



Neutral Citation Number: [2023] EWHC 182 (Ch)

Case No: CR-2022-001103

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST

In The Matter Of VICE LIMITED
And In The Matter Of THE COMPANY DIRECTORS DISQUALIFICATION ACT
1986

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

Date: 09/02/2023

Before :

I.C.C. JUDGE JONES

Between :

FRANCIS OLUWAFISAYO FALODUN

Applicant

and

THE SECRETARY OF STATE FOR BUSINESS, ENERGY

AND INDUSTRIAL STRATEGY

Respondent

Mr Zachary Kell (instructed by FWJ Legal Limited) for the Applicant
Mr Thomas Cockburn (instructed by Legal Services, The Insolvency Service) for the
Respondent

Hearing dates: 19 October and 21 December 2022

Approved Judgment

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

.....09/02/23.....
I.C.C. JUDGE JONES

I.C.C. Judge Jones:

A) Introduction

1. This application for permission to act as a director of VICE Limited despite disqualification by undertaking was last before me on 19 October 2022. I identified a number of concerns and adjourned it for further evidence, whilst continuing the interim permission previously granted by Chief ICC Judge Briggs on 13 April 2022. I reserved judgment on 21 December 2022 in particular to consider further concerns that arose from the evidence both in terms of non-disclosure and deficiencies.
2. Mr Falodun's disqualification began on 19 April 2022 as a result of an undertaking given by him on 28 March 2022. It ends on 18 April 2027. He accepted as grounds of unfitness ("the Grounds") that he had failed to ensure Switch Leisure Limited ("Switch") maintained and/or preserved adequate accounting records or alternatively that he had failed to deliver them up. He did so in the context of accepting (amongst other facts) that Switch at the time of its liquidation only had assets valued at £4,000, whilst it had liabilities of £837,487.71. The key particulars of the grounds of unfitness ("the Particulars") accepted for the purposes of the disqualification undertaking that resulted from his conduct as a director of Switch Leisure Limited were (in summary):
 - a) The absence of till receipts, a cash book or other sales records to verify payments to Switch totalling £2,875,461.
 - b) The absence of purchase invoices or expense receipts to determine whether payments out of £2,875,871 were for the company's benefit .
 - c) An absence of explanation for payments of £300,240.50 made from the bank account to three associated companies controlled by the same directors.
 - d) An absence of explanation for payments from 4 associated companies of £247,265.70.
 - e) An absence of explanation for why payments appear to have been made in respect of expenses incurred by associate companies.
 - f) An inability from records to determine the true amount due for the directors' loan accounts.
 - g) An inability from records to determine the true amount due, for VAT and PAYE.
 - h) The inability to determine the cause of the company's failure.

- i) The fact that company accountants were unable to prepare annual accounts due to insufficient records.
3. The reference as a ground to a failure to ensure Switch maintained adequate accounting records is to the obligation under *s. 386 of the Companies Act 2006* (“*s.386*”) to keep records that are sufficient to show and explain the company's transactions; to disclose with reasonable accuracy, at any time, the financial position of the company at that time; and to enable the directors to ensure that any accounts required to be prepared comply with the requirements of the Act. *S.386(3)* provides that accounting records must, in particular, contain: entries from day to day of all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place; and a record of the assets and liabilities of the company.
4. *Section 387 of the Companies Act 2006* provides every officer who is in default as a result of their company not complying with *s.386* commits a criminal offence subject to establishing the defence that they acted honestly and that the default was excusable in the circumstances in which the business was carried on.
5. Those provisions make clear not only the requirements for keeping adequate accounting records but also the seriousness of breach. Although the law will be referred to in more detail below, it is self-evident that an applicant asking for permission to act will need to present evidence to satisfy the court that the past misconduct will not repeat itself. Whilst each case turns on its own facts, that will usually require an explanation for the misconduct, repentance with understanding of what is needed to ensure such conduct does not reoccur, and also evidence to satisfy the court that the purposes of the disqualification undertaking/order will not be undermined by the grant of permission. Those purposes being the protection of the public and deterrence in regard to both the disqualified applicant and others who are or may become directors.

B) The Evidence

6. The evidence in this case started with an affidavit by Mr Falodun made in support of the application and for the purpose of obtaining interim relief. In that affidavit Mr Falodun describes himself as being 33 years old with a BA in accounting and international business management. He has been involved in a number of businesses since 2008. He attributes the insolvency of Switch to aggressive competition in a declining market with trading difficulties being contributed to by a high turnover of staff at the nightclub it operated in Preston. Switch was unable to attract external investment and its compulsory liquidation resulted specifically from its inability to pay very high business rates, with two years of rates having to be paid at the same time.
7. Mr Falodun refers to the Grounds and Particulars only to the extent of exhibiting the undertaking. There was no additional evidence providing an explanation or expressing repentance except to the extent that it can be implied from the evidence addressing the keeping of adequate accounting records by VICE Limited.

8. The affidavit principally addressed the business of VICE Limited. It was incorporated on 1 May 2020 with investment of £25,000, which he and the other shareholder contributed. Its business concerns specialist digital, personalised business cards and employs about 24 people. Its sole director was his brother, Charles Falodun. His role and focus is described as being “the front end” of the business, including marketing campaigns, whilst Mr Falodun is concerned with day to day marketing, client relations and running the day to day operations.
9. The current success of VICE Limited is set out in some detail. It has the “lion’s share” of a market in which there are only 22 other companies worldwide and, it is said that they do not operate to the same “spec or standard”. An impressive list of “blue chip” companies are included as its clients. That is obviously creditable, although, the greater the “success” of the new company the more important in practical terms becomes the need to have adequate accounting records and the greater the potential impact of any repeated unfit conduct.
10. Mr Falodun states that his original intention when giving the undertaking was to act as an employee only but he has not found that to be practical. His importance to the company results from his detailed involvement in and knowledge of the technology behind the product, and his day to day dealings with the clients including their procurement and marketing teams. He is the main point of contact for orders and negotiates prices with larger clients. He plays a central role “in establishing the company’s brand and reputation in the market ... running its day to day operations and developing the vital software ...”. He expands upon this further in particular at paragraphs 21-22 of the affidavit. He describes his role as “critical to the company’s ongoing immediate and future success”.
11. Mr Falodun’s role as described in particular at paragraphs 23-27 of the affidavit also places him at the centre of financial decisions, including the requirements for compliance with the s.386 duty. He states the accounting records and company documentation are up to date. There is an internal bookkeeper, Mr McDonald, who is described as a “part qualified chartered accountant”. He has some 19 years of experience which, on the face of it makes him a suitable person to be keeping the financial records subject to the supervision of the board. An email from Mr McDonald does not expressly specifically state that the accounting records and systems are adequate for the purposes of s.386 but it and its exhibits suggest they are and it is confirmed that all HMRC filings and payments are up to date.
12. The company’s finances are presented as being healthy. A balance sheet (without notes) as at 12 April 2022 records £538,092 net assets and is supported by a redacted bank statement credited in the sum of about £121,000, and by a spreadsheet showing gross sales of some £324,000 between 1 April 2021 and 5 April 2022. There are external accountants responsible for the year end accounts.
13. A second affidavit made 16 June 2022 was filed. It addresses the trading and record keeping of Switch in some more detail. In particular he attributes the record keeping problems to the failure of staff to properly record sales in the night club and to entertainers failing to provide invoices for cash payments or payment transfers. He says (in effect) that the three directors, including himself, did not address the problem in circumstances of each trying to do a bit of everything in the business and (as I imply it) not having structured tasks or delegated roles. Mr Falodun concludes by

stating that he has learnt his lesson but he has not sought to explain how the misconduct occurred in the context of what he did or did not do and why he did or did not do it. This will be analysed further within an overview below.

14. The second affidavit also refers in detail to the business of and his role in VICE Limited. He explains his importance as a founder who has worked with the developers of the product from the beginning, enabling him to pick up a detailed understanding of how it works. He concludes that he is “uniquely equipped to bring in and manage clients”. He has even developed new products by inventing and adapting new technology. All this is “necessary to keep ahead of the market” and his involvement means he has “a clear roadmap for future development of the client’s experience and [the company’s] product range”.
15. Mr Falodun’s day to day roles described within para 40 at “i” to “l” confirm he has an active involvement with the company’s financial record keeping. However, he also makes clear that the keeping of adequate accounting records is a team affair which also includes his brother. This is expanded upon at paragraphs 42-44. Mr Falodun intends being added to the bank mandate.
16. Attention is drawn (importantly) to the differences between the two companies and those involved, VICE Limited has a different type of business. As a result, Mr Falodun states that he now deals with third parties who will provide the required paper work. The importance of Mr McDonald, the book-keeper and now a director, is emphasised. He is described as a person acting as a check and balance, and a third pair of eyes. Although not specifically addressed in this affidavit, Mr McDonald’s appointment as a director on 8 June 2022 is plainly an important factor. Until then, as an employee he did not have the statutory duty to keep accounting records. The accounting records appear to be up to date, and the company trading successfully with debts being paid as they fall due. I also refer to paras 67-70 of the affidavit concerning statutory compliance. The company’s accountants have advisor access.
17. Mr Falodun also refers to the fact that he has offered conditions for the permission sought as set out in the terms of a draft order. He does not specifically address their implementation other than through general statements in paras 78-80. These conditions have developed and will be referred to later.
18. There is also an affidavit from Mr Charles Falodun. He sets out his background and his role within VICE Limited to date, to establish that he can be relied upon as a fit and proper person to be a director and that statutory duties have been complied with to date. He mentions the success of the company. He does not address the impact of his brother having permission to be a director or to any safeguards or controls to extinguish or minimise risk to the company and the public. He gives a far greater impression of his role concerning the keeping of accounting records than I gained from reading the evidence of Mr Falodun, and he does not address the extensive role his brother describes for himself. I refer to paragraphs 9-13 of the affidavit.
19. Mr McDonald also provided an affidavit. His curriculum vitae encourages reliance upon his involvement as a director in the context of ensuring the risk to the public will be extinguished or minimised. He describes his focus as entirely financial and record keeping. He is satisfied with the record keeping system and records that he prepares the VAT records, payroll, PAYE and NIC returns as well as processing bank

transactions (following explanation and then authorisation from Mr Charles Falodun). He prepares the monthly management accounts. He holds regular internal meetings with both brothers to discuss the financial position.

20. The Secretary of State's observations concerning the cumulative evidence in support of the application can most conveniently be identified from the skeleton argument of Mr Cockburn. It draws attention to the following observations to enable a "proper evaluation of the respective merits of granting or refusing Mr Falodun permission ...":
 - a) Mr McDonald was a bookkeeper for Switch for the period in which that company failed to maintain adequate records (see the email dated 13.04.22 at paragraph 3).
 - b) Mr McDonald failed to respond to a request made to him by the Secretary of State under section 7(4) of the CDDA 1986 (again, see the email dated 13.04.22 at paragraph 3).
 - c) Mr McDonald is now the bookkeeper for VICE (see paragraph 30 of Mr Falodun's first affidavit).
 - d) Mr McDonald does not address his involvement in Switch or the subsequent investigation into its affairs in his affidavit. Mr Falodun's solicitors have explained in correspondence that Mr McDonald cannot recall when he received the letter under section 7(4) of the CDDA 1986, but did not intentionally fail to respond.
21. It is a surprise to read of Mr McDonald's previous role with Switch bearing in mind there has been no mention of it by Mr Falodun despite the obvious importance of Mr McDonald to assure the court that the misconduct will not reoccur if permission is given for Mr Falodun to be a director of VICE Limited. In addition, the Particulars were not addressed in the second affidavit. At the beginning of the hearing on 19 October 2022, I raised my pre-reading impression that there was insufficient evidence from Mr Falodun concerning the reasons for the record keeping deficiencies identified by the Grounds and Particulars of undertaking. In addition that there was no information to demonstrate that he had taken any or any reasonable steps to resolve the problems incurred by the Official Receiver when carrying out statutory duties. Those matters were raised in the context of providing the opportunity for Mr Falodun to request an adjournment to enable him to provide additional evidence. The adjournment was applied for and granted.
22. A third affidavit from Mr Falodun was filed and served for the 21 December 2022 hearing explaining that it sought to address the court's concerns:
 - a) Mr Falodun describes his "focused" role as a director of Switch as being: to oversee general operations; chair weekly directors' management meetings; and to booking artists and celebrities. The regular discussions of finances would include reference to a review of a spreadsheet (saved and then used as a base precedent to be updated for the following week's) ("the Weekly Spreadsheet"). He refers to income being derived principally from credit card payments which

would be found within Switch's bank statements and to cash receipts being banked.

- b) He states that when Switch was in liquidation it was found that "there were almost never any receipts kept or stored for payments by customers to enter the nightclub and that even receipts that could have been automatically generated (or so ... the directors believed) by the till were not largely printed out and/or otherwise maintained by the staff and the system ... The tills were manual ... there was no electronic back up of the till receipts. The majority of invoices or receipts that were generated and retained by Switch were all stored on emails".
 - c) He describes the approach to record keeping as "haphazard", there being no centralised system. The accounting software was not used to track turnover, calculations being manual during board meetings.
 - d) There is reference to the use (lending) of their personal funds and the payment of their expenses with an observation that the "initial mix of funds ... further complicated the progress of keeping track of how Switch was doing financially and the supporting records".
 - e) Although the reason for the timing is unexplained, the directors sought to have Switch registered for VAT "immediately before [it] entered into liquidation".
 - f) He attributes the accounting record problems to a lack of commercial experience, it being the first attempt to run a high turnover company. He states that he "overestimated the involvement, responsibility and autonomy of [Switch's external accountants]".
 - g) It is stated that "all [Switch's] banking information, statements were delivered up ... [and] detailed summary of cash expenses incurred by staff ... and details of all known creditors ... everything that was available and retained by [Switch] as at the date of the liquidation ...".
23. The Secretary of State filed the affidavit that was prepared for the original disqualification proceedings to give the court a fuller picture of the circumstances of the misconduct that was in issue (both before and after the commencement of the liquidation). The potential problem for that evidence is that it has not been tested. Instead the parties reached agreement based upon the undertaking and the matters of unfitness accepted by Mr Falodun. However, those matters are the same as the Grounds and the Particulars. I therefore consider it right to have reviewed the evidence which led to the undertakings. Nevertheless, I will bear in mind that there is no evidence in answer before me and as a result will treat it as background information.
24. It is again most convenient to set out a summary from Mr Cockburn's skeleton argument (as renumbered) of the evidence within the third affidavit drawn attention to by the Secretary of State for the purpose of observations to be made in respect of this application:

(1) Mr Falodun did deliver up some limited records to the Official Receiver (see §31, 35 and 59 of the affidavit of Karen Maxwell [279-288]);

(2) Mr Falodun completed the Preliminary Information Questionnaire [335ff], attended and engaged with an interview with the Official Receiver on 16.05.19 [319ff], and responded to correspondence by which the Insolvency Service sought to ascertain what had happened to Switch's accounting records (see §31 to 40 of the affidavit of Karen Maxwell [279-283]);

(3) There was engagement with the Official Receiver to explain how cash takings were dealt with (see §35 of the affidavit of Karen Maxwell [285]). Mr Falodun was able to provide the headline figures for cash payments made each week from the cash takings [409]. The Official Receiver's difficulty was in verifying those figures in the absence of: a breakdown of how the figures were calculated; supporting documentation; or a corresponding record of cash takings;

(4) Some of the missing information and records related to transactions with other companies of which Mr Falodun was a director (see §71 to 78 of the affidavit of Karen Maxwell [292-295]). His failure to provide the documentation relating to transactions with those companies suggests that his failure to maintain adequate accounting records was not confined to his directorship of Switch. If those other companies had kept such records Mr Falodun would have been able to furnish the Official Receiver with them.

(5) Mr Falodun stated that Switch relied upon a bookkeeper (Mr McDonald) for accounting functions (see §21 and 23 of the affidavit of Karen Maxwell [276]) and that he expected the bookkeeper to have copies of the daily takings sheets (page 12 of 14 of the PreAdd [331]). There is still no explanation of what the bookkeeper's role was in the failure of record keeping (bearing in mind that he continues as a director of VICE).

(6) Mr Falodun explains at §10 of his third affidavit that the records of weekly income were used as a base precedent for use at the following week's board meeting [195]. It is understood that this is a reference to the spreadsheets being overwritten, which is why the historic records of takings are not available. It is observed that this does not explain why even the most recent version of the income spreadsheet was not provided. It does not appear that the Official Receiver was even provided with the template document.

25. The Secretary of State also drew attention to a short exchange of correspondence with Mr Falodun's solicitors in November and December 2022, by which the Secretary of State queried the consistency of Mr Falodun's third affidavit with the information he had previously provided to the Insolvency Service. Mr Falodun's solicitors responded.
26. I have also been shown the transcript of Mr Falodun's interview with the OR on 16 May 2019 which he has signed as true, and is subject to section 5 of the Perjury Act 1911. It is neither appropriate or necessary to review that statement within this judgment. The disqualification claim, its evidence in support and the undertaking sufficiently identify the missing information and misconduct.

C) Submissions

27. I will deal briefly with the submissions of counsel. That is for pragmatic reasons but I wish to make clear that I found both sets to be of great clarity. I have borne in mind all of the contents of their carefully drafted skeleton arguments and of their forceful oral submissions when reaching my decision, including their references to the law.
28. Mr Kell on behalf of Mr Falodun emphasised three key points:
 - a) Permission was required to protect the business and reputation of the successful VICE Limited both for its benefit and for the benefit of its other directors, its employees and other shareholders.

- b) The importance of Mr Falodun's role within VICE Limited could not be underestimated, and the need for him to be a director is overwhelming.
 - c) The draft order contains terms which require Mr Falodun, VICE Limited and others to act in such a way that the public will be as fully protected as possible and the policy of deterrent will not be undermined.
29. Mr Kell also addressed issues arising from the third affidavit. This included submitting that the evidence established full co-operation with the Official Receiver. Whilst there was no reference to the associated companies, they were not the subject of the disqualification claim. The final Weekly Spreadsheet, in other words the last updated weekly version, had not been available to deliver up to the Official Receiver. There is no underlying document. Whilst Mr Falodun or his witnesses did not mention Mr McDonald's role with Switch, the evidence concerning his qualifications and experience when combined with the protective terms of the draft order should satisfy the court that permission should be granted.
30. Mr Cockburn's submissions were made in the context of expressed neutrality. He addressed the observations of the Secretary of State previously referred. These need not be repeated other than to add his submission that "if Switch failed to meet its statutory obligations to maintain or preserve adequate accounting records notwithstanding the involvement of Mr McDonald as bookkeeper, his involvement in the bookkeeping of VICE is by itself unlikely to provide the court with adequate assurance that the same misconduct will not be repeated".
31. Two other points should be mentioned:
- a) Attention was drawn to the fact that Mr Falodun was registered as a director of some 17 other companies at the time he was a director of Switch. There is no evidence concerning them or the reasons for the appointments but it might be relevant when considering the topic of experience.
 - b) The Secretary of State raised concern that the weekly spreadsheet (whether in its final updated form or previous versions) had not been produced.

D) The Conditions

32. The conditions Mr Falodun offers for the purpose of his application for permission contained within a revised, draft order include for the remaining period of the undertaking (in summary):
- a) A replacement director must be appointed within 21 days of either Mr Charles Falodun or Mr McDonald resigning.
 - b) Obligations upon Mr Falodun to procure that VICE Limited: complies with *s.386*; has monthly management accounts to be considered each month by the board; submits the management accounts to its accountants ("Ryans"); prepares annual accounts; files returns and accounts at Companies House; files all HMRC returns and pays all sums due on time; .

- c) New accountants who have accepted the obligations of the conditions insofar as they are affected shall be appointed within 14 days should Ryans cease to act.
- d) The accountants shall be under a contractual obligation to report to the board in writing any concerns regarding management or financial control. For that purpose they shall have unrestricted access to books and records, and Mr Falodun shall procure implementation of any required, corrective action. He shall resign should the board not act upon any concerns expressed by the accountants.
- e) Any financial agreement shall be signed by at least two directors and all directors should be on the bank mandate.
- f) Permission shall lapse upon breach unless the provision permitting time to bring the matter back to court for variation apply.

E) The Law

33. Guidance to the court's approach to applications for permission pursuant to section 17 of the CDDA was set out by Miles J in ***Rwamba v Secretary of State for Business, Energy, and Industrial Strategy*** [2020] EWHC 2778 (Ch), [2021] BCC 184 at [34] as follows:

"i) The court has a discretion under section 17 to allow a person who has been disqualified to be a director of a company or be concerned or take part in the promotion, formation, or management of a company.

ii) The onus is on an applicant under the section to persuade the court to grant permission. The starting point when approaching the jurisdiction is that the applicant has been held unfit to be a director for the period of the order (or has accepted the equivalent when giving an undertaking). Nonetheless leave may be given in a proper case.

iii) It is for the court (and not for the Secretary of State) to be satisfied that it is appropriate to give leave for the applicant to be a director etc.

iv) The discretion under section 17 to give leave is unfettered. It is wrong to seek to add glosses or preconditions. The question for the court is whether in all the circumstances it is appropriate to give leave; and in approaching this question the court balances all the relevant factors.

v) Though it is usual to establish that the Company has a 'need' for the applicant to be a director or involved in the management, this is not a precondition. For instance, the appointment may be made to allow the director to obtain a tax advantage.

vi) The court should, among other things, have regard to the nature and seriousness of the conduct that led to the disqualification order or undertaking and the length of the disqualification. Where that conduct was dishonest a court may be reluctant to give leave.

vii) The court should, when deciding whether to give leave for a director to act as a director have regard to the purposes of a disqualification order. These include (i) protecting the public directly by prohibiting the disqualified person from acting and (ii) deterring both the particular director and others from the kind of conduct that has led to the order.

viii) *Leave should not be too freely given as this would tend to undermine the protective and deterrent purposes of a disqualification order. The court would not wish anyone dealing with a director to be misled as to the gravity of a disqualification order.*

ix) *On the other hand, the power of the court to grant leave under section 17 is inherent in the disqualification regime and in an appropriate case it may serve the public interest to allow a disqualified person to be a director of a specific company.*

x) *Moreover, the fact that the applicant for leave has agreed to the imposition of conditions designed to ensure high standards of corporate conduct may itself be seen as promoting the policy of deterring misconduct."*

34. The emphasis upon "need" in case law does not arise from any statutory reference to that requirement. Its application led to some confusion in early case law but the position was made clear by Sir Richard Scott to the effect that the broad width of the court's discretion when deciding whether to grant permission means that all facts and matters relevant to the circumstances of the particular situation should be taken into consideration (see ***Re Dawes & Henderson (Agencies) Ltd (No 2)*** [1999] 2 BCLC 317 in particular at 326.
35. I also refer to the following paragraphs by the editors of "**Mithani, Directors' Disqualification**" within Chapter 4 of Division VI:

*"On one side of the scales is the right of the applicant to seek release from the restraints of disqualification and on the other side is the need to ensure that the public is protected from his past misconduct and that the reasons for, and purposes of, his disqualification are not undermined. As Sir Richard Scott said in ***Re Barings plc, Secretary of State for Trade and Industry v Baker (No 3) sub nom Re Barings plc (No 4), Secretary of State for Trade and Industry v Baker (No 4)***:*

"It seems to me that the importance of protecting the public from the conduct that led to the disqualification order and the need that the applicant should be able to act as a director of a particular company must be kept in balance with one another. The court in considering whether or not to grant leave should, in particular, pay attention to the nature of the defects in company management that led to the disqualification order and ask itself whether, if leave were granted, a situation might arise in which there would be a risk of recurrence of those defects."

*The Vice-Chancellor reiterated the views which he had expressed in his earlier decision in ***Re Barings plc (no 4)***, commenting:*

'I remain of the opinion expressed in that passage. In a case where no need has been demonstrated on the company's part to have the applicant as its director or, from a business point of view, on the applicant's part to be a director, there would need, I think, to be only a very small risk to the public which the granting of the leave might produce to justify the refusal of the application. Per contra, if a substantial and pressing need on the part of the company, or on the part of the individual in order to be able to earn his living, could be shown in favour of the grant of leave then it might be right to accept some slight risk to the public if the leave sought were granted.'

This approach ensures that the purpose of disqualification is focussed primarily towards the protection of the public from the past misconduct of the applicant, rather than to penalise the applicant. It means that the court must look at the past, consider what is being proposed by the application and what risks might arise in the future if permission is granted."

F) An Overview

36. Mr Falodun's first affidavit was stated to have been produced within a relatively short timescale. Nevertheless, it is surprising that he did not address the causes of the Grounds whether with direct reference to the Particulars or otherwise. At paragraph 19 he merely states, in one sentence, the fact of the undertaking and the grounds for it. The earlier reference to trading difficulties and a high turnover of staff may explain Switch's insolvency but not the failure to keep adequate accounting records. This causes concern not only because of non-disclosure but also because the court cannot properly assess the risk to the public of his appointment as a director of VICE Limited, and carry out the balancing exercise without understanding the original misconduct and ensuring he appreciated what was required to avoid its reoccurrence.
37. Mr Falodun also makes no reference to the fact that Mr McDonald was the bookkeeper of Switch or address (as a result) why that fact does not affect the conclusion that the court can rely upon Mr McDonald's qualification, experience and involvement as bookkeeper of VICE Limited. This has the potential for being serious non-disclosure in the context of a request for an interim order of permission to act.
38. In addition, Mr Falodun did not appear to be apologetic or repentant. His focus was upon the fact that he now had a successful company, and it required him to be involved in its management. Whilst that is obviously of great importance to this application, it is clearly not the "be all and end all".
39. Mr Falodun had the opportunity to correct matters in his second affidavit. However, whilst he identifies underlying causes for the failure to keep adequate records (receipt and payments of cash) he does not refer to either what he did to try to address those causes (including any resulting problems) or to the reasons why he did not address (or try to address) the problems when carrying out monitoring and supervision of the business's operations to ensure compliance with a statutory duty to keep adequate accounting records.
40. He does not address the absence of information/explanation for: the payments totalling £2,875,461 and £2,875,871 referred to within the undertaking; the payments of £300,240.50 made from the bank account to three associated companies controlled by the same directors or those received from 4 associated companies of £247,265.70; why payments appear to have been made in respect of expenses incurred by associate companies; the true amount due for the directors' loan accounts and due for VAT and PAYE; or specifically, the substantial deficiency of £833,587.71 ("the Missing Topics").
41. He does not address implementation of the conditions offered, whether by linking them to the relevant conduct which gave rise to the disqualification undertaking or by demonstrating through his factual evidence that the conditions will in practice, with reference to the operations of VICE Limited, extinguish or sufficiently minimise the risk to the public of reoccurrence of the misconduct.
42. There is also some concern that there is reference to limited board minutes having been kept whilst his brother was the sole director. The concern being the reliability of those around Mr Falodun to ensure he will comply with his duties as a director.

43. Mr Falodun still makes no reference to the fact that Mr McDonald was also the bookkeeper of Switch despite the observations of the Secretary of State. The same omission continues to apply to his brother's evidence and, most importantly, to Mr McDonald's. He does not address his involvement with the record keeping of Switch, he does not seek to explain the extent to which he was or ought to have been aware of the inadequacies (whether generally or with specific reference to the Particulars), and he does not address the current/future record keeping of VICE Limited in that context. He did not make a supplemental affidavit to cure those deficiencies.
44. The third affidavit leaves far too many questions. The reference to overseeing Switch's general operations does not refer to what he in fact did or did not do that prevented him from appreciating and/or dealing with the deficiencies in record keeping. It does not explain why the absence of receipts referred to by reference to entry charges and tills was only appreciated when Switch was in liquidation. Mr Falodun does not explain how or from what information the Weekly Spreadsheet was prepared or how manual calculations of turnover were achieved in board meetings. It is unclear why the last document prepared was not available. The reference to the inter-mingling of personal funds is vague and symptomatic of the general absence of detailed information. An observation that also applies to the reference to needing to register for VAT when Switch was or was soon to become insolvent. This appears to indicate non-compliance with the VAT registration requirements from an early trading date, which, if correct, would also be of considerable concern. The third affidavit still does not specifically address the Missing Topics.
45. There is also nothing substantive within the third affidavit concerning the Missing Topics when dealing with the information provided to the Official Receiver to help address the difficulties faced by the absence of adequate records. It was, after all, a particular of the Grounds that the absence of information resulting from the failure to maintain or deliver up adequate accounting records prevented fulfilment of the duty to carry out investigations under *s.132(1) of the Insolvency Act 1986*. It is of importance to state what was done to try to resolve that problem. The Secretary of State referred to what was done through Mr Cockburn's skeleton argument but Mr Falodun did not do so in his evidence.
46. Mr Falodun instead refers to a recent communication from his solicitors with the Insolvency Service asking the Service to address his co-operation with the Official Receiver. Reliance is placed upon a recent statement by email from the Insolvency Service that the author understands that Mr Falodun co-operated, and that there are no outstanding matters which the OR is to raise. However, the email seeking that information makes no specific reference to the Missing Topics, and did not ask whether the information was provided or whether its continued absence has hampered the liquidation and, if so, how. The reply was also sought within a two day time frame because of holiday difficulties. The reply was from a different person to the person from whom the information had been sought. It was not, therefore, the last fee earner acting for the Official Receiver. The reply also explained that the examiner who had dealt with Switch's liquidation was away. The response was given in reliance upon the author's colleague having looked into the matter and having done so in "the time frames set out ...".
47. Whilst it is correct that the Secretary of State has concluded that there are no outstanding lines of enquiry into Switch's affairs and that Mr Falodun co-operated

with the liquidation, the evidence referred to above justifying that conclusion is unsatisfactory. There is evidence that following a request for information from the Official Receiver “a substantial number of documents to explain certain transactions that had been queries [sic] by the Official Receiver as part of their investigation” were provided. However, this occurred before the undertaking at which date it was accepted as a fact that the duty to carry out investigations under *s.132(1) of the Insolvency Act 1986* could not be fulfilled. It is then stated that Mr Falodun’s former solicitors “took over corresponding with the Insolvency Service directly” after that search had been carried out. The last contact being on 9 June 2021 but with no details being provided either of that correspondence or of any further information provided whether concerning the Missing Topics or otherwise.

48. Plainly all those matters need to be weighed in the balance against the strong case of “need” and current compliance with statutory record keeping obligations within a currently successful company. I have not dwelt on that strong case because it is evident from the evidence to which I have referred. I have treated this as an application for which this element weighs heavily in the scale for permission.

G) Decision

49. This application is not made without notice, and the Secretary of State has had the opportunity to consider and respond to the evidence in support by filing evidence in answer and/or by appearing through counsel at the hearings. Nevertheless, the application is made without the Secretary of State being bound to carry out investigations, and it would be impractical to expect such a course to be taken to any extensive degree. In those circumstances, and bearing in mind that personal knowledge of much of the information will be restricted to the applicant and their witnesses, and the fact that dispensation is being sought: the application is to be made in good faith and with disclosure of matters material to the grant of permission. The court is considering the need to protect the public and the need to promote the policy of deterrence. This requires candour, including the disclosure of material adverse to the application.
50. That duty has not been fulfilled in this case. It is of particular concern (without watering down the other matters referred to in the overview) that Mr Falodun when applying for interim permission, and in his subsequent evidence, failed to disclose that Mr McDonald had direct involvement in the keeping of the books and records of Switch. That is of obvious importance when his current and future involvement with VICE Limited is being considered, both generally and within the specific context of considering whether there are others who can be relied upon to ensure the public will be protected on the balance of probability from future similar misconduct by Mr Falodun. Mr McDonald was clearly presented as someone who can be relied upon to ensure compliance by VICE Limited with *s.386*. That may still be correct, but it is a proposition that requires disclosure of a relevant circumstance, his involvement in the accounting record keeping of Switch, by both Mr Falodun and Mr McDonald before such a conclusion can be reached.
51. It may also be added, although not in evidence but noted in Mr Kell’s skeleton argument, that no comfort is gained from the fact that Mr McDonald did not respond

to enquiries made of him during the *s.7(4) CDDA 1986* enquiries and the explanation in correspondence that he was not a director and was not being personally investigated is hardly appropriate. I refer to the following:

“Just picking up on your query as to Mr McDonald's involvement in the previous investigation, he has confirmed that there was no specific reason why he did not respond. He was originally made aware that the investigation because our client and the two other directors who were involved with the matter had informed him of it in the context of an informal conversation. Of course, Mr McDonald was not a director of that Company and/ or not being investigated personally for any wrong doing relating to it. As it was some time ago now, he cannot recall when or where he received a letter from the Insolvency Service but he assures me that he would not have deliberately ignored it.”

52. Added to this item of non-disclosure is the failure to address the Missing Topics whether within the context of explaining them and Mr Falodun's responsibility or of providing reassurance that such conduct will not reoccur or of showing they had been addressed with the Official Receiver to cure or try to cure the resulting problems caused by the inadequate records as identified within the Particulars.
53. Those matters not only weigh very heavily in the balance against the grant of permission, they also raise the issue whether the application should be dismissed for breach of the duty to disclose material matters. The underlying point, however, is that this breach makes it extremely difficult for the court to be satisfied on the balance of probability that the grant of permission will not present a risk to the public or undermine the policy of deterrence.
54. That heavy weight is added to a scale already containing misconduct that involved serious breaches of duty. Whilst 5 years is within the minimum bracket for disqualification, the importance of *s. 386* is not to be underestimated, is made apparent by the criminal offence established by *s.387 of the Companies Act 2006*, and is apparent in the context of this case from each of the Particulars.
55. The only reason why further consideration needs to be given to the decision is the potential impact of a refusal upon the business of VICE Limited including upon its employees. The fact that this appears to be a new, innovative and successful business in itself suggests that it will be in the public interest for permission to be granted if, as the evidence establishes, Mr Falodun is a crucial cog within its management. It is to be concluded from the evidence that his current involvement would need to cease absent permission, and that an entirely different job description will be required should he be an employee or agent (for example, a consultant). Whilst no-one has addressed the possibility of the business being transferred to Mr Falodun whether as a sole trader or partnership, or of him otherwise undertaking personal liability for any future financial failure, it appears reasonable to conclude that this would be (at best) an unsatisfactory alternative.
56. This reason is supported by the evidence of current compliance with the obligation to keep adequate accounting records, and with the requirements for filings and payments concerning HMRC liabilities. Nevertheless, “need” of the company concerned and current compliance cannot in this application on its own outweigh the burdened scale against the grant of permission. At least not without the court being offered sufficient, satisfactory conditions to establish on the balance of probability that the public is protected and that the policy of deterrence will not be undermined.

57. The conditions are “agreed” with the Secretary of State, subject to the stated neutrality to the outcome of the application. The facts of neutrality and of approval are to be added to the balance in favour of permission but neutrality in this case can hardly be equated with approval bearing in mind the points made by Mr Cockburn on the Secretary of State’s behalf. Furthermore, it in any event remains for Mr Falodun to satisfy the court that permission should be granted.
58. Without addressing the drafting or the details (which would be done if permission would be granted subject to approval of the final terms of the order), the conditions offered are inadequate. Of course they are important, and in other cases may be more than sufficient. Their drafting clearly bears in mind the causes for the undertaking and the statutory requirement to keep adequate financial records both in the context of protection and deterrence.
59. However, Mr McDonald’s required presence on the board cannot be treated as a fact which will eliminate or sufficiently reduce the risk to the public of reoccurrence of the misconduct of Mr Faodun when it took place whilst Mr McDonald was contracted as the bookkeeper of Switch. That is because of the non-disclosure by Mr Falodun or Mr McDonald and also Mr Charles Falodun. It follows from the failure to address and explain why Mr McDonald can nevertheless be relied upon in the future as a relevance to the issues of risk and deterrence.
60. That conclusion takes into consideration the fact that the evidence is that books and records are currently being kept and necessary filings and payments made. This suggests the risk might not arise once permission is granted but that cannot be concluded on the balance of probability when there has been serious non-disclosure directly relevant to the issue whether this board can be relied upon to ensure that the previous misconduct will not reoccur. The role of the accountants envisaged by the conditions is important but it too is not sufficient to avoid that conclusion. They are not involved in day to day management.
61. Whilst the impact of non-compliance with the conditions is critical, namely the ending of permission (subject to provisions allowing time to apply for relief), it is not sufficient to ensure that the misconduct of the type concerned will not occur. Indeed whilst those terms are there to mitigate the problem that no-one will be supervising what occurs (it is not the duty of the Secretary of State to do so), the fact that no third party will be monitoring VICE Limited and Mr Falodun is an important factor that has to be taken into consideration. Indeed, it merits in itself the requirement that the court must be able to trust the application by compliance with the duty to disclose.
62. In all the circumstances I conclude that Mr Falodun has not satisfied the burden upon him to show on the balance of probability that the grant of permission is justified. His application and evidence has not shifted the balance in favour of lifting the restraints of the undertaking to enable his involvement in management with, and as a director of a limited liability company, VICE Limited. The balance is weighted in favour of refusal to ensure the public remains protected and the policy and objectives of disqualification are not undermined.
63. In reaching that decision I am acutely conscious of the adverse consequences which may result for VICE Limited. During the course of submissions I floated the possibility of an independent chartered accountant being appointed to the board as an

example of the other options that may be available. Mr Falodun and VICE Limited have had the opportunity of the delay between dissemination of the draft judgment and its handing down to consider alternatives (a longer period than normal for that purpose). To assist, permission was granted to discuss the draft judgment with other board members, subject to them being subject to the same judgment confidentiality provisions. Insofar as it needed to be discussed with anyone else, a request for extended permission was permitted by email.

64. To allow for the possibility of an alternative approach being presented, the hand-down was listed for the day and time when I am sitting in the interim (urgent relief) list to provide time for any required further application and/or submissions. Any further application, evidence and/or skeleton arguments was to be filed and exchanged in good time with the parties ensuring they reach my clerk electronically as well as being placed on the CE-File.
65. In the event that an alternative approach is identified, my indication to assist (although the indication is not binding one way or the other) provided with the draft judgment was that I anticipated it will be necessary to address the disclosure and information so lacking in the evidence before me. Should that route be taken, an additional question will be whether a new application is required. That will need to be the subject of submissions taking into consideration not just the reasons for this judgment but also the consequences (if any) that ought to flow as a result of the identified non-disclosure. Subject to the bases for any further application and any further submissions, I can indicate that I currently favour the idea of a new application. That is because of the non-disclosure. However, there will be no need to issue a protective application before such a decision is made at the hand-down hearing. Any order requiring a new application can be conditional upon it being issued within [x] days. Any application for interim permission can be made on that basis too.

Order Accordingly