Neutral Citation Number: [2023] EWHC 3072 (Ch)

Case No: CR-2016-007673

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

IN THE MATTER OF WIFIME LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Rolls Building, Fetter Lane, EC4A 1NL

Date: 5 December 2023

Before :

Deputy Insolvency and Companies Court Judge Addy KC

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Between :

(1) THE OFFICIAL RECEIVER **Applicants**
(as liquidator of WIFIME LIMITED (in liquidation))
(2) WIFIME LIMITED (in liquidation)

- and -

(1) AZAM IQBAL HAQ **Respondents**
(2) TAMINA AZAD

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Mark Baldock (instructed by Clarke Willmott LLP) for the Applicants
The First Respondent, Azam Iqbal Haq, appearing in person
and the Second Respondent not attending

Hearing dates: 6 November and 5 December 2023

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JUDGMENT

Deputy Insolvency and Companies Court Judge Addy KC:

Introduction and background

1. As issued and at the time of the hearing before me, this was an application by the Official Receiver (the **"OR"**), acting as liquidator of Wifime Ltd, seeking essentially summary judgment against the First Respondent, Azam Iqbal Haq ("**Mr Haq**"), and default judgment against the Second Respondent, Tamina Azad, who was Mr Haq's spouse ("**R2"**). At all material times, Mr Haq was the sole recorded director and sole shareholder of Wifime Ltd (the "**Company**"). A winding up order was made in respect of the Company on 23 January 2017, pursuant to a petition presented by HM Revenue and Customs ("**HMRC**") on 21 November 2016.

2. The OR appeared by Mr Baldock of counsel and Mr Haq appeared in person. R2 was neither present nor represented. Although the proceedings and the Application had been served by the OR upon both of the Respondents at what was understood to be the appropriate residential address, during the hearing Mr Haq stated that R2 no longer resided at that address and that she had not resided at that address when the proceedings were served.

3. As issued, the Application sought the following relief:

    i) Default Judgment pursuant to CPR Part 12 against R2, in the sum of £74,057.93 (on a joint and several basis with Mr Haq). That sum being the total amount of debits recorded on the bank statements for Wifime Ltd with her name appearing as the payment reference in the 2-year period prior to the presentation of the winding up petition by HMRC. By the Points of Claim, the OR contended that such payments, which appeared on the face of the

Company's bank statements to have been made to her, were transactions at an undervalue for the purposes of section 238 of the Insolvency Act 1986 ("**IA1986"**) (being for no identified consideration) and R2 being a person "*connected with*" the Company pursuant to section 249(a) and 425 of IA1986 (such that insolvency of the Company was to be presumed at the relevant times and the relevant look back period being 2 years).

ii) Summary Judgment against Mr Haq for the following:

a) £24,005 in respect of "salary" payments made to Mr Haq to which the OR contends Mr Haq had no contractual entitlement (the "**Salary Claim"**);

b) £137,488.87, or alternatively £74,057.93, in respect of payments claimed to have been made gratuitously from the Company's bank account to R2 (the "**Payments Claims**"); and

c) £9,304.75 in respect of a sum claimed to be outstanding on Mr Haq's director's loan account with the Company as at the date of liquidation, together with interest thereon at the Official Rate of Interest published by HMRC, that being the applicable rate of interest identified in the Company's accounts (the "**DLA Claim**").

iii) Alternatively, an order striking out the whole of Mr Haq's Points of Defence for an asserted failure to comply with CPR 16.5.

4. In the further alternative, the OR seeks permission to amend the Points of Claim and further directions for service and evidence.

5. In support of the Application, the OR relies upon the supporting witness statement of Ms Crocker, of Clarke Willmott LLP, dated 26 April 2023 and the various documents which are exhibited thereto, together with the witness statement of the OR, Ms Hill, dated 6 December 2022, filed in support of the underlying substantive application for relief and the documents exhibited thereto.

6. Pursuant to Insolvency Rule 12.1(1) of the Insolvency (England and Wales) Rules 2016 ("**IR2016"**), the provisions of the CPR apply to these insolvency proceedings except insofar as they are disapplied by or are inconsistent with IR2016. Despite the Application properly drawing Mr Haq's attention to CPR 24.5(1), which requires a Respondent who wishes to rely on any written evidence at the hearing of the summary judgment application to file and serve such evidence at least 7 days before the hearing, Mr Haq had not filed or served any such written evidence. However, it became apparent during the course of the hearing that there was much that he wished to say in opposition to the claims made, although, to date, Mr Haq had strongly believed that he should not be compelled to respond to the OR's claims at all. It was unfortunate that Mr Haq had not sought to engage with the OR more constructively in advance of the hearing. Nevertheless, and notwithstanding his failure to comply with CPR 24.5(1), in accordance with the overriding objective it was appropriate to give Mr Haq the opportunity to respond fully to the Application, for the purposes of determining whether there was no real prospect of him successfully defending the relevant claims at a trial.

7. In view of the matters debated and the information which came to light during the course of the hearing before me,

i) at the hearing on 6 November, the OR did not pursue the alternative application to strike out the Points of Defence filed by Mr Haq; and

ii) as was openly anticipated by Mr Baldock at the hearing on 6 November (judgment having been reserved at the conclusion of the hearing and the court having sat late in order to hear the parties' arguments), on 8 November the OR filed a Notice of Discontinuance in respect of the proceedings against R2.

8. In such circumstances, the matters which remain for me to determine are whether summary judgment should be entered against Mr Haq in respect of all or any of the matters set out in paragraph 3(ii) (a) to (c) above (namely the Salary Claim, the Payments Claims and the DLA Claim) and/or, to the extent that summary judgment is not entered against him in any of those respects, the directions which would be appropriate for the ongoing proceedings.

Applications for summary judgment generally

9. CPR 24.3 provides –

" The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—

(a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

10. In relation to the principles to be applied, Mr Baldock referred me to and relied upon the following summary by Lord Justice Hamblen (as he then was) in *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37 at [37]:

"It was common ground that for the purpose of the present case the applicable principles concerning strike out and summary judgment may be conveniently summarised as follows.

(1) The court must consider whether the case of the respondent to the application has a realistic as opposed to fanciful prospect of success—in this context, a realistic claim is one that carries some degree of conviction and is more than "merely arguable".

(2) The court must not conduct a "mini-trial" and should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by the trial process.

(3) If the application gives rise to a short point of law or construction then, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should "grasp the nettle and decide it".

See Easyair Ltd (trading as Openair) v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15]: Arcadia Group Brands Ltd v Visa Inc [2014] EWHC 3561 (Comm) at [19]; Tesco Stores Ltd v Mastercard Inc [2015] EWHC 1145 (Ch) at [9]–[10]."

11. Mr Baldock further referred to and relied upon the Judgment of Chief Master Marsh in Punjab National Bank (International) Limited v Techtrek India Limited [2020] EWHC 539 (Ch), where the Chief Master said at paragraph [11]:

"it is well-established that if the applicant adduces credible evidence in support of its case, the evidential burden shifts to the respondent and the respondent must prove some real prospect of success or some other reason for a trial."

12. As Mr Baldock rightly pointed out, although the Court must not conduct a *"mini-trial"*, that does not mean it cannot evaluate the strength of the evidence before it

where there is a conflict and decide that a case has no real prospect of success. In this regard, he placed reliance on the following authorities:

a. *BFS Group Limited v Foley* [2017] EWHC 2799 (QB), in which Mr Justice Foskett said at paragraph [16]:

"I am, therefore, required to assess the pleadings and evidence at this stage to decide whether C has established as against each of the defendants to this application that there is no real prospect of succeeding in their defence at trial in relation to the particular claims identified in the application. In doing that I should avoid conducting a mini-trial and avoid deciding uncertain propositions of law on assumed facts. At the end of the day, the question of whether to grant summary judgment is a discretionary one: see per Lord Hobhouse of Woodborough, quoted at paragraph 12 above".

b. *King v Stiefel & Others* [2021] EWHC 1045 (Comm), in which Mrs Justice Cockerill said at paragraphs [21] to [22]:

"[21] The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that - even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial.

[22] So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up".

<u>The Salary Claim</u>

13. It is the OR's case (based on the information given by Mr Haq in his formal statement made to the OR in response to the Preliminary Information Questionaire following the making of the winding up order in respect of the Company (the "**PIQ Statement"**)) and which appears to be agreed by Mr Haq) that Mr Haq remunerated himself by:

i) Paying himself a *"salary"* that corresponded to his personal, tax-free allowance;

ii) Drawing against his director's loan account; and

iii) Declaring a dividend at the end of each financial year which would reduce, or extinguish, any balance in the Company's favour on his director's loan account.

14. As regards the Salary Claim, this was claimed by the OR on the asserted basis that there was no contractual entitlement to it, relying on Mr Haq's acceptance that he did not have a *written* contract with the Company for these purposes. On this basis, the OR alleges that Mr Haq had no service agreement with the Company and accordingly was not entitled to receive any salary, with the result that any payments characterised as such were required to be repaid by him. In support of this argument, Mr Baldock referred to and relied upon the Judgment of HHJ Davis-White QC (sitting as a Judge of the High Court) in *Hamuel Reichernbacher Limited v McDermott* [2022] EWHC 623 (Ch) at [195], where the Judge held that as there was no contractual entitlement to receive the relevant payment which had been made to the director, it was a payment made in breach of section 171 of the Companies Act 2006 and, on the facts before him, a defence pursuant to section 1157 of that Act (that the defendant acted honestly and reasonably) could not be made out. Whilst that part of the Judgment in fact concerned pension rather than salary payments, Mr Baldock relied upon it for the

proposition that there must be a contractual entitlement to receive any sum by way of remuneration and therefore including salary. It does not however say in terms that such entitlement must be pursuant to a *written* contract.

15. Furthermore, Regulation 82 of Table A (which applies to the Company pursuant to section 8 of the Companies Act 1985) provides the following in relation to the remuneration of directors:

"The directors shall be entitled to such remuneration as the company may by ordinary resolution determine and, unless the resolution provides otherwise, the remuneration shall be deemed to accrue from day to day."

16. During the course of the hearing Mr Haq accepted that he did not have a *written* contract for the payment of his salary but said that he had paid himself such amount by way of salary having decided to do so based upon advice received from the Company's accountants (in line with the circumstances described in paragraph 13 above and relied upon by the OR) and that such salary payments were always recorded as such within the accounts which were prepared by the accountants and which he approved and signed. The accounts which I was taken to Mr Baldock do indeed record such payments as salary paid to Mr Haq.

17. When asked what the OR's position was in relation to what effect the fact that such payments were formally recorded as salary in the Company's accounts signed by Mr Haq might have and whether it could be said that a relevant entitlement did exist notwithstanding the absence of a formal written contract in circumstances where he was a sole director signing such accounts and/or given that he was the sole shareholder and having regard to the *Duomatic* principle, Mr Baldock took instructions and confirmed that the OR did not press the application for summary

judgment in respect of the Salary Claim accepting that fuller argument on such issues would be appropriate in due course having had an opportunity to consider such factual and legal issues further. In those circumstances, I cannot conclude (for the purposes of CPR 24.3) that Mr Haq has no real prospect of successfully defending the Salary Claim.

18. Accordingly, the Salary Claim will need to proceed to be determined at a trial.

The Payments Claims

19. By the Payments Claims, the OR seeks an order against Mr Haq for him to repay to the Company £137,488.87, that being the total amount of payments made from the Company's bank account with the payment reference "*Tamina Azad*" (being the name of R2) in the period from 29 April 2014 to 30 November 2016, of which £74,057.93 was paid from the Company's account during the period of 2 years prior to the presentation of the winding up petition.

20. As currently pleaded in the Points of Claim, the OR seeks repayment of these sums on the asserted basis that "*there was no legitimate business, or other, reason for the First Respondent to cause, suffer or procure the Company to make those payments to the Second Respondent"*. Accordingly, the OR avers that the payments were made by Mr Haq in breach of sections 171, 172 and 174 of the Companies Act 2006. In Section C4 of his Points of Defence, Mr Haq has stated "*The payments that refer to Tamina Azad are the DLA/Dividend payments that I made throughout the year to myself as explained above"* and that "*The payee name is just a legacy from many years ago that I did not change"*. The reference to DLA payments is a reference to drawings on his

directors loan account. As explained above, both the OR's and Mr Haq's position is that during the course of the year Mr Haq would make drawings against his directors loan account which would subsequently be reduced or extinguished at the end of the financial year by the declaration of dividends.

21. During the course of the hearing, Mr Haq produced a screen shot of a bank account which he contended was the account to which all of the payments showing the reference "*Tamina Azad*" were made and which showed him to be the sole beneficiary of that account. The OR has not yet been provided with fuller bank statements in respect of such account in order to be able to verify that it received *all* of the payments which comprise the £137,488.87 claimed. But nor has the OR sought access to payment information from the Company's bank, which (if obtained) would identify the details of the bank account to which the relevant payments were made. Whilst the proceedings against R2 were live, this was obviously an issue of considerable significance. As regards the application for summary judgment against Mr Haq and now that the proceedings against R2 have been discontinued, I proceed on the basis that Mr Haq avers that all of the payments which are listed in the Schedule to the Points of Claim were made to him rather than to R2.

22. Although it is contended by the OR that these payments (whether they were received by Mr Haq or paid to R2) were "*gratuitous alienations*" and therefore payments made in breach of Mr Haq's duties as a director, during the course of the hearing Mr Haq pointed out that in respect of at least a significant number of the payments claimed the payment reference includes a second line (in addition to the reference to R2 by name) and he contended that such second lines provide an indicator of their purpose. Thus,

for example, the payment reference for the debit of £200 on 8 May 2016, read in full states:

"Tamina Azad

Nexgen Solutions S"

Mr Haq explained that 'Nexgen Solutions' was the name under which the Company was originally intended to be incorporated and he contended that the addition of the letter 'S' to this second line indicated, wherever it appeared, that the corresponding payment was in respect of his salary (and would therefore already be encompassed by the Salary Claim).

23. By way of further example, he pointed out that the debit on 30 June 2016, when read in full states:

"Tamina Azad D

Azam Haq Expenses"

Perhaps unsurprisingly, albeit without further evidence or explanation at this stage, he contends that this would have been reimbursement to him for expenses (repeating that the payments were made into his account and not to R2 as is currently pleaded).

24. After the hearing, Mr Baldock provided to the Court an amended schedule of all the payments claimed by the OR (totalling £137,488.87) which now additionally incorporates the second line of each payment reference. It is apparent from this amended schedule that a substantial number of the payments fall into the 2 asserted categories that I have identified above, i.e. with the additional reference of either "*Nexgen Solutions S"* or "*Azam Haq Expenses*".

25. Moreover, Mr Baldock was unable to confirm that there was no double counting as between the Salary Claim and the Payments Claims.

26. Accordingly, whilst the OR is understandably frustrated by the lack of formal evidence provided by Mr Haq in response to the Application, this is not a case in which I can conclude that in relation to the Payments Claims falling into the 2 categories identified above that there is no real prospect of them being successfully defended at a trial.

27. In addition, whilst some of the Payments Claims have a second line reference which refers only to '*Nexgen Solutions'* (without the 'S') or to "*Tamina Azad D*" and therefore do not fall within the particular explanations put forward by Mr Haq at the hearing, given that the other (and majority) of Payments Claims will be proceeding to trial in any event, additionally addressing these further Payments Claims at the same time will not materially add to the length of the trial and in my judgment it is preferable for the Court to determine the same with the benefit of having heard all of the available evidence, including Mr Haq's full account in respect of all of the relevant payments and any further evidence which may be obtained including in relation to the recipient bank account/s of the payments.

The DLA Claim

28. As to the DLA Claim for £9,304.75 (together with interest thereon), this comprises a claim for repayment of the £9,361 shown as outstanding from Mr Haq as of 31 October 2015 in the Company's accounts signed by Mr Haq for that financial year end and after applying a credit of £56.25 for the financial year ending 31 October 2016.

29. The credit of £56.25 is explained in the witness statement of Ms Hill as having been derived from the balance shown on the Company's nominal ledger report for the

directors loan account, which showed a balancing credit of £56.25 as at 31 July 2016, with the last entry being recorded for 26 July 2016.

30. This computation also accords with the information which Mr Haq provided in his PIQ Statement. In response to the question "*Has the company made any loans to you"*, Mr Haq answered 'yes' and provided the following information in the corresponding table:

Officer or associated company	Date of loan	Amount of loan	Repayment made (including dates)	Amount now outstanding
AZAM HAQ	31/10/15	-9360	last finance	
	31/07/16	+56.00	CREDIT	

31. However, it is of note that in his PIQ Statement Mr Haq did not specifically confirm the amount which he accepted was outstanding (that column having been left blank). In any event, at the hearing, Mr Haq contended that by the time the Company entered liquidation he had in fact repaid the amount which was shown as drawn on the directors loan account as at 31 October 2015. In support of that contention he referred, by way of asserted example, to 2 payments made into the Company's bank account with his name appearing as the reference in September 2016, totalling £6500, which it is was his contention (but which is not yet specifically pleaded in his Points of Defence) that it should have been applied against the DLA Claim. I also note that additional similarly referenced payments were made into the account of £2000 on 31 August 2016, £1000 on 2 September 2016 and £2400 on 4 October 2016.

Accordingly, it appears (at least without further evidence or explanation as to their source or purpose) that within the financial year ending 31 October 2016 (and after the last date shown on the nominal ledger report relied upon by the OR), Mr Haq paid £11,900 into the Company's bank account.

32. Mr Baldock was unable to provide any answer as to whether (or if not, why not) these apparent credits had been taken into account. I also note that given Mr Haq's position is that he (rather than R2) was the true recipient of the payments listed in the Schedule to the Points of Claim, it is possible that there may be some double counting between the Payments Claims which pre-date 31 October 2015 and the DLA amount recorded in the accounts for that financial year end. Accordingly, without any further evidence in relation to these issues, I cannot be satisfied that Mr Haq has no real prospect of successfully defending the DLA Claim at trial.

Conclusion

33. In the circumstances and the proceedings against R2 having now been discontinued, directions should be made for the claims against Mr Haq to proceed to trial as swiftly as possible. I note that in the event that the application for summary judgment was unsuccessful, the OR intended to seek permission to amend the Points of Claim and, in view of the matters which were aired during the course of the hearing (as well as the subsequent discontinuance of the proceedings against R2), that would seem to be the sensible course in any event. I will hear submissions from the parties in relation to appropriate further directions at the time of handing down this Judgment.