Neutral Citation Number: [2021] EWHC 1501 (Ch)

Case No: E30MA836

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
INSOLVENCY AND COMPANIES LIST

IN THE MATTER OF AVACADE LIMITED
AND IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986

Date: 4 June 2021

Before :

His Honour Judge Halliwell sitting as a Judge of the High Court

- -

Between :

The Secretary of State for Business, Energy and Industrial Strategy **Claimant**

- and -
(1) LEE EDWARD LUMMIS
(2) CRAIG STANLEY LUMMIS

Defendants

- -
- -

Lucy Wilson-Barnes (instructed by **TLT LLP**) for the **Claimant**
David Berkley QC (instructed by **Zakery Khub Solicitors**) for the **Defendants**

Hearing dates: 14 - 18 December 2020, 30 March -1 April, 13 April 2021

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII. The deemed date and time for hand down is 4th June 2021 at 2pm.

HHJ Halliwell:

(1) Introduction

1. By these proceedings, the Secretary of State seeks disqualification orders, under *Section 6* of the *Company Directors Disqualification Act 1986*, in relation to two directors of Avacade Limited ("the Company"), Messrs Lee Edward Lummis ("Mr Lee Lummis") and Craig Stanley Lummis ("Mr Craig Lummis") (collectively "the Defendants").

2. The Company carried on the business of an investment broker. It went into liquidation on 6th November 2015 with an estimated deficiency, as regards creditors, of £3,977,125 including a claim for £1,231,992 from HMRC. The deficiency was subsequently revised to £12,928,059 to reflect additional HMRC claims. The claims submitted by HMRC now amount to £10,183,926.

3. HMRC's claims arise from two separate tax planning schemes implemented by the Company pursuant to advice from EDF Tax Limited ("EDF Tax") and, subsequently, Qubic Tax Limited ('Qubic Tax"). HMRC contend that the two schemes were and are ineffective and the Company thus incurred significant tax liabilities. Surprising as it might seem, I am advised there has not yet been a conclusive judicial determination on the validity of either scheme. HMRC has served notices on the Company and issued determinations on the basis that the schemes are ineffective. However, at least in respect of the EDF Scheme, their claim is subject to appeal.

4. The Secretary of State's case against the Defendants is based on a single ground of unfitness, namely that in the 15-month period prior to the liquidation - 1st August 2014 to 6th November 2015 - they caused the Company to enter into transactions totalling £1,504,566 for their own benefit at the risk of HMRC. It is alleged that these transactions took place after the Company had ceased trade. They involved the disposal of the Company's assets and a series of payments to the Defendants in part satisfaction of monies due to them on directors' loan account. In the aftermath, it is alleged there were no assets to meet the Company's contingent liabilities to HMRC.

5. After repeated postponements, the trial took place remotely on 14th - 18th December 2020, 30th March – 1st April and 13th April 2021. At all times, Ms Wilson-Barnes, of counsel, appeared on the Secretary of State's behalf. On 14th- 18th December 2020, Mr Lee Lummis attended personally in the absence of Mr Craig Lummis. Mr Craig Lummis was then unable to attend or give evidence owing to a syndrome of health problems relating to diabetes and

hypertension. Although they had been professionally represented in the past, the Defendants were not professionally represented at this stage and Mr Lee Lummis personally cross examined each of the Secretary of State's witnesses. Once the Secretary of State's case had closed, I adjourned the trial part heard with effect from 18th December to allow Mr Craig Lummis a final opportunity to give oral evidence. I did so in the light of a medical report from Dr Eric Tran Qyet Chinh confirming that Mr Craig Lummis's condition was life threatening and, although he had been prescribed a course of Bromazepan, he was not fit to give oral evidence and this would remain so until his hypertension had been brought under control. It was envisaged there was a reasonable prospect this could be achieved in 90 days. The rest of the trial was thus adjourned for further hearing in late March 2021.

6. The Defendants then re-engaged Zakery Khub Solicitors and Mr David Berkley QC to act as their solicitors and counsel for the remainder of the trial. Having assimilated the historic detail and acquainted himself with the evidence, Mr Berkley re-focussed the Defendants' case on the critical issues when the trial resumed. At this stage, the Defendants both gave oral evidence and, following cross examination, they were re-examined, at some length, by Mr Berkley.

7. I reserved judgment following closing submissions on 13th April 2021. However, by letter dated 14th May 2021, the Secretary of State's solicitors, TLT LLP, advised Zakery Khub Solicitors that they had reviewed their files and discovered some additional documents. These were produced in order to satisfy their "client's continuing duty of disclosure". The documents included a letter dated 6th December 2013 from Qubic Tax to the Company, a document entitled Accounting Summary and Disclosure for Avacade Limited Employee Trust 2013 and a letter dated 27th June 2018 from the Company's accountants, Walker Begley Limited ("WBL") to the Insolvency Service. They were subsequently forwarded to me with additional written submissions from Mr Berkley and Ms Wilson-Barnes. The documents have thus been admitted as evidence and I have taken them into consideration together with counsel's additional written submissions.

(2) Factual sequence

8. The Company was formed on 28th January 2010. At the outset, the Defendants were appointed as directors together with Mr Ray Fox ("Mr Fox"). In respect of the Company's

nominal share capital of £1,000, 300 shares were allotted to Mr Fox and 350 shares each to Messrs Lee and Craig Lummis.

9. Shortly after incorporation, the Company commenced business as an investment broker. It filed statutory accounts in respect of the periods ending on 31st March 2011, 2012, 2013 and, ultimately, for the extended period ending on 30th September 2014. Between the years ending on 31st March 2012 and 2013, the Company's turnover climbed from £1,576,621 to £5,459,043 and amounted to £5,586.263 in the period ending on 30th September 2014. However, this was not reflected in an increase in the Company's net profit. After recording a net profit of £87,992 for the year ending on 31st March 2012, the Company made a net profit the following year of only £50,018 and a net loss of £1,413,137 in the period ending on 30th September 2014. It is apparent from the Company's profit and loss account that this was primarily attributable to an increase in employees' remuneration which climbed from £380,654 for the year ending 31st March 2012 to £4,108,720 and £6,983,657 in the periods ending on 31st March 2013 and 30th September 2014. There is an issue between the parties as to whether, by the end of the extended period, the Company had ceased trade.

10. No doubt, the increase in employees' remuneration was partly attributable to an increase in the number of employees. At one point, the Company was employing upwards of 50 staff. However, during 2012 the Company entered into tax planning arrangements involving the creation of an Employer Financed Retirement Benefit Scheme under which substantial amounts were transferred to an off-shore trust company, IFM Corporate Trustees Limited. These amounts were intended for the ultimate benefit of employees but it was anticipated the Company would thus be entitled to deduct Corporation Tax prior to any payment to the employees themselves. The Scheme ("the EDF Scheme") was created pursuant to advice from EDF Tax. In November 2012, the sum of £1,000,000 was transferred to a trust company under the EDF Scheme. Further amounts were subsequently transferred to trustees in connection with a tax scheme ("the Qubic Scheme") created by Qubic Tax.

11. At all material times, WBL were the Company's accountants. Mr Craig Lummis was closely acquainted with one of WBL's directors of WBL, Mr Kevin Begley ("Mr Begley"). In addition to acting for and advising the Company in connection with its accounts, Mr Begley had initially introduced the Company to EDF Tax and Qubic Tax, and recommended their schemes. Early in 2014, HMRC submitted enquiries to the Company about the EDF tax scheme. These were referred to Mr Begley. Mr Begley attended to HMRC's initial enquiries and, by letter dated 23rd April 2014, he advised HMRC that the

Company had "asked to be admitted to a Representative Sample Arrangement organised by [its employee] Mr Nick Bent at Specialist Investigations at Solihull".

12. At about this time – it is unclear precisely when – Mr Craig Lummis signed, on behalf of the Company, a document headed "Representative Sampling Agreement" ("the RSA Document") in connection with the EDF Scheme. Whilst the Secretary of State has produced a copy of the RSA Document bearing Mr Craig Lummis's signature, the copy is un-dated and un-signed on behalf of HMRC or EDF Tax.

13. It was implicit in the RSA Document that legal proceedings had been or would be issued in connection with the EDF Scheme and it was expressly provided, in clause 8, that "the Company and HMRC [would] be bound by any final decision made by the Tribunals or the Courts in any lead case also using [the EDF Scheme] unless they can differentiate the Company's circumstances from those of a decided lead case".

14. At a board meeting on 29th April 2014, Mr Fox agreed to resign as a director. Notice of his resignation was duly filed at Companies House.

15. Following Mr Fox's resignation, the Board resolved to cease providing access to clients who had not yet been sent investment documents and, later, to sell the Company's database to an associated company, Alexandra Associates (UK) Limited ("Alexandra Associates"). At a board meeting on 15th July 2014, the Company resolved to sell the database for the sum of £150,267, "…cease trading and…be wound up once pipeline income has been received as no further trading is possible".

16. The Defendants maintain that, by this stage, the Company owed them substantial amounts in respect *inter alia* of unpaid remuneration, bonuses and monies applied under the Qubic tax planning scheme. They rely on directors' loan account summaries produced by Mr Begley with credit balances of £856,849.93 and £845,029.22, augmented by upwards of £35,000 each in respect of additional salary and bonuses and some £2,068,092.36 under the Qubic Scheme. Before me, the Secretary of State did not take issue with the calculation of these amounts.

17. By an agreement dated 1st August 2014 the Company duly assigned its rights in the "Customer Database" to Alexandra Associates.

    17.1. This agreement was signed as a deed by Mr Craig Lummis on behalf of the Company and Mr Lee Lummis on behalf of Alexandra Associates. Whilst Messrs Craig and Lee Lummis were both directors of the Company at the time, Mr Lee

Lummis was not recorded as a director of Alexandra Associates. However, the nominal share capital of £2 in Alexandra Associates was allotted to Messrs Craig and Lee Lummis who held one ordinary £1 share each.

17.2. The "Customer Database" was not defined. However, the assignment encompassed "all Intellectual Property Rights in the Customer Database" and "Intellectual Property Rights" was defined widely so as to include *inter alia* rights in "trade, business…" and "rights in goodwill".

18. The contractual purchase price was £150,267. In Clause 3.1, the Company acknowledged receipt. However, no sum was transferred to the Company, rather the sum of £75,133.50 was debited to the Defendants' director's loan accounts.

19. There is an issue between the parties whether the Company ceased trade on 1st August 2014. However, between 1st August 2014 and 6th November 2015, when the Company went into liquidation, some £1,634,046 of "pipeline income" from the Company's historic business was credited to the Company's bank accounts. Of that amount, some £647,000 was credited to each Defendant - in aggregate some £1,294,000 – in part satisfaction of the amounts due to them and recorded as such in the Company's accounting records. The Company's ordinary trading creditors were also paid in full.

20. On 25th June 2015, the Second Defendant signed off the Company's accounts for the extended period ending on 30th September 2014. Following sales of £5,586,263, the Company made a gross profit of £5,417,235. However, after accounting for general expenses, it made a net loss of £1,379,620 notwithstanding an exceptional item of £1,315,631 in respect of monies written off from Mr Fox's directors loan account following his resignation as a director. By far the largest item of expenditure was "wages" in the sum of £6,983,657.

21. In addition to writing off his director's loan account, Mr Fox agreed to transfer his rights in land earmarked for development in Brazil. On 13th August 2015, Mr Fox entered into a written agreement with the Defendants to assign his rights of ownership in land in Brazil in settlement of a claim brought against him by the Company. Having recorded that the Company had "resolved" that the agreement was "in the best interests of [the Company] and its members as a whole to authorise" the Defendants to receive [the land] for and on behalf of [the Company]", Mr Fox transferred the land to the Defendants with the consent of a development company.

22. In September 2015, WBL introduced the Defendants to Clarke Bell Limited ("Clarke Bell"), a firm of licensed insolvency practitioners, for advice with a view to placing the Company in liquidation. On 24th September 2015, the Defendants attended a preliminary meeting with Mr Begley and Mr John Paul Bell ("Mr Bell"), of Clarke Bell, at WBL's offices. The Defendants later instructed Clarke Bell to arrange for the Company to be placed in voluntary liquidation. On 8th October 2015, Clarke Bell opened a file note ("the 8th October 2015 Note") headed "Initial Advice Meeting" and submitted a payment request to the Company for professional fees in the sum of £6,000.

23. By an email dated 20th October 2015, Clarke Bell emailed Mr Lee Lummis with some questions about the Company's historic business activities. In answer to Clarke Bell's request for a full list of creditors' names and addresses, Mr Lee Lummis stated that "the only creditors to the business are Lee Lummis and Craig Lummis. Full amounts can be obtained by Kevin Begley at Walker Begley…" However, this was superseded by an email from Mr Begley timed at 1.58 pm on 4th November 2015, in which Mr Begley advised Clarke Bell that the Company had just received an amended corporation tax assessment amounting to £1,231,992.

24. The Company's draft statement of affairs was prepared by Ms Jessica Williams ("Ms Williams"), a chartered certified accountant in the employment of Clarke Bell. Mindful of Mr Begley's email, Ms Williams entered HMRC as a non-preferential creditor for £1,231,992.

25. The members' statutory meeting was scheduled to take place on 6th November 2015 at 2 pm. In preparation for the meeting, Clarke Bell emailed documentation to Mr Lee Lummis at 5.23pm the evening before. This included a draft statement of affairs with unsecured non-preferential claims on behalf of the directors themselves and HMRC in the respective sums of £2,744,133 and £1,231,992. The estimated deficiency, as regards non-preferential creditors, was £3,976,125. Shortly before the time scheduled for the meeting, the draft statement of affairs was again emailed to the First Defendant.

26. Ms Williams conducted the meetings remotely via Weblink with Mr Lee Lummis in attendance as chairman. It was resolved that, by reason of its liabilities, the Company could not continue in business and the Company should be voluntarily wound up. Mr Bell was appointed liquidator.

27. Mr Lee Lummis signed the documentation that had been sent to him, including a statement of concurrence, a certificate that the meeting had been held, minutes of the first meeting of creditors and the Company's Statement of Affairs as at the date of the meeting, 6th November 2015. He then scanned the signed the documentation and returned it to Miss Williams by an email timed at 2.59 pm that afternoon.

28. On the same day, 6th November 2015, HMRC issued PAYE determinations in respect of the Company in the aggregate sum of £3,261,000 under *Regulation 80* of the *Income Tax (PAYE) Regulations 2003* and Notices under *Section 8* of the *Social Security Contributions (Transfer of Functions etc) Act 1999* in respect of the years 2011-2012 and 2012-2013.

29. By letter dated 27th November 2015, Mr Begley challenged these determinations on the grounds *inter alia* that the EDF Scheme had not given rise to employment income or earnings and the determinations were wrong in law and excessive. Since that time, further *Regulation 80* and *Section 8* Notices have been issued in respect of the years ending on 2014-2015 and 2013-2014 in the aggregate sums of £3,374,577 and £3,548,374. In total, HMRC have now submitted claims amounting to £10,183,926. If this is an accurate statement of the Company's liability to HMRC, the deficiency to creditors is some £12,928,059.

30. On 30th October 2018, the Claimant commenced the current proceedings against the Defendants for disqualification orders under the provisions of *Section 6* of the *Company Directors Disqualification Act 1986.*

(3) Witnesses

31. On behalf of the Secretary of State, five witnesses were called to give evidence, namely Messrs Duncan Smith ("Mr Smith"), Parmjit Cheema ("Mr Cheema"), Robin Passmore ("Mr Passmore"), Mr Bell and Ms Williams.

    31.1. Mr Smith is an Investigation Manager in the Insolvent Investigations North department of the Insolvency Service. He confirmed the affidavits of Anthea Mary Simpson ("Ms Simpson") who had originally dealt with the case as Chief Investigator. Mr Cheema was previously employed by HMRC as EFRBS Theme Lead in Counter-Avoidance and is now in their Clearance and Counteraction Team. Mr Passmore's designation is as EBT Theme Lead in Counter-Avoidance. These witnesses did not have nor did they profess to have any direct knowledge of the facts in issue. Their evidence was based on the available records and inference from them. However, there

was and is nothing to suggest their evidence was incorrect and their inferences were generally reasonable and measured.

31.2. Mr Bell was and is a licensed insolvency practitioner and principal director of Clarke Bell. He gave evidence about the 24th September 2015 Meeting and confirmed he had a faint recollection that Mr Begley had visited his offices on 8th October 2015. On this basis, Mr Begley could be taken to have been formally instructed him to proceed with the liquidation at that stage. This perception was borne out by the 8th October 2015 Note. He also confirmed that, in the Statement of Affairs, the HMRC claim of £1,231,992 was based on the amount identified in Mr Begley's email dated 4th November 2015. Mr Bell did not and could not be expected to have had a full recollection of everything that had happened. He didn't suggest otherwise but, where necessary, he drew inferences based on his usual practice. I am satisfied that his testimony was given to the best of his recollection and was generally reliable.

31.3. Ms Williams is a chartered certified accountant and an employee of Clarke Bell. She confirmed that she was the author of the 8th October 2015 Note. It had been entered on a standard internal document with a pre-written column and spaces for manuscript entries. Although typed with the heading "Initial Advice Meeting" it was treated as an internal note on which she entered information as and when provided. She also confirmed that she conducted the remote meeting on 6th November 2015 at which the Company was placed in liquidation. Whilst she considered it was possible she mentioned the HMRC claim to Mr Lee Lummis at the meeting, she had no specific recollection of doing so. I am satisfied Ms Williams's testimony was accurate and reliable.

32. Messrs Craig and Lee Lummis both filed affidavit evidence and their oral testimony was carefully explored by Ms Wilson-Barnes in cross examination. Substantial parts of their main affidavits replicated one another. At times, they also took the opportunity, in their affidavits, to argue their case rather than limiting themselves to the factual issues; an approach which also featured in their oral testimony.

33. Having been appointed as a director on 28th January 2010, Mr Craig Lummis remained in office when the Company went into liquidation. He acted as managing director. Mr Lee Lummis is his son. There is nothing to suggest that there have ever been any material differences between them in relation to management issues. Following Mr Fox's

resignation, all significant decisions in relation to the management of the Company were essentially taken by Messrs Craig and Lee Lummis only. However, in re-examination, Mr Craig Lummis confirmed that he had enjoyed a long established professional relationship with Mr Begley for many years prior to the formation of the Company and relied on Mr Begley in connection with the Company's accounts and the management of its affairs, including its tax affairs and matters such as the "monthly payroll".

34. In considering Mr Craig Lummis's testimony, I have made some allowance for his state of health and need for medication. He is now 61 years of age. He has for some time been suffering from a syndrome of health problems arising from diabetes and hypertension. In December 2020, the case was adjourned part heard to enable him to attend for cross examination. When the trial resumed on 30th April 2021, his blood pressure had been brought under control but he remains on medication. If his powers of concentration have been affected, this was not obvious when he gave evidence but, where appropriate, I have sought to give him the benefit of the doubt.

35. Nevertheless, Mr Craig Lummis was a defensive witness who was unwilling to say anything harmful to his case as he perceived it. This coloured his evidence. When referred to contemporaneous documents which appeared to contradict his account, he was reluctant to make concessions unless required to do so. For example, in his affidavit dated 30th September 2019, he repeatedly stated that he had not seen documents to which Ms Simpson referred in her affidavit dated 29th October 2018 notwithstanding that the documents were plainly exhibited to Ms Simpson's affidavit itself. It was at least implicit in Mr Craig Lummis's evidence that his solicitor might not have forwarded the exhibited documentation or he might otherwise have formed the impression that the documentation was omitted but, if so, his criticisms of the Secretary of State's case were made without first having made the most perfunctory of inquiries. At Paragraph 54 of his affidavit, Mr Craig Lummis stated that he had not seen a copy of a letter dated 29th July 2016 from Mr Begley to the liquidator which was exhibited to his own affidavit. In this respect, Mr Craig Lummis was unwilling, in cross examination, to confirm his affidavit was incorrect until left with no room to suggest the contrary.

36. Mr Lee Lummis was again appointed director on 28th January 2010 and remained in office when the Company went into liquidation. He acted as operations director. He was born in August 1984. He was thus only 25 years of age when the Company was first formed and 31 years of age on 6th November 2015 when the Company went into liquidation. He was

thus entrusted with a significant role within the Company at a relatively young age. However, by August 2014, when the Company is alleged to have ceased business, he had already accumulated a significant amount of business and financial experience.

37. In addition to his oral evidence, Mr Lee Lummis sought to advance the Defendants' case at the hearing before me on 14th-18th December 2020. At that stage, he personally cross examined the Secretary of State's witnesses. He showed significant skill in doing so and was adept at navigating his way through a substantial volume of documentation. Throughout the trial, it was clear he is aggrieved that the Secretary of State has singled out Mr Craig Lummis and himself for disqualification notwithstanding that Mr Fox also approved the EDF Scheme although there is no allegation of impropriety in the Company's decision to proceed with EDF Scheme itself. When called as a witness, his sense of grievance coloured his evidence.

38. As a witness, Mr Lee Lummis was argumentative and evasive. His answers frequently took the form of a lengthy commentary or statement of opinion which did not address the question that had been put to him. Sometimes, his answers were inconsistent with his affidavit evidence. For example, when asked about a letter dated 21st February 2014 to WBL in which HMRC stated that they were checking the Company's return for the period to 31st March 2012, Mr Lee Lummis stated there was no evidence it had been forwarded to the Company and thus suggested it had not been brought to his attention at the time, having previously confirmed, in his affidavit, that Mr Begley had informed the directors the letter reflected HMRC's standard practice and did not require further action from the Defendants themselves. Mr Lee Lummis stated that he had no recollection of reading correspondence from EDF Tax Limited dated 18th and 25th September 2012 in relation to the EDF Tax Scheme before the Company proceeded with the scheme. He also stated that he did not read the draft statement of affairs in relation to the Company prior to the statutory meeting of creditors on 6th November 2015. Given the importance of these documents and his attention to detail on other aspects of the case, for example when cross examining the Secretary of State's witnesses, it is implausible to suggest that Mr Lee Lummis omitted to read any of these documents when referred to him for consideration.

39. Where their evidence is inherently implausible, I have thus exercised caution before accepting the testimony of Messrs Craig and Lee Lummis in the absence of independent corroboration. This includes their evidence about their own perceptions of the risk of a successful challenge to the EDF Scheme.

(4) The Secretary of State's ground of unfitness

40. The Secretary of State relies upon a single ground of unfitness against each Defendant in identical terms. This was set out in Ms Simpson's first affidavit in support of the Claim and is in the following terms.

> "In the knowledge that [the Company] had been accepted into a Representative Sample Arrangement by HM Revenues & Customs ("HMRC") in respect of previous tax planning schemes, the outcome of which had not been resolved and would potentially result in an HMRC liability and that [the Company] had ceased trading, [each Defendant] caused [the Company] to enter into transactions totalling £1,504,566 between 1 August 2014 and the date of liquidation which were at the risk of HMRC and to the benefit of [each Defendant]."

41. In support of this ground of unfitness, Ms Simpson provided the following particulars.

41.1. "On or after 1 August 2014, [the Defendants each] received £75,133 from the proceeds of sale of [the Company's] client database…which reduced the amount [the Company owed to [each Defendant] through his Director's Loan Account; the main credits to the Loan Account having accrued from the treatment of wages and salaries within a tax planning scheme which had been disclosed by the promoter to HMRC under the Disclosure of Tax Avoidance Schemes regime.

41.2. Between 1 August 2014 and 20 May 2015, [they] received transfers totalling £647,000 (with the same amount being transferred to his co-director) from a combination of the credit balances available in the company's bank accounts as at the close of business on 31 July 2014 and receipts into the company's bank account from 1 August 2014 onwards, which totalled £1,677,311, which reduced the amount [the Company] owed to [each Defendant] through his Director's Loan Account.

41.3. On 13 August 2015, [they] each jointly received the benefit of the assignment of land in Brazil by a former director of [the Company], in settlement of a claim again him by [the Company]. [The Defendants] gave no consideration to [the Company] in respect of this assignment. The land in Brazil had an estimated value of £60,300.

41.4. Between 6 November 2015 and 15 March 2018, HMRC issued *Regulation 80* Determinations and *Section 8* Notices in respect of the tax years 2011/2012 to 2014/2015 inclusive, showing liabilities totalling £10,183,926".

(5) The facts

42. Before considering whether a director's conduct merits disqualification, it is necessary to determine the factual matters on which the allegation of unfitness is based, *Re Finelist Ltd, Secretary of State for Trade and Industry v Swan (No 2) [2005] EWHC 603 at [77]*.

43. If there is any doubt about the factual parameters of the case on which the Secretary of State's is entitled to rely, this must be resolved at the outset. In the present case, there is an element of ambiguity about the tax liability on which the Secretary of State's case is founded. He relies on transactions which the Defendants are alleged to have caused at HMRC's risk "in the knowledge that [the Company] had been accepted into a Representative Sample Agreement…" and in support of the allegation of unfitness, he later relies on liabilities amounting to £10,183,926 which is sufficiently large to encompass, in aggregate, the EDF and Qubic Schemes. However, since the Representative Sample Agreement, if any, was confined to the EDF Scheme and, before me, Ms Wilson-Barnes founded her case on the failure to make provision for the Company's liability under the EDF Scheme only, I am satisfied that any ambiguity, should be resolved in favour of the Defendants. The Qubic Scheme has featured in the evidence and forms part of the factual background to the case: it is indicative of the Defendants' willingness to commit the Company to successive tax planning schemes. However, it is not suggested that there was anything in itself improper in causing the Company to enter into the schemes. The putative ground of unfitness should thus be limited to transactions at risk to HMRC owing to the Company's tax liabilities in respect of the EDF Scheme only. The Qubic Scheme is significant only as part of the factual context and in connection with the light it throws on the Defendants' awareness of and willingness to enter into such schemes.

44. It appears that, as yet, there has been no judicial determination on the validity of the EDF Scheme whether in the First Tier Tribunal or otherwise. Moreover, no evidence was adduced before me as to HMRC's prospects of successfully establishing its case in relation to the Company's putative liabilities. The Company's liabilities, if any, in the years 2011-2012 and 2012-2013 arise from the EDF Scheme and its liabilities in the years ending 2013-2014 and 2014-2015 arise from the Qubic Scheme. HMRC have issued a Jeopardy Corporation Tax Amendment against assessments for 31st March 2012 and 31st March 2013 with *Regulation 80* determinations and *Section 8 Notices*. For the years 2011-2012 and 2012-2013, they now contend that the Company's liabilities respectively amount to £250,880 and £3,010,126. By letter dated 18th February 2016, HMRC advised Clarke Bell

of an "…HMRC announcement in 2013 to issue Accelerated Payments Notices against liabilities arising from tax advantages gained from what HMRC considers to be an Avoidance Scheme". It also appears Mr Begley referred to such notices at a meeting, on 31st August 2016, with Mr Morton of Clarke Bell and the Defendants. However, this aspect of the case is obscure. If such notices were served, it is unclear what, if any liabilities might have been incurred under them.

45. Putting the Secretary of State's case at its highest, the material question is thus whether the Defendants entered into the relevant transactions aware of a significant risk the EDF Scheme was ineffective so as to attract a substantial tax liability to HMRC. However, once the question is formulated in this way, I am satisfied that the answer is yes.

46. It is first necessary to examine the Defendants' knowledge in November 2012 or thereabouts when they committed the Company to the EDF Scheme and initially authorised the transfer of funds to the trust company for application under the EDF Scheme.

47. Upon analysis, I am satisfied the Defendants were each aware of the risk at the outset. They were jointly involved in the decision to enter into the scheme as indeed was Mr Fox. It was a critical decision in connection with the overall management of the Company's affairs with important financial implications for the Company and there is nothing to suggest the Defendants failed to communicate openly with one another as father, son and close business partners. There could have been no reason for them to conceal anything from each other nor, indeed, is it suggested they did so.

48. Firstly, it is obvious from the correspondence with EDF Tax before the Company entered into the EDF Scheme that EDF Tax were well aware HMRC would, in all likelihood, investigate the scheme and there was every possibility it would be challenged. In guidance published as long ago as 5th August 2010, HMRC had already issued a warning that they believed such schemes to be ineffective and EDF Tax can be taken to have been aware of the guidance. They thus set out to warn Mr Craig Lummis the EDF Scheme would come under scrutiny. By their letter dated 25th September 2012, they stated "it was almost guaranteed that HM Revenue & Customs will enquire into the planning." Elsewhere in the letter, they observed that it was the current practice of HMRC to look at a representative sample of clients. If they accepted the tax deduction, all cases would be closed, whether in the sample or not. If they decided to submit a challenge, the sample cases would be narrowed to select one or two cases to be heard before the First Tier Tribunal. They also

advised that "ultimately if HMRC are successful and a tax liability arises then an interest charge would arise on the unpaid tax from the normal due date". Although it was addressed to Mr Craig Lummis marked "strictly private and confidential to be opened and read by" only by him, it was a significant document with important ramifications for the Company and, indeed, for Messrs Craig and Lee Lummis themselves. Mr Lee Lummis was aware of the proposals. I am also satisfied Mr Craig Lummis received the relevant correspondence and, in the absence of good reason for him to exclude such correspondence from Mr Lee Lummis, I am satisfied that it was shown to Mr Lee Lummis. Although Mr Lee Lummis stated, in cross examination, he had no recollection of seeing it, I am satisfied the Defendants would each have read and considered it before committing the Company to the EDF Scheme.

49. No doubt, EDF Tax had confidence in the EDF Scheme. Elsewhere in their letter dated 25th September 2012, they advised Mr Craig Lummis that it was their view "…and the view of Tax Counsel that [the EDF Scheme was] technically robust, [would] stand up to the scrutiny of HMRC and the courts and…deliver the planned tax efficiencies". However, they did so having observed (in their preceding letter dated 18th September 2012) that "we offer no guarantee that any tax planning strategy will be successful. We have discussed this with you and have agreed and accepted this".

50. In these circumstances, EDF Tax persuaded the Defendants that the EDF Scheme was likely to succeed as a device to "reward employees and achieve a Corporation Tax deduction without giving rise to a corresponding liability to Income Tax and National Insurance". However, it is unrealistic to suggest that, as sophisticated and experienced financial advisers, they were so naïve as to believe there was no significant risk the EDF Scheme would fail or attract tax substantial liabilities. In evidence, it was suggested that, at least in part, the qualifications and reservations in the letter about EDF Tax's liabilities were designed as a disclaimer to reduce or eliminate its own professional risk. No doubt this is correct and the Defendants perceived this to be the case. However, it would also have been self-evident to them that there could be no good reason for a disclaimer if the EDF Scheme was free from risk.

51. Mindful of the risk that the EDF Scheme might ultimately prove to be ineffective and thus attract a substantial tax liability to HMRC, the directors approved a note to the Company's financial statements for the year ending on 31st March 2013 and the period ending on 30th September 2014 in the following form under the heading "Contingent Liabilities".

> "The company has appointed assets to an Employer Financed Retirement Benefit Scheme. The company is liable for PAYE/NIC that may arise on awards made by the Trustees. The Directors are of the opinion that the Trustees will award most of the benefits in a way that will not result in a PAYE/NIC liability".

52. The 2013 and 2014 accounts were signed on behalf of the board on 11th December 2013 and 25th June 2015. On each occasion, they were signed off by Mr Craig Lummis. In 2013, the Defendants and Mr Fox were all on the board. However, Mr Fox had resigned by the time that the 2014 accounts were signed off. In cross examination, Mr Lee Lummis stated that he couldn't recall reading the 2013 and 2014 accounts at the time. He also stated that he did not recognise the concept of "contingent liability" in the context of accounts. However, he did not suggest he was unaware of the statutory requirement for the board to approve the Company's accounts nor, indeed, did he suggest that the board had failed to do so or that, in this respect, he had failed to act responsibly in accordance with his duties as a director. On the balance of probability, I am satisfied that the Defendants read and approved the Company's 2013 and 2014 accounts and, whilst content to certify that they were of the opinion that the proceeds of the EDF Scheme were not being applied in such a way to result in a tax liability, they were aware there was a risk that it would be successfully challenged by HMRC.

53. The next questions are whether the Company entered into a Representative Sample Agreement with HMRC and, if so, whether it did so with the knowledge of the Defendants. The Representative Sample Agreement provided for the parties to be bound by final decisions of the Tribunals and Courts on a sample of cases in relation to the effect of the EDF Scheme. The Secretary of State maintains that the Company entered into such an agreement with HMRC during early 2014 and the Defendants had knowledge of the same by the time they resolved the Company should cease trade. In support of his case, he relies on the RSA Document and a letter dated 23rd April 2014 from Mr Begley to Mrs Clowes of HMRC confirming that the Company had "asked to be admitted to a Representative Sampling Arrangement".

54. Initially the Defendants did not deny that the Company entered into a Representative Sample Agreement and, by implication, they accepted they had knowledge of it. By Paragraphs 8 and 12 of their respective affidavits each sworn on 30th September 2019, the Defendants deposed, in identical terms, as follows.

> "It is correct that the Company entered into a Representative Sample Arrangement with HMRC in respect of a scheme. This was upon the advice of Mr Begley and EDF Tax (EFRB)".

55. Later in their affidavits, Mr Craig Lummis stated that he did not recall signing the RSA Document and Mr Lee Lummis confirmed he did not sign it. However, they both stated as follows.

> "I do accept that Mr Begley advised the Company to enter into such agreement and he further advised that the outcome was likely to be positive and beneficial for the Company. Again, it is important to emphasise that this was against the background of the written advice already received from EDF that it was their opinion (and that of Tax Counsel) that the scheme was technically robust would stand up to scrutiny by HMRC and would deliver the planned tax efficiencies…"

56. The Secretary of State's case on this was not challenged until 16th December 2020 when Mr Lummis filed a written argument stating that the evidential threshold had not been met. At the resumed hearing on 30th March 2021, Mr Berkeley submitted that, by signing the RSA Document, Mr Craig Lummis did not bind the parties to a commitment. It would have taken more than the signature of one of the parties to achieve such an outcome. In cross examination, Mr Craig Lummis stated that, whilst the RSA Document appeared to bear his signature, he had no recollection of signing it. Contrary to the impression created by his witness statement, he also asserted that the RSA Document was not legally binding. The same point was taken by Mr Lee Lummis.

57. Having had the opportunity to fully evaluate their evidence, I am satisfied, based on the advice they were given in early 2014, that the Defendants were willing to commit the Company to a Representative Sample Agreement and subsequently – no later than the end of April 2014 - they formed the impression the Company had done so upon the terms set out in the RSA Document itself. This remained the case at all times prior to liquidation and the early stages of these proceedings. It is on that basis they filed affidavits confirming that the Company entered into such an agreement.

58. The Defendants have plainly re-considered this aspect of the case. If the RSA Document did not, in itself, amount to a binding agreement, they seek to maintain that the Secretary of State has failed to file evidence showing that the Secretary of State and EDF Tax Ltd

ever assented to such an agreement. In response, Ms Wilson-Barnes, for the Secretary of State submits they are precluded from doing so.

59. By virtue of *Para 2(1)* of the *Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987*, the *CPR 1998*, and any relevant practice direction, apply. During counsel's closing submissions, I advised counsel that, to take their new point that the Company did not enter into an RSA, it would be necessary for the Defendants to obtain the permission of the Court to withdraw their admission that it did so, under *CPR 14.1(5)*, on the basis that the admission pertains to a relevant part of the Secretary of State's case within the meaning of *CPR 14.1(1)*. In considering whether to give permission, *Paragraph 7.2* of *Practice Direction 14* requires me to have regard to all the circumstances of the case including:

> "(a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;
>
> (b) the conduct of the parties, including any conduct which led the party making the admission to do so;
>
> (c) the prejudice that may be caused to any person if the admission is withdrawn;
>
> (d) the prejudice that may be caused to any person if the application is refused;
>
> (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
>
> (f) the prospects of success (if the admission is withdrawn) or the claim or part of the claim in relation to which the admission was made; and
>
> (g) the interests of the administration of justice".

60. Having heard counsel's submissions on this issue, I decline to give the Defendants permission to withdraw the admission. Applying the specific considerations in *Paragraph 7.2*, the application has been made following a re-assessment of the existing evidence rather than the delivery of new evidence. Whilst the Defendants were not legally represented at the commencement of the trial, they were represented at an earlier stage of the proceedings and there can be no good reason to require of them lower standards than a represented litigant, *Barton v Wright Hassall [2018] UKSC 12.* The Secretary of State's case has at all times been conducted properly and with due regard to the Rules. The material admissions

did not arise from any failure on his part. The present proceedings could obviously have serious implications for the Defendants and it is potentially to their disadvantage for them to be held to their admission. However, the proceedings also have an important statutory function. Moreover, the material issue is as much directed to the Defendants' perceptions as it is to the legal effect of the RSA itself. It is also of obvious significance that the issue was raised for the first time at a very late stage. For these reasons, it would be inappropriate for me to re-open the issue at this stage.

61. In any event, I am satisfied that, when Mr Craig Lummis signed the RSA Document, the Defendants were aware the EDF Scheme was being investigated and was likely to be made subject to challenge. No doubt, they continued to believe that the EDF Scheme was likely to be effective. However, once aware it was under investigation, it is unrealistic for them to suggest, as they did, that they perceived there was no risk whatsoever or only a negligible risk that the challenge would succeed.

62. The next important factual issues between the parties are whether a decision had been taken and implemented for the Company to cease trade by the time the Defendants caused the Company to enter into the relevant transactions.

63. In support of his case on these issues, the Secretary of State relies on the directors' report to the statutory meeting of creditors on 6th November 2015 recording that the Company ceased trade on 31st July 2014 having discovered, earlier in the year, that "one of its major pension compan[ies] had to place their trading activities on hold whilst their regulatory body undertook investigations". The significance of this was that "the majority of [the Company's] income was reliant on that company" and, by 31st July 2014, there were "no other sources of income". It was recorded in the report that "continuous effort [was] being made to collect in the commissions that were in the pipeline" but it was not suggested that this might somehow have precluded the cessation of trade.

64. The directors' report to the creditors is consistent with the notes of the Company's board meetings dated 12th June and 15th July 2014 , each attended by the Defendants in which it was resolved that with effect from 1st August the Company would "have a skeleton staff only to manage the completion of the existing pipeline of business" with "staff… transferred under a TUPE arrangement to Alexandra Associates (UK) Ltd" and, then, that the Company was to "cease trading and…be wound up once pipeline income has been received as no further trading is possible".

65. However, the Defendants both took issue with the proposition that the Company ceased trade on 1st August 2014 or, indeed, during the period that followed. They contended that they could not have ceased trade since they continued to collect income from the business and apply it to the Company's creditors. This included the Company's ordinary trading creditors and the Defendants themselves who were owed monies on directors' loan account. The Defendants also suggested that, during this period, they sought to secure new business on behalf of the Company.

66. I am satisfied that, having resolved to do so, the Company ceased to trade on 1st August 2014. Having disposed of its rights in the Company database, it ceased to provide services and transact new business on behalf of clients. By then, it had no immediate prospect of resurrecting its business. Moreover, there is no independent evidence that the Defendants sought to secure new business on behalf of the Company from that time or, indeed, contemplated doing so and there is certainly nothing to suggest any new business was transacted on behalf of the Company from this point in time. No doubt, "pipeline income" from the Company's historic business continued to be credited to the Company's bank account and this was applied to meet the Company's debts to its trade creditors. Significant amounts were also credited to the Defendants to meet the amounts due to them on their directors' loan accounts. However, this did not, in any meaningful sense, involve continuing the Company's trading activities.

67. Following the cessation of trade, I am satisfied that the sum of £1,294,000 was transferred to the Defendants and they received £647,000 each from monies credited to the Company's bank account, as pipeline income, in respect of the amounts due to them on directors' loan account. By then, the Defendants were the only directors of the Company and there is no issue that, together, they authorised and approved the transactions. They did so in the knowledge that the Company had applied assets under the EDF Scheme. They continued to believe that the scheme was likely to withstand challenge. However, they were aware the Company had entered into an RSA providing for it to be bound by final decisions of the Tribunals and Courts in relation to the effect of the scheme. They can also be taken to have been aware that the ultimate outcome of any litigation with HMRC was not free from doubt and there was a significant risk the EDF Scheme would thus attract a substantial tax liability. It is unrealistic to suggest otherwise.

68. There is no factual dispute between the parties that, in addition to the amounts transferred to the Defendants from the "pipeline income", the Defendants were each credited with

£75,133 from the proceeds of sale of the Company's database to Alexandra Associates. The Defendants emphasised that this did not involve a payment. The sum of £75,133 was simply debited to the amounts standing to their credit on directors' loan account. However, the Defendants were the only shareholders of Alexandra Associates at the time and, by utilising their directors loan accounts in this way, they were able to procure the acquisition of Company assets without the introduction of third party funds.

69. The Defendants also accepted that they entered into the written agreement for the assignment of Mr Fox's rights of ownership in land in Brazil on behalf of the Company. Although these rights were not treated as an asset in the Company's Statement of Affairs, the Defendants accept that they hold the same for and on behalf of the Company.

70. I must next determine when the Company first became insolvent and when the Defendants can be taken to have known that it was insolvent. In my judgment, the Company was almost certainly insolvent on a balance sheet basis by 1st August 2014 when it transferred its rights in the customer data base to Alexandra Associates and ceased trade. Once it did so, it also had no tangible assets and no longer had any expectation of future receipts other than the pipeline monies generated from historic business. The Company's accounts for the period ending on 30th September 2014 were not formally approved by the board until 25th June 2015. However, after making an operating loss of £1,413,930, they showed the Company to have net liabilities of £1,400,368 as at 30th September 2014 once there was taken into consideration some £2,476,160 due on the directors' current accounts. Consistently with established accounting practice and the Defendants' view of the EDF Scheme, the liability to HMRC was noted but not quantified as part of the Company's net liabilities. Nevertheless, the Company was insolvent regardless of any liability to HMRC. Moreover, whilst the balance sheet recorded the Company's position some two months after the Company ceased trade, it is inherently unlikely that it only achieved an adverse balance in the period after 1st August 2014. As the Company's directors and main creditors, the Defendants can be taken to have known and certainly ought to have known that the Company was insolvent on a balance sheet basis on 1st August 2014 when they disposed of its interest in the database and caused the Company to cease trade.

71. Two factual issues have arisen in relation to the period immediately before the Company was placed in liquidation, namely issues as to whether the 8th October 2015 Note is a forgery and Mr Lee Lummis knew that HMRC was listed in the Company's Statement of Affairs as a claimant creditor when he signed the same at the creditor's meeting. There is

also an issue about the accuracy of the directors' report which Mr Lee Lummis also signed at the meeting.

72. The 8th October 2015 Note was exhibited to Ms Simpson's second affidavit dated 18th November 2019 in which it was described as "a note of an initial meeting between Clarke Bell and Lee Lummis on 08 October 2019" (sic). The reference to the date was obviously a typographical error; it was intended to be 8th October 2015. However, Mr Lee Lummis's suspicions were excited because there was no meeting on that date between himself and any representative of Clarke Bell. He surmised that the note had been created in response to an erroneous reference, in his own affidavit, to a meeting on 8th October 2015 which actually took place on 24th September 2015 and described the note as a forgery. However, having heard the evidence of Ms Williams, I am satisfied that the 8th October 2015 Note was nothing more than an internal note or memorandum on which she entered information, from time to time, in manuscript, against a column of printed entries. She did so between 8th October and 6th November 2015 when the Company was placed in liquidation. It is unfortunate that the printed entries were headed with the words "Initial Advice Meeting" and Ms Williams entered the date on which she commenced work against the entry for "Meeting Date". However, Mr Lee Lummis jumped to the conclusion that the document was a forgery without proper consideration. Allegations of forgery should not be made lightly. It is unfortunate that, when cross examined, Mr Lee Lummis continued to demonstrate at least some reluctance to treat it as an authentic document.

73. The next issue is whether Mr Lee Lummis knew HMRC was listed as a claimant creditor when he signed the Company's Statement of Affairs.

74. In his affidavit of 30th September 2019, Mr Lee Lummis stated that he "sign[ed] the documents as they were emailed over and my accountant was not present at signing to verify the figures. I trusted they were correct. In particular, the addition of a liability to HMRC was, I believe, made only on 6 November 2015 on the advice of Mr Begley…I again stress that prior to this date, the Directors were not aware of any liability to HMRC…I am simply astonished and alarmed to learn that Clarke Bell saw it appropriate to change the directors statement of affairs without my knowledge and/or consent. As I set out herein, it is my genuine belief that at the time of the liquidation the only creditors which the Company had was myself and Mr Lee Lummis". The reference to "myself and Mr Lee Lummis" is no doubt a typographical error which may have crept into Mr Lee Lummis's affidavit when passages were copied and pasted from a preliminary draft of Mr Craig

Lummis's affidavit. Although he did not sign the statement of affairs, Mr Craig Lummis deposed himself that "I am astonished and was alarmed to learn that Clarke Bell saw it appropriate to change the Directors' Statement of Affairs without my knowledge and/or consent. As I set out herein, it is my genuine belief that at the time of the liquidation the only creditors which the Company had was myself and my co-Defendant".

75. In cross examination, Mr Lee Lummis confirmed that, when he signed the Statement of Affairs, he didn't notice that HMRC was listed as a creditor in the sum of £1,231,092. He did not dispute the Secretary of State's case that a draft copy of the statement of affairs was emailed to him the evening before the meeting, at 5.23 pm. However, he stated that he would have left work by that time and it is thus unlikely he would have looked at it that day. In any event, although it was emailed to him again before the meeting on 6th November 2015, he confirmed that he first read the statement of affairs at the meeting itself.

76. I have reached the following conclusions. Firstly, if it is in doubt, I am satisfied the draft statement of affairs emailed to Mr Lee Lummis on 5th November 2015 was identical to the draft sent to him the following day which he signed at the statutory meeting. There is nothing to suggest that a preliminary draft of the statement of affairs was ever sent to Messrs Lee or Craig Lummis other than in this form and there is thus no room for any suggestion that such a draft might have been "changed". Secondly, on the balance of probability, I am satisfied Mr Lee Lummis read and understood the draft statement of affairs before signing it. I am also satisfied it would have been obvious to him, when signing the document, that HMRC had been entered in the statement of affairs with a claim for £1,231,092. The estimated deficiency as regards creditors was thus £3,976,125. These details were conspicuously listed above Mr Lee Lummis's signature in the Summary of Liabilities and, together with the directors' claim for £2,744,133, they were the Company's only listed liabilities. At trial, Mr Lee Lummis came across as an intelligent and confident witness who was not willing to make concessions unless fully satisfied it was in his interests to do so. When he signed the Statement of Affairs, he was 31 years of age and had significant business and financial experience. The Statement of Affairs recorded that HMRC had submitted a *claim* for £1,231,092. It is true that Messrs Lee and Craig Lummis have always disputed the Company's liability to HMRC. However, there is no suggestion that signing the Statement of Affairs with knowledge of HMRC's claim would have been tantamount to a concession about the Company's liabilities to HMRC under the EDF Scheme or, indeed, the Qubic Scheme. It is also significant that the Statement of Affairs was based on

information provided by the Company and, in preparing the draft Statement of Affairs, Ms Williams was alerted to the HMRC claim by Mr Begley on behalf of the Company. It is unrealistic to suggest that this was not brought to the attention of Mr Lee Lummis at the time.

77. There remains an issue about the accuracy of the directors' report which Mr Lee Lummis also signed at the meeting. Mr Lee Lummis contends that, whilst based on a handwritten document provided by him, the directors' report was not limited to information in the document and contains some material inaccuracies. No doubt the document was not limited to information provided by the directors personally and it is conceivable some errors crept into the draft, for example, in relation to the date Clarke Bell were "approached" for their advice. If so, however, these errors are insubstantial. It would not be surprising for Mr Lee Lummis to have overlooked them when approving the final document.

78. Finally, there is an issue as to the extent to which the Defendants relied on Mr Begley for his advice and assistance on matters relating to the Company's accounts and tax affairs. Mr Begley was not called to give evidence. I have thus exercised caution in relation this aspect of the case. However, I accept Mr Craig Lummis's evidence that he already had a well-established professional relationship with Mr Begley when the Company was formed and I am satisfied that, at all material times, the Defendants relied on Mr Begley in connection with the Company's pay roll, the maintenance of its accounting records, the management of its tax affairs and, more generally, the advice he gave in relation to these matters. I am satisfied that it was upon Mr Begley's recommendation that they approached EDF Tax and, subsequently, Qubic Tax, for specific tax advice. No doubt, Mr Begley also encouraged the Defendants to act in accordance with the professional advice that they were given. It is also apparent from the notes to a meeting at Clarke Bell's offices on 31st August 2016, in the presence of the Defendants, that Mr Begley confirmed that the Defendants had received "robust independent advice that the schemes were effective" when the Company entered into the tax schemes. However, this is likely to have been a reference to the advice received from EDF Tax and Qubic Tax, not advice from himself personally. In my judgment, Mr Begley can be expected to have done no more than endorse this specialist advice and encourage the Defendants to act on it. If it is being suggested that he went further than this and gave the Defendants the impression that the schemes were free from risk, I am not satisfied this is the case. Nor, indeed, can it realistically be suggested that

EDF Tax did anything to indicate that, contrary to their advice in written correspondence, there was no more than a negligible risk that the tax schemes would fail.

79. It is more than likely Mr Begley was aware, at the time or shortly afterwards, of the transactions under which the Company's database was transferred to Alexandra Associates and, in aggregate, some £647,000 transferred to the Defendants each although these transactions were initiated by the Defendants themselves. No doubt, Mr Begley was himself persuaded that the EDF Scheme was likely to succeed and, if so, the Company would thus be under no attendant tax liability. However, he would also have been aware it was by no means out of the question that the EDF Scheme would fail, attracting a substantial tax liability for the Company. Self-evident as it might appear, had he been asked to advise the Defendants, whether formally or informally, of the risks of proceeding with the relevant transactions or, more generally, whether to go ahead, he could thus have been expected to remind the Defendants of the Company's potential liability to HMRC and that the transactions would involve divesting the Company of assets to meet such liability if and once the Company went into insolvent liquidation. However, these matters would have been obvious to the Defendants without such advice. With some hesitation, in view of the fact that Mr Begley has not given evidence, I have reached the conclusion the Defendants did not ask him to advise them, in specific terms, about the propriety of the relevant transactions or the risks to which they would give rise under insolvency legislation and, in those circumstances, he did not issue them with a warning about these matters.

(6) Analysis

80. *Section 6(1)* of the *Company Directors Disqualification Act 1986* provides that disqualification is mandatory in the case of directors of an insolvent company if their conduct as a director makes them unfit to be concerned in the management of a company. In *Re Grayan Building Services Limited (in liquidation) [1995] Ch 241* at *253*, Hoffman LJ observed that this requires the Court to determine whether their conduct "viewed cumulatively and taking account of any extenuating circumstances, has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies". In making this determination, it is axiomatic that the court is concerned solely with the conduct identified by the Secretary of State as grounds of unfitness.

81. In the present case, the Secretary of State relies on the conduct of the Defendants in causing the Company to enter into the disputed transactions between 1st August 2014 and 6th

November 2015, a period commencing with the cessation of trade and ending with the insolvent liquidation of the company.

82. It is now established that the directors of an insolvent company are under a duty to have proper regard for the interest of the company's creditors, *Jetivia SA v Bilta [2016] AC 1* (Lord Toulson and Lord Hodge at *[123]).* This duty arises when they "know or should know that the company is or is likely to become insolvent" and "in this context, 'likely' means probable", *BTI 2014 LLC v Sequana SA [2019] BCC 631 (*David Richards LJ at *[220]).* If "the directors know or ought to know that the company is presently and actually insolvent", David Richards LJ suggested, at *[222],* it is "hard to see that creditors interests could be anything other than paramount". In this part of his judgment, he drew no distinction between insolvency on a cash-flow and balance sheet basis. However, at [213], he referred to *West Mercia Safetyware Ltd (in liq) v Dodd (1988) 4 BCC 30*, as authority for the proposition that, when the company is "actually insolvent", insolvency on either basis will suffice and it is implicit in his analysis at [224] that insolvency on a cash-flow basis is enough where the company's total assets exceed the liabilities on its balance sheet and the statutory restrictions on the payment of dividend are not engaged.

83. In the light of these principles, I am satisfied that the Defendants were under a duty to have proper regard for the interest of the Company's creditors from 1st August 2014, at the latest, when the Company can be seen to have been insolvent on a balance sheet basis. If there could be any room for doubt that the Company was insolvent on 1st August 2014, the Company was by then at the latest likely to become insolvent in the sense envisaged by David Richards LJ in *BTI 2014 LLC v Sequana SA (supra).*

84. The Defendants' general duty to have proper regard for the interest of the Company's creditors was to be discharged in conjunction with their duties, as directors, to act in good faith, to avoid conflicts of interest and exercise reasonable skill and care. It applied to the interests of the Company's creditors as a whole and, subject to issues of security or priority, it would have precluded the Defendants from treating some creditors more favourably than others in the absence of good reason to the contrary. This is so regardless of whether doing so might have given rise to a statutory preference.

85. Although HMRC were to be treated only as contingent creditors, they fell within the class or classes of creditors to whom the Defendants owed a duty. At all material times prior to the liquidation and, indeed, at the time of the liquidation itself, the *Insolvency Rules 1986*

were applicable. This statutory regime has been superseded by the *Insolvency (England and Wales) Rules 2016* but remains in similar terms. By *Rule 12.3(1)* of the *1986 Rules,* "provable debts" was defined so as to include present, future, certain or contingent claims and, by *Rule 13.12(1)*, "debt" was defined so as to include any debt or liability to which the Company was subject on the date it went into liquidation or to which the Company may become after that date by reason of any obligation incurred before it. Consistently with *re Nortel GmbH [2014] AC 209* (in which the Supreme Court concluded that a financial support direction issued by the Pensions Regulator after a company entered insolvent administration was treated as a provable debt), the Company's liabilities, if any, to HMRC in respect of the EDF Scheme would have been provable or deemed provable as a debt or liability to which the Company might become subject under *Rule 13.12(1)(b)*. This was at least notionally the case throughout the period in which the Company entered into the disputed transactions.

86. Although HMRC were thus to be regarded as creditors with the Defendants under a duty to have proper regard to their interest as such, there is no suggestion HMRC were entitled to any special status. In view of the nature of the Company's liability to the Crown, it does not form part of the Secretary of State's case that the Defendants somehow took advantage of the Crown's forbearance so as to warrant a case based on unfitness in the sense envisaged by Dillon LJ in *re Sevenoaks Stationers (Retail) Ltd [1991] Ch 164 at 184*.

87. Moreover, the Brazil land transaction was no more than a makeweight in the Secretary of State's case. Mr Lee Lummis did not identify the Brazil land as an asset in the Company's affairs and no doubt, for that reason the liquidator took no action to realise it. However, on the available evidence, the land remains undeveloped; it is of limited value and, albeit contrary to the statement of affairs, the Defendants accept it should be treated a company asset. Moreover, it does not fit comfortably with the sworn ground of unfitness. I am not satisfied this materially adds to the ground of unfitness on which the Secretary of State relies.

88. Nevertheless, in my judgment, the Defendants caused the Company to enter into the transactions in relation to the client database and the directors' loan repayments of £647,000 without proper regard for the interests of the creditors as a whole, including HMRC. The Defendants were thus in breach of their duty to the creditors. I am also satisfied that their conduct fell below the standards of probity and competence that could reasonably have been expected of them as directors.

89. By disposing of the client database to Alexandra Associates, they divested the Company of its intellectual property and business goodwill without introducing assets for the general benefit of its creditors. They also benefitted personally from the transaction as shareholders of Alexandra Associates. On behalf of the Defendants, it was submitted that the Company also benefitted from the transaction because the database would not have been easily marketable and the purchase price was utilised to reduce the amounts that the Company owed to the Defendants on their directors' loan accounts. However, no evidence was adduced to suggest that the Defendants properly explored the opportunities that would otherwise have been available to the Company and the effect of the transaction was to divert the asset to a third party without introducing funds for the benefit of the Company's ordinary creditors.

90. Similarly, the Defendants transferred to themselves £647,000 each out of the pipeline monies at a time that the Company had ceased business and had no intention or realistic expectation of re-commencing the business. Whilst they were able to ensure that the Company's indebtedness to its ordinary trading creditors was discharged in full, this ultimately left the Company with no funds to meet its contingent liabilities to HMRC. According to the Company's Statement of Affairs, which the First Defendant signed on 6th November 2015, the Company had no assets at the time it went into liquidation. At no stage did the Defendants make any provision at all out of the Company's assets to meet its contingent liabilities to HMRC nor, indeed, did they explore the options that might have been available to do so, whether by crediting funds to a suspense account, insuring against the risk of a successful claim or otherwise. Whilst the Defendants were themselves creditors, they benefitted personally from the transactions at the expense of HMRC who were also creditors.

91. In his closing submissions, Mr Berkley invited me to conclude that the Defendants acted on the advice of Mr Begley. On this basis, he submitted that the Defendants should not be adjudged unfit. However, I have reached the conclusion that the Defendants did not ask Mr Begley for specific advice about the risks inherent in proceeding with the relevant transactions under insolvency legislation, particularly in connection with the Company's contingent liabilities to HMRC and, in a wider sense, whether it was proper for the Company to proceed with the transactions in the light of such liabilities. In the absence of a request for such advice, Mr Begley did not alert the Defendants to such risks and did not warn them that the transactions would involve any impropriety or lack of probity.

However, as directors, the Defendants had overall responsibility and they initiated or can be taken to have initiated the relevant transactions in the knowledge that the transactions would divest the Company of assets which would otherwise be available for its creditors, in particular HMRC, if and when the Company went into liquidation. The risks and impropriety of proceeding with the transactions on this basis ought to have been apparent to the Defendants in the absence of specific advice from Mr Begley. Following the transactions, the Company would have no substantial assets to meet its contingent liability to HMRC. In my judgment, the Defendants' conduct thus fell below the standards of probity and competence appropriate for the directors of a company. Disqualification is mandatory.

(7) Disposal

92. I shall thus make disqualification orders against each Defendant. During his closing submissions, Mr Berkley indicated that, in the event I am minded to make disqualification orders, he would seek to make further submissions about the length of disqualification in the light of my findings. I shall determine this issue once I have heard counsel's submissions when the case is next listed for substantive hearing.