Neutral Citation Number [2022] EWHC 971 (Ch)

CR 2020 000962

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

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

Date: 29/04/2022

Before :

ICC JUDGE BARBER

- -

Between :

THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Claimant

- **and –**

MR TARQUIN CHARLES SPENCER BARNSBY

Defendant

- -

Mr. Raj Arumugam (instructed by The Insolvency Service) for the **Claimant**
Mr. Usman Roohani (instructed by Cripps LLP) for the **Defendant**

Hearing dates: 11 June 2021 and 15-17 December 2021
Circulated in Draft: 14 April 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be sent to The National Archives for publication. The date and time for hand-down is deemed to be 9.30 a.m on 29 April 2022

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ICC Judge Barber

1. This is the claim of the Secretary of State for Business, Energy and Industrial Strategy seeking an order under Section 6 of the Company Directors Disqualification Act 1986 that the Defendant Mr Tarquin Charles Spencer Barnsby be disqualified for 11 years by virtue of his conduct as a director of Pure Zanzibar Limited, which was placed into creditors' voluntary liquidation on 19 December 2017 with a deficiency as regards creditors of £517,638. In addition, the Claimant seeks a compensation order against the Defendant pursuant to section 15A CDDA 1986. This judgment addresses the disqualification claim.

Evidence

2. For the purposes of this trial, I have read the First and Second Affidavits of David Elliott dated 28 January 2020 and 16 September 2020 and the Defendant's Affidavit of 3 April 2020, together with other documents contained in agreed trial bundles, to which reference will be made where appropriate.

3. I also heard oral evidence from the Defendant. Cross-examination of Mr Elliott was dispensed with.

The Defendant as a witness

4. There was a marked disconnect between the Defendant's written and oral evidence in certain material respects. At paragraph 32 of his affidavit, for example, he stated that he 'understood the important need for the Company to have an ATOL to sell holidays that included flights.' In context the clear implication was that this was his understanding over the material period of 1 April 2017 to 19 December 2017. From his oral testimony however it became clear that over the material period, the Defendant had persuaded himself that the holidays being sold by the Company did not need an ATOL even if they included flights.

5. The Defendant also changed his oral testimony on several occasions over the course of the trial to meet what he perceived to be his own best interests.

6. One late change was a suggestion that he had given express instructions to his staff following the expiry of the Company's ATOL not to sell any holidays that included flights. This had not been mentioned in pre-action correspondence or in his affidavit, and was completely at odds with what he had told the Insolvency Service by email dated 23 May 2019.

7. In the context of the evidence overall, it was clear that he had not given his staff an express instruction in 2017 not to sell any holidays that included flights. This was a self-serving untruth.

8. The Defendant also changed his explanation for failing to refund Mr Welfare. On day one of cross-examination, when it was put to him that he had never gone through a list of the customers who had been sold ATOL holidays before the Company lost its licence to inform them of the ATOL expiry and to refund them, his response was:

'Well under the … definition that we relied on at the time this would not have been licensable turnover so wouldn't have required a refund'.

9. On day two of his cross-examination, however, when asked why he had not refunded Mr Welfare his deposit of £7830 paid on 12 February 2017 following a clear instruction from the CAA that he should do so, he claimed that it was because 'he didn't show up correctly on the computer system', claiming that he 'would have looked to see who was on our system' and that because Mr Welfare had not been issued with an ATOL certificate 'at this point if I was to try and follow this he wouldn't have shown up'. Again, this was not a point raised in his affidavit and was entirely inconsistent with his earlier testimony on the issue.

10. The Defendant also changed his oral testimony on the subject of Ms Buckley, suggesting initially that she had made mistakes but later hinting that she was a rogue employee, flouting his instructions for her own purposes.

11. In short, whilst the Defendant was undoubtedly truthful in his testimony in certain respects, he was prepared to deviate from the truth when it suited his purposes. At times, I am satisfied that he knowingly told untruths. At others he appeared to have persuaded himself of an alternative narrative when reality became unpalatable. Overall, save where the Defendant's testimony is supported by contemporaneous documentation, I have come to the conclusion that it should be viewed with caution.

Background

12. The Defendant was the sole director of the Company, from its incorporation on 14 August 2006 until it entered liquidation in 2017. The Defendant also held 80% of the shares in the Company. The remaining 20% of the shares were held by Ms Susan Buckley, who was also Company Secretary from 14 August 2006 until the date of liquidation. The Defendant and Ms Buckley have three children together.

13. The Company operated as a bespoke travel agency. It began trading by arranging accommodation bookings in Zanzibar but quickly grew and diversified into selling whole safari tours across East Africa. At its peak, the Company employed 12 people, including the Defendant.

14. Between 4 February 2010 and 31 March 2017, the Company was the holder of an Air Travel Organisers Licence ('ATOL') issued by the Civil Aviation Authority ('CAA'). ATOL is a statutory scheme which is operated by the CAA, a statutory body pursuant to inter alia the Civil Aviation Act 1982 ('the 1982 Act') and the Civil Aviation (Air Travel Organiser's Licensing) Regulations (SI 2021/1017) ('the 2012 Regulations').

15. The CAA's website explains that ATOL:

> 'is a UK financial protection scheme and it protects most air package holidays sold by travel businesses that are based in the UK. The scheme also applies to some flight bookings…
>
> ATOL was first introduced in 1973, as the popularity of overseas holidays grew. After a number of high-profile travel business failures left people stranded overseas, the UK government realised consumers required protection when their travel providers fell into difficulties. ATOL currently protects around 20 million holidaymakers and travellers each year.

> If a travel business with an ATOL ceases trading, the ATOL scheme protects consumers who had booked holidays with the firm. It will support consumers currently abroad and provide financial reimbursements for the cost of replacing parts of an ATOL protected package.
>
> The scheme is designed to reassure consumers that their money is safe and will provide assistance in the event of a travel business failure'.

16. Regulation 69 of the 2012 Regulations makes it a criminal offence for a person (in this case the Company) to undertake certain activities without having a valid ATOL in place.

17. The Company suffered serious setbacks in 2014 and 2015. The outbreak of the Ebola virus in Africa triggered a sudden drop in sales. The Brexit referendum then impacted on the value of the pound versus the US dollar, which in turn affected the Company's profit margins.

18. The Company's ATOL expired on 31 March 2017. The CAA informed the Defendant (and the Company) on several occasions that the Company's ATOL was about to expire/had expired and the restrictions which that imposed on the Company, which included (a) not taking new licensable bookings (b) not accepting payments for existing licensable bookings (c) stopping advertising licensable business and removing all references to ATOL on the Company's websites and other publicity/promotional material; and (d) notifying customers who were due to travel after 31 March 2017 that the Company could not provide their travel arrangements and providing a full refund to such customers (see CAA emails of 23 March 2017, 27 April 2017, 23 June 2017, 2 August 2017 and 17 August 2017).

19. From 1 April 2017, the Company illegally took new bookings and payments from Brian Hladnik, Dr Tonko Mardesic, Steve Bramall and Robert Orr, each of which should have been ATOL protected. The Company did not issue ATOL certificates to any of these customers. Each of their booking forms included the ATOL logo and the Company's old ATOL number, suggesting that the Company was ATOL licensed.

20. The Company also failed to refund a fifth customer, Mark Welfare, in respect of a deposit which he had paid in February 2017 for a holiday which, following the expiry of its ATOL, the Company could no longer lawfully provide. The Company took a further payment from Mr Welfare in respect of that holiday on 13 October 2017, the same month in which the Company approached an Insolvency Practitioner for insolvency advice and very shortly before a decision was taken to place the Company into creditors' voluntary liquidation.

21. The Company entered creditors' voluntary liquidation on 19 December 2017 with an estimated deficiency as regards creditors of £517,638. According to paragraph 3.6 of the Financial Information to Creditors and Members of the Company dated 8

December 2017, prepared pursuant to Statement of Insolvency Practice 6, the Defendant attributed the failure of the Company to the following:

. High costs and overheads which were unsustainable in the event of a turndown in trade.

. Difficulty with competing with Internet prices, and heavy discounting now commonplace within the industry.

. The weakening of GBP vs USD.

22. None of the five customers referred to in paragraphs 19 and 20 above received any refund of the monies they paid. Nor did they receive the holidays which they paid for. None of the five were ATOL protected.

Grounds of unfitness

23. As summarised at paragraph 9 of Mr Elliott's first affidavit and amended by consent, the grounds of unfitness relied upon by the Claimant are as follows:

> 'During the period 01 April 2017 to 19 December 2017 [the Defendant] caused or allowed [the Company] to sell holidays and accept payments for holidays from customers that were required to be protected by an Air Travel Organiser's licence ('ATOL') at a time when its ATOL had expired. [The Defendant] also caused or allowed [the Company] to fail to refund a deposit to a customer as required by the [CAA] on its ATOL expiration. As a consequence, at the date of the liquidation five customers who had purchased holidays via the Company were owed £88,674. In that:
>
> 9.1 [The Company] traded as a travel agent and was in possession of an ATOL between 04 February 2010 and 31 March 2017.
>
> 9.2 [The Company's] ATOL expired on 31 March 2017 due to the correct supporting documents not being provided to the CAA.
>
> 9.3 The CAA emailed [the Defendant] on 23 March 2017 to inform him that [the Company's] ATOL was due to expire and that as a result of the ATOL expiration [the Company] should stop accepting payments for holidays that are covered or partly covered by ATOL; should remove the ATOL symbol from its website and publicity material; and should refund customers who booked holidays before 31 March 2017 but were due to travel after that date. The CAA sent a further email to [the Defendant] on 27 April 2017, following the ATOL expiration, to inform him that [the Company's] ATOL had expired and to set out the aforementioned requirements.

> 9.4 Between 04 May 2017 and 21 September 2017, [the Company] accepted holiday bookings that were required to be protected by ATOL from at least four customers who paid a total of £72,872 to [the Company] between 04 May 2017 and 13 October 2017. None of these customers received their holidays. One customer received a partial repayment of £2,678 from their credit card provider, leaving £70,194 owing to the four customers at the date [the Company] entered liquidation.
>
> 9.5 None of these four customers received ATOL certificates from [the Company]. Three of them state that they assumed they were protected as their booking forms contained the ATOL symbol, which included [the Company's] ATOL number. The other customer was not aware of ATOL due to them living outside of the UK.
>
> 9.6 [The Company] continued to display the ATOL symbol on its website after the expiration of its ATOL, contrary to the CAA's regulations.
>
> 9.7 One further customer had booked their holiday prior to the expiry of [the Company's] ATOL. The customer was not provided with a refund, as stipulated by the CAA. The customer did not receive their holiday and lost their deposit totalling £18,480.
>
> 9.8 [The Company] entered liquidation on 19 December 2017 owing £517,862 to creditors, comprising £190,389 owing to customers, £140,500 owing to connected parties, £121,524 owing to trade creditors, and £65,449 owing to banks.

ATOL: Statutory Framework

24. The CAA is a statutory body with statutory functions and objectives: see ss 2 to 4 of the 1982 Act.

25. Part III of the 1982 Act gives the CAA functions in relation to the regulation of civil aviation. Section 71 of the 1982 Act enables the Secretary of State to make regulations so as to secure (inter alia) that a person does not in the UK:

(1) Make available 'flight accommodation' either as principal or agent, unless the person (inter alia) holds a licence issued in pursuance of those regulations, or is exempted by those regulations from holding such a licence: s.71(1)(a) and (1A)(a);

(2) Hold himself out as one who may make flight accommodation available, either as principal or agent or without disclosing the person's capacity, unless the person (inter alia) holds a licence issued in pursuance of those regulations, or is exempted by those regulations from holding such a licence: s.71(1)(b) and (1A)(a).

26. The term 'flight accommodation' is defined in section 71(5) of the 1982 Act as 'accommodation for the carriage of persons on flights in any part of the world'. This definition is important and is the same definition used in the 2012 Regulations.

27. Section 71(1B) does not apply to the facts of this case because the Company was not at any stage an 'operator' of aircraft, as defined at s105(1) of the 1982 Act.

28. Pursuant to section 71 of the 1982 Act, the Secretary of State made the 2012 Regulations. The following provisions are of note in the current context:

(1) In Regulation 4, the definition of 'flight accommodation' is the same as that used in the 1982 Act, namely 'accommodation for the carriage of persons on flights in any part of the world';

(2) In Regulations 4 and 24, 'Flight-Plus' is defined as existing when four conditions in Regulation 24(1)(a) to (d) are satisfied, namely:

(i) Flight accommodation is made available which includes as a minimum (i) a flight out of the UK; or (ii) a flight into the UK where the consumer has commenced the journey in the UK and departed the UK using another means of transport; and

(ii) Living accommodation outside the UK … is requested to be booked and is supplied by any person under or in connection with the contract for such flight accommodation; and

(iii) Such living accommodation … is requested to be booked by or on behalf of the consumer on the same day as the consumer requests to book the flight accommodation, the previous day or the next day; and

(iv) The arrangement covers a period of more than 24 hours or includes overnight living accommodation.

(3) Regulation 24(3) explains when a package will constitute a Flight-Plus.

(4) In Regulation 4, a 'package' is defined as 'the prearranged combination of at least two of the following components when sold or offered for sale at an inclusive price and when the service covers a period of more than 24 hours or includes overnight accommodation - (a) transport; (b) accommodation; (c) other tourist services not ancillary to transport or accommodation …'

(5) Regulation 9(b) provides that 'a person must not in the United Kingdom make available flight accommodation unless that person is - (b) an ATOL holder acting in accordance with the terms of its ATOL;'

(6) Regulation 16(b)(i) provides that 'a person must not in the United Kingdom - (b) give an indication directly or indirectly by whatever means that they - (i) hold an ATOL which they do not hold …'

(7) Regulation 17(1) provides that 'Any person… who makes available flight accommodation to a consumer – (a) on its own, (b) as a component of a package, or

(c) as a component of a Flight-Plus, must supply an ATOL Certificate to the consumer…

(8) Regulations 26 to 30 concern the regulation of Flight-Plus, including the obligation in regulation 26(1)(b) upon a Flight-Plus arranger to refund the consumer where before the intended departure, the Flight-Plus arranger becomes aware that any part of the Flight-Plus will not be provided;

(9) Regulations 31 and 32 set out the licensing provisions for the grant of an ATOL, including the obligation in regulation 32 (1) for the CAA to refuse an ATOL 'if the CAA is not satisfied that the applicant is a fit person to make available flight accommodation';

(10) Regulations 49 to 66 set out the quasi-judicial procedural provisions as to hearings and decisions in relation to licensing and hearings in relation to licensing decisions;

(11) Regulation 67 provides for appeals to the County Court against any decision of the CAA that a person is not a fit person to hold an ATOL;

(12) Regulation 69 makes it a criminal offence for a person to contravene regulations 9 or 16.

29. The 2012 Regulations were amended (from 29 April 2012) in minor respects by the Civil Aviation (Air Travel Organisers' Licensing) (Amendment) Regulations 2012 (SI 2012/1134). These amendments are not relevant to the case.

30. The 2012 Regulations were then more substantially amended by the Civil Aviation (Air Travel Organisers' Licensing) (Amendment) Regulations 2018 (SI 2018/670), with effect from 1 July 2018, including by removing the references to Flight-Plus. Since the Company entered liquidation on 19 December 2017, the 2018 Regulations have no application to this case.

31. For the sake of completeness, I should also refer briefly to the Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288) (the '1992 Regulations'). These were mentioned in the Claimant's supplemental skeleton argument but as they were not referred to in any pre-action correspondence or in either of Mr Elliott's affidavits I do not base my conclusions in this judgment on the same. Mr Roohani objected to their late introduction and I consider his objection to be well-founded. The 1992 Regulations were in force from 23 December 1992 until 30 June 2018. By regulations 7, 16 and 17-21 of the 1992 Regulations, the Company was required by law: (i) to have in place security arrangements to protect any sums paid by a consumer who purchased a package holiday; (ii) to provide to the consumer before a contract was concluded written information about those security arrangements; and (iii) to be able at all times thereafter to provide sufficient evidence of those security arrangements.

Application of the legislation to this case

32. As will have been noted, the summary of the ground of unfitness set out at paragraph 9 of Mr Elliott's First Affidavit makes reference to five customers of the Company. These customers were:

(1) Mr Brian Hladnik

(2) Dr Tonko Mardesic

(3) Mr Robert Orr

(4) Mr Stephen Bramall

(5) Mr Mark Welfare

33. A summary of the breaches of the legislation in the case of each of the five customers is set out below. Save for (1) an objection as to quantum in respect of Dr Mardesic's booking (which it is now agreed should stand as £11,635 rather than £12,689) and (2) the case of Mr Welfare, the breaches set out in paragraphs 34 to 38 below are largely common ground. To the extent that they are not, I find the breaches proven.

34. In relation to Mr Brian Hladnik's booking:

(1) The booking date is stated as 4 May 2017;

(2) It includes internal flights within Tanzania, 10 nights accommodation in Tanzania and private road transfer. It therefore includes flight accommodation and is a package. It is not Flight-Plus as flights into or out of the UK are not included. This booking was provided by the Company in contravention of regulations 9 and 17 of the 2012 regulations, which is a criminal offence.

35. In relation to Dr Tonko Mardesic's booking:

(1) The booking date is stated as 1 June 2017, but relates to travel starting on 19 November 2017;

(2) It includes international flights from the Czech republic, accommodation and helicopter transfers. It therefore includes flight accommodation and is a package. It is not Flight-Plus as flights into or out of the UK are not included. This booking was provided by the Company in contravention of regulations 9 and 17 of the 2012 regulations, which is a criminal offence.

36. In relation to Mr Robert Orr's booking:

(1) The booking date is stated as 27 June 2017;

(2) It includes international flights to and from London, internal flights within Kenya and accommodation in Tanzania. It therefore is a package and a Flight-Plus. This booking was provided by the Company in contravention of regulations 9 and 17 of the 2012 Regulations, which is a criminal offence.

37. In relation to Mr Stephen Bramall's booking:

(1) The booking date is stated to be 21 September 2017;

(2) It includes international flights to and from London, internal flights in Kenya, vehicle transfers between Zanzibar Airport to a hotel, and accommodation. As with Mr Orr's booking, it therefore is a package and a Flight-Plus. The booking was provided by the Company in contravention of regulations 9 and 17 of the 2012 Regulations, which is a criminal offence.

38. In relation to Mr Mark Welfare's booking:

(1) The booking date is stated as 12 February 2017;

(2) It includes international flights to and from Newcastle, internal flights within Tanzania and accommodation in Tanzania. As with Mr Orr's booking, it therefore was a package and a Flight-Plus. Upon the expiry of the Company's ATOL, Mr Welfare's payments should have been refunded and no further payments taken from him, as the CAA notified the Company on three separate occasions (by emails sent 23 March 2017, 27 April 2017 and 23 June 2017). On 13 October 2017, the Company accepted a further payment of £10,650 from Mr Welfare;

(3) The Defendant disputed the obligation to refund Mr Welfare's deposit but I am satisfied that the Company was under an obligation to refund the same. In my judgment, the obligation to provide a refund to Mr Welfare arose from Regulations 9 and 26(1)(b) of the 2012 Regulations. In failing to cancel the booking and provide the refund, the Company was in continuing breach of Regulations 9 and 26(1)(b). In this regard I reject Mr Roohani's attempt to persuade me of a narrow construction of the same.

(4) The Defendant also 'put the Claimant to proof' that the Company was in breach of the 2012 Regulations in taking a further payment in respect of it on 13 October 2017, as at the time of the original booking, the Company had ATOL cover. In my judgment, there is nothing in this point. Regulation 9 of the 2012 Regulations provides that a person must not 'make available' flight accommodation unless that person *is* an ATOL holder acting in accordance with the terms of its ATOL. By not cancelling the booking and instead taking further payments in respect of the booking after its ATOL had expired, the Company was continuing to 'make available' flight accommodation in respect of the booking, which was a breach of Regulation 9. As put by Mr Arumugam, flight accommodation made available *stays* available until it is *retracted*.

39. There was a degree of common ground in respect of various breaches by the Company of Regulation 16(b)(i) of the 2012 Regulations. In particular, it is admitted that

(1) the booking forms for each of Mr Hladnick, Dr Mardesic, Mr Brammall and Mr Orr, all of which post-dated 31 March 2017, contained the ATOL logo and the Company's old ATOL number;

(2) the email signature of Ms Buckley still contained the ATOL logo after 31 March 2017;

(3) at least one of the Company's websites continued to make reference in its terms and conditions to ATOL protection after 31 March 2017.

40. The Defendant maintained that there was no evidence before the court that any of the Company's websites contained the ATOL logo after 31 March 2017.

Caused or Allowed

41. The Claimant maintains that the Defendant 'caused or allowed' the Company's contravention of the regulations addressed above.

42. In this regard both parties referred me to the guidance given in the cases of Kappler v Secretary of State for Trade and Industry [2006] EWHC 3694 (Ch) and Re X E Solutions Ltd: The Secretary of State for Business, Energy and Industrial Strategy v Selby & Ors [2021] EWHC 3261 (Ch).

43. In Kappler, a central issue on appeal was the scope of the word 'caused' in the first allegation of unfitness. At [88]-[90], Judge Roger Kaye QC, sitting as a deputy high court judge, reasoned thus:

> '[88] I entirely agree with Mr Bamford that the word 'causing' is normally to be given a proactive interpretation as meaning 'to bring about, to be the cause of, to produce, induce, or make'.
>
> [89] But in the context of this case I do not see at all why the Secretary of State should not have been entitled to advance the case or argument in closing he did. A director who knows about a state of affairs and appreciates it and its consequences may, if he fails to do anything about it at all, depending obviously on the circumstances, be just as much 'causing' the consequences as well as 'allowing' them. This may be particularly pertinent in a small company where there are only one or two directors who together control and conduct the affairs of the company and where one (or both) of them has (or have) an intimate knowledge of the company's affairs.
>
> [90] The crucial factor in this case, in my judgment, is knowledge. Counsel for the Secretary of State below made it plain that if Mr Kappler knew about the invoices and their consequences (ie that they were fraudulent) and did nothing to stop them then that would support a case that he had 'caused' the invoices and… in my judgment this knowledge was a conclusion the district judge was entitled to make on the evidence'.

44. In the later case of Selby, the formula 'caused or allowed' was used for a certain key allegation. Commenting on this, ICC Judge Prentis stated:

> '[29] Mr Selby, Mr Sayed and Mr Awan are said to have 'caused or allowed' the Company's participation in such transactions. The addition of the concept of allowing avoids the dispute in issue … in Kappler…, being whether causing required positive action, to be sidestepped. While, as the judge found, causing may be made out through inaction, when known or obvious facts are ignored, allowing makes the allegation of inaction in the face of duty, if not actual knowledge, plain'.

45. It was conceded by Mr Roohani in closing that 'known or obvious facts … being ignored can be causation, and inaction in the face of duty can be said to constitute allowing….'

Director Disqualification: Framework and Principles

46. The Claimant brings this claim under s.6 CDDA. Section 6(1) provides:

> 'The court shall make a disqualification order against a person in any case where, on an application under this section, it is satisfied
>
> (a) that he is or has been a director of a Company which has at any time become insolvent … and
>
> (b) that his conduct as a director of that Company (either taken alone or taken together with his conduct as a director of one or more other companies …) makes him unfit to be concerned in the management of a Company'

47. There is no dispute that the Defendant was a director of the Company and that the Company became insolvent. It follows that these threshold requirements of s.6(1)(a) CDDA are met. The core question for this court is whether it is satisfied that the Defendant's conduct as a director of the Company makes him unfit to be concerned in the management of a Company. If the court is so satisfied, it must make a disqualification order of a minimum of two years.

48. When determining unfitness, the Court must have regard to section 12C and Schedule 1, paras 1 to 7 CDDA. The factors set out in paras 1 to 7 of Schedule 1 are as follows:

> 1. The extent to which the person was responsible for the causes of any material contravention by a Company… of any applicable legislative or other requirement.
>
> 2. Where applicable, the extent to which the person was responsible for the causes of a Company … becoming insolvent.
>
> 3. The frequency of conduct of the person which falls within paragraph 1 or 2.

> 4. The nature and extent of any loss or harm caused, or any potential loss or harm which could have been caused, by the person's conduct in relation to a Company …
>
> 5. Any misfeasance or breach of any fiduciary duty by the director in relation to a Company…
>
> 6. Any material breach of any legislative or other obligation of the director which applies as a result of being a director of a Company…
>
> 7. The frequency of conduct of the director which falls within paragraph 5 or 6.

49. In this regard, the Claimant relies upon what he describes as 'clear and persistent breaches of the 2012 Regulations' by the Company, which were, the Claimant contends, 'plainly' the responsibility of the Defendant as its sole director.

50. On behalf of the Claimant, Mr Arumugam took me to a helpful summary of the relevant principles set out in the case of Secretary of State for Business Innovation and Skills v Khan [2017] EWHC 288 (Ch). At paragraph [12], Registrar Jones said: 'the Secretary of State must establish that the director has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies' and (at [13]) that 'if the Defendant has fallen below the required standards of probity and competence, it is the duty of the court to make a disqualification order. Other matters, such as subsequent conduct and the current position are for mitigation and/or an application for permission to act'.

51. In Khan, having considered the decision of Mr Justice Blackburne in Re Uno plc 2004 EWHC 933 (Ch), Registrar Jones continued (at [15])

> 'Mr Justice Blackburne and the decision of Mr Justice Park to which he referred … emphasise the need for the courts when identifying and applying standards of probity and competence to recognise that directors have to make value judgements. Those judgements may well not be clear-cut and they often have to be made in pressurised circumstances. For example, it can be extremely difficult to choose between continued trading and the dire consequences of closure… It is a question of fact and circumstance. The court needs to reflect upon events as they occurred and not with hindsight and divorced from reality.'

52. Mr Arumugam further reminded me that the fact that a director himself honestly believed that what he was doing was not wrong does not excuse him, if, on an objective view, his conduct justifies a finding of unfitness: Goldberg v Secretary of State for Trade and Industry [2003] EWHC 2843 (Ch).

53. Both Counsel reminded me of the guidance given in Re Sevenoaks Stationers (Retail) Ltd 1991 Ch 164 at 176:

> 'The test laid down in section 6... 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'.

54. On behalf of the Defendant, Mr Roohani submitted that the court is entitled to find that, while a director's conduct has been imprudent and, in part, improper, it is not so serious as to justify a finding of unfitness warranting a two-year disqualification. In this regard he referred me to the conclusion reached by Peter Gibson J in Re Bath Glass Ltd (1988) 4 BCC 133.

55. Mr Roohani further submitted that, where directors have been shown to be fundamentally honest, a finding of unfitness will not be made where incompetence is not of a sufficiently high degree, referring me, by way of example, to the case of Secretary of State for Trade and Industry v Lewis [2003] BCC 611.

The Defendant's role

56. As sole director of a small company, the Defendant was responsible for managing all aspects of the Company's affairs. The Company's accountants, Williams Giles, confirmed by letter dated 12 November 2018 to the Insolvency Service that the Defendant was solely responsible for instructing them. It was the Defendant who approved the Company's accounts each year. The Defendant was also the main point of contact for the Company's bankers, HSBC. The Defendant confirmed in cross-examination that he regularly monitored the Company's bank account. By his director's questionnaire, completed on 17 April 2018, he confirmed (in answer to question 18) that he kept himself aware of the Company's financial position from the 'internal computer system' on a 'daily' (or near-daily) basis. In short, he ran the Company.

57. In an interview with the Insolvency Service on 10 October 2018, the Defendant confirmed that 'he generally dealt with the day-to-day financial side, but that both he and his partner would muck in as and when needed. What they were required to do could change on a daily basis and according to the needs of the customer.' By 2017, the Company had only two members of staff, Ms Buckley and Mr Gaze. For the most part Ms Buckley and Mr Gaze dealt with the 'customer facing' side of the business by this stage, taking the bookings, but as confirmed by the Defendant in his interview with the Insolvency Service, he would 'muck in as and when needed'. The Company's business was largely conducted from a converted outbuilding in the garden of a house owned by the Defendant's parents, which the Defendant occupied with Ms Buckley and their children. It was a small concern.

The Defendant's explanation for the breaches

58. The Defendant's explanation is summarised at paragraphs 33-40 of his affidavit, which provide as follows:

> '[33] The Company's ATOL was due to expire on 31 March 2017. I was aware of the impending expiry and the new CAA regulatory changes in respect of reporting accountants and wrote to the Company's accountants (William Giles) on 23 March 2017, asking them to let me know what they needed to complete the new process.
>
> [34] I informed William Giles that the process needed to be completed that week and provided the information William Giles requested on 28 March 2017.
>
> [35] On 31 March 2017, the date of the ATOL renewal deadline, William Giles informed me that they had successfully taken the test and could 'officially sign the forms as ATOL Reporting Accountants'. They also requested further information to complete the return to ATOL, which I provided on 3 April 2017.
>
> [36] On 24 March 2017, I also informed Michelle Whalley, who works in the finance team at my father's company, and often on hand to answer any questions I may have on an informal basis, of the new guidelines regarding the ATOL reporting accountants' scheme and asked for her advice on what needed doing. Ms Whalley's reply confirmed that the Company accountants would need to complete the new process and said that they would have the necessary paperwork to complete the return.
>
> [37] I arranged for the Company to pay the ATOL fee of £965 to the CAA on 27 March 2017…
>
> [38] I was also in regular contact with an individual at the CAA, who reassured me that the delay in accounts being returned and/or submitted had been common that year due to the changes in regulation which meant that only an accountant registered with the CAA could complete the return needed for an ATOL to be issued.
>
> [39] Given my previous experience with the ATOL renewal process I genuinely believed that the issue would be resolved quickly and an ATOL would be in place without delay. When it became clear that this was not going to happen, I took the following steps on behalf of the Company:
>
> 39.1 I updated the Company's booking form precedents. The Company used the Tourplan software … to generate bookings.

> 39.2 I removed the ATOL logo from my own signature as evidenced in the email sent on 4 May 2017…
>
> 39.3 I removed the ATOL logo from the Company's active websites. I explain further below the Company's use of websites.
>
> 39.4 I removed the ability of users of Tourplan to generate ATOL certificates.
>
> 39.5 I informed members of staff that the ATOL had expired. At the time, the only members of staff booking holidays were Ms Buckley and John Gaze. I continued my role of general management of the Company.
>
> [40] I have had real difficulty accessing the Company's Google, Facebook and email accounts because I no longer use the email addresses and devices used to authenticate access to those accounts. As such, my knowledge of the Company's websites and Facebook accounts, as well as email exchanges, is based on my recollection and the documents I have seen exhibited to the affidavit of Mr Elliott dated 28 January 2020. Although I do have a hard drive that has stored historic documents related to the Company, including emails, the drive is too unstable to access and crashes when I try to search it. I have prepared this affidavit without the benefit of being able to conduct a reasonable search of the hard drive.

59. At paragraph [51], the Defendant accepted that Ms Buckley, on behalf of the Company, did sell holidays that should have been protected by the ATOL scheme once the Company's ATOL had expired. The Defendant went on to state:

> 'I had no personal involvement in the booking of these holidays and would have only become aware of them once the bookings had been made'

60. Commenting on the booking forms used by Ms Buckley for the four bookings in question, at [52] the Defendant states:

> 'I have seen the booking forms issued to each of the four customers … Despite the Company updating its precedent booking form (as explained above) I believe Ms Buckley used a short cut when issuing the booking confirmations to these four customers by amending a previous booking confirmation. This meant that the changes made to the precedent were not reflected'.

61. The Defendant goes on to note in his affidavit that the four customers were not issued with ATOL certificates and that the Company's terms and conditions state that if an ATOL certificate is not used the holiday is not ATOL protected.

62. In short therefore, the Defendant's case is that the failure to renew ATOL in time was due to circumstances beyond his control, that the Company's accountants were to blame for this, that from his conversations with CAA, he had hoped that the problems could be resolved quickly, that when it became apparent that they would not be quickly resolved, he took the steps outlined at paragraph 39 of his affidavit (updating the Company's booking form precedents, removing the ATOL logo from his email signature and the Company's active websites, and informing members of staff that the ATOL had expired). He maintains that the presence of the ATOL logo on certain booking forms was as a result of Ms Buckley using a shortcut when creating booking forms rather than using the Company's revised precedent. He also contends that the presence of the ATOL logo on certain posts on Facebook was the results of an automated repeated post, which mistakenly was not cancelled. He says that he was not aware of the bookings until after they were made.

Reasons for non-renewal of ATOL

63. It will be noted from the ground of unfitness summarised at paragraph 9 of Mr Elliott's First Affidavit that the Claimant's case focusses, not on the Company's failure to renew its ATOL, but on what the Defendant is alleged to have caused or allowed to occur after its expiry.

64. In closing, however, Mr Roohani on behalf of the Defendant invited me to address the reasons for the non-renewal of the ATOL. I shall do so briefly on his invitation.

65. In 2017 a new regulatory requirement was introduced by the CAA requiring the Annual Accountants Report (which had to be submitted as part of the ATOL renewal process) to be submitted by an approved ATOL Reporting Accountant. In broad summary, approval involved the accountant in question taking a test and applying to their own professional body to be designated as an ARA. Once designated, they would be added to a list of approved ATOL Reporting Accountants maintained by the CAA.

66. The Defendant maintained that Williams Giles were slow in getting registered as ATOL Reporting Accountants. He maintained that the Company's ATOL would have been renewed by 31 March 2017 (or by 4 May 2017) but for Williams Giles' delay in getting registered. His case was that their delay had meant that the CAA had not accepted accounting information available by 31 March 2017 (or 4 May 2017) which would otherwise have been acceptable to it and would have resulted in the ATOL being renewed. Instead, as a result of the delay, the CAA had instead required 'updated' accounting information. This had slowed the whole process down and was ultimately the fault of Williams Giles in not getting registered in good time by 31 March 2017.

67. A brief review of contemporaneous correspondence, however, clearly demonstrates that this was not the case. In my judgment this is a prime example of the Defendant having persuaded himself of an alternative narrative when reality is too much for him to bear. He even stuck to that narrative when taken on a blow by blow basis to the correspondence in cross-examination. I turn, then, to the correspondence on renewal.

68. By email dated 23 March 2017, the CAA wrote to the Defendant regarding the forthcoming ATOL renewal deadline of 31 March 2017. The email made clear that the CAA would require, inter alia,

(1) a copy of the Company's accounts for the year ending 31 August 2016; and

(2) the Annual Accountants Reports Parts 1 and 2, submitted by a valid ATOL Reporting Accountant.

The CAA went on to note that they had not received the Company's APC returns for the licence period or the payment relating to licensable passengers booked during this period. The email of 23 March 2017 made clear (with emphasis added): 'We cannot consider your application until *all of the above* has been received'.

69. The CAA's email of 23 March 2017 continued

> 'There is now limited time for us to process your application and for you to meet any requirements that have to be met. You should note that if a new ATOL is not granted by 31 March 2017, the current ATOL will expire and you will be unable to transact business which you are legally required to cover under your own ATOL and with effect from 1 April 2017 you would therefore have to:
>
> . Stop taking new licensable bookings.
>
> . Stop accepting payments for existing licensable bookings.
>
> . Instruct your agents (if applicable) that they should not accept any new bookings or any payments.
>
> . Stop advertising licensable business and remove all references to ATOL on your website/s and other publicity/promotional material.
>
> In addition you would be in breach of the ATOL Regulations if you continue to hold bookings for customers that have entered into licensable transactions with you. This means you would have to notify all customers due to travel after 31 March 2017 that you cannot provide the travel arrangements and provide a full refund of all monies paid.
>
> Guidance on the arrangements you would need to make can be viewed by clicking here'

70. At the time of the CAA's email dated 23 March 2017,

(1) the Company accounts for the financial year ended 31 August 2016 had not been prepared; and

(2) no accountant from Williams Giles had been registered as an ATOL Reporting Accountant.

71. By email of the same day (23 March 2017), the Defendant wrote to Sam Rylah of Williams Giles, enclosing a link to guidance on the ATOL Reporting Accountants' scheme, asking her to confirm what she needed to complete the forms on the link.

72. By email dated 24 March 2017, the Defendant emailed a family friend with some accounting experience, Michelle Whalley, who had agreed to help out informally with the Company's book-keeping, saying:

> 'Hi Michelle,
>
> Apologies for not coming back to you sooner, please remind me where we are up to and what you need and I will send it over. Please can you also look at the following and let me know what we need to complete. I need to get this filled out ASAP.'

73. The email to Ms Whalley included a link to the ATOL Reporting Accountants' scheme.

74. On 24 March 2017, Michelle Whalley replied, confirming that the form referred to in the link would need to be completed by Williams Giles, as the Company's accountants and asking for the deadline.

75. On the same day (24 March 2017), Sam Rylah of Williams Giles replied, asking 'do you need the ATOL forms doing at this time?' The email confirmed that the link related to the new training course that Williams Giles as accountants would need to take to qualify as ATOL Reporting Accountants. The email continued:

> 'How are the books coming along for this year? Has Michelle taken over doing them yet?
>
> I have some TourPlan reports to 31st August 16, but no bank analysis, statements or invoices?
>
> The Year End accounts are due in the next two months so it would be good to make a start on them now'

76. On 27 March 2017, the Defendant paid the ATOL renewal fee.

77. On 31 March 2017, the Company's ATOL expired. By email of the same date, Sam Rylah of Williams Giles confirmed that she had taken the ARA test but that she required accounting information from the statutory accounts in order to complete the second part of the ATOL return. She stated:

> 'I am afraid we need the books listed below to do this:

> All Bank statements & credit cards 1/09/2015 to 31/08/2016
>
> The summary of expenditure from the bank.
>
> Trade Creditors at 31/08/2016.
>
> Trade Debtors at 31/08/2016.
>
> Details of any loans made to the Company which do not fall part of the income'

78. The Company was clearly unable to fulfil ATOL's renewal requirements by the deadline of 31 March 2017. Leaving aside the fact that Sam Rylah had not been designated an ARA by her regulatory body by this stage, the Company's accounts for the year ended 31 August 2016 had not yet been prepared.

79. The Defendant implied that this was Williams Giles' fault. On the evidence as a whole however, it is plain (and I so find) that he had been dilatory in collating and sending to the Company's accountants the information which they required in order to prepare the accounts for the year ended 31 August 2016. See by way of example the correspondence referred to at paragraph 72, 75 and 77. The CAA required the Company's accounts for the year ending 31 August 2016 as a pre-condition of renewal: see CAA's email of 23 March 2017, referred to at paragraph 68 above. In a letter dated 12 November 2018 to the Insolvency Service, Williams Giles had stated that the Defendant had a history of providing his books late.

80. By email dated 3 April 2017, the Defendant sent Williams Giles some, but not all, of the information which they had requested, copying in Michelle Whalley.

81. Ms Whalley replied directly to the Defendant and his father on the same day (3 April 2017), chiding the Defendant for being so late in getting information to Williams Giles. Her email read as follows:

> 'Hi Tarquin,
>
> Your YE August 2016 information should have been with WG prior to the Xmas shut down.
>
> You are running tight for time to get your YE completed by the May deadline, had you forwarded the necessary info to WG they would have had the information to complete the return.
>
> Can you please start gathering whatever you provided historically to WG for your YE 2016.
>
> Has Suzie sorted the May booking yet as this will impact on YE figures going forward'

82. In cross-examination the Defendant refused to accept that Ms Whalley was criticising him in any way for his tardiness to getting information to the accountants. He insisted that she was simply criticising 'the situation'. This again was an example of the Defendant persuading himself of an alternative narrative. It was entirely clear in context that Ms Whalley was criticising the Defendant by her email of 3 April 2017.

83. By email dated 27 April 2017, from ATOL Renewals to the Defendant, the ATOL Renewals team wrote to the Defendant chasing up on the outstanding information. The email provided (with emphasis added):

> 'please be advised that as we have not received *any* of the information required from you. I have enclosed lapsed ATOL confirmation form for you to complete and return'.

84. At this stage, therefore, the CAA had still not received the Company's accounts for the year ended 31 August 2016. The email of 27 April 2017 continued:

> 'Should you wish to continue with the renewal process of your application, please submit what is required from you no later than 4 May 2017 including bringing your APC return update.
>
> Your current ATOL has expired on Friday, 31 March 2017. Our records indicate that as at today's date there are requirement(s) are still outstanding and that you should not transact business which you are legally required to cover under your own ATOL and with effect from 1 April 2017 you would therefore have to do:
>
> . Stop taking new licensable bookings.
>
> . Stop accepting payments for existing licensable bookings.
>
> . Instruct your agents (if applicable) that they should not accept any new bookings or any payments.
>
> . Stop advertising licensable business and remove all references to ATOL on your website/s and other publicity/ promotional material.
>
> . Your website still contains ATOL logo and therefore you must remove the ATOL logo with immediate effect and make changes to your terms and Conditions. Guidance on the arrangements you would need to make can be viewed by clicking here.
>
> In addition you would be in breach of the ATOL Regulations if you continued to hold bookings for customers that have entered into licensable transactions with you. This means you would have to notify all customers due to travel after 31 March 2017 that you cannot provide their travel arrangements and provide a

> full refund of all monies paid. I have copied this email to our compliance to monitor practices'

85. On 4 May 2017, there was an exchange between the Defendant, Williams Giles and the CAA regarding Sam Rylah's status. It was clear that whilst Sam Rylah had passed the ARA test, she still had not been designated an ARA by her professional body. The Defendant blames this for the failure to obtain renewal. The reality however is that the Company had still not sent to the CAA its accounts for the year ended 31 August 2016, which were required for the renewal.

86. By June 2017, the CAA was still awaiting the Company's accounts. By email dated 23 June 2017 from Sasan Molaie of the CAA to Ms Buckley, cc'd to the Defendant, Ms Molaie wrote (with emphasis added):

> 'Dear Susie,
>
> With regard to your licence renewal *we are still awaiting your accounts.*
>
> Whilst you have submitted your AAR Parts, I notice Samantha Granville is still not registered as an ARA…
>
> Please take action on *both* the above points.
>
> Please refer to the attached correspondence we sent to you in March and April setting out instructions in the case of a lapsed licence. These include not taking new licensable bookings and no longer accepting payments for existing licensable bookings. Further, any references on your website or other publicity material to ATOL must be removed. Not complying with these would mean you are in breach of ATOL Regulations.'

87. Enclosed with the email of 23 June 2017 were copies of the emails of 23 March 2017 and 27 April 2017.

88. By emails dated 28 June 2017 and 3 July 2017, the Defendant wrote to the CAA seeking confirmation as to whether Williams Giles had yet been approved as an ARA. The emails also requested confirmation on whether the CAA was 'waiting on any further information'. It should have been perfectly clear that it was. It was still waiting for the Company's accounts. This was confirmed by Ms Molaie of the CAA by email dated 3 July 2017, when she wrote:

> 'Dear Tarquin,
>
> Thank you for your AAR Parts submission. Alastair Crawford [of Williams Giles] is a registered ATOL Reporting Accountant.
>
> We are still in need of your accounts'

89. The accounts for the year ending 31 August 2016 were then sent to the CAA by email on the same day (3 July 2017). The Defendant's evidence that they had been sent previously was not supported by the contemporaneous correspondence in evidence and I reject it. I would add that the accounts in question were not even signed off by the Defendant until 3 May 2017 and so were clearly not available by the 31 March 2017 deadline for renewal.

90. By emails of 6, 13 and 14 July 2017, the Defendant chased the CAA for an update. Contrary to the Defendant's suggestion in evidence that the CAA were refusing to consider the Company's accounts at this stage as they had not been accompanied by the right form, or had not been submitted by an ARA, it is clear from the CAA's response that the CAA were actively reviewing the Company's accounts for the year ended 31 August 2016. By email dated 25 July 2017 (at 08:56), for example, Damian Chilcott of the CAA wrote stating:

> 'Dear Tarquin,
>
> Please can you provide a breakdown of other creditors of £418,549 as per note 8 to the accounts.
>
> Once I have this I can discuss our renewal requirements.'

91. The reference to 'renewal requirements' is in my judgment pertinent. As made clear from subsequent correspondence, it is open to the CAA to impose conditions on renewal. These conditions may include cash injections to improve the liquidity ratio of a Company.

92. On the same day (25 July 2017, at 09:44)), Sam Rylah of Williams Giles responded to Mr Chilcott, copying in the Defendant, attaching a word document explaining Note 8 of the accounts.

93. It is clear from subsequent correspondence that discussions then took place between Mr Chilcott of CAA and the Defendant. By email dated 25 July 2017 (at 16.29), Mr Chilcott wrote to the Defendant:

> 'Dear Tarquin,
>
> Further to our earlier discussion please can you provide some management accounts showing the improved up to date position.
>
> Please also confirm what the long term creditor of £30,100 is.'

94. On the evidence as a whole, (which included accounting information for the Company spanning back several years and a letter from the Company's accountants to the Defendant dated 17 June 2016 warning the Defendant that the Company was insolvent and should cease trading unless a £100,000 cash injection could be found) I

consider it legitimate to conclude that on or by 25 July 2017, the CAA had expressed some concerns about the Company's financial position and were considering imposing conditions on renewal. On a balance of probabilities, I find that the Defendant had sought to allay the CAA's concerns by claiming (wrongly) that the Company's 'up to date' position had overall 'improved'.

95. In cross-examination, the Defendant insisted that, as at 25 July 2017, the CAA simply required information regarding the 'updated' position *because of the delay*. On the evidence as a whole, however, this is incorrect. The CAA referred to the need for evidence of an 'improved' position at least twice in correspondence. By email dated 2 August 2017, for example, Mr Chilcott sent a chasing email to the Defendant, stating (with emphasis added):

> 'Hi Tarquin,
>
> Please can you let me know when you can supply the attached information.
>
> We need the management accounts *to see some evidence of the improved financial position.*
>
> You should be aware that whilst the licence has lapsed you should not be promoting yourself as an ATOL holder or taking any money for licensable business'

96. The Defendant was then in some difficulty, as the Company could not demonstrate an improved financial position overall. The CAA chased again for evidence of an improved financial position on 17 August 2017. The email also noted that the Company's websites were still active and warned the Defendant not to promote the Company as an ATOL holder or take any money for licensable business.

97. By email dated 18 August 2017, the Defendant wrote to Sam Rylah of Williams Giles. It was clear from the heading to the email 'Re: Queries to Client 2017' that the Company's accountants had had some queries regarding the figures provided for the purposes of preparing updated management accounts. The Defendant wrote:

> 'Hi Sam,
>
> I tried to filter out any Aug activity.
>
> [It] is likely this is exchange-rate variance.
>
> ATOL are getting worried they have still not had these figures, how long until we can send them something? As you know these are supposed to be management, so will be updated before being actuals'.

98. Sam Rylah of Williams Giles responded by email dated 22 August 2017, attaching a balance sheet and trading profit loss account. She wrote:

> 'Hi Tarquin,
>
> I appreciate the figures are management accounts but we still need to have them based on accurate figures.
>
> Results are as follows attached;
>
> . At the moment, the ratios have not improved, they have stayed the same.
>
> . The Liquidity ratio (a Company's ability to repay short-term creditors out of its total cash) should be over 1:1 ratio and the figures show 0.8:1, which has not improved on last years, in fact it is identical.
>
> . Gross profit margin is down from 21% to 18%.
>
> I did look at the ATOL website for 'check your data criteria' however they do still require your ATOL number and name and it takes five days to come back, so I didn't think it would be appropriate to test it, as I believe you were advised you could do anonymously.
>
> We would suggest that if Susie's sister can put in £100,000, this would improve the liquidity requirement that ATOL will more than likely require. This would show as a long-term loan, see point 9 on the balance sheet.
>
> They may request £150,000 as this is what is really required to bring the Company into a stable position.'

99. In cross-examination, the Defendant tried to play down the significance of this email, pointing out that the Company had achieved renewal of its ATOL in the previous year despite poor trading figures and being balance sheet insolvent. The figures for the y/e 31 August 2016 however were in certain respects *worse* than those for the y/e 31 August 2015; turnover was down by £200,000 yet administrative expenses had gone up by £30,000, and the Company's balance sheet deficit had increased from £117,181 to £118,022. Moreover, the correspondence in evidence showed the CAA actively seeking out evidence of an improved financial position; clearly, this would be unnecessary if the CAA had been content to renew unconditionally on the basis of the y/e 2016 figures in any event.

100. In cross-examination, the Defendant dismissed the accountants' recommendation of a cash injection of £100,000 - £150,000 as simply a 'suggestion', implying that Williams Giles did not really understand the situation. This was notwithstanding the fact that he had previously been warned by his accountants (by email of 17 June 2016) that the Company was insolvent, that its position was 'dire' and that it should cease to trade as soon as possible in the absence of a cash injection of £100,000. This again was an example of the Defendant failing to face reality.

101. By email dated 25 August 2017, the Defendant sent 'draft accounts for an 11 month period' to the CAA. By emails dated 6 and 11 September 2017, Ms Buckley then asked the CAA for an update. Ms Molaie of the CAA responded by email dated 11 September 2017, stating that her colleague, Damian Chilcott, was still 'reviewing your file and may require further information'. Ms Molaie also suggested that 'in the meantime', the Company resubmit the ARA Part 1, as the previous version covered the wrong period; it should cover 1 October 2015 to 31 March 2016. Pausing there, it will be noted that the fact that the ARA form required resubmission was not, as the Defendant sought to suggest in evidence, delaying or preventing the CAA's review of the accounting information provided by the Company thus far. Damian Chilcott was still reviewing the file. The resubmission of the form was simply something that the Company was invited to do 'in the meantime'.

102. In October 2017, the Company approached an Insolvency Practitioner for insolvency advice. Shortly thereafter, on 2 November 2017, the Company's board resolved to put the Company into liquidation.

103. By email of 3 October 2018, when asked by the Insolvency Service why the Company's ATOL was not renewed, Mr Hyde (Lead Compliance Officer) of the ATOL compliance team responded:

> 'With regard to the nonissue of a renewal offer, our licensing team were apparently still assessing whether or not, based upon financial information provided to us over summer 2017, Pure Zanzibar Ltd met the financial criteria applicable to ATOL holders. In addition, in September 2017 we referred the Company to a need for it to resubmit its recent ATOL Annual Accountants Reports and for its accountant to be qualified as an ATOL Reporting Accountant.'

104. I turn then, to the Defendant's case on renewal, as summarised by Mr Roohani in closing by reference to the evidence. For ease of reference, I shall set out each submission (in italics) and my conclusions in turn.

(1) *This was not a case where the Defendant acted in gross disregard of his regulatory obligations. He sought to have the ATOL renewed as he had every year since 2010, through the Company's accountants, Williams Giles. Things changed in 2017 due to changes implemented by the CAA in 2016 with effect from 2017, which required accounts to be submitted by approved accountants only.*

The Claimant's case is not based on a failure to renew. In reality, however, it is clear (and I so find) that the Defendant instructed the Company's accountants (and provided them with the requisite information) far too late for them to be able to have the accounts for the year ended 31 August 2016 prepared by the CAA renewal deadline of 31 March 2017.

(2) *It was the accountants' failures to get registered as ARAs that led to the ATOL not being renewed. If William Giles had not slipped up in this regard, an ATOL would have been granted and these proceedings wouldn't be going ahead because none of the breaches would have occurred*

This is irrelevant to the grounds of unfitness relied upon. Moreover, these submissions were not supported by the evidence. On the evidence as a whole, it is clear (and I so find) that the CAA were not satisfied with the accounting information provided and had concerns about the Company's financial stability. The need to re-submit the ARA Report Parts 1 and 2 of itself was not an insuperable hurdle, as by the time of the re-submission request, Alastair Crawford of Williams Giles was registered as an ARA. Ms Molaie of CAA suggested that the re-submission of the ARA Report forms could be dealt with whilst Mr Chilcott completed his review of the Company's financial position. In this regard the words 'in the meantime' (see paragraph 101 above) speak for themselves. The fundamental problem was the financial position of the Company.

(3) *Initially the accounts were filed on time before the deadline and it was only as a result of the delay in the Company's accountants being registered as approved ATOL reporting accountants that updated accounts were required. The financial position shown by the accounts initially filed was satisfactory at the time that the original application was made, which was in time and before the ATOL had expired*.

This is untenable on the documentary evidence before me. The accounts for the year ending 31 August 2016 (which were required by 31 March 2017 for the ATOL renewal application) were not 'filed on time', if that is intended to imply that they were lodged with the CAA by 31 March 2017; they were not even signed off until 3 May 2017, after the 31 March 2017 deadline for ATOL renewal. They were not sent to the CAA until 3 July 2017 (see paragraph 89 above), which was after the expiry of the 'lapsed renewal' deadline of 4 May 2017 referred to in CAA's email of 27 April 2017. Moreover, the financial position shown by the accounts for the year ending 31 August 2016 was not satisfactory. It was for this reason that the Defendant sought to persuade the CAA by telephone that the Company's financial position had improved since y/e 2016. The CAA then required updated management accounts, to evidence the alleged improvement. Overall, there was no material improvement. See generally paragraphs 93-99 above.

(4) *The CAA did not even assess the Company's financial information when the Company made its initial application for the ATOL renewal. It was not even considered because it wasn't submitted by an ATOL reporting accountant*.

The financial information required by the CAA as a pre-condition of renewal included the Company's accounts for the year ended 31 August 2016. These were not available by 31 March 2017 as they had not been prepared by that stage. As and when relevant financial information was provided by the Company to the CAA for the purposes of the renewal application in 2017, it *was* considered by the CAA; see by way of example the two emails from the CAA dated 25 July 2017 and the email from the CAA dated 11 September 2017, referred to at paragraphs 90, 93 and 101 above.

(5) *The Company's ATOL had been renewed in previous years with worse ratios and worse financial situations*

This was not made out on the evidence. However even if it was correct, what mattered was the CAA's approach on this occasion. It was clear from contemporaneous correspondence that the CAA wanted evidence of an improved financial position from that shown by the accounts for the year ended 31 August 2016. They chased for such

evidence several times. See generally emails dated 25 July 2017 and 2 August 2017 referred to at paragraphs 93 and 95 above.

(6) *The most 'proximate cause' for the ATOL not being renewed by 31st March 2017 was the failure of Williams Giles to have one of their number registered as an ARA by the original deadline*.

On the evidence before me, I reject this submission. For reasons already given, it is untenable.

(7) *If the Claimant alleges that the Defendant is unfit simply because he left one particular matter close to the deadline, that's a very steep hill for the Claimant to climb*.

That is not the Claimant's case.

(8) *The suggestion that the ATOL was not renewed because of the Company's financial position was largely speculation or conjecture*.

I reject this submission. It is clear from contemporaneous correspondence that the CAA were pressing for evidence of an improved financial position. Evidence demonstrating an improved financial position was never provided.

(9) *It was the departure of Ms Buckley which precipitated the Company's demise*.

This assertion was not supported by the evidence considered as a whole and I reject it. The report to creditors dated 7 December 2017 listed other causes of the Company's demise and made no mention of loss of key personnel. The Company had been balance sheet insolvent from at least 2014. The Company's accountants had warned the Defendant that the Company should cease trading in 2016 unless a cash injection of £100,000 could be found and had warned the Defendant that he could face disqualification proceedings if he carried on. The Company accountants advised again in 2017 that a cash injection of £100,000 - £150,000 was required. No such cash injection was made.

The Defendant's conduct after the Company's ATOL had expired

105. The Defendant's account of the steps which he took following the expiry of the Company's ATOL on 31 March 2017 is summarised at paragraph 39 of his Affidavit, which, for ease of reference, is repeated below:

> '[39] Given my previous experience with the ATOL renewal process I genuinely believed that the issue would be resolved quickly and an ATOL would be in place without delay. When it became clear that this was not going to happen, I took the following steps on behalf of the Company:
>
> 39.1 I updated the Company's booking form precedents. The Company used the Tourplan software … to generate bookings.

> 39.2 I removed the ATOL logo from my own signature as evidenced in the email sent on 4 May 2017…
>
> 39.3 I removed the ATOL logo from the Company's active websites. I explain further below the Company's use of websites.
>
> 39.4 I removed the ability of users of Tourplan to generate ATOL certificates.
>
> 39.5 I informed members of staff that the ATOL had expired. At the time, the only members of staff booking holidays were Ms Buckley and John Gaze. I continued my role of general management of the Company.'

The websites

106. The Claimant alleged that the Company 'continued to display the ATOL symbol on its website after the expiration of its ATOL, contrary to the CAA's regulations' (Elliott(1) para 9.6).

107. In their email to the Insolvency Service dated 1 October 2018, the CAA stated that 'Information from one of the consumers suggested that Pure Zanzibar Limited's website had continued to display the ATOL protected logo and a reference to its ATOL after the ATOL had expired.' The CAA further stated that 'on 21 November 2017 and also on 4 December 2017 … the website purezanzibar.co.uk did include references to financial protection under the ATOL scheme'.

108. The CAA provided the Insolvency Service with screen prints of the Company's *purezanzibar.co.uk* website as at 21 November 2017 and 4 December 2017. As at both dates, Clause 17 of the 'Terms and Conditions' section of the Company's 'purezanzibar' website was headed 'ATOL' and stated that '*Many of the flights and flight inclusive holidays on this website are financially protected by the ATOL scheme*'. Clause 18 of the Terms and Conditions section was headed '*Your financial protection'* and stated that '*When you buy an ATOL protected flight or flight inclusive holiday from us you will receive an ATOL certificate*'.

109. Neither screenshot showed the ATOL logo on it as at 21 November 2017 and 4 December 2017.

110. On behalf of the Defendant, Mr Roohani submitted that the onus was on the Claimant to prove that the Company continued to display the ATOL logo on its websites after 31 March 2017. I accept that submission. He further submitted that there was no evidence before the Court which established on a balance of probabilities that any of the Company's websites displayed the ATOL logo after 31 March 2017. I reject that submission. The evidence must be considered as a whole. The evidence established that the Company had been ATOL registered since 2010. The Defendant had explained in his written evidence (at para 14) that ATOL registration was important to the Company 'because many larger travel companies would not permit the Company to be a supplier for them if it did not have an ATOL'. I consider it legitimate to

conclude that at all material times from 2010 up to and including 31 March 2017, all the Company's websites displayed the ATOL logo.

111. The next question is what happened as at 31 March 2017. As at that date, as I have found, the ATOL logo was displayed on the Company's websites. The ATOL logo would remain on the Company's websites unless positive steps were taken to remove the logo.

112. On the Defendant's own admission, he did not take steps to remove the ATOL logo from any of the Company's websites immediately on the expiry of the Company's ATOL licence.

113. On his own admission, the Defendant adopted a stance of 'wait and see'. He did not take any steps to remove the ATOL logo from any of the Company's websites until, in his words, 'it became clear' that the problems encountered in renewing ATOL would not be resolved quickly. His evidence, both written and oral, was opaque on the issue of when, for these purposes, it 'became clear' to him that the problems would not be resolved quickly. In closing submissions Counsel for the Defendant invited the Court to conclude that the Defendant reached that moment of clarity within a few weeks of expiry, possibly by 4 May 2017, but acknowledged that there was no documentary evidence on timing and accepted that it 'might have been a bit longer'.

114. Contemporaneous correspondence in evidence supports the conclusion that the Company continued to display the ATOL logo for at least several weeks after 31 March 2017. By email dated 27 April 2017, for example, the CAA wrote to the Defendant confirming that the Company's ATOL expired on 31 March 2017 and, having listed a set of restrictions which applied as a result of the ATOL expiry, stated (with emphasis added):

> '*Your website still contains ATOL logo and therefore you must remove the ATOL logo with immediate effect* and make changes to your terms and Conditions. Guidance on the arrangements you would need to make can be viewed by clicking here.'

115. In cross-examination, the Defendant did not deny receipt of this email but maintained that 'We were in the process of getting this resolved was my impression of it, there was an interim period which on 27th April we were inside of'. He said that at this stage (27 April 2017) he was under the impression that the problem would be resolved 'swiftly'.

116. From the Defendant's oral testimony overall, it was clear that in his own mind, the Defendant had persuaded himself that he had an 'interim extension' of sorts, to 4 May 2017, for the ATOL renewal. In this regard, he relied on CAA's email of 27 April 2017, which had enclosed a 'lapsed renewal' form and stated that '*should you wish to continue with the renewal process of your application, please submit what is required from you no later than 04 May 2017'*. This is another example of the Defendant persuading himself of an alternative narrative. The CAA's email of 23 March 2017, sent to the Defendant, had warned him that the ATOL would expire on 31 March

2017 and listed the resultant restrictions which would apply from 1 April 2017. The CAA's subsequent email of 27 April 2017 stated, in terms, that the Company's current ATOL had expired and set out the consequences of that expiry. Moreover, by the time of the email of 27 April 2017, almost a month had elapsed since the Company's ATOL had expired; that email of itself cannot justify or explain the continued display of the ATOL logo and references to ATOL on the Company's websites from 1-26 April 2017.

117. The Defendant's stated belief that the problems with renewal would be resolved 'swiftly' is also difficult to understand in context. The ATOL renewal process required (inter alia) submission of the Company's accounts for the year ending 31 August 2016, and these were still under preparation as at 27 April 2017.

118. On the evidence as a whole, I am satisfied that the Defendant did not take steps to remove the ATOL logo from any of the Company's websites on or by 31 March 2017, notwithstanding having been warned by the CAA that he should do so by letter dated 23 March 2017.

119. I am further satisfied that from 1 April 2017 until at least 4 May 2017, when the Defendant started to take steps to remove the logo from the Company's websites, the Company was in breach of Regulation 16(b)(i) of the 2012 Regulations by displaying the logo.

120. On the evidence as a whole, I am satisfied on a balance of probabilities that the Defendant consciously elected to 'wait and see' until (at the very earliest) 4 May 2017, over a month following expiry. He treated the period of 1 April 2017 to 4 May 2017 as an 'interim period' (see paras 115 and 116 above) in which he could effectively ignore Regulation 16(b)(i), notwithstanding the CAA's express confirmation that the ATOL had expired and clear instructions by emails dated 23 March 2017 and 27 April 2017 to remove the ATOL logo and any references to ATOL from the Company's websites. In my judgment he thereby *caused* the Company to be in breach of Regulation 16(b)(i) over the period 1 April 2017 to (at least) 4 May 2017.

121. Mr Roohani submitted that the Defendant's initial approach, to wait and see if the problem could be resolved quickly, was reasonable in the circumstances. He reminded the court of the need to consider a director's position not with the benefit of hindsight, but reflecting on events as they occurred.

122. The difficulty with this submission is that this was not a case of a director deciding to continue to trade for a short period, in the hope that a given order would come in. It was not a judgment call of that nature, in the cut and thrust of trading. The position was clear: it is a criminal offence under the 2012 Regulations for a person (in this case the Company) to give an indication by any means that they hold an ATOL when they do not. The Defendant had been warned by the CAA's email dated 23 March 2017 that 'if a new ATOL is not granted by 31 March 2017, the current ATOL will expire' and that 'with effect from 1 April 2017', the Company would have to (inter alia) 'Stop advertising licensable business and remove all references to ATOL on your website/s and other publicity/promotional material'. The Defendant was sole director of the Company. It was his conscious, informed decision to hold off taking any steps to

remove the ATOL logo and reference to ATOL from the Company's websites for (at the very least) a period of in excess of a month. In my judgment this was not a reasonable or responsible approach for a director to take.

123. On or shortly after 4 May 2017, the Defendant then embarked upon a process of personally removing the ATOL logo from as many of the Company's active websites as he could. This was a laborious process as many of the websites were old and fairly rudimentary.

124. Even when the Defendant did take steps to remove the ATOL logo from the Company's websites, however, it is clear from the evidence (as apparent inter alia from the Zanzibar website screenshots from November 2017 and December 2017) that he failed to remove all references to ATOL on all of the Company's websites. The references that remained gave the impression that the Company held an ATOL, when it did not.

125. The Defendant maintained that the situation was difficult as the Company had over 30 websites, some of which were very old and difficult to edit. At paragraph 47 of his affidavit, he maintained that it 'would have been impossible' for the Company instantly to remove every trace of the ATOL logo from every website. In cross-examination, however, he accepted that he could have hired an IT operative to remove references to ATOL in the Company's various websites; and that the work involved would have taken such an operative *about a week*.

126. Even if, given the Company's financial position, the Defendant wished to avoid the expense of hiring such an operative, there were other options readily available to him. The Defendant accepted in cross-examination that he could simply have switched off the websites at the flick of a switch. When asked why he did not switch off all the websites other than, say, one or two essential sites, and just focus his editing on those websites, he had no adequate explanation. The fact that the Company might wish, as the Defendant suggested through Counsel, to use several websites to improve its Google ratings and internet presence overall, was no proper answer, given that the Company faced criminal sanctions for breach of the 2012 Regulations.

127. In my judgment, in relation to the period 5 May 2017 to 19 December 2017, the Claimant has on the evidence made out its case that the Defendant *allowed* the Company to continue to make reference to ATOL protection on the Company's websites. He failed to take reasonable steps to remove remaining references to ATOL which appeared in the terms and conditions displayed in at least some of the Company's websites (or to shut down such websites), thereby leaving the Company in continuing breach of Regulation 16(b)(i) of the 2012 Regulations until December 2017. This was inaction in the face of duty.

The booking forms/email signatures

128. It was common ground that the booking forms for the Hladnik, Mardesic, Orr and Bramall bookings, which post-dated expiry of the Company's ATOL, were all prepared by Ms Buckley and all displayed the ATOL logo and the Company's old ATOL number, in breach of Regulation 16(b)(i) of the 2012 Regulations. It was also common ground that Ms Buckley's email signature continued to display the ATOL

logo and number after 31 March 2017 until June 2017. There was no evidence that Ms Buckley's email signature bore the ATOL logo after June 2017. I pause here to note that it was in June 2017 that Ms Buckley was sent directly by the CAA copies of its two earlier emails dated 23 March and 27 April 2017.

129. The Defendant's written evidence was that he took steps to update the Company's booking precedents, removing the ATOL logo and all references to ATOL, 'when it became clear' that the problems in renewing the Company's ATOL would not be resolved 'quickly'. He also removed the ability of Tourplan to generate ATOL certificates and removed the ATOL logo and number from his *own* email signature. Again, his evidence was opaque on the timing of such steps. For reasons previously explored, I am satisfied on a balance of probabilities that he consciously elected not to take any such steps until 4 May 2017 at the earliest. An example of his email signature in evidence, which is dated 4 May 2017, does not display the ATOL logo. Viewed in the context of the evidence overall, this is consistent with the Defendant having effected changes around then.

130. His explanation for booking forms bearing the ATOL logo and number on or after 4 May 2017 is set out at paragraph 52 of his affidavit, where he states:

> 'I have seen the booking forms issued to each of the four customers listed at paragraph 77 of Mr Elliot's affidavit. Despite the Company updating its precedent form (as explained above) I believe Ms Buckley used a short cut when issuing a booking confirmation to these four customers by amending a previous booking confirmation. This meant that the changes made to the precedent were not reflected.'

131. In oral testimony the Defendant placed responsibility for Ms Buckley's continued use of her email signature until June 2017 and for the booking forms firmly at Ms Buckley's door. His explanations for her conduct in continuing to use such booking forms and her old email signature varied. At times in his oral testimony, he presented Ms Buckley as an innocent employee who had made a few mistakes. In relation to the booking forms, for example, he explained that the aesthetic of the Tourplan booking forms was not particularly good and so it was likely that Ms Buckley had used a precedent saved in Word on her own computer, to save time but also for aesthetic reasons. The clear implication was that she had probably overlooked the ATOL logo and number when using an old form. At other times, he sought to cast her as a rogue employee who, being paid on a commission only basis, may have been acting for her own purposes, motivated by self-gain. The suggestion that Ms Buckley was 'chasing commission' by wrongful means, however, was not supported by the Company's bank statements in evidence; these showed only four payments being made to Ms Buckley, in minimal amounts (£250, £250, £250 and £400), over the period 1 April 2017 to the date of liquidation. Moreover, the Defendant had made no allegation of wrongdoing on the part of Ms Buckley anywhere but in the witness box.

132. On the evidence that I have heard and read, I reject the Defendant's attempts to cast Ms Buckley as a rogue employee. On the evidence as a whole, I am satisfied on a

balance of probabilities that Ms Buckley's continued display of the ATOL logo and number in her email signature was an unintentional error on her part. It is telling that there is no evidence of Ms Buckley using the logo in her signature after June 2017, the point at which the CAA forwarded to her its earlier emails of 23 March and 27 April 2017. I consider it legitimate to conclude that at that stage (June 2017) she realised that she should amend her email signature and did so. It is correct to state that Ms Buckley continued to use booking forms bearing the ATOL logo and number after June 2017 notwithstanding receipt of the CAA's emails of 23 March and 27 April 2017. On the evidence as a whole, I am satisfied on a balance of probabilities that Ms Buckley's continued use of booking forms bearing the ATOL logo and number was an unintentional error on her part. I so find. When booking a complex itinerary for a customer, her attentions would have been focussed on the detail of the itinerary and not on the header or footer of the form. I am further satisfied on a balance of probabilities that her use of the old booking forms was prompted by a desire to save time by using aesthetically pleasing precedents already stored on her own computer, rather than for any nefarious reasons.

133. In cross-examination, the Defendant was pressed to explain how such errors were allowed to have occurred on his watch as director. The Defendant's written evidence, which in this regard I accept, was that 'when it became clear' that the problems with ATOL renewal would not be resolved quickly, he 'informed members of staff that the ATOL had expired' (affidavit, paragraph 39.5). The steps listed at paragraph 39 of his affidavit, however, do not state, in terms, that he expressly instructed the Company's two staff members (Ms Buckley and John Gaze) to remove reference to ATOL in their email signatures or to use only the updated booking form precedents.

134. In my judgment these omissions are telling. This was a professionally drafted affidavit. Overall, it was very carefully drafted. It deftly omitted any reference to the date (even in approximate terms) that the Defendant (on his case) realised that the problems encountered with renewing ATOL would not be resolved swiftly and took the steps listed in paragraph 39: see opening words of paragraph 39 itself. It adopted similarly anodyne language in relation to the Defendant's knowledge of bookings taken after 31 March 2017; paragraph 51 stating simply (with emphasis added) 'I had no personal involvement in the booking of these holidays and would only have become aware of them *once the bookings had been made*'; again, without stating *when* he became aware.

135. Mr Roohani submitted that the gaps in the Defendant's written evidence are a consequence of the Claimant having failed in its own evidence to set out its case with sufficient clarity or particularity. I reject that submission. In my judgment, the key tenets of the Claimant's case were more than adequately set out in Mr Elliott's First Affidavit.

136. Moreover, the stated purpose of paragraph 39 of the Defendant's affidavit was to list the steps he took once it became clear to him that the problems encountered in renewing the ATOL would not be swiftly resolved. There was no reason to list, as one of those steps, the removal of ATOL from *his own email signature* and not to list, as a further step, having given instructions to the Company's staff to remover the ATOL symbol from *theirs*, had he given such instructions. There was no reason to list as one of those steps the updating of the booking form precedent and not to list as a further

step having given instructions to the Company's staff only to use that precedent when taking new bookings, had he given such instructions.

137. On the evidence as a whole I consider it legitimate to conclude that the reason why there was no reference in the Defendant's affidavit to the Defendant having issued express instructions to Ms Buckley and Mr Gaze to delete reference to ATOL in their email signatures and only to use the updated booking precedent *is that he did not issue such instructions*. The Defendant's belated attempts to suggest otherwise in his oral testimony were entirely unpersuasive and on the evidence as a whole, I reject them.

138. On the evidence as a whole it is also clear (and I so find) that the Defendant took no steps to check that Ms Buckley and Mr Gaze had deleted reference to ATOL in their email signatures and were only using the updated booking forms for new bookings. In oral testimony the Defendant explained that as Ms Buckley was aware that the ATOL had expired and had many years' experience in the travel industry, he did not consider it necessary to check the booking forms or email signature that she was using.

139. In my judgment this was a clear case of inaction in the face of duty. As sole director of the Company, the Defendant *allowed* these breaches of Regulation 16(b)(i) of the 2012 Regulations to occur.

140. Mr Roohani attempted to play down the significance of these breaches. In my judgment, however, these breaches cannot be considered in vacuo; they must be considered in context. The Defendant's failure to take reasonable steps to prevent or correct these breaches takes on a greater significance when considered in the context of the holiday bookings taken or proceeded with by the Company after its ATOL had lapsed. All five of the bookings forming the focus of this claim required ATOL protection by law. Ms Buckley's email signature and the booking forms gave an indication that the Company held an ATOL.

141. On the evidence before me it is clear (and I so find) that consumers were misled by the Company's various breaches of Regulation 16(b)(i) addressed above. In this regard (to the extent of the breaches found proven) I accept as accurate the accounts of Mr Hladnik, Dr Mardesic, Mr Orr, Mr Brammall and Mr Welfare summarised at paragraphs 83, 84, 85, 86, 93 and 96 of Mr Elliott's First Affidavit. From those accounts, it is clear that Mr Hladnik, Mr Orr, Mr Brammall and Mr Welfare were misled. Dr Mardesic was unaware of the ATOL scheme.

142. I turn next to consider the Defendant's role in and responsibility for the holiday bookings taken or proceeded with by the Company in breach of the 2012 Regulations after its ATOL had lapsed.

The holiday bookings

143. At paragraph 32 of his affidavit, the Defendant stated that he 'understood the important need for the Company to have an ATOL to sell holidays that included flights.' In context the clear implication was that this was his understanding over the material period of 1 April 2017 to 19 December 2017.

144. From his oral testimony however it was clear (and I so find) that over the period 1 April 2017 to 19 December 2017, the Defendant, as sole director of the Company, persuaded himself that the holidays being sold by the Company did not need an ATOL even if they included flights. In my judgment, this was another example of the Defendant adopting an alternative narrative when reality was too much for him. In the real world, the Company was, as the Defendant well knew, reporting licensable turnover to the CAA each year in its annual ATOL returns as part of the renewal process. On his own evidence, by 2017, prior to expiry of its ATOL, the Defendant had personally set up a rule on the Company's Tourplan system that required users to select whether an itinerary was 'accommodation only' or 'included flights'. As at 2017, the 2012 Regulations had been in place for five years, and the definition of 'flight accommodation' was clear. Despite all of this, when the Company's ATOL expired, the Defendant persuaded himself that the Company could carry on selling holidays with flights. He did so by resorting to some out of date guidance which related to the regulatory framework in place prior to the introduction of the 2012 Regulations, which he found on a government website. In the Defendant's words on day one of cross-examination: 'we took steps to, you know, to define what licensable turnover was as best I could'. He added 'I looked on a government website to get clarification'.

145. The 'clarification' relied upon by the Defendant was a guidance note from January 2008, long before the 2012 Regulations were introduced. It was a note for travel organisers published by BERR entitled 'What is a package?'. Paragraph 1 of the guidance note provided:

> 'This note provides guidance to the travel industry in assessing whether part or all of the business constitutes a 'package' for the purposes of the Package Travel, Package Holidays and Package Tours Regulations 1992 and the Civil Aviation (Air Travel Organisers' Licensing) Regulations 1995 ('ATOL Regulations'). It replaces earlier guidance provided by this Department relating to the definition of a package (guidance on other aspects of the PTRs remains available on the BERR website here) and represent our view of the law in the light of recent court decisions.'

146. This guidance note related to regulations in force before the 2012 Regulations.

147. The position which the Defendant had persuaded himself to adopt over the period 1 April 2017 to 19 December 2017, on the issue of what counted as 'licensable' under the 2012 Regulations, was demonstrated repeatedly during his oral testimony. I shall list a few examples.

148. In relation to Mr Hladnik's booking:

(1) When it was put to the Defendant on day one of the trial that the trip arranged for Brian Hladnik included flight accommodation, he responded

> 'no, I would have viewed this as a, you know, an internal transfer, it's a, you know, part of a - of the trip , it's not really

> to and fro, it's necessary, so if you went up on a hot air balloon, for argument's sake, would one consider that as … as flight accommodation?'

(2) When asked what on earth was the Company doing accepting these sorts of sums of money from consumers, when he had been told by the CAA on 27th April to stop doing that, he responded (with emphasis added):

'Sorry, the CAA told us to stop taking *licensable* turnover'

149. In relation to Mr Mardesic's booking:

(1) When it was pointed out that the booking included an international flight from Prague, he asserted 'Prague is not in the UK', adding shortly thereafter (with emphasis added):

> 'I think it's fair to say there are difficulties in interpreting the … the ATOL regulations *and I believed, you know, and I think Suzanne would have believed at this time*, that it was not originating in the UK'

(2) When it was put to the Defendant that Dr Mardesic's holiday was 'a licensable holiday', he responded:

> 'Well, that might be questionable because it's not in the - not a launch coming from - it doesn't originate as flights in the UK'

Where the flight originated was utterly irrelevant, given the definition of 'flight accommodation' under the 2012 Regulations.

150. In relation to the Orr family booking, which included flights from the UK through Nairobi to Zanzibar:

(1) When it was put to the Defendant that this was a 'flight plus holiday', he responded, 'In hindsight possibly yes', adding: '*it's not according to the information that I relied upon at the time*', referring again to the out of date guidance he had found on a government website.

(2) When it was put to him that he understood that he was selling licensable holidays, he responded (with emphasis added):

> 'Under the definition *that we used at the time*, these holidays fell as - as not licensable'

151. In relation to the Brammall booking,

(1) When asked whether he was unsure whether a holiday was ATOL, he replied:

> 'A: I think there is confusion on the regulations as they stood at this time'
>
> Q: so, if you were confused why did you not get clarity?
>
> A: I thought I had from a government website
>
> Q: so you thought wrongly that this was not an ATOL holiday, is that right?
>
> A: We saw - so we had traded prior to having an ATOL licence and the rules at the time were that packaged holidays were determined as licensable turnover of which we did not sell because we did not have prearranged packages
>
> Q: and this… holiday....for Mr Bramall, this is flight plus isn't it?
>
> A: it's not a prearranged package
>
> Q: it's a flight out of the UK?
>
> A: if you… if you, well, if you look at the … the definition that was on the government website and is still on the government website.. that is on page 880 it falls quite clearly in what that describes as not a package'

152. In relation to Mr Welfare's booking:

(1) When it was put to the Defendant that the booking included flights from Newcastle to Dar es Salaam and so would be licensable, the Defendant responded (with emphasis added):

> 'As I, you know, in - and I think so but *as per the information that we interpreted at the time*, it wouldn't have formed a package and … I think there is confusion on this matter …

(2) When it was put to the Defendant that he had never gone through a list of the customers with outstanding bookings who had been sold ATOL holidays before the Company lost its licence and had never contacted them to let them know or to offer a refund, his response (with emphasis added) was:

> 'Well under the … definition *that we relied on at the time* this would not have been licensable turnover so wouldn't have required a refund'

153. Whilst, at times, during the second day of his oral testimony (which was several months after the first), the Defendant sought to 'row back' from the position which he had adopted on day one on the approach taken to 'licensable' holidays over the material period, it was clear from his evidence overall that over the period 1 April 2017 to 19 December 2017, the Defendant had persuaded himself that, and had proceeded on the basis that, the holidays being sold by the Company were not 'licensable' (and so did not need an ATOL) even if they included flights. I so find.

154. The Defendant maintained this 'head in the sand' approach to the realities of the situation long after the Company had entered into CVL. By email dated 23 May 2019, for example, the Defendant had written to Mr Peter Smith of the Insolvency Service stating, inter alia:

> 'It is my understanding ATOL insurance is not a legal requirement for a travel company that sells tailor-made holidays. It is a specific requirement for package holiday providers and not a legal or industry standard for the type of holiday provided by PZL. It was and still is my belief that at no stage as a Company Director for a tailor-made travel company was I in breach of any legal or industry standard of requirement.
>
> PZL did take out ATOL insurance as a best practice option and had this insurance in place for many years. ..'

155. On the evidence as a whole, I am satisfied that the position which the Defendant had persuaded himself to adopt on the issue of what counted as a 'licensable' booking informed the instructions which he gave to the Company's staff at or about the time of expiry of the Company's ATOL on 31 March 2017.

156. On the evidence which I have heard and read, I am satisfied that at or about the time of expiry of the Company's ATOL, the Defendant informed members of staff (1) that the Company could not take 'licensable bookings', but that (2) the holidays being booked by the Company did not qualify as 'licensable bookings', even if they included flights. I so find.

157. On day two of the trial, for example, the Defendant stated that:

> 'I did advise all the members of staff to stop taking licensable bookings. At the time we believed that … tailor-made packages did not fall under licensable bookings' (day two page 43 transcript).

158. At a later stage of his cross-examination, when it was put to him that it really was not that difficult; all he needed to have done was to tell his staff to stop booking holidays that included flights, he claimed that he *did* tell his staff to stop taking bookings that included flights. I reject the Defendant's evidence on this issue. At no stage had the

Defendant suggested this before. It was entirely inconsistent with the stance which he had adopted in correspondence with the Insolvency Service in 2019. It was inconsistent with much of his earlier testimony. It would have been the most obvious thing to mention in his affidavit. On the evidence as a whole, I am satisfied that this was a self-serving untruth.

159. On the evidence as a whole, I am satisfied on a balance of probabilities that the Defendant instructed the Company's staff, including Ms Buckley, that the Company could continue to take holiday bookings that included flights notwithstanding the expiry of its ATOL, because tailor made holidays did not count as licensable turnover. I am further satisfied that it is for that reason, rather than any 'rogue employee' conduct on her part, that Ms Buckley continued after expiry of the ATOL to take and proceed with on behalf of the Company the bookings forming the subject matter of this disqualification claim. I so find.

160. On the evidence as a whole, notwithstanding the Defendant's protestations to the contrary, I am satisfied on a balance of probabilities that at all material times, the Defendant knew that the Company continued to take and to proceed with bookings that included flights after the expiry of its ATOL. I so find.

161. This was an extremely small company. As the Defendant had confirmed in a telephone interview with the Insolvency Service on 10 October 2018, although the costs per trip were high (£30k to £40k per trip), 'there were not many bookings'. Over the period 31 March 2017 onwards, only a handful of bookings were taken by the Company.

162. Whilst the Defendant generally dealt with the day-to-day financial side and Ms Buckley was mostly customer-facing, 'both he and his partner would muck in as and when needed. What they were required to do could change on a daily basis and according to the needs of the customer' (interview with Insolvency Service, 10 October 2018) .

163. As confirmed in his director's questionnaire, completed on 17 April 2018, the Defendant kept himself aware of the Company's position from the 'internal computer system' on a near daily basis. In cross-examination he also confirmed that he regularly monitored the Company's bank account.

164. The four post-ATOL bookings forming the focus of this claim were all significant events, in banking terms, for the Company, as the Company was in financial crisis at the time. It was largely in overdraft and had very few payments of this size coming in. The payments from these four bookings (and from Mr Welfare's booking) were all very swiftly applied in manual payments out of the bank account as soon as they were received. On the evidence as a whole, I consider it legitimate to conclude that the Defendant arranged those payments out as soon as he saw the booking receipts coming in.

165. In my judgment it is implausible for the Defendant to suggest that he did not discuss these bookings with Ms Buckley at the time that they were made. They were significant events at a time of crisis for the Company. He shared a house with Ms Buckley. The Company was run from his back garden. Both he and Ms Buckley had a

long-standing interest in niche holidays of this nature. The Defendant had told the Company's staff (including Ms Buckley) that they could carry on booking holidays with flights, notwithstanding the ATOL expiry; Ms Buckley therefore had no reason to conceal from the Defendant that she was booking holidays with flights. On the evidence as a whole, on a balance of probabilities I am satisfied that the Defendant and Ms Buckley discussed these bookings at the time that they were made and that the Defendant was aware that they included flights.

166. Moreover, even if, contrary to my conclusions on this issue, the Defendant did not discuss these bookings with Ms Buckley, on the evidence as a whole it is clear (and I so find) that at all material times, up to the expiry of the Company's ATOL, approximately half of the Company's turnover involved bookings with flights. This was reflected in the Company's last ATOL return. Against that backdrop, I am satisfied that the Defendant must have known that, absent a clear instruction from him to the Company's staff that they should *not* accept any bookings involving flights, a significant proportion of the bookings which the Company continued to take after 31 March 2017 *would* involve flights. He either knew or turned a blind eye to the fact that bookings with flights were still being taken.

167. I am further satisfied the Defendant did not at any material time instruct the Company's staff to *stop* booking holidays that included flights. I am also satisfied that he took no reasonable steps to monitor the extremely modest number of bookings taken by the Company after expiry of its ATOL in order to ensure that no licensable bookings were being taken, or to cancel any such bookings which were taken and refund the customers. I so find.

168. In the light of the Defendant's conduct as found, it is in my judgment particularly unattractive for the Defendant to have sought to lay the blame on Ms Buckley for the bookings forming the subject matter of this disqualification claim, or to feign ignorance of the fact that the Company continued to take bookings with flights after the expiry of its ATOL.

169. For the sake of completeness, I should confirm that I reject the Defendant's attempts to excuse his failure to refund Mr Welfare on the basis that he could not find his booking on the system. I find that the Defendant made a conscious decision not to refund Mr Welfare's deposit following expiry of the Company's ATOL. That decision was based on the stance which the Defendant had chosen to adopt on the issue of what constituted licensable trade.

170. On the evidence which I have heard and read, I am satisfied that in instructing the Company's staff on or shortly after 1 April 2017 that the Company could continue to take holiday bookings that included flights notwithstanding the expiry of its ATOL, the Defendant *caused* material and continuing contraventions by the Company of Regulations 9(b) and 17(1) of the 2012 Regulations over the period 1 April 2017 to 19 December 2017.

171. I am also satisfied that the Defendant's conduct (1) in failing to instruct the Company's staff at any material time after the expiry of the Company's ATOL that they could *not* accept holiday bookings which included flights (2) in failing to take reasonable steps to monitor the small number of bookings taken by the Company after

expiry of its ATOL in order to ensure that no licensable bookings were being taken and (3) in failing to cancel any such bookings which were taken and refund the customers, *allowed* material and continuing contraventions by the Company of Regulations 9(b) and 17(1) of the 2012 Regulations over the period 1 April 2017 to 19 December 2017.

172. I am further satisfied that the Defendant caused the Company to fail to refund a deposit to Mr Welfare, contrary to Regulations 9 and 26(1)(b) of the 2012 Regulations.

Unfitness

173. I turn next to the issue of unfitness. In doing so I remind myself of the need to have regard to the matters set out in Schedule 1 paras 1 to 7 to the CDDA, in so far as relevant to the grounds of unfitness alleged.

174. Paragraph 1 requires the Court to consider the extent to which the person was responsible for the causes of any material contravention by a company… of any applicable legislative or other requirement. By paragraph 3, the Court is also required to consider the frequency of conduct of the person which falls within paragraph 1.

175. As I have found, the Defendant made a conscious, informed decision not to remove the ATOL logo from any of the Company's websites for the period 1 April 2017 to 4 May 2017 (at the earliest). His conduct in this respect *caused* material contraventions by the Company of Regulation 16(b)(i) of the 2012 Regulations over that period.

176. Whilst the Defendant thereafter took steps personally to remove the ATOL logo from as many of the Company's websites as he could, he failed to take reasonable steps to ensure the removal of all references to ATOL from the Company's websites or to shut down such websites, with the result that references to ATOL remained on at least one of the Company's websites until December 2017. His conduct in these respects *allowed* material contraventions by the Company of Regulation 16(b)(i) from 4 May 2017 to 19 December 2019.

177. Whilst I am satisfied that the Defendant removed the ATOL logo from his own email signature and updated the Company's booking form precedent on or by 4 May 2017, he failed at any material time from 1 April 2017 onwards to instruct the Company's staff to remove the ATOL logo from their own email signatures or to adopt a system of using only the updated booking form precedents when booking holidays. He also failed to check that they had done so. In my judgment his conduct in these respects *allowed* material contraventions by the Company of Regulation 16(b)(i) from 1 April 2017 onwards.

178. By instructing the Company's staff on or about 1 April 2017 that the Company could continue to take holiday bookings that included flights notwithstanding the expiry of its ATOL, the Defendant *caused* material and continuing contraventions by the Company of Regulations 9(b) and 17(1) of the 2012 Regulations over the period 1 April 2017 to 19 December 2017.

179. The Defendant's conduct (1) in failing to instruct the Company's staff at any material time after the expiry of the Company's ATOL that they could *not* accept holiday

bookings which included flights (2) in failing to take reasonable steps to monitor the small number of bookings taken by the Company after expiry of its ATOL in order to ensure that no licensable bookings were being taken and (3) in failing to cancel any such bookings which were taken and refund the customers, *allowed* material and continuing contraventions by the Company of Regulations 9(b) and 17(1) of the 2012 Regulations over the period 1 April 2017 to 19 December 2017.

180. The Defendant decided not to refund Mr Welfare's deposit following expiry of the Company's ATOL, notwithstanding instructions from the CAA that he should do so. The Defendant's conduct in this respect *caused* a continuing material contravention by the Company of Regulation 26(1)(b) over the period 1 April 2017 to 19 December 2017.

181. Paragraph 4 of Schedule 1 to the CDDA requires me to consider the nature and extent of any loss or harm caused, or any potential loss or harm which could have been caused, by the person's conduct in relation to a Company. As I have yet to be fully addressed on the quantum of any actual pecuniary loss caused to the customers forming the focus of the disqualification claim by the Defendant's conduct (this being an issue to be considered in the forthcoming compensation claim), I shall put the issue of actual pecuniary loss to one side for current purposes. On any footing however, on the evidence which I have heard and read, I am satisfied that the Defendant's conduct (at the very least) (1) caused customers to be misled into thinking that they would have ATOL protection if they purchased, or continued with, travel arrangements booked with the Company (2) caused customers to be exposed to significant risk of substantial financial loss (3) could have exposed consumers to the risk of further significant financial loss had the Company not ceased trading and entered CVL (4) risked undermining the public's trust in the ATOL scheme and the statutory purpose of that scheme (5) exposed the Company to the risk of criminal sanction.

182. Paragraph 5 of Schedule 1 requires the Court to consider any misfeasance or breach of any fiduciary duty by the director in relation to a Company. Mr Roohani submits that this must be construed in the context of the grounds of unfitness alleged. I accept that submission up to a point. I accept that I should not take into account any breach of s.172(3) of the Companies Act 2006 which may be apparent from the evidence, for example, as this goes materially beyond the grounds of unfitness alleged and is not the case which the Defendant understood he was to meet. In the current disqualification claim however, given the grounds of unfitness alleged, the Court has to consider, inter alia, whether the Defendant's conduct as found proven shows incompetence to a marked degree. In my judgment consideration of s.174 of the Companies Act 2006 is implicit in this process, as it serves to 'set the bar' between competent and incompetent. It would be entirely artificial to ignore s.174 or to decline to take it into account, simply on the basis that the Claimant has not referred to it expressly in the evidence in support. I shall therefore take s.174 into account. In this regard, whilst I am satisfied that the Defendant acted honestly at all material times, I am also satisfied that his conduct, in (variously) causing or allowing the Company to contravene the 2012 Regulations in the respects which I have found proven, was in breach of duties owed by him to the Company pursuant to s.174 of the Companies Act 2006.

183. Overall, the Defendant's most serious failings in my judgment were in (1) *causing* continuing material contraventions by the Company of Regulations 9(b) and 17(1) of the 2012 Regulations over the period 1 April 2017 to 19 December 2017 and (2) *allowing* continuing material contraventions by the Company of Regulations 9(b) and 17(1) over that period. In my judgment, this was woefully reckless and incompetent conduct on the part of a sole director of a Company operating in such a highly regulated framework. It put customers' money at significant risk. It could have caused consumers further loss had the Company not ceased to trade. Moreover, it was a criminal offence for the Company to undertake such activities as it did over the relevant period. The impact of these failings was exacerbated by the continued use of the ATOL logo and attendant ATOL references, which misled consumers as to the legal protection they would receive if they purchased or continued with holiday bookings arranged with the Company.

184. The Defendant placed store by the fact that the CAA had chosen not to take any action. In my judgment that is of no relevance. The statutory framework of the CDDA is entirely distinct from that in which the CAA operates.

185. In closing, Mr Roohani submitted that the Defendant was 'not a lawyer'. I accept that.

186. Mr Roohani further submitted that the Defendant had made reasonable efforts to understand what licensable booking meant so as to give relevant instructions to his staff. If he got that wrong, he submitted, that was entirely understandable, as the regulations are not straightforward.

187. I do not accept these submissions. In my judgment the Defendant, as the sole director of a Company operating in a highly regulated industry in 2017, was under a duty to know how the 2012 Regulations operated and to take all reasonable steps to ensure that the Company complied with the same. If he was in any difficulty in understanding the regulatory framework, he should have taken professional advice. Instead, as I have found, he closed his eyes to the obvious and recklessly adopted an indefensible position on what constituted 'licensable' trade. His incompetent and reckless actions had criminal consequences for the Company and put consumers money at significant risk.

188. Whilst the grounds of unfitness relied upon by the Claimant do not include an allegation of wrongful trading, the parlous financial state of the Company over the period 1 April 2017 to 19 December 2017 does form part of the relevant factual backdrop to the grounds of unfitness found proven; as does the fact that monies paid by the five customers forming the focus of this disqualification claim were not applied in discharge of sums owed to third parties in respect of the holidays booked by those customers, but were instead used in the ordinary course of business by the Company. This combination of factors, both of which were known to the Defendant at all material times, served to exacerbate the risk to which those consumers were exposed by virtue of the grounds of unfitness found proven.

189. I accept that the Defendant acted honestly and was not motivated by personal gain. In my judgment, however, he has by his conduct as found proven shown recklessness and incompetence to a marked degree. In my judgment, his conduct as found proven

renders him unfit to be a director of or otherwise concerned in the management of a Company.

Period of Disqualification

190. In the light of my finding of unfitness, a period of disqualification is mandatory. Under s.6(4) of the CDDA, the minimum period of disqualification is two years and the maximum period is fifteen years.

191. Both parties referred me to the guidance given in Re Sevenoaks Stationers. In Re Sevenoaks, Dillon LJ (Butler-Sloss and Staughton LJJ concurring) endorsed three brackets for periods of disqualification as follows:

(1) The top bracket of disqualification for periods over 10 years should be reserved for particularly serious cases. These may include cases where a director who has already had one period of disqualification imposed on him is disqualified again;

(2) The minimum period of 2 to 5 years disqualification should be applied where, though disqualification is mandatory, the case is, relatively, not very serious; and

(3) The middle bracket of disqualification from 6 to 10 years should apply for serious cases which do not merit the top bracket.

192. Both parties also referred me to the guidance given in Re Westmid Packing Service Ltd, Secretary of State for Trade and Industry v Griffiths [1998] BCC 836. In Westmid, the court explained that in determining the appropriate period of disqualification, the court should start with an assessment of the correct period to fit the gravity of the offence, bearing in mind that the period has to contain deterrent elements, and then allow for mitigating factors (such factors not being restricted to the facts of the offence). A variety of matters may be relevant in mitigation, including the director's age and state of health, the length of time spent in jeopardy, admittance of the unfit conduct, the director's general conduct both before and after the unfit conduct, and the periods of disqualification of co-directors that may have been ordered by other courts.

193. Mr Arumugam also referred me to Re Smooth Financial Consultants Ltd [2018] EWHC 2146 (Ch), where it was stated that in determining disqualification periods, the court should take into account all the relevant circumstances, including the Defendant's role and knowledge of the Company's financial position, the impact disqualification would have on his career prospects, and the extent to which he had been involved in the financial administration of the Company.

194. On behalf of the Claimant, Mr Arumugam submitted that the misconduct in this case falls within the top of the Sevenoaks brackets. In summary, he submitted that:

(1) the Defendant's conduct found proven, in (variously) causing and allowing numerous breaches by the Company of the 2012 Regulations, over a period of several months, had exposed the Company to the risk of criminal sanction and had put consumers' money at risk;

(2) the continued use of the ATOL logo had misled consumers as to the legal protection they would receive if they purchased travel arrangements from the Company;

(3) the activities forming the focus of this claim occurred in the context of a Company which had plainly been insolvent for a number of years and which accordingly was not in a position to refund consumers itself;

(4) a function of disqualification is deterrence; the court should send out a message to directors of similar companies; and

(5) it was clear that the public needed to be protected from this director, who had shown no remorse or insight in his witness evidence as to the gravity of what he had done.

195. On behalf of the Defendant, Mr Roohani submitted that in the event of a finding of unfitness, the minimum two-year period of disqualification should be imposed. He submitted that the Defendant's conduct could not sensibly be described as so serious as to warrant a top bracket disqualification, given that the top bracket is typically reserved for directors with multiple disqualification orders and/or those who have been found guilty of fundamentally fraudulent conduct.

196. He also urged me to have regard to the applicable mitigating factors. In this regard he referred me to paragraphs 1 and 60-78 of the Defendant's affidavit.

197. Paragraphs 1 and 60-67 of the Defendant's affidavit provide as follows:

> '[1] I am currently unemployed and care for my three children. I share custody with Ms Susan Buckley…
>
> [60] The disqualification period sought by the Claimant is very long and will see me prevented from being involved in the management of the Company until I am at least 50 years old. I have already been unable to act in the management of a Company given the ongoing investigations by the Claimant, which have spanned more than one year, and my financial position subsequent to the failure of the Company.
>
> [61] Furthermore, I understand that such a severe length of disqualification is reserved for serious instances of fraud and/or misfeasance. I have not personally benefited from the conduct complained of. The Company did benefit from the payments from customers for the holidays sold after 31 March 2017, however, the Company's bank statements show those funds being used in the ordinary course of business.
>
> [62] I took a cautious approach to my remuneration as a director of the Company and saw the business of the Company as a future investment, rather than an entity to provide significant cash flow to me personally. The benefits I received from the Company were limited to a minimal salary and the

> payment of personal expenses, which were all properly accounted for in the Company's accounts. The Company contributed towards the rent of the property I reside at because it occupied part of that property. When the Company hit cash flow difficulties the owners of the property, my parents, waived their entitlement to rental payments to assist with cash flow.
>
> [63] The bank statements exhibited to Mr Elliott statements demonstrate the minimal personal income I received and show that I drew [a total of] …£7,139 over a 9 month period [from 15 February 2017 – 10 October 2017].
>
> [64] Myself, my father and Ms Buckley's father each invested money into the Company…
>
> [65] Furthermore, I, together with Ms Buckley, gave a personal guarantee in respect of the Company's £20,000 overdraft facility, which I am still responsible for. Ms Buckley is currently attempting to make payments towards the debt as she works and I look after our children. The balance outstanding as at 25 February 2020 was £21,769.46.
>
> [66] I sincerely regret that the conduct of the Company has caused losses and understand that there may be a public interest in preventing such conduct again. However, as explained above, I did not complete the bookings and had taken steps to prevent ATOL certificates being issued by the Company. The CAA is responsible for enforcing its rules and appears to have kept my details for those purposes. Furthermore, I have absolutely no intention of operating a travel company again. It is, however, obvious that I am not particularly employable as an ex-director of a Company that operated in a very specific sector. It is likely that when I do have the ability to work again it will be in the form of me running my own business, via a limited Company, using one of the skill sets I have developed, such as website design.
>
> [67] Although the Claimant has offered a one-year 'discount' in the event I agree to an undertaking to be disqualified I do not consider such an offer to represent a genuine discount and believe that the appropriate period of disqualification, if one is appropriate at all, should be significantly less than 10-11 years.'

198. Paragraphs 68 – 78 of the Defendant's affidavit set out the Defendant's personal financial circumstances, which are extremely modest. In re-examination the Defendant confirmed that there had been no material change.

199. Paragraph 70 provides:

> [70] …. I mainly care for my three children who are currently aged nine, seven and four years old. I do not have a full-time job and live at a property that is owned by my parents. The Company and I previously shared the rent of £2000 for the property, however my parents have waived entitlement to rental payments since the Company got into difficulty. I do not currently pay rent. I have a partner, who earns £1,661 monthly (net) and assists with our living expenses. I do, wherever possible, freelancing work (website design) and gardening jobs, which generate a nominal monthly income of around £400-£600.

200. Paragraph 71 went on to provide:

> '[71] I do not legally own, have any beneficial interest in, have any control or otherwise over, any assets'.

201. In oral testimony the Defendant confirmed that Ms Buckley is still slowly paying off the debt owed by both Ms Buckley and the Defendant to the bank under their joint guarantee of the Company's overdraft. The Defendant had ended up looking after the children more, as Ms Buckley had needed to work more than she originally anticipated and the Defendant had found it difficult being in 'limbo' pending the outcome of these disqualification proceedings. The Defendant confirmed that he still had debts which he was trying to pay off on very little income and that he had no assets.

202. In the concluding paragraphs of his affidavit, the Defendant stated that (at [79])

> '[79] I am surprised by the Claimant's pursuit of a punitive disqualification period … in circumstances where the conduct complained of was carried out by a staff member of the Company. This is clear from the booking forms exhibited to Mr Elliott statements. I did take steps, on behalf of the Company, to prevent a breach of the ATOL scheme, as explained above'.

203. Save to the extent that any matters raised on the period of disqualification are inconsistent with my findings and conclusions in this judgment, I confirm that I take all such matters into account.

Conclusions on Period of Disqualification

204. In my judgment, on the facts as found, the Defendant's conduct warrants a period of disqualification falling within the middle of the Sevenoaks brackets. Whilst it is a serious case, it is not a particularly serious case warranting top bracket. The Defendant is a first-time offender and my finding of unfitness is based on recklessness and incompetence to a marked degree and not dishonesty or personal gain. In my

judgment the correct period to fit the gravity of the conduct found proven is eight years and, allowing for mitigating factors, it is seven years.

205. In reaching this conclusion, I take into account my findings as set out in this judgment, all of the circumstances as set out in the evidence and the following factors in particular:

(1) Whilst my finding of unfitness is based on recklessness and incompetence to a marked degree and not dishonesty or personal gain, it must be considered in context. The Defendant, as sole director of the Company, was operating in a highly regulated industry. His conduct as found proven, in (variously) causing and allowing numerous breaches by the Company of the 2012 Regulations, exposed the Company to the risk of criminal sanction. It also put consumers' money at considerable risk. Whilst the period over which the breaches occurred spanned only six months, I am satisfied on a balance of probabilities that the breaches (and therefore the risk to consumers) would have continued but for the fact the Company ceased trading and entered CVL. Even two years later, in 2019, the Defendant was adamant that neither he nor the Company had done anything wrong (see letter to Insolvency Service that year), having wrongly adopted the position that the holidays being sold by the Company did not comprise licensable business; against that backdrop, it is in my judgment legitimate to conclude that the unlawful sale of holidays with flights (and the attendant risk to consumers) would have continued but for the Company's cesser of trading.

(2) The continued use of the ATOL logo and related references misled consumers as to the legal protection they would receive if they purchased and continued with travel arrangements from the Company. It also risked undermining public confidence in the ATOL scheme and the legislative purpose of that scheme.

(3) The activities forming the focus of this claim occurred in the context of a Company which, as the Defendant knew, had been insolvent for a number of years and which had used monies received by consumers in the ordinary course of business, rather than applying such monies in payments to third parties for the holidays which the consumers had booked. The combination of these two factors served to increase the consumers' exposure to significant financial loss in the absence of ATOL protection.

(4) I further take into account the factor of deterrence. This is of particular significance in the context of a highly regulated industry.

(5) In my judgment, Mr Arumugam is also correct in submitting that the public needs protection from the Defendant. Whilst the Defendant expressed a degree of regret *for the events which have occurred*, on the written and oral evidence overall, it was clear that ultimately, he had very little insight as to his *own* role in, or responsibility for, those events and their consequences.

206. The factors raised in mitigation (save insofar as inconsistent with my findings and conclusions in this judgment) do however warrant a reduction in the period of disqualification from eight years to seven. In this regard I take particular account of the following:

(1) This was a very well-intentioned project from its inception. The Company had functioned successfully for a number of years until hit by the Ebola pandemic and the Brexit Referendum. The Defendant was already facing a number of pressures as a result of these two factors in the run-up to the planned ATOL renewal on 31 March 2017.

(2) The Company was small and the Defendant had little management support. A situation over ATOL renewal, which the Defendant initially hoped could be resolved quickly, rapidly developed into something that could not.

(3) The Defendant acted honestly but recklessly and incompetently to a marked degree.

(4) This was not a case in which the Defendant was motivated by personal gain. Over the course of 2017, the Defendant withdrew minimal sums from the Company, hoping to keep it afloat.

(5) Historically both the Defendant and other members of his family had invested their own personal funds into the Company. Those funds have now been lost.

(6) The Defendant also remains personally liable as joint guarantor (with Ms Buckley) for the Company's overdraft of approximately £20,000.

(7) The Defendant's age and employment prospects are further factors which I take into account.

(8) I also take into account the fact that the Defendant has already spent a length of time in jeopardy, awaiting the outcome of these proceedings, which were issued in February 2020 following investigations prior to issue. The extent to which this factor can be taken into account is, however, tempered by the approach which the Defendant has taken to this claim. This was not a case in which the Defendant readily admitted his unfit conduct. He blamed several others, including his accountants, Ms Buckley, the Company's customers for not arranging their own travel insurance and even (in his telephone interview with the Insolvency Service on 10 October 2018) the CAA. It would have been open to him to admit unfitness early on in these proceedings and simply to dispute the period of disqualification applicable. Instead, he has raised and contested a number of factual issues upon which he has lost and has disputed unfitness overall. Such factors have undoubtedly increased the length of time which it has taken to achieve final disposal of the disqualification claim. This affects the extent to which time in jeopardy can be taken into account in determining the ultimate period of disqualification applicable.

207. For all these reasons, I propose to disqualify the Defendant for a period of seven years. I shall hear submissions on costs and consequentials on the handing down of this judgment.

ICC Judge Barber