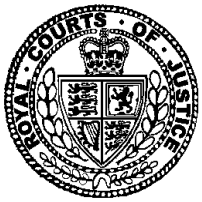

Neutral Citation Number: [2024] EWHC 674 (Ch)

IN THE HIGH COURT OF JUSTICE **No: CR-2022-003454**

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF COMBAT CONSTRUCTION LIMITED

AND IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986

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

28 March 2024 (remote hearing, Teams)

Before :

I.C.C. JUDGE JONES

B E T W E E N:

THE SECRETARY OF STATE FOR BUSINESS AND TRADE

Claimant

- and -

DANIEL SINGH SEKHON

Defendant

- -
- -

Mr Cockburn (instructed by **the Insolvency Service Legal Directorate**) for the **Claimant**
Mr Bedenham (instructed by **DWF Law**) for the **Defendant**

Hearing dates: 20-21 January 2024

- -

Approved Judgment

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

.....28/3/24.....

I.C.C. JUDGE JONES

I.C.C. Judge Jones:

A) Introduction

1. The grounds for the Secretary of State's claim for a disqualification order, arising from the conduct of Mr Sekhon as a director of Combat Construction Limited ("the Company"), appear at paragraph 9 of the affirmation of Mr Gitner. He is Deputy Head of Insolvent Investigations (Midlands & West) within the Investigations Directorate of the Insolvency Service, an executive agency of the Department of Business and Trade. His sources of information are the public records at Companies House, information provided by the Official Receiver to the Secretary of State and an examination of the available accounting and other records of the Company.

2. The overarching ground for which there are particulars within sub-paragraphs reads as follows:

> *"[Mr Sekhon] caused [the Company] to trade to the detriment of [HMRC] from 22 January 2018 in respect of Construction Industry Scheme ("CIS") tax and from 07 November 2017 in respect of Value Added Tax ("VAT") until 10 April 2019, the date of his resignation, resulting in liabilities of at least £226,002 at liquidation. During this period, payments to other creditors were maintained."*

3. Mr Bedenham, counsel for Mr Sekhon, has submitted that: (i) that ground as stated, together with its particulars, does not establish an arguable claim for disqualification; and/or (ii) the case as presented at trial has strayed outside the ambit of that ground and case law both of general application to civil litigation and of specific application to claims under ***the Company Directors Disqualification Act 1986*** ("***CDDA***") has established that this is not permitted.

4. The need for the evidence in support to identify the grounds stems from ***Rule 3(3) of the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987 (the Disqualification Rules)***. It requires the affidavit served in support of the application to contain *'a statement of the matters by reference to which the defendant is alleged to be unfit to be concerned in the management of a company'*. The need for the substance of the case to be set out clearly has been explained by the Court of Appeal in ***Re Rex Williams Leisure Plc*** [1994] Ch 350 and in many other subsequent cases.

5. This judgment needs, therefore, to start by identifying the ambit of the ground and considering whether it can establish an arguable claim. Both those tasks need to be addressed in the context of the statutory requirements and case law. To the extent that there is an arguable claim, it will be necessary to address the evidence and then decide if the case as advanced has strayed outside its permitted boundaries.

B) Discriminatory Practice – The Law

6. Starting with the law, ***section 6 of the CDDA*** (as applied to this claim) requires disqualification if the court is satisfied, having taken into consideration pursuant to ***section 12C of the CDDA*** (for conduct from 1 October 2015) the matters listed within the amended ***Schedule 1 to the CDDA***:

> *"The defendant 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); and,*
>
> *Their 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."*

7. The factors within ***Schedule 1*** are:

> *"1 The extent to which the person was responsible for the causes of any material contravention by a company or overseas company of any applicable legislative or other requirement.*
>
> *2. Where applicable, the extent to which the person was responsible for the causes of a company or overseas company becoming insolvent.*
>
> *3. The frequency of conduct of the person which falls within paragraph 1 or 2.*
>
> *4. The nature and extent of any loss or harm caused, or any potential loss or harm which could have been caused, by the person's conduct in relation to a company or overseas company.*
>
> *5. Any misfeasance or breach of any fiduciary duty by the director in relation to a company or overseas company.*
>
> *6. Any material breach of any legislative or other obligation of the director which applies as a result of being a director of a company or overseas company.*
>
> *7. The frequency of conduct of the director which falls within paragraph 5 or 6".*

8. The burden of proof is upon the claimant applying the normal civil standard, the balance of probabilities. Each case turns on its own facts, the court asking whether the conduct found and relied upon by the defendant has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies. In reaching that decision the court takes into account any extenuating circumstances.

9. Although the phrase *"trade to the detriment"* is used in the stated ground within Mr Gitner's affirmation, as though the fact of non-payment is itself unfit conduct, the question raised by the grounds is whether the director caused the company to apply a discriminatory practice of paying other creditors with the consequence that the company was trading at the expense of the creditor who was discriminated against.

10. When answering that question the Court will normally take into consideration the fact that the Crown is potentially more exposed to discrimination because of the administrative problem it has in pressing for prompt payment as companies get into difficulties. Lord Justice Dillon explained the position in ***Re Sevenoaks Stationers (Retail) Limited*** [1991] Ch 164 at p.183 as follows:

> *The obvious result was that the two companies traded, when in fact insolvent and known to be in difficulties, at the expense of those creditors who, like the Crown, happened not to be pressing for payment. Such conduct on the part of a director can well, in my judgment, be relied on as a ground for saying that he is unfit to be concerned in the management of a company. But what is relevant in the Crown's position is not that the debt was a debt which arose from a compulsory deduction from employees' wages or a compulsory payment of VAT, but that the Crown was not pressing for payment, and the director was taking unfair advantage of that forbearance on the part of the Crown, and, instead of*

> *providing adequate working capital, was trading at the Crown's expense while the companies were in jeopardy. It would be equally unfair to trade in that way and in such circumstances at the expense of creditors other than the Crown. The Crown is the more exposed not from the nature of the debts but from the administrative problem it has in pressing for prompt payment as companies get into difficulties.*

11. The law relevant to the grounds of this claim can be summarised as follows (as established within cases such as ***Re Structural Concrete Ltd*** [2001] BCC 578, a decision approved by the Court of Appeal in ***Cathie v Secretary of State for Business, Innovation and Skills (No2)*** [2012] EWCA Civ 739, [2012] BCC 813, and as previously set out in ***Secretary of State for Business Innovation and Skills v Khan*** [2017] EWHC 288 (Ch) at [12-13]):

    a) Failure to pay a particular creditor, including HMRC, is not unfit conduct in itself. The Secretary of State must establish that the director has fallen below the standards of probity and competence appropriate for person fit to be directors of companies, taking into account any extenuating circumstances.

    b) The starting point is to establish a discriminatory practice of paying other creditors with the result that the company is trading at the expense of the creditor who is discriminated against may constitute unfit conduct.

    c) The evidence required to establish a policy of discrimination can be direct but it can also be inferred from conduct – for example the fact of withholding payment for a significant period in contrast to the payment of others.

    d) Such practice is normally found in cases where the company is insolvent, cannot pay all its creditors when the debts falls due and decides to pay those creditors who press and not those who forbear (whether intentionally or because of administrative problems in pressing for prompt payment of companies in financial difficulty).

    e) If a deliberate policy of non-payment of Crown debts is established, the court asks whether the Defendant has fallen below the standards of probity and competence appropriate for person fit to be directors of companies taking into account any extenuating circumstances. However the guidance of the court is that a deliberate policy of non-payment over a lengthy period is likely to be misconduct justifying such a finding.

    f) If the Defendant has fallen below the required standards of probity and competence, it is the duty of the court to make a disqualification order. Other matters, such as subsequent conduct and the current position are for mitigation and/or an application for permission to act.

12. For the purposes of this case it should also be added that tax assessments establish the liability of the Company to HMRC as a statutory debt but they do not establish binding evidence concerning the conduct of the director claimed to have given rise to the liability (see ***Re Kazitula Ltd*** [2022] EWHC 2588 (Ch), [2023] B.C.C. 377).

13. It follows for the purpose of considering the submissions of Mr Bedenham and identifying the ambit of the claim that it is necessary to identify from the grounds and their supporting evidence that at the time of the conduct relied upon as evidence of unfitness: HMRC was a creditor who was not being paid when other creditors were and that this resulted from a discriminatory practice (either to be established by specific evidence or to be inferred) attributable to or resulting from Mr Sekhon's conduct as a director of the Company. If so, that the consequence was that the company was trading at HMRC's expense because of that discrimination and that in all the relevant circumstances this was unfit conduct.

C) The Ambit of the Unfit Conduct Allegation

C1) The CIS Claim

14. The claim of unfit conduct asserts that the Company traded to the detriment of HMRC in respect of two identified taxes during the dates specified within the stated ground (i.e. from 22 January 2018 for CIS and 7 November 2018 for VAT until 10 April 2019 when Mr Sekhon resigned as a director) and that this resulted in unpaid liabilities of £226,002 for those periods when payments to other creditors and the director were maintained.

15. At this stage, therefore, the claim is simply that trading during those dates made HMRC a creditor and it was not paid although other creditors and the director were. The "Relevant Time" (i.e. the time of the conduct relied upon as evidence of unfitness) for the accrual of the liability, non-payment and the existence and application of the discriminatory policy is, therefore, between 22 January 2018 and 10 April 2019 for the CIS claim and between 7 November 2017 and 10 April 2019 for the VAT claim.

16. That CIS claim is developed within sub-paragraphs 9.1 to 9.3 to allege that: (i) a liability of £70,181 was determined for the year ended 5 April 2018 under ***Regulation 13 of the Income Tax (Construction Industry Scheme) Regulations 2005*** ("***Regulation 13***"); and (ii) in addition a liability of £39,301 accrued as a penalty (incorrectly, although nothing turns on it, identified with reference to ***section 36 of the Finance Act 2008***). There follows the statement that the tax liabilities remain outstanding in the liquidation.

17. The penalty has not been relied upon but the £70,181 is the figure presented to quantify the tax liabilities. The claim does not rely upon that determination as the starting date for the Relevant Time. The quantification resulted from the Company having not accounted for and paid to HMRC the CIS tax that was or ought to have been deducted when making payment to its subcontractor. It is the date when those deductions should have been accounted for to HMRC and the subsequent period during which it remained unpaid that is the Relevant Time; between 22 January 2018 and 10 April 2019.

18. Sub-paragraphs 9.9 to 9.11 address why the Company's trading establishes a policy of discrimination during the Relevant Time: The Company paid out more than the income it received during the period 7 November 2017 to 30 December 2019 (£1,818,944 out and £1,817,547 in), only £2,748 was paid to HMRC. In contrast £1,597,509 was paid in respect of wages and labour costs. This has left HMRC with a debt for which it is

proving of £226,002 and the Commissioners are the only creditors. That is equally applicable to the VAT claim to be considered below.

19. Based on the summary of the law above, I consider the ground for disqualification insofar as it applies to CIS to be sufficiently stated as a claim based upon a discriminatory policy to be inferred from the non-payment of the tax liability during the Relevant Period when other creditors were being paid.

20. For the reasons set out above I do not accept Mr Bedenham's submission that the CIS allegation relies upon the date of the Regulation 13 determination as the date from which the discriminatory policy is claimed to have started.

21. Whilst I agree with the submission of Mr Bedenham that particulars of knowledge of that liability are not pleaded, I do not consider that necessary within the grounds provided the evidence following addresses his role and conduct together with what he knew or ought to have known. That is because a policy can only exist if there is knowledge (albeit of the facts from which it is inferred) and, if established, Mr Sekhon being the sole director will have that knowledge.

22. Looking (in summary) at that evidence, the Secretary of State relies upon a compliance visit on 20 March 2018, and notification by letter 26 July 2018 that the company had failed to comply with the CIS scheme by making (as stated within the exhibited letter) the deductions required. The ***Regulation 13*** determination is then referred to. Mr Sekhon's interview by the Official Receiver on 9 March 2020 is mentioned next. It is said that he accepted the sum determined was due and reference is made to his following statement: *"We deducted CIS tax at source this was kept in the bank. This was used to pay other subcontractors. We were basically borrowing from one to pay another"*.

23. Pausing there, the ambit of the claim is clearly that deductions were or ought to have been made but there was no account or payments made to HMRC. Instead the money was used to pay other creditors bringing into play the discriminatory policy. Bearing in mind Mr Sekhon was the sole director, the claim clearly relied upon his responsibility for that conduct of the Company. That is the ambit of the claim.

24. The evidence from Mr Gitner goes on to address the responses of Mr Sekhon within pre-claim correspondence. This includes a letter dated 4 January 2021 in which Mr Sekhon raised the following facts and matters:

    a) Prior to HMRC's visit *"on 13 February 2018 where they made determinations of £70,181 for CIS"* the Company had been unable to access the CIS web-site to ascertain whether the subcontractors (supplying labour) had *"gross payment status"* ("GPS") so that the CIS deductions would not have to be made.

    b) That was because the Company's CIS login code did not work and no code was sent despite contacting the CIS helpline, chasing for one every 6 weeks, and being told repeatedly that a new code had been posted to the Company. This was also explained during the 20 March 2018 visit.

    c) The Company had documents from the major subcontractor (the one in issue), Akshay Contractors Limited ("Akshay"), *"of their CIS status [MG1 Page 346-347"]*.

25. Mr Gitner then referred to a response from the Insolvency Service dated 16 February 2021 which included the statement:

> *"payments to Akshay … were made without a CIS deduction and before [the Company] had completed the verification process (on 8 March 2018). This was communicated to the [Company] in letters dated 16 January 2019 and 18 February 2019.*
>
> *Mr Sekhon was asked in this correspondence 'Was the code ever received from HMRC and do you have contact with HMRC regarding the error*? In the telephone log records provided by HMRC generally, there was no mention of an issue with the CIS log in and requests for a new one' … Following the CIS determination … did the [Company] seek to appeal this?"

26. The evidence also addressed additional correspondence. This included raising issue with an assertion that the Company had not benefited from not deducting CIS by referring to the above-mentioned statement in interview that the deductions had been made and used to pay other subcontractors.

27. This form of drafting of a statement by simply repeating correspondence is unhelpful. Instead the statement should provide evidence identifying what is being relied upon and asserted as a result of the information received. For example, as a result of the further information received the conclusion was reached on behalf of the Secretary of State that [ ] and the claim is brought on that factual basis notwithstanding the matters raised because [ ].

28. Nevertheless the ambit of the claim (paragraph 23 above) has not altered except insofar as Mr Sekhon has identified a defence, and it has been responded to. As to the response, it is apparent that the Secretary of State's case is that this defence cannot be true or good because there is no evidence to support the claimed contact with HMRC concerning the code, because deductions should have been made unless and until the verification process had been concluded and because Mr Sekhon informed the Official Receiver under oath that deductions had been made but used to pay other creditors.

29. In my judgment this ambit of claim (paragraph 23 above) combined with the reply to the defence certainly presents an arguable case to be determined from the evidence at trial. I therefore reject the first part of Mr Bedenham's submissions concerning CIS. Whether the case as pursued at trial has fallen outside this ambit and is susceptible to Mr Bedenham's further submissions will need to be addressed when reaching my decision after addressing the evidence.

C2) The VAT Claim

30. I consider the position to be different with respect to the VAT. The particulars within sub-paragraphs of the overarching ground are as follows:

a) Only £2,748 was paid against a liability of £4,181 due upon the VAT return for the quarters ending June 2017 to March 2018.

b) The assessment of £742 made in the absence of a VAT return for the quarter ending June 2018 was unpaid.

c) There were no further returns.

d) Mr Sekhon knew the Company was the subject of a VAT investigation between 14 June and 24 July 2018. He knew input tax would be disallowed in the absence of evidence to support the returns for that period.

e) The assessment resulting from the investigation raised on 7 February 2020 totalled £105,409 for the quarters ending September 2017 to March 2018. It was not paid.

31. The first two sums are minor (sub-paragraphs (a) and (b) above). On their own they would not sustain this claim. The issue is the £105,409, although the first two sums will add some evidence should that issue be effective.

32. The problem, however, with the statement of the allegations of unfitness concerning the £105,409 is that it is based upon the following proposition: the fact that input VAT tax has been rejected means that Mr Sekhon must have caused the Company not to pay the VAT during the Relevant Period when he knew the input tax could not be deducted from the output tax in that amount.

33. That does not follow. He may have genuinely considered that the input tax could be claimed as a deduction from the output tax. The proposition needs to be: Mr Sekhon when submitting the relevant returns or at any later, relevant stage knew or ought to have known that the Company did not have the input VAT evidence which HMRC was entitled to require if it was to be deductible from the output tax.

34. That proposition means it is necessary to address his knowledge at that time of claiming input deduction and subsequently with reference to the items of expenditure which were rejected, the evidence for those items which were/could be relied upon by him on behalf of the Company, and whether he concluded or as a director acting reasonably ought to have concluded that the relevant input tax deductions were impermissible.

35. The grounds certainly do not approach the claim in that manner, as they should. However, it is also necessary to address the substance of the evidence itself, as it was with the CIS, before reaching a conclusion upon Mr Bedenham's submissions.

36. Paragraphs 40-47 of Mr Gitner's affirmation effectively mirror the grounds and takes the issue no further. The letter of 4 January 2021 from Mr Sekhon is next referred to in which he wrote of his understanding that the refusal was because invoices did not have the full address of the supplier, and his defence that the suppliers were all registered and the correct VAT numbers inserted on the invoices.

37. The response of Mr Gitner's affirmation was that the input tax was disallowed because evidence to substantiate the claims for deduction had not been provided. This was an ongoing issue from 13 February 2018 until the letter dated 7 May 2019 confirming the disallowance. There followed a statement of Government guidance concerning names and addresses on invoices but without making it clear whether this was a or the reason for the lack of evidence decision. The further Insolvency Service letter dated 7 April

2021 (next referred to) repeated cause of disallowance as the absence of evidence to substantiate without mentioning addresses.

38. In my judgment that evidence does not address Mr Sekhon's knowledge at the time with reference to the items of expenditure which were rejected, the evidence for those items which were/could be relied upon and/or whether he had concluded or as a director acting reasonably ought to have concluded that the relevant input tax deductions were impermissible.

39. The result is that Mr Sekhon did not have evidence addressing those key points to answer. If he had, he would have been able to address his knowledge in the context of the specific allegation and address: not whether HMRC were correct to reject the evidence but his state of mind during the relevant period concerning whether it would or might be rejected and whether the Company's non-payment of any resulting VAT debt was attributable to as policy of discrimination. In short, whether he had or ought to have had the knowledge to draw the conclusion before or during the period of liability that the input claims would be rejected and, if so, to what extent.

40. Therefore, I accept Mr Bedenham's submission that the VAT ground as stated within the evidence in support cannot and do not establish a case of unfit conduct. In my judgment this claim can only proceed with any prospect of success in reliance upon the CIS discriminatory policy claim.

D) The Defence

41. Turning to the defence to the CIS liability ground to be found within Mr Sekhon's evidence in answer, it can be summarised as follows: Mr Sekhon believed that the main subcontractor to whom payments were made without deductions, Akshay, had GPS and, therefore, deductions did not have to be made or (it follows) be accounted for. Even though that now appears incorrect, his conduct as a director was reasonable and not unfit taking into consideration what was represented to him by Akshay and the fact that he was unable to access the CIS online portal to carry out verification checks.

42. Although the VAT claim is not an issue as a result of my decision above, for completeness I will record the manner in which he responded ,noting that he did not treat the VAT differently from my analysis above. The defence can be summarised as:

    a) The assessment by HMRC occurred almost a year after the business had been sold, the purchaser should have addressed the returns and he was not in a position to cause an appeal. He had no reason to believe such a liability would accrue or was accruing based upon the company's trading.

    b) The reason the liability became so large was the rejection of the application of input tax deductions based upon returns that had been filed for previous quarters for the purpose of assessment. This should be appealed but his conduct was reasonable and not unfit at the relevant time of trading. The business records and paperwork were retained by Mr Gurmeet Singh Sidhu as the new owner from 10 April 2019. In addition, the sale of the company was upon terms that the outstanding VAT returns would be completed.

E) The Trial

E1) The Secretary of State's Witness

43. Mr Gitner gave evidence for the Secretary of State. Whilst I unhesitatingly reach the assessment that Mr Gitner did his best to assist the court, he could not of course provide personal knowledge of the relevant events. As a result, there was no requirement to put Mr Sekhon's case to him when that would simply involve an argument of the merits.

44. Mr Bedenham approached his cross-examination accordingly and concentrated upon two themes. First, the absence of investigations of HMRC and second the conclusions of fact that might be drawn from certain HMRC documents and correspondence. Whilst Mr Gitner did his best to assist, the reality is that his stated sources of knowledge (see paragraph 1 above) did not refer to HMRC enquiries and he could not speak to HMRC's documents.

45. Mr Bedenham submitted that not only is the absence of evidence from HMRC detrimental to the claim, and that it means the claim has been presented unfairly without necessary investigation and testing but also that an adverse inference should be drawn. He has referred me to the following passage from the judgment for the case of ***Wisniewski v Central Manchester Health Authority*** [1998] EWCA Civ 598; [1998] PIQR at page 324:

> *(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action. (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness. (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue. (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."*

46. I will consider such submission to the extent it is necessary to do so in the context of the judgment. In doing so I will apply that law. I note that adverse inference may also be relevant as a result of Mr Sekhon not having called other witnesses.

E2) Mr Sekhon's Evidence

47. Mr Sekhon plainly had difficulty, as many witnesses do, remembering dates and what he knew or did at a particular time. Overall his recollection was generally vague, at times contradictory and from time to time left me with the impression that he would say whatever he perceived best suited his case. I do not suggest this was intentional conduct but attribute it to the difficulties of giving evidence concerning past events whilst under the inevitable pressure caused by cross-examination. However, that was my assessment and I refer to the following as examples:

a) His recollection of the sale of the business was vague including: how the original price was agreed, and the relevance of the late VAT submissions and tax returns that were needed to be completed; which books and records of the Company were handed over and when; and what his role was and how he performed it through contact with Mr Singh Sidhu, the purchaser, between completion of the sale in April and December 2019.

b) The extent to which he could give evidence as though he had dealt with HMRC (as he did asserting his ability/knowledge to do so) when it was his brother who was delegated responsibility for the administration of the Company, and Mr Sekhon's time was principally spent on site, his involvement with administration being limited to "bits and bobs".

c) He first said he knew that the email from himself to the investigators sent on 5 April 2021 included as an attachment, as it stated, the letter from HMRC to Akshay, which had been provided by this subcontractor to the Company and purportedly stated that Akshay held GPS. He then confirmed he had such knowledge despite the fact that the email had been drafted by his brother. He then accepted that he did not know that it was in fact attached but had made his statement of knowledge relying upon the fact that its attachment was stated in the email his brother drafted. It was then put to him that this must mean, if it was attached, that he and his brother had not handed over the letter to Mr Sidhu Company in April 2019 on completion of the sale of the Company as he had previously stated. Instead of agreeing to that inevitable logic, his "knee-jerk" response was that they did not have the letter to attach it. All this evidence being given after counsel had agreed out of court that the letter was not attached.

d) Upon it being put to him that he knew there was no GPS held from receipt of the 26 July 2018 HMRC letter, his denial of receipt of the letter also came across as a "knee jerk" answer to avoid being tied to an admission.

48. That all said, it is plainly right not to jump to the conclusion that his evidence is false. Account must be taken of the lapse of time, the pressure of giving evidence in court under cross-examination, the memory issues specifically mentioned and the potential for false memory that is generally now recognised by the courts in civil claims. As a result there will inevitably be at least some parts of a lengthy cross-examination which raise issues over reliability without leading to the conclusion that he intentionally does not tell the truth or that all of his evidence is unreliable.

49. I conclude that the correct course is to treat the reliability of his evidence with caution. His evidence must be tested against contemporaneous evidence and the evidence as a whole bearing in mind those reliability issues. It is also the position, however, that if one part of his evidence is rejected due to unreliability, it will not necessarily follow that the same conclusion should apply to any other evidence.

F) The Evidence and Findings of Fact

50. I will only address those facts and matters which I consider relevant to the decision. I will do so without necessarily expressly referring to or identifying counsels'

submissions concerning acceptance or rejection of such matters or of their resulting consequences or implications.

51. I am satisfied that the evidence establishes the basic facts relied upon in the grounds of Mr Gitner's first affirmation as particularised. Trading took place during the relevant period whilst Mr Sekhon was the sole director and without payment to HMRC for 2 years and nearly 2 months save for £2,478. Mr Sekhon accepts he knew and understood the CIS scheme including the need for deductions and the requirement to account for the tax due to HMRC unless a sub-contractor held GPS.

52. It is established by the evidence that the ***Regulation 13*** determination was for a liability of £70,181 for the tax year ended 5 April 2018. This is directly attributable to the 20% deduction that should have been made in respect of Akshay for the period January 2018 to February 2018. It has been established that neither this sum nor the £39,301 penalty or any part of those liabilities have been paid.

53. Only £2,748 was paid towards VAT for the returns for the June 2017 to March 2018 which recorded a liability of £4,181and that part payment was only made after receipt of an enforcement letter. The assessment for the June 2018 quarter was also unpaid. There is a liability of £105,409 for the VAT quarters September 2017 to March 2018 as assessed on 7 February 2020. No payments were made for those quarters whether as assessed or otherwise.

54. In contrast all creditors and Mr Sekhon, as the director, were being paid. The figures are stark, as set out in sub-paragraphs 9.9 - 9.11 of Mr Gitner's first affirmation, which I find proved on the balance of probability as drafted. The Company paid out more than the income it received during the period 7 November 2017 to 30 December 2019 (£1,818,944 out and £1,817,547 in), and despite this only £2,748 was paid to HMRC. In contrast £1,597,509 was paid in respect of wages and labour costs. HMRC is proving for a debt of £226,002 and the Commissioners are the only creditors.

55. In addition, Mr Sekhon in his second affirmation acknowledges that the Company could not pay the ***Regulation 13*** determination and was insolvent. That obviously applies from March 2018 but the determination is of an accrued liability which the Company did not pay and was a debt due and owing (which should have been the subject of returns) the non-payment of which evidences insolvency. That conclusion would normally be subject to consideration of the Company's accounts but none have been filed during its trading and no management accounts have been relied upon at the hearing.

56. On the face of all those facts and in the light of the evidence concerning the income in and expenditure out, this appears (without consideration yet of the matters Mr Sekhon raises in defence) to be a classic case for which an inference of a policy of discrimination is likely to be made.

57. In addition, the Secretary of State's evidence includes the written statement made by Mr Sekhon to the Official Receiver under oath. Mr Sekhon has asked for this to be read subject to the stress that he was under at the time and to him being prepared to say whatever would bring the interview to an end quickest. The problem with that is that the statement makes clear on its face not only its admitted truth but also that it has been signed on 9 March 2020 as true knowing the consequences of ***section 5 of the Perjury***

Act 1911. Whilst that does not mean the Court will not consider errors (intentional or otherwise), the starting point must be that this is a true statement to the best of his knowledge and belief at the time. In his statement:

a) He explained that he did not retain an accountant and took any profit as his wage.

b) The sale of his shares in April 2019 to Mr Singh Sidhu was because the company could not pay the wages and Mr Singh Sidhu offered him a way out. It had been intended that he would still be used to speak to clients because of Mr Singh Sidhu's language difficulties but Mr Singh Sidhu disappeared after he had paid the £600. He alleged that Mr Singh Sidhu was stealing clients, although that is unexplained.

c) The Company did not have enough money to pay HMRC and they were told that. In about January/February 2019 they attended the Company's office and explained how to complete the tax returns in the future. Mr Singh Sidhu agreed to pay the debt and clear the arrears. There was no reference to CIS issues.

d) He was responsible for the returns and some £4,000 was owed when the Company was sold. *"We deducted CIS at source this was kept in the bank. This was used to pay other subcontractors. We were basically borrowing from one to pay another. When we tried to pay HMRC but the funds were not available … It started to go wrong 5-6 months before I sold the Company …".*

58. It is to be noted that there was no reference to any CIS issues or assessment at any time and the tax liability was only put at £4,000. It is also to be noted that the admission of keeping deducted CIS tax and using it to pay other creditors than HMRC is not an admission that would be lightly made unless true whether Mr Sekhon was under stress and/or wanted to leave as quickly as possible or not. Whilst there are no details of the amount involved, all this evidence supports the CIS claim of a discriminatory policy to be inferred from the non-payment of the CIS tax liability during the Relevant Period when other creditors were being paid.

59. Also exhibited is Mr Sekhon's completed questionnaire booklet provided by the Official Receiver, dated 9 March 2020 also subject to a statement of truth and ***section 5 of the Perjury Act 1911***. In that document he acknowledged the Company's debt of £70,000 to HMRC but attributed that to unpaid VAT. He also stated that all deductions from payments to subcontractors had been accounted for to HMRC. I do not consider this evidence alters the conclusion that the evidence referred to so far supports the CIS claim.

60. In all those circumstances the evidential burden has shifted to Mr Sekhon. That is because at this stage of the evidence: (i) a subsequent assessment has established that from 22 January 2018 to 10 April 2019 the Company traded without accounting for and paying its CIS tax liabilities with £70,181 being the assessed sum for the tax year ended 5 April 2018; (ii) during the period 7 November 2017 to 30 December 2019 only £2,748 was paid to HMRC when the Company had income of £1,817,547 and expenditure of £1,818,944; (iii) HMRC was the only creditor at the date of liquidation whereas in contrast £1,597,509 was paid in respect of wages and labour costs; (iv) a discriminatory practice of paying other creditors with the result that the company is trading at the expense of HMRC who is discriminated against is to be inferred taking into

consideration the figures and time involved; and (v) Mr Sekhon was the sole director and responsible for that state of affairs. All of this falls within the ambit of the CIS grounds set out in the evidence in support.

61. The shifting of the evidential burden means that if Mr Sekhon had not defended the CIS claim or done so without reliance upon any evidence, the conclusion would be that the claim was established on the balance of probability subject to the court considering whether the conduct was unfit. As the sole director the knowledge of the Company trading without paying HMRC would be attributed to him. He would be responsible as the sole director and for the general approach of paying all creditors and himself whilst not paying HMRC. On the evidence at this stage he will have chosen not to account for CIS payments in the amount subsequently determined. This conduct would fall below the standards of probity and competence appropriate for person fit to be directors of companies taking into account any extenuating circumstances.

62. Mr Sekhon's evidence to meet that burden is that he believed during the Relevant Time that no CIS was to be deducted because the relevant contractor, Akshay, held GPS. The background to that belief is the fact that he would ensure the Company carried out *"regularity and due diligence"* checks before entering into a contract with a supplier. That occurring in the context of him knowing about and understanding the CIS requirements.

63. In his evidence in answer he said this:

> *"34d. Verification of CIS/GPS registrations, this including checking my suppliers and the subcontractors registrations. However, we were unable to carry out online checks due to HMRC not providing Combat with the access code that was needed to access the CIS portal. So instead, we had to rely upon the suppliers and subcontractors evidencing that they were CIS/GPS registered. This was usually by showing us HMRC correspondence stating that they were registered under the CIS or had GPS.*
>
> *40. This was communicated to HMRC on numerous occasions by both myself and Jason, and on all occasions we were told that the access code would be sent via post as they did not have the facility to provide the code to us over the phone.*
>
> *41. On 20 March 2018, there was a visit by HMRC and I raised this issue with the three officers that attended. I explained to them the difficulties that we had had in retrieving our access code, and thus we were unable to verify the CIS/GPS status of our supply chain online. During the meeting we also showed officer Kaur and Johnson that we were unable to log on to the system and what code was required. I also went onto explain to them that we had to rely on our trading partners evidencing their registrations under the CIS and GPS approvals by way of HMRC correspondence.*
>
> *42. The attending officers checked some of our paper work and also took some paperwork with them, which was never returned back, and I understood, or certainly thought that they would help us retrieve our access code, but instead they stated that we had not deducted the correct amount of CIS for some of our suppliers, including Akshay Contractors Limited ("Akshay"). As we were unable to log in to the CIS portal, we relied on the evidence provided by Akshay and as a result of which, we did not deduct the CIS as Akshay had evidenced to us that they had GPS status and therefore no deductions were required. It was not until after the meeting in March 2018 that we were advised by HMRC that Akshay did not have GPS and that we should have been making a 20% deduction."*

64. In evidence in rejoinder, Mr Sekhon also said this:

> *"20. … At the time of carrying out due diligence checks, I was shown a hard copy of HMRC correspondence by the director of Akshay … I took a copy of the same. The correspondence evidenced that Akshay was duly registered under [CIS] and [held GPS]".*

65. The evidence is, therefore, that there was no deliberate policy of discrimination. The Company had evidence from Akshay that it held GPS and were unable to check this through the portal because HMRC did not provide the access code despite many requests. The assessment itself was not until 18 February 2019 and once identified not only left a mere two months until Mr Sekhon resigned but caused him to ensure that the purchaser was obliged to cause the Company to pay the liability.

66. There has been some argument that the failure to call HMRC has meant that the lack of GPS for the relevant period has not been proved. The reality is, however, that there is no evidence of GPS except for Mr Sekhon's word that he had the HMRC/Akshay letter he said had been given to him. The issue is whether that word is to be believed but it is to be accepted that this must be tested in the context of no direct, only hearsay evidence from HMRC.

67. Addressing that issue, it is to be observed that Mr Sekhon lacks documentary evidence to support his recollection. He says he took a copy of the Akshay letter of GPS but has not produced it in evidence. Potentially (to be considered further below), however, he handed it over to the purchaser of the Company who has disappeared, Mr Sidhu. He relies upon his memory and does so without having provided evidence from his brother. His brother was in Court and was the person with specific responsibility for the Company's administration including the payment of sub-contractors. There is no explanation for his absence as a witness.

68. The Secretary of State relies upon hearsay documentary evidence and upon the absence of any appeal against the ***Regulation 13*** determination when the right to appeal expired before the sale of the Company following notification of the decision by letter dated 18 February 2019. The Secretary of State also relies upon the evidence of Mr Sekhon that he continued to be available to assist the Company for some 6 months after the April 2019 sale and to remain on the bank mandate controlling the account.

69. Looking at the evidence: As to the sale, the signed "Share and Ownership Transfer Agreement" effective from 10 April 2019 is for the sale of Mr Sekhon's shares to Mr Sing Sidhu for £600.00. It provides that Mr Singh Sidhu *"will be sole responsible for all aspects of [the Company]- This includes all aspects of debtors and creditors"*. There is evidence of payment of the consideration on the same day. There is no reference to Mr Sekhon and his brother *"stay[ing] on for an initial six month period so that things could be handed over … and also due to English not being [the] first language of [Mr Singh Sidhu and his business partner, Mr Baldev Singh]"* but Mr Sekhon's oral evidence was that this was a term of the sale.

70. The oral evidence of Mr Sekhon was that the sale of the Company's issued share transfer for which he was the sole owner was first agreed by him with Mr Singh Sidhu around January 2019 for £78-80,000. Mr Sekhon said that the price took into account the outstanding VAT and corporation tax owed to HMRC and that it was agreed orally that Mr Singh Sidhu would ensure the Company made the outstanding returns and tax payments.

71. He could not explain how that share valuation was concluded except to say that: it was a considerable reduction from his opening gambit of over £100,000; Mr Singh was purchasing the Company's existing contracts; and Mr Gurmeet Singh was able to value the Company because of his knowledge and experience in the locality (he *"operated a concrete finishing business in Wolverhampton ... had a lot of experience and also a large work force behind him"*) which meant he was able *"to estimate how much you make from the workforce"*.

72. However, this arrangement had altered by April as a result of Mr Sekhon's disclosure of the ***Regulation 13*** determination. Mr Gurmeet Singh required the liability to be deducted from the purchase price to which Mr Sekhon agreed, the Company having lost a couple of contracts. That reduced the price to a mere £600.

73. As previously mentioned, the evidence concerning the sale of the business and the role undertaken by Mr Sekhon during the following six months was vague. In addition, there is the strange asserted fact of Mr Gurmeet Singh's disappearance and Mr Sekhon's loss of all contact details due to a change of telephone. Bearing in mind the evidence of Mr Sekhon that Mr Gurmeet Singh was an established businessman with a business in Wolverhampton that had a large work force, it is probably not surprising that the Secretary of State is sceptical about whether the sale was genuine. However, I consider it right to ignore all questions along that line because it is not an allegation within this claim.

74. The important fact to bear in mind is that Mr Sekhon sold his shares, which he had been originally willing to sell for £78-80,000, for only £600. That was because of his acceptance of the ***Regulation 13*** determination. It was a liability deducted from the previously agreed purchase price without any consideration of the now asserted fact that there was no liability because Akshay had provided a letter from HMRC recording it has GPS. That "acceptance" of the liability does not disprove the evidence from Mr Sekhon but it undermines its credibility and will need to be considered with all other evidence relied upon by the Secretary of State to assert that Mr Sekhon's oral evidence should not be believed or relied upon.

75. As mentioned, that evidence consists of hearsay documentation. The starting point is the letter dated 21 August 2017 that undermines Mr Sekhon's statement that the Company never received a pin or code to enable access to the CIS portal to check whether Akshay held GPS. The letter from HMRC in fact contained a pin to be activated within 28 days to access the CIS service and, as a result, to be able to check whether Akshay held GPS status.

76. I am satisfied from the evidence overall that a check would have established they did not. There is no evidence to the contrary and that is the fundamental premise of the ***Regulation 13*** determination. The determination of £70,181 can be seen mathematically (using 20%) to relate to the gross payments of £210,297 and £140,608 used for the calculation.

77. Receipt of the pin plainly undermines Mr Sekhon's recollection that no access code, as he described it, was received. He was adamant in the witness box that this was not a case of a pin having been received but not working. It is fair to observe in this regard that he was given (bearing in mind the lapse of time and the giving of evidence in court) every opportunity to review and correct such evidence. He was referred to a letter from

his solicitors dated 18 December 2020 which presenedt a different factual recollection. Namely that the first code did not work and requests for further pins were not fulfilled. His recollection remained, however, that the pin was not received.

78. He was also given the opportunity to consider the proposition that his evidence concerning his knowledge of what occurred does not fit with his role as the person on site and his brother's role as the administrator. In other words, it was put to him that his brother may have known of the letter but not him. However, he did not and would not change his evidence that he was in a position to know and did know the pin had not been received by the Company.

79. To support his defence, Mr Sekhon recollected a meeting with HMRC on 20 March 2018 at the Company's premises. His evidence was that he not only told them a code had not been received but showed them that he could not gain access on the laptop. I did not understand why he would show them when the absence of a pin would lead to that inevitable conclusion but even assuming there is an explanation, there is still the fact that his evidence that a code had not been received is incorrect.

80. The problem for Mr Sekhon's evidence is not only that the letter shows it was sent but that he handed over this letter to the Official Receiver upon his examination at interview. He has provided no explanation as to why he had that document if the Company did not receive the pin as he asserts.

81. The Company plainly did receive it because it had the document. Therefore, on the balance of probability and absent any other explanation, I find that the Company received the pin to enable activation. Once that is established, Mr Sekhon needs to explain why he did not know of its receipt or why the pin was not used or why it did not work. That is not his evidence and, therefore, he has not done so. His unequivocal evidence is that the Company never used it because it never had it. I must obviously include that evidence within the scales against his defence but I will still do so still bearing in mind the lapse of time. It is still important to view the evidence as a whole.

82. The Secretary of State also relies upon a letter dated 26 July 2018 from HMRC to the Company in which one C.E. Bleathman of "CIS Technical Support" wrote:

> *"I can see that the business registered as a Contractor within the Construction Industry Scheme on 20 November 2016, on 6 October 2017 you verified the subcontractor Dhillon Structures Ltd and were advised to operate Net Payment Status. Indeed upon making the first payment in November 2017 Tax at the standard rate of 20% was correctly deducted, however the subsequent payments made in December 2017 and January 2018 were made Gross.*
>
> *I can also see that you verified the subcontractor Akshay Contracts Ltd on 8 March 2018, however you had already made payments to the business prior to that date, namely in January 2017 and February 2018, if you had verified at the correct time you would have been advised by HMRC that the payments should after the Standard Rate of deduction of 20%, you however made both payments on a Gross basis. Apart from making payment without verification, the amounts involved amounted to January £210,297 and February £140,608."* (my underlining for emphasis)

83. On its face this evidences access to the CIS website scheme by the Company and its verification of two subcontractors, the latter being Akshay. Mr Sekhon denied this and I have decided not to rely upon this part of the letter for the purpose of reaching my decision as to whether to accept Mr Sekhon's evidence in defence to the claim. The

reason being that there is no HMRC witness statement addressing the points asserted and no opportunity to test the evidence by cross-examination in a context where the source of what C.E. Bleathman "can see" has not been identified or subsequently produced in evidence.

84. I also bear in mind that no contemporaneous note of the meeting has been produced whether as an exhibit or by an HMRC employee's witness statement. Equally there is an absence of any witnesses from HMRC to address the evidence that Mr Sekhon (whether by himself or his brother) told HMRC on numerous occasions (at one stage he said every 6 weeks and that he and his brother were repeatedly told that one was in the post but it never arrived) that a code (i.e. pin) had not been received.

85. That absence of HMRC evidence would potentially provide considerable evidential strength to Mr Sekhon satisfying the shifted evidential burden but for the fact that the principal problem for his evidence is that a pin was received as already explained. In other words, whilst the Secretary of State has not provided back up evidence to counter Mr Sekhon's oral evidence as might have been done, the Secretary of State can still challenge Mr Sekhon's evidence that he knows as a fact that the Company did not receive the access code and that this prevented access to the CIS site. That evidence of Mr Sekhon must still be weighed against the receipt of the letter dated 21 August 2017 and the fact that he had it in his possession even as at the date of his interview.

86. The letter dated 26 July 2018 also contains notice under ***section 66(3) (B and (c) of the Finance Act 2004*** cancelling the Company's GPS registration because of the failure to deduct CIS as required. It informed the Company that HMRC would be writing to its contractors informing them that all payments should be paid after deduction and setting out the requirements upon each new contractor for whom the Company works to notify HMRC of the Company's unique tax reference and national insurance number. There was a notified 30 day right of appeal against the cancellation decision.

87. Plainly these are important consequences (all occurring at least six months before the sale of Mr Sekhon's shares) and one would have expected the Company, still under Mr Sekhon's directorship, to appeal during the 30 day period if indeed the true position was that there had been no access and no pin number enabling access. There was no appeal and this is of some (but not overly heavy) weight in the balance against his defence.

88. The same conclusion is to be drawn from the fact that ***the Regulation 13*** determination was not appealed. The letter of notice is dated 18 February 2019. That is before the concluded sale in April and the 30 days' time period for appeal, as stated in the letter, also covered the period of Mr Sekhon's directorship. It is reasonable to expect, if true, that Mr Sekhon would have raised the issue of appeal with Mr Gurmeet Singh and explained to him that the determination could not be right because the Company did not have access to the CIS web-site to check companies' GPS, and in any event held a letter (to be referred to further below) evidencing that Akshay held GPS. That is all the more reasonable to expect, if true, when the price of the share sale was otherwise to be reduced by the amount of the determination. Indeed, if true, it does not make commercial sense to sell for £600 when the share is worth £78-80,000 subject to that issue. Yet there is no evidence from Mr Sekhon of any such conversation. No evidence even that he tried to persuade Mr Gurmeet Singh to pay more for those reasons but finally accepted £600. No evidence of why he capitulated to that nominal sum.

89. Also to be added to the weight of evidence against Mr Sekhon's evidence is the fact that the first document from him or on his behalf which referenced the absence of a code from the Company is not written until a letter dated 18 December 2020.

90. I now turn to the written evidence that might have shown that Akshay provided a letter from HMRC evidencing it held GPS: In an email sent to investigators on 5 April 2021 (drafted by Mr Sekhon's brother but which he sent and he acknowledges as his) it is written:

> *"Our supplier also provided us with a letter proving his gross status which I have attached".*

91. The first point that results is that if Mr Sekhon had the letter relied upon as at 5 April 2021, he has provided no explanation as to why he has not produced it as evidence in this claim. Second, and standing alone is the fact (agreed during the hearing between the parties) that the HMRC/Akshay letter was not attached. There is no explanation for that, assuming it existed. Third, the existence of the letter is inconsistent with the fact that Akshay did not in fact have GPS status unless it is to be concluded that the letter was a fraudulent creation by that contractor. Fourth, bearing in mind the obvious importance of this letter and it being appreciated by this date that it was essential to establish that the Company had seen such a letter, its absence as an attachment highlights the absence of evidence from Mr Sekhon's brother.

92. Consideration of the absence of the HMRC/Akshay letter must also bear in mind the inconsistencies of Mr Sekhon's evidence concerning its existence as an attachment to which I have drawn attention above when assessing him as a witness. This undermines his reliability.

93. Looking at the evidence as a whole, the oral evidence for Mr Sekhon's evidential defence is heavily outweighed by the written evidence to which I have referred combined with the many flaws in the oral evidence. I treat the evidence against as a whole rather than individually but the fact of possession of the letter with the pin and the fact that the HMRC/Akshay letter has never been produced notwithstanding its importance are clearly factual matters of considerable weight. Mr Sekhon's brother might have provided supporting evidence and was in a position with the Company which meant he should have been able to do so but he did not. I will not draw an adverse inference but it means there is no support for Mr Sekhon's evidence. Adding to this the whole issue of the purchase price, the lack of appeals and the resulting deduction weighs heavily against oral evidence which is subject to considerable caution as to reliability.

94. I reject as a fact that Mr Sekhon knew the Company did not have an access code or pin and that this was the reason why the Company did not access the CIS web-site to check whether Akshay held GPS. I also reject the evidence that Akshay provided a letter from HMRC recording or otherwise evidencing it held GPS. Taking those points into consideration, I have to conclude on the balance of probability that the HMRC/Akshay letter did not exist.

95. In reaching that decision I have considered the absence of evidence from anyone at Akshay. This could be the subject of adverse inference against Mr Sekhon. In a case where this is a crucial issue and he has no documentary evidence to support the evidence of recollection he would give, one would have expected a witness from Akshay.

However, I have decided not to take that approach and not to give any weight to this omission. That is because if it is to be assumed that the letter existed, Akshay may well be reluctant to give evidence about a document which records a status that had not been granted.

96. The conclusion for the facts of this claim, therefore, is that Mr Sekhon has not shifted the evidential burden of proof. His evidence has been rejected and the facts supporting the claim stand.

97. Whilst it is unnecessary to turn to the VAT, the factual position is clear and supports the conclusion that I have reached concerning the merits of that part of the claim. There were no returns for and no payments of VAT for the quarters ending September 2017 to March 2018. The assessment made on 7 February 2020 was based upon the previous returns which had given rise to a small liability as a result of inputs almost cancelling out outputs. The assessment did not accept the figures for inputs as a result of a lack of documentation and calculated the VAT accordingly. That was attributable to the absence of satisfactory evidence. However, the absence of evidence addressing key issues means there was are no facts that can be reached concerning: (i) what documentation was lacking for which input figures; (ii) Mr Sekhon's knowledge at the time of the input figures being inserted on the returns; (iii) whether it was reasonable for him as a director to conclude that the relevant input figures would be rejected and, if so, as to when that state of mind existed or ought to have existed.

G) **Submissions**

98. Although not expressly, I have borne in mind the submissions of both counsel concerning the evidence when reaching my findings of fact. Their submissions on liability depend upon my conclusions concerning the ambit of the CIS claim, the submissions of Mr Bedenham concerning the VAT claim having been accepted. In the event that I am entitled within that ambit to find that Mr Sekhon caused the Company not to account for and pay the CIS claim, realistically (but without concession) it is accepted that unfit conduct will have been established.

99. As to the ambit, Mr Bedenham's excellently constructed submissions have considerable force but for the need to analyse the burden of proof and the shifting of the evidential burden. He is right to submit that there is no room for finding fraud, dishonesty, sham, a de facto directorship after resignation or the like. Those matters are not the subject of the grounds of the claim. He is also right to submit that a policy of discrimination can not be established if the starting date is, as he submits, the date of the ***Regulation 13*** determination. The position at this stage was that the Company was insolvent, HMRC could not be paid and he ceased to be a director having sold his shares at the beginning of April 2019. It is too short a period.

100. The submission I cannot accept is that this claim has not been based upon an allegation that Mr Sekhon knew or should have known before the ***Regulation 13*** determination that the CIS debt was due. The basis for this is that it is not pleaded that Mr Sekhon knew or ought to have known that Akshay did not hold GPS.

101. The reason why that cannot succeed is that the correct analysis of this claim is that it was founded (the original and binding ground) on the fact that £70,000 odd of tax accrued prior to the determination and was not accounted for and paid in the context of all other creditors being paid. Mr Sekhon as the sole director was responsible for this (as claimed in the ground and its relevant sub-paragraphs). The claim of a policy of discrimination has to be based upon Mr Sekhon adopting that policy. In other words, that he knew before the ***Regulation 13*** determination that the CIS debt was due and chose to pay others instead of that debt. That is the substance of the claim.

102. The issue of knowledge of Akshay's GPS status was separately raised as a defence when the evidential burden had shifted. This defence was then addressed within the evidence. The Secretary of State had not been required to frame the stated ground as being based upon statements that a pin had not been received and that the HMRC/Akshay letter did not exist. The absence of the pin and the existence of the letter were matters to address in response to the evidential defence by reply evidence. That occurred and the consequence of this judgment's findings of fact is that Mr Sekhon's defence that he could not check Akshay's status and/or that he had evidence from Akshay that it held GPS status is rejected. That returns this claim to the original ground.

103. In support of his submission Mr Bedenham explained that had the issue of knowledge been addressed within the evidence in support, Mr Sekhon would have had the opportunity to present evidence specifically addressing the issue. He explained carefully that whilst such evidence cannot be identified because this did not occur, Mr Sekhon would have had the opportunity to have explained through evidence why, for example, the business model did not sustain the existence of such knowledge and that the Company would not decline to deduct the 20% required when to do so would only benefit Akshay not it.

104. However, the problem for this submissions remains the fact that the opportunity existed within the context of raising the evidence required to sustain the defence presented evidentially to meet the shifted evidential burden of proof. The points concerning business model and absence of benefit can in fact still be made (in principle, although it is stymied by the absence of accounts to show there was no deduction, the admission in interview with the OR concerning the use of money which was deducted and the overwhelming strength of the evidence causing the evidential defence to be rejected on the facts) but it cannot be successfully submitted that Mr Sekhon was somehow prevented from producing the evidence which his defence relied upon. An example of that concerns his brother and Akshay. There is no reason flowing from the grounds and evidence relied upon by the Secretary of State why Mr Sekhon could not have called their evidence to support the defence and (potentially) satisfy the shifted evidential burden.

105. The one concern that arises, however, is the submission of Mr Cockburn in reply concerning amendment of grounds within the first affirmation of Mr Gitner.

106. The issue of amendment arose because it was raised by me with Mr Bedenham when addressing his submissions, whilst expressly acknowledging that it would be for the Secretary of State to ask and argue for permission to amend if that course was chosen not for a Judge to address it without such an application. Mr Cockburn addressed the need for amendment in reply and it is important to note that his primary submission was that amendment is not required.

107. His alternative submission, however, was that if an amendment was required it should be: *"The Secretary of State was aware since 8 March 2018 that the Company's subcontractor, Akshay, did not have gross payment status under the Construction Industry scheme. He ought to have known from that date that the Company is liable for £70,000 odd resulting from its trading with Ackshay during the tax year 5 April 2018"*. This drafting was proposed in the context of it being said that the case of the Secretary of State has been put at trial on the basis that such knowledge existed from 8 March 2018. I will address this within the context of my decision.

H) Disqualification Claim Decision

108. Plainly the first requirement of section 6 of the CDDA is satisfied. Mr Sekhon was a director of a company which has at any time become insolvent.

109. As to the second, the Secretary of State has proved on the balance of probability that the Company failed to account for and pay CIS contributions totalling some £70,000. This was Mr Sekhon's responsibility as the sole director. On the grounds and evidence in support of the claim and without the defence, the ***Regulation 13*** determination provides the evidence that the sums had been due since the date on which they should have been accounted for and the tax paid. That then requires a policy of discrimination to be addressed.

110. Mr Sekhon has admitted under oath and subject to ***section 5 of the Perjury Act*** that: *"We deducted CIS at source this was kept in the bank. This was used to pay other subcontractors. We were basically borrowing from one to pay another. When we tried to pay HMRC but the funds were not available … It started to go wrong 5-6 months before I sold the Company …"*. Whilst this did not specifically address the £70,000 odd CIS liability, it is evidence of his approach towards his duties as a director.

111. Absent consideration of the evidential defence, the comparative evidence relied upon by the Secretary of State establishes a history and pattern of trading whereby creditors and the director himself were paid but not HMRC. The figures contrasting the sums in, the sums out and the product of all being paid except for HMRC is stark. Applying the guidance of Court of Appeal authority it should be inferred that there was a policy of discrimination. This was a case of withholding payment for a significant period in contrast to the payment of others for which Mr Sekhon was responsible.

112. The defence, which if established would be a good defence, is that Mr Sekhon was not only unable to check whether Akshay held GPS but that he had positive evidence to believe it had. This defence fails on the facts. This means the claim as set out in the grounds, that "[Mr Sekhon] caused [the Company] to trade to the detriment of [HMRC] from 22 January 2018 … until 10 April 2019, the date of his resignation" is made out on the basis of the evidence presented in support of the claim and in reliance upon the evidence causing the evidential defence to be rejected.

113. However, the position is potentially complicated by identification for the trial within the skeleton argument for the Secretary of State of a starting date for actual knowledge of the CIS liability as 8 March 2018. That is the date the HMRC letter dated 26 July 2018 identified as when their record (or rather what was viewed) shows the Company

verified Akshay's status. That leads to the submission that this falls outside the ambit of the claim and to the problem that I have decided that this evidence should not be relied upon for the reasons given.

114. Subject to an overall assessment of fairness at trial, I consider the answer to this problem to be straight forward once it is appreciated that the Secretary of State's claim based on a policy of discrimination has not changed by the addition of this specific date.

115. As explained, a policy of discrimination requires knowledge whether its existence is established by express evidence or is to be inferred. In the case of more than one director that knowledge may need to address them specifically concerning, for example, what their role was, what they did and what they saw. In this case, however, Mr Sekhon was the sole director.

116. The original claim for this case did not rely upon the letter dated 26 July 2018, identification by the Company via the portal on 8 March 2018 or identification of GPS via the portal at all. It relied upon an inferred policy and, therefore, knowledge during the period 22 January 2018 until 10 April 2019. The different date chosen as a reply to the defence has not been proved as a starting date. That means the claim remains as stated within the evidence in support of the claim (i.e. the period the period 22 January 2018 until 10 April 2019). There is no need for amendment and, indeed, the amendment would have been refused. The ambit of the claim remains and the decision reached so far stands subject to unfairness.

117. I am satisfied that the trial was not unfair. First, this change to the new date arose within the skeleton argument. Second, its origin was the evidence in reply to the defence. Third, I have not allowed this to be a claim where a new allegation of knowledge as at 8 March 2018 based upon the HMRC letter dated 26 July 2018 can be made. The original and existing ground must be kept. Fourth, the findings of fact are based upon the evidence in support and the rejection of the defence not upon a case of knowledge as at 8 March 2018 due to access to the portal. Fifth, the decision as to unfit conduct is to be made on the basis of the ambit of the claim as stated in the evidence in support.

118. As to that conduct, taking into consideration ***Schedule 1 of the CDDA***, I am satisfied that the proved policy of non-payment of Crown debts establishes that Mr Sekhon's conduct as a director of the Company fell below the standards of probity and competence appropriate for person fit to be a director of a limited company. I do not consider there are any extenuating circumstances to lead to a different conclusion. That is particularly the case when the facts relied upon as a defence have been rejected. This is a conclusion which meets with the Court of Appeal's guidance that a deliberate policy of non-payment over a lengthy period is likely to be misconduct justifying such a finding.

119. That being so, I am required by statute to make a disqualification order and having heard submissions as to length, noting the fact that the disqualification is only attributable to CIS tax and that the adverse consequence is in the region of £70,000, and taken into consideration the purposes of the order (to protect the public by preventing further misconduct in particular, to provide a deterrent for Mr Sekhon and for all acting as directors) the order is for 4 years as sought by the Secretary of State.

Order Accordingly