Case No: 3447/2010

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

7 Rolls Buildings,
Fetter Lane,
London EC4A 1NL

Date: 05/11/2014

Before :

MR REGISTRAR JONES

- -

Between :

ELLIOT HARRY GREEN	
(Liquidator of Al Fayhaa Mass Media Limited	**Applicant**
- and -	
MOHAMAD MACHI EL TAI	**Respondent**

- -
- -

Mr J. Morgan (instructed by **Freeths**) for the **Applicant**
Mr S. Oram (instructed by **Hodders LLP**) for the **Respondent**

Hearing dates: 23 and 24 October and 5 November 2014

- -

Approved Judgment

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

.....

MR REGISTRAR JONES

MR REGISTRAR JONES:

A) A Summary of the Applicant's Case and Evidence in Support

A1) The Beneficial Interest Claims

1. This trial concerns the purchase on 9 May 2008 of a 999 year lease of Units 1 and 2, Freetrade House, Lowther Road, Stanmore HA7 1EP ("the Property") for £300,000. The lease was granted to the Respondent in his own name. A deposit of £15,000 had been paid on 5 December 2007 together with £5,000 for rent for occupation pending completion.

2. The deposit, rent monies and balance of the purchase price were all paid from money derived from the bank account of Al Fayhaa Mass Media Limited (now In Liquidation) ("the Company"). The Respondent was at all material times the sole director and shareholder of the Company.

3. The Applicant first claims that the Respondent holds the Property on trust for the Company pursuant to a resulting trust arising by operation of law from the fact that the Company's money was used to purchase it. The Applicant does not accept that the money was paid to the Respondent pursuant to demands made by him for part repayment of his director's loans. It is accepted, however, that the Company at all material times owed the Respondent sums in excess of the amounts paid for the purchase of the Property.

4. This part of the Applicant's case focuses upon the following entry in the Company's accounts for the year ended 31st July 2008, signed by the Respondent on 15th November 2008. The Applicant contends that it evidences the fact that the Company purchased the Property and did not repay loans:-

> *"4. Investment Long Term. The company bought office for £305,000 but the Dead [sic] registered in the Directors name"* ("Note 4").

5. Note 4 is also relied upon to support an alternative case, namely that if in fact the Respondent purchased the legal and beneficial interests of the Property due to the repayment of his loans, Note 4 evidences the fact that an express trust of that interest was created.

6. Mr Morgan, counsel for the Applicant, contends in his skeleton argument that *"the natural reading"* of Note 4 is that the Company is the owner of the beneficial interest whether due to a resulting or express trust. However, he acknowledges that *"the note will need to be explored in detail in cross-examination"* in particular when: (a) the Property is not included as a Company asset in the balance sheet for the 31st July 2008 year end accounts; (b) the same accounts are drawn on the basis that a sum equivalent to the purchase monies is treated as a repayment of part of the director's loan account; (c) Note 4 does not refer to any specific entry in those accounts; and (d) Note 4 is absent from the year end 31st July 2009 accounts filed on 18 March 2010.

A2) The Transfer At An Undervalue Claim

7. The absence of Note 4 causes the Applicant to be concerned that there might have been a subsequent transfer of the beneficial interest by the Company to the Respondent. A further alternative claim alleges that if that occurred, it was a transfer at an undervalue pursuant to ***section 238 of the Insolvency Act 1986*** ("the Act").

8. However, the Respondent's case is that he was always and remains the legal and beneficial owner of the long lease. He does not assert there was a subsequent transfer of the beneficial interest. In those circumstances this claim falls away and in any event was not pursued in closing submissions.

A3) The Preference Claim

9. Should the Applicant's claim that the Company is the beneficial owner of the lease of the Property fail because the purchase monies were used to repay the director's loan account, he alleges that the repayment of the balance of the purchase price of £285,000 at the end of April or beginning of May 2008 was a preference pursuant to ***section 239 of the Act***.

10. It is alleged that the Company was insolvent at the date of purchase of the Property, which was within 2 years of the onset of its insolvency. It is also alleged that repayment of the loans put the Respondent in a better position than he would otherwise have been upon the Company's liquidation. Reliance is placed upon the statutory presumption of a desire to prefer due to the Respondent's connection with the Company (section 239(5) and (6) of the Insolvency Act 1986).

11. In order to establish insolvency at the time of payment and to reply to any case seeking to rebut the presumption of desire, the Applicant turns to the Company's accounts and to a claim by a former employee, Dr Mohsin.

12. On 18 March 2008 Dr Mohsin commenced tribunal proceedings against the Company claiming that his dismissal as an employee on 24 December 2007 was wrongful and unfair. On 12 March 2009 the Employment Tribunal decided that continuity of employment was established with the result that the application for unfair dismissal could proceed. On 23 July 2009 he was awarded in the region of £62,000 to be paid by no later than 31 July 2009.

13. The Applicant relies first upon the balance sheet as at 31 July 2008 to establish actual insolvency. That balance sheet does not include the contingent liability owed to Dr Mohsin. Mr Morgan submits it should but that the accounts in any event show that the Company was balance sheet insolvent. The only asset recorded is cash in bank totalling £89,629 and the only debt is the director's loan account totalling £176,935. Taking account of a small turnover (£19,559.95) and operating loss (£87,766.14), Mr Morgan submits that it is plain the value of the Company's assets was less than the amount of its debts (whether taking into account contingent liabilities or not) as at 31 July 2008. He then turns to the Company's bank accounts (current and savings) for the end of April beginning of May 2009 to show the position was not materially different when the £275,000 was paid.

14. The Applicant also relies upon the existence of Dr Mohsin's claim to establish motive for the repayment of the loans. It is alleged that the Respondent wanted to avoid Dr Mohsin recovering anything should his claim succeed and that his decision to repay the loans following demand was attributable to that desire.

A4) The Breach of Duty Claim

15. There is a final, alternative claim assuming the others fail. This is that the Company's insolvency meant that the Respondent, whilst acting as a director, owed a duty to have regard to the interests of the creditors when deciding whether to repay his loans. It is the Applicant's case that a decision to repay a director's loan when it would leave insufficient funds to repay the contingent liability was a breach of that duty.

B) A Summary of the Defence and Evidence in Answer

B1) Background

16. The Respondent in his witness statement emphasises that the Company's business was not intended to be profit making for the benefit of its members. Its purpose was to act as a vehicle which could produce television programmes in Arabic to "*both highlight and demonstrate the advantages of democracy*" to those living in Iraq following the fall of Saddam Hussein's regime (see paragraph 3). He explains that the Company ran "*Alfayhaa TV*" which he describes as "*the number-one channel in Iraq dedicated to anti-terrorism and democracy*" (see paragraph 4). From his witness statement it appears that this involved danger for himself and others working for the Company.

17. The Respondent's statement also refers to two other companies. Alfayhaa Multimedia Production Company W.L.L. ("the Iraq Company"), which was incorporated in Iraq in 2004 and operates the Al-Fayhaa Television channel. He is its general manager and also a shareholder. The second is Al Fayhaa Multi Media Production ("the Dubai Company") which was incorporated in Dubai but ultimately de-registered.

18. The Respondent at paragraph 13 of his statements sets out a list of loans totalling £775,165.38 which he says he made to the Company between 14 August 2007 and 2 June 2008. He says:-

> *"15. Each of these payments was a loan by me to the Company, not a gift, and was repayable at any time when I chose to demand …*
>
> *16. A part of that money had previously been loaned to me from the Iraq Company … The purpose of that money was for me to lend it on to the Company, as indeed I did as shown in the above table, in order to allow it to continue its activities …".*

B2 Defences

B2(1) Beneficial Ownership

19. The Respondent's defence to the first issue of beneficial ownership is straightforward. He purchased the Property. The agreement to grant a lease was made with him in his personal capacity. He demanded repayment of sums due to him from the Company. All the conveyancing documents concerned him. They made no reference to the Company. The purchase was completed using the money repaid to him. Those facts, it is contended, substantiate that he became its legal and beneficial owner, as do the facts that the accounts of the Company for the year end 31 July 2008 do not record the Property as an asset of the Company but do record the payment of £285,000 (and indeed of the earlier deposit) as a repayment of part of his director's loan account. He says (see paragraphs 20-21 of his 1st witness statement):-

> *"20. At the end of 2007, I decided to purchase some commercial property as a personal investment which could also be used by the Company. My intention when I bought the Property was that it would be a long term personal investment. I was not concerned if I made any money from the Property in the short term, as I thought that it would yield a return later on when the Company moved out and I sold the premises. Alternatively, I also had the option of renting the Property to someone else once the Company moved.*
>
> *21. I intended to allow the Company to use the Property for no rent …".*

20. As a detail relied upon in support of his case, he refers to the fact that the Respondent had to *"top up the Company's account"* with a number of payments from his own funds in order that the Company would have sufficient funds so *"that a single banker's draft could be issued and given to my solicitors"* for the payment of the completion monies (see paragraph 23 of his 1st witness statement).

21. The Respondent explains the financing as follows (see paragraph 24 of his witness statement):-

> *"In order to arrange the funding … I requested that some of the money loaned by me to the Company was returned. I asked Mr Sultan [the manager of the Company] if £285,000 could be returned to me for the purpose of buying the Property. In order to save on both time and money in respect of the pending completion of the Property transfer, I asked that the Company make the payment directly to the solicitors who were dealing with the Property transaction … As you can see from the banker's draft, the solicitor wrote the following on it 'received the above banker draft <u>from Mr Eltai</u>"* (the Respondent's underlining).

22. As to Note 4, Mr Oram, counsel for the Respondent, in his skeleton argument raises issue whether a signature to company accounts by a director can ever have the effect of recording a disposition in a personal capacity. However, at the heart of the defence is the simple denial that Note 4 either does or was intended to record and therefore evidence that the Company is the beneficial owner of the Property (see paragraph 30 of the Respondent's 1st witness statement).

23. The Respondent relies upon (amongst other documents) a witness statement from Mr Yasiri of Yasiri Associates Ltd, who produced and reported upon the 31 July 2008 accounts. The statement was filed in proceedings commenced in the Willesden County Court by Dr Mohsin against the Company and the Respondent to enforce his Employment Tribunal award and obtain a charging order over the Property. It includes the following (which is for the avoidance of doubt accurately typed):-

> *"5. … Notes in the accounts of 2007/2008 was intended to bring the attention of the shareholder the funds movement of the company as the director was a sole funds provider for the continuation of the company into the business. It was not intended to say that the company owned the property …".*

B2(2) Preference

24. As to the claim of preference, the Respondent's position is that (see paragraph 41 of the Respondent's 1st witness statement):-

> *"There was no reason why I should not have called in the loan, and it ultimately enabled the Company to move to new and better premises, rent free."*

25. The Respondent denies any desire to prefer and his case to rebut the connected person presumption relies first upon the assertion that he was unaware of Dr Mohsin's claim and therefore that he was a contingent creditor at the time of the decision to buy the Property in October/November 2007. He also asserts that had he been aware of it prior to it being made on 18 March 2008, he would have been confident of its failure. He gives two reasons which whilst they appear to refer to the period prior to 18 March 2008, in context are to be read as applying at the date of purchase. First that Dr Mohsin had not been an employee for more than a year and therefore could not bring an unfair dismissal claim. Second because he had been dismissed for gross misconduct (see paragraph 44 of the witness statement).

26. The Respondent also asserts that he would have been the only creditor at the time he decided to purchase the Property. He also exhibits at MET 14 to his 1st witness statements *"a number of examples which clearly evidence that all of the Company's creditors would be paid in full and on time"* (see paragraph 45 of the Respondent's 1st witness statement).

27. Mr Oram in his skeleton argument raises issue with the claim that the Company was actually insolvent (i.e. on a balance sheet test applying ***BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL Plc*** [2013] UKSC 28, [2013] 1 WLR 1408) when the liability to Dr Mohsin was contingent and/or the Respondent provided lending to the Company when required.

B2(3) Breach of Duty

28. The Respondent relies upon the facts and matters supporting his defence to the preference claim in answer to the breach of duty claim, which he complains lacks particulars.

D) The Evidence

D1) The Applicant's Evidence

29. The Applicant's evidence in chief and in reply is produced from information obtained by him in the course of carrying out his duties as liquidator of the Company. It being substantially hearsay, it is sufficiently identified for the purposes of this stage of the judgment within sub-heading (A) above subject to referring to his reliance at trial on the following matters: first that on 20 October 2009 the Respondent granted a 25 year sub-lease of the Property for what appears to be a non-market premium and a pepper corn rent potentially with the intention of preventing any enforcement of Dr Mohsin's judgment. Second that on 29 September 2009 the Respondent transferred a residential property in London registered in his name as a gift to Mr Sultan potentially for the purpose of hiding it.

30. The Applicant's cross-examination was concerned with: (a) the modest value of trade creditors during the Company's trading; (b) the books and records of the company; (c) information provided by Yasiri Associates Ltd in 2 e-mails sent by them on 10 November 2010 and 21 March 2012; (d) the financing of the Company; (e) the timing of the payments towards the purchase of the Property; and (f) allegations made as to the motives of the Respondent.

31. The Applicant gave his evidence carefully and fairly and provided the following answers which I consider relevant to my decision and will bear in mind even if I do not expressly refer to each fact and matter when reaching my decision:-

    31.1 Whilst he has not adjudicated upon trade debts, they appear modest with reference to the accounts seen and the claims made.

    31.2 His source for asserting in his second witness statement that Mr Sultan, the manager of the Company ("Mr Sultan"), prepared the wording of the 10 November 2010 e-mail is paragraph 13 of Dr Mohsin's statement in the Willesden County Court proceedings. He has found no source or documentation to support that assertion.

    31.3 The books and records of the Company handed over by the Respondent and by the Company's accountants, Yasiri Associates Ltd, were incomplete despite them having been asked to hand over all files. For example, the cash book for the financial year ending 31 July 2008 only records payments into and not receipts from the Company's bank accounts. There is no cash book for the previous year. The working papers provided by Yasiri Associates Ltd consist of a small, incomplete file.

    31.4 No trust deed concerning the Property has been found.

    31.5 The accounts for the financial year ending 31 July 2008 treat the monies paid into the Company from the Respondent and/or the Iraq Company as debits to the Respondent's director's loan account. They appear to be the sole providers of funding. No other source has been identified.

31.6 The same accounts treat the funds that exited the Company's bank account to pay the deposit and completion funds for the purchase of the Property as repayments of the Respondent's director's loan account notwithstanding Note 4.

31.7 The Property is never shown as an asset in the balance sheet and is only referred to once within the various accounts produced in Note 4.

31.8 Note 4 does not expressly refer to a trust and his reference to that in paragraph 8 of his second statement was intended to be an assertion that the existence of a trust should be inferred.

31.9 His allegations concerning motive in paragraph 9 of his second statement concerning the absence of Note 4 from the accounts for the following financial year is speculation.

31.10 The £20,000 deposit was paid on or around 15 October 2007 before the dismissal of Dr Mohsin on 24 December 2007.

31.11 The Respondent increased his indebtedness to the Company prior to the purchase of the Property and continued to do so afterwards (subject to repayments of sums lent).

31.12 The deposit of £20,000 was paid.

D2) The Respondent's Late Evidence

32. The Respondent by an application notice issued on 17 March 2014 applied for permission to rely upon some 50 pages of documentation which had not been exhibited to the evidence in answer. At trial the Applicant agreed to permission being granted. In those circumstances it was admitted subject to my observation that it has not been exhibited to a witness statement and therefore there is no evidence referring to or explaining it. This omission did not need to be addressed further.

D3) The Respondent's Hearsay Evidence

33. The Respondent has chosen not to call Mr Yasiri of Yasiri Associates Ltd but to rely instead upon his exhibited witness statement from the Willesden County Court proceedings, an e-mail/letter sent on 10 November 2010 by Yasiri Associates Ltd to enquiries made by e-mail from David Rubin & Partners on behalf of the Respondent and upon a further email sent on 21 March 2012 to Mr Sultan.

34. In that statement Mr Yasiri (in summary) identifies himself as the person who prepared the 31 July 2008 year end accounts pursuant to an engagement letter dated 31 July 2007. He states that the information provided to him by the Respondent and Mr Sultan was that there were no fixed assets. He says that the director's loan account balance was a credit of £176,934 at the year end as a result of the Company having

received £781,165 and repaid £604,230 that year. His statement concerning Note 4 is set out at paragraph 23 above.

35. In the 10 November 2010 e-mail Yasiri Associates Ltd state their understanding that there was no trust agreement between the Respondent and the Company and no intention for the Respondent to hold the Property on trust for the year 2007/2008. It is also written that the "Notes attached to the accounts for the year ended 31/7/2008 were *reflected in the movements of funds in the Bank's statements"*. The letter is in similar but slightly different terms.

36. In the second e-mail Yasiri Associates Ltd state (amongst other matters) that (typed as it appears):-

> *"The company received total sum £781,165 in the year ended 31/7/2008 as director,s Loan. The director made an decision to recover part of loan of £604,230 (included £305,000) in year ended 31/7/2008. The notes in the accounts of 2007/2008 was intended to explain where the funds transferred to and why. Therefore it was not repeated in the accounts of the following years. If the company has bought a property then it must be named clearly with its full address and must also be listed under heading as Fixed Assets of the company …".*

37. Mr Morgan submits that I should draw adverse inferences from the failure to call Mr Yasiri as a witness. He makes the same submission in respect of witness statements made in the same Willesden County Court proceedings by Abeer Abdul Khudur, Adel Mohamed Salim, Haider Mohamad Jawad and Diaa Abdulkader Yassin. These too are exhibited to the witness statement of the Respondent.

38. They make their statements as shareholders of the Iraq Company purportedly in support of the Respondent's case that he is the owner of the Property. They confirm that shareholder approval was given on 23 May 2007 to the Iraq Company lending the Respondent ten million Dirhams in order to finance a television production studio in London. Their exhibits consist of documentation in Arabic which has not been translated, although translated versions of what appear to be the same documents are exhibited by the Respondent to his witness statement in answer in this claim.

D4) Cross-Examination of the Respondent

39. The Respondent had the assistance of an interpreter. Whilst he has a reasonable grasp of English for day to day purposes and had been able to attend and answer questions at an interview with the Applicant without such assistance, my assessment is, that was a prudent measure.

40. My overall impression of the Respondent whilst giving evidence is that whilst some issues and difficulties arose which I will refer to later, he was an honest and reliable witness subject to a concern that he may have been holding back information concerning the granting of the sub-lease and the sale of his London property. That impression is based upon the manner in which he gave his evidence but cannot be considered a scientific assessment. In those circumstances I approach his evidence on

the basis that whilst the manner in which he gave his evidence gives me no cause to doubt his truthfulness, his evidence should be considered carefully and be tested against the facts derived from other sources.

41. His evidence concerning the extent of his involvement with the Company was that whilst performing his duties as a director, his work was mainly in Dubai and Iraq. He relied heavily on Mr Sultan, to whom he was indirectly related through marriage, as the office manager in London. They kept in contact mainly by telephone and Mr Sultan would inform him of anything important straight away.

42. The financing of the Company resulted from a loan facility of 10 million Dirhams from the Iraq Company. The loan to him was to be repaid within 60 months, interest free.

43. Mr Morgan raised issue with whether the loan had been made directly to the Company rather than to him. This resulted from the fact that all the monies received by the Company between 14 August 2007 and 10 March 2008 (9 payments totalling £596,296 odd) were paid directly by the Iraq Company and from the fact that the original request for the loan facility dated 2 May 2007 was signed by him as: *"Mohamad El-Tai, General Manager"*. The answer dated 23 May 2007 was addressed to him personally but referred to approving the loan *"which you asked in your application"* and therefore may or may not refer to an application by him on behalf of the Company acting as General Manager. Ambiguity also arose become whilst the Company made some repayments to the Respondent personally, others were sent back directly to the Iraq Company. Nor was the issue resolved by a resolution of the Company passed on 30 May 2007 which authorised acceptance of *"loans from Mr Mohamad Eltai and his company in Iraq interest free for the company business"*.

44. The Respondent was adamant that the loan facility, which equated to about £1.3 million, was made to him. He said that he borrowed the money in order to start a television production studio in London using the Company. He explained that his co-shareholders and directors of the Iraq Company (5 people including himself who held a 20% shareholding each) were willing to lend it to him.

45. The Respondent was asked questions about written instructions to the Director of Commercial Bank in his capacity as Director-General of the Dubai Company before August 2006 but this does not assist in providing an answer. Nor was assistance gained from his answers concerning his personal wealth.

46. The Respondent was taken to an e-mail which appears to set out the terms of the agreement for the purchase of the lease of the Property. It is dated 15 October 2007 and was sent by or on behalf of the vendor to Mr Saman. It records: a £15,000 deposit was required to purchase the lease *"subject to satisfactory searches and survey"* with completion on 7 April 2008; *"you"* would be allowed into occupation prior to completion for a 4 month rental of £5,000. A 50% rental discount would be provided as a reduction from the purchase price; The purchase price would become £300,000; The balance of the purchase price to be paid on completion therefore was £285,000. That sum was paid by a banker's draft dated 30 April 2008 and signed for by the Respondent's solicitors that day. The Respondent could provide no explanation for the fact that the lease records the premium as £282,500.

47. The lease was granted to the Respondent but his title was not registered for over a year. The Respondent attributed this to the conveyancing solicitors and to the fact that their practice was intervened. However, this does not appear to have occurred until the summer of 2009, assuming that they ceased trading soon after intervention. In any event the lease could only be registered in the Respondent's name unless he assigned it to the Company. There is no suggestion of that.

48. The Respondent's answers to his cross-examination concerning his knowledge of Dr Mohsin's claim were not entirely satisfactory. However, key features did emerge. The starting point is that Dr Mohsin was dismissed on 24 December 2007. My understanding is that the Respondent may have been out of the country. However, when asked whether he had knowledge of the allegations made against Dr Mohsin which appear in paragraph 24 of the Employment Tribunal's decision, the Respondent without hesitation stated that he had been sent the relevant evidence by Mr Sultan. In my judgment from this evidence and the evidence concerning contact with Mr Sultan referred to above, I am satisfied on the balance of probability that he would have been involved in the decision to dismiss.

49. The Respondent was aware of Dr Mohsin's claim after it was issued on 18 March 2008. There is no suggestion of any pre-claim warning or correspondence. There is no specific date for that knowledge but it is not suggested that the claim was not served until after the 30 April banker's draft was delivered and/or the completion of the purchase on 9 May 2008.

50. The Respondent's evidence was that he was unaware of the amount that might be awarded until the decision of the Tribunal was communicated to him by Mr Sultan following the receipt of reasons contained in a decision dated 23 July 2009. He consistently maintained his position that he always considered the claim to be one which would fail. Whilst it was put to him that the belief could not be genuine and attempts were made during cross-examination to lead the Respondent to admit that the allegations against Dr Mohsin were made up, I accept the Respondent's denials. They appeared genuine and there is no evidence to contradict him. The overall impression of his evidence was that he firmly believed the claim should and would fail both because Dr Mohsin had not been employed for long enough and because of his alleged misconduct.

51. I note for completeness that I do not find the fact that he did not attend the final hearing undermined that assessment of his evidence. Nor do the findings of the Tribunal alter it. They stand as evidence of another decision and no more.

52. The Respondent was criticised during cross-examination for failing to cause the Company to borrow from the Respondent and/or to use its own cash held in the bank to make payment in full or in part to Dr Mohsin once the claim was determined. The response was that he tried to settle the claim with a payment of £20,000. This is obviously not entirely satisfactory but its relevance depends upon whether and, if so to what extent, actions after the final decision of the Tribunal are relevant. It is also to be noted that the Company ceased trading on 1 August 2009. This effectively immediately followed the decision and the Respondent was right to observe that the Company was then insolvent. It follows that payment in full, as opposed to a parri passu dividend, would have been generous and to his personal detriment as a creditor of the Company.

53. The cross-examination turned to Note 4. The Respondent's position remained that however others may construe this, the long term investment was an investment by him that would allow the Company a rent free existence. He said:-

> *"Investment Long Term – means investment for a long time; an investment means instead of paying rent we will invest money in property and we will use it for the studio."*

54. Since that term and its construction arise within the context of the Company's accounts, it is difficult to see why this evidence should not be referring to the Company. Certainly it was taken that way by Mr Morgan. However, I did not consider that was the intended meaning and I gave the Respondent the opportunity to explain himself further. The Respondent denied such a construction or intention to give such meaning within his answer. He said the investment was in his name to help the Company and that the purchase money was money that had repaid part of his loan. When asked about the words *"the company bought the office"* he said this meant to him that the Company paid the money but did not mean it was the Company's money. The money paid was a repayment of part of the loan.

55. His denials relied upon his stated understanding that he had demanded and been repaid his loan. He relied upon the fact that the Property was not included as an asset of the Company in the accounts. He can also rely upon the treatment of the payments as loan repayments in the accounts.

56. At the start of his cross-examination on this issue, the Respondent admitted reading the accounts before signing them. They were signed on 15 November 2008 and filed on 4 March 2009. He acknowledged that they had been produced as a result of a meeting he had had with the accountants. He appreciated that they should be accurate. Nevertheless he resorted under pressure to blaming the accountants and to denying that he had read the accounts properly before signing them. This was inconsistent with his previous evidence during which he had dealt with Note 4 on the basis of his understanding of its meaning not on the basis that it was something he had not read.

57. Mr Morgan questioned whether the e-mails from the accountants (referred to above) in fact set out their instructions from Mr Sultan and/or the Respondent rather than containing their own views. The response was that they were the accountant's own views. He denied the allegations that they had been instructed to say that the Property did not belong to the Company and to exclude Note 4 from the 2009 and later year end accounts to suit his own ends. I accept this based upon his evidence and the absence of evidence to the contrary.

58. The cross-examination also delved into the decision making of the Respondent based upon the assumption that he had purchased the beneficial interest in the Property using the part repayment of his directors' loans. The underlying theme of the questions was that he, in his capacity as director, chose to ignore Dr Mohsin's claim and indeed to do all he could to place himself in a better position to the detriment of Dr Mohsin.

59. The answers to a series of questions may be summarised as follows: He had intended to purchase the Property with monies repaying his loans since October 2007. By March 2008 he was aware of Dr Mohsin's claim. As of 23 March 2009 the Tribunal decided there was jurisdiction to hear the claim and rejected an argument that Dr Mohsin had been an employee for less than a year. The year end 2008 accounts offered no prospect of repayment of his loan (other than by further use of the facility from the Iraq Company). The turnover was small and the trading loss £87,000. Whilst there was cash in the bank of just under £90,000, this would be required for future trading expenditure and the director's loan account could not be repaid. There was also the possibility of having to pay Dr Mohsin.

60. He was asked why in those circumstances he chose to proceed with the purchase of the Property by the repayment of his loan. It was suggested that he could and should have changed his mind. It was put to the Respondent that he could have borrowed money from the Iraq Company or used his own money instead. It was put that repayment of the Respondent's loans (assuming that is what it was) was made in order to place the Respondent in a better position than Dr Mohsin.

61. The Respondent's evidence remained that the purchase and repayment had been decided since October 2007. He did not accept that he desired to place himself in a better position than Dr Mohsin. He rejected the suggestion that he should have paid for the Property from his own funds without recourse to the repayment of the loan and he did not accept that he had available funds to do so in any event. Although he received £200,000 as a part repayment of his lending on 5 March 2008, he said that had been spent on refurbishment and other costs of the building itself which was a new build.

62. He also rejected the suggestion that he should have borrowed more money from the Iraq Company rather than demand repayment from the Company in order to purchase the Property. His answer was that he did not want to borrow more from the Iraq Company. He referred to the fact that a few months ago this year the Iraq Company asked for repayment of the sums he had borrowed and whilst this was unclear, appeared to be implying that he had not wanted to increase his liability by borrowing more at the time of the purchase of the Property.

63. It was again put to the Respondent that the Company should have paid Dr Mohsin at least once he had obtained judgment. The purpose behind this was to show that the Respondent never intended to pay him. When it was put to him that the £89,269 cash in bank shown in the 2008 year end accounts could have been used, the Respondent said he had tried to settle the claim for a sum of £20,000 but that Dr Mohsin wanted to destroy the Company. He explained those monies were needed for its trading expenses. When it was pointed out to him that his director's loan account was reduced by some £119,000 during the 2008/9 financial year without making any payment to Dr Mohsin, he responded: "why should we pay Dr Mohsin?".

64. The cross-examination ended with a series of topics designed to demonstrate that the Respondent always intended to do everything he could to avoid payment to Dr Mohsin. The following facts were relied upon: that the Company ceased active trading (having no turnover but still incurring expenses) around March 2009 at the time when Dr Mohsin succeeded in establishing jurisdiction; on 20 October 2009 the Respondent granted a sub-lease to a Mr Sadik for 25 years for a pepper corn rent and

a premium of £35,000 despite the market value rental identified in the e-mail dated 15 October 2007 being £15,000 per year; and a transfer of residential property purchased by him on 29 September 2009 to Mr Sultan for no consideration on 21 May 2010.

65. His answers were (in summary): the company ceased trading due to economic conditions; the sub-lease was an arm's length transaction with the only person, who would rent the Property and who he does not otherwise know; and the transfer was attributable to his intention to gift it to his children in circumstances of personal dangers he faced due to his work in Iraq.

E) The Decision

E1) Issue 1 – Beneficial Ownership

66. I should start with the fact that the Applicant accepts that at the time of payment of the purchase price (£285,000), the Respondent's director's loan account was in credit by more than that amount. Whilst he was challenged during cross-examination with the proposition that the Iraq Company had lent the money, that is not the case set out in the Application and evidence in support. There has been no application to amend that case and it would have been too late to do so.

67. I should add, however, that I am satisfied by the Respondent's answers to the questions asked on this issue and, if necessary, would have decided on the basis of the evidence before me that the 10 million Dirham facility was made available to the Respondent for his use. There is no doubt that the monies received from the Iraq Company and on occasions from himself directly were loans. The Respondent sought repayment of the loans from the Company. The repayments relevant to the Property were used for his own purchase. There is no suggestion that the Iraq Company ever made repayment demands itself or claimed an interest in the Property. It has not submitted a proof.

68. The fact that the leasehold interest in the Property was purchased by the Respondent as legal owner and subsequently registered in his name with title absolute is a starting point but does not resolve the issue of beneficial ownership. If the Company's money was used to purchase the Property, there will be a rebuttable presumption that the Company did not intend the Respondent to take the Property beneficially and (if not rebutted) a resulting trust will arise.

69. The Respondent does not seek to rebut the presumption as such. His case is that it does not arise because the purchase money was his. The banker's draft for £285,000 repaid his loans to that amount upon its delivery to his conveyancing solicitors. The evidence in support of this defence includes the testimony of the Respondent concerning the original intention to purchase in October 2007 (as described in paragraphs 20-21 of his statement), his demand for repayment and his decision as director of the Company to repay the loan (as described in paragraph 24 of his statement). In addition there is the fact that there is no written declaration of trust and all of the conveyancing documentation concerns the Respondent without mention of the Company. The application for registration of title does not contain an application for a restriction in standard form. There is no documentation other than Note 4 to

support a case that the Company was to be the beneficial owner and that its money was not used to repay the director's loan account.

70. Against that, however, is the fact that a natural construction of Note 4 is that the Company bought the Property as a long term investment for £305,000 albeit that the Respondent is the legal owner.

71. However, that construction is in conflict with the fact that the Property is not recorded as an asset of the Company. It is in conflict with the treatment of the director's loan account. If that was its meaning the account would not have been debited and the Property would have been added to the balance sheet. Whilst this could be attributed to a deliberate intention to hide the beneficial ownership by lying to the accountants, the rhetorical question in answer is: why would Note 4 have been written if that was the case?

72. In reaching my decision I have decided not to give weight to the hearsay evidence described under (D4) above. There is no satisfactory reason or any explanation Mr Yasiri or indeed the members of the Iraq Company not providing statements in these proceedings and not being called to give evidence. However, I do not consider it right to reach an adverse conclusion. In particular I must take account of the professional capacity of Mr Yasiri and the fact that the Applicant could have made enquiries of him whether voluntarily or under ***section 236 of the Act*** if they considered it appropriate. It would be wrong to conclude that his exhibited statement or the contents of the e-mails are untrue.

73. I have accepted that all of the documentation concerning the purchase concerned the Respondent not the Company. The one document which might suggest otherwise, the e-mail sent on 15 October 2007 to Mr Saman, is not relied upon by the Applicant to establish that the Company was to purchase the Property or that any consequences flow from that. No doubt that is because the e-mail was not concerned with the arrangements between the Company and the Respondent.

74. Mr Oram submits I should also take account of the Respondent's increased lending shortly before the payment of £285,000 as evidence that this transaction was intended to be for his own benefit. Whilst the payments came directly from him as opposed to previous payments from the Iraq Company, I do not do so. It seems to me that this fact can point both ways.

75. My decision is based upon my assessment of the Respondent as a witness (see paragraph 40 above) and my conclusion that the balance of the documentary evidence overall weighs in support of his defence because of the matters set out in paragraph 69 above and the fact that the apparent construction of Note 4 is contradicted by the contents of the accounts themselves as explained within paragraph 71. The evidence against which his testimony must be tested does not lead me to change my judgment that I have no cause to doubt and therefore accept his truthfulness on this issue.

76. In my judgment the Respondent is the legal and beneficial owner because the purchase price was paid with his money after the Company had repaid his loans by the delivery of the £285,000 banker's draft to his solicitors on 30 April 2008.

E2) Preference

77. Section 239 of the Act reads as follows:-

> *(1) This section applies as does section 238.*
>
> *(2) Where the company has at a relevant time (defined in the next section) given a preference to any person, the office-holder may apply to the court for an order under this section.*
>
> *(3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference.*
>
> *(4) For the purposes of this section and section 241, a company gives a preference to a person if—*
>
> > *(a) that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities, and*
> >
> > *(b) the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.*
>
> *(5) The court shall not make an order under this section in respect of a preference given to any person unless the company which gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (4)(b).*
>
> *(6) A company which has given a preference to a person connected with the company (otherwise than by reason only of being its employee) at the time the preference was given is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (5).*
>
> *(7) The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of a preference.*

78. The requirement that the Respondent was one of the Company's creditors is plainly satisfied. It is also established that the repayment of the £285,000 was in the period of 2 years ending with the onset of insolvency. The Company was wound up by order of the Court on 14 July 2010 pursuant to a petition of a Dr Mohsin presented to the court on 23 April 2010. The liquidation therefore commenced on that later date and repayment by a banker's draft dated and received by the Respondent's solicitors on 30 April 2008 therefore occurred within that period.

79. However, the time of repayment is not *"a relevant time"* unless the company concerned was unable to pay its debts within the meaning of ***section 123 of the Act*** at the time of the transaction challenged or became so in consequence of the transaction. This is a matter of dispute.

80. The Applicant claims actual insolvency under ***section 123(2) of the Act*** based upon the balance sheet for the year ending 31 July 2008 and its reconstitution by Mr Morgan for 9 May 2008 using the bank accounts, director's loan account and the sum due to Dr Mohsin. The balance sheet for the year end reveals that the Company's assets are limited to cash and its creditors to the sums owed to the Respondent. That reflects the fact that the Company traded at a loss through the year and was dependent upon the monies borrowed from the Respondent to finance that loss by paying its

debts as they fell due. The balance sheet does not include the contingent claim of Dr Mohsin but plainly should do. It is a contingent debt.

81. In those circumstances I accept the reconstitution, which includes that claim. The reconstitution substantiates the conclusion that there was no substantial or material difference in the balance sheet position as at 9 May 2008. Nor is there any possibility of any material change as at 30 April 2008, the date of repayment.

82. In doing so I accept Mr Morgan's submission that I should follow the decision of His Honour Judge Purle Q.C. and use hindsight for the purposes of valuing Dr Mohsin's claim. In ***David John Watchcorn v Jupiter Industries Limited*** [2014] EWHC 3003 the learned Judge, whose eminence in this field is recognised, for the purposes of applying the *"relevant time"* test within the context of ***section 238 of the Act*** decided (albeit obiter and whilst noting that it would not be conclusive in every case) that when asking whether a company was solvent, it is permissible to judge the situation with hindsight; i.e. looking at what happened and not at how hypothetically directors might have viewed the matter on the date in issue. His decision applied the Court of Appeal decision in ***Ex parte Russell*** (1882) Ch 588 and referred to the support for such an approach in the Australian decision of Palmer J. in ***Lewis v Doran*** (2004) 208 ALR 385.

83. The Tribunal's final, reserved decision dated 20 July 2009 awarded Dr Mohsin: £57,115 for unfair dismissal and 3 weeks unpaid wages (£1,315.76) and notice pay (£1,153.84). It does not appear from the decision that the 50% uplift asked for was added to the last two figures, although Mr Morgan values the claim at £62,678.00. However, nothing turns upon the difference in total amount.

84. In order to decide whether this results in a balance sheet insolvency I must apply the principles laid down by the Supreme Court in ***BNY Corporate Trustee Services Limited v Eurosail-UK-2007-3BL Plc*** [2013] UKSC 28, [2013] 1 WLR 1408. Mr Morgan has also referred me to the further guidance provided by the Court of Appeal in ***Bucci v Carman (Liquidator of Casa Estates (UK) Ltd)*** [2014] EWCA Civ 383, [2014] BCC 269.

85. It is plain that the Company was at all material times balance sheet insolvent. There were net liabilities in the region of £83,000 and the Company was only able to continue trading by reason of the Respondent's lending. That method of trading would continue throughout 2009. Whilst the Company made a profit of £32,226.85 for that year end, that level of profit would always be insufficient to discharge the liabilities owed to both the Respondent and Dr Mohsin. Its net liabilities stood at £55,439 at the end of the 2009 year end without Dr Mohsin's claim. I am satisfied the Company was actually insolvent.

86. I am also satisfied for the purposes of ***section 239*** that the effect of the repayment of £285,000 was to put the Respondent in a better position than he would otherwise have been in had the Company gone into insolvent liquidation. If repayment had not been made, the Respondent would have been an unsecured creditor receiving a dividend of less than 100 pence in the pound.

87. As a result the payment was a preference at a relevant time. However there is the further requirement of ***section 239 (5)*** to be satisfied before the court can make an

order under ***section 239***, namely that the decision to repay was influenced by the desire to produce the result set out in section 239(4)(b) of the Act ("the Desire").

88. In the case of ***Re M C Bacon Ltd*** [1990] BCC 78 at 87-88 Mr Justice Millett, as he then was, explained the *"radical"* difference between ***section 239*** and its predecessor, ***section 44(1) of the Bankruptcy Act 1914***, as follows:-

> *"This is a completely different test. It involves at least two radical departures from the old law. It is no longer necessary to establish a* dominant *intention to prefer. It is sufficient that the decision was* influenced *by the requisite desire. That is the first change. The second is that it is no longer sufficient to establish an* intention *to prefer. There must be a* desire *to produce the effect mentioned in the subsection.*
>
> *This second change is made necessary by the first, for without it it would be virtually impossible to uphold the validity of a security taken in exchange for the injection of fresh funds into a company in financial difficulties. A man is taken to intend the necessary consequences of his actions, so that an intention to grant a security to a creditor necessarily involves an intention to prefer that creditor in the event of insolvency. The need to establish that such intention was dominant was essential under the old law to prevent perfectly proper transactions from being struck down. With the abolition of that requirement intention could not remain the relevant test. Desire has been substituted. That is a very different matter. Intention is objective, desire is subjective. A man can choose the lesser of two evils without desiring either."*

89. Therefore there must be a desire to produce the effect of improving the Respondent's position in the event of the Company's insolvent liquidation whether it is the only or just one of the factors that influenced the decision to repay £275,000. The existence of the Desire may be established by direct evidence or be inferred from the circumstances. In order to decide whether it exists the following passage from the judgment of Millett J. provides clear guidance:-

> *"A man is not to be taken as desiring all the necessary consequences of his actions. Some consequences may be of advantage to him and be desired by him; others may not affect him and be matters of indifference to him; while still others may be positively disadvantageous to him and not be desired by him, but be regarded by him as the unavoidable price of obtaining the desired advantages. It will still be possible to provide assistance to a company in financial difficulties provided that the company is actuated only by proper commercial considerations."*

90. Mr Oram on behalf of the Respondent submits that this must be tested in or around October 2007 when the Respondent first decided to proceed with the purchase of the Property (see the e-mail dated 15 October 2007).

91. That is not so as a matter of law. The decisions of Mr Justice Lloyd (as he then was) in ***Wills & Another v Corfe Joinery Ltd (In Liquidation)*** [1997] BCC 511 and Mr Justice David Richards in ***Re Stealth Construction Ltd*** [2011] EWHC 1305 (Ch), [2012] 1 BCLC 297 make plain that the relevant date is the date the decision to actually repay the loan is made. That is because the test of preference is concerned with whether one or more creditors should be repaid ahead of others at the time of repayment when the company concerned is insolvent. It is therefore necessary to distinguish the date when the liability to repay arose from the date when it was decided to fulfil that liability. The question is not asked at the time the debts became due and owing but when the Company decided to pay them.

92. In fact in this case because the loans were repayable upon demand, the date will not have been until April 2008 in any event. In my judgment the relevant date is the date when the Respondent (wearing his hat as a director) decided to agree to his (wearing his hat as lender) request for the Company to *"make the payment directly to the solicitors who were dealing with the Property transaction"* (see paragraph 24 of his witness statement). The Respondent does not provide a precise date for that decision and in my judgment it should be taken to be the date of the banker's draft, 30 April 2008.

93. The Respondent being a connected person, he must rebut the presumption that he was influenced by the Desire (***section 239(6) of the Act***). That requires him on the balance of probability to satisfy the court that when deciding to repay the £285,000 he was acting solely by reference to proper commercial considerations and that there was no desire (a subjective test) to place himself in a better position than he would otherwise have been in upon the event of an insolvent liquidation.

94. The Respondent's evidence is that he made the decision because he had decided he would buy the Property as planned since October 2007 and demanded repayment of his loans for that purpose. His decision to repay fulfilled that decision and repaid the loans as demanded in circumstances where the Company would also gain benefit by being able to occupy the Property, a better property, rent free in the future. Its existing rental liability was in the region of £12,000 per annum and the Property's rental for the pre-completion occupation was equivalent to a rent of some £15,000 per annum.

95. The Applicant, however, responds to this rebuttal of the presumption by alleging there was another factor influencing the desire, namely a desire not to pay Dr Mohsin. This was denied by the Respondent under cross-examination.

96. The Applicant's case is primarily based upon subsequent events from which it is submitted by Mr Morgan that it is apparent that the last thing the Respondent would do would have been to allow the Company to pay Dr Mohsin's claim. Mr Morgan submits that the 2008 year end accounts and the exclusion of Note 4 in the accounts for the two, subsequent year ends demonstrate this by showing a desire to hide ownership of the Property. It is also submitted that the grant of the sub-lease and the transfer of the residential property in London provide further examples of this desire to prevent payment by hiding assets. The Respondent on the other hand asserts that he never contemplated the claim being successful at the time the Property was purchased and therefore it did not influence his decision making.

97. I must decide what the Respondent's state of mind was on 30 April 2008 when deciding in his capacity as a director to repay the £285,000 in order to determine whether the statutory presumption is rebutted.

98. I approach this task chronologically. First it is apparent that the arrangements for the purchase of the Property were agreed in or about October 2007. I have accepted that those arrangements involved a purchase by the Respondent and I accept that his intention was to use repayment of money lent to the Company for that purpose. The circumstances of his demand for repayment are set out in paragraph 24 of his statement. They lack particularity but there is no documentary or other evidence to dispute that statement and I accept his continued commitment to its truth during cross-examination.

99. Second, the demand occurred after Dr Mohsin's dismissal as an employee on 24 December 2007 and after he had commenced his Employment Tribunal proceedings on 18 March 2008. The decision was made at a time when the Company was balance sheet insolvent whether Dr Mohsin's claim was included or not but his claim of £62,000 materially added to the net liabilities.

100. Objectively, therefore, there is certainly room to conclude that the Respondent was influenced by the existence of the claim when making his decision. However, I am concerned with a subjective issue. Listening to the Respondent giving evidence it was plain to me on the balance of probability that his attitude to the claim at that time was that it was of no merit. His belief stemmed from two causes. One the absence, as he thought, of a sufficient length of employment to establish jurisdiction for an unfair dismissal claim and second the allegations made against Dr Mohsin's conduct which need not be repeated but can be read in the final judgment.

101. True both grounds proved unjustified. However, I am satisfied they were genuinely held and as a result the decision was made without regard to that claim. The Respondent has satisfied me on the balance of probability that he did not have Dr Mohsin's claim in mind when he decided to repay the loan. He reached that decision in his capacity as a director of the Company solely because repayment had been demanded and the purchase would benefit the Company and its future trading.

102. In reaching that decision I have rejected the submission of Mr Morgan that the Respondent's subsequent actions reveal that his motive at the time of the decision must have been to avoid payment to Dr Mohsin. My primary reason for doing so is that I have not found from the evidence under cross-examination any reason to link the subsequent acts to the Respondent's thoughts at the time of the decision.

103. Another reason is that such a desire is inconsistent with Note 4. I can see no reason why Note 4 should be included if, as Mr Morgan asserts, the Respondent always intended to hide assets from Dr Mohsin. True Note 4 did not appear in later accounts but the 2008 accounts remained at Companies House.

104. Finally whilst I have concerns that the grant of the sub-lease and the sale of his London property may have involved a motive of removing valued interests from the Respondent's name/ownership, those events occurred after the Tribunal's decision and during the course of the Willesden County Court proceedings. Facts had changed significantly by then, not least the findings of the Tribunal and application for a charging order, and in my mind this prevents me linking them back to 30 April 2008 in the face of the Respondent's testimony.

105. The reasons for the decision identified by the Respondent are plainly commercial. However, the Respondent in reaching his decision has not adequately considered the financial position because his approach assumed he was the only creditor. That being so, he was the only person who might be repaid and his repayment was not a preference. However, it was not so.

106. This raises the potential issue whether an objective test should replace the subjective test due to the Respondent not taking into account matters he ought to have taken into account. It raises the possibility of arguing that the decision was not a "*proper*" commercial decision. It also raises the claim of breach of duty. The Applicant has

chosen that claim as his route to deal with this point and has not argued the other two possible options. It would not be right to consider the other options without argument. No doubt Mr Oram would wish to argue, for example, that the test must remain subjective and the decision was *"proper"*.

107. I therefore dismiss the claim of preference because the Respondent has rebutted the presumption of the Desire on the balance of probability and turn to the final claim. However, for the avoidance of doubt I record that it seems to me that the Applicant's choice presents the same issues and consequences that would have arisen upon the other routes but is a safer option for the Applicant because the law concerning the application of an objective test and the establishing of a breach of duty is settled.

E3) Breach of Duty

108. It is trite law that a director must have regard to the interests of the creditors when managing a company that is insolvent, whether the insolvency is commercial and/or actual. The director is not to reach decisions which put the prospects of payment of the creditors at a real, rather than remote, risk. In circumstances where the director has received the benefit of the payment said to have resulted from misfeasance, the evidential burden of proving the payment was proper falls upon him.

109. The duty is subjective and the question whether there has been a breach normally involves consideration of the director's state of mind. The court normally asks whether the director honestly believed his decision was in the interests of the creditors. However, that normal approach assumes the director's mind took account of those interests. If not, as here because the Respondent did not consider Dr Mohsin's claim, the test becomes objective if and to the extent it was unreasonable to omit such considerations (see generally paragraphs 87 – 93 of the decision of Mr John Randall QC in ***Hellard and another v Carvalho, In the Matter of HLC Environmental Projects Ltd (In Liquidation)*** [2013] EWHC 2876 (Ch)).

110. In reaching an answer to this claim it is therefore necessary to take account of all facts relevant to the decision, known or which ought to have been known at the time to the Respondent. In my judgment they are these:-

(a) The claim of Dr Mohsin was a contingent liability as at 30 April 2008. In practice that meant it would not become a liquidated sum due and owing until the claim was proved and would not have to be paid until after that date. However, had the Company been placed into liquidation on 30 April 2008, subject to costs and expenses there would have been a distribution in the region of £50,000 to him from the £285,000.

(b) The 2008 year end accounts reveal that the Company's practice was to pay debts as they fell due using the money lent by the Respondent and leaving him as the sole creditor. That was continued during the 2009 financial year (Dr Mohsin remaining a contingent creditor). Whilst the Respondent's loans were repayable upon demand and there was no agreement to be a deferred creditor, this was his practice.

(c) The table of lending until 2 June 2008 (see paragraph 13 of the Respondent's statement) shows that between 1 May 2008 and 2 June 2008 the Respondent lent the Company £148,878 after repayment of the £275,000.

(d) The 2008 year end accounts show there was cash in bank of £89,269 and that the only creditor was the Respondent in the sum of £176,935. Dr Mohsin's risk position as a contingent creditor had worsened from 29 April 2008 but there was still cash available to pay him in full and there was a potential facility through lending by the Respondent of over £1 million.

(e) It was not unreasonable for the Respondent to anticipate that the Company's second year of trading would be profitable, at least to a small degree, bearing in mind that occurred with a net profit of just over £32,000.

(f) Nor was it unreasonable for the Respondent to conclude there were sufficient funds which he could lend to ensure debts were paid as they fell due throughout the second financial year.

111. The position as at 30 April 2008 was that the £285,000 was due and owing. There were no other current liabilities. The Company would receive further lending of £148,878 by 2 June 2008 and by 31 July 2008 there would be sufficient cash in the bank and a sufficient borrowing source from which to conclude that the loan repayment of £285,000 had not placed the prospects of payment of the contingent liability at a real risk assuming the Company's pattern of trading continued. There was no objective reason to conclude that the pattern of paying debts as they fall due, leaving the Respondent as the sole creditor, would not continue.

112. Subject to one issue, in those circumstances based upon an objective test, it cannot be considered a breach of duty to repay £285,000 when the Company would gain a benefit from the use of the Property rent free and when sufficient funds would be lent by as soon as 2 June 2008 to provide a facility from which to pay the contingent creditor should the claim be established and therefore be due and owing in the reasonably foreseeable future.

113. Of course there is the feature that the facility was no longer available by the end of the next financial year in circumstances of the director's loan account debt reducing from £176,935 to £57,745. During the year end 31 July 2009 the Company made an operating profit of £32,226.85 instead of a loss of £87,766.14 from a turnover that had increased from about £20,000 to just over £100,000. Its cash in bank was reduced from £89,269 to £2,306 and the debt owed to the Respondent stood at £57,745 rather than £176,935.

114. However, that reduction in debt owed to the Respondent raises the question whether the director's loan account should have been reduced in all the circumstances during the 2009 financial year. In my judgment that cannot establish a breach of duty on 30 April 2008. What happened during the second financial year of trading needs to be examined and that is not part of the claim before me.

115. The one issue to consider is whether it should be concluded at the time the decision was made that the Respondent's lending would never be used or available to pay Dr Mohsin ahead of the Respondent. If so, potentially the transfer of £285,000 (rather

than its retention) placed the prospects of payment of the contingent liability (or at least of the dividend that would be received on a *pro rata* distribution had the Company then ceased to trade) at a real risk.

116. Applying the subjective test, the answer to the issue over existence of the Desire applies. If, as I have found, the Respondent did not have Dr Mohsin's claim in mind when he decided to repay the loan, the decision cannot be viewed from the premise that he did not intend to pay the contingent claim.

117. Nor in my judgment can it be objectively concluded at 30 April 2008 that the Company would never repay Dr Mohsin's claim when it fell due from monies borrowed from the Respondent and/or from its future profits. The evidence is simply absent. Whilst repayments of the director's loan account occurred after 2 June 2008, they occurred in different scenarios which require investigation and cannot be traced back to 30 April 2008. Whilst non-payment arose after the Tribunal's decision dated 23 July 2009, this too occurred in a different scenario, requires investigation and cannot be traced back.

118. In my judgment whatever approach may have been taken in different circumstances in the future, there is no or insufficient evidence from which to conclude at the date of the decision to repay that the Company would never repay Dr Mohsin's claim when it fell due. The Respondent has satisfied the evidential burden to justify the repayment.

119. I dismiss the claim.

Order Accordingly