Neutral Citation Number: [2022] EWHC 1399 (Ch)

Case No: CH-2021-000105

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

14/06/2022

Before :

MR JUSTICE FANCOURT

- -

Between :

THE OFFICIAL RECEIVER	**Respondent**
- and -	
NDUKA OBAIGBENA	**Appellant**

- -
- -

Mr Tiran Nersessian (instructed by **Gowling WLG**) for the **Respondent**
Mr Hugh Sims QC and Ms Daisy Brown (instructed by **Francis Wilks & Jones**) for the **Appellant**

Hearing date: 18 May 2022

- -

Approved Judgment

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

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THE HON. MR JUSTICE FANCOURT

Mr Justice Fancourt :

Introduction

1. This is an appeal against an Order of Deputy Insolvency and Companies Court Judge Agnello QC ("the Judge") made on 8 April 2021 following a trial of the Official Receiver's claim to disqualify the appellant, Mr Nduka Obaigbena, from being involved in the management of a limited company, pursuant to section 6 of the Company Directors Disqualification Act 1986 ("the 1986 Act"). Mr Obaigbena was at all material times the sole director of Arise Networks Ltd ("the Company").

2. The Judge ordered that:

> "Mr Obaigbena shall not:
> 1. be a director of a company, act as a receiver of a company's property or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company unless (in each case) he has leave of the Court; and
> 2. act as an insolvency practitioner:
> for a period of 7 years with effect from 29 April 2021."

3. The Official Receiver's allegation of unfitness, pursuant to rule 3 of The Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987 was that:

> "Mr Obaigbena caused Arise Networks Ltd to trade to the detriment of creditors from 31 December 2014 onwards with no reasonable prospect of creditors being paid or of the company avoiding insolvent liquidation."

4. The Judge found that Mr Obaigbena caused the Company to continue to trade while insolvent, when there was no reasonable prospect that the creditors would be paid. She found that Mr Obaigbena genuinely believed that sufficient funds would one day come into the jurisdiction and be available to pay the Company's increasing liabilities but that this was not a reasonable belief in the circumstances. She also found that Mr Obaigbena's belief was irrational and unjustified, and that his decision to continue to trade was gambling with sums owing to the creditors, without regard for or compliance with proper standards.

5. The Judge directed herself, at para 8 of her judgment, that she needed to decide whether Mr Obaigbena's conduct fell into the category of demonstrating a serious failure or serious failures constituting misconduct which justify a finding of unfitness, but that:

> "the question remains, put simply, whether the conduct complained of makes the defendant unfit. The cases demonstrate that no further 'finesse' in relation to the test is needed or indeed advisable."

6. She also directed herself that ordinary commercial misjudgement is, in itself, insufficient to demonstrate unfitness.

7. The Judge considered that the case fell within the "middle bracket" in the guidance on disqualification given by the Court of Appeal in Re Sevenoaks Stationers (Retail) Ltd [1991] Ch 164 ("*Re Sevenoaks*") and that, although this was not a case of dishonesty, the appropriate period of disqualification was 7 years.

Grounds of Appeal

8. Permission to appeal was refused on the papers by Meade J on 23 June 2021. The grounds at that stage amounted principally to challenges to the Judge's factual findings, but also against the length of the disqualification period.

9. The application for permission was renewed before me on 16 December 2021. I gave permission to appeal on limited grounds, as follows:

> "Amended Ground 1: The judge applied the wrong legal test in that whilst she found that there was no reasonable prospect of creditors being paid or of the company avoiding insolvent liquidation she failed to go on and find that the Appellant ought to have so concluded.
>
> Ground 3: In any event, the judge erred in disqualifying the appellant for a period of 7 years – this involved a failure correctly to apply the principles, was grossly disproportionate, and left out of account relevant mitigating factors, or failed to state how those formed part of her assessment of a suitable period."

The Company and its Insolvency

10. The Company was incorporated by Mr Obaigbena in 2012. He prepared a business plan at that time for the Company and other companies controlled by him, registered both in the UK and in Nigeria. The plan was that they would provide or facilitate broadcast production services in the UK relating to television news and media. The group's TV network, known as Arise Network, would concentrate on African news and events. Mr Obaigbena intended to launch the network in the UK and in the USA.

11. The business plan established that the Company would not be capable of making any profits for a period of 5 years – a 'soft launch' stage. Its income, needed to pay its creditors and generate profit, was dependent on advertising revenue; advertising revenue essentially depended on a positive review from the Broadcasters Audience Research Board (BARB) review; and a positive review would not be obtained until the Company had a more substantial range of programs. This necessitated increasing the Company's level of production (which Mr Obaigbena decided to do in December 2014, after a failed BARB review was received), which in turn required significant capital investment.

12. The Company depended entirely on working capital being provided by the group companies in Nigeria. The group's activities in Nigeria were further advanced and were producing income there. Substantial sums were lent to the Company by other group companies during the 4 years from incorporation until winding up. Even before September 2014, as the Judge found, there were problems with prompt payment to creditors, many of whom were said to be the Company's 'employees', though in reality they were probably consultants.

13. The principal difficulty for the Company arose when, in September 2014, the Nigerian Central Bank imposed restrictions on foreign currency exchange, owing to a collapse in the oil price. This significantly inhibited the ability of the group to send funds to the Company or any of its associated companies in the UK. Funds were still sent during the period September 2014 to April 2016, which enabled some outgoings of the Company to be paid; but not enough funds to pay all the Company's debts.

14. According to the evidence, which was not disputed in this regard, the level of the Company's losses and debts increased significantly over the period from 31 December 2013 to 22 April 2016:

Year end:	Accumulated losses:	Trade debts	Related company debts
31.12.13	£3,854,112	£1,545,883	£3,094,260
31.12.14	£12,922,174	£3,737,445	£14,407,929
31.12.15	£24,913,106	£5,636,596	£19,681,779
22.4.16	£25,671,167	£5,850,730	£20,313,691

15. The allegations of trading to the detriment of creditors with no reasonable prospect of their being paid or of the Company avoiding insolvent liquidation were confined to the period starting on 31 December 2014. Between that date and the date of the winding up, the trade debts of the Company increased by a little over £2.1 million, from a starting point of £3.737 million. Debts to 'employees' increased from £465,250 in December 2014 to £2,597,583 in April 2016. Mr Obaigbena was therefore clearly continuing to trade at the expense of his 'employees' unless there was a reasonable prospect of payment of these debts.

The Judge's main findings

16. Mr Obaigbena was found to have received correspondence from a union with regard to the employee debts, though in evidence he denied any recollection of it. The Judge found that this demonstrated an attempt by him not to admit knowledge of material which could cast him in a poor light as regards avoiding payments due for some time to many individuals. She found that many of these workers relied upon promises that they would be paid, which promises were frequently broken. She characterised Mr Obaigbena's attitude and approach as "not one…of seeking to minimise the potential loss to creditors, or even attempting to pay some of the arrears due".

17. Because Mr Obaigbena accepted that the Company had been trading whilst insolvent, the Judge directed herself in paragraph 36 of her judgment to consider carefully the reasons given by Mr Obaigbena and the evidence in support of his causing the Company to continue to trade from December 2014 onwards.

18. The Judge found that Mr Obaigbena had not dealt straightforwardly and openly with creditors, including its 'employees', during this period but that he honestly believed that, at some time in the future, the currency restrictions would be eased, enabling him to transfer yet more funds from Nigeria with which to pay the Company's debts. He did not know when the expected sums would be available – there were no guidelines available in Nigeria for someone in his position to understand when he would be able to transfer more funds; and he described the net effect as "pot luck", though to him it was always a question of "when, as opposed to if".

19. The Judge found that Mr Obaigbena had no intention of ceasing the operation of the Company at any moment during the 16-month period, and that he was well aware of the financial position of the Company and its increasing liabilities. She found that he did not accept that there was a problem with the arrears building up; he asserted that the creditors' losses were caused by "force majeure" rather than as a result of his actions. He described the difficulties of the Company as "teething problems". The Judge found that "the attitude of Mr Obaigbena is one of the reasons as to why he caused the Company to continue to trade, thereby increasing the liabilities to the extent [he did]" (para 38), of which she found that he was well aware.

20. Mr Obaigbena asserted that one of the reasons he considered that the Company could continue to trade after the Nigerian currency restrictions came into force in September 2014 was that agreements had been reached with creditors. However, this was rejected by the Judge. It did not amount to a justification for continuing to trade. In fact, the evidence showed that many creditors were chasing sums that had been outstanding for some time. Mr Obaigbena also relied on his belief that the dispute with the petitioning creditor could be resolved, but there were many other creditors also pressing for payment. The Judge did not consider that Mr Obaigbena's belief provided any real justification for a reasonable prospect that creditors would be paid. She found that the factors relied on by Mr Obaigbena

did not amount to anything more than his firm conviction that funds would arrive at some time in the future, without there being any certainty as to when (para 44).

21. The Judge found that the evidence did not support any rational basis for that belief that sums would become available to satisfy the Company's ever-increasing liabilities. There was no evidence to support it (para 46). While the Judge accepted that Mr Obaigbena's belief was genuinely held (i.e. there was no finding of dishonesty), she found that it was not underpinned by any real or adequate grounds and was not reasonable. She found that Mr Obaigbena's conduct amounted to an inappropriate gamble with the creditors' monies. There was no justification for it.

22. On this basis, the Judge was satisfied that the charge relied upon by the Official Receiver was made out, and that Mr Obaigbena's conduct was conduct that was such as to render him unfit to act as a director under section 6 of the 1986 Act.

23. The Judge then considered the appropriate period of disqualification. She referred to the guidance provided by the Court of Appeal in *Re Sevenoaks*, which divides the period of disqualification into 3 brackets:

    (i) the top bracket – over 10 years, reserved for particularly serious cases;
    (ii) the middle bracket – 6-10 years, for serious cases that do not merit the top bracket; and
    (iii) the minimum bracket – 2-5 years, for cases that are not, relatively speaking, very serious.

    She then referred to the general guidance in Re Westmid Packing Services Ltd (No.2) [1998] BCC 836 ("*Re Westmid*") to the effect that the protection of the public was the primary purpose of disqualification, and that deterrence, the gravity of the offence and mitigation should all be taken into account. She also directed herself that the court could take into account any light shone on a director's unfitness by the evidence that he gives in response to the charges.

24. It was argued on behalf of Mr Obaigbena that this was a lower bracket case, in particular as there was no dishonesty and the period of insolvent trading was not very long. Mr Obaigbena also relied on a settlement agreement entered into with the liquidators, under which Mr Obaigbena had paid significant funds.

25. The Judge held that this was a case which fell squarely into the middle bracket as a "serious case". She found that the conduct of Mr Obaigbena was "a gamble which the creditors paid for". She said that the absence of any basis for his unreasonable belief, with creditors dating back a considerable time as the year 2015 progressed, took the case well into the middle bracket. She expressed the reasons for the 7-year period as follows:

    > "The increase in the liabilities during the period from December 2014 until the liquidation was in excess of £2 million in relation to the unconnected creditors and over £5 million for the connected creditors. Directors who gamble with the position of the creditors, in the belief that all will be fine in the end, are not acting in the interests

> of those creditors and are instead taking risks to their detriment. The middle bracket is not in my opinion only for those cases where directors continue to trade for more nefarious reasons. I take into account that with the exception of the unreliability of Mr Obaigbena as a witness on certain aspects set out above, I do not consider this is a case of dishonesty. However, this does not mean that the case is any less serious. The public interest is served in this case, in my judgment by disqualifying Mr Obaigbena for a period of 7 years."

Appeal Ground 1: application of the wrong legal test

26. The first ground of appeal (as amended) is that the Judge applied the wrong legal test by failing to consider and decide whether Mr Obaigbena knew or ought to have known that there was no reasonable prospect of creditors being paid or of the Company avoiding insolvent liquidation.

27. Section 6 of the 1986 Act provides (so far as relevant):

> "(1) The court shall make a disqualification order against a person in any case where, on an application under this section…
> (a) the court is satisfied –
> (i) that the person is or has been a director of a company which has at any time become insolvent…, or
> (ii) …, and
> (b) the court is satisfied that *the person's conduct as a director of that company* (either taken alone or taken together with the person's conduct as a director of one or more other companies or overseas companies) *makes the person unfit to be concerned in the management of a company*."
>
> (1A) In this section references to a person's conduct as a director of any company or overseas company include, where that company or overseas company has become insolvent, references to that person's conduct in relation to any matter connected with or arising out of the insolvency." (*emphasis added*)

28. The italicised words are the sole statutory criterion for a disqualification order under s.6. The criterion being very broad, rule 3(3) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987 requires the claimant's evidence or the Official Receiver's report to include:

> "… a statement of the matters by reference to which the defendant is alleged to be unfit to be concerned in the management of a company".

The statement required by this rule performs the function of a pleading, in that it discloses to a defendant the case that will be alleged against them and confines the claimant and the court to consideration of those matters when deciding

whether the defendant is unfit and what the period of disqualification should be: *Re Sevenoaks* at p.177, per Dillon LJ.

29. The matters alleged against Mr Obaigbena are contained within Mr Anthony Hannon's report dated 10 April 2018, at para 6, which describes them as "the matters by reference to which Nduka Obaigbena is, in the opinion of the Official Receiver, unfit to be concerned in the management of a Company". They are headed "UNFIT CONDUCT", and read as follows:

> "Nduka Obaigbena ("Mr Obaigbena") caused Arise Networks Ltd to trade to the detriment of creditors from 31 December 2014 onwards with no reasonable prospect of creditors being paid or of the company avoiding insolvent liquidation. This is demonstrated by the following:
>
> • The company had £nil turnover throughout its trading existence and was wholly dependent upon funds being provided by associated businesses in Nigeria;
> • At 31 December 2013 the company's liabilities were: Losses of £3,854,112; trade and expense debts of £1,545,883; related company debts of £3,094,260;
> • In September 2014 the Nigerian Government introduced stringent exchange controls preventing the free-flow of currency from the country and seriously restricting the ability to transfer necessary funding to ARISE. As a consequence:
> • At 31 December 2014 the company's liabilities were: Losses of £12,922,174; trade and expense debts of £3,737,445; related company debts of £14,407,929;
> • At 31 December 2015 the company's liabilities were: Losses of £24,913,106; trade and expense debts of £5,636,596; related company debts of £19,681,779;
> • At 22 April 2016 the company's liabilities were: Losses of £25,671,167; trade and expense debts of £5,850,730; related company debts of £20,313,691;
> • The company came under increasing creditor pressure from late 2014 onwards in respect of increasing arrears due to creditors as a consequence of the company's inability to pay its debts, as and when they fell due as demonstrated by the evidence of creditor actions and demands for payment."

The Arguments

30. Mr Sims QC, who appeared with Ms Daisy Brown on behalf of Mr Obaigbena, argued that the matters alleged against him were not limited to this statement but that the allegation of unfitness also included a statement in para 48 of Mr Hannon's report (under the heading "Conclusion"), where he said:

> "The question for the Court is whether Mr Obaigbena had known, or should have known, that [the Company] had no reasonable prospect of avoiding insolvent liquidation and should therefore have ceased trading earlier than liquidation in April 2016. I summarise the matters that were or ought to have been known to him: [...]"

31. Mr Sims argued that the statement in para 6 of the report, read on its own, did not spell out why Mr Obaigbena should be considered at fault for the Company continuing to trade past December 2014 and be unfit to be concerned in the management of a company. It is established law that trading whilst insolvent is not, in and of itself, sufficient to make a finding of unfitness under s.6 of the Act (Re CSTC Ltd, Secretary of State for Trade and Industry v Van Hengel [1995] 1 BCLC 545 at 553 and 557, Secretary of State v Taylor [1997] 1 WLR 407 at 414 ("*Taylor*")). It was argued that to properly understand the charge against Mr Obaigbena one needed to look at para 48 of Mr Hannon's report and that without that addition the charge was deficient.

32. It was submitted that any culpability of Mr Obaigbena should not be judged with the benefit of hindsight (the Company having gone into compulsory liquidation), but rather required an assessment of whether the circumstances at the time were such that Mr Obaigbena "knew or ought to have known" that there was no reasonable prospect of paying creditors or avoiding insolvent liquidation. This allegation having been made (in the conclusion of Mr Hannon's report) and being needed, the Judge had to make a finding that Mr Obaigbena did know or ought to have known. It was submitted that as the Judge did not make this finding, she erred as a matter of law in making a finding of unfitness and the finding therefore cannot stand.

33. Mr Sims also relied particularly on Secretary of State for Trade and Industry v Creegan [2001] EWCA Civ 1742, [2002] 1 BCLC 99 ("*Creegan*"), and referred to *Taylor* and to Re Uno plc, Secretary of State for Trade and Industry v Gill [2004] EWHC 933 (Ch); [2006] BCC 725 ("*Re Uno*"), to support his argument that, as a matter of law, it needed to be proved that Mr Obaigbena knew or ought to have known that there was no reasonable prospect of the Company's creditors being paid. In essence, the Appellant's argument was that where an allegation of "trading to the detriment of creditors" is made, unless there is some additional misconduct (such as discrimination against certain classes of creditors, or paying only creditors who were pressing for payment), *Creegan* and the other cases relied on show that a director will not be at risk of being found unfit unless there is also a finding that they knew or ought to have known that there was no reasonable prospect of paying creditors or avoiding insolvent liquidation. Mr Sims submitted that there were therefore two categories of cases: additional misconduct cases and knowledge cases.

34. In the present case, it is not disputed that the Judge did not expressly find that Mr Obaigbena ought to have known that there was no prospect of paying creditors or avoiding insolvent liquidation. She found that he honestly believed that they would be paid in due course. Mr Sims submitted that a finding that he ought to have known had not been made implicitly either. He said that in order to reach a conclusion in respect of what Mr Obaigbena ought to have known, it would have been necessary to undertake an analysis of the Company's financial documents, in particular the "growth pattern" of the Company's creditors as compared to the money that did come in from Nigeria. (In this regard, it is relevant to note the Judge's finding that no management accounts (if they existed) were handed over to the Official Receiver, and that the Company's liabilities increased during the entire 16-month period and that Mr Obaigbena was well aware of this.)

35. Mr Nersessian on behalf of the Official Receiver submitted that the only legal test which the Judge was required to apply under s.6 of the 1986 Act was whether the charge against Mr Obaigbena (as set out in para 6 of Mr Hannon's report) was proved and, if so, whether that made him unfit to be concerned in the management of a company. This is a mixed question of law and fact. The Judge made a primary finding that the Company was trading whilst insolvent, to Mr Obaigbena's knowledge, and that it did so to the detriment of its creditors. She also found that the Company continued trading in circumstances where there was no reasonable prospect of the Company paying its creditors or avoiding insolvent liquidation. Having made these primary findings, which are not challenged on appeal, Mr Nersessian argued that the Judge then had to decide whether the conduct was sufficient to render the director unfit. Mr Nersessian relied on *Re Sevenoaks* in this regard. Para 48 of Mr Hannon's report was not part of the statement of the offending conduct and did not need to be an element of the charge against Mr Obaigbena.

36. Mr Nersessian's alternative position was that a finding of "ought to have known" is implicit in the judgment, in light of the Judge's findings that Mr Obaigbena's belief in money coming in at some time in the future was irrational and unsupported by any evidence, whereas the fact of the increasing debts was clear; and the finding that Mr Obaigbena was gambling with creditors' money.

<u>The Authorities</u>

37. In <u>Re Bath Glass Ltd</u> ("*Re Bath Glass*") [1988] BCLC 329 at 333, Peter Gibson J said as follows about the test under s.6:

> "In contrast [with the test of wrongful trading under section 214 of the Insolvency Act 1986], the test in s.6 is quite different: there is no single specified offence that is the condition to be satisfied for the court to make a disqualification order. What the court must have regard to is the director's conduct; that is a term of great generality and I do not doubt that it was deliberately so chosen. The court must be satisfied that the conduct in question is sufficiently serious to lead it to the conclusion that the director is unfit and that is emphasised by the mandatory disqualification for at least two years to be imposed by the court if that conclusion is reached.
> […]
> To reach a finding of unfitness the court must be satisfied that the director has been guilty of a serious failure or serious failures, whether deliberately or through incompetence, to perform those duties of directors which are attendant on the privilege of trading through companies with limited liability. Any misconduct of the respondent qua director may be relevant, even if it does not fall within a specific section of the Companies Act or the Insolvency Act."

38. In *Re Sevenoaks,* Dillon LJ (with whom Butler-Sloss and Staughton LJJ agreed) said:

> "It is beyond dispute that the purpose of section 6 is to protect the public, and in particular potential creditors of companies, from losing money through companies becoming insolvent when the directors of those companies are people unfit to be concerned in the management of a company. The test laid down in section 6 – apart from the requirement that the person concerned is or has been a director of a company which has become insolvent – is whether the person's conduct as a director of the company or companies in question "makes him unfit to be concerned in the management of a company." These are ordinary words of the English language and they should be simple to apply in most cases. It is important to hold to those words in each case.
>
> The judges of the Chancery Division have, understandably, attempted in certain cases to give guidance as to what does or does not make a person unfit to be concerned in the management of a company. Thus in In re Lo-Line Electric Motors Ltd. [1988] Ch. 477, 486, Sir Nichols Browne-Wilkinson V-C said: "*Ordinary commercial misjudgement is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although I have no doubt in an extreme case of gross negligence or total incompetence disqualification could be appropriate*." Then, at p. 492, he said that the director in question "*has been shown to have behaved in a commercially culpable manner in trading through limited companies when he knew them to be insolvent and in using the unpaid Crown debts to finance such trading*."
>
> Such statements may be helpful in identifying particular circumstances in which a person would clearly be unfit. But there seems to have been a tendency, which I deplore, on the part of the Bar, and possibly also on the part of the official receiver's department, to treat the statements as judicial paraphrases of the words of the statute, which fall to be construed as a matter of law in lieu of the words of the statute. The result is to obscure that the true question to be tried is a question of fact – what used to be pejoratively described in the Chancery Division as 'a jury question.'"

39. Many cases under s.6 of the 1986 Act involve an allegation that the director caused the Company to trade whilst insolvent to the detriment of creditors. This allegation can be expressed in various ways. In <u>Re Synthetic Technology Ltd</u> [1993] BCC 549, the allegation was that the director "had permitted the company to continue to trade whilst it was insolvent". In that case, Mr Edward Evans-Lombe QC (sitting as a deputy High Court judge) applied *Re Sevenoaks* and *Re Bath Glass* at p. 562:

> "From the combined judgments of Dillon LJ in the *Sevenoaks* case and Peter Gibson J in the *Bath Glass* case, it is apparent that a director can permit his company to continue to trade whilst insolvent, while not exposing himself to a charge of wrongful trading under sec. 214 of the 1986 Act, but still be guilty of conduct amounting to

> misconduct under sec. 6. In the course of his submissions I was flattered by Mr Newey commending to me words which I used in my judgment in the case of *Re Euromove Ltd* where I sought to define such conduct as the taking of unwarranted risks with creditors' money by continuing to trade.
>
> I have set out in the first part of this judgment a reasonably detailed history of the company's trading. But for two matters, that trading portrayed all the hallmarks of a company trading whilst it was insolvent and in so doing taking unwarranted risks with its creditors' money. I need only draw attention to Mr Joiner's admissions that by mid-1987 he was keeping the company alive by only paying creditors that were pressing and by leaving payment even of these until the last possible minute, in some cases after those creditors had obtained judgment against the company."

40. Another example is *Creegan,* which was a second appeal to the Court of Appeal against the decision of Judge Howarth, who allowed an appeal against a disqualification order made under s.6 by District Judge Sykes in the Liverpool County Court. In *Creegan*, the allegation was that the director had "caused the company to trade whilst it was insolvent without a reasonable prospect of meeting creditors' claims."

41. The leading judgment was given by Sir Martin Nourse, with whom Lord Justices Ward and Potter agreed and contains the following passage:

> "[3] The essence of Judge Howarth's decision was expressed as follows:
> 'At the end of the day I look in vain in the district judge's judgment for any finding that there has been trading during the period that Mr Burgess was a director which has been trading both with knowledge of insolvency and in circumstances which Mr Burgess either knew or ought to have realised that there was no reasonable prospect of the creditors being paid…'
> It is well established on the authorities that causing a company to trade, first while it is insolvent and, secondly, without any reasonable prospect of meeting creditors' claims is likely to constitute incompetence of sufficient seriousness to ground a disqualification order. But it is important to emphasise that it will usually be necessary for both elements of that test to be satisfied. In general, it is not enough for the company to have been insolvent and for the director to have known it. It must also be shown that he knew or ought to have known that there was no reasonable prospect of meeting creditors' claims."

42. In *Taylor*, Chadwick J held that there was no statutory duty on a director not to trade while insolvent, and that a director could properly form the view that it was justified for the company to seek to trade out of its difficulties. But, he said at 414F:

> "…the legislation imposes on directors the risk that trading while insolvent may lead to personal liability. Section 214 imposes that liability where the director knew, or ought to have concluded, that there was no reasonable prospect that the company would avoid going into insolvent liquidation.
>
> If it is established, in proceedings under section 6 of the Act of 1986, that a director has caused a company to trade when he knew, or ought to have known, that there was no reasonable prospect that the company would avoid going into insolvent liquidation that director may well be held unfit to be concerned in the management of a company."

43. In *Re Uno*, the allegation against the directors was that (as summarised at para 2 of the judgment) "they had caused or allowed the two companies to trade at the risk of certain customers at a time when the companies were insolvent but at a time when there was a reasonable prospect of the group avoiding insolvency". The judgment was given by Blackburne J, who said as follows at paragraph 144:

> "Chadwick J's observations [in *Taylor*], which I gratefully adopt as an accurate statement of the law, mean that, ordinarily, a director will not be at risk of a finding of unfitness, such as to lead automatically to disqualification, merely because he knowingly allows the company to trade while insolvent, i.e. he allows the company to incur credit (including, I would add, accepting a payment from a customer in advance of the supply of the relevant goods or service) even though, at the time and as he knows, the company is insolvent and later goes into liquidation. It does not add anything to the proposition to say that, in causing the company to incur credit (or accept payment in advance of the supply of the goods or service), the director was "taking advantage" of the third party in question. In a sense, every company which incurs credit when, as its director knows or ought to know, it is insolvent, is "taking advantage" of the third party supplier of credit. If the director is to be found unfit there must ordinarily be an additional ingredient. Normally that ingredient is that, at the time that the credit is taken (or the advance payment received, which is in essence the same), the director knows or should know that there is no reasonable prospect of his company avoiding insolvency."

44. Blackburne J then referred to *Creegan*, as quoted above. He then went on to say in paragraph 145:

> "But, as the Court in Creegan recognised, it is not the case that, merely because at the time in question the directors reasonably believed that the company could avoid insolvency, they can escape a finding of unfitness in consequence of having allowed the company to trade while insolvent."

Ground 1: Discussion

45. I do not agree with Mr Sims that para 48 of Mr Hannan's report is part of the statement of wrongful conduct, or 'charge', which his report was required by rule 3(3) to include. It is clear that that statement is contained exclusively in para 6 and is identified as such. Para 48 is no more than (impermissible) argument as how the judge should approach the question of assessing Mr Obaigbena's culpability. The Judge did not, by reason of the terms of the report and rule 3(3), have to address the question as stated by Mr Hannan in para 48. The only questions for the Judge were whether the statement of matters alleged in para 6 of the report were proved by the evidence (questions of primary fact), and if so whether (as an evaluative judgment) those matters made Mr Obaigbena unfit to be concerned in the management of a company.

46. Nor do I accept that the statement in para 6 of the report was deficient because it lacked any element of culpability that, if found, would justify a finding that Mr Obaigbena was unfit. An allegation of trading to the detriment of creditors when there is no reasonable prospect of creditors being paid carries with it an allegation of blameworthy conduct, which then needs to be established on the evidence. It does not make the mistake that the District Judge in *Creegan* made of alleging unfitness by reason only of causing a company to trade while insolvent. The charge against Mr Obaigbena did not need an allegation of "knew or ought to have known" and, being absent from the charge, it should therefore not be read into it.

47. Sir Martin Nourse's judgment in *Creegan* does not, properly understood, impose any such requirement. In view of the leading decisions of *Re Bath Glass* and *Re Sevenoaks*, of which Sir Martin would surely have been aware even though they were not referred to in his judgment, it would have been surprising if he was imposing any sort of judge-made overlay of the statutory test.

48. The relevant facts in *Creegan* were that the District Judge had found directors to be unfit on the basis of a charge that "the defendants caused the company to trade whilst it was insolvent without a reasonable prospect of meeting creditors' claims". The appeal was allowed by Judge Howarth, not, significantly, on the ground that the statement of offending conduct was inadequate to justify a finding of unfitness because knowledge or deemed knowledge were not alleged, but on the ground that the District Judge had only found trading with knowledge of insolvency, not that the directors also knew or ought to have realised that there was no reasonable prospect of the creditors being paid. As Sir Martin explained:

> "It is well established on the authorities that causing a company to trade, first, while it is insolvent and, secondly, without a reasonable prospect of meeting creditors' claims is likely to constitute incompetence of sufficient seriousness to ground a disqualification order. But it is important to emphasise that it will usually be necessary for both elements of that test to be satisfied."

49. It was the lack of a finding that there was no reasonable prospect of meeting creditors' claims that was the problem, not the absence of a finding of knowledge or deemed knowledge. The reason why Sir Martin then referred to the state of

knowledge or deemed knowledge of the directors is because the District Judge had found that:

> "… Both directors accepted the previous company's indebtedness, both failed to inject capital into the business and both knew, or ought to have known, that the company was insolvent by July 1997. [This] is evidence of unfitness to act as directors… I am satisfied that the claimant has established that both directors caused the company to trade whilst insolvent and that that ground is established and shows that they were unfit to act as directors."

Sir Martin then commented, at [7]:

> "It is to be noted that whereas she had, earlier in her judgement, correctly stated the two elements of the material test, in that decisive passage the District Judge makes no reference to the requirement that there should be no reasonable prospect of meeting creditors' claims."

and at [8] that it was still necessary to ask whether the evidence established that there was no reasonable prospect of meeting creditors' claims.

50. Chadwick J's reference to "knew or ought to have known" in *Taylor* is explained by his reference to wrongful trading, under s.214 of the Insolvency Act 1986, as a restriction on directors' ability to trade while their company is insolvent. It is, in that context, an example of what may well lead to a finding of unfitness under s.6, not a statement of what has to be proved before unfitness on the ground of trading while insolvent is justified. Again, the context is that trading while insolvent is not of itself necessarily (or usually) sufficient to render the director unfit.

51. In *Re Uno*, Blackburne J is drawing the same distinction that Sir Martin Nourse drew in *Creegan*, namely that a finding only of trading while insolvent is usually insufficient, and that there must be an "additional ingredient", which is normally that the director knows or should know that there is no reasonable prospect of avoiding insolvency. Blackburne J then referred to Peter Gibson J's judgment in *Re Bath Glass*, in which he rejects the argument that no lesser test than wrongful trading (i.e. including a requirement of knowledge or deemed knowledge) suffices for s.6 purposes and then explains, in the passage quoted in [35] above, that the language of the s.6 test was deliberately of great generality.

52. It is therefore clear that Blackburne J could not have meant that it was a requirement for a conclusion of unfitness on the grounds of trading while insolvent that the directors knew or ought to have known that insolvency could not be avoided. The making of an order under s.6 of the 1986 Act is not to be equated with a finding of wrongful trading under s.214 of the Insolvency Act 1986.

53. In my judgment, none of these decisions creates an "overlay" on the test which the court needs to apply in each case, which is whether the director's proven conduct was such as to render him unfit. In very many cases, the element of culpability in cases of insolvent trading will be provided by an allegation that the

director knew or ought to have known that there was no reasonable prospect of trading out of insolvency, but it does not have to be so. Nor is there a taxonomy of types of culpable conduct associated with trading while insolvent, into one or other of which a case squarely has to fall, however convenient (and understandable) it is for textbooks or commentaries to identify types of case. Whether the fact that Mr Obaigbena caused the Company to trade to the detriment of creditors with no reasonable prospect of their being paid or the Company avoiding insolvent liquidation, as the Judge found, was conduct that made him unfit to be concerned in the management of a company, was a broad evaluative question for her judgment.

54. I therefore conclude that the Judge did not err in law by failing to apply a 'legal test' of whether Mr Obaigbena ought to have concluded that there was no reasonable prospect. I do not consider this legal test is required by s. 6 of the 1986 Act or by the statement of the matters alleged to make Mr Obaigbena unfit contained in the Official Receiver's report.

55. The Judge plainly did consider Mr Obaigbena's conduct as a director and his attempts to explain what had happened. She made express findings that Mr Obaigbena's belief that the Company would be able to pay its ever-increasing liabilities was irrational, that there was no evidence that provided any ground for this belief, and that Mr Obaigbena was gambling with the creditors' monies for a period of 16 months, as the Company's liabilities increased by millions of pounds. It does seem to me to be implicit in this express finding that the Judge concluded that Mr Obaigbena was taking unwarranted risks with creditors' money, given his knowledge that the Company was insolvent and had no income ("Directors who gamble with the position of the creditors, in the belief that all will be fine in the end, are not acting in the interests of those creditors …"). The risks were unwarranted because there was no evidence or objective justification for the optimism that Mr Obaigbena had, nor any evidence that this was an important consideration for him. He had "a lack of regard for and compliance with proper standards".

56. In short, the Judge asked the correct question and was entitled to answer it as she did, to the effect that the proven conduct made Mr Obaigbena unfit to be concerned in the management of a company. In light of this conclusion, I do not need to consider the Respondent's alternative case (that a finding of "ought to have known" was implicit in the findings and the decision). It seems to me highly likely that, if the Judge had asked herself whether Mr Obaigbena ought to have known that there was no reasonable prospect of the creditors being paid and the Company avoiding insolvent liquidation she would have answered the question in the affirmative, but where such an allegation is not part of the charge it is wrong to say that the Judge should have made a finding on the question, or that she can be taken to have done so without expressing it. I will therefore go on to consider the second ground of appeal, which relates to the period of disqualification.

Appeal Ground 3: Period of disqualification

57. The second ground of appeal is that the Judge erred in disqualifying the Appellant for a period of 7 years.

58. What is alleged on behalf of Mr Obaigbena is, first, that the decision involved a failure correctly to apply the principles on disqualification, second that it was grossly disproportionate, and third that it left out of account relevant mitigating factors. Alternatively, it failed adequately to state how those mitigating factors formed part of the assessment of a suitable period.

59. Mr Sims argued that this was a clear case for the lower bracket in the Court of Appeal's guidance in *Re Sevenoaks*, first, by reference to previous case law, and second and in any event, because there was no aggravating factor in this case that lifted the case into the middle bracket and there were mitigating factors that should have kept it in or brought it down to the lower bracket.

60. Mr Sims argued that the Judge erred by placing this case in the middle bracket on account of it being "serious", since all cases of disqualification under s.6 of the 1986 Act are by definition serious. He cited a number of cases involving a finding of "trading to the detriment of creditors" which had resulted in a disqualification period of 2-3 years. He accepted that a finding of dishonesty was not a prerequisite to placing a case in the middle bracket, but that the express finding of a lack of dishonesty in this case, and the absence of any other aggravating factor, should have resulted in the case being placed firmly in the lower bracket. Mr Sims also pointed to other mitigating factors, which he said that the Judge had failed (or failed properly) to consider:

    (a) the creditors who suffered most were the creditors connected to Mr Obaigbena himself;

    (b) substantial sums of money did arrive from Nigeria, albeit not sufficient to discharge the Company's liabilities;

    (c) the period during which the Company traded to the detriment of creditors other than his own group companies was quite short; and

    (d) Mr Obaigbena entered into a settlement agreement with the liquidators (which the Judge noted as a submission made to her, but then did not go on to explain how it featured in her decision).

61. Mr Nersessian argued that the Judge correctly applied the principles and that the finding that the case was "serious" was by reference to the brackets in *Re Sevenoaks,* which stated that the lower bracket was for cases that are "not, relatively speaking, very serious"; the middle bracket for cases that were "serious that did not merit the top bracket"; and the top bracket reserved for "particularly serious cases".

62. Mr Nersessian also relied on Lord Woolf MR's judgment in *Re Westmid* at p.846, where he held that the citation of other cases as examples of the period of disqualification will, in the great majority of cases, be unnecessary and

inappropriate. It was wrong in principle to compare the facts and periods in other cases with the facts of the instant case. He submitted that the Judge carefully and correctly directed herself by reference to the facts of the case and came to a justified conclusion that this was a middle bracket case.

63. He submitted, rightly, that the task for an appellate court is not to re-make the decision but to consider whether the period of disqualification decided by the Judge was wrong in principle, or whether she erred in law in the exercise of her discretion, and that considerable latitude was given to the Judge in deciding what she thought was the appropriate period.

64. Mr Nersessian relied on the following factors in support of his argument that this case in any event warranted the middle bracket:

> (a) The high sums involved – an additional £2.1m of unconnected creditor liability incurred (in addition to an extra £5m of connected liabilities) during the 16-month period in question;
>
> (b) The extended period of trading while insolvent to the detriment of creditors;
>
> (c) That there was at no time a prospect of creditors being paid;
>
> (d) That the Company was insolvent at all times during the period;
>
> (e) That the Company had no revenue, which meant that it had no prospect of "trading out" of its insolvency; and
>
> (f) The finding that Mr Obaigbena was gambling with creditors' money.

65. I have already summarised the guidance on the brackets given in *Re Sevenoaks* in para 23 above.

66. *Re Westmid* was an appeal against an order under s.6 disqualifying two directors for the minimum period of 2 years, and a cross-appeal by the Secretary of State to increase the period of disqualification.

67. Lord Woolf MR, who gave the leading judgment (with which Waller and Robert Walker LJJ agreed), said at p.843:

> "We do not accept that the judge erred in principle in imposing the minimum period of disqualification, or that he was plainly wrong to do so. This court – without having seen the appellants giving evidence or heard submissions from counsel on his behalf as to the facts – is of the view that a longer period of disqualification, in the middle of the lower range, would have been more appropriate. But that is not enough to lead the court to interfere with the judge's exercise of his discretion. We cannot say that the way that the judge exercised his

> discretion was wrong in principle and it is significant that the Secretary of State does not challenge the judge's decision that the case falls within the minimum bracket."

68. Lord Woolf MR went on to say at p.846:

> "The principles applicable to the court's jurisdiction under the Act are now reasonably clear. The application of those principles to the facts of the particular case is a matter for the trial judge. The citation of cases as to the period of disqualification will, in the great majority of cases, be unnecessary and inappropriate."
> […]
> What is required and what the court should confine the parties to, is sufficient evidence to enable the court to adopt a broad brush approach. This should be regarded, especially in relation to the period of disqualification, as a jurisdiction which the court should exercise in summary manner and the court should confine the parties to placing before it the material which is needed to enable it to exercise the jurisdiction in that way."

69. In my judgment, the Judge did not err in principle or make an error of law in imposing a period of disqualification of 7 years, which is towards the lower end of the middle bracket.

70. The Judge applied the guidance in *Re Sevenoaks,* referred to *Re Westmid,* and directed herself that what was required was consideration of the guidelines in relation to the particular facts of the case. This is plainly correct, in light of the judgment in *Re Westmid*.

71. In making her decision, the Judge took into account that while Mr Obaigbena was an unreliable witness in certain aspects, she did not consider this case to be one of dishonesty. She went on to say: "However, this does not mean that the case is any less serious."

72. Mr Sims argued that this was plainly a misdirection and error of law, to suggest that a case without a finding of dishonesty is no less serious than the same case with dishonesty. I do not consider that that is what the Judge meant. She found that Mr Obaigbena had not acted dishonestly at the time when the Company continued to trade while insolvent. She explained why the case was nonetheless serious, in the terminology used in *Re Sevenoaks*, and that the fact that there was no finding of dishonesty did not mean that it could not be a serious case. In other words, a case that does not involve dishonesty can still be a serious (middle bracket) case.

73. A finding of dishonesty will often lead to a case being placed in the middle or upper bracket, but in my judgment the judge was right to conclude (as she effectively did) that it was not a prerequisite of a case falling into the middle bracket. Although many cases in which no dishonesty is involved do fall into the lower bracket, even if there are aggravating features, there is no immutable

principle to that effect. There was therefore no error of principle by the Judge in this regard. The question for the Judge was whether the other characteristics of this case made it so serious that it should be treated as a middle bracket case. Absence of dishonesty should not be treated as a mitigating factor that calls for a reduction in the period that is otherwise appropriate. The seriousness of the conduct of the director should be considered in the light of all the facts found.

74. The Judge considered and summarised the relevant aspects of the case. Save for the settlement agreement and other mitigating factors, Mr Sims does not allege that the judge failed to take into account a relevant matter or took into account an irrelevant matter. He submitted that she made a decision on period of disqualification that was grossly disproportionate.

75. Dealing with the mitigating factors relied on, these were, first, that the connected companies of the group suffered greater loss than the unconnected creditors. While this fact underscored the Judge's conclusion about the honesty of Mr Obaigbena's belief that all would eventually turn out well and prevented a conclusion that Mr Obaigbena was exploiting certain creditors for the benefit of others, which would have been even more serious, I cannot see why it mitigates the seriousness of Mr Obaigbena's irrational decision to continue to gamble with (and therefore disregard the proper interests of) the unconnected creditors over a period of 16 months.

76. Second, and connected to the first factor, funds from Nigeria were coming in and were used to fund the Company's activities, so Mr Obaigbena was doing what he could to fund the Company. But, notwithstanding this, the debts continued to mount to his knowledge, by millions of pounds during the period in issue, and the unconnected creditors – principally the 'employees' – went unpaid. In those circumstances, the substantial injections of insufficient capital are not a mitigating factor as these went to fund investment, not to pay the unconnected creditors, and merely increased the Company's indebtedness further.

77. Third, it was argued that the period of insolvent trading was relatively short, and of the 16 months in issue it was only really over a period of 9 months in 2015 that the level of debt increased by more than a small amount. It is true that most of the increase in the level of trade debts is attributable to a 9-month period but – given the very substantial level of debt at the start of that period – it is impossible to see why the fact that the debt was increased by about £2 million during a 9-month period should be regarded as any kind of mitigation. I am not persuaded that a 16-month (or even a 9-month) period is relatively short for cases such as this, so as to attract some reduction in the period of disqualification. It would in any event be wrong to focus on the length of the period without also considering the amount (in this case a very substantial amount) by which the debts that were not going to be paid increased during it.

78. Fourth, the settlement agreement. It was common ground that Mr Obaigbena agreed to contribute £700,000 of his own money to the funds available for the creditors, but the circumstances in which that agreement was reached were not explored before the Judge. She referred to the fact of the settlement agreement in the penultimate paragraph of her judgment, but did not specifically mention it

in the concluding paragraph, where she decided that 7 years was the appropriate period.

79. In view of this, it cannot be said that the Judge did not have the settlement agreement in mind. It might have been better if the Judge had said whether any reduction or none was appropriate in this regard, however judges determining a period of disqualification are encouraged by the statements in the leading authorities to take a broad-brush approach and to deal with the length of the period without the need to give detailed reasons, and certainly not to deal individually with each point advanced in relation to the appropriate length of the period of disqualification. There is therefore no legitimate complaint that the Judge did not specifically mention the extent to which she had treated the settlement agreement as a mitigating factor and how it affected the decision, if at all.

80. Turning to the argument that the period of 7 years was grossly disproportionate, I might well have been persuaded, based on what I have heard, to impose a lower period of disqualification, but, as in *Re Westmid*, that fact is irrelevant. Further, I did not hear all the evidence from and about Mr Obaigbena that the Judge did. It is clear that she was distinctly unimpressed by the way in which he gave his evidence and considered his evidence to be evasive and in part untruthful. She made findings that were critical about the cavalier way in which Mr Obaigbena treated the Company's creditors. These were matters that the Judge was entitled to take into account in determining the length of the period.

81. Although a period of 7 years is at the upper limit of what could be a reasonable exercise of discretion by any judge on the facts of this case, I am unable to conclude that it was so excessive as to be beyond the ambit of the discretion afforded to the Judge. In particular, the Judge was entitled on the facts of this case to conclude that, even absent dishonesty and a finding that Mr Obaigbena knew or should have known that there was no reasonable prospect of avoiding insolvent liquidation, this was a serious case that fell into the middle bracket. There is no error in principle in the way that the Judge approached the decision. I therefore reject the appeal on this ground.

Conclusion

82. For the reasons set out above, I will therefore dismiss the appeal on both grounds that were advanced.