Neutral Citation Number: [2021] EWHC 639 (Ch)

Case No: CR-2012-005358

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

23 March 2021

Before :

JUDGE JONATHAN RICHARDS
Sitting as a Deputy Judge of the High Court

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Between :

DAVID INGRAM **Applicant**
(as liquidator of MSD Cash & Carry Limited)

- and –

(1) MOHINDER SINGH **Respondents**
(2) SURJIT SINGH

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Clara Johnson (instructed by **Moon Beever LLP**) for the **Applicant**
Geraint Jones QC (instructed by **Rainer Hughes Solicitors**) for the **Respondents**

Hearing date: 9 March 2021
Draft judgment circulated: 17 March 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Judge Jonathan Richards:

Introduction

1. The two Respondents (individually "R1" and "R2" respectively) were directors or de facto directors of MSD Cash & Carry Plc ("MSD"), now in liquidation. The Applicant is the liquidator of MSD.

2. On 5 November 2011, the Respondents caused MSD to give a credit note (the "Credit Note") in the sum of £996,494.61[1] to a company called Dale Wholesale Limited ("Dale"). By order sealed on 24 July 2018 (the "July 2018 Order"), His Honour Judge Hodge QC, sitting as a judge of the High Court, declared among other matters that the Credit Note was false and a void disposition under s127 of the Insolvency Act 1986. In consequence, it was declared that Dale was indebted to MSD for goods supplied in the sum of £996,494 together with interest.

3. Paragraph 6 of the July 2018 Order declared that, in causing MSD to give the Credit Note to Dale, the Respondents were guilty of misfeasance and in breach of their fiduciary duties owed to MSD and accordingly were jointly and severally liable to compensate MSD for its loss if Dale failed to make good its liability.

4. Before making the July 2018 Order, the court had in, the trial judgment reported at [2018] EWHC 1325 (Ch) (the "Trial Judgment") considered, and rejected, the Applicant's argument that the Respondents' liability to MSD, should Dale not meet its debt, was necessarily equal to the principal amount of that debt together with accrued interest. Very broadly, the court reached this conclusion because it recognised the possibility, raised in submissions recorded at [165] and [166] of the Trial Judgment, that even if the Credit Note had never been issued, Dale's financial position was such that it would not have been able to pay a significant part of the £996,494.61 plus interest that it owed. If that was correct, then making the Respondents liable for the full amount if Dale failed to pay risked over-compensating MSD.

5. At [173] of the Trial Judgment, the court concluded that the Applicant had demonstrated that the Respondents' misfeasance would cause some loss if Dale failed to pay. However, it declined to take a "robust approach" and determine the measure of that loss at £996,494 plus interest. Accordingly, by paragraph 7 of the July 2018 Order, it was directed that there should be an inquiry (the "Inquiry") as to the amount of that loss. This is my judgment on the Inquiry.

Preliminary matters of procedure

6. The procedure at the hearing was complicated by the fact that the Respondents failed to comply with the provisions of an order made by consent on 10

[1] The Order refers to the Credit Note as being for £996,494.61; the Trial Judgment occasionally refers to the figure of £996,494.63. I will refer to it as being for "£996,494".

December 2020 (the "Debarring Order") which provided, so far as material, as follows:

> *"1. The deadline contained in paragraph 2 of the order dated 27 August 2020 as extended by order 30th October 2020 be further extended to 20th December 2020 on terms that unless the Respondents do by 4pm on 20th December 2020 file and serve their evidence in reply they be debarred from filing any evidence or defending the application dated 9th July 2020 being the Inquiry into loss directed by the Order of 16 July 2018."*

7. It was common ground that the Respondents did not serve evidence by the applicable deadline so that the Debarring Order took effect. The Respondents applied for relief from sanctions, but ICC Judge Prentis dismissed that application at a hearing on 11 January 2021.

8. Despite the apparent effect of the Debarring Order, the Respondents made the following applications:

   i) On 1 February 2021, they applied for permission to rely on expert evidence. ICC Judge Burton dismissed that application at a hearing on 26 February 2021, but the Respondents sought to renew it at the hearing before me.

   ii) They sought permission to make submissions at the hearing before me, although they did not seek permission to cross-examine the Applicant on a witness statement that he had served in connection with the Inquiry.

9. At the start of the hearing, I heard argument from both the Respondents and the Applicant as to the scope of the Debarring Order and the application for permission to rely on expert evidence. During the hearing, I gave an oral judgment, with reasons, on these matters whose effect was as follows:

   i) I refused the Respondents' application for permission to rely on expert evidence.

   ii) I refused to hear submissions from the Respondents on the Applicant's case, including those submissions that were contained in the skeleton argument that Mr Jones QC served prior to the hearing, subject to the following limited exceptions:

      a) I allowed Mr Jones to make submissions as to the scope of the Debarring Order.

      b) Some of the points that Mr Jones had raised in his skeleton argument touched on matters that had occurred to me while I was preparing for the hearing. I concluded that I was entitled to raise those issues with Ms Johnson as part of the ordinary dialogue between judge and counsel, even though they found some echo in Mr Jones's skeleton argument.

c) I allowed Mr Jones to make some submissions on the general question of what the Applicant must prove and where the burden of proof or evidential burden lie.

iii) I indicated that I was likely to wish to hear from the Respondents on the final form of the order and costs.

Findings of fact

Findings in the Trial Judgment

10. It was common ground that all findings of fact made in the Trial Judgment apply for the purposes of the Inquiry as well. I therefore adopt all findings of fact in the Trial Judgment. I will not summarise all those findings but simply highlight the following as being particularly pertinent to the discussion that follows with references to numbers in square brackets being to paragraphs of the Trial Judgment unless I say otherwise.

11. At [5] and [9] the court explained that Dale and MSD were connected companies, with both companies' shares being owned by the same family unit. More specifically, R1 held the majority of the shares in MSD, the remainder being held by his wife Mrs Kaur. R1 also held 50% of the shares in Dale, with Mrs Kaur owning the other 50%. Although not mentioned in the Trial Judgment, as it was not material, Mrs Kaur transferred her shares in Dale to Mrs Deol, R2's wife, in around 2013.

12. The Credit Note was issued by MSD to Dale on 5 November 2011 ([160]) and had the apparent effect of releasing Dale from an obligation to pay £996,494 to MSD. At that time, a petition to wind up MSD had been presented, though that petition had not yet been served ([3]). Ultimately the court made a winding-up order on 16 January 2012 ([3]) which had the effect that the winding-up was treated as commenced when the petition was presented, and so before the date the Credit Note was issued.

13. The Respondents' case at trial was that the Credit Note was justified in part by the fact that MSD had acquired some £924,000 of stock from a third-party supplier, agreed to supply it onward to Dale, but never delivered it. That account was rejected as untruthful in the Trial Judgment and R2, who gave evidence to this effect was found ([152]) to be a "thoroughly unreliable, incredible and dishonest witness". It was found ([150]) that the Respondents refused to tell MSD's liquidator who its own supplier of the £924,000 of goods was to make it more difficult for the liquidator to investigate and interrogate the Respondents' explanation for the credit notes. At [151], the court noted that the Respondents had failed to produce documents such as VAT returns and SAGE records for both MSD and Dale that could have corroborated the explanation advanced for the Credit Note, were it true.

14. Therefore, the Court rejected the Respondents' explanation for the Credit Note. It also made findings as to the Credit Note's true purpose after considering Dale's accounts, for among other years, those ending 31 March 2011 and 31 March 2012. Both sets of accounts were unaudited.

15. Dale's accounts to 31 March 2011 could not reflect any impact attributable to the Credit Note because the Credit Note was not issued until November 2011. The 2011 accounts showed the following:

    i) Current assets of £1,425,938 (consisting primarily of stock of £1,352,512 and cash at bank of £52,162).

    ii) Creditors due within one year of £414,445 (and so net current assets of £1,011,493).

    iii) Creditors due after more than one year of £1,011,035 (and so net assets of £458).

16. Dale's accounts for the year ended 31 March 2012, also unaudited, covered the period in which the Credit Note was issued and MSD was put into liquidation. Those accounts showed the following:

    i) Current assets of £1,328,991 (consisting primarily of stock of £1,238,195 and debtors of £65,093)

    ii) Creditors due within one year of £1,310,467 (and so net current assets of £18,524)

    iii) Creditors due after more than one year of £16,437 (and so overall net assets of £2,495).

17. Therefore, Dale's creditors due after one year (which the court referred to in the Trial Judgment as "other creditors" to distinguish them from creditors due to be paid in less than a year) fell from £1,011,035 in the 2011 accounts to £16,437 in the 2012 accounts. By contrast, Dale's creditors due within less than a year increased from £414,445 in the 2011 accounts to £1,328,991 in the 2012 accounts.

18. At [154], the court concluded that these accounts were consistent with:

> *"a 'soft' debt[2] owed to a connected company (MSD) having been recorded in the entry "other creditors" in 2011 and then either written off due to the credit note or transferred to "current trade creditors" as a result of the liquidation of MSD in 2012."*

19. Also at [154], the court found that it was simply not possible to say whether the Credit Note had been taken into account when the 2012 accounts were prepared. Those accounts were unaudited and it could not be known what information had been given to Mr Alinek, the accountant who prepared them, and no evidence had been put forward from witnesses who could have assisted on that matter.

[2] i.e. a debt between connected companies containing terms favourable to the debtor as to interest rate and repayment date.

20. Against that background, having rejected as untrue the Respondents' explanation of the Credit Note, the court found at [160] that the Credit Note was created:

> *"... in order to 'net-off' the outstanding balance owed to a connected company when it was on the verge of entering into insolvent liquidation."*

21. Accordingly, the court's conclusion, reflected in paragraph 4 of the July 2018 Order was the Credit Note was "false and a void disposition under section 127 of the [Insolvency Act 1986]".

Additional findings of fact

22. I supplement the findings of fact in the Trial Judgment with the findings set out below.

23. On 24 July 2018, the Applicant demanded that Dale pay it £996,494 plus interest. Dale failed to do so, the Applicant delivered a winding-up petition and Dale was ordered to be wound up on 17 October 2018. To date, neither Dale nor its liquidator has paid any part of the amount claimed.

24. Dale's liquidator has prepared an interim report to creditors dated 19 December 2019. It shows that Dale's assets consist of £84 cash at bank and book debts of £104,559. Its total unsecured liabilities add up to £1,800,788.43. Anticipated professional fees associated with the liquidation exceed the total assets and the anticipated realisation of the book debts is described in the report as "uncertain". Moreover, the report states that the payment of any dividend to unsecured creditors is dependent on action being taken against Dale's former directors and/or third parties.

25. Dale has declared and paid significant dividends to its shareholders. In its accounting periods ended 31 March 2013, 2014, 2015 and 2016 it paid dividends of £124,000, £200,000, £208,000 and £300,000 respectively.

26. Dale's VAT returns were, at material times, prepared for periods of three months. From May 2012 to November 2014, they showed material turnover of at or around £2m of VATable sales in each 3-month period. In some periods turnover exceeded £3m.

27. On 10 March 2016, an associated company of Dale called MSD Wholesale Limited created security in favour of Dale. The Debenture constituting the security had a definition of "Amount" being "to the value of £500,000", though it is not clear from the Debenture where that definition was actually used. On 5 November 2018, an RK Deol (probably Mrs Deol, R2's wife), purportedly acting on behalf of Dale, provided Companies House with a certificate of satisfaction stating that the charge had been satisfied in full. In fact, by 5 November 2018, Dale was in liquidation, so RK Deol would have had no authority to give the certificate of satisfaction.

28. Dale's liquidator has experienced difficulties in obtaining information from Dale's former directors about its trading position in 2011 and 2012. Mrs Deol,

who maintained Dale's books, declined to attend an interview with Dale's liquidator to discuss its business affairs.

Discussion

The nature of the loss that must be shown

29. The relief the Applicant seeks consists of a request that this court exercise its powers under s212(3) of the Insolvency Act 1986 to require the Respondents to contribute such sum to MSD's assets by way of compensation for their misfeasance or breach of fiduciary duty as the court thinks just.

30. The Applicant has already demonstrated that the issue of the Credit Note involved misfeasance or breach of fiduciary duty on the part of the Respondents. The July 2018 Order contains a declaration to that effect. Therefore, the question raised by the Inquiry is what, if any, sum the Respondents should justly be required to pay as compensation for their misfeasance and breach of fiduciary duty.

31. As I have noted, notwithstanding the Debarring Order, I permitted the Respondents to make submissions as to the matters the Applicant must prove and the burden of proof. As regards the first issue, I took the parties to be agreed that the principle is correctly stated in Paragraph 41.109 of Lewin on Trusts (20th Edition) and the compensation I order should be the amount, if any, required to restore MSD's estate to the value it would have had if the breach of fiduciary duty or misfeasance had not taken place. Moreover, the amount to be determined as compensation under s212(3)(b) is limited to the actual loss caused to MSD and is determined by applying normal principles of causation.

32. The Respondents' misfeasance and breach of fiduciary duty consisted of an attempt on 5 November 2011 to dispose of an asset of MSD, being its right to receive payment of £996,494 from Dale, by issuing the Credit Note. That attempt to dispose of MSD's asset was ultimately unsuccessful because the court declared the Credit Note void. Therefore, as a matter of law, at all material times, Dale has owed £996,494 to MSD.

33. However, it was only following the July 2018 Order that relevant parties, including the Applicant (in his capacity as MSD's liquidator) and Dale could have realised that the Credit Note was void. Therefore, between 5 November 2011 and the July 2018 Order, the Respondents' actions deprived MSD and its liquidator of the practical ability to demand that Dale repay it £996,494. That was particularly significant in relation to MSD's liquidator because, whether or not MSD might otherwise have been content not to demand payment from its connected company Dale, once MSD was placed into liquidation, the Applicant came under a duty to gather in MSD's assets for the benefit of its creditors and, accordingly, would have demanded that Dale repaid the sum owed.

34. Accordingly, MSD's loss is the difference between (i) the amount it would have received had it, or its liquidator, demanded payment at some point between 5 November 2011 and the date of the July 2018 Order and (ii) the amount that MSD can realistically expect to obtain in Dale's liquidation.

The burden of proof

35. The Applicant submits that the burden of proof is on the Respondents, as the defaulting fiduciaries, to demonstrate that they should not have to account for the full principal amount of the Credit Note. In support of that proposition, he relied on the decision of the Court of Appeal in *Murad & Another v Al-Saraj & Another* [2005] EWCA Civ 959. In that case, a fiduciary entered into a transaction together with other investors to whom he owed fiduciary duties. The venture was profitable, but in breach of his fiduciary duties the fiduciary had misrepresented the nature and extent of his own investment and failed to disclose a conflict of interest. The court ordered that the investors were entitled to an account of the profit that the fiduciary made by reason of his deceit. The fiduciary argued that this over-compensated the investors because it had been found as a fact that, had the fiduciary had told the truth, the investors would still have been content to enter into the transaction, although they would have required a larger share of the profit, with the result that the fiduciary would still have received some profit. The fiduciary's liability to account, it was argued, should be the difference between the profit he actually made and the lower profit he would have made if he had told the truth.

36. The Court of Appeal rejected this argument, holding that the fiduciary was obliged to account for all the profits he made (see [84] of the judgment of Arden LJ). The Applicant relies on the following passage of the judgment of Arden LJ:

> *"76. For policy reasons, the courts decline to investigate hypothetical situations as to what would have happened if the fiduciary had performed his duty. In the* Regal *case at page 154G, Lord Wright made the following point, to which I shall have to return below:*
>
> > *"Nor can the court adequately investigate the matter in most cases. The facts are generally difficult to ascertain or are solely in the knowledge of the person being charged. They are matters of surmise; they are hypothetical because the inquiry is as to what would have been the position if that party had not acted as he did, or what he might have done if there had not been the temptation to seek his own advantage, if, in short, interest had not conflicted with duty."*

37. I do not consider that passage, or the *Murad* authority generally, to contain any statement as to the incidence of the burden of proof on a claim made under s212 of the Insolvency Act 1986. Rather, the passage quoted was concerned with the question whether considerations of "loss" were relevant at all in connection with the equitable account that was ordered in that case against a fiduciary who had misrepresented the facts to the principal and so had an undisclosed conflict of interest. The court's conclusion was that considerations of "loss" were not relevant in that case, but that says nothing about the incidence of the burden of proof in this case, not least because the parties are agreed that any compensation I order under s212(3)(b) is in respect of loss that MSD has suffered.

38. The Applicant also referred me to *GHLM Trading Limited v Maroo* and others [2012] EWHC 61 (Ch) and *Re Idessa (UK) Ltd* [2011] EWHC 804 (Ch) which were discussed at [136] and [137] of the Trial Judgment. However, it seems to me that those authorities were relevant to the question of who had the burden of proving that the Respondents breached their fiduciary duties, and not the question of who bore the burden of quantifying any resulting loss for the purposes of s213(2)(b). In any event, in the Trial Judgment, the court held that the burden was on the Applicants to establish a breach of duty.

39. Therefore, I conclude that the burden of proof is on the Applicant to establish the amount of loss that MSD has suffered. That said, the amount of MSD's loss depends heavily on matters that are within the Respondents' knowledge, but not within the knowledge of the Applicant. That is because the amount of the loss depends, in essence, on Dale's financial position between 5 November 2011 and the date of the July 2018 Order and the Respondents, being a 50% shareholder in Dale and his son, are clearly much better placed to provide evidence of Dale's financial situation than the Applicant. Yet despite the very purpose of the Inquiry being to look in detail at Dale's financial position, the Respondents have chosen to adduce no evidence on that issue. In those circumstances, it is appropriate to consider whether the Applicant has shown a prima facie case that MSD's loss was the £996,494 claimed plus interest. If the Applicant has shown such a case, but the Respondents have chosen not to rebut that case with their own evidence, I am entitled to conclude that the Applicant has discharged his burden. In essence, I will apply common-law principles as to the discharge of the burden of proof that are well illustrated in the following statement of Handley JA in the Australian authority of *Houghton v Immer* (No.155) Pty Ltd [1997] NSWLR at p59:

> *"The court should assess the compensation in a robust manner, relying on the presumption against wrongdoers, the onus of proof, and resolving doubtful questions against the party 'whose actions have made an accurate determination so problematic'."*

Quantifying the loss

40. Given the findings made at [24] above, I have concluded that the Applicant can realistically expect to receive nothing in Dale's liquidation. I note the report of Dale's liquidator mentions the possibility of taking action against former directors and third parties. However, there is no suggestion in the report, or in any other evidence shown to me, of any degree of confidence in the prospects that such action will produce assets sufficient to pay any material dividend to unsecured creditors.

41. Dale's accounts drawn up to both 31 March 2011 and 31 March 2012 show that it had positive net assets and so suggest that it had sufficient assets to discharge all its liabilities. The accounts to 31 March 2011 were obviously drawn up to a date before the Credit Note was issued and therefore do not directly substantiate Dale's ability to pay after 5 November 2011. However, the accounts to 31 March 2012 also show positive net assets.

42. I acknowledge that it is theoretically possible that the accounts to 31 March 2012 were drawn up on the footing that Dale's liabilities were £996,494 lower than they would otherwise have been because the Credit Note was assumed, in those accounts, to have reduced liabilities by that amount. If the accounts were drawn up on that basis, then Dale's liabilities would have been understated by £996,494 (since the Credit Note was void and of no effect) and the accounts should have shown Dale to be balance sheet insolvent as at 31 March 2012. However, despite the 2012 accounts showing a *prima facie* case that MSD had positive net assets, the Respondents have chosen to adduce no evidence as to what was taken into account in the 2012 accounts to substantiate any assertion that, in fact, Dale was balance sheet insolvent. On the contrary, there is some suggestion that Dale's liquidator has been deprived of access to trading records. That weighs in the balance because, as was found in the Trial Judgment, the issue of the Credit Note represented a deliberate attempt to keep the £996,494 that Dale owed out of the hands of MSD's creditors. It might reasonably be expected that no such attempt would have been made if Dale was unable to pay that sum in any event.

43. I also note that, if Dale was balance sheet insolvent as at 31 March 2012, there would have been a significant reduction in Dale's net assets between 31 March 2011 and 31 March 2012, but no explanation has been given in evidence as to why that should have happened. I will not, therefore, infer that MSD was balance sheet insolvent in 2012. On the contrary, I conclude that Dale's accounts provide some evidence of Dale's ability to pay £996,494 as at 31 March 2012. The accounts do not, however, establish that as at 31 March 2012, Dale had sufficient assets to pay interest that would have accrued by then.

44. It is also significant that Dale has paid dividends of some £832,000 to its shareholders between 2013 and 2016. That suggests that Dale was producing healthy profits at that time. Dale's VAT returns show that it had significant turnover and while high turnover does not necessarily produce high profit, in this case, it apparently did since otherwise Dale could not lawfully have paid such significant dividends. I recognise the possibility that Dale might, like many family-owned companies, have chosen to pay what was economically salary to family members in the form of dividends. If that were the case, then at least to an extent, some of the dividends paid should properly be regarded as analogous to salary and so as a cost of earning profit, rather than profit itself. However, Dale's policy on remunerating family members would have been well known to the Respondents, yet they chose to put forward no evidence on this matter in the Inquiry. I will not, therefore, conclude that any part of the dividends formed part of the costs of earning profits.

45. Nor do I consider it appropriate for me to interrogate Dale's VAT returns to consider whether they reflect the Credit Note or whether Dale's input tax recovery would be affected by the Credit Note. It has now been determined that the Credit Note was void and accordingly, Dale's VAT returns should not have included any adjustment consequent on its issue. If the Respondents wished me to conclude that Dale's VAT position was unduly flattered by positive adjustments produced by the void Credit Note, they had the opportunity to produce evidence in support, yet chose not to do so.

46. I also note that there is documentary evidence suggesting that, as at 10 March 2016, MSD was able to make available some sort of credit facility to MSD Wholesale Limited of up to £500,000. I recognise that the document indicating that the facility was repaid is unsatisfactory as it was signed by someone who, at the time, had no authority to give it. However, nevertheless the existence of the debenture on its own provides some indication that Dale had economic substance as it was able to provide financial support of up to £500,000 to a connected company. If the Respondents wished to argue that this was not the case, they could have provided further evidence as the debenture was referred to in the Applicant's witness statement that is relied upon in this inquiry as to loss.

47. From the above, I have concluded, on a balance of probabilities that, had MSD demanded payment of £996,494 at some point between 5 November 2011 and the date of the July 2018 Order, Dale would have been able to effect payment in full together with accrued interest. It might not have been able to make payment immediately following a demand in 2011 or 2012 (not least since its net asset position was not sufficient to cover accrued interest). However, Dale's strong cashflows and profit would have enabled it to make payment in full at some point in the period. I recognise, of course, that there are indications to the contrary. When payment was actually demanded in 2018, Dale promptly went into insolvent liquidation. It is possible that exactly the same thing would have happened if payment had been demanded earlier. However, the Applicant has put forwarded a *prima facie* case that Dale could have made payment in full. The Respondents have chosen to advance no evidence to meet that *prima facie* case. The necessary evidence could reasonably be expected to be available to the Respondents, and there is no suggestion that it was available to the Applicant. In those circumstances, in the face of the Respondents' conscious attempt to divert assets away from MSD's creditors, I consider it appropriate to assess MSD's loss robustly by reference to the Applicant's *prima facie* case.

48. I have considered whether paragraph [166] of the Trial Judgment should be taken as containing a concession by the Applicant that he could only realistically have expected to recover £206,000 of the £996,494 from Dale. I do not consider it is. I read paragraph [166] as containing submissions that the Respondents' then counsel, Mr Cousins, made as to conclusions that should be drawn from the Applicant's witness evidence. The court did not treat any concession as having been made and indeed, it is clear from the Trial Judgment that the Applicant was urging the court in 2018 to assess compensation robustly at £996,494. The purpose of the inquiry as to loss directed by paragraph 7 of the July 2018 Order was to determine the precise amount of compensation payable. No order was made to the effect that the maximum amount of loss was £206,000.

49. My overall conclusion, therefore, is that the Applicant's loss should be fixed at £996,494.61 plus interest. I would invite counsel to settle the terms of an Order. Notwithstanding the Debarring Order, I am prepared to hear from the Respondents as to the final form of the order and on costs. If there are other issues on which the Respondents wish to be heard consequential on this judgment, they may apply accordingly.