



Neutral Citation Number: [2020] EWHC 2749 (Ch)

Case No. 28 of 2019 (B00HD697)

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN LEEDS
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF BM ELECTRICAL SOLUTIONS LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BEFORE: DEPUTY HIGH COURT JUDGE LANCE ASHWORTH QC (sitting as a Judge of
the High Court)

BETWEEN:

(1) **BM ELECTRICAL SOLUTIONS LIMITED**
(IN LIQUIDATION)

(2) **JAMES RICHARD DUCKWORTH**
(Liquidator of BM Electrical Solutions Limited)

Applicants

- and -

MICHAEL EDWARD BELCHER

Respondent

Matthew Maddison (instructed by **Clarke Mairs LLP**) for the **Applicants**

The **Respondent** in person

Hearing date: 14th October 2020

Judgment Handed Down: 14th October 2020

JUDGMENT

Introduction

1. This is judgment on the application dated 4th October, 2018 brought by BM Electrical Solutions Ltd (“**the Company**”) and Mr James Duckworth, its liquidator, against Michael Belcher, a director of the Company from its incorporation on 21st January 2011 until it entered into liquidation on 3rd August 2015, seeking declarations as to sums said to be due from Mr Belcher to the Company.
2. This matter was heard as a hybrid hearing. Mr Matthew Maddison of Counsel has appeared remotely for the Company and the Liquidator, who was also remote. Mr Belcher has appeared in person in Court. This led to an early difficulty in that Mr Belcher did not have a computer with him and therefore did not have access to the electronic bundle. I am very grateful to the Court staff who lent Mr Belcher a laptop so that he could access the bundle. In the future, care will need to be taken that when one of the parties is appearing in person, he or she is advised by the represented party before coming to court of the need to have a laptop with him or her at court and in the event that is not possible that arrangements are made for access to a laptop for his or her use.

Background

3. The Company was an electrical contractor. Initially, there were 2 directors, the other being Mr Stephen Mattock. The 2 directors fell out and Mr Mattock left the business in August 2012 formally resigning on 11th April, 2013, leaving Mr Belcher as the sole director.
4. The Company only ever filed one set of accounts, those for the period to 31st January, 2012, filed on 11th August 2012. These disclosed a net asset position of £6,465 of which

the profit and loss account was £6,365. At that point, the Company was profitable but not to any great extent. No dividends were declared for that period.

5. The Company maintained loan accounts for both directors. As at 31st January, 2012 both directors' loan accounts were in credit, Mr Mattock's in the sum of £10,916.55 and Mr Belcher's in the sum of £4,215.00.
6. According to a print out of Mr Belcher's P14 summary, his gross pay for 2012/2013 was £12,600 (equivalent to £11,702 net).
7. The Company ran into difficulties firstly as a result of a significant bad debt from a customer introduced by Mr Mattock and secondly because of issues with HMRC related to tax alleged to be due, including under the Construction Industry Scheme ("CIS"). Mr Belcher says that the sums claimed by HMRC do not give credit for around £147,000 that has been deducted from contractors and clients in respect of CIS, nor for monies paid to HMRC by Bibby's factoring who, he says, paid monies over to HMRC between April, 2013 and July 2014.
8. HMRC presented a winding up petition against the Company, which led to the Company being wound up on 3rd August, 2015. Mr Duckworth was appointed as liquidator of the Company on 22nd January 2016.

The Liquidator's investigation and analysis

9. As set out above, the Company filed no accounts for any period after 31st January, 2012. The Liquidator has not recovered any books and records for the Company explaining its financial dealings.
10. The Liquidator has, however, reviewed the Company's bank statements for the period from 31st January, 2012 until liquidation. His analysis (at pages 16 to 46 of the bundle) has identified:
 - (a) bank transfers to Mr Belcher of £221,034.94;
 - (b) cash withdrawals of £38,122.04;
 - (c) payments to an online betting company, Bet365, of £10,242;
 - (d) miscellaneous payments for restaurants, gambling and football season tickets of £8,447.53.

11. After allowing for the credit balance of £4,215.00 as at 31st January 2012, the Liquidator says that Mr Belcher has had the sum of £273,631.51 from the Company without explanation. He says that further credit should be given to Mr Belcher for salary at the net rate of £11,702 per annum, that is to say that the Liquidator has assumed that the sums received by Mr Belcher from the Company include his salary at that rate. Over the 3½ year period this equates to £40,957.00.
12. The balance of the monies which Mr Belcher has had from the Company comes to £232,674.51.

The Proceedings

13. The Liquidator says that these sums should be treated as loans by the Company to Mr Belcher, which he should be required to repay now, alternatively that Mr Belcher was in breach of his fiduciary duty in allowing the loan account to become overdrawn by that sum, and in the further alternative, seeks a declaration that Mr Belcher holds this sum on trust for the Company and must now account for the sum or its traceable proceeds. He did not in the Application Notice assert that these are unlawful distributions to Mr Belcher in his capacity as a member of the Company.
14. The Liquidator issued this application on 4th October, 2018 supported by a witness statement from the Liquidator, which sets out the analysis above. In the witness statement, Mr Duckworth says that Mr Belcher has failed to provide any explanation or documentation to evidence the use of these monies by the Company and/or for its purposes. He says that there are no formal accounts or any proper accounting records. He records that the Liquidator's solicitors wrote a letter before action to Mr Belcher on 30th March, 2017 setting out the claims and that there has been no response from Mr Belcher. The Liquidator finally observes that he has had claims from creditors of £150,435.55. He does not say if he has adjudicated on them yet.

Mr Belcher's response

15. On 18th December, 2018 Mr Belcher filed a witness statement in answer, in which he refers to the bad debt of some £42,489.24 which caused financial difficulties for the Company and the consequent difficulties that arose between himself and Mr Mattock as a result.

16. Mr Belcher complains that he is hampered in his defence as he has no paperwork or records available, saying he had handed them over to “the insolvency agency”. Significantly, he goes on to say that he still has the server and computer with the Company’s accounts package on them, but that he has tried and cannot access them.
17. As to his salary, Mr Belcher explained that in a previous company he had been advised to take a very low salary and “*claim other monies as dividends as a tax saving which is common within a limited company structure*”. He understood that this was only possible if the Company was making a profit, which he says it did not in its first year (although according to its accounts, it did in fact make a small profit).
18. After the first year, he says that the Company was making a profit right up until the winding up but “*the problem was the cashflow and I could never recover from the bad debt*”. He says that he totally disagrees with the figures suggested by the Liquidator as being owed to the Company as he believes “*the monies should be recorded as dividends*”. He goes on to say that it is not unreasonable to assume a salary/dividends of approximately £70,000 per annum for running an electrical contractor such as the Company. He does not claim, in his witness statement, that he actually voted to pay himself this amount of money whether as salary or dividends.
19. As to the cash withdrawals of £38,122.04, he says this was done to pay for hotels and subsistence for employees. He had up to 6 employees working away from home and says that £20 a night was provided to them for subsistence, in addition to which sometimes employees had to pay for hotels in cash. He claims that up to £1,000 a month “*is totally acceptable and accountable.*” At the end of paragraph 6 of his witness statement he says “*once again this is logged on the accounts package*”.
20. As to the £8,477.53 charged to his card for restaurants, gambling and football tickets, he says that the restaurant costs and some hotel costs were for when he was working away from home. This seems to have included costs of entertaining clients for meals. He identifies one particular entry of Parkdean Holidays as being the cost of renting a caravan for employees to stay in, this having been cheaper than booking hotel rooms. He accepts that the purchase of football tickets was for personal use, although he did take clients on occasion, and also that he sponsored his son’s football team.

21. He accepts in his witness statement that the money spent on betting was “*totally unacceptable*”. These totalled £12,232.00 being a combination of monies spent with Bet365 and SkyBet, the latter being part of the monies charged to his card.
22. However, he claims in his witness statement that in the period after 31st January, 2012 he transferred back to the Company the sum of £55,514.00 in order to keep the Company trading.
23. Mr Belcher exhibited no documents to his witness statement in support of his claims.

Directions

24. By order dated 28th May 2019, District Judge Pema gave directions for disclosure by 5th July 2019 and further witness statements from Mr Belcher by 30th August 2019 and from the Liquidator by 27th September, 2019.
25. Mr Belcher did not serve any further witness statement. The Liquidator served a very short witness statement dated 26th September, 2019 in which he recorded that Mr Belcher had not provided any disclosure list or filed a witness statement. Other than that, there was nothing of any substance in that witness statement, the Liquidator not accepting that Mr Belcher had explained sufficiently any of the monies sought to be recovered. The Liquidator did not comment on Mr Belcher’s claims as to having the server and computer with the accounts package on them.
26. This matter was listed for trial on 19th December, 2019 but adjourned on Mr Belcher’s application and re-listed to come on today.

Witnesses

27. I have heard evidence today from the Liquidator and from Mr Belcher.
28. The Liquidator was only asked a few questions. He told me that he has not had any contact with Mr Belcher directly, save for one letter that he sent to Mr Belcher shortly after his appointment to which Mr Belcher did not respond. He said that he had not been offered access to the computer and server to which Mr Belcher had referred in his witness statement, saying that he thought that it would have been offered as part of the disclosure process which had been ordered to take place. Having said that, he went on to say that he

made no attempt to ask Mr Belcher for access to those items, having noted that they had been referred to in the witness statement. The reason why is that he read it as being inaccessible having been switched off for 3 years.

29. As to Mr Belcher, in my judgment he gave his evidence honestly and openly. He said that a number of his actions, both at the relevant time and subsequently in connection with the proceedings were as a result of naivety and/or stupidity. That is an assessment with which I agree. Mr Maddison did not seek to suggest to him that he was not telling the truth, in particular about the existence of the accounts software package and how he operated it.
30. In his evidence in chief, he firstly clarified his witness statement and his skeleton argument in respect of credits which he thought had not been applied by the Liquidator in undertaking his calculations. He accepted that the Liquidator had credited the sum of £55,514.00 referred to above and had also credited payments received by the Company from Bet365. Accordingly, he did not take issue with the Liquidator's calculations.
31. He produced an analysis from the bank statements of payments received from the Company's customers, in order to seek to demonstrate that the monies alleged to be owed to HMRC cannot have been owed. While he clearly feels strongly that HMRC have overcharged the Company and that the debt is not owing, the Company did not challenge the winding up petition presented by HMRC. The Liquidator has not said whether he has adjudicated on the claim by HMRC. However, this is not a matter I ultimately need to rule on and I say no more about it at this stage.
32. In cross-examination Mr Belcher expanded on his witness statement by explaining the basis on which the various categories of payments were made. By November, 2012 the almost daily payments to Bet365 had ceased. Payments made directly to him increased after Mr Mattock left the business in August 2012. What followed was then a pattern of a number of payments being made to Mr Belcher on a daily basis, for example on 12th November 2012 some 9 payments were made to him totalling £2,500.00. The payments to him were all remuneration for his services, not payments made to him for him then to make payments for the Company's purposes.

33. He told me that the payments he received directly were made after he had considered the profitability of the Company, which he was able to do from the software operated by the Company which allowed him to see that every contract was profitable. A small proportion of the sums paid to him were his salary, which was set at £12,600 gross per year and the rest of the payments were entered onto the accounting software package under a code for “dividends”. This system was adopted because some years previously in a prior company in which he had been involved, an accountant had said that this was the most tax efficient manner to be paid. In that previous company, he said that there would be a monthly meeting of the directors of the company who would consider the profitability and then record in writing the payment of sums to themselves (it was not clear if this was a formal resolution and if so, whether it was being passed by the directors or by the shareholders, there being a coincidence of identity between them). At the year end, the company’s accountants would review the payments to confirm that there were sufficient profits to cover these “dividend” payments.
34. Mr Belcher said that he and Mr Mattock followed this system for the first year of trading of the Company, making payments to themselves in excess of their salaries, and entering these into the software under the “dividends” code, producing these pieces of paper recording what had happened (although none of them have been produced in evidence by either side). However, by the time the accounts for the first period of trading until 31st January 2012 were being prepared, the Company had suffered the large bad debt of some £42,489.24. They were advised by their accountants, Lambert, Roper and Horsfield Ltd, that they could either write off the bad debt meaning that there would not be sufficient profits to cover the dividends or they could decide not to write it off and produce profits which would cover the dividends. They chose to write that bad debt off, reducing the profit to a very small sum. Accordingly, the “dividends” were then treated as directors’ loans.
35. After that first year and after Mr Mattock left the business, Mr Belcher continued in the same way with two significant differences. The first is that he no longer had monthly meetings (as he felt he could not meet with himself) nor did he produce the pieces of paper recording what he had done. There was no paperwork kept by him. The second and more important is that he did not cause any further accounts to be prepared by the accountants for any period after 31st January 2012. Accordingly, there was no end of year

reconciliation where the accountant would advise whether there were sufficient monies to cover the sums recorded in the accounts software package as “dividends”. Mr Belcher honestly told me that this was his choice not to do this, saying this was down to his naivety or stupidity. He says he could have gone to the accountants to get it all regularised, but he chose not to do so.

36. Mr Belcher’s justification for making these payments was that there was nothing wrong with this, he could not be expected to live off £11,702, his net salary, and in effect that his tasks deserved proper remuneration.

37. While he said that he did not regard them as loans to him as a director at the time, he accepted with the benefit of hindsight that was the correct way to classify them, so that these payments entered under the “dividend” code were effectively a loan, which would be written off at the end of the year by formal declaration of dividend.

38. As to the cash withdrawals, Mr Belcher repeated that these were mainly in respect of payments to sub-contractors by way of subsistence while working away at the rate of £20 a night and on occasion for accommodation, in particular when they were staying in bed and breakfast accommodation which did not have card facilities and would ask to be paid in cash. He says that every cash withdrawal was entered on the accounts software package under the appropriate code and assigned to the job to which it related.

39. He identified one larger payment on 29th June 2012 in the sum of £8,540.10 which was withdrawn on his debit card, which was a cash payment to particular sub-contractors. There had, he said, been a problem with a payment to these sub-contractors and he therefore got the authority of the bank to withdraw this sum in cash which he then paid into his bank account, making payment to the sub-contractors out of his own bank account. He said he had only just noticed this in the course of his preparation for this hearing and therefore had not mentioned it in his witness statement. Although this explanation came late in the day, Mr Maddison did not suggest to him that this was a made up explanation.

40. He said that none of the cash payments were made to himself, making the point that given the number and frequency of the bank transfers he was making to himself, he would not have needed to make cash withdrawals in addition for his own purposes.

41. As to the miscellaneous payments, Mr Belcher accepted that those for Sky Bet and the Leeds United season tickets should not have been charged to the Company. The balance of £5,737.53, however, he said was in respect of hotel and restaurant costs while he was working away from home and therefore were for the purposes of the Company.

The relevant law

42. The obligations on Mr Belcher as a director of the Company are set out in sections 171-177 of the Companies Act 2006. These are well known and include the obligation to act for proper purposes, in the Company's best interests, to have regard to the interests of creditors in certain circumstances (as explained by the Court of Appeal in ***BTI v. Sequana*** [2019] EWCA Civ 112) and to promote the success of the Company, while avoiding conflicts of interest.

43. As to the declaring and payment of dividends, the requirements are comprehensively set out in Part 23 of the Companies Act 2006. A company may only pay dividends out of profits available for the purpose (section 830), and whether a company has sufficient profits is to be determined by reference to profits, losses, assets and liabilities "*as stated in the relevant accounts*" (section 836). Those relevant accounts are the last annual accounts or interim accounts if the distribution would otherwise contravene Part 23. Sections 837 and 838 set out requirements to be complied with in the event of use of the last relevant accounts and interim accounts respectively. I do not set out those in detail in this judgment as it has not been asserted that either were used in this case.

44. Section 847 of the Companies Act 2006 sets out the consequences of the making of an unlawful distribution as follows:

"(1) This section applies where a distribution, or part of one, made by a company to one of its members is made in contravention of this Part

(2) If at the time of the distribution the member knows or has reasonable grounds for believing that it is so made, he is liable—

(a) to repay it (or that part of it, as the case may be) to the company, or

(b) in the case of a distribution made otherwise than in cash, to pay the company a sum equal to the value of the distribution (or part) at that time.

(3) This is without prejudice to any obligation imposed apart from this section on a member of a company to repay a distribution unlawfully made to him."

45. For a dividend to become payable it must be declared. Once it is declared it becomes a debt due by the company to the member. However, unless formally declared there is no liability on the company to pay it (*Bond v. Barrow Hermatite Steel Co.* [1902] 1 Ch 353 at 362).
46. Accordingly, if Mr Belcher cannot point to a dividend having actually been declared, it is not open to him to say now that payments he has received should be treated as having been declared as dividends. However, even if he could do so, he would have to go on to show that any such dividend was lawfully declared in accordance with Part 23 of the Companies Act 2006 by reference to the last relevant accounts or some interim accounts. If he cannot do that, any distribution to him would be unlawful and he would be liable to pay it back to the Company.
47. If there was no distribution, the monies paid to Mr Belcher must have been paid as a loan and, as such, must have been repayable to the Company. It is on this basis that the Liquidator seeks to categorise the payments made to Mr Belcher.
48. On the question of cash payments made by the Company, Mr Maddison has taken me to the decision of Norris J in *Toone v Robbins* [2018] EWHC 569 in particular at paragraph [37] where he cited with approval the summary of the relevant law in respect of the burden of proving that payments were for proper company purposes found at paragraph [28] of the decision of Lesley Anderson QC in *Re Idessa (UK) Ltd* [2011] EWHC 804 (Ch):

“I am satisfied that whether it is to be viewed strictly as a shifting of the evidential burden or simply an example of the well-settled principle that a fiduciary is obliged to account for his dealings with the trust estate that [Counsel] is correct to say that once the liquidator proves the relevant payment has been made the evidential burden is on the Respondents to explain the transactions in question. Depending on the other evidence, it may be that the absence of a satisfactory explanation drives the Court to conclude that there was no proper justification for the payment. However, it seems to me to be a step too far for [Counsel] to say that, absent such an explanation, in all cases the default position is liability for the Respondent directors. In some cases, despite the absence of any adequate explanation, it may be clear from the other evidence that the payment was one which was made in good faith and for proper company purposes” (emphasis added)

49. In *Toone*, Norris J went on to say at [38]:

“Once the Chief Registrar had decided (as he did) that in the absence of clear evidence one way or the other he had to determine the issue by reference to the burden of proof then (there being no dispute that the company had made the payments to the Directors) the benefit of any doubt had to be given to the Joint Liquidators (not to the recipients of the company's money). This is entirely in accordance with principle. Directors who receive money from the company cannot be heard to say:

'We have received company money: but our record keeping is so bad that the basis upon which we received it is unclear. So by reason of our defaults we ask you to assume in our favour that we took the money lawfully'.” (emphasis added)

50. The consequence of these authorities is that in so far as money has been paid to Mr Belcher personally which he cannot show has been made in good faith and for the proper purposes of the Company, he will be in breach of his obligations as a director of the Company and liable to repay them to the Company.

Findings

51. As to the bank transfers to Mr Belcher of £221,034.94, Mr Belcher has sought to justify these as payments of remuneration to himself, which should be treated as a salary and/or dividends of approximately £70,000 per annum. However, he does not assert that there was ever actually a resolution that he should receive remuneration at this level nor that the Company did in fact declare dividends in his favour.

52. There is no documentary evidence demonstrating that any part of these monies received was treated in the Company books and records as salary. The only evidence before me is of the P14 demonstrating a gross salary for 2012/2013 of £12,600 (equivalent to £11,702 net). This covers the period until 5th April 2013. He has not suggested that his salary increased after this time. The Liquidator accepts that he should give credit of £40,957.00 in respect of the net salary that Mr Belcher was entitled to for the period until liquidation.

53. Accordingly, the balance of £180,077.94 is the sum which Mr Belcher says he paid to himself and ascribed to the “dividend” code in the accounts software package.

54. In my judgment, the correct treatment of these sums is that they were loans made to Mr Belcher in the expectation that there would be sufficient profits each year to clear them off. While Mr Belcher ultimately accepted this, I do not make this finding on the basis of

that concession but rather because it is the correct treatment of the sums. I accept that he made these payments having considered the information that he had available to him as to the apparent profitability of the Company at the time the payments were made. I am unable, and do not need, to reach a conclusion as to whether the Company was actually profitable or as profitable as Mr Belcher thought at the time, because of the issues with what was or was not due to HMRC.

55. However, Mr Belcher did not take any steps to have accounts drawn up after 31st January 2012 and therefore never got any input into whether these sums could actually be cleared off at year end by the formal declaration of a dividend, let alone declaring a dividend properly. It may be that they could have been so cleared and that there could have been a formal declaration of a dividend in compliance with Part 23 of the Companies Act 2006. If that had happened, these payments would not be subject to challenge by the Liquidator. As it is, there was no such declaration of a dividend with the consequence that the loans were not written off.
56. An alternative route to the same conclusion would be that if these were not loans, but were distributions, they were not lawful because the formalities in Part 23 of the Companies Act 2006 were not complied with. This would mean that Mr Belcher is obliged to pay these sums back to the Company under section 847 of the Companies Act 2006 as the member receiving payment, knowing or having reasonable grounds for believing that the payments had been made in breach of Part 23. Mr Belcher's knowledge of these matters as a director would apply equally to his position as a member.
57. This is not the pleaded claim by the Company and Liquidator in the Application Notice. I do not criticise the Liquidator in this respect as it was only in the course of Mr Belcher's oral evidence that it became clear what he had actually done, this not having been foreshadowed in any detail in his witness statement and he having failed to file a fuller witness statement in accordance with District Judge Pema's order.
58. Accordingly, had it been necessary to do so, I would have granted the Company and Liquidator permission to amend even at this late stage to add a claim under section 847 of the Companies Act 2006 against Mr Belcher as a member and to add to the claim for misfeasance an alternative that Mr Belcher breached his fiduciary duty as a director in

permitting these payments to be made and I would have found for the Company and Liquidator on these alternative bases.

59. As to the cash withdrawals, Mr Maddison on behalf of the Company and Liquidator says that the Liquidator has established that these cash withdrawals were made and that they were received by Mr Belcher, matters which Mr Belcher accepts. Accordingly, Mr Maddison says the burden shifts to Mr Belcher to explain the transactions in question. He says that Mr Belcher has not provided such an explanation and his oral testimony as to the purpose of these withdrawals is not sufficient. There is no clear evidence, he says, one way or the other and the benefit of the doubt has to be given to the Liquidator and not to Mr Belcher.
60. I am unable to accept the submissions as to Mr Belcher not having explained the transactions. He has given clear evidence why the withdrawals were made i.e. to pay sub-contractors subsistence and accommodation costs and, in one instance, to make a substantial payment to a sub-contractor where there had been a problem with payment of his invoice. His evidence that they were all properly recorded on the accounts software package has not been challenged by Mr Maddison, quite properly given that no one has accessed the software.
61. I accept that Mr Belcher could have made greater efforts to provide the Liquidator with access to the computer and its contents and that he did not comply with the disclosure order which he should have done. However, the Liquidator was on notice from Mr Belcher's first witness statement that he claimed that each of these payments was logged onto the accounts software package at the time, but he chose not to challenge this by seeking access for himself to the computer and software package.
62. Accordingly, notwithstanding that there is no documentary evidence to support Mr Belcher's position, which in my judgment is because the evidence is on the computer which Mr Belcher has been unable to access, I accept that Mr Belcher has explained the transactions satisfactorily. This is not a case where there is no evidence either way, so that it comes down to the benefit of the doubt.
63. As to the balance of £5,737.50 of the miscellaneous payments, Mr Maddison has realistically accepted that they follow the cash withdrawals in that if I accept Mr

Belcher's evidence on those (which I have done) it will follow that I accept his evidence on the balance of the miscellaneous payments. I do so. These were payments made in good faith for the Company's purposes.

64. The same cannot be, and is not, said by Mr Belcher in respect of the payments to Bet 365, Sky Bet and Leeds United. He accepts that he will have to account for those. They total £12,952.03.

65. Accordingly, the sums outstanding of Mr Belcher's loan account amount to £193,029.97 less £4,215.00 which was the credit as at 31st January, 2012. He must repay that sum to the Company as a debt. Alternatively, he is liable for breach of fiduciary duty in permitting the loan account to become outstanding in the aforesaid sum and must pay equitable compensation to the Company in the said amount.

66. I will hear further submissions on costs and interest.