Edward Christopher Wetton (As Liquidator of Mumtaz Properties Limited) v Saeed Ahmed, Shafiq Ahmed, Mumtaz Ahmed, Munir Ahmed, Zafar Ahmed

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
24 May 2011

Case No: A2/2010/2151 & 2905

Court of Appeal (Civil Division)

[2011] EWCA Civ 610, 2011 WL 1151888

Before: Lady Justice Arden Lord Justice Aikens and Lord Justice Patten

Date: 24/05/2011

On Appeal from the High Court of Justice (Chancery Division) Leeds District Registry

HHJ Simon Brown QC (Sitting as A High Court Judge in the Birmingham Civil Justice Centre)

In the Matter of Mumtaz Properties Ltd

In the Matter of the Insolvency Act 1986

Hearing date: 14 April 2011

Representation

Mr Paul Chaisty QC (instructed by Ward Hadaway) for the Appellants.
Mr Hugh Jory (instructed by Walker Morris Solicitors) for the Respondent.

Judgment

Lady Justice Arden:

1. Each of the first three appellants has been found liable, as an officer of Mumtaz Properties Ltd ("the Company"), to replace monies owing to the Company on their directors' loan accounts and the loan accounts of other directors. The first two appellants, Mr Saeed Ahmed ("Saeed") and Mr Shafiq Ahmed ("Shafiq"), were shown at the Companies House as duly appointed directors of the Company and they (together with the other appellants) principally appeal on the ground that they should not have been held liable for the directors' loan accounts opened for other persons. The third appellant, Mr Zafar Ahmed ("Zafar"), was not, however, a duly appointed director of the Company. He separately appeals against the judge's finding that he has the same liability as a duly appointed director on the grounds that he was a de facto director, that is, a person occupying the position of a director even though not formally appointed as such. The fourth appellant, Mr Munir Ahmed ("Munir"), whom the judge also found to be a de facto director, separately appeals against a substantial debit of £74,551.37 made against his director's loan account.

2. This is an appeal from the order dated 3 August 2010 of HHJ Simon Brown QC sitting as a judge of the High Court, in the Leeds District Registry. The proceedings were brought by the liquidator of the Company pursuant to section 212 of the Insolvency Act 1986 for, among other matters, a declaration that the respondents to the proceedings were liable to repay the amount of the directors' loan accounts and compensation for misfeasance and breach of fiduciary duty.

3. The proceedings were brought against five members of the Ahmed family, the four appellants named above together with Mr Mumtaz Ahmed ("Mumtaz"). Saeed, Ahmed and Munir are the sons of Mumtaz. Zafar is the son of Saeed. The judge held that all of these persons were jointly and severally liable to repay to the Company the aggregate amount due on their loan accounts, totalling £205,211.75, plus interest totalling £121,111.61, save that Mumtaz's liability was limited to £65.30. They were also ordered to pay the liquidator's costs and to make an interim payment on account of costs. There is no appeal by Mumtaz.

4. The Company was a property development and letting company. The driving force had originally been Mumtaz but he is described by the judge as elderly, and at the relevant time he took a back seat. The Company entered administration on 19 March 2003, and on 8 November 2004 it entered creditors' voluntary liquidation. At that date, the Company had an estimated deficiency as regards creditors of £621,786.54. The shares in the Company were held as to 50% by Munir and as to 50% by his wife.

5. There are four issues:

i) Did the judge err in holding that Zafar was a de facto director?
ii) Did the judge err in holding that the appellants Saeed and Shafiq were jointly and severally liable for the aggregate amount due in respect of all the directors' loan accounts?
iii) Did the judge err in refusing to allow the appellants to set off the amounts (if any) of the pre-liquidation debts owed to them by the Company?
iv) Did the judge err in finding that the debit balance on Munir's director's loan account included the sum of £75,551.37?

6. I make no reference to issues raised in the skeleton arguments for which no permission was given or which were not pursued orally.

The liquidator's case

7. The statement of affairs was sworn to by Saeed and it showed that the five respondents to the proceedings had debit balances on their loan accounts in an aggregate sum of £91,400.77. The liquidator was able to reconcile this amount with the Sage accounts (which I assume meant a trial balance sheet for some period). However, he subsequently became aware that the debit balances in the statement of affairs were incorrect and, basing himself on the balances on such accounts (referred to in the Company's accounting records as "DLAs" or "directors' loan accounts") as shown in the Company's accounting records and information provided by the Company's administrators, he came to the view that the amounts properly due were the following, which formed the basis of his claim in these proceedings:

"21.1	Saeed Ahmed (Canada Life)	£1,357.57
21.2	Saeed Ahmed	£12,648.23 (credit)
21.3	Saeed (Personal House Mortgage)	£8,891.33

21.4	Munir Ahmed	£171,909.87
21.5	Zafar Ahmed	£21,599.75
21.6	Shafiq Ahmed	£14,036.16
21.7	Mumtaz Ahmed	£65.30

8. The liquidator does not have in his possession any vouchers and papers relevant to this appeal that support the entries in the directors' loan accounts in the Company's accounting records. The liquidator's case, therefore, is that the debit balances there shown are prima facie evidence that the directors are liable for those amounts.

9. The liquidator does not rely on section 341 of the Companies Act 1985 (now section 213 of the Companies Act 2006), which confers remedies against directors for loans unlawfully made to themselves or authorised by them. It is common ground that it is a breach of fiduciary duty for a director to receive any loan made to them to meet personal expenditure. That liability is expressly preserved by section (and section 213(8)). It is, therefore, unnecessary for this court to consider *Neville v Krikorian [2006] EWCA Civ 943* , in which this court considered the circumstances in which a director could be said to have authorised a loan to another director for the purposes of those sections.

The judge's judgment

10. The judge's judgment raises a point of general importance. The judge starts his judgment with a section dealing with the factual issues. He gave himself the following direction with regard to his task of fact-finding:

> "18. Prior to the commencement of the substantive hearing of the application, Counsel for the parties helpfully agreed the sequential factual questions to be answered upon the evidence, both oral and documentary, before the court.
>
> 19. I will take each in turn.
>
> 20. In doing so, the Court bears well in mind that this is a case where the events in issue are now between 5 and 10 years ago and the contemporaneous documentation is far from complete. However, the witness statements are relatively recent. This judgment will therefore analyse the issues and the evidence in accordance with the guidance provided in the dissenting speech of Lord Pearce in the *House of Lords in Onassis v Vergottis [1968] 2 Lloyds Rep 403* at p 431:
>
> > "'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees

> it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. [emphasis added] And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.”””

11. By the end of the judgment, it is clear that what has impressed the judge most in his task of fact-finding was the *absence* , rather than the presence, of contemporary documentation or other independent oral evidence to confirm the oral evidence of the respondents to the proceedings.

12. There are many situations in which the court is asked to assess the credibility of witnesses from their oral evidence, that is to say, to weigh up their evidence to see whether it is reliable. Witness choice is an essential part of the function of a trial judge and he or she has to decide whose evidence, and how much evidence, to accept. This task is not to be carried out merely by reference to the impression that a witness made giving evidence in the witness box. It is not solely a matter of body language or the tone of voice or other factors that might generally be called the ‘demeanour’ of a witness. The judge should consider what other independent evidence would be available to support the witness. Such evidence would generally be documentary but it could be other oral evidence, for example, if the issue was whether a defendant was an employee, the judge would naturally consider whether there were any PAYE records or evidence, such as evidence in texts or e-mails, in which the defendant seeks or is given instructions as to how he should carry out work. This may be particularly important in cases where the witness is from a culture or way of life with which the judge may not be familiar. These situations can present particular dangers and difficulties to a judge.

13. Care must also be taken by the appellate court. As a general rule, the appellate court would treat the trial judge as having had a special advantage in seeing the witnesses give their evidence. Where the evidence is largely documentary, this advantage is of less worth than where, as in this sort of case, the oral evidence constitutes the primary evidence in the case. In this sort of case, an appellate court is slow to interfere with a trial judge's finding on a question of fact. As Lord Summer held in *SS Honestroom v SS Sagaporak [1927] AC 37* at 47:

> "What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: Order LXVIII., r.1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone."

14. In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.

15. That was the predicament in this case. The liquidator could not show that Munir and Zafar were de facto directors from the Company's books and papers because the directors had not handed over the necessary documents to the administrators. The judge held, in the context of Munir's denial that he was a de facto director despite the fact that he had acted as chairman of the meeting convened to pass a resolution for voluntary liquidation, that, had it been necessary to do so, he would have been entitled to draw adverse inferences against the respondents to the proceedings:

> "26. It is accepted by the Applicant [the liquidator] that he can only place this example before the Court. However, as regards this, the explanation is quite simple. The Company's books and records are not within the possession or control of the Applicant despite his enquiries to ascertain the whereabouts of the books and records, and hence the Applicant could only prepare his case on the papers he has in his possession. The Respondents each asserted they did not have the books and records and that these were with either the accountant or Kiran Mistry. Both of these individuals, who were witnesses for the Respondents, confirmed in cross examination that any Company documents they had, had been passed to the Applicant and that they did not have possession of any of the missing books and records and these remained with the Company. Therefore the books and records of the Company must have remained with the Company. The Respondents have chosen not to deliver them up to the Applicant and nor to disclose them within the proceedings. The Court can draw adverse inferences against the Respondents for this but does not need to do so as this single piece of documentary evidence is compelling and, indeed in my judgment, overwhelming."

16. The approach of the judge in this case was to seek to test the evidence by reference to both the contemporary documentary evidence and its absence. In my judgment, this was an approach that he was entitled to take. The evidence of the liquidator established a prima facie case and, given that the books and papers had been in the custody and control of the respondents to the proceedings, it was open to the judge to infer that the liquidator's case would have been borne out by those books and papers.

17. Put another way, it was not open to the respondents to the proceedings in the circumstances of this case to escape liability by asserting that, if the books and papers or other evidence had been available, they would have shown that they were not liable in the amount claimed by the liquidator. Moreover, persons who have conducted the affairs of limited companies with a high degree of informality, as in this case, cannot seek to avoid liability or to be judged by some lower standard than that which applies to other directors, simply because the necessary documentation is not available.

18. In some cases, the judge may find that the parties have simply not focused on the issues and he or she may then seek to depart from the usual rules of evidence (see for example, Renton v Renton, Inner House, Court of Session, 11 March 2011), but this appeal is not concerned with such a case and I express no view on it. In other cases, there may be evidence as to the significance of an act within a particular culture in the community: see, for example, *Khan v Khan [2007] EWCA Civ 399* . This may assist the judge on questions of credibility, but it is not usual for there to be such evidence.

19. We are told that the tape for one half day of the trial has been lost and so there is no transcript of the evidence of Munir and a transcript of only part of the evidence of Zafar. However, we have been provided instead with a note of their oral evidence for which no transcript exists.

The judge's findings

20. In this part of my judgment, I will refer to some of the judge's factual findings which are not mentioned elsewhere.

21. The judge found that the respondents to the proceedings were all closely related as a family. He also found that they were closely related in business:

> "4. The Respondents are also closely interrelated in business. Companies House website registers numerous interlinked company appointments held by the Respondents, including various property companies and [the Company]."

22. The judge held that little turned on the titles which the respondents had:

> "37. The evidence before the Court showed that the Respondents in general showed scant regard to legal definitions and terminology and that in order to determine the role each person played in the Company regard must be had to the evidence and not simply to title. This was shown in both the evidence of First Respondent who gave evidence as to his directorships of various companies which was not supported by Companies House records; the evidence of the Fifth Respondent that

> he could not have been a director of the Company due to his age and inexperience at a time when he was registered as a director of various other companies; the confusion in the written evidence of the Second Respondent as to his position in the Company and the evidence regarding the change of position of the Fourth and Fifth Respondents as to their status as an employee or consultant of the Company and the evidence of the Third Defendant that he was only an "honorary" director, whatever that may mean."

23. The judge held that the Company was run as an extension to the greater family formed of the respondents to the proceedings:

> "38. It is plain on the evidence of directorships of the Fourth and Fifth Respondents that they played key roles in many of the companies owned or controlled by the family, and of which the First Respondent claimed to be a director, and the status of director or company secretary is seen by the family as a nominal title. Indeed the evidence of the First Respondent appeared to be that company money was not that of a company but of the family given his references to money of this Company and another Company owned by the family, Bellforce, as his money."

24. The judge held that Zafar was a de facto director for these reasons:

> "43. The Applicant accepts that there is no evidence that the Fifth Respondent [Zafar] 'held himself out' as a director of the Company, as the Fourth Respondent undoubtedly did.
>
> 44. [Nevertheless,] there is compelling evidence that the Fifth Respondent did assume the status and functions of a 'de facto' director of the Company:
>
> > 1. An employee or agent of the Company either was instructed to establish a director's loan account in the Fifth Respondent's name or had sufficient evidence before them to do so.
> >
> > 2. The Fifth Respondent had dealings with suppliers to the Company and was able to enter into agreements with local authorities regarding the Company.
> >
> > 3. The Fifth Respondent changed his position regarding his status within the Company without credible explanation. His tax return was signed in the same way as the Fourth Respondent and the Fifth Respondent relies on the same, incredible, change of position as to his status with the company as the Fourth Respondent to support such tax return.
> >
> > 4. Finally the excuse given as to why the Fifth Respondent could not be a director of this company, i.e. his age, is plainly wrong given he was already a director of other companies.

…

45. These factors in the preceding paragraph, in my judgment, demonstrate that the Fifth Respondent did exercise real influence over the corporate governance of the Company. …"

25. The judge had to deal with a number of issues with which this appeal is not concerned. When it came to deciding what amounts were due in respect of the individual loan accounts the judge made the following general findings:

"54. The Applicant has assisted the Court in this regard as far as he is able to do so and has produced a "Scott Schedule" setting out the basis of his claim to each item in the ledger. Surprisingly only the Fourth Respondent responded to this.

55. The ledger is on a simple well established accounting software called Sage. The dates listed on the face of the ledger are the date entered as the date of the entry by the user of the Sage system. The date on the ledger therefore does not reflect the date an entry was made. The Applicant has with the assistance of Sage looked at the metadata behind the entries and discovered that all ledger entries in the *DU* accounts with which these proceedings are concerned were made prior to the Company entering into administration. Hence, they cannot have been made by the Applicant, as asserted by Mr Carter.

56. Nobody has been called to give evidence that they made the entries in error and logic dictates that all the entries in the ledgers were made by persons authorised by the duly appointed directors of the Company to make entries onto the system. In doing so it is to be assumed that the person, or persons, making the entries (and in particular those entries made on 9 March 2003 being a time at which the directors of the Company knew it was to be placed into administration) had evidence upon which the entries were to be made. That evidence of course is not before the Court.

57. The Applicant was straightforward in his position: he does not have the relevant documentation. The former Administrator of the Company was equally clear: he does not have the relevant documentation. Whilst criticism could be made of parts of the evidence given by the former Administrator and in particular the confusion he has undoubtedly caused by his contradictory statements regarding the books and records of the Company, when giving evidence to the Court he was clear that he did not have the books and records of the Company and that all documentation he had had been delivered up to the Applicant.

58. The simple position therefore is that the Applicant has placed the evidence he has before him before the Court. There is nothing within such which leads one otherwise to question the transactions within the Sage entries and in particular nothing to suggest that the entries within the *DU* were for the benefit of the Company.

59. In my judgment, these entries are accurate and were made prior to the administration of the Company by persons with knowledge of the Company's affairs and were not for the benefit of the Company."

26. The judge went through the points taken on each loan account separately and as to Zafar's loan account he held:

> "Fifth Respondent: There is no documentary evidence that the sum shown in the ledger in the name of the Fifth Respondent is incorrect. None of the items could conceivably be for the benefit of the Company e.g. Sky subscriptions etc."

27. The judge drew the threads together in the following findings:

> "61. In my judgment, the DLAs are precisely what the Company directors and bookkeepers meant them to be at the times they were created and subsequently maintained until administration of the Company i.e. "directors loan accounts" detailing accurately personal expenditure by the Company for the personal benefit of each named Respondent. None of these payments were lawful remuneration or for the benefit of the Company.
>
> 62. In my judgment, the journal entries made on 9th and 10th March 2003 adding significant sums to the DLAs of the First Respondent, the Fourth Respondent and the Fifth Respondent are explicable only on the basis that they knew, as "directors" of the Company operating their own DLAs that it was about to be placed by them into administration, as it was shortly thereafter on 19th March.
>
> 63. I do not accept any of the evidence of the Respondents. It is self serving and exculpatory. If it had been accurate and true, it would have been supported by documentation such as invoices etc. There are none produced by any of the Respondents. In my judgment, in relation to each Respondent the figure due and owing under their loan accounts is that set out at paragraph 16 above."

28. The judge held that each of the respondents to the proceedings, other than Mumtaz, was liable for breach of duty with respect to the loan accounts of the other respondents to the proceedings, as well as his own.

Issue (i)

29. This is by far the most substantial issue on this appeal as a matter of law.

30. Counsel agreed on a number of propositions which were placed before the judge and which the judge summarises in paragraph 9 of his judgment:

> "9. Guidance upon the definition of a " *de facto* " director was provided in *Gemma Ltd v Davies [2008] BCC 812* , at Para 40. In order to show that a party is a de facto director for the purposes of S.212 of the Act:

> 1. The Applicant must plead and prove that the Fourth Respondent undertook functions in relation to the company which could properly be discharged only by a director (per MiIlett J. in *Re Hydrodan (Corby) Ltd (in liq.) [1994] B.C.C. 161* , at 163;
>
> 2. It is not a necessary characteristic of a de facto director that he is held out as a director; such "holding out" may, however, be important evidence in support of the conclusion that a person acted as a director in fact;
>
> 3. Holding out is not a sufficient condition: what matters is not what he called himself but what he did;
>
> 4. It is necessary for the person alleged to be a de facto director to have participated in directing the affairs of the company (per *Secretary of State for Trade and Industry v Hollier [2007] B.C.C. 11)* on an equal footing with the other director(s) and not in a subordinate role;
>
> 5. The person in question must be shown to have assumed the status and functions of a company director and to have exercised "real influence" in the corporate governance of the company: *Re Kaytech International Plc [1999] B.C.C. 390* ;
>
> 6. If it is unclear whether the acts of the person in question are referable to an assumed directorship or to some other capacity, the person in question is entitled to the benefit of the doubt: *Re Richborough Furniture Ltd [1996] BCC 155* ."

31. Neither counsel took us to the authorities cited in this passage as, since the trial before the judge, the Supreme Court has considered the law on de facto directors, albeit 'in the context of the liability of individual directors of a corporate director' *HMRC v Holland [2010] 1 WLR 2793* . The question was whether the sole individual director of a corporate director became liable, under section 212 of the Insolvency Act 1986 as a de facto director of the company of which the corporate director was a duly appointed director, by virtue of acts done in that individual's capacity as a director of the corporate director. The Supreme Court, by a majority of 3 to 2, answered this question in the negative. As the trial judge in Holland held that the director in question had done nothing beyond acting as a director of the corporate director, the question which this case raises, namely whether a person has been responsible for acts sufficient to constitute him or her a de facto director for the purposes of section 212 , is considered only as an incidental issue by the Supreme Court. Lord Hope, who gave the leading judgment, considered that all the relevant factors had to be taken into account. Those factors would include any holding out as a director by the company, or any claim by the person to be a director:

> "39 …All one can say, as a generality, is that all the relevant factors must be taken into account. But it is possible to obtain some guidance by looking at the purpose of the section. As Millett J said in *Re Hydrodam (Corby) Ltd [1994] 2 BCLC 180* at 182, the liability is imposed on those who were in a position to prevent damage to creditors by taking proper steps to protect their interests. As he put it, those who assume to act as directors and who thereby exercise the powers and discharge the functions of a director, whether validly appointed or not, must accept the responsibilities of

> the office. So one must look at what the person actually did to see whether he assumed those responsibilities in relation to the subject company."

32. The second judgment was given by Lord Collins. Lord Collins made the point that the courts were confronted with a very difficult problem in identifying what functions were, in essence, the sole responsibility of a de facto director. There was no single test but the director had to be part of the corporate governance structure of the company. This point confirms sub-paragraph 5 in the summary of guidance given to the judge.

33. Thus Lord Collins held at paragraph 93 of his judgment:

> "[93] It does not follow that 'de facto director' must be given the same meaning in all of the different contexts in which a 'director' may be liable. It seems to me that in the present context of the fiduciary duty of a director not to dispose wrongfully of the company's assets, the crucial question is whether the person assumed the duties of a director. Both Sir Nicolas Browne-Wilkinson V-C in *Re Lo-Line Electric Motors Ltd, [1988] Ch 477* and *Millett J in Re Hydrodam (Corby) Ltd [1994] 2 BCLC 180* , 183 referred to the assumption of office as a mark of a de facto director. In Fayers Legal Services Ltd v Day (11 April 2001, unreported) , a case relating to breach of fiduciary duty, Patten J, rejecting a claim that the defendant was a de facto director of the company and had been in breach of fiduciary duty, said that in order to make him liable for misfeasance as a de facto director the person must be part of the corporate governing structure, and the claimants had to prove that he assumed a role in the company sufficient to impose on him a fiduciary duty to the company and to make him responsible for the misuse of its assets. It seems to me that that is the correct formulation in a case of the present kind. See also Primlake Ltd (in liq) v Matthews Associates [2006] EWHC 1227 (Ch.) 1227; [2007] 1 BCLC 666 at [284]."

34. The real question, therefore, on this issue is whether the judge correctly applied the law.

35. It was common ground that there was no evidence that Zafar had held himself out as a director. He did not call himself a director of the Company. He had, however, been permitted to have a director's loan account on which he could make drawings for his personal benefit. He also dealt with suppliers to the Company and made contracts with the local authorities in connection with the Company's property. In his tax return, he had originally claimed to be self-employed. However, later he changed his status by ticking the box which showed that he was a director or employee.

36. There was no evidence that Zafar had ever directed the management or operation of the Company behind the scenes. Part of the liquidator's case was that he had a company credit card, which he was permitted to use for his own personal purposes. The liquidator considered that this was not usual for a mere employee.

37. Mr Paul Chaisty QC, for the appellants, submits that the judge did not have a sufficient basis for holding that Zafar was a de facto director of the Company. It was not shown that he was part of the corporate governance structure of the Company. It was not a board function to deal with local authorities. There was very little evidence of his dealing with suppliers. However, the transcript of evidence included the following passages:

> " **Mr Saeed Ahmed:** I'll manage it, Munir manage it, my son will manage it. All three *manages* (inaudible)
>
> **Miss Jackson:** So, so Zafar also assisted in managing the properties?
>
> **Mr Saeed Ahmed:** He's employed to do that particular job. He's not there just for cup of tea.

…

Miss Jackson: Zafar would deal with the local authorities, wouldn't he?

Mr Saeed Ahmed: Local authority, yes. Any day to day running, business, concerning the property matters, if the task was given to them and they're employed by me, yes they'll do it.

Miss Jackson: For example, if the local authority had a health requirement, due to health inspectors, Zafar could agree to their demands couldn't he?

Mr Saeed Ahmed: He couldn't, he couldn't agree to their demand if the demand is, is unreasonable they'll serve a notice on to us and I'll take care of it. If a genuine requirement needed to be done, yes they have authority to do that.

…

Miss Jackson: And Zafar, your son, we've already established was allowed to deal with the local authorities. He also dealt with suppliers to the company didn't he?

Mr Saaed Ahmed: He did.

Miss Jackson: And if he gave instructions as to what was to happen in the running and management of the company, they'd follow, wouldn't they?

Mr Saaed Ahmed: Of course they would. If he give instruction to the company. If I give him the instruction what do, he'll do it.

Miss Jackson: But if he gave the instructions the (inaudible)

Mr Saaed Ahmed: Go on.

Miss Jackson: To the company, to you.

Mr Saaed Ahmed: He does not give me any instructions, he is my son. He listen to me.

Miss Jackson: Both Munir and Zafar will tell you what was happening in the company, they would tell you what was needed to be done and you together with them would ensure it was done.

Mr Saaed Ahmed: I will listen to them, at the end of the day ultimate decision is mine."

38. As to the change of status in the tax return, Zafar's evidence in his witness statement was that he started as a consultant but later became an employee of the Company. He also gave evidence:

> "I had no involvement with the Company in its decision-making. My role was to assist wherever in viewings, taking quotations for repairs, inspection of properties. These activities were carried out under the instruction of the Directors of the Company with their approval for actions carried out."

39. Mr Chaisty submits that Zafar was not cross-examined on this specific evidence. However, it seems to have been common ground that his activities in the Company were in relation to its properties and it appears that no point was taken at the trial

to the effect that he had not been cross-examined on the passage cited as the judge does not refer to any such objection in his judgment. The point that he was not cross-examined was not taken until the hearing of this appeal.

40. To address this point straight away, a judge is not always prevented from rejecting evidence simply because it has not been challenged. In the course of the hearing of this appeal, Lord Justice Aikens drew the parties' attention to Socimer International Bank Ltd v Standard Bank London Ltd [2008] EWCA 344 (Laws, Rix and Lloyd LJJ) at paragraphs 52 and 143 to 144. It is sufficient for me to cite paragraphs 143 to 144:

> "143] As it was, Mr Millett, by an exercise of shrewd advocacy, was able, even in the absence of any challenge, to address the judge on the basis that Messrs Clifford's and Feld's evidence should be disregarded or discounted on the ground that it was incredible, self-serving and partisan: and in essence he succeeded in those submissions so far as the valuation exercise was concerned, as I have sought to show above. And yet, before this court, Mr Millett expressly accepted that he had no case of bad faith to make against Standard's witnesses. In these circumstances, his submission to us that the judge was simply entitled to make up her own mind as to the value of Standard's evidence did not meet the point. Of course the judge was entitled to make up her own mind about the evidence before her: but she was not entitled, at any rate not without the most explicit warnings and possible need for an adjournment, to find that evidence which had not been challenged by any cross-examination was false evidence, or evidence which spoke to a valuation exercise which was flawed by bad faith, irrationality or negligence. It is simply unfair for Standard's witnesses to be found wanting in such respects, unless the relevant challenges had been put to them and they had been afforded the opportunity (and I mean a proper opportunity, for which the ground had been sufficiently prepared in the pre-trial process) to answer the accusations made against them.
>
> [144] This is not one of those cases where a minor issue arises as to whether some detailed point had been sufficiently covered in cross-examination. As has often been said, it is not necessary to cover every point. This case, however, is remarkable. There was, quite deliberately, no cross-examination at all of Messrs Clifford and Feld on their relevant evidence, but the forensic submission was nevertheless made in effect that such evidence should be totally rejected on the ground that "They would say that, wouldn't they?""

41. These paragraphs make it clear that, while it is not open to a party to invite a judge to find, or for a judge to find, that the evidence of a witness which he has not challenged was given in bad faith or negligently or irrationally or was false for the reason that the witness had not had an opportunity of dealing with those points, the judge still has to consider whether to accept the evidence in the context of other evidence in the case and decide how much weight to give it. Accordingly these paragraphs do not, in my judgment, prevent the judge from preferring other conflicting evidence or attaching a different significance to facts than the witness did if in the course of his evaluation of the evidence the judge thinks that the witness must be incorrect. He must of course bear in mind that his findings must be fair to the witnesses having regard to the evidence which they have given but there was other evidence in the case, which would have been known to all the parties to it, and the issues to be decided were clear. In the circumstances I do not consider that the fact that Zafar was not cross-examined on the passage quoted from his witness statement, assuming that that is what happened, would necessarily be determinative of this appeal in his favour.

42. However, it does appear that all the material points were put to Zafar in cross-examination. He was, for instance, given the chance to answer Counsel's suggestion that he was a director, that his role went to the heart of the business, that he was able to deal with matters on his own initiative, that he was able to deal with matters without his father's instructions when his father was out of the country, that he had 20 other directorships or secretaryships and that he was a director of the Company in all but name and was understood to be such by those who kept its accounting records. In those circumstances, I do not accept the submission that Zafar was not cross-examined on the passage from his witness statement quoted in paragraph 38 of this judgment.

43. Mr Chaisty further submits that, in order to find Zafar to be a de facto director, there had to be the evidence that Zafar was participating in corporate governance. For this purpose, he would have to have taken decisions on behalf of the Company

without seeking approval from the board of directors. In fact, he was consulting his father. The judge discounted the evidence of the directors. The judge, Mr Chaisty submits, simply adopted the liquidator's submissions. There was no evidence as to what supply contracts Zafar had made. The very limited number of invoices that were produced bearing Zafar's name did not demonstrate that he was discharging the role of a director, as opposed to that (say) a manager.

44. Mr Hugh Jory, for the liquidator of the Company, submits that the affairs of the Company were conducted with a high degree of informality. He relies on paragraphs 37 and 38 of the judge's judgment which I have already set out in paragraphs 22 and 23 of this judgment.

45. Mr Jory observes that, in his evidence, Munir made it clear that he was holding the shares on behalf of all the family. The Company was, therefore, on his submission a family enterprise whose affairs were conducted for the benefit of the family. It was, therefore, a matter of chance whether a person was formally given a title or not. The passages from the transcript already set out show that Saaed accepted that Zafar had authority to deal with local authorities if they served notices and he (Saaed) did not give any particular instructions. We have not been taken to any evidence which shows that such instructions were ever given, or were given with any frequency. The evidence also showed that all the respondents could access the Company's accounting records. When Mumtaz was asked in the course of his evidence about the whereabouts of the records, his reply was that the liquidator should ask Zafar. Zafar, therefore, clearly had been given access to the accounting records, which was another indication that he was discharging the functions of a director.

46. I turn to my conclusions on this issue. The first step is to examine the governance structure of this company. The judge found that the Company was a family company, providing employment or income for the children of Mumtaz and, in the case of Zafar, one of his grandsons. It is, therefore, unsurprising that the Company would be run with a high degree of informality with decisions not necessarily being taken at board meetings but whenever relevant family members were in communication with each other. It is likely that they all implicitly agreed to run the Company in this way. The judge had to decide whether or not to accept the evidence that was placed before him. The witness statements were not informative and the answers given in cross-examination did not appear to present a picture of the Company's affairs with any clarity. Moreover, although Saaed had sought at times in his evidence to paint a picture that Zafar was a mere employee who had to revert to Saaed if there was something unusual, there was no independent evidence of Zafar reporting back. If such evidence existed, it was for the respondents to the proceedings to produce it. Moreover, he accepted that if he did not give instructions Zafar could act on his own authority. Added to this was the fact that Zafar had a loan account in the Company's records, which was denominated as a director's loan account and that Zafar had had this account for two years to his knowledge, and that he was listed as a director in the statement of affairs. The judge rejected Zafar's case that he did not know he had a director's loan account.

47. There is undoubtedly force in Mr Chaisty's submissions. It is a serious matter for a person to be found liable on the basis that he was a de facto director. Taken on its own, the fact that Zafar dealt with local authorities or with the occasional supplier did not make him a director as opposed to a manager. The fact his status in his tax return was changed did not, of itself, amount to an admission that he regarded himself as a director. The fact was that the judge was satisfied, looking at the evidence as a whole (including, no doubt, the evidence that he had a company credit card, which he was able to use for his own purposes and the fact that, unlike an ordinary employee, he had left monies with the Company for investment by him in his own properties at a later date), that he was also part of the corporate governance structure of the Company. He was (and these are my words) one of the nerve centres from which the activities of the Company radiated. The judge clearly drew inferences from the absence of documentation which he has not articulated in detail. In my judgment, he was entitled to come to his conclusion on the totality of his findings as to how the Company's affairs were run. He was not bound to accept Zafar's denials which were not corroborated by other independent evidence.

Issue (ii)

48. The issue here is whether Saaed and Shafiq permitted Munir and Zafar to operate overdrawn directors' loan accounts. Since it is common ground that such accounts were unlawful (as contrary to section 330 of the Companies Act 1985), Saaed and Shafiq would, in general, be liable for the monies misapplied by drawing on them, even if the accounts were drawn on by others.

49. The judge's findings on this issue were clear:

"(6) Did the duly appointed directors of the company allow the Fourth and Fifth Respondent to apply the money of the Company to their own use?

51. The evidence provided to the Court in this regard was plain and clear in that the duly appointed directors of the Company did allow the Fourth and Fifth Respondents to apply the money of the Company to their own use. As regards the First Respondent this occurred due to the First Respondent permitting the Fourth and Fifth Respondents to use the company credit cards for their own use. The First Respondent did of course tell the Court that such sums were to be repaid to the Company. It is plain however from the ledgers that such did not occur.

52. The Second and the Third Respondents allowed the Fourth and Fifth Respondents to apply the money of the Company to their own use as they failed to give any attention to the accounts of the Company or to the use of the Company's money. Indeed the weight of the evidence was that save when the Second Respondent was needed to sign a document as a legal requirement the Second and Third Respondents took no role in the Company and left the First and Fourth Respondent to run the Company unchecked and unhindered."

50. The judge was satisfied that the breach of duty by Saaed and Shafiq caused the loss to the Company:

"78. Joint liability arises where directors permit each other to use the money of a Company for their own ends; they are in breach of their fiduciary duties to act for the benefit and for the success of the Company: Selangor United Rubber Estates v Craddock (A Bankrupt) (No.3). Hence to the extent that the Respondents as directors of the Company permitted other directors to have loan accounts which were overdrawn, they are liable to recompense the Company for this as well (*Re DKG Contracts Ltd [1990] BCC 903*). Therefore the liability of each of the Respondents would be for the total of all the overdrawn accounts and not simply each Respondent's individual account.

79. I find that the elderly Third Respondent was probably not fully aware of the responsibilities of a director or the activities of the other directors and their loan accounts. He was a marginal figure leaving all the running of the Company to his sons and grandson. He was, of course, wrong to abdicate his responsibilities but in my judgment it would be inequitable to hold him jointly responsible for making good £205,211.75 to the Company and its creditors, particularly when he is only personally responsible for restitution of £65.30 and where he alone gave some honest evidence about the running of the Company.

80. Each of the other Respondents took no heed of and paid no regard to the accounts of the Company. They each had a director's loan account for their personal gain not for the benefit of the Company and were aware, or ought to have been aware that their fellow directors, howsoever called, had directors' loan accounts yet they took no time to inform themselves of such or to control this illegal activity.

81. Leaving the Third Defendant aside, each other Respondent stated they did not see the accounts. I simply do not believe that evidence. Even if they had not, then as directors of the Company they wrongly took no effective control over the finances of the Company. Such is flagrant breach of their duties as directors of the Company and in particular the duty to act *bonafide* in the interest of the Company.

82. The result of such breach of duties was that each of the directors without check and without recourse utilised the Company's money for their own purposes, and hence were permitted by the

> other Respondents, to convert the Company's property to their own ends. The breach of duty was a continuing breach of duty by each of the Respondents which continued up to the date of the administration of the Company. As such the breach of duty by the Respondents caused the loss of the entire sum claimed in the application and it is just and equitable that the Respondents do jointly pay to the Applicant as liquidator of the Company the entire sum obtained from the Company by the Respondents to enable the Applicant to pay the costs, expenses of the liquidation and a dividend to the creditors of the company. The sum owed to the creditors being in excess of that claimed in the application."

51. Mr Chaisty fairly and properly accepted that the judge's conclusions in this paragraph turned on findings of fact which he was not in a position to challenge.

52. In the circumstances, I would dismiss the appeal on this issue.

Issue (iii)

53. The issue here is whether the judge was right in law to hold that the respondents were not able to seek to set off any pre-liquidation debt owed to them by the Company against their loan accounts. This point was advanced only on behalf of Shafiq, who maintained that he was owed £50,000 by the Company, which had not been posted as a credit to his director's loan account, thus eliminating the debit balance.

54. The judge, however, did not accept Shafiq's evidence on this point. He held in paragraph 60.4 of his judgment:

> **"Second Respondent:**
>
> Again, no documentary evidence is produced by the Second Respondent to show that the sums noted in his ledger as a loan were in fact payment for goods and services supplied. There are no invoices nor documentation to support such. In contrast the ledger entry is clear. There is again no documentary evidence to support the assertion that the Second Respondent was entitled to credits against the account or that withdrawals for the house mortgage were made against sums to be credited."

55. Mr Chaisty did not challenge this finding. Accordingly, the appeal on this issue must fail.

Issue (iv)

56. Munir's case was that he did not receive the benefit of the payment of £74,551.37, which was the last item debited to his director's loan account, and that this represented a payment made for the benefit of the Company. The liquidator, however, could not find any evidence to support this. There was, therefore, no positive evidence to show why this debit was made. Munir's case was that the judge's findings on the question of this debit were confused as the judge appeared to think that the question was whether the Company had obtained a benefit for this sum, not whether Munir should be debited with this sum:

> "60.4.1 The 4th Respondent has no information about the £74,551.37 attributed to this account. However, there is no documentary evidence to support these bare assertions that the ledger entries represent sums incurred for the benefit of the Company. Whilst the Applicant has been unable to inform the Court as to the purpose of the debit to the account of £74,551.37 on 9 March 2003, but dated 10 March 2003, the Court accepts that this was properly made by a person authorised to do so on the basis of evidence before them to support it. The entry to the credit of the DLA of the Fourth Respondent was made at that time just before the Company went into administration on 19th March. In my judgment, this was an unjustified credit made purely for the Fourth Respondent's personal

> benefit to the Company's detriment at a time when he knew, or must have known the Company was insolvent and about to go into administration."

57. There is force in the argument that this sub-paragraph 4.l is confused. It makes three points: (1) that there was nothing to support the argument that the debit entry of £74,551.37 represented proper corporate expenditure; (2) the judge accepts that the entry was made by someone with authority to make it, and (3) there was an entry in the accounting records on the eve of the administration, which gave Munir an "unjustified credit". As the entry of £74,551.37 was the last entry before the administration and was alleged to be proper corporate expenditure, it seems to me that what the judge must have been saying was that if there had been an entry to the credit of the director's loan account just before the Company went into administration, that would have been an unjustified credit made purely for Munir's personal benefit at a time when the Company was insolvent. If that is what the judge was saying, it would have been correct: it would have been a credit made not for the purposes of the Company but for the improper purpose of conferring a benefit on Munir at a time when the duties of the directors were owed also to its creditors. It would have clearly been wrong to say that the debit was for the benefit of Munir. On the contrary, it increased his liability by a very substantial sum. Nonetheless, I do not consider that the judge's conclusion on the £74,551.37 was materially affected by any error as to debit and credit. In my judgment he was entitled to find, in the absence of evidence as to how and why the entry had been made, that it was what it appeared to be, namely a debit entry duly made and increasing Munir's liability on his director's loan account. Munir produced no evidence showing how the entry had come about and provided no explanation for the absence of such evidence. The judge was entitled to infer that he could have made enquiries about this entry if there was any evidence or explanation that would support his case.

58. A point was taken that this point ought to have been put to Munir in cross-examination, but the notes show that the judge asked Munir about the debit of £74,551.37 and he replied simply that he could not explain this transaction.

Disposal of appeal

59. For the reasons given above I would dismiss this appeal.

Lord Justice Aikens:

60. I agree.

Lord Justice Patten:

61. I also agree.