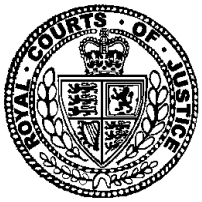

Neutral Citation Number: [2024] EWHC 1024 (Ch)

Case No: CR-2021-001065

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

IN THE MATTER OF ACTIVE TICKETING LIMITED
And
IN THE MATTER OF THE COMPANY DIRECTORS' DISQUALIFICATION ACT 1986

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

Date: 02/05/2024

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

- -

Between:

THE SECRETARY OF STATE FOR BUSINESS AND TRADE	**Claimant**
- and -	
(1) GEORGE EDWARD GORING **(2) LEE JON BOOTH**	**Defendants**

- -
- -

Giselle McGowan (instructed by **Insolvency Service Legal Department**) for the **Claimant**
Mr Goring and Mr Booth in person

Hearing dates: 11,12,13,14 April 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 2 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief ICC Judge Briggs:

1. Active Ticketing Limited (the "Company") was incorporated for the purpose of acquiring, developing and marketing mobile ticketing software at scale. The intention of Mr Goring and Booth, who were to become directors in the Company, was to combine the technology developed by a company known as Eskimo Media & Technology Limited ("Eskimo"), in which Mr Booth was a director, and the business of Bright North Limited ("Bright North"), in which Mr Goring was a director. The medium to long term goal for the Company was to float it on an international stock exchange.

2. A successful Initial Public Offering ("Initial Offering") would need underwriting. The Company had hoped that an investment bank would underwrite the Initial Offering and arrange for the shares to be listed on the NASDAQ exchange.

3. The Company needed short-term finance to ready itself for an Initial Offering.

4. This case concerns the raising of short-term finance and in particular, the conduct of Mr Booth and Mr Goring at the time of and following a bond issue.

5. The relevant events took place soon after incorporation in January 2015 until the end of 2017.

6. A petition to wind up the Company was presented in January 2018 and an order to wind up was made on 20 June 2018.

7. On 21 November 2018 Lloyd Hinton of Insolve Plus Limited was appointed liquidator.

8. On 14 June 2021 the Claimant issued a claim form whereby it seeks an order that Mr Goring and Mr Booth be disqualified as directors of a company pursuant to section 6 of the Company Directors' Disqualification Act 1986.

Early days

9. Mr Booth and Mr Goring operated Eskimo and Bright North in the same offices. Mr Goring explains in his written evidence that he and Mr Booth decided to approach financiers to raise equity for the businesses to enable faster growth. Malcolm Johnson "pitched" to them and raised the idea of amalgamating the businesses with the aim of raising capital and listing. As I understand it, Mr Johnson worked with his son in a company known as Lochwood Capital. The basis of the combined operation would be the software built and owned by Eskimo, known as Stikit. The software platform had the potential to provide specialist ticketing services that could work on mobile phone networks and reach a large market.

10. The law firm Gordon Dadds LLP were instructed by the Company to amalgamate the businesses of Eskimo and Bright North and provide advice on the Company's admission to trading on a NASDAQ exchange. Subsequently, the Company was incorporated in October 2015 as Active Ticketing Plc. Mr Goring was appointed director and Chief Executive Officer. Mr Goring appointed director. They both held 11050000 ordinary shares with a nominal value of £00.10.

11. Eskimo licenced the Stikit software to the Company.

12. Mr Johnson introduced several facilitators and advisors. First, Keswick Global AG who carried out a due diligence process and made recommendations for the preparation of an Initial Offering. Secondly, Danske OTC ("Danske") who were to be the primary underwriters. And thirdly, Trend Advisors ("Trend") a Serbian based organisation, to act as secondary underwriters.

13. Funds had been provided to the Company from shareholder pockets. More was needed to capitalise the Company. Advisors pointed Mr Goring and Mr Booth toward Level 7 Global Holdings Corporation. Mr Goring explains:

> "Level 7 agreed terms in mid-April 2016 to make an investment of £1.5 million (Level 7 worked in Euros, its original funding agreement was for an investment of €1,687,500, equivalent to £1.5 million), which was sufficient to satisfy the regulatory working capital requirement for a NASDAQ listing and to cover the listing fees. However, notwithstanding signing a binding funding agreement, Level 7 failed to pay its first tranche of funds, €562,500 when drawdown was requested."

14. Level 7 was not the only prospect. The Company looked to private equity. It reached an advanced stage of negotiating an investment from the Ngiam family based in Singapore. Due diligence had been conducted. The family asked for personal guarantees from the directors. The anticipated funds did not materialise, as the directors were not prepared to provide personal guarantees. The relationship with the Ngiam family terminated in or around June 2016.

15. Mr Goring's evidence, which on this issue is not disputed, is that Lochwood and Keswick advised that the offer of a short-term bond would bridge the funding gap. Mr Goring says:

> "Keswick, Gordon Dadds, Malcolm Johnson, Lochwood, Duff & Phelps and CCW all advised on postponing the IPO and that process until the Company had raised further funds. During this period it became clear that the collective professional advice was that a bond was a viable option and the Company's fund-raising efforts were focused in that direction. The bond instrument was drawn up by Lester Aldridge originally on the basis that it was an unsecured bond. However, on the advice of Lochwood Capital, Mr Booth and I looked at progressing with a secured bond, backed by a bank guarantee. We were advised that the bond would sell more easily to investors if it was backed by a guarantee. Following discussions with Malcolm Johnson and Lochwood, Malcolm Johnson and Lochwood contacted Trend. Trend offered a bank guarantee as precursor to the underwriting. I have already explained earlier in this witness statement how the guarantee was structured."

16. Mr Goring's evidence is that Sberbank provided a guarantee to Trend, and Trend held the guarantee as agent for the Company. His evidence is that he flew to Belgrade to execute the guarantee before a Notary.

17. The primary and secondary underwriters appeared to have been supportive. The situation changed in October 2016 when Danske OTC withdrew due to an internal audit issue. Trend stepped in, offering to underwrite €35 million of an Initial Offering.

18. On 14 October 2016 the Company issued the first bond. In total £5,060,000 of bonds were sold to 213 individuals who understood, when purchasing bonds, that the bonds were backed by a bank guarantee.

The Bank Guarantee

19. There is some dispute about the part played Lester Aldridge LLP in obtaining and executing the bank guarantee.

20. Mr Goring's position is that:

> "…the Company took extensive advice from professional finance advisers, legal advisers and underwriters. High end, comprehensive professional advice was taken on all technical matters whose professional expertise was required."

21. Gordon Dadds LLP were engaged from March 2016. The Gordan Dadds retainer was limited to the acquisition by the Company of Eskimo and Bright North, and admission of the Company to NASDAQ.

22. Lochwood Capital advised that a secured bond would be more attractive to investors. The risk of default could be tempered by a bank guarantee.

23. As regards Trend Advisers, no engagement letter is in evidence. The Secretary of State accepts that Trend Advisors, based in Belgrade, Serbia, were engaged to arrange the guarantee for the bonds and were to become the escrow agent. On 6 September 2016 Bojan al Pinto wrote to Mr Goring and Mr Booth to state:

> "Trend Advisors have arranged with Sberbank a bank guarantee to support obligations of Active Ticketing with regard to the EUR 25m Bond Issue…[which] shall be secured with a first charge over AT assets…It is expected that the MT 760 will be issued during the course of this week…Draft wording of the bank guarantee will be available by September 9th 2016, a copy of which I shall send to you for your approval."

24. The e-mail of 6 September 2016 and conversations had with Mr Al Pinto of Trend Advisors would lead Mr Mr Goring and Mr Booth to reasonably understand that:

    24.1. A bank guarantee had been arranged with Sberbank. The guarantee was to reduce the risk to bond holders and would be paid out in the event that the Company defaulted on the coupon or capital payments;

    24.2. Trend Advisors was willing to act as escrow agent for the Company;

    24.3. An escrow agreement would be entered between the Company and Trend advisors setting out relative obligations;

24.4. Trend Advisors would hold (as escrow agent): (i) assets sufficient to pay some of the coupons and (ii) the original guarantee signed and executed by Sberbank on the one hand and the Company through its directors on the other. The escrow agent would receive a swift MT760;

24.5. Draft wording of the Sberbank guarantee would be available by 9 September 2016.

25. The Defendants acted on advice and incorporated AT Management Services Limited ("Management Services") on the same day. Mr Paul Williams was appointed the sole director.

26. The purpose of Management Services was to put distance between the Company and bond holder funds. Management Services was responsible for paying commissions to sales companies and other expenditure. The net receipts would be transferred to the Company for the further development of the software and expenses incurred in preparing for the Initial Offering.

27. Management Services was wholly owned by the Company.

28. On 22 September 2016 Bojan Al Pinto sent an e-mail to the Company attaching "Sberbank plc Moscow Letter of Intent to Active Ticketing plc London re issuing of bank guarantee."

29. By a second e-mail sent on the same day a "standard bank guarantee" from Sberbank. The following day Trend Advisors sent the "draft agreement for bank guarantee".

30. The documents sent on 22 and 23 September 2016 were in Russian, but there is evidence of an English translation.

31. On 3 October 2016 Trend Advisors informed the Company that the guarantees could not be for a term of longer than one year. Consecutive guarantees would be issued so that the "bondholders would remain secured at all times for the [two-year] term…"

32. The evidence given by Mr Goring and Mr Booth is that the Company relied on Lester Aldridge to provide:

> "legal advice and drafting assistance in the preparation of documentation in connection with a convertible corporate bond proposed to be issued by the Company; advice in connection with the preparation of the underlying bond documents and negotiating the security documentation required by Sberbank GB for the purpose of consummating the guarantee, as well as preparing and finalising all documentation required to facilitate the bond offering."

33. The documentary evidence demonstrates the limits of the involvement of Lester Aldridge in respect of the bond guarantee. Initially, as Mr Goring states in his written evidence, the bond was to be unsecured, but this changed. He asked Mr Holden and Lester Aldridge to provide a draft instrument and followed up the request on 25 August 2016. Mr Holden sent the draft bond as an attachment to an email response saying:

> "*We need to work out how the actual bank guarantee will work (i.e. how can funds be drawn down from the blocked account in*

> *the event that we need to because of a shortfall*). Has the depositor confirmed with you how they intend for this to happen? Clearly, you will want a written agreement in place with them (I would suggest a short form letter agreement to do this), but more *importantly we need to ensure that any enforcement can be implemented*. *I will leave this with you and Alex for the purpose of getting the bond offer document shipshape*. Later this evening, I will put together a note for everyone re. the transaction structure, as there are a few details/questions etc. which should be fleshed out, and it would be good to ensure everyone is on the same page." (emphasis supplied)

34. Alex Johnson (son of Malcolm Johnson) was a partner in Lochwood Capital, one of the advisors to the Company.

35. A month passed when Lester Aldridge received a summary term sheet, a summary of the bond instrument and the SWIFT letter.

36. On 29 September 2016 Simon Holding wrote to Mr Goring, who had assumed responsibility for the bond issue, guarantee and work toward the Initial Offering:

> "The SWIFT message translation, or I should say two different translations (attached for ease of reference), looks like it has been completed from a draft message. No problem in and of itself, but clearly there are some very salient facts missing; i.e. the fact that the funds are reserved in connection with the AT bond transaction and the amount of funds that are reserved. The point I am making is that if the SWIFT has been provided in draft form, it clearly has little (read zero) value and should provide no comfort to AT (yet). If the funds are committed into a blocked account, you should ensure that the final SWIFT message is obtained from the bank.
>
> The Word translation attached refers to a bank letter guarantee; which is clearly very positive. I would expect to see this document, which would further evidence the facility and its permitted use. However, as per my comment above, the two translations you forwarded are not the same and the pdf version does not refer to a guarantee. It would be helpful to know which document is the correct translation for the purpose of ensuring the provisions referred to in the term sheet are correct.
>
> As per our conference call with Ash, we will also need the contact details of the relevant persons at the bank who are able to confirm the details contained in the SWIFT and we also need to ensure that the relevant permission(s) is/are provided for the purpose of AT being able to draw down on the blocked funds in the event of a default."

37. Lester Aldridge cautioned that the securely transferred MT760 message, sent via the Society for World Interbank Financial Communications was in draft form and therefore

could not be relied upon. The warning to the Company was that the final bank letter guarantee should be seen and checked against the term sheet, and the details of the security should be understood (money to be held in a blocked account). Mr Holden notified the Company that contact details of the relevant persons at Sberbank should be obtained, and permissions given for the purpose of any drawn down if the security comprised money held in a blocked account.

38. It appears that Mr Holden had not seen the Escrow Agency Agreement.

39. The draft bond names Sberbank of Russia as the guarantor. The translation to English (the bond and guarantee were sent in Russian) are included in the documents before the court. It includes a provision for payment:

> "The payment shall be made upon written request from Beneficiary (by telex) and shall be received not later than in 10 days after maturity date."

40. In evidence is a Certificate of the guarantee and a guarantee.

41. Mr Goring and Mr Booth say that the Sberbank guarantee was finalised on or by 30 September and before the first issue of bonds to investors September 2016.

42. An unsigned copy of the Escrow Agency Agreement includes the following provision relating to the setting up of the escrow account:

> "Within three (3) Business Days from the date first written above, Active Ticketing shall (i) instruct Sberbank to confirm the Bank Guarantees to the Escrow Agent, and (ii) transfer the amount equal to Active Ticketing liabilities for total interest to be duly paid to the Bond Holders for coupons under the Active Ticketing Bond Issue Term Sheet to the Escrow Account."

43. If the Company defaulted on the bond obligations a bond holder was to give notice:

> "If the Bond Holders give a notice to the Escrow Agent that an event of default has occurred on the principal of the Bond Instrument within ten (10) Business Days from the date of such default occurring, the Escrow Agent shall give a notice to Active Ticketing of receiving a notice of the event of default by the Bond Holders and require settlement on the principal of the Bond Instrument within five (5) Business Days. If no notice of settlement is received within seven (7) Business Days from the date of the Escrow Agent giving a notice to Active Ticketing of receiving a notice of the event of default by the Bond Holders, the Escrow Agent shall inform Sberbank of the event of default on the principal of the Bond Instrument and activation of the Bank Guarantee."

44. The Escrow Agreement provides a dispute resolution clause and:

> "The Escrow Agent shall receive a one-time fee of 24,000.00 EUR."

45. It is the evidence of Mr Goring and Mr Booth that Mr Goring signed the documentation including the bank guarantee, in Belgrade. The guarantee is said by them to have been executed at a Sberbank office. They both (not at the same time) visited the Sberbank office when they were taken through some form of "know your client" process.

46. It is their uncontested evidence that they visited the premises of Trend Advisors and paid Trend Advisors.

47. Although the Escrow Agency Agreement does not bear a date, it is marked October 2016. Mr Booth flew to Belgrade to sign documentation with Trend Advisors and Sberbank in early October 2016.

48. In respect of the guarantee, Mr Goring states:

> "I repeat that both Mr Booth and I went to Belgrade to execute documentation in front of a notary relating to the guarantee. Because the guarantee was actually given in favour of Trend, Trend told us that the originals were being held by them. As set out later in this witness statement, we were provided with subsequent documentation by Trend which we had no reason to doubt."

49. A minute of a meeting dated 30 September 2016 records the following resolution:

> "It was agreed that the company should for strategic reasons approve a corporate bond for €35 million and has the ability to market and service this bond while meeting its current obligations."

50. In oral evidence Mr Goring and Mr Booth explained that there were many board meetings that involved non-executive directors and advisors. The meetings were minuted, but are not before the Court. The evidence is that the minutes were provided to the Official Receiver on liquidation. If this is a true statement, and there is no reason to doubt it, this is the only minute to survive the collapse of the Company. It is not uncommon, as Mr Booth said, for some sort of chaos when a company enters liquidation as many events collide: staff leave, IT is shut down, computers handed-in, desks and filing cabinets are emptied and the working premises vacated.

51. The evidence is that the Company intended to repay the bond holders within a very short period. This would be achieved by finding an institutional investor and taking the Company public.

52. Not long after the first bond issue, an institutional investor was introduced by Trend Advisors, perhaps in association with Lochwood Capital.

53. The First National Bank of South Africa through its investment company Lesapan (Pty) Ltd expressed serious interest. Mr Goring flew to South Africa to meet with the bank. On 26 October 2016 the Company was asked for confirmation of the bank guarantees

(No.086/17 and No.087/17) by SWIFT to a bank account in the name of Lesaspan held at the First National Bank:

> "As you are aware, Active Ticketing is issuing a EUR 35m convertible bond instrument with 2 years maturity (the 'Bond Instrument'). The Bond Instrument was offered and sold to LESASPAN (PTY) LTD, SOUTH AFRICA (the 'Bond Holders'). The Bank Guarantee No. 086/ 17 and the Bank Guarantee 087/ 17 were styled to the Bond Holders of Active Ticketing. Active Ticketing therefore requires a confirmation to the Bond Holders' account as per the account details hereinabove."

54. Trend Advisors had already stated that there was a technical problem with sending the MT760 and, according to Mr Goring, it was an expensive exercise. He says that Trend Advisors thought it better to wait to send the MT760 once an institutional investor was involved and the existing bond holders repaid.

55. Lester Aldridge remained involved but to a lesser extent in the period after 20 September 2016. On 14 November 2016 Mr Goring wrote to Mr Holden attaching 3 documents. One of the documents is titled "Sberbank guarantee terms (certified English translation) and another "Draft agreement". Mr Goring writes:

> "Attached are: 1. The signed off MT760 agreements (2 x for €17.5m totalling €35m) both in Russian. 2. A certified translation…these clearly outline the terms of the guarantee 3. The draft agreement between AT and SB. This was executed in Belgrade a few weeks ago so it has been signed. We are waiting for hard copies to arrive. If you need proof pdf signature for the purpose of your call with Paul, then let me know and I can get Bojan Al Pinto (who oversaw the signing) to forward a scanned copy."

56. There is no e-mail response from Mr Holden or e-mail trail to understand what question was being asked of him. It may be that Mr Goring was sending him the documentation for interest only.

57. On 22 December 2016 the Company was informed that due to sanctions there was a difficulty with transmitting the MT760. Trend Advisors provided some assurance:

> "Notwithstanding the above, we hereby confirm the Bank Guarantees remain valid and enforceable and we are committed to the project with the Principal as outlined in our letter of intent dated 22 September 2016. If this was the letter seen by Lester Aldridge, it should have given little comfort to the Company.

58. The explanation as to the structure of the Guarantee provided by Mr Goring in his written evidence, maintained before the Official Receiver on liquidation of the Company and at trial is:

> "The Bank Guarantee given by SberBank was a guarantee given in favour of Trend Advisors but purely for the purpose of the bond issue being undertaken by the Company. The guarantee was secured by assets under management whichTrend Advisors had with SberBank. For the Company's part, Trend had security over a large block of shares. Trend were charging a company a percentage fee (which I recall was around 1.5%) for any investors in the bond which Trend introduced. In particular, First National Bank of South Africa ("FNB") were introduced by Trend, and I shall refer to them later in this witness statement. They were proposing to acquire €17.5m of the total €35m bond. However, Trend's primary focus and their real incentive was in relation to an IPO They were going to act as one of the underwriters of the IPO and would receive a significant fee in the form of shares for doing so."

59. Mr Goring explains that when he flew to Belgrade to execute the guarantee and other documentation, the Company paid for a translation and relied on advice provided by Mr Al Pinto of Trend Advisors.

60. Mr Booth states in his written evidence he was required to take "notarised documentation" to the meeting in Belgrade. He says that the documentation was "checked and received by the manager at the Sberbank branch". He had taken identity documents such as his passport, and at the meeting he signed documentation to open a bank account with Sberbank.

61. Negotiations with the First National Bank of South Africa continued and in early 2017 were evidently progressing. In January a draft loan agreement between Lesapan and the Company was circulated whereby the Company was to lend money to Leasfin, a subsidiary of Lesapan, for the purpose of capitalising its expansion into the development and sales of the ticketing technology owned by the Company. On 10 February 2017, Kathleen Yacaarino of Deutsche Bank wrote to Mr Goring:

> "We, Deutsche Bank, would like to inform you that we are actively working on the project. Please note that the planned issuing and delivery would take place no later than February 10, 2017."

62. The letter is curious in that the letter is dated the same day as the planned issuance and delivery; nevertheless its authenticity is not in question in this trial.

63. There followed a serious of e-mail exchanges between Mr Sosso, Mark Bloom and "gary" of Monte Carlo Capital and Mr Goring. As I understand it Monte Carlo Capital had been approached and were interested in investing. The named individuals at Monte Carlo Capital were well known to Mr Goring who had previous dealings with them. They had seen the Deutsche Bank letter and were suspicious of its providence. On 11 February 2017 Mark Bloom wrote:

> "Seems pretty simple. It is a fake!"

64. He advised Mr Goring to "Drop it all and get on a plane" to visit Deutsche Bank.

65. Mr Goring's evidence in cross-examination on the point was that he put Mr Sosso in touch with Mr Al Pinto who quelled the concerns expressed in the e-mail chain. Throughout the next months, Mr Goring kept Mr Sosso informed of the progress with the potential South African investment and simultaneously worked on an investment from a Hong Kong investor (which had failed by early May 2017).

66. In this period the Company entered an agreement for the sales of tickets in Dubai for a substantial number of sporting and other events and Mr Booth had flown to America to negotiate running the ticket sales of the US Super Bowl.

67. Bonds continued to be sold. The amount of money raised by the Bonds did not provide the Company with sufficient working capital.

68. It appears that third party marketing agents, advisors and other agents absorbed a significant proportion of the funds raised: sales and marketing received approximately 50%. Mr Goring was paying for plane tickets and hotels out of his own pocket and Mr Booth was using funds from Eskimo to keep the London operation running. They continued in the forlorn expectation that a large investor would be found, and the Company taken public. That prospect appeared to them attainable, in April 2017.

69. On 7 April 2017 a minute of a board meeting records the possibility of Lesapan purchasing bonds to a value of €28m. The contemporaneous document records that "verbal" funding commitments from some individuals had been received and:

> "Mr Goring further noted that he also received confirmation from Amanda Steenkamp of FNB, who were willing to invest up to Euro 28 million in active Ticketing through an intermediary company, Lesaspan, under the bond, that she had received confirmation from Helen Melin at Deutsche Bank (the correspondent bank of Sberbank) that the guarantee from Sberbank had been satisfactorily transmitted through the banking system from Sberbank, under an MT760 via Deutsche Bank, to FNB, for the benefit of Lesaspan. There remained certain inter-bank checks that required completion, but as soon as these are completed, Active Ticketing will receive a copy of the fully completed MT760 (inter-bank transmission of the guarantee) and can start to draw down the funds from FNB. The copy MT760 is expected to be received on Monday 10 April.
>
> Mr Goring also went on to say that, once Active Ticketing was in possession ofa copy of the final, fully authorised MT760, upon the provision of it to Stephen Wheatley (the manager of a number of discretionary funds with values of between $50 million and $200 million each), Stephen Wheatley would be prepared to take up £2.0 million of the bond and invest it within 48 hours of the provision of the copy MT760. He would further be prepared to take up additional tranches under the bond of up to £10 million, subject to their being sufficient headroom under the bond instrument and the guarantee from Sberbank."

70. The minute also records the expectation that an organisation known as Level 7 would invest in May 2017. There is no doubt that a large investment was required within a short period as the money "burn" was high with £80,000 a month being paid on wages; £35,000 on directors' remuneration; £65,000 a month on consultants, and a further £35,000 on overheads such as rent, insurance and rates. The estimate of the overall monthly "burn" was £260,000.

71. Trend Advisors wrote to the Company on 13 April 2017 making a demand for payment pursuant to "our Bank Guarantee Settlement Agreement". The fee charged was said to be in respect of Trend's successful agency work in procuring a bank guarantee by Sberbank in favour of Deutsche Bank for the purpose of providing security to the First National Bank:

> "Bank Guarantee No. 542BGA1700109 dated March 22nd, 2017 to the amount of 35,000,000.00 EUR was delivered this afternoon by Deutsche Bank AG Frankfurt, active on the basis of bank guarantees previously issued in its favor for the benefit of Active Ticketing, to First National Bank - South Africa. Copies of the correspondence between the two banks are enclosed in this notice."

72. The enclosed correspondence stated that Deutsche Bank had sent the First National Bank a SWIFT MT760 in favour of Lesaspan. The enclosed MT760 refers to a bank guarantee for €35m. The Applicant as "Siemens Medical Solutions AG". The bank guarantee reference number is stated as 542GA1700109 and dated 22 March 2017. An e-mail purportedly sent from Deutsche Bank to the First National Bank states:

> "Dear Ms. Steenkamp, we hereby notify you of sending a bank guarantee to your customer. A copy of the dispatch and a letter of notification is attached."

73. On the same day Mr Crocker (the Company's CFO) wrote to Mr Booth:

> "Why is the applicant of the SWIFT given as "Siemens Medical Solutions AG"?"

74. Mr Booth contacted Mr Goring and Mr Goring contacted Mr Al Pinto. Monte Carlo Capital raised the same query. The evidence on this issue is hazy, but Mr Goring was led to believe that the MT760 was a test run to make sure that the SWIFT messaging was working. Whatever the situation the investment from the First National Bank did not proceed and the Company did not pay the fee demanded by Trend Advisors.

75. In or around this time Gordon Dadds were replaced by Lewis Silkin as solicitors engaged to work on the Initial Offering. Gordon Dadds subsequently sought payment of its fees which took some time to resolve. They also asked for the Bond documentation, including the guarantee, ostensibly to satisfy themselves that money paid by the Company to satisfy the fees charged, was the Company's money. Gordon Dadds accepted payment following receipt of signed copies of the guarantee and certificate of guarantee.

76. The Secretary of State's written case, pursued at trial, was that "Although Gordon Dadds did accept payment from Active, there is no evidence in the documents that they provided

to the Liquidator that they ever saw the purported bank guarantee". The Secretary of State conceded during closing that the guarantee had been sent to Gordon Dadds.

77. In June 2017 Mr Booth sought out a company known as CQRS, to find new equity investors in the Company. Mr Quentin Solt of CQRS asked for a copy of the Sberbank guarantee. It does not appear to have been supplied.

78. The Secretary of State's case is that it was not supplied because it did not exist.

79. Time was running out for the Company. The coupons on the bonds were not paid on the quarter day, 25 September 2017. The Company sent letters to bondholders appraising them of fund-raising efforts and requesting a payment holiday.

80. In or around the same time Trend Advisors affirmed the Sberbank guarantee. The affirmation came because the renewal of the guarantee for the second year of the bond was due. Trend Advisors wrote to state that the second-year guarantee would be automatically renewed as no claims had been received.

81. In January 2018 an investor sent the Company a statutory demand and on 25 January 2018 a petition was presented to wind it up. This led to a staff walk out and Mr Goring and Mr Booth working hard to salvage the Company until 20 June 2018 when the winding up order was made.

Liquidation

82. On 3 December 2018 Mr Goring provided a statement to the Official Receiver. The Company had issued £5,060,000 of bonds to 213 investors.

83. Investigations show that £396,099 had been received by Mr Goring; £335,100 received by Malcom Johnson and £742,800 had been paid for advice received from Lochwood Capital.

84. Elizabeth Pigney, the Deputy Head of Insolvent Investigations, Midlands & West, within the Investigations and Enforcement Directorate of the Insolvency Service, an Executive Agency of the Department of Business, Energy & Industrial Strategy produced an affidavit in support of the claim that Mr Goring and Mr Booth should be disqualified to act as directors. Her affidavit , later adopted by Mr Peter Smith, was produced by reference to: (i) public files maintained by the Registrar of Companies; (ii) information provided by the Official Receiver and later the liquidator appointed by the Secretary of State; (iii) information provided in reply to enquiries carried out by the Insolvency Service and (iv) an examination of the accounting records maintained by the Company.

85. In a reply to queries Mr Booth stated that the Company failed due to its inability to attract "sufficient working capital".

86. Mr Smith, having adopted the evidence contained in the affidavit of Elizabeth Pigney, states that:

> "the Bond Instrument, and the bond certificates issued to investors each describe the bond as 'guaranteed' or 'fully secured'. The Bond Instrument defines the 'Guarantee' as "the two guarantees (in equal amounts of €17, 500, 000) provided by Joint-Stock Commercial Savings Bank of Russian Federation

> (branch number 1569 located at 1 19019 Moscow, Nikitinsky bulvar 10, and otherwise known as Sberbank) (the Guarantor) and granted in favour of the Issuer, pursuant to which the Issuer's obligations under this instrument are guaranteed by the Guarantor."

87. He then refers to the marketing material that claimed that the bonds would be fully secured:

> "The Company's obligations under the Bond are irrevocably guaranteed by a very substantial international bank."

88. Mr Smith explains that the Official Receiver wrote to Sberbank on 10 September 2018 asking about the guarantee. On 13 September 2018 Sberbank responded by e-mail:

> "we inform you that the mentioned bank guarantee was never issued by Sberbank of Russia"

89. Attached to the e-mail was a letter that said:

> "This fraudulent bank guarantee shall not impose any legal commitment or obligation on either Sberbank of Russia or any of its branches whatsoever."

90. Mr Smith then sets out his primary case against Mr Goring and Mr Booth is [91]:

> "Contrary to the bond marketing brochures, capital invested in the bond by investors *was not secured by a bank guarantee* and would not be repaid in the event that Active defaulted on its commitments under the terms of the bond." (emphasis supplied)

91. In liquidation Mr Goring and Mr Booth attended the Official Receiver for interview on several occasions. The Official Receiver formed the view that there was no guarantee given by Sberbank following the receipt of its letter on 13 September 2018, denying its existence. The Official Receiver wrote to Mr Goring to explain Sberbank's position and Mr Goring responded on 14 September 2018:

> "Well to say I'm dumbfounded is an understatement. As you are aware we had no contact with Sberbank personally as all the negotiations were carried out by Trend Advisors who acted as the custodian of the guarantee and to whom we paid a significant fee and from whom we have a plethora of correspondence stating that the guarantee was valid and enforceable. Both Lee and I both visited a branch of Sberbank (on separate occasions) with Bojan Al Pinto (Managing Partner TA) in Belgrade in September 201 6 and signed documents thereafter. We also have a contract between us and TA holding us to significant penalties should the guarantee be called upon. Reading between the lines it seems fairly obvious that Trend have acted fraudulently."

92. Trend Advisors were asked about the response from Sberbank. It responded similarly:

> "We have no knowledge of this. The documents were handed to us by the responsible officers of Krasnopresnenskaya Branch. *We were acting in good faith and had no reason to question the validity of documents*." (emphasis added)

93. Mr Booth responded by e-mail to the news:

> "I think it's fair to say I'm livid about the response from Sberbank. This is not what has been contracted and we have evidence of having followed all the processes we were asked to complete in order to obtain the guarantee. Bojan/Trend must step up and address this and help find where the guarantee is held."

94. Mr Smith pursued the line of questioning with Mr Goring and Mr Booth but without investigating Trend Advisers and /or Sberbank. Without such investigations, no further light was shed on the issue of the guarantee. Mr Smith queried the costs involved with the marketing of the bonds and the payments made from the Company to Lochwood, Malcolm Johnson, Mr Goring and Mr Booth.

95. Mr Goring and Mr Booth engaged Maddox solicitors in 2020 to represent them at this stage. Maddox responded:

> "LB and EG took professional advice on the content of the bond offering document and followed that advice. The advice received by LB and EG was that the uses to which the money would be put had to be summarised at the time of preparing the bond issue. The bond monies were a relatively expensive form of investment capital, reflecting the risk involved in the business, the short-term nature of the bond (2-years) and the cost of the supporting guarantee. At the time of entering into the bond issuing process, the costs associated with the bond issue were, LB and EG understood, standard for this type of product and around 20% to 25%. However, after the money had been raised it became apparent that the cost of the bond was substantially higher than they had been led to believe by the advisers involved in the process. With hindsight, LB and EG accept that the cost of funding ended up being high but with the benefit of professional advice the commercial decision was justifiable at the time of deciding to issue a bond. With respect to the specific comment quoted from the report to creditors, LB was not responsible for the day-to-day operation of the bond. From his discussions with EG, this estimate of 45% to 55% was provided by LB at the time of the report to creditors… All payments were made to pursue A T's business operations, in line with the business proposition and risks involved in the business as set out in the bond offering. We would point out that the bond offering has to be read as a whole, rather than through the selective extraction of particular phrases, to understand the overall risks being presented. All payments made, as set out in the schedules referred to, were in respect of for legitimate business expenses, to: pay staff costs and other operational expenses; expand the company's business; raise the

> necessary capital to develop the software required to build the software product; pay advisers; market the product; build a sales team; and run demonstrations and develop client relationships in order to expand the business. EG and LB were travelling extensively to promote the business of A T, together with third party advisors, and in doing so were incurring significant expenses on travel and subsistence. A key aspect of the business was expansion of AT for an imminent IPO on NASDAQ which required the development of investment contacts, fundraising and new leads. These were all activities that supported the future expansion of AT. We submit that the evidence of how the Company was run, when viewed in its entirety, demonstrates that LB and EG have acted reasonably, diligently, competently and with integrity at all times in their conduct as directors, and that they have complied with their duties as directors throughout their stewardship of the Company."

96. On 6 October 2020 the Secretary of State gave notice under section 16 of the Company Directors' Disqualification Act 1986 that a claim would be made to disqualify Mr Goring and Mr Booth as directors.

The allegations

97. The allegations are the same in respect of both directors of the Company, notwithstanding their roles in the Company were very different. I shall not repeat the allegations twice (once for each director).

    97.1. They caused the Company to mis-represent an investment opportunity resulting in losses amounting to £5,060,000 to 213 investors;

    97.2. They caused the Company to promote an investment in electronic ticketing software for which it had obtained exclusive rights by way of a bond offering. Under the terms of the bond investors were to receive quarterly interest payments and their investment would be returned to them in full after 2 years;

    97.3. The investment was described in Active's marketing material as a "Fully Secured Corporate Bond Offering' which was "backed by the security of a full bank underwriting". No such guarantee was in place. They failed to carry out adequate checks in order to confirm the existence of the guarantee and whether investors' money was secured;

    97.4. Between 14 October 2016 and 1 November 201 7 Active received funds from investors in respect of the bond offering amounting to £5,060,000;

    97.5. The marketing material stated that investors' money would be used 'to fund a diversified portfolio of corporate loans, as well as the internal expansion of Active Ticketing'. Of the £5,060,000 paid by investors £396,099 was paid to Mr Goring [a different sum was paid to Mr Booth] and £1,688,785 was expended for reasons other than the purpose stated in Active's marketing material; and

97.6. Active was wound up on 20 June 2018 owing £8,424,844 to creditors, of which £5,060,000 was owed to 213 investors.

98. It is immediately apparent from a reading of the "statement of matters determining unfitness" that the second, fourth and sixth allegations are statements rather than allegations. In respect of the second allegation, there is no contest. The fourth matter is not contested and the sixth is accepted although Mr Goring and Mr Booth have said that the sum of total creditors appears overstated.

99. The case law establishes that there is an obligation on the Secretary of State to set out clearly what are the essential facts on which he relies. Furthermore, because the Secretary of State is acting in the public interest and not as a civil litigant, she is required not to overstate the case against the director. In Mithani, Directors' Disqualification chapter 5, para [7] the authors explain:

> "The duty of fairness casts the claimant more in the role of a criminal prosecutor whose duty is not to obtain a disqualification order at all cost but to present to the court a balanced view of the evidence with a view to the court deciding whether the claimant's case that it is expedient in the public interest that a disqualification order should be imposed has been made out."

100. The duty of fairness arises in this case for two reasons. First, the Secretary of State put its main case on the basis that the Company received no guarantee from Sberbank. This is at the heart of her case. If there was no guarantee the Secretary of State's allegation is that Mr Goring and Mr Booth "failed to carry out adequate checks in order to confirm the existence of the guarantee".

101. It was suggested in cross-examination that the directors knew that there was no guarantee and continued to act "because [they] thought it would be short term" and Mr Goring and Mr Booth thought "the bond holders would soon be repaid." In closing the Secretary of State confirmed that this is not the case pursued by the Secretary of State.

102. Secondly, the only other allegation concerns how the money raised from the bonds had been spent. In cross examination it was put to the witnesses that the sums spent on marketing were very large. The Secretary of State does not provide evidence of a reasonable or acceptable proportion of the funds that could have been spent on non-operational matters. In closing the Secretary of State referred to proportionate expenditure but accepted that the allegation is narrower and refers to a failure to specify in the marketing material how all the sums raised would be allocated. The Secretary of State fairly accepted that it was not necessary to include every item of expenditure in the marketing material and that the expenditure allegation is "very much a secondary allegation".

The evidence

103. Mr Peter Smith, the Deputy Head in the Investigations and Enforcement Directorate of the Insolvency Service adopted the affidavit evidence of Mrs Pigney made on 10 June 2021 and 2 March 2022 and produced his own evidence correcting minor mistakes made in the June 2021 and March 2022 affidavits.

104. Mr Smith gave straight-forward and in my view honest evidence. He was careful in checking his answers to questions put to him in cross-examination by Mr Goring, on behalf of the Defendants, with the documents. His evidence was limited given he had no first-hand knowledge of events.

105. Mr Goring explored with Mr Smith the reasons why the Secretary of State had not gone further in his investigations into the issue of the guarantee. He asked about the contact made with Gordan Dadds, Lester Aldridge and the commercial advisers such as Trend Advisors and Lochwood (including Mr Johnson).

106. Mr Goring put to Mr Smith the contradictory responses Trend Advisors (through Mr Al Pinto) had provided about the guarantee stating first that the guarantee existed and remained valid and later that it never existed because a bank account had not been opened with Sberbank. Mr Smith acknowledged the inconsistencies.

107. Two matters of interest emerged from the cross-examination. First, the Insolvency Service did not contact Mr Williams, the sole director of Management Services. That was surprising since it was Management Services that had paid the commissions, fees and expenses complained of in the second allegation. Mr Smith fairly stated that he relied on the written responses to questions asked by the Official Receiver and given by the Defendants.

108. Secondly, the Secretary of State's case rested on the accuracy of a response received from Sberbank to a letter Mr Ireson (the Official Receiver) had sent on 10 September 2018. The letter asked the bank officials:

> "In order to assist me in carrying out the Official Receiver's statutory duty I would be obliged if you could provide me with full details in English about the guarantee provided to the company and, in particular, how any claim under the guarantee should be made."

109. The response I have set out above: a denial that Sberbank had "issued" a bank guarantee.

110. Mr Goring gave honest evidence. He explained that he could not remember all the events as they happened reaching back to 2016 and 2017. At times he tended to speculate what he would have done in a certain situation. When asked he quickly acknowledged that he could not remember the event. His speculative answers have little evidential weight. Nevertheless, Mr Goring gave his evidence honestly and earnestly.

111. Mr Goring was quick to accept that a guaranteed bond carried a different risk measure to an unsecured bond. He knew the importance of the guarantee. He was taken to the representations made in the bond marketing material. He accepted that the marketing material claimed that the bonds would be "fully secured" and wished to point out that the material included many warnings as to risk and was targeted at high-net-worth individuals only. He explained that the marketing material had been produced by advisors with the aid of Lochwood. He had approved it and approved a script for the salespeople. He had visited each of the selling agents and been through the scripts with them. He was taken to a responder to the Official Receiver's questionnaire. The purchaser of the bond had been persuaded by the salesperson to self-certify that they were a high net worth individual when they were not. The loss of the £15,000 invested was significant and serious for that investor.

Mr Goring says that he went through the scripts with the sales teams, and they were not authorised to sell to individuals who did not have a high net worth. It was beyond the authority of the sales teams to persuade someone to self-certify when they could not meet the criteria.

112. Mr Goring was tested on his time spent in Belgrade, questioned on the operation of the guarantee, translations of the guarantees and other agreements said to have been signed in Russian, and asked about the Company's relationship with Trend Advisors. At one point in his evidence, he wrongly said that Trend had provided a guarantee to the bond holders which itself was guaranteed by Sberbank, saying the guarantee was in favour of the Company and lastly that there was no guarantee:

> "I was under impression there was a guarantee from Trend… The instruments are correct in that there was a guarantee between the Bank and AT… I accept what the Sberbank is saying in 2018- the guarantee was never issued."

113. His evidence was muddled and unreliable on this issue. However, that does not mean that the totality of his evidence had no value. He was responding to the documents he was directed to in cross-examination and not relying on his recall. For example, in response to a question about why the guarantee documents produced by the Secretary of State at trial were not signed by the Company, he responded:

> "…it is very odd I had not signed anything".

114. When a different question was asked without reference to a document in the trial bundle, he explained that:

> "I went to Belgrade in September or October 2016 and was accompanied by Malcolm Johnson. We met Mr Al Pinto. It was then that I signed the bank guarantee."

115. He could remember having a translation but not the circumstances. In closing Mr Booth was able to point to a document that demonstrated that the Company had paid for translations services at the relevant time. Mr Goring's evidence was that the Company had relied heavily on Trend Advisors who were regulated and had been recommended by Malcolm Johnson. He thought that the guarantee and agreements with Trend Advisors had been sent by post to the Company and filed away by "Sandrine" who worked as an administrator at the Bloomsbury office. He admitted in cross-examination that he did not know this as a fact as he did not see Sandrine file the documents. He was seldom in the office. His time was spent travelling the world primarily tasked with finding potential investors and early adopters of the ticketing software.

116. His explanation given as to why he failed to "adequately" check for the receipt of the MT760 lacked commercial logic but was convincing. The explanation given hinged on three factors. First, he had been informed by Trend Advisors that there had been a "technical glitch". There is documentary evidence to support this. Secondly, he was told that the imposition of sanctions provided an obstacle for the Sberbank that could only be overcome with it working with a corresponding bank in Europe. Again, documentary evidence supports his memory. Thirdly he had been questioned about the MT760 by Monte

Carlo Capital who were experienced in the field of finance. Mr Al Pinto was able to satisfy Monte Carlo that the failure to obtain the MT760 was unfortunate but not critical:

> "I was concerned at the time but was happy that as Ian Sosso was not worried after speaking with Trend, I was not concerned- Mr Al Pinto also assured me. When these issues came up I had several conversations with Al Pinto, he told me it was technical difficulties only- I had an external discussion with a colleague who had gone through the same experience. It was not critical."

117. No evidence has been tendered by the Secretary of State to doubt that there were technical difficulties nor that the imposition of sanctions provided challenges for Sberbank.

118. He was asked about the second allegation and explained each of the payments:

118.1. "Malcolm Johnson was paid £335,000 for advice relating to the issue of the bond and introductions to advisors- these are all operational costs or non-operational costs and marketing material states that these costs will be incurred though not the amount";

118.2. "I received payments from ATMS [Management Services]- this company was designed to be independent as we had Paul Williams as sole director but we had lots of problems with Metro Bank abroad so I had to use my personal account a lot- I took 128 flights in two years and paying a good proportion for those flights. Some flights were about £5,000 and costs of staying somewhere…I have not provided the receipts but they exist. Maddox legal were provided with the receipts. They represented us in these proceedings until we ran out of money".

118.3. "I agree the commissions were heavy but we did not think they were much above the market rate and the bond issue would be short lived, so it was something the Company could live with".

118.4. "We paid €100,000 to Trend Advisors and then there were the other advisors."

119. At the end of cross-examination Mr Goring was taken to some of the responses from individuals who had lost their investment. Mr Goring responded:

> "After the Company failed, I had an extremely difficult time mentally and stuck my head in the sand. I had a lot of guilt not just for the investors but for the employees, Mr Booth and all those who trusted and relied on us. I spent time reflecting on what I had done, turning it around in my head. Previously I had great success and this was a greater blow because of it. I am not immune to the losses to the investors. I kept in touch with them and heard many of their stories. I found it hard to hear some of them. I felt horrid. It is right to talk about these people but I would like to say that there were many supportive bond holders too. I kept in touch as even at the time we thought there was a chance to rescue. For me it has been bad. I lost my marriage and then my partner. I lost my house. I have experienced physical health issues since the failure of the Company with an ulcerated bowel condition. I have spent time in cognitive therapy."

120. Mr Booth was entitled to cross-examine Mr Goring but as their cases aligned and they acted together as a team, sharing opening and closing, a re-examination was conducted. Mr Booth took Mr Goring to some of the documents he had visited in cross-examination and asked him to read them carefully. He then asked him what his answer would be to the allegation that there was no guarantee. He was taken to correspondence dated 23 September 2016 from Trend Advisors that stated that the guarantees were irrevocable. Mr Goring responded that he understood that on 23 September 2016the process of obtaining the guarantee was irrevocable, Trend Advisors would be entitled to their fee from that time but that the guarantee had not been executed until he flew to Belgrade. He affirmed this evidence when he was taken to contemporaneous documents where Mr Al Pinto of Trend Advisors stated:

> "I can confirm that Trend Advisors are the Escrow Agent acting for the bond holders."

121. And a letter from Trend Advisors to the Company a year later, on 19 October 2017:

> "Reference to bank guarantees number 086/17 and number 087/17, issued by Sberbank PJSC Moscow, on September 30th, 2016 to the total amount of EUR 35m (EUR 17.5m each) in favor of Active Ticketing Pk bond holder…"

122. He was taken to an English translation of the guarantee purportedly bearing the seal of the bank with a "wet" signature on top of the seal, and confirmed there was a guarantee. He was asked about a missing "c" in Ticketing on the guarantee. He said he had not noticed it and neither had any of the other advisors.

123. Mr Booth gave evidence on the third day of trial. He had been on paternity leave until the end of September 2016 when shortly after his return he flew to Belgrade to sign the documentation. Overall piecing together strands of evidence, documentary, direct and circumstantial, Mr Booth provided reliable and honest evidence. He had less involvement in the procurement of the Sberbank guarantee, bond issue and preparation for the Initial Offering than Mr Goring. His role as a director was to run the London office, the employees and supervise the technological advances of the ticketing software: "there was a clear division of labour between us". His evidence was:

> "To best of my knowledge the bonds were guaranteed. I think there was a guarantee and that someone doesn't want to pay out on it."

124. He admitted that he had not seen the guarantee in the London office and accepted that he had made errors when completing the questionnaire provided by the Official Receiver.

125. As the relevant events were distant in time, he could not recall the detail. He explained that he heard nothing from the Official Receiver for 21 months following his interview and had not been prepared for the allegations made. As regards whether a Sberbank account had been opened he gave evidence of his time in Belgrade:

> "I believe we had a bank account in Sberbank. I visited the bank in Belgrade and signed documents and was told that this is how they do KYC [know your client]. I was told this by Sberbank-

> account opening process. I was told this by Malcolm Johnson. I was given a business card but not an account number- I understood the account was not open at that time I was there, because this was a process."

126. He said that he had handed the business card to the Official Receiver. The Official Receiver may have used the contact details on the card to communicate with the bank when he asked Sberbank if the guarantee is valid.

127. Mr Booth recalled he saw draft agreements between the Company and Trend Advisors and remembered how the agreements had been discussed at a board meeting with the non-executive directors. He explained that the Company, he and Mr Goring had no previous relationship with Mr Al Pinto and that Trend Advisors came to their attention by way of an introduction from Malcom Johnson who they did know, and trust. He gave evidence that "due diligence" on Trend Advisors was undertaken by Keswick and Danske on which they relied.

128. Mr Booth could read Russian but did not profess to be an expert. He had noticed the misspelling of "Ticketing" in the documentation had brought it to the attention of Mr Al Pinto. He says he was given an explanation and was told it was not an issue. He could not recall what the explanation but recalled the gist:

> "I was told by Mr Al Pinto that Sberbank have accepted your documents, that are spelt in a different way. This is how they spelt it and its on their system but doesn't matter because we were not opening an account."

129. His evidence is that he did heed warnings from the likes of Montecarlo Capital and did dig deeper into the issue of the MT760. The fact that there is no e-mail stating that he had, was not evidence that he had not. He said it was a long time ago and could not now recall the answer to the issue except that he would also have asked Mr Goring.

130. He was asked about the second allegation: the payments. His answer was:

> "The payments out were mostly about travel for fund raising- fees to paid to Trend- I knew Mr Goring was spending a lot of his own money on travel and staying away so he would be paid expenses via ATMS [Management Services]. There was a clear division between operating money and money used for commissions and marketing and other expenses involved with a technology start up. There are a lot of expenses involved in a technology start up. The payments were made by ATMS for the marketing and fund raising. Paul [director of Management services] would have approved the payments- the payments made to the Company – I did not approve the fees paid to Mr Goring. I did not approve payments made to Lochwood Capital or Malcolm Johnson."

131. Lastly Mr Booth also expressed regret at the loss of the Company and the financial pain it had caused investors and employees. He said that he had also suffered financially, having lost a deposit on a house and his own money spent on expenses were not recovered. He

said that he had provided the Official Receiver with a "fully costed" expense sheet to justify any money he received and the losses he had suffered.

Legal principles

132. Section 6 of the Company Directors' Disqualification Act 1986 provides:

> "The court shall make a disqualification order against a person in any case where, on an application under this section
>
> (a)the court is satisfied—
>
> (i)that the person is or has been a director of a company which has at any time become insolvent (whether while the person was a director or subsequently), or
>
> (ii)that the person has been a director of a company which has at any time been dissolved without becoming insolvent (whether while the person was a director or subsequently), and
>
> (b)the court is satisfied that the person's conduct as a director of that company (either taken alone or taken together with the person's conduct as a director of one or more other companies or overseas companies) makes the person unfit to be concerned in the management of a company."

133. In *Secretary of State for Business, Innovation and Skills v Chohan* [2013] EWHC 680 at [170]-[171] Hildyard J. stated the following propositions:

> "(1) The court is required by s.[12C] of the CDDA to have particular regard to the matters mentioned in Sch.1 to that Act.
>
> 2) However, Sch.1 to the CDDA is not exhaustive: the court is entitled to take into account other conduct in order to determine the question of unfitness: any misconduct of a person exercising the powers of a director may be relevant.
>
> (3) "Unfitness" is ultimately a question of fact, or, as Dillon LJ stated in *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch. 164 … "what used to be pejoratively described in the Chancery Division as 'a jury question'": but, as the authorities demonstrate, a less pejorative and possibly more accurate description may be a "value judgment" (see *Re Grayan Building Services Ltd* [1995] Ch. 241 at 255D …). As such, that determination of unfitness involves a comparison with a standard of behaviour against which the conduct complained of may be measured.
>
> (4) Accordingly, as explained by Hoffmann LJ (as he then was) in *Re Grayan* at 254G …:"The judge is deciding a question of mixed fact and law in that he is applying the standard laid down by the courts (conduct appropriate to a person fit to be a director) to the facts of the case."

(5) It being a major concern of the CDDA to raise standards and to protect those who deal with companies which have the benefit of limited liability from directors who have in the past departed from such standards, a finding of unfitness does not depend upon a finding of lack of moral probity:

"the touchstone is lack of regard for and compliance with proper standards, and breaches of the rules and disciplines by which those who avail themselves of the great privileges and opportunities of limited liability must abide (see per Henry LJ in *Re Grayan*)".

(6) Equally, ordinary commercial misjudgement is in itself insufficient to demonstrate unfitness (see per Browne-Wilkinson V-C (as he then was) *in Re Lo-Line Electric Motors Ltd* [1988] Ch. 477, 486 …): risks that have eventuated may in retrospect, and with the wisdom of hindsight, appear to have been taken wrongly, but the purpose of limited liability is to provide some protection from risk-taking, subject to proper standards of care and compliance with duty.

(7) As, again, Hoffmann LJ put it in *Re Grayan*, the court:

"must decide whether that conduct, viewed cumulatively and taking into account any extenuating circumstances, has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies."

(8) Although the touchstone of unfitness should reflect the public interest in promoting and raising standards amongst those who manage companies with the benefit of limited liability, the test is always whether the conduct complained of makes the defendant unfit, and not whether it is more generally in the public interest that a person be disqualified: thus, for example, the question is whether the present evidence of the director's past misconduct makes him unfit, not whether the defendant is likely to behave wrongly again in the future.

(9) In each case the court must consider the director's personal responsibility:

"it is his personal conduct which is in issue, and it is not sufficient to assume responsibility for some departure from required standards in the management of the company from the fact of his being a director".

(10) Nevertheless, a "broad brush" is not inappropriate (see *Re Barings Plc (No.5); Secretary of State for Trade and Industry v Baker* [1999] 1 B.C.L.C. 433, 483, approved by the Court of Appeal [2001] B.C.C. 273, 283), and "responsibility" is not confined to direct executive responsibility for the particular

> misconduct, and a failure to engage in proper supervision, review or scrutiny of the activities of delegates or fellow directors may suffice (see *Re Skyward Builders Plc; Official Receiver v Broad* [2002] EWHC 2786 (Ch) at [393]).
>
> (11) The court must consider any allegations of misconduct both individually and in the round: *Secretary of State for Trade & Industry v McTighe* [1997] B.C.C 224

134. Much the same was said by Blackburne J when he referred to *Re Grayan,* in *Re Structural Concrete* [2001] BCC 578.

135. On the issue of the evaluative nature of a decision to disqualify a director for incompetence I was taken to *Re Barings (No. 5)* [1991] 1 BCLC 433, 481:

> "Where, as in the instant case, the Secretary of State's case is based solely on allegations of incompetence (no dishonesty of any kind being alleged against any of the respondents), the burden is on the Secretary of State to satisfy the court that the conduct complained of demonstrates incompetence of a high degree. Various expressions have been used by the courts in this connection, including 'total incompetence ' (see Re Lo-Line Electric Motors Ltd [1988] BCLC 698 at 703, [1988] Ch 477 at 486 per Browne-Wilkinson V-C), incompetence 'in a very marked degree ' (see Re Sevenoaks Stationers (Retail) Ltd [1991} BCLC 325 at 337, [1991] Ch 164 at 184 per Dillon LJ) and 'really gross incompetence ' (see Re Dawson Print Group Ltd [1987] BCLC 601 per Hoffmann J). Whatever words one chooses to use, the substantive point is that the burden on the Secretary of State in establishing unfitness based on incompetence is a heavy one. The reason for that is the serious nature of a disqualification order, including the fact that (subject to the court giving leave under s 17 of the Act) the order will prevent the respondent being concerned in the management of any company".

136. Jonathan Parker J (as he then was) went on to explain that an error of judgment may not be sufficient to find unfitness. On the other hand, if a director has shown himself "so completely lacking in judgment" that may justify a finding of unfitness. Much depends on the facts of the particular case.

137. The court should also have in mind that a disqualification order is a serious order to make against an entrepreneur who operates through a limited company. A period of disqualification, particularly one towards the upper end of the scale, is very serious. It will prevent the defendant from being a director of a company, acting as a receiver of a company's property or in any way, directly or indirectly, being concerned or taking any part in the promotion, formation or management of a company or from acting as an insolvency practitioner (s.1(1)): *Re R Williams Leisure* [1994] Ch 1, 14, [1993] 2 All ER 741.

138. Owing to the nature of the allegations, I do not consider that there is need for further citation of principle. It is worth briefly mentioning the issue of the extent to which a court

should rely on the recollection of witnesses and the fallibility of human memory. This first arose in a commercial setting through observations made by Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) ('Gestmin') at [15]– [22], and more recently in *Blue v Ashley* [2017] EWHC 1928 (Comm) at [68] –[69]. In *Blue v Ashley*, Leggatt J at [70], rehearsed his own earlier observations in *Gestmin*, approached evidence of a crucial conversation in a way that was "[m]indful of the weaknesses of evidence based on recollection". In *Kogan v Martin and Others* [2019] EWCA Civ 1645 the Court of Appeal considered the statements of Leggatt J and emphasised the need for a balanced approach to oral evidence and said [88]:

> "the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function."

139. The approach I take in this case is to be aware of the fallibility of memory and given that the events took place many years ago, the accuracy of recall I check against the contemporaneous documents.

140. Nevertheless, not all the Company documents are before the court which is acknowledged by all sides. In this case there are certain documents that although not before the court, other evidence points to their existence. My assessment is that Mr Goring and Mr Booth were experienced businessmen who had, as they told me, been directors of successful companies. The Company produced minutes of meetings, records of creditor and debtors, accounting information, employed a large work force, developed products, appointed non-executive directors who attended board meetings and made contributions, employed external marketing teams, employees were charged with administrative functions and the Company engaged a number of professional advisers including lawyers, auditors and financial experts. It may be unrealistic to expect all the Company's documents to have survived the chaos of an abrupt termination of business. In any event it is axiomatic that the court bundle does not include all the Company documents passed to the Official Receiver.

141. In this case several firms of solicitors have been involved in the Company's affairs. Following liquidation Maddox solicitors received substantial fees for dealing with a claim raised by the liquidator and queries from the Official Receiver. I am informed that Maddox solicitors exercises a lien on some documents including receipts.

142. The Company had many advisors all of whom will have created and received documents in respect of the Company. It is reasonable to infer that the more hands documents pass through or have an involvement the greater the chance that documents will go missing.

143. My findings are made following an analysis of the surrounding facts - by reference to the documentary evidence in the form of contemporary or near contemporary statements, the oral and written evidence, and known or probable facts.

Did the Company obtain a guarantee?

144. The case for the Secretary of State is built around the letter sent on 19 October 2018 from Sberbank in response to the question asked by the Official Receiver.

145. Circumstantial evidence includes correspondence from Lester Aldridge up to a point, the failure to respond to Gordon Dadds with copies of the executed guarantee (which is denied), questions asked about the failure to receive a MT760, questions raised internally by Mr Crocker and externally by Montecarlo Capital, and lastly from a series of contradictory responses sent from Mr Al Pinto (not all of which make sense). The circumstantial evidence has not been deployed to support the claim the guarantee never existed, more for evidence to support the allegation that the Defendants failed "to carry out adequate checks to confirm the existence of the guarantee". As the Secretary of State submitted, the questions raised internally and externally were "red flags" to the Defendants.

146. The straight denial by Sberbank is powerful evidence that there was no guarantee. Some regard I have for the responses made by Mr Al Pinto. It is probable that his more recent responses made to the liquidator (e.g. (i) the company was not a plc and therefore could not have a guarantee (ii) the company needed to open a bank account to obtain a guarantee) have been thought up after the event, are inconsistent to the contemporaneous documents he produced in 2016 and 2017 and are commercially improbable.

147. Weighing the contemporaneous documents, oral and written evidence, I have reached the conclusion that it is more likely than not that the Company did obtain a guarantee from Sberbank despite not receiving a MT760. I do so for the following reasons:

147.1. The oral evidence of Mr Booth was unequivocal. He had flown to Belgrade soon after returning from paternity to sign documents at Sberbank and Trend Advisors.

147.2. The oral evidence of Mr Goring was more equivocal to begin with. He had been persuaded by the e-mail and letter sent by Sberbank on 19 October 2017. On re-examination, having been taken back to the contemporaneous documents he changed his mind and said that the Company had secured the guarantee from Sberbank.

147.3. Mr Goring stated in his evidence that Trend Advisors had on many occasions stated that the bonds had the benefit of a guarantee.

147.4. Mr Goring states in his written evidence, which was not challenged, that the only purpose for flying to Belgrade was to sign the guarantee at the Sberbank branch.

147.5. The Company paid for an interpreter at the time of execution. I infer that the purpose was to enable Mr Goring/ Mr Booth to understand the terms of the guarantee.

147.6. Mr Goring/Mr Booth was accompanied by Malcolm Johnson. This was not challenged. Mr Johnson was not called by any party. I infer that Mr Johnson was with Mr Goring to assist the Company in the execution of the guarantee.

147.7. It is not contested that a notary was present at the time of the visit by Mr Goring and Mr Booth. I infer that a notary was present because the document signed by Mr Goring was of a special nature and not a mere contractual agreement.

147.8. None of the other documents, namely the Escrow Agency Agreement and the Term Agreement is likely to have required the personal attendance of Mr Goring and Mr Booth.

147.9. If the opening of a bank account was needed to obtain the guarantee, then there is no written evidence of the requirement.

147.10. It is more likely than not that attendance at Sberbank was required to verify identity and execute the guarantee.

147.11. In early September 2016 there was an e-mail exchange between the Defendants and Trend Advisors where Trend state that it has arranged a guarantee with Sberbank to support the bond issue.

147.12. A draft bank guarantee was sent by Trend Advisors to the Defendants on 9 September 2016.

147.13. Other documents support and make probable the execution of the guarantee. For example, on 22 and 23 September 2016 a letter of intent, standard form guarantee and draft agreement for the guarantee was sent from Sberbank via Trend Advisors who were engaged to procure the guarantee.

147.14. On 23 September 2016 Trend Advisors confirmed that they were the Escrow Agents. A draft Escrow Agency Agreement is in evidence. Trend Advisors were paid substantial funds to act as Escrow Agents. From these known facts I infer that if there was no guarantee there would be no Escrow Agency.

147.15. A board minute records the board's approval for the bank guarantee.

147.16. The original guarantee, according to the Escrow Agency Agreement, was held by Trend Advisors.

147.17. The e-mail from Trend Advisors stating that a second guarantee would be "automatically" issued presupposed there was a first guarantee.

147.18. Trend Advisors reference the issued bank guarantee in correspondence in April 2017.

147.19. Trend Advisors issued an "Article 3" notice under the Bond Issue Term Sheet dated 28 October 2016 referencing the "Bank Guarantee Settlement Agreement." I find it more likely than not that Trend Advisors was not acting in bad faith when it sent the notice. I infer that these agreements related to the issuance of the guarantee and payment would only be asked for on the successful execution of the guarantee.

147.20. Mr Booth directed the court to a signed and sealed copy of an English translation of the guarantee certificate.

147.21. Mr Booth directed the court to an English translation of a guarantee executed by Mr Goring. The counter party was Sberbank that had endorsed a seal on the guarantee and signed the seal. The guarantee agreement number matches the guarantee agreement number. This is strong evidence that the Company paid for a translation of the guarantee and Mr Goring did execute the guarantee in Belgrade as he said.

147.22. Gordan Dadds were sent the signed version of the guarantee and accepted it before receiving payment from the Company.

147.23. The initial reaction from the Defendants on being informed that there was no guarantee was bewilderment. Mr Goring was "dumbfounded" when told by the Official Receiver and Mr Booth said he was "livid".

147.24. Mr Al Pinto provided an array of explanations for the Sberbank denial letter but his initial reaction was that the guarantee had been given by a responsible officer at the Sberbank branch and "we have no knowledge of the Sberbank guarantee being inexistent."

147.25. Lastly, I find it more likely than not that Mr Goring, working with Mr Johnson on the marketing material, genuinely believed that the bonds were fully secured by an international bank when the marketing started.

Adequate checks

148. The term "adequate" is not a term of art. The allegation requires context for it to act as a measure of competence. For example, a director may fail to ensure that a company maintains and preserves 'adequate' accounting records: *Official Receiver v Duckett* [2020] EWHC 3016. The court would measure adequacy against the statutory requirements to maintain and preserve accounting information provided by the Companies Act 2006. One can think of other examples, but it is not common to allege that there had been inadequate checks to confirm a thing had happened or come into existence. This is particularly so when the directors of a company had been at the event that made the thing happen or brought it into existence. It is the evidence of Mr Goring that he was present and participated in executing a guarantee and that is not challenged by the Secretary of State. The adequacy or inadequacy of the checks (as claimed by the Secretary of State) arise after the event.

149. If I had to decide whether adequate checks had been made after the execution of the guarantee, I would find in favour of the Defendants. The defence of Mr Goring and Mr Booth is that they reasonably relied on advisors. They did not have access to the original documents as these were held, under contract, by the Escrow Agent. The Defendants relied on the Escrow Agents to inform them if the guarantee was properly executed and binding.

150. It is worth stating what the case is not about. It is not the Secretary of State's case that the Defendants were not entitled to rely on Trend Advisors; that Trend Advisors were unqualified to act; that the Company should not have entered contractual agreements with Trend Advisors; or that it was unreasonable to obtain a guarantee from Sberbank.

151. It is not the Secretary of State's case that Mr Goring and/or Mr Booth lied about their trip to Belgrade (that is an accepted fact).

152. The Secretary of State does not assert that Mr Goring did not execute the guarantee.

153. Mithani on Disqualification [775] sums up the position of reliance on professional advice:

> "There are limits to the extent to which a director may rely on professional advice. It may not be reasonable for a director to rely entirely on such advice where he himself has relevant professional experience. In addition, such reliance will not protect him if the advice is obviously wrong."

154. It can be said straight away that neither Mr Goring nor Mr Booth had professional experience of bond issuance or obtaining a guarantee to back a bond issue. The Secretary of State does not allege that advice received from Trend Advisors, or any advisor engaged by the Company, was obviously wrong.

155. There is no doubt that questions were asked about the veracity of the guarantee internally and externally. I accept the evidence of Mr Goring that Monte Carlo Capital had satisfied themselves of the existence of the guarantee having spoken with or contacted Trend Advisors. Trend Advisors continued to act as Escrow Agents and received fees for doing so.

156. Mr Goring and Mr Booth accept that they made mistakes. It was a mistake to walk away from Belgrade without a signed copy of the guarantee instrument in their possession; and it was an unnecessary short-cut to execute the guarantee in a foreign country without the presence of the Company's appointed lawyer. Nevertheless, the Company was not without advisors.

157. Trend Advisors had contractual arrangements with the Company and, owing to the agency agreement, will have been bound by the rules of agency which included fiduciary obligations. The contractual agreement included an obligation to procure a valid guarantee. The agency agreement obliged Trend Advisors to, among other things, retain money from the Company, retain the original guarantee executed at Sberbank, and deal with potential claims from bondholders where the Company had defaulted. The third agreement entered was called a term bond agreement. This ostensibly facilitated, I infer, the issue of a second bond after the expiry (by effluxion of time) of the first. There was a further agreement known as the "Settlement Agreement". There is no copy of this agreement but the parties agree that it related to the payment of fees by the Company to Trend Advisors in respect of commissions or work done.

158. The Company and the Defendants acted on advice provided by a London based advisor (Lochwood Capital) and engaged Trend Advisors. Malcolm Johnson was known to the Company and had a reputation for bond issues and taking a company public. It was reasonable for the Company to rely on advice and representations made by these combined advisors.

159. It was reasonable for Mr Johnson to go to Belgrade with Mr Goring to execute the guarantee and other contractual documents with Trend Advisors. The Secretary of State accepted in argument that the Company "almost entirely" relied upon representations and documentation provided to them by Trend Advisors.

160. In my judgment it was not unreasonable for the Defendants to rely on Trend Advisors who made consistent assertions (at the time) that the guarantee was valid and operative.

161. Mr Goring said he was concerned that the MT760 was not provided when asked. Mr Al Pinto provided him with a commercially rational reason for its absence. It was not unreasonable for Mr Goring to rely on Mr Al Pinto who had a relationship with Sberbank, and had procured the guarantee, and facilitated the operation of the escrow account.

162. Monte Carlo Capital, who were not slow to criticise Mr Goring, were, according to Mr Goring's evidence, satisfied that there was a guarantee after speaking with Trend Advisors.

163. Lastly, Gordon Dadds accepted payment from the Company once it had sight of the guarantee (and other documentation).

164. It is possible with hindsight to think of more that could have been done to make "adequate checks" but the allegation rests on adequacy only.

165. The use of hindsight is not a suitable tool to make a value judgement.

166. If, contrary to my finding, there was no executed guarantee, Trend Advisors will have failed in its obligations, taken money under its contract with the Company when it should not have done, misled Monte Carlo Capital and others such as Mr Johnson, sent an ostensibly executed copy of the guarantee certificate and guarantee to the Company (which was later passed to Gordon Dadds) in the knowledge that it would be relied upon, and most importantly misled Mr Goring and Mr Booth.

167. If there was no guarantee, the court would need to be satisfied that Mr Al Pinto acted knowing there was no guarantee, made false representations, allowed the Company to continue with the issue of bonds knowing that they were not guaranteed by Sberbank, and all the while profiting financially from the falsehoods.

168. Whatever mistakes were made, those mistakes are not sufficiently made out to warrant a finding that Mr Goring or Mr Booth were "so completely lacking in judgment" to justify a finding of unfitness. As Mr Goring and Mr Booth were entitled to rely on Trend Advisors, I find that their actions or inactions do not make them unfit to be directors.

The second allegation

169. The Company's marketing material for the Bonds indicated that funds raised from the bonds would be used: (i) to fund the final stages of the IPO (ii) for the expansion of the Company business (iii) to grow the Company's revenue through investment into sales channels and acquisitions, (iv) to invest directly into revenue making strategies and acquisitions and used to pay off existing bondholders and on general non extraordinary operating expenditure, (v) to fund a diversified portfolio of corporate loans as well as the internal expansion of the Company, (vi) to fund organic growth and refinance certain loans at a lower finance cost.

170. The allegation is that money was paid (not wrongfully paid) to Mr Goring and for "reasons other than the purpose stated in Active's marketing material.

171. The evidence given by Mr Goring and Mr Booth was that the money they received was to reimburse expenses paid by them personally. The Secretary of State does not dispute this.

172. I accept the evidence that the Defendants spent money on flights, accommodation and incidentals whilst pursuing revenues from other sources which included payments in respect of the NFL ticketing prospect in the US, flying to Hong Kong, South Africa and Dubai, and pursuing an institutional investor whilst expenditure was made on software development and furthering the ambition to make an Initial Offering. These were legitimate expenses designed to "expand" the Company. In my judgment the receipt of money is more likely than not to fall within operating or non-extraordinary operating expenditure.

173. It was argued that the expenditure on advisors and marketing was so great that it should have been included in the marketing material. The Secretary of State did not proffer evidence of the level of expenditure that would have been acceptable to not include in the marketing material.

174. The allegation is narrow. The Secretary of State accepted, at he was bound to do, that not every item of expenditure would or could be included on the marketing material. It is not unreasonable to infer that having received glossy and lengthy marketing materials and spent time speaking with sales teams, that the high-net-worth individuals expected that some of the money raised from the bond issue would be spent on marketing.

175. In any event, the marketing materials, with input from Mr Goring were drafted and produced by company advisors including Malcolm Johnson. As Mr Goring and Mr Booth had not produced such marketing material before, it was not unreasonable for them to rely on advisers.

176. In my judgment the allegation is not made out.

Conclusion

177. In respect of the first allegation:

> "The investment was described in Active's marketing material as a "Fully Secured Corporate Bond Offering" which was "backed by the security of a full bank underwriting". No such guarantee was in place. Mr Goring and Mr Booth failed to carry out adequate checks in order to confirm the existence of the guarantee and whether investors' money was secured".

178. I dismiss the allegation on the ground that there was a guarantee, and in any event adequate checks had been carried out when measured against the yardstick of reasonable reliance on professional advice.

179. On the second allegation that money:

> "was paid to Mr Goring [and] was expended for reasons other than the purpose stated in Active's marketing material".

180. I find that the allegation is not made out on the ground that the sums received by Mr Goring were legitimately received from Management services and the expenditure on marketing and professionals was a commercial decision to be made in the best interests of the Company (which included all stakeholders) by the directors. The objective reader would find that the expenditure fell within the intended expenditure set out in the marketing material.

181. I would like to express my gratitude to Ms McGowan. Her command of the papers was impressive. But for her assistance the witnesses and the court would have found it very difficult to navigate the unusual order of the court bundles.

182. I invite the parties to agree a draft order.