, the Applicant has not persuaded me of any 'special circumstances' satisfying the second limb of the INS test. It follows that his application to vary the second undertaking under s.8A fails.

The s.216 application

298. In the light of my previous conclusions, the application under s.216 shall stand dismissed.

299. For the sake of completeness, however, I shall briefly address the arguments raised.

300. Mr Deputy Registrar Baister held at paragraph 39 of his judgment that it was arguable that the court could, pursuant to s.216(3), grant retrospective permission to use a prohibited name in cases of fraud.

301. The Applicant alleged that the insolvency of Tropeo was caused by fraud, and that therefore retrospective permission should be granted. As he put it at paragraph 10 of his fourth affidavit: 'if not for the frauds, there would have been no liquidation and without liquidation, the regime of directors disqualification and prohibited names is never engaged'.

302. As put in Ms Doran's skeleton argument (at para 64):

> 'because Tropeo's insolvency was caused by the fraudsters' non-payment of £500,000 it is not right that the Applicant should have been subsequently prohibited from acting in the management of Nozomi, and the court ought to relieve that injustice by granting permission'.

303. This was a hopeless argument. As rightly noted by Mr Nersessian, the fact that the insolvency of a company is caused by fraud does not mean that the company is not insolvent. It is not the case that Tropeo was placed into liquidation as a result of a fraud when it was in fact solvent.

304. The Applicant maintained that Messrs Scourfield and Mills had promised to purchase his interest in Soiram for £500,000 but failed to pay. He said that this resulted in Tropeo being 'starved of capital' (Applicant (3) at para 116).

305. Leaving aside the fact that the Applicant failed to establish on a balance of probabilities that such an agreement existed, there was no evidence before me to establish on a balance of probabilities that Tropeo's insolvency was caused by the non-payment of £500,000 by Messrs Mills and Scourfield. Even if it was, however, the fact that Messrs Mills and Scourfield failed to pay £500,000 and were later convicted of fraud does not make the failure to pay £500,000 an act of fraud.

306. Moreover, even if breach of a promise to pay £500,000 could be established and was somehow fraudulent, the Applicant was a director of three further companies trading as Nozomi that became insolvent: Trophy, Lifestyle and Eastzest. He was a serial offender. Given the Applicant's repeated use of phoenix companies to trade under the trading name 'Nozomi', it was plain that no permission should be granted to the

Applicant under s.216, whether retrospectively or otherwise: Brian Sheridan Cars Ltd at 1049H.

Conclusion

307. For all of these reasons, the Applicant's application is refused in its entirety.

308. I shall hear submissions on costs following the handing down of judgment.

ICC Judge Barber

3 April 2020