SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT ABERDEEN

UNDER THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986

[2026] SC ABE 19

ABE-B337-22

JUDGMENT OF SHERIFF IAN H L MILLER

in the cause

THE SECRETARY OF STATE FOR BUSINESS AND TRADE

Pursuer

against

KAMYAR SHOKAT SADRI

Defender

Act: Roxburgh, advocate
Alt: the defender

Aberdeen 15 April 2025

The Sheriff, having heard counsel for the pursuer and the defender personally in proof, and having resumed consideration of the cause:

FINDS IN FACT

that

1. The pursuer is the Secretary of State for Business and Trade. The pursuer has a place of business in Edinburgh

2. The defender is Kamyar Shokat Sadri. He resides in Aberdeen. He resided formerly at another address in Aberdeen. He was born on 21 March 1975.

The Disqualification Undertaking

3. On 30 November 2017 the defender gave a Disqualification Undertaking (the Undertaking) which was accepted on behalf of the then predecessor in office of the pursuer. The Undertaking was made under the Company Directors Disqualification Act 1986 (the Act). It came into force on 28 December 2017 and its duration was 4 years from that date.

4. By giving it the defender undertook that he would not (a) be a director of a company, act as receiver of a company's property or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company unless (in each case) the defender had the leave of the court and (b) act as an insolvency practitioner.

5. The factual basis on which he gave it was as set out in the Schedule of Unfit Conduct attached to it. That was his conduct while a director of a limited company called Aberdeen Delivery Services Limited which had gone into liquidation on 27 May 2016 as a result of a petition presented by the Advocate General for Scotland representing Her Majesty's Revenue and Customs (HMRC). At the point of liquidation the company had assets of £5,300 and liabilities of £348,000. In the liquidation HMRC claimed £393,219.14 in respect of VAT liabilities owed. The conduct of the defender was that between the VAT quarters that ended on 06/12 and on 09/15 he caused or allowed that company to trade to the detriment of HMRC from at least April 2014 until it ceased trading in April 2016.

6. The defender accepted in the Undertaking that this conduct constituted a matter of unfitness for office as director.

7. The defender had received legal advice from his solicitors in advance of entering into the Undertaking on its nature and what it prevented him from doing without having first applied to the court and been granted leave to act in any respect covered by section 1(1) of the Act. He understood that advice.

8. The defender did not, either before or after the Undertaking came into force, make an application to court for leave to act as a director of a company pursuant to section 17 of the Act and did not apply to the court for leave to be concerned or take part in the promotion, formation or management of a company.

KPD (UK) Delivery Limited

9. KPD (UK) Delivery Limited (the Company) was registered under the Companies Acts with registered number SC441321 and was incorporated on 28 January 2013. It changed its name to Scott Logistics Services Limited on and with effect from 9 November 2018.

10. The Company traded principally from premises at Unit B4, Blackness Road, Altens Industrial Estate, Aberdeen. Those premises were leased by the Company under a Lease originally entered into between Tarras Park Properties and the Company dated 28 March and 17 April, and registered in the Books of Council and Session on 24 April, all days of 2012 as varied by a Minute of Variation between Legal & General Property Partners (Industrial Fund) Limited as General Partner of Industrial Property Investment Fund as landlords (the Landlords) and the Company dated 23 September and 4 October and registered in the Books of Council and Session on 22 November, all days of 2016.

11. The business of the Company was the delivery of goods in parcels by van. To achieve that it had about twenty staff, both employed and self-employed. Most of them were van drivers of Eastern European origin.

12. The defender was a director *de iure* of the Company from 28 January 2013 until 22 September 2015. On that later date he submitted a termination of appointment as director

form to the Registrar of Companies. From and after that date the defender ceased to be a director *de iure* of the Company.

13. At various points in its life the Company had three other *de iure* directors. They were: (1) Akram Mazhari from 28 January 2013 to 20 December 2017; (2) Amir Gharani from 20 November 2017 to 1 November 2018; and (3) Atanas Georgiev from 1 November 2018.

14. Akram Mazhari was at all material times the wife of the defender. Amir Gharani is the son of Akram Mazhari. He is the defender's stepson.

15. The Company was wound up by an order of the Sheriff at Aberdeen Sheriff Court dated 24 May 2019. The winding up petition had been presented by the Landlords who had been landlords of the premises since 16 January 2017. In that order, the court appointed Thomas Campbell MacLennan and Alexander Iain Fraser as joint interim liquidators of the Company with the usual powers under statute and at law.

16. The joint interim liquidators prepared an Estimated Statement of Affairs of the Company as at the date of the winding up order. It stated that its assets were estimated to realise nil and its total liabilities were in the sum of £458,681.74. The three most substantial creditors were HMRC, the Landlords and Aberdeen City Council. The sums stated for them were £245,464.51, £84,001.34 and £65,694.21 respectively. No realisations were made and no dividend was paid to any creditor of the Company.

17. In these circumstances the liquidators made an application to the court under section 204 of the Insolvency Act 1986 that the company be dissolved in accordance with that section because the realisable assets of the company were insufficient to cover the expenses of the winding up. The court was satisfied that it was appropriate to do that and made the order on 19 August 2020.

18. The Company went into liquidation at a time when its assets were insufficient for the payment of its debts and other liabilities and the expenses of the winding up.

19. As part of the liquidation process the liquidators identified the directors of the Company in order to make a report on their conduct to the Insolvency Service (IS) which they did.

The Company's bank account

20. The Company held a bank account with Royal Bank of Scotland (RBS). It was set up pursuant to an application for a digital and telephone business banking application dated 17 November 2015 signed by the defender and his wife. They were the authorised users of the bank account. The defender had the authority to use digital and telephone banking facilities in relation to that account.

21. The defender and his wife were authorised to issue and sign cheques drawn on the bank account.

22. On or before January 2018, the defender ceased to be a signatory authorised to issue cheques drawn on the bank account. His wife remained a signatory authorised to sign cheques drawn on that account notwithstanding that she ceased to be a director of the Company on 20 December 2017.

23. Amir Gharani was not an authorised user of the bank account at any time and neither was Atanas Georgiev.

24. Mr John Graeme Clark was the part-time bookkeeper of the Company from sometime during 2016 onwards. He could not sign Company cheques. He left them for signature and reckoned that it was the defender who signed them.

25. The defender's wife was credited by the RBS with being the main contact with the bank and also with signing cheques drawn on the bank account. That gave her at best a nominal involvement in the conduct of the finances of the Company.

26. At least following the resignation of Akram Mazhari on 20 December 2017, no director *de iure* of the Company had control of the bank account. The defender controlled it at all material times from 2016 onwards.

27. For the period 28 December 2017 to 21 January 2019 the defender received payments totalling £15,556 from the Company and during the same period made payments to the bank account totalling £26,739. During the same period, the directors *de iure* Amir Gharani and Atanas Georgiev were paid £0 and £300 respectively by the Company and made no payments into the account.

The defender's role within the Company between about 2016 and its date of liquidation

28. The Aberdeen depot was the main place of business of the Company. A depot in Dundee was established by about December 2017. It was effectively run by the defender's stepson.

29. Throughout the period of time from about 2016 to 24 May 2019 the defender was a continuous presence in the Aberdeen depot.

30. Its office was manned and run by the defender and the transport manager.

31. The defender did everything in the Aberdeen depot except for the work done by the transport manager who was responsible for overseeing the vehicles, the drivers and the routes used by the vans. The defender impinged upon that side of the business by organising the drivers and they reported to him.

32. His administrative duties included dealing with customers of whom there were four or six main ones. He issued invoices to customers of the Company and was the person to contact if anyone had any queries about them. He issued the sales invoices.

33. Having issued those invoices he recorded that fact in a module in the Company's Sage accounting system which was located in a computer normally used by him. He was able to access that system. He was responsible for reconciling payments to outstanding invoices.

34. He administered the payroll for the Company and decided on the payment due to employees whether employed or self-employed. If anyone had any queries about pay it was he to whom they spoke.

35. He authorised payments to suppliers.

36. He was authorised to operate the online and telephone banking facilities in respect of the Company's bank account.

37. He was an authorised signatory to the Company's bank account until he ceased to be that on or before January 2018.

38. He was involved in the preparation of VAT returns for the Company but it was Mr Clark who submitted the completed returns to HMRC.

39. These administrative and financial duties undertaken and conducted by the defender were in the context of the Company central to the administrative and financial management and running of it and its business.

40. Neither the defender's wife, nor his stepson nor Mr Georgiev were recorded or recollected by any third party as having taken any part in the conduct of the business of the Aberdeen depot of the Company between about 2016 and 24 May 2019 with the limited exception that his wife was able to sign cheques.

41. The defender was in effective control of the Aberdeen depot from about 2016 to the date of liquidation of the Company.

42. The Aberdeen depot ran fairly smoothly with the defender there.

43. The defender did not evince that he was acting on or under the instruction of any of the directors *de iure* of the Company at any material and relevant point in time.

44. His role, duties and responsibilities within the Company did not really change after the Undertaking came into force.

45. The nature and scope of the role, duties and responsibilities assumed by the defender from at least 2016, assessed in the round, demonstrate that he was in effective control of the day to day operations and management of the Company from 2016 on, during the period of time that the Undertaking was in force and until the date of liquidation of the Company.

46. What the defender did within the Company throughout that period of years had him assume the status and function of a director of it and accordingly made him responsible as if he were a director *de iure.*

How the defender held himself out to third parties having dealings with the Company between about 2016 and the date of liquidation of the Company.

MMG Archbold

47. Between 28 January 2013 and approximately 27 June 2018 the accountants of the Company were MMG Archbold, Montrose (MMG). Their role included the preparation of the Company's accounts, corporation tax returns and form P11D, the filing of confirmation statements and the preparation of personal tax returns for the defender and his wife. In that capacity, MMG were intimately familiar with the circumstances in which the Company was operated.

48. MMG was aware in 2015 that the defender demitted office as a director of the Company.

49. The last set of accounts that MMG prepared for the Company was for the year from 1 February 2016 to 31 January 2017. MMG did not deal with the VAT returns of the Company.

50. Mr Robertson wrote the letter dated 11 January 2022 that was addressed to Mr Hubbuck of the IS. The purpose of the letter was to give details of MMG's relationship with the Company and the defender.

51. Throughout a period of time that started in 2013 and extended as far as the first five months or so of the life of the Undertaking the defender was the main contact at the Company. Notwithstanding his demission of office as a director *de iure* he was understood by MMG to be a director effectively running the Company.

52. The defender held himself out to MMG as a director of the Company. From their dealings with him MMG reasonably understood that effectively he ran the Company.

HMRC

53. HMRC visited the premises of the Company on 23 January 2018, 20 March 2018, 11 June 2018, 1 October 2018 and 23 October 2018 and spoke only with the defender about sums due to HMRC by the Company.

54. On 10 May 2018 and 1 October 2018 the defender agreed Time to Pay Agreements with HMRC regarding sums due to it by the Company.

55. On 10 May 2018, 11 May 2018, 30 May 2018 and 15 October 2018 the defender telephoned HMRC and spoke to them about the Company's debt due to HMRC.

56. On 9 November 2018 HMRC made a VAT related visit to the premises of the Company. The defender advised the HMRC officer at that visit that: (i) he was in overall control of the day to day operation of the Company; (ii) he had sole access to the Sage accounting system used by the company and was responsible for the information recorded within that system; and (iii) he had sole access to the Government gateway used when submitting VAT returns and was responsible for submitting those returns. That was said slightly more than ten months after the Undertaking came into force.

57. By letter dated 7 March 2019 HMRC issued to the Company a Notice of Penalty Assessment under Schedule 24 to the Finance Act 2007 and stating the penalty charged for submitting erroneous VAT returns was £55, 176.28.

58. By letter dated 8 March 2019 HMRC issued a Personal Liability Notice to the defender under paragraph 19(1) of that same Schedule requiring payment by him of the same sum. HMRC issued that letter because it considered that he was in control of the Company and that the behaviour that had led to the Notice of Penalty Assessment was deliberate.

59. The defender challenged the Personal Liability Notice. In due course the decision to issue the Notice was reviewed. The review officer cancelled the Notice. She did that because the evidence before her did not support the conclusion that the behaviour of the defender was deliberate. She made no mention of the ground that the defender had been in control of the Company at all material times and therefore did not depart from it or question its correctness.

60. The defender in the course of his various dealings with HMRC described himself as being a director of the Company and held himself out as being such.

The Landlords

61. The only person the Landlords or their agents had dealings with regarding the obligations of the Lease was the defender. In particular he and an officer of the agents of the Landlords conducted an email correspondence between 5 September 2018 and 1 November 2018 regarding overdue payments of rent and service charges owed by the Company. In the email dated 5 September 2018 the defender stated that the Company would pay £7,500.00 plus service charge that day and the rest by the end of that week. That did not happen. In the email dated 1 November 2018 he stated that the Company would empty unit 4 within the next three to four weeks so that it could be put back on the market.

62. At all of these points in time it was the defender who was engaged in this correspondence. The defender conducted all negotiations with the landlord's agents in relation to *inter alia* settlement of arrears of rent and others due under the lease and a proposal to renounce the lease.

Tyre Services Aberdeen Limited

63. One of the trade creditors of the Company was Tyre Services Aberdeen Limited (TSAL). It traded with the Company during the months of October 2018 to April 2019. The defender set up the account with TSAL by filling up a form and signing it. Mr Brian Brechin, the director of TSAL, normally dealt with the defender because he understood him to be one of the two directors of the Company, the other being the defender's wife, and believed that he was responsible for running its affairs. He saw him going to work at the Company's Aberdeen depot every day in one of a succession of vehicles. Mr Brechin expected the defender would be able to deal with any problem he had with the Company.

64. From what he saw of the nature and scope of the defender's duties and responsibilities and the fact that he was present every day at the Aberdeen depot of the Company Mr Brechin was satisfied that the defender ran the Company and was its director. The defender never said to Mr Brechin that he needed to obtain authority from anyone else to deal with a business problem or that he had limited authority to deal with business problems. When the Company ceased trading Mr Brechin tried to discuss with the defender the sum owed to TSAL but he never replied to him.

65. TSAL never had any dealings with the defender's wife.

66. The ways in which the defender comported himself towards MMG, HMRC, the Landlords, TSAL and in respect of the business of the Company and his role within it and his authority to act on its behalf demonstrated that he held himself out as not only concerned in the management of the Company but that he had gone further than that and had assumed the status and function of a director of the Company.

67. He conveyed to third parties that he acted consistently and throughout his active involvement with them and his business dealings with them on his own initiative in respect of the business of the Company.

The IS investigation into the defender

68. On 1 April 2021 the IS sent an initial enquiry letter to the defender because it was investigating the conduct of the directors of the Company on behalf of the pursuer. The purpose of the investigation was to consider whether disqualification proceeding should be started against the defender or any other director of the Company. Accompanying the letter was a Director Questionnaire. The defender was required to complete and return it by

15 April 2021. He did not comply with that date for return. The IS received it on or after the date which it bore being 29 July 2021.

69. On 28 January 2022 the IS wrote to the defender. In that letter it detailed the evidence held by it that it considered showed the defender had continued to act in the running of the Company during the period of his disqualification.

70. On 8 February 2022 the IS wrote to the defender to advise him that it was considered appropriate, on the basis of the information obtained during its investigation, to recommend to the then Secretary of State for Business, Energy and Industrial Strategy that proceedings for his disqualification be initiated. That elicited a written response from Meston Reid on behalf of the defender received by the IS on 18 February 2022 rejecting the suggestion that the defender had acted as a director or as a senior manager of the Company. The IS replied to them by correspondence dated 4 March 2022 intimating that the IS would be recommending to the Secretary of State that proceedings for his disqualification as a director should be started. The reply was copied to the defender.

71. In furtherance of that decision on 10 March 2022 the IS sent to the defender a Notice pursuant to section 16 of the Act. That Notice gave notice to the defender of the pursuer's intention to apply to the court for the making of a disqualification order against him.

72. The IS proceeded with that proposed course of action. It did that under the Act and in particular under its section 6.

What the defender did while subject to the Undertaking

73. By continuing to conduct himself as if he were a director while the Undertaking was in force the defender was in breach of the Undertaking.

FINDS IN FACT AND IN LAW

That

1. The Company became insolvent because it went into liquidation on 24 May 2019 at a time when its assets were insufficient for the payment of its debts and other liabilities and the expenses of its winding up.

2. Between about 2016 and 24 May 2019 the defender assumed constantly a level and degree of involvement with the administrative and financial business of the Company that placed him in control of those key aspects of the business of the Company and made him its directing mind and in charge of the governance system of the Company.

3. As such the defender assumed within the Company the office of director *de facto* of the Company and accordingly made himself responsible as if he were a director *de iure*.

4. Viewed in the round, between about 2016 and 24 May 2019 the respondent assumed the status, responsibility and duties of a director *de facto* of the Company when acting on behalf of the Company in its relations with third parties as if during that period of time he had been appointed as a director *de iure*.

FINDS IN LAW

1. The defender held the office of director *de iure* of the Company from 28 January 2013 until 22 September 2015.

2. The Company became insolvent after 22 September 2015 under and in terms of section 6(1)(a)(i) of the Company Directors Disqualification Act 1986.

3. The conduct of the defender within, for and on behalf of the Company between 28 December 2017 and 24 May 2019 evidenced that throughout that period of time he was in charge of the corporate governance of the Company.

4. That conduct of the defender caused him to assume the status and function of a director of the Company *de facto* so as to make him responsible as if he were a director *de iure*.

5. That conduct of the defender while the Undertaking was in force was in breach of the Undertaking and amounts to misconduct under section 6 of the Company Directors Disqualification Act 1986.

6. That misconduct makes him unfit to be a director or to be concerned in the management of a company under and in terms of section 6(1)(b) of the Company Directors Disqualification Act 1986.

7. In these circumstances the court must make a disqualification order against the defender under and in terms of section 6 of the Company Directors Disqualification Act 1986.

8. The nature and duration of the misconduct takes the length of the period of disqualification to be imposed on the defender into the third or top bracket.

9. Within the top bracket the appropriate, reasonable and proportionate period of disqualification is 12 years.

THEREFORE

Sustains the pursuer's second plea-in-law;

Grants a Disqualification Order under and in terms of section 6(1) of the Company Directors Disqualification Act 1986 against the defender ordering that for a period of twelve (12) years (a) he shall not be a director of a company, act as a receiver of a company's property, or in any way, whether directly or indirectly, be concerned or take part in the promotion,

formation or management of a company unless (in each case) he has the leave of the court and (b) he shall not act as an insolvency practitioner;

Directs under and in terms of section 1(2) of the Company Directors Disqualification Act 1986 that the period of disqualification imposed will begin at the end of the period of twenty one (21) days beginning with the date of this interlocutor;

Directs that the making of the Order be registered by the pursuer; and

Finds the defender liable to the pursuer in the expenses of the application as the same may be taxed.

NOTE

Introduction

[1] The findings in fact, findings in fact and in law, findings in law and interlocutor that precede this Note give my decision on this summary application. The purpose of this Note is to set out how and why I have reached that decision.

[2] The application has come about because the defender gave a Disqualification Undertaking (the Undertaking), accepted on behalf of a predecessor in office of the pursuer, whereby he disqualified himself from (a) being a director of a company, or in any way, whether directly or indirectly, being concerned or taking part in the promotion, formation or management of a company unless he had leave of the court to undertake that office or any of those functions, and (b) acting as an insolvency practitioner and that for the period of 4 years beginning on 28 December 2017. The pursuer pleads and avers that the defender breached that undertaking by acting as a director of, or at least by being concerned with and taking part in the management of, the Company between 28 December 2017 and 24 May

2019. The defender avers in his response that he was active on behalf of the Company between those dates but denies that his actions amounted to a breach of the Undertaking.

[3] The application has been presented under section 7 of the Company Directors Disqualification Act 1986 (the Act). The pursuer craves the court to grant: (1) an order under section 6(1) against the defender that he be made subject to a disqualification order preventing him from being a director of a company, acting as a receiver of a company's profits or in any way, whether directly or indirectly, being concerned or taking part in the promotion, formation or management of a company unless in each case having leave of the court and from acting as an insolvency practitioner and that for a period of not less than 2 years and not more than 15 years; (2) a direction that the making of the order sought be registered by the pursuer; and (3) a finding in his favour of the expenses of the application and the procedure to follow thereon. The defender in his defences has opposed the grant of the order and direction sought.

[4] The cause has proceeded to a hearing on evidence, otherwise known as a proof, at which the pursuer was represented by counsel and the defender represented himself. The respective positions of the parties are expressed in the Record number 14 of process and in their Joint Minute of Admissions number 17 of process. They have also lodged a Joint Bundle of Productions.

[5] The two primary issues in dispute for determination at the proof according to the Record are whether the pursuer has proved that the order and direction should be granted and if so for what period of years. The focus of attention at proof in respect of the first issue was on whether the defender had, between 28 December 2017 and 24 May 2019, assumed the status and function of a director *de facto* of the Company so as to make him responsible as if he were a director *de iure*.

The statement of the parties' positions on Record

(a) The presentation of the defender's defence on Record

[6] The task of determining from the Record what has been placed in dispute has been made more difficult than usual because of the way in which the defender has presented his defence. His defences were lodged by Meston Reid & Co., a firm of chartered accountants in practice in Aberdeen, and not by a firm of solicitors. They state that Meston Reid did this at his request and on his behalf and that the answers in them are those of the defender. The defences were lodged unsigned. They were subsequently adjusted.

[7] The defender has chosen to express his defences in ways that depart from established pleading practice in three fundamental respects and moreover has added two further unusual features.

[8] The first departure is that while he has responded to each of the original 35 Articles of condescendence he has not conformed to the established practice of answering each averment of fact made by the pursuer in one of three ways: by admitting it, or by denying it, or by stating that the matter is not known and not admitted and then by proceeding to put forward his substantive case or line of defence prefaced by "explained and averred". Instead he has responded in a unique and alternative manner. At no point does he state that he admits any averment. The closest he comes to that is to indicate agreement with the content of certain articles or parts of an article. For the majority of the articles he responds or begins his response with the word "Noted" or the phrase "Noted and agreed". For other articles he does not begin with any such wording but goes straight into a statement of what he wants to present as his substantive case or line of defence. The second is that he has not

closed his averments of fact with "Quoad ultra denied" or similar wording to that effect before expressing his own position. The third is that he has tabled no pleas-in-law.

[9] Beyond those departures the first unique feature is that he has responded to the crave of the application with a statement expressed in three paragraphs. It begins with an acknowledgement of receipt of the summary application, continues with the observation that the pursuer has not raised proceedings against his wife or stepson, expresses in a discursive manner his problems in continuing with legal representation because of the cost and finishes with an explanation that he secured assistance from the firm of accountants whom he asked to submit his answers to the application. The second is that he ends his defences with an answer to which there was no article at the time of lodgement. This answer contains his personal criticisms of the ways in which he asserts the pursuer is pursuing the application against him. The pursuer has responded to that answer by adding an Article 36 and denying his averments.

[10] Where the defender has commenced his answer to articles of condescendence with the word "Agreed" I have construed that as being equivalent to an admission of the facts averred in those articles and where the agreement extends to part only of an answer I have restricted that conclusion to that part. Where he has begun an answer with the word "Noted" I have thought it right to treat this response as indicating an appreciation that he is aware of the content of the article but not an acknowledgement that its content is accepted or admitted as being what it purports to be.

(b) The pursuer's case on Record

[11] The pursuer's averments on Record are set out in 36 Articles of condescendence. His fundamental assertion, as expressed variously in Articles 4, 8, 11, 32 and 34, is that the

defender continued to act as a director of the Company after he resigned as a *de iure* director with effect from 22 September 2015 and in particular that he acted as a director of, or at least he was concerned and took part in the management of, the Company from and after 28 December 2017 in breach of the Undertaking, and did that until 24 May 2019, the date of its liquidation, without, as averred in Article 8.2, having made an application to court for leave to carry out any of these functions. The ways in which he comported himself in respect of the Company are averred in general terms in Article 8.3 to be by carrying out negotiations with a creditor of the Company, dealing with His Majesty's Revenue and Customs (HMRC) over the company's liabilities including its obligation to pay VAT, holding access to digital and telephone banking for the Company's bank account, negotiating with its Landlords over the lease of the company's premises and dealing with its accountants, MMG Archbold, Accountants, of Montrose (MMG).

[12] These general positions are particularised in the following twelve ways.

(1) Over the period 28 December 2017 to 21 January 2019 the defender received payments of £15,556 from the Company and made payments to it of £26,739. Over the same period, the then *de iure* directors Amir Gharani and Atanas Georgiev received payments of £0 and £300 from it respectively and made no payments to it (Article 8.4).

(2) Tyre Services Aberdeen Limited (TSAL) was a creditor of the Company and lodged a claim in its liquidation. Mr Brian Brechin, the director of TSAL, completed a Creditor Questionnaire on behalf of his company dated 13 August 2020 in respect of a debt said to be due for services provided by TSAL to the Company between October 2018 and April 2019. In that questionnaire TSAL included the following information.

i. the name of the person that TSAL normally dealt with at the Company was the defender;

ii. his role in the Company was that of director;

iii. TSAL believed that the directors of the Company were the defender and Akram Mazhari because of what was recorded at Companies House;

iv. TSAL believed that the defender was responsible for running the affairs of the Company because he was a director;

v. TSAL thought from experience that what Akram Mazhari and the defender each did or were responsible for in the Company was because they were the two directors (Article 12).

(3) HMRC visited the premises of the Company on 23 January 2018, 20 March 2018, 11 June 2018, 1 October 2018 and 23 October 2018 and spoke with the defender about sums due to HMRC by the Company (Article 13.1).

(4) On 10 May 2018 and 1 October 2018 the defender agreed Time to Pay Agreements with HMRC for sums due by the Company (Article 13.2).

(5) On 10 May 2018, 11 May 2018, 30 May 2018 and 15 October 2018 the defender contacted HMRC and spoke to them about the sums due to HMRC by the Company (Article 13.3).

(6) On 9 November 2018 HMRC visited the premises of the Company. The defender advised the HMRC officer at that visit that: (i) he was in overall control of the day to day operation of the Company; (ii) he had sole access to the Sage accounting system used by the company and was responsible for the information recorded within that system; and (iii) he had sole access to the Government gateway used when

submitting VAT returns and was responsible for submitting those returns (Article 13.4).

(7) The Company held an account with Royal Bank of Scotland (RBS). The account was set up pursuant to an application for a digital and telephone business banking application dated 17 November 2015 signed by the defender and his wife. They were the authorised users of the account. The defender had authority to use digital and telephone banking facilities in relation to that account. He and his wife were signatories authorised to issue cheques drawn on the account. On an unknown date on or before January 2018, the defender ceased to be a signatory authorised to issue cheques on drawn on the account. Despite that, he continued to sign and issue cheques drawn on the account. His wife remained a signatory authorised to sign cheques drawn on the account notwithstanding that she ceased to be a director of the Company on 20 December 2017. Amir Gharani was not an authorised user of the account at any time and neither was Atanas Georgiev. Accordingly, at least following the resignation of Akram Mazhari on 20 December 2017, no *de iure* director of the Company had control of the bank account. The defender controlled the account at all material times (article14).

(8) A bank analysis prepared by the IS for the period 28 December 2017 to 21 January 2019 showed that 571 online transactions were made totalling £307,120. Only the defender and Akram Mazhari were authorised to use this online service between 17 November 2015 and the date of liquidation. In the circumstances condescended upon in (7) above, the pursuer believed and averred that these transactions were made and authorised by the defender (Article 15).

(9) The bank analysis showed that the defender received payments totalling £15,556 from the Company and that during the same period, he made payments to the Company's bank account totalling £26,739 (Article 16).

(10) The bank analysis also showed that during the same period the *de iure* directors Amir Gharani and Atanas Georgiev were paid £0 and £300 respectively by the Company and made no payments to its bank account (Article 17).

(11) The Company traded principally from the premises at Unit B4 which it leased. The defender was the Landlords' principal contact. He conducted all negotiations with the landlords' agents in relation *inter alia* to settlement of arrears of rent and other sums due under the lease and a proposal to renounce the lease (Article 18).

(12) MMG acted as the Company's accountants between 28 January 2013 and approximately 27 June 2018. Their role included accounts preparation, corporation tax return preparation, form P11D preparation, the filing of confirmation statements and personal tax return preparation for the defender and Akram Mazhari. In that capacity, MMG were intimately familiar with the circumstances in which the Company was operated. The defender held himself out to MMG as a director of the Company and MMG reasonably understood that he effectively ran the Company (Article 19).

[13] The pursuer concludes his averments by saying that the conduct of the defender condescended upon make him unfit to hold the office of director of a company and therefore support the order and direction craved. Accordingly a disqualification order should be made against him as sought in his second plea-in-law and that the period of disqualification should be such as the court considered to be proper.

(c) The defender's case on Record

[14] The essence of the defender's defence, in so far as relevant to what the pursuer asserts, is that from and after the date on which he resigned as a director of the Company he operated under instruction from its continuing directors and did not hold himself out to be a director of it in any verbal action or written communication (answer 8.1). In support of that general position he makes a variety of averments which might be expressed conveniently as the following ten features.

(1) He was the Company's operations manager and was involved with customer service activity (answer 12).

(2) He had a contract of employment with the Company (answer 2)

(3) He was not in control of the Company (answer 13.4).

(4) The payments that he received from the Company over the period from the date when the undertaking took effect until 21 January 2019 were for services that he had rendered to it as an employee (answers 8.4 and 16).

(5) As a result of his relationship with Amir Gharani he advanced occasional sums to the Company so that third party creditors could be paid on time (answer 16).

(6) The Company did not pay TSAL the sum that they said was due from it because the Company was of the opinion that the work had not been done on a fit for purpose basis (answer 12).

(7) The defender did speak with HMRC about sums due by the Company to HMRC (answers 13.1 and 13.3) and did agree with HMRC a Time to Pay Agreement for those sums but did that in accordance with instructions from Amir Gharani rather than on his own account (answer 13.2).

(8) With regard to the Company's bank account he signed forms which removed him as a signatory at the time of the Undertaking. He never saw Company bank statements and had no involvement with either lodgements or payments. He could not recall making any BACS payments from January 2018 onwards. He denied signing cheques or authorising BACS transfers for the Company (answer 14).

(9) He was unable to access either the Sage computer facility or the Company's VAT account on the Government Gateway system (answers 14 and 15).

(10) He denied that he held himself out to MMG from 28 January 2013 and 27 June 2018 as a director of the Company and that they reasonably understood that he effectively ran it (answer 19).

He concluded his averments by saying that the orders craved should be refused.

The agreed facts on Record and in the Joint Minute

[15] From the Record as thus construed and from the content of the Joint Minute it is evident that the parties are not in dispute on eleven aspects of the facts of the case.

[16] The first is that the pursuer's case rests upon the Undertaking. It came into force on 28 December 2017 and its duration was 4 years from that date. It was given and accepted under and in terms of section 1A of the Act. By giving it the defender undertook that he would not (a) be a director of a company, act as receiver of a company's property or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company unless (in each case) the defender had the leave of the court and (b) act as an insolvency practitioner. The factual basis on which he gave it was as set out in the schedule attached to it. That was his conduct while a director of a company called Aberdeen Delivery Services Limited which had gone into liquidation on 27 May 2016 as a

result of a petition presented by the Advocate General for Scotland representing His Majesty's Revenue and Customs (HMRC). The conduct was that between the Value Added Tax quarters that ended on 06/12 and on 09/15 he caused or allowed that company to trade to the detriment of HMRC from at least April 2014 until it ceased trading in April 2016. He accepted in the Undertaking that this conduct constituted a matter of unfitness for office as director.

[17] The second is that the defender did not, either before or after the Undertaking came into force, make an application to court after the Undertaking came into force for leave to act as a director of a company pursuant to section 17 of the Act and did not apply to the court for leave to be concerned or take part in the promotion, formation or management of a company.

[18] The third is that the pursuer's case is concerned with activities of the defender between 28 December 2017 and 24 May 2019 in respect of the Company.

[19] The fourth is that the Company was registered under the Companies Acts with registered number SC441321. It traded principally and latterly from premises which it leased at Unit B4, Blackness Road, Altens Industrial Estate, Aberdeen and latterly had its registered office there. Its principal activity was freight transport by road.

[20] The fifth is that it was wound up by an order of the Sheriff at Aberdeen Sheriff Court dated 24 May 2019. The winding up petition had been presented by Legal & General Property Partners (Industrial Fund) Limited as Landlords of the premises at Unit B4 since 16 January 2017. The Company had not lodge answers to it. The winding up order the court appointed Thomas Campbell MacLennan and Alexander Iain Fraser as joint interim liquidators of the Company with the usual powers under statute and at law.

[21] The sixth is that the defender had been a *de iure* director of the Company from its date of incorporation until 22 September 2015 on which date he had submitted a termination of director appointment form to the Registrar of Companies.

[22] The seventh is that at various points in its life span the Company had three other *de iure* directors, namely, the defender's wife, Akram Mazhari, from its date of incorporation until 20 December 2017, her son and his stepson, Amir Gharani, from 20 November 2017 to 1 November 2018 and Atanas Georgiev from 1 November 2018.

[23] The eighth is that the Company held an account with Royal Bank of Scotland (RBS). The account was set up pursuant to an application for a digital and telephone business banking application dated 17 November 2015 signed by the defender and his wife. They were the authorised users of the account. The defender had authority to use digital and telephone banking facilities in relation to that account. He and his wife Akram Mazhari were signatories authorised to issue cheques drawn on the account. On a date on or before January 2018 the defender ceased to be a signatory authorised to issue cheques drawn on the account.

[24] The ninth is that MMG acted as the Company's accountants between 28 January 2013 and 27 June 2018. Their role included the preparation of the Company's accounts, corporation tax returns and form P11D, the filing of confirmation statements and the preparation of personal tax returns for the defender and his wife.

[25] The tenth is that on 28 January 2022 the Insolvency Service (IS) wrote to the defender. In that letter it detailed the evidence held by it that it considered showed the defender had continued to act in the running of the Company during the period of his disqualification. The IS re-sent its terms to the defender attached to its email dated 4 February 2022. On 7 February 2022 the defender acknowledged that email.

[26] The eleventh is that on 8 February 2022 the IS wrote to the defender to advise him that it was considered appropriate, on the basis of the information obtained during its investigation, to recommend to the then Secretary of State for Business, Energy and Industrial Strategy that proceedings for his disqualification be initiated. That elicited a written response from Meston Reid on behalf of the defender received by the IS on 18 February 2022 rejecting the suggestion that the defender had acted as a director or as a senior manager of the Company. The IS replied to them by correspondence dated 4 March 2022 intimating that the IS would be recommending to the Secretary of State that proceedings for his disqualification as a director should be started. The reply was copied to the defender.

The conduct of the proof

The defender's motion to discharge the proof

[27] When the proof was called the defender moved to have it discharged in order for him to obtain legal representation. In support of that motion he said that he had contacted a firm of solicitors who had indicated to him by email sent the day before the calling of the proof that they were prepared to look at his papers but had not committed themselves to acting on his behalf until they had considered them. Counsel for the pursuer opposed that motion on two grounds: the history of the case with particular reference to previous statements the defender had made at previous callings of the case about representation none of which had resulted in the appearance of a qualified lawyer; and the existence of a risk to the public caused by the defender having the opportunity to serve as a director of a company and that despite the passage of time that had occurred in respect of the subject matter of the application. I gave the defender time to contact the firm to convey my request

to the solicitor who had written the email to appear to confirm if he considered himself instructed on behalf of the defender. On reconvening the defender intimated that the solicitor was not willing to attend to say that the defender was his client. He wanted to study the case and that would take him a week.

[28] I refused the motion. The procedural history of the cause taken together with the advanced stage of it at which it was made did not support the motion. It had been in court for almost exactly 2 years as at the first day of the proof, 13 June 2024. The defences had been lodged on 8 July 2022. The case had been appointed to a diet of proof by interlocutor dated 20 October 2022 which was assigned in due course to 15 to 17 May 2023. On 13 April 2023 the court discharged the diet on the defender's unopposed motion to give him the opportunity to seek legal advice. This was the first occasion noted in the process that he wished that assistance. When the case next called the defender appeared and informed the court that he intended to represent himself. After an extended period of time the case was, on 14 March 2024, assigned to a diet of proof commencing on 13 June 2024. The pre-proof hearing held on 16 May 2024 was continued to 23 May 2024 to allow the defender's solicitor to appear. No solicitor appeared on his behalf on 23 May and the court refused his opposed motion to discharge the diet of 13 June 2024 in order to instruct legal representation. At no point during the progress of the action has any qualified lawyer appeared at any calling of the cause on his behalf. It seemed to me that the defender had had more than enough opportunity to secure legal advice and representation. Moreover the proceedings are summary in nature which indicates a need to be aware of appropriately assessed expedition in the conduct of the case. I also accepted as a consideration that carried weight the submission that the order sought in the application raised an issue that has a strong public

element to it and that there existed a risk to the public by his continued ability since the expiry of the undertaking to act as a director of a company.

The evidence presented at the proof

[29] In the course of the proof I heard evidence from six witnesses all led on behalf of the pursuer: Mr Alexander Ian Fraser, Mr Barry Gould, Mr Graeme King, Mr Craig Robertson, Mr Brian Brechin and Mr John Graeme Clark. Mr Fraser was one of the joint liquidators of the Company. Mr Gould was a senior civil servant who is a Corporate Governance & Risk Management Lead within the Corporate Governance Team of the IS which is an executive agency of the Department for Business and Trade. Mr King was an officer with HMRC whose role involves undertaking investigations in relation to matters of VAT. Mr Robertson was a chartered accountant and a director of MMG. Mr Brechin was the owner of TLAS that had traded with the Company and Mr Clark was a retired chartered accountant who had worked part time for the Company over several years as its bookkeeper. In summary the evidence that each gave was as follows.

[30] Mr Fraser's evidence was almost entirely formal in nature. He gave a narrative of his experience as an insolvency practitioner, a statement of his appointment as a joint liquidator of the Company and an explanation of his duties as a liquidator. He spoke to the estimated Statement of Affairs of the Company as at the date of liquidation which showed that its assets were insufficient for the payment of its debts and other liabilities and the expenses of the winding up. He also spoke to the order of court dated 19 August 2020 that dissolved it finally with no dividend paid to any of its creditors. He moved on to explain that his report to IS was part of his duties as liquidator and what its preparation entailed. He concluded by saying in cross-examination that the defender did not operate under a contract of

employment with the Company and that the information available to him suggested that the defender was a director of the Company.

[31] Mr Gould was not directly involved in the investigation process into the defender that was undertaken following the receipt by IS of the report from the joint liquidators of the Company which they were obliged to file within three months of their appointment but he had familiarised himself before giving evidence with the material that the IS held about the defender and the Company. The officer within IS who had investigated the defender was Mr Richard Hubbuck.

[32] Mr Gould's evidence consisted of an explanation of the investigation process against the defender from the initial contact letter from the IS to him dated 1 April 2021 informing him that the IS was investigating the conduct of the directors of the Company in order to consider whether disqualification proceedings should be started against him or any other Company director to the letter dated 4 March 2022 intimating that Mr Hubbuck would be recommending to the Secretary of State that disqualification proceedings should be raised against him. During those eleven months the process of investigating the role of the defender with regard to the Company involved a course of correspondence between the IS and Meston Reid acting on his behalf, included a questionnaire sent to the defender by the IS and completed by him and eventually returned to it, correspondence between the IS and the Company's bankers, its accountants MMG, its landlords and the questionnaire completed and returned to the IS by Mr Brechin on behalf of TSAL. The IS position at the end of its investigations was set out in detail in its letter to the defender dated 28 January 2022. It listed in nine paragraphs the facts on which it relied for the contention that he continued to act in the running of the Company during the period of his disqualification. This elicited a response from Meston Reid by letter dated 18 February 2022 in which they stated in its

essentials that the defender did not consider that he had acted as a director of the Company but had provided it with administrative assistance as an employee under a contract of employment. That letter did not cause Mr Hubbuck to change his mind about the position and responsibilities which he considered were held by the defender within the Company and his reply to it was his letter dated 4 March 2022.

[33] Mr King's involvement with the Company and the defender began in about early June 2019 when he took over from a colleague an already initiated investigation by HMRC into VAT returns previously submitted to HMRC by the Company. By the time that he took over HMRC had already issued a Notice of Penalty Assessment to the Company and to the defender covering four tax periods for the period from 1 July 2016 to 31 August 2018. The proceedings that followed the service of that Notice were conducted in a succession of letters passing between Mr King and Meston Reid between 17 June 2019 and 11 November 2020 and also involved reference to two telephone interviews instigated by Mr King, one in December with the defender and Mr Reid and the other on 18 January 2021 with Mr Clark as former bookkeeper of the Company. For both of them he kept a written record of their purpose and content. The defender indicated his opposition to the Assessment and sought a review of the decision to issue the Notice. The letters set out in detail the standpoints of HMRC and the defender on that matter. HMRC contended that it had issued the Notice because of what it said were significant differences between the information held within the accounting records of the Company and the VAT declarations that had been made in respect of the four tax periods. The defender took issue with the calculation of the assessments and suggested that difficulties encountered by HMRC in calculating assessments merely reflected the accounting records, which left something to be desired, rather than an intention to understate the VAT liability of the Company. He concluded by stating that the defender

maintained that if there were any errors they amounted to no more than a regrettable oversight and were not deliberate. Later in the correspondence the defender stated that he merely signed/sent VAT returns presented to him because he was the nominated contact with HMRC albeit he had not been a director of the Company since September 2015. The dispute came to an end because the review officer who conducted the statutory review concluded that the evidence before her did not support the conclusion that the behaviour that led to the Notice was deliberate. She conveyed that conclusion to him by letter dated 5 May 2021.

[34] Mr Henderson is and was at all material times a principal in MMG. He gave evidence of his professional dealings with the Company between about 2015, when he first met the defender, until 27 June 2018, when MMG ceased to act on its behalf. In about 2015 the defender and Mr Clark were his points of contact with the Company. After the defender had resigned as a director of it he had only one meeting with him. From then on he dealt with his wife and Mr Clark as the Company bookkeeper gave MMG the majority of the information, including from the Company's computer system, which was used to prepare the Company's accounts but the defender had a role in this process which was that he was trying to embellish what information Mr Clark had given.

[35] Mr Henderson confirmed his authorship of the letter sent from MMG to Mr Hubbuck dated 11 January 2022. Its purpose he said was to state the relationship that MMG had had with the Company, which by then was in liquidation. It narrated the scope of the professional accountancy services undertaken. In it he stated that the main contact in the Company was the defender whom he described as being a director effectively running the Company. Mr Henderson then commented upon the answers given by the defender in Part 4 of the Director Questionnaire completed by him and dated 29 July 2021 to the effect

that he found some answers quite unusual and that it was factually incorrect to say that MMG made any payments on behalf of the Company.

[36] Mr Brechin gave evidence about the business dealings that his company TSAL had with the Company between October 2018 and April 2019 and the role that he understood the defender played in the Company at the time of those dealings and also during the subsequent period of time when he was trying to secure payment for the provision of services to the Company. He acknowledged that he had provided and reviewed the answers to the questions posed in the Creditor Questionnaire dated 13 August 2020 which TSAL returned to the IS, thus completed. His position in evidence was as stated in the questionnaire, that the role of the defender was that of director and that he was responsible for running the affairs of the Company because he was a director.

[37] Mr Clark's evidence fell into three parts: his recollection of certain features of working with and for the Company as its bookkeeper from about 2016 and the role of the defender within it; his responses to being asked about the Note made and retained by Mr King of the telephone conversation that they had on 18 January 2021 and what Mr Clark was recorded in it as having said; and his responses to the letter from him to Meston Reid dated and signed by him giving details of his involvement in the business of the Company and what he said in it about the role of the defender within the Company. This last part was first raised in cross-examination and then formed the subject of re-examination.

The decision of the defender not to give evidence

[38] After the pursuer had closed his case the defender stated that he declined to give evidence. He was in no position to lead evidence from any third party because he had not lodged a list of witnesses and had given no indication that he wished to call anyone as a

witness. Counsel indicated that she was willing to speak to the defender about the legal and evidential consequences for him of the position that he had intimated, explain to him what his failure to give evidence would mean for his defence, and inform him if he changed his mind and expressed a willingness to give evidence, which lines of inquiry she would put to him in cross-examination. The defender indicated a willingness to have her speak to him on these matters and I adjourned to let that meeting take place. On reconvening, counsel said that she had explained to him that if he did not give evidence she would invite the court to conclude that the only matters of fact for determination would be those spoken to by the witnesses for the pursuer and that unless he gave evidence on those matters which he set out in his defence they would not be before the court. During submissions she elaborated upon what she had said to him: that she had looked briefly at the Record with him and said to him that she would make a submission that the court could only have regard to matters on Record to the extent that the court had heard evidence about those matters and that any document that had not been spoken to by witnesses were not evidence before the court. The defender responded by confirming that he had received and had understood what counsel had said but that it had not changed his mind. He reiterated that he declined to give evidence. He accepted that meant that his case had to be closed without the presentation of any evidence in support of his defences. He then closed his case.

Further undisputed facts

[39] In the course of the proof it became apparent from the content of cross-examination of the pursuer's witnesses that more facts were not being controverted by him. They are as follows.

a) The parties are as stated in the instance of the Record.

b) No assets were identified in the liquidation of the Company and therefore no realisations were made and no dividend was paid to any of its creditors. As part of the liquidation process the liquidators identified the directors of the Company in order to make a report on their conduct which they did.

c) HMRC visited the premises of the Company during 2018 and spoke with the defender about sums due to HMRC from the Company.

d) On 10 May 2018 and 1 October 2018 the defender agreed Time to Pay Agreements with HMRC in respect of the sums due by the Company.

e) HMRC issued a Personal Liability Notice to the defender under schedule 24 to the Finance Act 2007 but on review concluded that the evidence available did not support the view that the defender's behaviour was deliberate.

f) MMG was aware in 2015 that the defender demitted office as a director of the Company.

g) The last set of accounts that MMG prepared for the Company was for the year from 1 February 2016 to 31 January 2017.

h) MMG did not deal with the VAT returns of the Company.

i) Mr Robertson wrote the letter dated 11 January 2022 that was addressed to Mr Hubbuck of the IS. The purpose of the letter was to give details of MMG's relationship with the Company and the defender.

j) TSAL traded with the Company between October 2018 and April 2019.

k) Mr Brechin was a director of TSAL.

l) When the Company ceased trading it owed TLAS the sum of £3,695.10. That sum was never paid.

m) TSAL was a creditor of the Company and lodged a claim in the liquidation and completed a creditor questionnaire dated 13 August 2020.

The submissions

(1) The content of the defender's submissions

[40] At the hearing on evidence the parties presented their submissions in writing and added to them at the hearing orally.

[41] Counsel, having seen the defender's written submissions, in advance of the hearing on evidence gave notice that she wished to address the court on their content. She invited the court to consider that they went beyond making representations as to the evidence that was led at proof and the legal issues that arose from that evidence. I requested that both parties make oral submissions at the hearing on evidence on what was in effect a pursuer's motion. Both parties did that on the second day of the hearing and requested that my decision be given in writing rather than ex tempore in court. I do that now.

[42] Counsel presented her submissions on the motion in four propositions. The first was that the defender having closed his case without giving evidence it was not open to him to lead evidence in support of his case by way of submissions. She found support for this in paragraph 1.37 of the opinion of Lord Nimmo-Smith in the case of *McTear* v *Imperial Tobacco Ltd* 2005 2 SC 1: that the fundamental rule was that a court must decide the case before it on the basis of the evidence led before it, leaving aside any other considerations and that with a few well-recognised exceptions the terms of a document which had been lodged as a production were not evidence, that evidence was required to prove its terms and that the court would have regard only to those passages that were expressly referred to in evidence.

[43] The second she derived from passages within paras [301] to [307] in the opinion of the Lord President (Carloway) in the case of *SSE Generation Ltd* v *Hochtief Solutions AG* 2018 S.L.T. 579 regarding the use of documents as evidence in the absence of oral testimony from its author. She submitted that one of the purposes of the abolition of the prohibition against hearsay in civil proceedings effected by section 2 of the Civil Evidence (Scotland) Act 1988 was to permit that. In the present case that allowed a witness to speak to the accuracy of the contents of a document prepared by another with the result that the contents could be accepted as true and accurate even in the absence of the author.

[44] The third was that the defender could not lead evidence without the leave of the court after he had closed his case. She found support for that in the opinion of Temporary Judge Coutts QC in the case of *Wilson* v *Imrie Engineering Services Ltd* 1993 S.L.T. 235 at 236 G to I where he references and follows the words of Lord Cameron in the earlier case of *Roy* v *Carron Co* 1967 S.L.T. (Notes) 84. It is competent to reopen a proof and to apply for leave to tender additional evidence. That motion may be granted as an exercise of discretion by the court "if satisfied that the ends of justice require it" and "on sufficiently weighty grounds" …" but the occasions must be rare when such a motion can properly be made and the grounds in support weighty".

[45] The fourth was that the defender had made no such application and if one were made it would be inappropriate to reopen the proof and allow additional evidence because it would not be in the interests of justice. There were two reasons for that: the defender took the decision to refrain from giving evidence in light of what counsel had said to him when he first intimated he intended to give no evidence; and if additional evidence were led it would have to be given orally and subject to the right of cross-examination on behalf of the pursuer. That followed from the decision of the Sheriff Appeal Court in the case of

The Accountant in Bankruptcy v *Sieroslawski* [2024] SAC (Civ) 35 at paras [33] to [35] which adopted and followed the rule expressed by Lord Hodge in the case of *Griffiths* v *TUI UK Ltd* [2023] UKSC 48; [2023] 3 WLR 1204, at paragraphs 42 and 43.

[46] All that the court could take account of in the defender's written submissions was what he said about challenging the quality of the evidence of the defender's witnesses.

[47] The defender said in reply that he had had the opportunity to read the cases relied upon by counsel and he took no exception to the statement of the law contained in the various passages founded on by her. After being given time to consider his position on how to respond to her submissions he said that he could neither agree nor disagree with what she had said because he did not understand what she had said. He moved on to challenge the relevance of her reference to the cases because they dealt with facts that were different from the present case. When his attention was drawn to the proposition that the citation of cases was a means to establishing legal principle he accepted that his submission was itself irrelevant. He then said that the court should take account of the whole of his written submissions but did not give a reason why.

[48] The defender's written submissions contain different features. They can be expressed under seven heads: (i) his acceptance that he entered into the Undertaking; (ii) comments upon the quality of the evidence of the witnesses; (iii) references to facts that form part of his answers on Record but which were not spoken to in evidence; (iv) references to productions or parts of productions that were not admitted in the joint minute of admissions and were not put in evidence; (v) expressions of his personal views on the process and individual witnesses for which there is no Record or evidence; (vi) his opposition to the duration of any period of disqualification; and (vii) statements of what orders he would like the court to make.

[49] The law in the passages founded upon by counsel is in point for deciding the pursuer's motion. In particular the decision in The *Accountant in Bankruptcy* case is not only in point it is binding on me: section 48(1) of the Courts Reform (Scotland) Act 2014.

[50] The fundamental rule is as stated in *McTear* that a court must decide the case before it on the basis of the evidence led before it and leave aside any other considerations and that evidence was required to prove the terms of a document that had been lodged as a production but only to the extent of those passages that were expressly referred to in evidence.

[51] Features (iii), (iv), (v) and (vi) of the defender's written submissions raise matters that were not placed in evidence during the proof and none of the productions under (iv) fell into the category of documents that did not require evidence. Accordingly I can take no account of the content of these four features. The defender has made no application to reopen the proof and seek leave to lead additional evidence.

[52] As a consequence I have précised for the purposes of this Note only those parts of the defender's written submissions that fall under heads (i), (ii) and (vii). He added to them certain comments made orally and I have incorporated them. The excluded heads contain the greatest part of his written submissions. That is particularly so for head (iii).

The pursuer's submissions

[53] Counsel submitted that the evidence presented at proof on behalf of the pursuer supported her motion that the court should sustain his second plea-in-law and grant decree as craved.

[54] Counsel presented her submissions on behalf of the pursuer in six chapters.

(i) An overview of proceedings for disqualification

[55] The Act governed the disqualification of company directors. Of particular relevance for the present case were sections 1, 6 and 12C, in combination with schedule 1 thereto. Assistance on the purpose of the Act could be found in *Re Swift 736 Ltd* [1993] BCC 312 at 315 and *Re Westmid Packing Services Ltd (No. 3)* [1998] B.C.C. 836 at 841. It demanded that where a court had determined that a director was unfit to be concerned in the management of a company, disqualification was mandatory for a period of at least 2 years whether or not the court thought that this was necessary in the public interest: *Re Grayan Building Services Ltd* [1995] BCC 554 at pp. 253–254.

[56] The nature of the assessment to be made by a court considering disqualification is that it must decide whether the conduct in question, viewed cumulatively and taking into account any extenuating circumstances, had fallen below the standards of probity and competence appropriate for persons fit to be directors of companies: *Re Grayan Building Services Ltd* [1995] BCC 554 at 573. This assessment involved a three stage process: first, did the matters relied upon by the pursuer amount to misconduct? Secondly, if they did, did they justify a finding of unfitness? Thirdly, if they did, what period of disqualification should result, being not less than 2 years and not more than 15 years? *Re Structural Concrete Ltd* [2001] B.C.C. 578 at 586.

(ii) The evidence that was led at the proof

[57] The court had heard the evidence of the six witnesses led for the pursuer. They were all credible and reliable. Where, as a result of the passage of time, their recollections were not entirely clear each fairly conceded where there were matters that were beyond recall.

Where they confirmed that they did recall matters or that matters stated in the contemporaneous material were accurate their evidence ought to be accepted.

(a) Mr Fraser

[58] Mr Fraser confirmed that the Company was insolvent at the date of its liquidation. He identified the creditors of the Company, stated that no assets were identified in the liquidation and therefore no realisations were made and confirmed that no dividend was paid to any of its creditors. As required of him by virtue of his appointment he had taken steps to identify the directors of the Company in order to make a report on their conduct to the pursuer which he did in respect of the defender.

(b) Mr Gould

[59] Mr Gould spoke to the investigation which was carried out by the IS on receiving the online report from the liquidators of the Company and how the investigation was conducted which was largely by correspondence whose content and import he spoke to. It had been undertaken by a colleague of his, Mr Richard Hubbuck. Mr Gould, as a senior officer of the IS, had familiarized himself with the work done in conducting the investigation. The IS was aware that the defender was at that time subject to the Undertaking.

[60] Mr Hubbuck sent the letter dated 1 April 2021 to the defender which was the initial intimation to him that the IS was conducting an investigation to consider whether to start disqualification proceedings against him or any other director of the Company. It also requested him to complete a Directors' Questionnaire and return it to him. The defender did that late but eventually and dated it 27 July 2021. In it he confirmed in Answer 14(b)

that he had been legally represented when he gave the Undertaking and that he had been advised of the consequences of entering into it.

[61] Companies House retained information relating to the appointment and resignation of directors of the Company. The defender's resignation as a director did not prevent the investigation proceeding. In the course of his investigation Mr Hubbuck had made enquiries of (i) HMRC; (ii) RBS; (iii) MMG; (iv) the Landlords; and (v) creditors of the Company.

[62] Mr Graeme King at HMRC had sent an email to Mr Hubbuck dated 28 March 2021 which had provided copies of notes of two telephone interviews that Mr King had made, one during December 2021 with the defender and his accountant Mr Reid of Meston Reid and the other with the Company's former bookkeeper, Mr Clark. Mr Gould confirmed that his office had received copies of printouts from HMRC's internal databases relating to the Company.

[63] RBS provided information in relation to the bank account operated by the Company. The account opening form dated 31 August 2016 and the associated forms showed that the defender was an authorised user of the Company's bank account from 17 November 2015 for the purposes of digital or online banking. These forms post-dated the defender's resignation as a director of the Company. RBS had completed and returned to the IS the creditor questionnaire dated 21 August 2020 in which RBS confirmed that whilst Ms Mazhari was the main contact on the Company's bank account both she and the defender were seen to be signing cheques. RBS had sent to the IS ten cheques written on the Company's bank account during 2018 which Mr Hubbuck had considered were signed in a way that was similar to the defender's signature on the account opening form but Mr Gould accepted in cross-examination that the defender was not an authorised signatory on the

Company's bank account but qualified that by saying that it did appear that he was signing cheques.

[64] MMG wrote to the IS a letter dated 11 January 2022 which gave information about their professional dealings with the Company between 28 January 2013 and 27 June 2018. He said that the terms of the letter suggested to him that the defender had continued to act in the capacity as a director of the Company after his resignation.

[65] Mr Laurie Clancy, an employee of the landlord's managing agents, sent to the IS two emails dated 19 October 2021 and 16 December 2021. In them he had confirmed that the defender was the only person from the Company with whom he had dealings in the period between 1 December 2017 and its liquidation. Moreover the correspondence showed the defender discussing with the managing agents payments of overdue rent and service charges and making it clear that he would arrange for them to be paid.

[66] Mr Gould spoke to the Creditor Questionnaire completed on behalf of Tyre Services Aberdeen Limited. Finally, he spoke to the several items of correspondence which Mr Hubbuck had issued on behalf of the IS to Meston Reid as the defender's representatives. In particular, he referred to the letter of 4 March 2022 in which Mr Hubbuck summarised the conclusions which the IS had reached from the information provided to it in its investigations and explained that the IS had concluded, based on that information, that the defender had acted as a director of the Company in the period from 28 December 2017 when he was subject to the Undertaking.

(c) Mr King

[67] Mr King spoke to his involvement on behalf of HMRC from about June 2019 until early May 2021 in the procedure that followed the service of the Personal Liability Notice

(the PLN) which had been issued to the Company on 7 March 2019 and to the defender on 8 March 2019. The PLN had been served by a colleague, Mr Russell Harrison, but he had retired.

[68] Mr King explained that a penalty was normally only issued against the trading entity, the Company, but could be issued against a third party such as a director where two conditions were met: that the person was responsible for the errors giving rise to the loss of tax; and that the conduct was deliberate. Mr King became involved after Meston Reid had written seeking a review of the PLN to which he replied by letter dated 17 June 2019 explaining the basis on which the PLN had been issued. It included information that Mr Harrison had been given when he had met the defender and Mr Clark as the Company's bookkeeper on 9 November 2018 and included the fact that the defender had advised him that he, the defender, was in overall control of the day to day operation of the Company.

[69] Meston Reid in their reply dated 28 June 2019 had not initially disputed the terms of Mr Harrison's description of the meeting but instead had sought confirmation of whether or not there was a note of the meeting. It stated that neither the defender nor Mr Clark recalled having been provided with a note of what had been said or agreed to review. Mr King explained in his response letter to Meston Reid dated 22 July 2022 that no notes of the meeting had been compiled but that Mr Harrison had recorded what had been said in his notebook and had updated HMRC's internal records from it. Mr King confirmed that the information he had given in his letter was true and accurate to the best of his knowledge and belief. Meston Reid had accepted that the defender had not advised HMRC when he had ceased to be a director but Mr King thought that it was known that the defender was not registered as a director of the Company and they were proceeding on the basis of the

information which he had given to Mr Harrison, namely, that he, the defender, was responsible for running the business of the Company.

[70] Mr King confirmed that he had arranged a meeting with the defender and his accountant, Mr Reid of Meston Reid, in December 2020 and a meeting with the Company's bookkeeper Mr Clark in January 2021 and that he had kept minutes of both meetings which he confirmed were true and accurate accounts of the meetings. He was not challenged on this. The PLN had ultimately been withdrawn by letter dated 5 May 2021 from the Solicitor's Office and Legal Services of HMRC to the defender because of the conclusion that his conduct was not deliberate.

[71] Mr King said that printouts shown to him and dated 2 November 2017 to 25 July 2019 appeared to be the IDRS system operated by HMRC's debt management team but that his team could not access it. He confirmed that an entry on 15 May 2019 at 16.44 showed information he had provided to that team regarding the suspension of the PLN and that it was the defender who had liaised with HMRC in relation to unpaid taxes.

(d) Mr Robertson

[72] Mr Robertson confirmed that MMG had been the Company's accountants between its date of incorporation and 27 June 2018. He first became involved with the Company in around 2016 when a partner of his, Mr Archbold, was planning his retirement and the intention was for there to be a handover of the Company's business to him. He attended one meeting at the Company's trading premises possibly in around 2016 at which the defender and the bookkeeper (Mr Clark) had provided information to him. MMG had arranged for registration at Companies House of the termination of the defender's appointment as a director. Despite that Mr Robertson considered the defender to have been

effectively running the Company. The last set of accounts for the Company that MMG had prepared was for the accounting period that had ended on 31 January 2017. That work would have been completed sometime after 18 July 2017 when those accounts had been approved by Ms Mazhari. Mr Robertson contacted the defender in June 2018 to advise him that MMG would no longer act for the Company because of non-payment of fees to which the defender responded that he was going to use another accountant.

(e) Mr Clark

[73] Mr Clark could not remember when he started working with the Company as its bookkeeper but it was around the time that Mr Archbold retired which he accepted was in 2016. The business of the Company then involved delivering packages within Aberdeen by van. The Company had in the region of twenty employees most of whom were van drivers, both employed and self-employed. In 2016 the defender was the general manager. He organized everything. He was responsible for organizing what work the drivers were to do, they reported to him, he issued invoices to customers and if there were issues arising with customers or creditors he dealt with them.

[74] In 2016 Mr Clark's role within the Company involved paying bills, running the payroll and preparing the VAT returns. If he were unsure what bills needed to be paid he checked with the defender. He was not an authorised user of the Company's bank account but the defender was and gave him access to it. Most payments were made by cheques which he wrote out and left in the office for signature. He assumed that they were signed by the defender. If he had queries in relation to the Company's ledgers he would contact the defender. The defender provided him with the information he required to process

payments to employees and contractors and if an employee or a contractor queried a payment he checked this with the defender.

[75] Mr Clark did not recall the exact date on which the defender had signed the Undertaking. He was aware that the defender's stepson had been appointed as a director of the Company at some point but could not recall exactly when. Nothing really changed in the management of the Company following the appointment of the stepson as a director but thought that the Company had expanded at some point. He was involved with other companies within the KPD group after the Company entered liquidation.

[76] He recalled a telephone meeting with Mr King in January 2021 and confirmed that the account he gave to Mr King as stated in the minute taken by Mr King was truthful and accurate. Having been taken through its terms he agreed with the content of its first seven paragraphs which gave information on the running of the business of the Company and the defender's role in that.

[77] Mr Clark was not challenged on his evidence regarding the minute in cross-examination. Instead, he was asked about the meeting with Mr Harrison in November 2019 for which there was no meeting note. Mr Clark was unclear as to what had occurred at that meeting. His position ultimately came to be that he did not remember who attended that meeting or what was said at it but he reiterated that the information that he had given to Mr King, as narrated in the minute of the meeting, was true and accurate.

(f) Mr Brechin

[78] Mr Brechin confirmed that TSAL had traded with the Company between October 2018 and April 2019, providing tyres and undertaking other mechanical work in relation to the Company's vans. His main contact within the Company was the defender

but he also dealt with Mr Peter Ledley who was a manager within the business. He understood the defender to be the owner of the business and its director. He confirmed that the information he had provided in the Creditor Questionnaire completed on behalf of TSAL was true.

[79] In cross examination, he stated that he knew that the defender was running the Company's business because he saw him go in there every day. When the defender had started trading with the Company the defender had signed the new client form. When payments had not been made he had initially sent emails to the Company and had called at its offices. When that had not resulted in payment he had called the defender. He had done this because it was the defender's business and he believed that the defender was the one who could make sure the payment was made.

(iii) The defender as de facto director

[80] The defender's conduct during the period of time in question indicated that he had assumed the office of director of the Company *de facto*. Section 22(4) of the Act defines "director" for the purposes of the Act as "includ[ing] any person occupying the position of director, by whatever name called". It therefore included a *de facto* director. Assistance in determining the circumstances in which an individual not appointed as a director would be taken to have assumed that position and the correct approach to take could be found in the decision of the Supreme Court in the case of *Revenue and Customs Commissioners* v *Holland and another* [2010] UKSC 51, [2010] 1 WLR 2793 in particular in the speeches of Lord Hope of Craighead at paragraph 39 and Lord Collins at paragraph 74 and also in *Smithton Limited* v *Naggar* [2015] 1 WLR 189 by Lady Justice Arden, as she then was, at paras [33] to [44].

[81] The pursuer relies upon five factors for the conclusion that the defender had assumed the status of a director of the Company. They use in particular the facts that are averred in Articles 11 to 14 and 16 to 19 of condescendence. Counsel acknowledged that the averments in Article 15 were unsupported in evidence because they were included to set up a line of cross-examination which in the event never happened.

[82] The first is the defender's role within the corporate governance structure of the Company. He was in control of the day to day operations of the Company from at least 2016 onwards. That was clear from the unchallenged evidence of Mr Clark. The HMRC systems record the defender as having confirmed that to Mr Harrison at the meeting in November 2018. The defender was responsible for dealing with the financial affairs of the Company and for issuing invoices on behalf of the Company. He had to authorise payments to suppliers and was authorised to operate the online and telephone banking facilities in relation to the Company's bank account. He was responsible for liaising with HMRC on behalf of the Company. The defender suggested in his answers that any actions he took in this regard were subject to the supervision of the *de iure* directors but had provided no evidence of this having occurred during the relevant period of time, from and after 28 December 2017. It was also inconsistent with Mr Clark's position that he did not see the defender's stepson at the Company's trading premises in Aberdeen during that period. On the matter of the averment in Article 14 that the defender continued to sign cheques on behalf of the Company after he had ceased having the authority to do that counsel stated that the evidence at its highest was that Mr Clark left the cheques for signature assumed that the defender signed them but did not see him doing that. This left scope to infer that the defender did sign cheques. On the matter of who submitted the Company's VAT returns to

HMRC counsel said that the pursuer's case could go no further than the note taken of the meeting with Mr Clark and he had said that he had submitted the erroneous returns.

[83] The second factor is that the defender viewed himself as being a director of the Company. That is how he described himself when contacting the HMRC debt recovery team. It is the impression which he gave when dealing with the Company's landlords and with other trade creditors and which he gave to the Company's bookkeeper Mr Clark. The defender averred that he was subject to a contract of employment with the Company. No such contract had been set up or put in evidence.

[84] The third factor is that he was held out as a director of the Company to third parties. That is how he described himself when contacting HMRC.

[85] The fourth factor is that third parties viewed him as being in party control of the Company. That was the understanding of Mr Brechin and the view reached by Mr Clark.

[86] The fifth factor is consideration of the defender's position in the round. He was responsible for key aspects of the management of the Company. The Company's business involved freight transport by road. He was the directing mind of the Company in respect of key aspects of that work. He dealt with the invoicing for services provided by the Company. He was responsible for entering into agreements with suppliers as spoken to by Mr Brechin. The defender had to authorise payments to suppliers and where disputes arose with creditors it was he who engaged with the creditors on behalf of the Company. His actions were directorial in nature. The Company viewed him as a director and held him out as such. Prior to the liquidation of the Company his position was that he was the director of the Company. Viewed in the round the defender was part of the corporate governance structure of the Company. He assumed the status and function of a director so as to make himself responsible as if he had been formally appointed as such.

(iv) The assessment of unfitness

[87] Moving on to the assessment of the defender's unfitness to hold the office of company director, counsel started with a review of the statute law and of decided cases that cast light on how to interpret that law.

[88] Section 6 of the Act provides that the court shall make a disqualification order of between 2 and 15 years against a person where it is satisfied:

(i) that he had been a director or shadow director of a company which has at any time become insolvent; and

(ii) that his conduct as a director or shadow director of that company makes him unfit to be concerned in the management of a company.

[89] The defender was a *de facto* director of the Company. The Company entered liquidation on 24 May 2019 in circumstances in which its assets were insufficient to meet its debts and other liabilities. The Company was accordingly insolvent: section 6(2)(a) of the Act. Section 12C of the Act provides that the court shall take into account the matters mentioned in schedule 1 to the Act in deciding whether someone has been unfit. Schedule 1 provides a list of factors which could result in a person being found to be unfit. The matters listed in Schedule 1 are drafted in intentionally wide terms but are not exhaustive of the matters which may be taken into account in determining unfitness: *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164 at 183.

[90] Whether a director is unfit to be concerned in the management of a company is a question of fact, including whether the director's specific conduct measured up to a standard of probity and competence fixed by the court. Support for that proposition can be found in the observations of Lord Justice Dillon in *Re Sevenoaks Stationers (Retail) Ltd* [1991]

at 176. The approach to be taken by the court when determining whether a director is unfit to be concerned in the management of a company were considered by Hoffman L.J., as he then was, in the case of *Re Grayan Building Services Ltd* at pages 253 to 254. This approach was followed by Lord Malcolm in *Her Majesty's Secretary of State for Business, Innovation & Skills* v *Ferdousi Reza* [2013] CSOH 86.

(v) The misconduct in the present case

[91] In this case the misconduct relied upon by the pursuer was that the defender acted as a director of the Company in breach of the Undertaking.

[92] The defender acted as a director of the Company during the period prior to the date of its liquidation. He was aware that the terms of the undertaking meant that he could not do that. That he did act as a director in those circumstances demonstrated a disregard for the sanction imposed for prior misconduct and also constituted a criminal offence under section 13 of the Act. Acting as a director of a company whilst disqualified from doing so is conduct which falls below the standards of commercial probity that are to be expected and constitutes misconduct on the part of the defender.

(vi) The length of the disqualification order

[93] The decision of the Court of Appeal in *Re Sevenoaks Stationers (Retail) Ltd* [1991] at 174 remains the leading authority on the question of the appropriate period of disqualification. That case laid down guidelines for the periods of disqualification, consisting of three brackets: the top bracket of over 10 years' disqualification for particularly serious cases; the minimum bracket of 2 to 5 years where the case was relatively not very serious; and the middle bracket of 6 to 10 years for serious cases which did not merit the top bracket.

[94] The length of the disqualification period is a matter for the exercise of a discretion by the court. In determining the appropriate period of disqualification: (i) the court should not take into account the fact that the director might be making an application for leave under section 17 to act as a director in respect of one or more specified companies; (ii) the period of disqualification must reflect the gravity of the offence; (iii) the court may take into account evidence of the general conduct in the discharge of the office of director, his age and state of health, the length of time he had been in jeopardy, whether he had admitted the misconduct, his general conduct before and after the offence, and the periods of disqualification of his co-directors which may have been ordered: *Re Westmid Packing Services Ltd (No. 3)* [1998] BCC 836 at 845 and Mithani, *Directors' Disqualification*, at [1590A].

[95] The defender's misconduct is sufficiently serious to bring him within the top bracket. He had had the benefit of legal advice when giving the Undertaking. The nature of it and the consequences of breaching its terms were explained to him by his solicitor. The defender knowingly acted as a director of the Company in breach of the undertaking and his doing so constituted a criminal offence. It also showed a blatant disregard for the legal sanction imposed upon him in respect of previous misconduct as a director. He did not give or lead evidence of any factors which could be said to mitigate the seriousness of his misconduct.

[96] In the foregoing circumstances the pursuer seeks a period of disqualification of 12 years against the defender. This period is consistent with the level of disqualification that has been granted in other cases where an individual has acted as a director in breach of a disqualification order or undertaking such as *Re Oldham Vehicle Contracts Ltd, Official Receiver* v *Vass* [1999] BCC 516.

The defender's submissions

[97] The defender's submissions, both written and oral, that fall within heads (i), (ii) and (vii) as determined above are as follows.

(i) His acceptance that he entered into the Undertaking

[98] As a result of his involvement in a previous limited liability company, the defender agreed (sic) a Disqualification Undertaking which covered a period of 4 years from 28 December 2017.

(ii) His comments upon the quality of the evidence of the witnesses

[99] Mr Fraser only spoke to the mechanics of his appointment. He had never met the defender nor taken a statement from him. He did not confirm that the defender had been a director of the Company.

[100] Mr Gould spoke about the enquiries which he and his former colleague Richard Hubbuck had undertaken. He made comment about the enquiries of HMRC, RBS and others but focused mainly on the paid cheques lodged as productions. He acknowledged that the signatures did not match that of the defender and his responses were vague. This did not prove to the required standard that the signatures on the cheques were those of the defender and he was unable to produce any document that supported the IS allegation that he acted as a director of the Company. He referred to statements made by the landlord yet the landlord was not in court to confirm or deny what Mr Gould said. Other than confirming that IS had received communication from other parties, Mr Gould was unable to provide any confirmation of matters and used phrases such as "it could be him" or "someone said it was him" which was a subjective view that ought to be rejected by

the court on the basis of a lack of tangible evidence. He was not able to point to anything that made the defender a director or shadow director.

[101] Mr Robertson of MMG was unable to provide any evidence that provided any instructions to him from the defender particularly during 2018. He confirmed that all VAT and financial information was drawn from either the Sage software or Mr Clark and not the defender. He also confirmed in court that he had only met him once. His conclusion that the defender was a director was improperly made.

[102] Mr Brechin confirmed that he did not complete the statement relied upon by IS but that it had been prepared by his bookkeeper and he simply signed it without authority. He claimed that after receiving the letter regarding the liquidation of the Company in 2019, he reviewed the information at Companies House and saw him listed as a director. He was not a credible witness because he did not know that the defender was a director until he checked at Companies House. He confirmed that other individuals from TSAL contacted him regarding vehicle issues such as booking services and instructing repairs i.e. other employees within the Company were accustomed to dealing with the defender and that he was no different from them. Finally, he claimed that the defender had signed the TSAL account opening forms but was not able to produce any such documentation. He was an unreliable witness whose evidence was tainted by the fact that the Company had declined to pay the invoices. He was neither a credible nor a reliable witness.

[103] Mr Clark confirmed that he had no involvement in the issuing of sales invoices and that he had provided a written statement of his role within the Company in a letter signed by him in September 2022. He also confirmed that his role involved paying bills, operating the payroll and preparing VAT returns. He said that subsequent to 2017 he was not present at the Company on a regular basis but merely attended to undertake his accounting record

maintenance duties, and could not recall much from that time. He admitted that the defender was not an authorised signatory for the company, and that he had never seen him sign a Company cheque and confirmed that the defender did not submit any VAT returns or manage PAYE or other accounting functions. His recollection of the visits from HMRC became rather vague under cross-examination. He did not deny that he was responsible for dealing with the VAT problem when he identified that it had arisen. He was not a reliable witness and never suggested that the defender was a director.

[104] Mr King confirmed that he had never met the defender.

[105] Various subjective views from witnesses who generally commented that they were unclear in their recollection of events are not sufficient to persuade the court that the defender had breached the Undertaking. The evidence led failed to provide any compelling evidence that the defender controlled the Company or acted in any directorship manner. The allegations made were unsupported by credible evidence or witness testimony.

(vii) His statements of what orders he would like the court to make.

[106] The defender requests the court to reject the pursuer's arguments, dismiss the case and grant an award of expenses in his favour of £30,000 for time and advisory costs.

Expenses

[107] Counsel and the defender agreed at the hearing on evidence that the expenses of process should follow success in the proof and that there was no need to appoint a hearing on expenses when issuing my judgment. Counsel said that she was not moving for sanction for the employment of counsel.

Decision

The absence of evidence by or for the defender

[108] Before deciding the merits of the case I must first address the consequences for the proof and for my judgment after proof of the defender's decision to decline to give evidence at the point in the proof when that fell to him. I have already, at paras [42] to [52] above, given my decision on what of the defender's submissions I am able to take into account.

[109] The absence of any evidence given in support of the defender's positive and affirmed averments of fact on Record not covered by his admissions or the Joint Minute of Admissions is a matter of substance. It is not a technicality. The case was appointed to proof on the pleadings that both sides set out in the Record. That is a document of fundamental importance. Its function is to give fair notice of the case which each side offers to support at proof and which the opposing party has to meet so that the parties can direct their evidence to addressing the issue or issues in dispute revealed in it. The formulation of the case for the defender carried with it his acceptance that he offered to prove by evidence given at proof the positive case that he affirmed and set out in the averments in his defences in so far as they were not admitted and to address the positive case stated by the pursuer. He has not done that and the Joint Minute does not do that. The furthest he went in presenting his case was to cross-examine the pursuer's witnesses in the course of which he alluded on occasion and briefly to aspects of it. The absence of evidence to support the defender's disputed averments does not convert the proof from a defended to an undefended diet. The defences are still in place and the defender has not sought leave to have them withdrawn.

[110] It is a fundamental rule that a court can decide a case after proof only on the evidence before it that was presented in the course of it and leaving aside any other

considerations: *McTear* at para [1.37]. In the present case that was the evidence given by the pursuer's witnesses. They were led for the purpose of supporting the pursuer's positive and affirmed case set out in his averments. This is in conformity with the settled general proposition that the burden of proof rests upon the party who alleges the affirmative. That has been expressed traditionally in the Latin maxim *ei qui affirmat, non ei qui negat, incumbit probatio.* The burden of proving his case rests at least initially on the pursuer. The defender answers that case in his averments in his defences. The standard of proof is on the balance of probabilities. Beyond what is admitted on Record or agreed in the Joint Minute those averments of fact dispute the pursuer's averments of fact. That means that the burden of supporting and proving those affirmed and disputed facts rests upon the defender. By not giving any evidence in support of his averments that dispute the pursuer's case the defender has denied to the court the opportunity of taking his disputed averments into account when weighing and assessing the quality of all the evidence that was led which would usually involve the evidence from both sides of the case and from that making such findings in fact, findings in fact and in law and findings in law as flowed from the concluded assessment. There is also the important point that the questioning of the pursuer's witnesses was, to an extent, made in the reasonable expectation that the defender would follow the normal course of a proof and give evidence in support of his case. To that end it ventured into a discussion of a number of aspects of the defender's case that was disputed by the pursuer.

[111] To what of the defender's case that remains disputed can I properly have regard? The answer is only his cross-examinations of the pursuer's witnesses to the extent that they challenged the quality of the evidence of the witnesses. I am obliged to take them into account because they form part of the totality of the evidence led. They, at least potentially,

fall within one of the purposes of cross-examination: to test the veracity of the witness (his credibility) and the accuracy of his evidence (his reliability).

The relevant law

[112] The pursuer has brought the application under the Act. That is the correct legal ground. The provisions of the Act that govern the particular facts and circumstances of the present case are contained in sections 1, 6, 7, 12C, 17, 22 and Schedule 1.

[113] Section 1 creates the judicial power to make a disqualification order for a period specified in the order and section 6 confers a duty on the court to disqualify unfit directors. Read short and so far as relevant to the present case its subsection (1) states:

> "The court shall make a disqualification order against a person in any case where, on an application under this section
>
> (a) the court is satisfied—
>
> (i) that the person is or has been a director of a company which has at any time become insolvent (whether while the person was a director or subsequently) … and
>
> (b) the court is satisfied that the person's conduct as a director of that company (either taken alone or taken together with the person's conduct as a director of one or more other companies …) makes the person unfit to be concerned in the management of a company.
>
> Subsection (2) defines insolvency for the purposes of the section as occurring when the company in question goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up. Subsection (3) confers jurisdiction over an application made under the section on the court where the company in question has been wound up by the court which is Aberdeen Sheriff Court. Subsection (4) prescribes the period of disqualification, that being a minimum of 2 years and a maximum of 15 years.

[114] Section 7(1) gives to the pursuer as Secretary of State the right to make application for a disqualification order within the period of time stated in subsection (2) which was done.

[115] Section 12C details the matters that the court has to take into account when determining unfitness to hold the office of director or be concerned in the management of a company. Included in those matter is the requirement under subsection (4) that when the court is making a determination on unfitness those matters it must have regard to in particular are (a) the matters set out in paragraphs 1 to 4 of Schedule 1 in every case, and (b) the matters set out in paragraphs 5 to 7 of that Schedule in a case where the person concerned has been a director of a company. Section 22 provides a definition of director for the purposes of the Act: that it "includes any person occupying the position of director, by whatever name called." Paragraphs 1 to 7 of Schedule 1 provide as follows:

> *Matters to be taken into account in all cases*
>
> 1 The extent to which the person was responsible for the causes of any material contravention by a company … of any applicable legislative or other requirement.
>
> 2 Where applicable, the extent to which the person was responsible for the causes of a company … becoming insolvent.
>
> 3 The frequency of conduct of the person which falls within paragraph 1 or 2.
>
> 4 The nature and extent of any loss or harm caused, or any potential loss or harm which could have been caused, by the person's conduct in relation to a company....
>
> *Additional matters to be taken into account where person is or has been a director*
>
> 5 Any misfeasance or breach of any fiduciary duty by the director in relation to a company ….

6 Any material breach of any legislative or other obligation of the director which applies as a result of being a director of a company ….

7 The frequency of conduct of the director which falls within paragraph 5 or 6.

[116] Authoritative guidance on interpreting the statutory provisions is given in the cases cited by counsel. Of particular relevance are the passages drawn from many of the cases founded upon by her when discussing four matters: (i) the nature of the assessment that the court has to make on the issue of unfitness when considering making a disqualification order; (ii) the circumstances in which an individual will be taken to have assumed the position of director albeit having not been appointed as such (a *de facto* director); (iii) the assessment of unfitness; and (iv) the question of the appropriate period of disqualification. The guidance given throughout is in point for the purposes of the application and I gratefully adopt it and apply it.

[117] I take from the cases the following twelve propositions that are relevant to the present case.

(i) The nature of the assessment

1) The purpose of the 1986 Act (and its predecessors) is to raise standards in the conduct and responsibility of those who manage companies incorporated with the privilege of limited liability: *Re Swift 736 Ltd* [1993] BCC 312 at p 315 and *Re Westmid Packing Services Ltd (No. 3)* [1998] B.C.C. 836 at p. 841).

2) The court considering disqualification must decide whether the conduct of the individual in question, viewed cumulatively and taking into account any extenuating circumstances, has fallen below the standards of probity and

competence appropriate for persons fit to be directors of companies: *Re Grayan Building Services Ltd* [1995] BCC 554 at page 574.

3) This assessment involves a three stage process. First, do the matters relied upon by the Secretary of State amount to misconduct? Secondly, if they do, do they justify a finding of unfitness? Finally, if they do, what period of disqualification, being not less than 2 years, nor more than 15 years, should result: *Re Structural Concrete Ltd* [2001] BCC 578 at page 586F to G?

4) Where the court determines that a director is unfit to be concerned in the management of a company, disqualification is mandatory and at that stage the court is not entitled to look at evidence which shows that, despite the director's shortcomings in the past, he is unlikely to offend again. The purpose of making disqualification mandatory is to ensure that everyone whose conduct had fallen below the appropriate standard is disqualified for at least 2 years, whether or not the court thinks that this is necessary in the public interest: *Re Grayan Building Services Ltd* at page 574.

(ii) De facto director

5) When the court is assessing whether an individual who is not appointed as a director of a company will be taken to have assumed that position the correct approach to be applied is that

> "… as a generality … all the relevant factors must be taken into account … 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": *Commissioners of Her Majesty's Revenue and Customs* v *Holland* [2010] 1 WLR 2793 per Lord Hope at paragraph 39.

6) The proper question is whether the actings of the director are such as to evidence that he assumed a role in the company which imposed on him the fiduciary duties of a director: *Holland* per Lord Collins at paragraph 94.

7) Factors which are of importance in undertaking that analysis are expressed by Lady Justice Arden, as she then was, in *Smithton Limited* v *Naggar* [2015] 1 WLR 189 in paragraphs 33 to 44.

"33. Lord Collins JSC sensibly held that there was no one definitive test for a *de facto* director. The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. However, a number of points arise out of *Holland's* case and the previous cases which are of general practical importance in determining who is a *de facto* director. I note these points in the following paragraphs.

34. The concepts of shadow director and *de facto* are different but there is some overlap.

35. A person may be *de facto* director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as a director.

36. To answer that question, the court may have to determine in what capacity the director was acting (as in *Holland's* case).

37. The court will in general also have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the defendant's acts were directorial in nature.

38. The court is required to look at what the director actually did and not any job title actually given to him.

39. A defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.

40. The court must look at the cumulative effect of the activities relied on. The court should look at all the circumstances 'in the round'(per

Jonathan Parker J in *Secretary of State for Trade and Industry* v *Jones* [1999] BCC 336).

41. It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case.

42. Relevant factors include: (i) whether the company considered him to be a director and held him out as such; (ii) whether third parties considered that he was a director.

43. The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision.

44. Acts outside the period when he is said to have been a *de facto* director may throw light on whether he was a *de facto* director in the relevant period."

(iii) The assessment of unfitness

8) The matters listed in Schedule 1 are drafted in intentionally wide terms but are not exhaustive of the matters which may be taken into account in determining unfitness: *Re Sevenoaks Stationers (Retail) Ltd* at 183.

9) Whether a director is unfit to be concerned in the management of a company is a question of fact, including whether specific conduct measures up to a standard of probity and competence fixed by the court. As Lord Justice Dillon observed in *Re Sevenoaks Stationers (Retail) Ltd* at page 176:

"The test laid down in section 6 - apart from the requirement that the person concerned is or has been a director of a company which has become insolvent - is whether the person's conduct as a director of the company or companies in question 'makes him unfit to be concerned in the management of a company.' These are ordinary words of the English language and they should be simple to apply in most cases. It is important to hold to those words in each case. In *In re Lo-Line Electric Motors Ltd*. [1988] Ch 477, 486, Sir Nicolas Browne-Wilkinson V.-C. said: the true question to be tried is a question of fact - what used to be pejoratively described in the Chancery Division as 'a jury question.'"

10) "The nature of the decision which the court has to make on whether conduct as a director…makes him unfit to be concerned in the management of a

company [is that] [t]he court is concerned solely with the conduct specified by the Secretary of State or official receiver…It must decide whether that conduct, viewed cumulatively and taking into account any extenuating circumstances, has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies": *Re Grayan Building Services Ltd* [1995] BCC 554 per Hoffman L.J., as he then was, at pages 573 to 574, followed by Lord Malcolm in *Her Majesty's Secretary of State for Business, Innovation & Skills* v *Ferdousi Reza* [2013] CSOH 86 at paragraph [16].

(iv) The appropriate period of disqualification

11) The period of disqualification falls into one of three brackets: the minimum bracket of 2 to 5 years where the case is, relatively, not very serious; the middle bracket for from 6 to 10 years for serious cases which do not merit the top bracket; and the top bracket for particularly serious cases which may include cases where a director who has already had one period of disqualification imposed on him falls to be disqualified yet again: *Re Sevenoaks Stationers (Retail) Ltd* at 174.

12) The length of the disqualification period is a matter for the discretion of the court. In determining the appropriate period of disqualification: (i) the court should not take into account the fact that the director may be making an application for leave under section 17 to act as a director in respect of one or more specified companies; (ii) the period of disqualification must reflect the gravity of the offence; (iii) the court may take into account evidence of the general conduct in the discharge of the office of director, his age and state of health, the length of time he has been in jeopardy, whether he has admitted the misconduct, his general conduct before and after the offence, and the periods of disqualification of his co-directors which may have been ordered: *Re Westmid Packing Services Ltd (No. 3)* [1998] BCC 836 at 845.

[118] A final proposition is taken from Mithani, Directors' Disqualification, at [1590A]:

> "A defendant who is found to be unfit for having acted in the management of a company in breach of an existing disqualification may expect to be disqualified for a lengthy period. This fact is recognised both by the matters which the court is required to take into account in Sch 1 to the [Act] in determining, inter alia, the period for which a disqualification order is made and by the *Sevenoaks* guidelines which expressly state that repeat disqualification will usually warrant the making of a disqualification order in the top bracket."

The issues in dispute

[119] The duty conferred by section 6 obliges the court to be satisfied that the requirements of subsection (1) are proved before it can make a disqualification order. The subsection requires proof of both features expressed in it, those being either of the two situations expressed in (a) and the situation expressed in (b). If satisfied that both features have been proved the court must make that order.

[120] Subsection (1)(a)(i) applies to the present case. It demands proof of two facts: that the defender is or has been a director of a company; and that the company has at any time become insolvent (whether while the person was a director or subsequently). The parties are agreed by way of admission both on Record and in the Joint Minute on the first fact but remain in dispute on the second except for the fact that the Company went into liquidation. That leaves the pursuer to prove that the Company was insolvent when it went into liquidation. Subsection (b) is in dispute in its entirety. Proof of its demands constituted almost the entirety of the evidence led.

[121] The pursuer asserts that the requirements of both subsections have been met and proved from the evidence given by his witnesses by their support of his positive and affirmed case on Record and accordingly the order and direction craved should be made. The defender resists that conclusion.

[122] What that leaves in dispute may be expressed in five issues as follows.

1. When the Company went into liquidation was that because its assets were then insufficient for the payment of its debts and other liabilities and the expenses of the winding up and accordingly it was insolvent for the purposes of subsection 6(1)(a) of the Act?
2. For the period of time from 28 December 2017 to 24 May 2019 did the conduct of the defender in respect of the business of the Company, assessed objectively in context and in the round, evidence that he assumed a role in the Company which imposed on him the fiduciary duties of a director irrespective of by whatever name he was called and therefore he occupied the position of director of the Company as understood by section 22(4) of the Act?
3. If the answer to issue 2 is in the affirmative, did the matters relied upon by the pursuer amount to misconduct under the Act on the part of the defender *qua* director *de facto* during that period of time under and in terms of section 12C of and Schedule 1 to the Act?
4. If the answer to issue 3 is in the affirmative did the conduct of the defender as a director *de facto* of the Company during that period of time make him unfit to be concerned in the management of a company as directed by subsection 6(1)(b) of the Act?
5. If the answer to issue 4 is in the affirmative then what period of mandatory disqualification by way of a disqualification order should the court pass on him under subsection 6(1) and (4) of the Act?

Issues 3 to 5 follow the three stage process expressed in *Re Structural Concrete Ltd*.

My assessment of the evidence given

[123] I begin the task of answering those five issues by making an assessment of the quality of the evidence given in the proof.

[124] Four of the six witnesses gave evidence that was grounded in their respective professional duties and responsibilities. Mr Fraser has been a licensed insolvency practitioner for about 35 years. He gave evidence of his experience as an insolvency practitioner, a statement of his appointment as a joint liquidator of the Company and an explanation of his duties as a liquidator. Mr Gould is a senior civil servant. At the time of giving his evidence he was the Risk Assurance Head with the Corporate Governance Team of the IS. He had risen within its ranks to that position. He explained the administration that was involved in order to commence an investigation into a company director that resulted in the pursuer authorising IS to proceed in May 2022 with the application in respect of the defender. Mr Gould was not himself involved directly in the investigation into the defender but he had familiarised himself with the material about him and the Company held by the IS before giving his evidence. Mr King is a Higher Officer of HMRC based in Edinburgh and working in Individual and Small Business Compliance. He has some 32 years of experience of working in Customs and Excise. His duties require him to carry out investigations involving Value Added Tax. He took over an initiated investigation into errors in previous submissions in respect of VAT due by the Company and saw it through to its conclusion. Mr Robertson is a chartered accountant. He qualified as such in 2005 and practices in Montrose with MMG. He spoke to his knowledge of work done by MMG as the accountants for the Company between 2015 and 27 June 2018.

[125] All four of them spoke to matters that were within their field of professional practice and expertise. The cross-examinations of three of them, Mr Fraser, Mr King and Mr Robertson, focused largely upon seeking information and clarification of what had been said in examination-in-chief rather than testing its quality. The defender's observation that the quality of Mr Fraser's evidence was challengeable because he had never met the defender nor taken a statement from him did not compromise his reliability on all that he said. The same conclusion applies to his similar observation about Mr King, which was his sole point for him, and Mr Robertson for whom the other points raised did not affect his reliability at all. Mr King's evidence of the progress of the VAT investigation was soundly based on the sequence of correspondence that he undertook with Meston Reid. He was in the ideal position to explain it because he was the author of much of it. What he said about the correspondence and its content made perfectly good sense. Mr Robertson spoke to his dealings with the Company and his limited personal dealings with the defender and in particular to his letter dated 11 January 2022 to the IS and his views on what the defender had said in his completed Director Questionnaire. Mr Gould gave formal evidence in general about the progress of an investigation by the IS and then in particular to the investigation of the defender and the Company. The defender's criticism of the quality of his evidence was that his responses were vague and subjective and used phrases such as "it could be him" or "someone said it was him" which was a subjective view that ought to be rejected. I did not accept these criticisms. Mr Gould's unwillingness to go beyond what he considered it was right to draw from the documents on which he gave evidence reinforced his reliability. That was not compromised in any respect by the way in which he dealt with the material contained in correspondence and questionnaires completed by the defender, the RBS and TSAL. Where he felt it right to make concessions of fact on aspects of his

knowledge of the progress of the investigation he did so readily and in a way that did not detract from his reliability. Such cross-examination as Mr Gould underwent on matters that sought to challenge the reliability of his evidence did not persuade me that any of the limited challenges had merit.

[126] I was satisfied that I could rely upon what each said about their work with and in respect of the Company and the defender. Each spoke with the requisite degree of authority drawn from his experience gained from the exercise of his profession and demonstrated that he was in command of what was asked of him in evidence. Nothing said either from memory or under reference to contemporaneous documents caused me to question the reliability of any of them on their recollection of events or on what each drew from the documents. No issue of credibility arose from their evidence.

[127] Mr Brechin spoke from the standpoint of being the owner of a small business that had provided services to the Company and had not been paid for them. That fact clearly still aggrieved him, as he indicated in a few of his answers. That was perfectly understandable. The defender asserts that Mr Brechin was an unreliable witness whose evidence was tainted by the fact that the Company had declined to pay the invoices. I am satisfied that any such sense of grievance did not extend to his account of the business dealings that he had had with the defender on behalf of the Company and I was satisfied of his reliability on those matters. Such cross-examination as touched incidentally on his reliability did not adversely affect it. The defender argued that he was not a credible witness because he did not know that the defender was a director until he checked at Companies House. That is not how I understood him to give evidence. The weight of his evidence was that he held the defender to be a director throughout the months that TSAL conducted business with the Company. He also said that other employees within TSAL were

accustomed to dealing with the defender. The defender in submission said that Mr Brechin added to this that he was no different from them. I do not find that last point in my record of the evidence. The defender also submitted as a test of reliability that Mr Brechin had said that the defender had signed the TSAL account opening forms but was not able to produce any such documentation. Mr Brechin had said that he had probably not retained records going as far back as 2018/2019. That I did not find surprising given the failure to recover any money from the liquidation of the Company. The absence from his evidence of an account opening form did not reduce the quality of his evidence because the explanation was understandable. The defender concluded that Mr Brechin was neither a credible nor a reliable witness. I was satisfied that I could rely upon his evidence and that his credibility was not placed in issue.

[128] Mr Clark's evidence fell into the three parts previously noted. Throughout his evidence on the first part he spoke with his acquired knowledge about the work that he had undertaken on behalf of the Company. When asked to indicate the role of the defender within the Company he gave his opinion on the various duties and responsibilities that he said the defender had assumed and undertaken. I accepted the reliability of that evidence. On the second part he confirmed the truthfulness and accuracy of what he was recorded as having said to Mr King in the Note and in particular he agreed with the content of its first six paragraphs. He confirmed that the call whose content Mr King recorded in the Note had a twofold purpose: to establish the circumstances leading to the Company's failure to declare amounts of VAT to HMRC; and the extent of the defender's involvement in the operation of the Company. On the third part he began answering with a degree of hesitation that even extended initially to denying the correctness of paragraph one of the Note which narrated that he had acted as the in-house accountant for the Company

from 2016 onwards and in addition had primary responsibility for maintaining its accounting records, had created the documents to allow BACS payments from the Company bank account and that he had no seen the defender process an online bank transaction. He then immediately changed that to believing it to be correct, then tried to justify his position by saying that he had no notes from the time of the call and finally settled on the correctness of the terms of the Note. This tergiversation on matters that could be expected to fall well within his knowledge of his duties did not enhance the quality of his reliability on this matter but my concern about that was set aside in re-examination when he admitted that he had signed the letter, did not recall if he had drafted it but that whoever drafted it he would not have signed it if unhappy with its terms. That was his final position which I accepted as the correct approach to take to the letter. I accepted his reliability in respect of the clear answers obtained when faced with the Note and the terms of the letter and about the work that he undertook on behalf of the Company and the role of the defender within the Company as he understood it. Nothing put to him in a limited cross-examination that bore upon the reliability or credibility of his evidence persuaded me that the challenges were made out. In particular while Mr Clark did not use the word director when discussing the defender's role in the Company he did say that he was its controlling party because of his continuous presence and the range of responsibilities he had. I accepted that his evidence overall was reliable and that no question of its credibility arose.

[129] My assessment of the quality of the evidence given meant that I accept as entirely reliable what Mr Fraser, Mr Gould, Mr King and Mr Robertson said. I accepted as reliable what Mr Brechin said about the business dealings he had with the Company and the role played in that by the defender. I accepted as reliable Mr Clark's evidence about his work and the role of the defender in the Company, the Note and his final position on the letter. I

apply that assessment when dealing with the evidence when discussing the issues in dispute and formulating findings.

Issue 1: When the Company went into liquidation was that because its assets were then insufficient for the payment of its debts and other liabilities and the expenses of the winding up and accordingly it was insolvent for the purposes of subsection 6(1)(a)?

[130] The resolution of this issue lies in whether the evidence that I accept as reliable supports the conclusion that the Company was insolvent at the date of liquidation, that being the second fact required under subsection 6(1)(a)(i). The evidence about the financial state of the Company as at the date of its liquidation came from Mr Fraser and was found in the Estimated Statement of Affairs of the Company that the joint liquidators prepared. That was the best estimate that they could present in the circumstances known to them. It stated that its assets were estimated to realise no sum of money and its total liabilities were in the sum of £458,681.74. No creditors, be they preferential such as employees or unsecured, received any payment. There being no realisable assets of the company there were insufficient funds to cover the expenses of the winding up. As a consequence the joint liquidators invoked the provisions of section 204 of the Insolvency Act 1986 and applied to the court for an order that the Company be dissolved. The court made that order on 19 August 2020. I accept all of this evidence and draw the conclusion from it that the Company went into liquidation on 24 May 2019 at a time when its assets were insufficient for the payment of its debts and other liabilities and the expenses of the winding up: section 6(2) of the Act. It was insolvent as at that date. Accordingly I am satisfied that both facts that have to be proved to satisfy the requirements of subsection 6(1)(a)(i) have been proved. I therefore answer the first issue in the affirmative.

Issue 2: For the period of time from 28 December 2017 to 24 May 2019 did the conduct of the defender in respect of the business of the Company, assessed objectively in context and in the round, evidence that he assumed a role in the Company which imposed on him the fiduciary duties of a director irrespective of by whatever name he was called and therefore he occupied the position of director of the Company as understood by section 22(4) of the Act?

[131] Almost the entire content of the proof was taken up with evidence that was intended to answer this issue.

[132] Counsel submitted that the evidence of the pursuer's witnesses, if accepted as reliable, proved to the required legal standard the averments of fact contained in Articles 11 to 14 and 16 to 19 of condescendence regarding the role, duties and responsibilities of the defender in the Company since before the Undertaking came into effect and while it was in force and that those proven facts set out what he actually did for and on behalf of the Company. In turn they supported the proof of the five factors relied upon by the pursuer for the conclusion that the defender, by what he actually did, had assumed the status of director of the Company. That submission is well founded. She acknowledged that the averments in Article 15 had been inserted in anticipation of cross-examining the defender on the facts in them and that the pursuer's witnesses had not provided evidence of its content.

[133] The definition of director for present purposes is as expressed in subsection 22(4) of the Act. It is not a definition that seeks to cover all eventualities because it states that it includes any person occupying the position of director, by whatever name called. As a result the determination of directorship turns upon the particular facts and circumstances of each individual case. In applying the definition to the present case I have followed the

guidance on the relevant factors to take into account given in *Holland* and *Naggar* in deciding whether the facts established after proof admit of the conclusion that the defender assumed a role in the Company which imposed on him the fiduciary duties of a director so as to make him responsible as if he were a director. The focus of attention on the facts is on what the defender actually did to see if that supports that conclusion *de facto* assessed objectively irrespective of whatever title or job description he may have been given.

[134] The formal governance structure of the Company from its inception to its liquidation was that it had a total of four directors *de iure* who held office at various times. The defender and his wife were directors from its date of incorporation on 28 January 2013 until 22 September 2015 and 20 December 2017 respectively. The defender's stepson was a director from 20 November 2017 to 1 November 2018. From that date and until 24 May 2019, the date of liquidation, the sole director was Mr Georgiev. This simple structure has the look of a small business governed and run as a family venture for close on 6 years until Mr Georgiev is said to have taken office about ten months into the life of the Undertaking. During that life and down to the date of liquidation, a period of some seventeen months, it had only one director *de iure* at any one time; the defender's stepson until 1 November 2018 and Mr Georgiev from that date on. The defender relinquished a necessary role in its governance when he resigned as a director *de iure* with effect from 22 September 2015.

[135] While the pursuer's case concentrates upon the period of time from 28 December 2017 to 24 May 2019 it is relevant to take into account the nature and extent of the relationship that the defender had with the Company in the earlier period beginning in about 2016. That is because, as expressed in *Naggar* as one of the factors to take into account, his conduct during that earlier period may throw light on whether he was a *de facto* director in the period beginning on 28 December 2017. In this case it certainly does.

[136] What the defender actually did within and for and on behalf of the Company from about 2016 was spoken to by all the witnesses. Of them Mr Fraser was able to say from his investigations as joint liquidator into the workings of the Company prior to its liquidation that the information obtained by the liquidators suggested that the defender was acting as a director of the Company and that he did not operate under a contract of employment with it. I accept that evidence. No such concluded contract was produced and placed in evidence. That left open for assessment the basis on which and the reasons for which he acted as he did in his dealings within and for the Company. Whatever they were they were not because he was an employee.

[137] Evidence on the defender's role within and his actions on behalf of the Company before 28 December 2017 came from Mr Clark and Mr Robertson. For the period of time after that date all five were able to provide information from their different standpoints.

[138] The best direct evidence of the business of the Company, how it was conducted from about 2016 onwards and who did what within it and on its behalf came from Mr Clark because of his position within its management structure as its bookkeeper, albeit part-time, for about 3 and a half years. Its business was the delivery of goods in parcels by van. To achieve that the Company had about twenty staff both employed and self-employed most of whom were van drivers and of Eastern European origin. Its principal place of business was the Aberdeen depot but as at about December 2017, about the time that the Undertaking took effect, he was aware that the Company was expanding its business into the Perth and Kirkcaldy areas. It had opened a depot in Dundee at some date about then of which he was unaware. The nature of the business was supported by Mr Brechin who said that every now and then TSAL provided tyres for the Company's vans and carried out mechanical repair work to them.

[139] Mr Clark said that the Aberdeen office was manned by the defender and the transport manager while the Dundee depot, once established, was effectively run by the defender's stepson. Mr Clark did not see him working in the Aberdeen depot. The defender did everything in the Aberdeen depot except for the work done by the transport manager who was responsible for overseeing the vehicles, the drivers and the routes used by the vans but the defender impinged upon that side of the business by organising the drivers and they reported to him. The defender's administrative and financial duties within the Company spoken to by Mr Clark and by reason of his acceptance of the truth and accuracy of what was said in the first six paragraphs of the Note of the telephone interview he had with Mr King on 18 January 2021, involved dealing with customers of whom there were four or six main ones. He issued invoices to customers of the Company and was the person to contact if anyone had any queries about them. He issued the sales invoices and this was corroborated and confirmed by the note kept by Mr King of what the defender had said to him in the course of the telephone interview held during December 2020. The defender recorded issuing invoices in a module in the Sage accounting system which was located in a computer normally used by him. He was able to access that system. He was responsible for reconciling payments to outstanding invoices. There were two authorised cheque signatories on the Company bank account, the defender and his wife. Mr Clark could not sign Company cheques. He left them for signature and reckoned that it was the defender who signed them. The defender administered the payroll for the Company and decided on the payment due to employees whether employed or self-employed. If anyone had any queries about pay it was he to whom they spoke. He authorised payments to suppliers. He decided, in the last analysis, which bills the Company had to pay were paid. It was not unknown for payment to be made on the basis that he who shouted loudest was

paid before others who were less forthright in demanding payment. The defender was a signatory to the Company's bank account. The Aberdeen depot ran fairly smoothly with him there. His role did not really change in the period after the Undertaking came into force. He also said that he assumed that the defender was the controlling party of the Company because he was a continuous presence and because of the range of responsibilities that he had. I accept this evidence and rely upon the facts contained in it.

[140] The evidence of Mr Clark narrated in the preceding paragraph places the defender, by reason of the nature and scope of the duties and the responsibilities he undertook, at the heart of the running and conduct of the business of the Company from about 2016 onwards. That was after he had resigned as a director *de iure* and when Mr Clark started working with the Company. The defender was in charge of the administration of the Company with the limited exception vested in the transport manager. He had the means and the opportunity to maintain control of the finances of the Company through his access to its banking facilities, through his control of the system of invoicing customers and payments received and through his control of the payroll of the Company's employees whether employed or self-employed. As counsel accurately observed this placed him in control of the day to day operations of the Company from at least 2016 onwards.

[141] Control of the conduct of the business and the finances of a company normally rests ultimately with its directors *de iure*. A legal person such as a company needs a person or persons to control and run it from day to day and ultimately that means those who hold office as its directors. A transport manager or accountant working part-time cannot be expected to take on that level of responsibility in normal circumstances and there is nothing in the evidence to indicate that either did. From and after 22 September 2015 that level of legal responsibility fell to three persons in almost exact succession: the defender's wife until

20 December 2017 which was eight days before the Undertaking took effect; the defender's stepson from 20 November 2017 to 1 November 2018; and Mr Georgiev from 1 November 2018 to the date of liquidation some seven month later.

[142] A telling and highly significant feature of the present case is the almost total absence of any reference to what those directors *de iure* did within, for or on behalf of the Company or to further its business. The defender's wife was credited by the RBS with being the main contact with the bank and also with signing cheques drawn on the Company's bank account but that is all that was said about her exercise of responsibilities. That gave her at best a nominal involvement in the conduct of the finances of the Company. Mr Brechin said that he had never had any dealings with the defender's wife whom he learnt was also a director of the Company. The defender's stepson effectively ran the Dundee depot but there is no evidence that he took any part in running the Aberdeen depot which was the main one and which was run and controlled by the defender or that he exercised any of the functions normally associated with the office of director. Of Mr Georgiev there is no information at all. The absence of any indication that any of the three took an active executive and directorial role in the running of the Company while holding the office of director *de iure* lends compelling support to the conclusion drawn from the evidence that the only person in active control of the Company and effectively running its administration, finances and direction during the times when the other three were in office as directors *de iure* was the defender.

[143] A further significant feature is that there was no evidence that the defender acted on or under the instruction of any of those three directors or that he indicated to any third party that he had to secure any such instruction before making any decision on behalf of the Company. All the indications are that he acted consistently and throughout on his own

initiative and considered himself to have the authority to do that. This feature adds further and strong support to that conclusion.

[144] The Company had the right to make payments by cheque on its RBS bank account. The defender was an authorised user of the Company's bank account from 17 November 2015 which was after he had resigned as a director and thus could make use of the digital and online banking facilities. That authority, according to the evidence, extended to signing cheques but only until about January 2018 which would broadly coincide with the Undertaking coming into force. Despite that Mr Clark reckoned that the defender did in fact do that. In support of the pursuer's submission that it was possible to conclude that the defender did in fact sign Company cheques while subject to the Undertaking, there were the ten cheques forwarded to the IS by RBS. All were dated in 2018. Mr Gould said that they carried a signature that was consistent with the defender's signature in the Application Form for banking facilities in 2015 and in the Director's Questionnaire that the defender completed and returned to the IS. Mr Gould's caution in his answer was understandable. He did not profess any skill in the study of holograph signatures. While it might be said that there is a basic similarity in certain features amongst the signatures in all those documents I am not satisfied that I am able to conclude that it is more likely than not that any or all of the ten cheques which were presented to prove that the defender signed them were signed by the same hand and that the hand was that of the defender. The defender's wife was authorised to sign cheques and known to have done that. No evidence was presented as to what her holograph signature was understood to be and how its distinctive features compared with or were in contrast to those of the defender's holograph signature which might have provided support for the pursuer's position.

[145] To the foregoing account of the defender's conduct within the Company must be added the opinions of those who did business with the Company. That is Mr Robertson, Mr Brechin and the Company's Landlords.

[146] Mr Robertson as a director of MMG was party to how the Company conducted its business and the defender's role in it between 2015 and June 2018. His direct involvement was limited; he met the defender only once after he had resigned as a director. Mr Clark gave the majority of the information to prepare the Company's accounts. The defender's involvement in that was that he tried to embellish what the bookkeeper had given. I take from this that the defender wished to assert some influence over the form and content of the accounts. Mr Robertson wrote the letter dated 11 January 2022 which he sent to the IS. Its purpose was to deal with MMG's relationship with the Company. He confirmed that its terms were correct to his knowledge and belief. In it he had said that the defender was the main contact at the Company and that he was a director effectively running the Company. That description covered a period of time that started in 2013 and extended as far as the first five months or so of the life of the Undertaking.

[147] Mr Brechin gave evidence from the standpoint of an outsider whose company had provided services to the Company during the time when the Undertaking was in force. Under reference to the Creditor Questionnaire from the IS regarding the Company and which was dated and signed by him on 13 August 2020 whose answers he confirmed were true and accurate. TSAL traded with the Company during the months of October 2018 to April 2019 which was entirely within the period of time that the Undertaking was in force. The defender had set up the account with TSAL by filling up a form and signing it. He expected the defender would be able to deal with any problem involving the Company. He said that the defender ran the Company. He knew that the defender was the director

because he saw him going to work at the Company's Aberdeen premises every day in one of a succession of private vehicles. The staff of TSAL knew that the defender was the director of the Company. The defender never said to him that he needed to obtain authority from anyone else to deal with a business problem or that he had limited authority to deal with business problems. When the Company ceased trading Mr Brechin took steps to recover that sum owed to TLAS which included sending emails and phoning it. Mr Brechin tried to discuss the sum owed with the defender but he never replied to him.

[148] The Landlords confirmed to the IS that the only person they had dealings with regarding the obligations of the Lease was the defender. In particular he and an officer of the agents of the landlords conducted an email correspondence between 5 September 2018 and 1 November 2018 regarding overdue payments of rent and service charges owed by the Company. In the email dated 5 September 2018 the defender stated that the Company would pay £7,500 pounds plus service charge that day and the rest by the end of that week. In the email dated 1 November 2018 he stated that the Company would empty Unit 4 within the next 3 to 4 weeks so that it could be put back on the market. At all points in time it was the defender who was engaged in this correspondence. I accept this evidence, conveyed by Mr Gould. The only director *de iure* then in office was the defender's stepson. He is never mentioned as taking any part in these discussions and negotiations. They are of a kind that could be expected to demand the attention and authority of a director. What I take from the defender's conduct with the landlords' agents is that he assumed the responsibility of being in charge of contacts with the landlord's agents and matters concerning the lease of the premises. He was thereby concerned not only with a significant aspect of the continuation of the business and management of the Company, he was acting as if he were a director of the Company.

[149] These three sources of evidence support from outside the Company the impression the defender gave regarding the extent of his control of it and of its day to day business. It was in real terms total to the exclusion of the other directors *de iure*.

[150] The defender described himself as being a director of the Company and held himself out as such in the course of his various dealings with HMRC. HMRC made a VAT related visit to the Company's premises on 9 November 2018. That was slightly more than ten months after the Undertaking came into force. As recorded in his notebook by the HMRC officer who attended it the defender stated during it that he: (1) was in overall control of the day-to-day operation of the Company; (2) had sole access to the Sage accounting software used by the Company and was responsible for the information recorded within that system; (3) had sole access to the Government Gateway used when submitting VAT returns; (4) was responsible for submitting those returns; and (5) was a signatory to the Company's bank account. I accept the reliability of that record. Furthermore he held himself out to HMRC regarding the Company's debt to HMRC as having the authority to act on behalf of the Company and to bind it in furtherance of his decisions, a status expected of a director. HMRC visited the Company's premises on 23 January 2018, 20 March 2018, 11 June 2018, 1 October 2018 and 23 October 2018 and spoke solely with the defender about the HMRC debt. On 10 May and 1 October 2018 he agreed Time to Pay agreements with HMRC for the Company's debt. The defender alone telephoned HMRC on 10 May 2018, 11 May 2018, 30 May 2018 and 15 October 2018 and spoke about the Company's debt.

[151] Mr Clark characterised the defender's range of duties and responsibilities within and for the Company as being that of an administration manager or general manager. That does not do proper justice to their nature, extent and scope; to what he actually did. The evidence, assessed objectively and in the round, supports the conclusion that from

about 2016 and until 24 May 2019 he exercised control over the business of the Company and its administration and finances and had the opportunity to do that on a daily basis. That meant that he was exercising a function that had him being more than a part of the governance system of the Company. He was the governance system of the Company. I hold that conclusion to be proved.

[152] Building on that conclusion I also hold it proved that his relationship with the Company from about 2016 onwards was that he assumed the status and function of a director and thereby assumed the responsibilities of that office as if he were a director *de iure*. Accordingly I hold on the evidence that throughout that period of years he assumed the status of director *de facto*. That assumption of status continued to exist after the Undertaking came into force because it did not really change in that latter period which ended with the liquidation of the Company.

[153] For all the foregoing reasons I answer the second issue in the affirmative.

Issue 3: If the answer to issue 2 is in the affirmative, did the matters relied upon by the pursuer amount to misconduct under the Act on the part of the defender *qua* director *de facto* during that period of time under and in terms of section 12C of and Schedule 1 to the Act?

[154] In answering this issue I found upon the provisions of sections 6 and 12C of the Act and Schedule 1 to it and adopt the guidance on how to apply them given in the three cases founded upon by counsel; *Sevenoaks*, *Grayan Building Services* and *Reza*.

[155] Whether the conduct of the defender renders him unfit to be concerned in the management of a company is a question of fact. The fact relied upon by the pursuer is that the defender had by his conduct assumed the office of director *de facto* and had carried out

directorship functions within and for the Company while subject to the Undertaking and until the date of its liquidation and had done all that without having first applied to the court for leave for the purposes of section 1(1)(a) of the Act and having been granted that leave. That leave includes being a director of a company or in any way, whether directly or indirectly, being concerned or indirectly taking part in the management of a company.

[156] For all the reasons discussed in answering issue 2 above I concluded that the defender had by his conduct assumed the office of director *de facto* of the Company and it is a matter of admission that he did not seek and obtain the prior leave of the court to hold that office. By assuming that office without leave he acted in contravention of the Undertaking. That brought him within the scope of section 13 of the Act and therefore made him liable to the criminal penalties laid down in that section which consist of imprisonment or a fine, or both.

[157] The conduct of the defender in assuming the office of director without leave of the court and acting in furtherance of that office throughout the almost 17 months' period of time that he was subject to the Undertaking and the Company was still engaged in the conduct of its business, viewed cumulatively, demonstrates a manifest, persistent and egregious departure from the standards of commercial probity and competence appropriate for persons fit to be directors of companies. He was thereby in breach of the demands of fitness required by section 6(1)(b) of the Act *et separatim* of matters 6 and 7 of Schedule 1 to the Act. There are no extenuating circumstances. The defender received legal advice on what the Undertaking demanded of him. He thereby knew that he was barred from holding the office of director. His conduct demonstrates that he disregarded its business restrictions despite having received that advice. His conduct amounts to misconduct in office.

[158] I answer the third issue in the affirmative.

Issue 4: If the answer to issue 3 in the affirmative, did the conduct of the defender as a director *de facto* of the Company make him unfit to be concerned in the management of a company as directed by subsection 6(1)(b) of the Act?

[159] It follows from my answer to the third issue that his misconduct amounts to an unfitness to be concerned in the management of a company as directed by subsection 6(1(b) of the Act. Accordingly I answer the fourth issue in the affirmative.

Issue 5: If the answer to issue 4 is in the affirmative, what period of mandatory disqualification by way of a disqualification order should the court pass on the defender under subsections 6(1) and (4) of the Act?

[160] Having answered the preceding four issues in the affirmative subsection 6(1) imposes on the court a mandatory duty to make a disqualification order against the defender. Subsection 6(4) directs that the minimum period of disqualification is 2 years and the maximum period is 15 years. The decision of the Court of Appeal in *Sevenoaks* remains the leading authority on the question of the appropriate period of disqualification and lays down guidelines for the period of disqualification. It falls into one of three brackets: the minimum bracket of 2 to 5 years where the case is, relatively, not very serious; the middle bracket for from 6 to 10 years for serious cases which do not merit the top bracket; and the top bracket for particularly serious cases which may include cases where a director who has already had one period of disqualification imposed on him falls to be disqualified yet again. The length of the disqualification period is a matter for the discretion of the court. In determining the appropriate period of disqualification it must reflect the gravity of the offence and the court may take into account, if available, *inter alia* evidence of the general

conduct in the discharge of the office of director, his age and whether he has admitted the misconduct. I also note the guidance given by Mithani that a person such as the defender who is found to be unfit for having acted in the management of a company in breach of an existing disqualification may expect to be disqualified for a lengthy period and that repeat disqualification will usually warrant the making of a disqualification order in the top bracket. I adopt that guidance.

[161] The defender's unfitness is his conduct within and on behalf of the Company during the period of time when he was subject to the Undertaking and the Company was still conducting business. I place weight upon the facts that he conducted himself as director *de facto* throughout that relevant period of 17 months or so, and did that knowing that the Undertaking prevented him from doing that unless he had secured the prior leave of the court which he had not done. That I assess is a significant aggravating feature. It was a blatant and knowing disregard for the sanction imposed in the Undertaking for his previous misconduct. His general conduct as director during that period of months was spoken to by Mr Clark and Mr Brechin. Mr Clark said that the Aberdeen depot was well run by the defender. Mr Brechin saw another side of him when he sought payment from the Company because he failed to make contact with him. The defender is 50 years of age. He did not admit his misconduct which is why the cause proceeded to proof. Beyond that there is no information that is relevant to the present task because he did not give evidence.

[162] Throughout the relevant period of some seventeen months or so the defender acted in breach of the Undertaking. That takes him into the top bracket. Within that bracket the period of disqualification under section 6 of the Act requested by the pursuer is 12 years. Having regard to what he did and the period of time over which he did it, I am satisfied that the period of time sought is appropriate, reasonable and proportionate. It is consistent with

the level of disqualification that has been granted in other cases where an individual has acted as a director in breach of a disqualification undertaking. Accordingly I order that the period of disqualification be 12 years. The period imposed will begin at the end of the period of 21 days beginning with the date of my interlocutor by virtue of section 1(2) of the Act. That is how I answer the fifth issue.

Expenses

[163] The parties agreed that expenses should follow success and therefore there was no need for a hearing on expenses. The pursuer has been entirely successful. I award him the expenses of process as the same may be taxed. There was no motion made for sanction for the employment of counsel for any aspect of the cause.

Conclusion

[164] My conclusion on the application is given in my interlocutor.