Neutral Citation Number: [2024] EWHC 29 (Ch)

Case No: CR-2023-LDS 000432

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

The Court House
Oxford Row
Leeds LS1 3BG

Before :

Her Honour Judge Kelly sitting as a Judge of the High Court

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Between :

JUST TRAYS LIMITED **Applicant**

- and –

EMU PRODUCTS LIMITED

Respondent

- -
- -

Mr Gregory Pipe (instructed by **Fladgate Solicitors**) for the **Applicant**
Mr Neil Berragan (instructed by **Bailoran Solicitors**) for the **Respondent**

Hearing date: 15 August 2023
Date draft circulated to the Parties: 01 January 2024
Date handed down: 12 January 2024

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APPROVED JUDGMENT

Her Honour Judge Kelly

1. This judgment follows the hearing of the application by Just Trays Limited ("the Applicant") for an injunction to restrain the presentation of a creditor's winding up petition by EMU Products Limited ("the Respondent"). The application is brought pursuant to the court's inherent jurisdiction and/or rule 7.24 of the Insolvency (England and Wales) Rules 2016. The injunction is sought on the basis that there is a clear and substantial dispute concerning the debt claimed in the statutory demand served by the Respondent.

2. Mr Gregory Pipe of Counsel represented the Applicant and Mr Neil Berragan of Counsel represented the Respondent. I had the benefit of skeleton arguments from both counsel before the hearing. I had read the skeleton arguments and all the documents to which my attention was directed in the skeleton arguments before the hearing. In addition, I had received correspondence from the Respondent's solicitors dated 10 August 2023 complaining about various issues with the bundle. In particular, the Respondent's solicitors were concerned that not all of the documentation which accompanied the statutory demand was contained immediately behind that statutory demand in the bundle. I was asked to read six documents which accompanied the statutory demand at the same time as I read the statutory demand itself. I confirm that I read all of those documents together with the statutory demand as requested.

3. In addition to the hearing bundle and the bundle of authorities, I was also provided with a third witness statement and exhibit from Mr Alex Norford dated 11 August 2023 for the Applicant. After argument, I decided that the third witness statement of Mr Alex Norford and its exhibit would not be admitted as evidence as they were served late. I gave full reasons for that decision during the hearing and I do not repeat them here.

Background

4. The Applicant is a manufacturer of shower trays. It manufactures the shower trays by combining various materials which include resin and an inorganic powder referred to as substrate ("the substrate powder"). Substrate powder is produced by blending various raw materials in particular quantities. The substrate powder has always been

produced for the Applicant off site by a third party. The shower trays themselves are then manufactured by the Applicant. Before the involvement of the Respondent, the substrate powder was blended by and bought from Advance Minerals Limited. Advance Minerals Limited was the only supplier of substrate powder for the shower tray market in the UK at that time and thus enjoyed a monopoly position in the market. After the Respondent became involved, the Respondent obtained blended substrate powder from Pennine Aggregates Ltd ("Pennine") and the substrate powder was then provided to the Applicant. Before the involvement of the Respondent, the Applicant sourced resin from a supplier called OCS.

5. Mr Paul Haigh was employed by the Applicant from 2014. The Applicant was acquired by Brand K Ltd ("Brand K") in June 2019. Mr Alex Norford ("Mr Norford") is a director of Brand K. When Brand K acquired the Applicant, Mr Norford became a non-executive director of the Applicant. He described himself as having very little involvement in the day-to-day management of the business.

6. From 1 October 2019, Mr Paul Haigh was the managing director of the Applicant. The day-to-day management of the Applicant's business was done by Mr Paul Haigh, Mr Lee Walker who was the finance director and Mr John Schofield who was the sales director.

7. The Respondent was incorporated on 18 October 2018. Initially, the only director and shareholder of the Respondent was Ms Louise Priestnal. She is the partner of Mr Paul Haigh. The Respondent was a dormant company until Mr Paul Haigh became a director of the Respondent on 13 May 2019.

8. The dispute between the parties can be relatively briefly stated. From September 2019 until approximately March 2023, the Respondent provided various materials which were used by the Applicant to make shower trays. Those materials included substrate powder and resin. It is not in dispute that the Respondent has invoiced the Applicant for goods to the total of the petition debt (including interest) of £938,086.69 and that those invoices remain unpaid. Almost every other matter between the parties is in dispute.

9. Whilst there are various other issues in dispute between the parties, the initial issue in dispute ("the initial issue") is whether or not a particular conversation took place between Mr Paul Haigh and Mr Norford, and if so, what was discussed. Mr Paul Haigh asserts that he informed Mr Norford in a conversation in or around June or July 2019 of the existence of the Respondent and the fact that he (Mr Paul Haigh) was the director of the Respondent. Mr Paul Haigh further asserts that it was agreed with Mr Norford that Mr Paul Haigh would use the Respondent to act as an alternative supplier of substrate powder on the basis that the Respondent could match or beat the current price set by Advance Minerals Ltd. Thereafter, the Respondent began to supply the Applicant with both substrate powder and later, resin.

10. Mr Norford denies that any such conversation took place. He asserts that he knew nothing about Mr Paul Haigh being a director of the Respondent. He knew nothing about the use of the Respondent to provide substrate powder and resin. He became aware after he raised concerns about why the Applicant's finances and performance were deteriorating. He says that he initiated an internal investigation then discovered that Mr Paul Haigh had arranged for the Respondent to be inserted into the supply chain for substrate powder and resin.

11. In short, Mr Norford asserts that Mr Paul Haigh created a situation whereby a secret profit was made and Mr Paul Haigh was in breach of his director's duties to the Applicant. The Respondent is not involved in the production of substrate powder or resin. It made arrangements for substrate powder to be supplied to the Applicant by Pennine. Orders were sent directly from the Applicant to Pennine. Pennine then delivered the substrate powder directly to the Applicant. However, Pennine invoiced the Respondent for the materials at the request of Mr Paul Haigh. The Respondent then invoiced the Applicant charging an additional fee on top of the invoice of Pennine. A similar situation appears to have followed when the Respondent began supplying the Applicant with resin.

12. Mr Paul Haigh denies any breach of his director's duties and asserts that as well as his activities being authorised by the Applicant, there was no conflict of interest in any

event because the Applicant did not have the expertise, finance or ability to do the work done by the Respondent.

13. I have had the benefit of reading all of the witness statements contained within the bundles, together with the various documents to which I was taken during the course of the hearing and directed to in skeleton arguments.

14. This is a case which does not solely turn on the credibility of the matters as set out in the witness statements. The contents of the documents contained within the hearing bundle are also of crucial significance. I do not propose to rehearse all of the arguments raised, nor all of the evidence referred to during the course of the hearing. However, I record that I read and considered the evidence as a whole, as well as various documents within the hearing bundle to which my attention was drawn, in addition to all those arguments before coming to my decision.

The Law

15. Happily, counsel agree on the legal principles to be applied. The court will restrain proceedings on a winding up petition if the petition debt is disputed on substantial grounds or if there is a genuine cross-claim which extinguishes the debt or reduces it below £750.

16. The test in either situation is essentially the same as for summary judgment, namely that there is a real prospect of succeeding on the claim or successfully defending the claim. In other words, the court will restrain presentation of a petition if there is a genuine triable issue which is real as opposed to frivolous. The court can reject evidence because of its inherent implausibility, because it is contradicted or not supported by the documents (see *Ashworth v Newnote* [2007] EWCA Civ 793, BIPR 1012 at paragraphs 32 to 34).

17. The relevant duties owed by a director to their company are set out within the Companies Act 2006 (the Act") as follows:

175 Duty to avoid conflicts of interest

(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).

(3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.

(4) This duty is not infringed–

(a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or

(b) if the matter has been authorised by the directors.

(5) Authorisation may be given by the directors–

(a) where the company is a private company and nothing in the company's constitution invalidates such authorisation, by the matter being proposed to and authorised by the directors; or

(b) where the company is a public company and its constitution includes provision enabling the directors to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution.

(6) The authorisation is effective only if–

(a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and

(b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.

(7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

176 Duty not to accept benefits from third parties

(1) A director of a company must not accept a benefit from a third party conferred by reason of–

(a) his being a director, or

(b) his doing (or not doing) anything as director.

(2) A "third party" means a person other than the company, an associated body corporate or a person acting on behalf of the company or an associated body corporate.

(3) Benefits received by a director from a person by whom his services (as a director or otherwise) are provided to the company are not regarded as conferred by a third party.

(4) This duty is not infringed if the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.

(5) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties

177 Duty to declare interest in proposed transaction or arrangement

(1) If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.

(2) The declaration may (but need not) be made–

(a) at a meeting of the directors, or

(b) by notice to the directors in accordance with–

(i) section 184 (notice in writing), or

(ii) section 185 (general notice).

(3) If a declaration of interest under this section proves to be, or becomes, inaccurate or incomplete, a further declaration must be made.

(4) Any declaration required by this section must be made before the company enters into the transaction or arrangement.

(5) This section does not require a declaration of an interest of which the director is not aware or where the director is not aware of the transaction or arrangement in question. For this purpose a director is treated as being aware of matters of which he ought reasonably to be aware.

(6) A director need not declare an interest–

(a) if it cannot reasonably be regarded as likely to give rise to a conflict of interest;

(b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware); or

(c) if, or to the extent that, it concerns terms of his service contract that have been or are to be considered–

(i) by a meeting of the directors, or

(ii) by a committee of the directors appointed for the purpose under the company's constitution.

182 Declaration of interest in existing transaction or arrangement

(1) Where a director of a company is in any way, directly or indirectly, interested in a transaction or arrangement that has been entered into by the company, he must declare the nature and extent of the interest to the other directors in accordance with this section. This section does not apply if or to the extent that the interest has been declared under section 177 (duty to declare interest in proposed transaction or arrangement).

(2) The declaration must be made–

(a) at a meeting of the directors, or

(b) by notice in writing (see section 184), or

(c) by general notice (see section 185).

(3) If a declaration of interest under this section proves to be, or becomes, inaccurate or incomplete, a further declaration must be made.

(4) Any declaration required by this section must be made as soon as is reasonably practicable. Failure to comply with this requirement does not affect the underlying duty to make the declaration.

(5) This section does not require a declaration of an interest of which the director is not aware or where the director is not aware of the transaction or arrangement in question. For this purpose a director is treated as being aware of matters of which he ought reasonably to be aware.

(6) A director need not declare an interest under this section–

(a) if it cannot reasonably be regarded as likely to give rise to a conflict of interest;

(b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated

as aware of anything of which they ought reasonably to be aware); or

(c) if, or to the extent that, it concerns terms of his service contract that have been or are to be considered–

(i) by a meeting of the directors, or

(ii) by a committee of the directors appointed for the purpose under the company's constitution.

184 Declaration made by notice in writing

(1) This section applies to a declaration of interest made by notice in writing.

(2) The director must send the notice to the other directors.

(3) The notice may be sent in hard copy form or, if the recipient has agreed to receive it in electronic form, in an agreed electronic form.

(4) The notice may be sent–

(a) by hand or by post, or

(b) if the recipient has agreed to receive it by electronic means, by agreed electronic means.

(5) Where a director declares an interest by notice in writing in accordance with this section–

(a) the making of the declaration is deemed to form part of the proceedings at the next meeting of the directors after the notice is given, and

(b) the provisions of section 248 (minutes of meetings of directors) apply as if the declaration had been made at that meeting.

185 General notice treated as sufficient declaration

(1) General notice in accordance with this section is a sufficient declaration of interest in relation to the matters to which it relates.

(2) General notice is notice given to the directors of a company to the effect that the director–

(a) has an interest (as member, officer, employee or otherwise) in a specified body corporate or firm and is to be regarded as interested in any transaction or arrangement that may, after the date of the notice, be made with that body corporate or firm, or

(b) is connected with a specified person (other than a body corporate or firm) and is to be regarded as interested in any transaction or arrangement that may, after the date of the notice, be made with that person.

(3) The notice must state the nature and extent of the directors interest in the body corporate or firm or, as the case may be, the nature of his connection with the person.

(4) General notice is not effective unless–

(a) it is given at a meeting of the directors, or

(b) the director takes reasonable steps to secure that it is brought up and read at the next meeting of the directors after it is given.

The Issues

18. The parties broadly agree on the matters to be determined, although they frame the issues to be determined somewhat differently. Part of the reason for that is that the Respondent appeared to frame its representations initially on the basis of the Applicant's solicitors letter dated 5 May 2023. That letter was sent in response to the

statutory demand and accompanying documents sent undercover of the Respondent's solicitors letter dated 27 April 2023. In that letter, there was no specific mention of sections 176 and 177 of the Act and three specific allegations in rebuttal of the statutory demand were made.

19. There was implicit criticism from Mr Berragan that the Applicant had put its case on different grounds and on a broader basis at the hearing than was set out in the 5 May 2023 letter sent before the application was made. Insofar as there was a submission that I should not go beyond what was contained within the letter sent in response to the statutory demand, I reject it. I can see no reason why any argument which can sensibly be put in relation to whether or not the debt is owed cannot be made, provided there is a legal and evidential basis for it. As I was reminded by Mr Pipe, for the purposes of this application, I am required to determine whether there is an arguable, rather than fanciful, case established by the Applicant, both in relation to liability and quantum issues.

20. In my judgment, the following questions should be considered as to whether the Applicant can establish a real prospect of successfully defending any claim upon which the statutory demand is based and which shows that there are genuine triable issues which are real as opposed to frivolous:
    (1) Is the statutory demand based on a legal debt?
    (2) Is there a realistic claim for damages by the Applicant in respect of the development of a new lightweight blend of the substrate powder?
    (3) Is there any arguable breach of fiduciary duty by Mr Paul Haigh or any breach of his director's duty under the Act?
    (4) Is there a genuine cross claim in respect of a claim for secret profits, misuse of confidential information, corporate opportunities and/or conspiracy against the Respondent and/or Mr Paul Haigh?
    (5) If the Respondent establishes that there is a direct contract between the Applicant and the Respondent, is there a genuine cross claim under section 14 of the Sale of Goods Act 1979 for breach of the implied terms of satisfactory quality and fitness for purpose in respect of the initial sale of an unreliable early version of the lightweight substrate powder by the Respondent to the Applicant?

(6) If the answer to the above questions are that the Applicant has a real prospect of successfully arguing its case, are the damages arguably likely to extinguish the debt claimed in the statutory demand?

The Evidence

21. I do not propose to set out all of the evidence which I read and heard, nor the contents of all of the witness statements. It is not necessary to do so. I will mainly deal with the evidence and submissions of each party when I consider the questions in turn.

22. That being said, the determination of the initial issue may well affect the answers to the other questions. Was there was any initial conversation and agreement between Mr Paul Haigh and Mr Norford about the involvement of the Respondent in the Applicant's supply chain?

23. In my judgment, there is plainly a triable issue on the initial issue and a real prospect of the Applicant successfully persuading the court that no such conversation ever took place. There is a straight conflict between the evidence of Mr Norford and Mr Paul Haigh about:
    (1) whether there was any discussion between the two of them, as Mr Paul Haigh asserts, where Mr Paul Haigh openly and fully informed Mr Norford about his involvement with the Respondent; and
    (2) whether there was an agreement for the Respondent to be inserted into the supply chain to assist the Applicant to avoid the monopoly of Advanced Minerals Ltd providing the substrate powder.

24. In addition, in my judgment, there is also a real prospect of the Applicant successfully arguing that the assistance and use of the Respondent was not needed, whether or not the Applicant had cash flow issues. Absent Mr Haigh's assertion that there were such cash flow issues which required the use of the Respondent to source alternative raw supplies, I struggle to see any reason at present why Mr Haigh could not have used his experience and contacts and done exactly the same work as managing director of the Applicant, rather than diverting that work to the Respondent. Mr Haigh was a director

of the Applicant and subject to a "full time and attention" clause in his employment contract.

25. Mr Norford accepted that the performance and profits of the Applicant had deteriorated since it was acquired by Brand K, hence the reason he began investigating the causes of that deterioration. However, in my judgment, the documentation submitted to support Mr Haigh's assertions (that the Applicant had cash flow difficulties such that third parties did not want to do business with them and supply chains were at risk) does not necessarily support those assertions. Various emails appear between pages 189 and 193 of the exhibits to Mr Haigh's first witness statement. Whilst various payments are discussed in those emails, including what invoices needed to be paid at what time, I do not accept that those documents necessarily support the assertion made in paragraph 43 onwards of Mr Haigh's statement that there was a risk to supply because the Applicant was not meeting payment terms.

26. In addition, I do not accept that the email relied upon by Mr Haigh necessarily justifies his asserted conclusion that the Respondent was required to be used in order to ensure a supply of resin. On the contrary, whilst the email from the existing supplier to the Applicant acknowledges that demand for resin "remains high" and that "availability is expected to be tight throughout Summer", it specifically says that "we remain confident in servicing the [Applicant's] needs… over the Summer Period".

27. In addition, there is the clear evidence of Mr Norford that funding was and would have been available from the Brand K group if it was needed by the Applicant. Whilst Mr Norford acknowledges that he wanted the Applicant to be able to deal with its own business without assistance from the rest of the Brand K group, he asserts that if assistance was needed, it would have been provided.

28. Further, the evidence of Mr Mark Dickinson ("Mr Dickinson"), the managing director of Pennine Aggregates Limited ("Pennine"), undermines various assertions made by Mr Haigh. Mr Dickinson describes being told initially by Andrew Bainbridge (from Auckland Environmental Services Limited) that Mr Paul Haigh from the Applicant

was trying to identify a new supplier of substrate powder. Mr Dickinson says that he was not prepared to work with Mr Bainbridge but he contacted Mr Paul Haigh and told him that Pennine would be happy to work with the Applicant.

29. At some point later, around the point of first supply of substrate powder to the Applicant, Mr Paul Haigh told Pennine that invoices should be addressed to the Respondent. Mr Dickinson was concerned as he had understood that Mr Paul Haigh was acting on behalf of the Applicant. Mr Dickinson said he would have preferred to deal directly with the Applicant as it was an established company rather than with the Respondent when it was a "very new company with…no assets or trading history". However, Mr Paul Haigh insisted that all invoices must be addressed to the Respondent. Pennine agreed to send invoices to the Respondent but requested that the Applicant provide a company guarantee. Mr Haigh then said he preferred to give a personal guarantee, although that personal guarantee was not given for a number of months. Further, Mr Dickinson specifically denies that the Respondent could obtain better credit terms with Pennine than the Applicant would have been able to obtain.

30. Having found that there is a real prospect of successfully arguing that there was no conversation or agreement between Mr Paul Haigh and Mr Norford, it is necessary to consider the other issues.

(1) Is the statutory demand based on a legal debt?

31. The Applicant raises the argument that although the statutory demand claims money for the supply of goods, there is no detail or explanation as to what the alleged contract was between the Applicant and the Respondent. The details of the debt as set out on the statutory demand read as follows:

"The Creditor supplied its unique lightweight powder blend ("the Product") to the Debtor Company for the purpose of making shower trays since November 2020 although supply of a different product had occurred since November 2019.

The Creditors (sic) supplied the Product subject to its terms of business.

The Product supplied was mixed by a third party agent on its premises and delivered to the Debtor Company using materials supplied by the Creditor.

> The Debtor Company would request supply of the Product direct to the Third Party agent who accept this as an order for the Creditor who was contracting directly with Debtor Company.
>
> Once supply had occurred the Creditor would invoice the Debtor Company.
>
> This business relationship has existed since 2019 and the Creditor is acknowledged as a usual supplier to the Debtor Company in its audited accounts during the period of supply."

32. The Applicant argues that there is no evidence as to how the contract was allegedly concluded between the Applicant and the Respondent. There is no detail as to the terms of the alleged contract, save that Mr Paul Haigh asserts that he sent the Respondent's standard terms and conditions to himself as the managing director of the Applicant. The only evidence in Mr Paul Haigh's witness statement about any contractual agreement between the parties relates to the substrate powder only, where he asserts that it was agreed with Mr Norford that he would use the Respondent to act as an alternative supplier. I have already found that there is a real prospect of successfully arguing this conversation and agreement did not in fact take place. Further, there is no evidence from Mr Paul Haigh at all concerning the sales of resin.

33. Mr Pipe for the Applicant further observed that it is accepted that the Applicant would request supply of the substrate powder direct to Pennine. As set out above, when initial discussions were taking place with Mr Dickinson of Pennine, Mr Dickinson had thought that Mr Paul Haigh was acting on behalf of the Applicant. He had never heard of the Respondent until it was mentioned to him by Mr Paul Haigh and he was concerned about dealing with the Respondent.

34. Although it is not in dispute that the Respondent supplied materials to the Applicant, it is not agreed that the Respondent has identified any contractual basis for the provision of those materials. In the absence of a proper explanation for a contractual basis for the materials, there could be other potential remedies available to the Respondent, such as a claiming restitution. However, there may be difficulties in pursuing restitutionary remedies if Mr Paul Haigh is established as being a wrongdoer and in breach of his director's duties to the Applicant. Further, Mr Pipe submits that there are arguable issues as to whether property in respect of the materials has passed

to the Applicant and whether or not once the goods are indivisibly incorporated into the shower trays, title to the materials would be lost.

35. In response, Mr Berragan asserts that the Applicant's arguments are a "most extraordinary submission" when it is not suggested that the Applicant had contracted directly with Pennine. Further, the Applicant had taken and used the raw materials and was not proposing to pay anybody for them. There did not need to be a separate piece of paper for there to be an enforceable contract between the Applicant and the Respondent involving third party suppliers. Mr Dickinson's evidence does not assist the Applicant because although he initially thought he was dealing with the Applicant, he accepts that he agreed to invoice the Respondent and he accepted a personal guarantee from Mr Paul Haigh for the Respondent's liabilities. Various raw materials were provided by the Respondent to Pennine and Pennine simply blended them on the instruction of the Respondent.

36. In my judgment, the circumstances leading to the Respondent's supply of substrate powder and resin to the Applicant can be described as opaque at best. I do not accept that the evidence of Mr Paul Haigh and the Respondent establish that the Applicant has no real prospect of successfully succeeding in an argument that the Respondent cannot establish that there was a concluded contract. Further, I accept that the Applicant's arguments in respect of there being a real prospect of successfully arguing that the Respondent may have real difficulties in obtaining a restitutionary remedy. Even if I am wrong about that, the matter would need to be further considered in any event. If the Respondent does establish that there was an enforceable contract, any debt may need to be set off against any successful cross claim.

(2) Is there a realistic claim for damages by the Applicant in respect of the development of a new lightweight blend of the substrate powder?

37. The Respondent accepted that there is a triable issue in respect of the intellectual property for the lightweight substrate powder. However, it argues that there is no realistic claim because there is no evidence of actual sales to third parties of the substrate powder. In the absence of such evidence of sales, the court should not accept that there is any realistic prospect of successfully establishing that there were any

such sales and, if there were, that damages would be sufficient to extinguish the debt owed by the Applicant.

38. The Applicant argues that of course there is no evidence of sales at the moment because there has not been any disclosure. This is an application to set aside a statutory demand and the extent of dealings of the Respondent company cannot be seen until such disclosure takes place. However, as the Respondent accepts that there is a realistic prospect of successfully arguing that the Applicant owns the intellectual property to the substrate powder, if there are sales of the powder by the Respondent to third parties, it is a reasonable assumption that damages will be recoverable.

39. In my judgment, it is notable that the Respondent accepts that there is a triable issue in respect of the intellectual property for the substrate powder when, in its statutory demand, the Respondent asserted that the debt was owed in respect of "it's unique lightweight powder blend". In his first witness statement in support of the application, Mr Norford specifically asserted that the Respondent appears to have sold and attempted to sell the substrate powder to third parties. Mr Norford also asserted that Mr Paul Haigh, acting on behalf of the Respondent, also had instructed employees of the Applicant to run trials of new blends of lightweight substrate powder for competitors of the Applicant.

40. Despite those assertions being made, Mr Paul Haigh does not address them in his evidence. Mr Paul Haigh simply asserts that it was the Respondent who was developing a new lightweight substrate powder. He does not deal at all with the assertion that the Respondent was selling the substrate powder to third parties.

41. The Applicant then provided further evidence in a statement from Mr Kenneth Lesley Beney ("Mr Beney"). Mr Beney was the managing director of Marleton Cross Limited trading as MX ("MX"). Until MX was acquired by the Brand K group, it was a direct competitor of the Applicant. While it was still a direct competitor, Mr Beney describes how Mr Paul Haigh involved Mr Beney and the Respondent in various email discussions which led to Mr Paul Haigh arranging tests for MX at the Applicant's laboratories and offering to sell MX the new lightweight substrate

powder. In the end, Mr Beney did not purchase the substrate powder because the testing performed was not a success and did not show any real advantage for MX in producing MX shower trays. However, he acknowledges that he was extremely surprised by the offer being made, apparently by the Applicant, to share with a competitor samples of a product recently developed which was being presented to the market as being unique to the Applicant.

42. In addition to that statement, the second statement of Mr Norford exhibited an email sent by Mr Paul Crossley, the previous director and majority shareholder of the Applicant before it was acquired by Brand K. In that email dated 24 October 2022, Mr Crossley said:

"Someday Paul you may own and run your very own business that will employ a significant amount of people. Especially in trusted and senior positions. Just think carefully about this scenario. If you had employed someone who had breached their employment agreement. Clearly had embarked on a process that was gross misconduct in supplying a competitor with a raw material that had been developed within your own business. That now gives a competitive an manufacturing edge. What would you do?
Even worse you have gained a significant monetary benefit directly from this process. Crazy and nuts…
Just from my personal point of view I know for an absolute fact. Developing this new raw material was central to the long term profitability of JT. It was part of your ongoing development program to enable JT to continue and thrive as market leader. You were absolutely in total control of this process Paul and with that trusted position came great responsibility.
I know your development of any new process and any raw material trials were reported on each month in the monthly board pack.
This was presented to the board, investors and the bank. This is a point of record. Paul you were developing alternative additives, raw materials to be added to our manufacturing process. To also develop an alternative materials that was more cost effective, perform better in the manufacturing process. Also and more importantly were crucially important to our cost effectiveness and viability of JT. Ensuring Just Trays were less reliant an a single supplier.
Your job and clear roll was as Commercial Director. A massively important roll within the business.
You had total responsibility of the running all manufacturing operations. Including research and development.
It clearly stated that whilst doing this job all Intellectual property you created to enable JT to grow and thrive was held by your employer.
I know I have exited the business. I would not normally get involved or send an email like this. However I believe it did directly involve JT at the time. As a 51% owner and managing Director of JT holdings at the time of the inception of the development of Emu holdings I do believe it effects me.

> I believe you used a significant amount of production time and importantly JT's resources to develop this product. Without that you would not be in the position you are in now."

43. As well as the evidence of the email from Mr Crossley, Mr Norford exhibited a document from Mr Paul Haigh himself in his letter of appeal against dismissal. Mr Paul Haigh stated that the substrate powder had been trialled at the Applicant's premises for the Respondent and also had been trialled at other manufacturers. Mr Paul Haigh appeared to accept that there had been sales because he stated that "Emu's confidential information is the only information used in any external transactions".

44. There is, I find, clear evidence from the Applicant that Mr Paul Haigh, on behalf of himself and/or the Respondent, was attempting to sell the new lightweight substrate powder to third parties (both after the Applicant was acquired by Brand K and before). This issue is not addressed directly by the Respondent at all. In those circumstances, in my judgment there is plainly a real prospect of successfully arguing that there were sales of the substrate powder by the Respondent to third parties. I accept that there is no evidence at present to show the extent of any such sales and thus there is inevitably a degree of uncertainty about the extent of any damages. However, I accept the submission of the Applicant that in the absence of disclosure from the Respondent, the Applicant cannot provide details of the amount of likely damages for sales of the substrate powder to third parties.

(3) Is there any arguable breach of fiduciary duty by Mr Paul Haigh or any breach of his director's duty under the Act?

45. The Respondent argues that there was no arguable breach of director's duty by Mr Paul Haigh. Section 175 of the Act cannot help the Applicant because of subsection (3), as the duty to avoid a conflict of interest does not apply to transactions or arrangements with the company. The Respondent argues that there is a problem with relying upon section 176 because the duty is not to accept a benefit from a third party. The Respondent asserts that as no benefit has in fact come from a third party, that fiduciary duty is not engaged.

46. The Respondent does accept that the duty under section 177 of the Act to declare an interest in any proposed transaction or arrangement is engaged. However, the

Respondent asserts that it is clear from the Applicant's own accounts that the arrangement between the Applicant and the Respondent had been both declared by Mr Paul Haigh and approved by the Applicant.

47. Mr Paul Haigh exhibits the audit for the Applicant to the year ending 28 February 2022. The audit specifically notes that Mr Norford is "not involved in daily operations". As part of that audit, related party details for the period ending 28 February 2021 are set out and specifically note that Mr Paul Haigh is also a director of "Emu Stone Limited and Emu Products Limited". The type and purpose of the transactions between the Applicant and Mr Paul Haigh as managing director of the Respondent are described as :

> "Remuneration, benefits in kind and expenses, also JT purchased raw material (powder) from EMU Products limited on normal commercial terms. Total spend for the period ended 28th February 2021 was £992,125 and the balance due to EMU from JT as at 28 February 2021 was £277,346.5"

48. Mr Paul Haigh also exhibits the strategic report, report of directors and audited financial statements for the Applicant for the periods 1 November 2018 to 28 February 2020 (signed off by Mr Walker on behalf of the Board of Directors on 26 February 2021), to year ended 28 February 2021 (signed off by Mr Walker on behalf of the Board of Directors on 21 October 2021) and to year end 28 February 2022 (signed off by Mr Walker on behalf of the Board of Directors on 25 November 2022). In the first report to 28 February 2020, note 24 to the financial statements records that the Applicant had purchased raw materials from a company with a common director to the value of £68,051. Details of the common director were not given. Similar information was contained within the following two sets of accounts, albeit the value of purchases from the unnamed company and unnamed common director had increased significantly.

49. Those reports were signed off by Mr Walker on behalf of all of the directors. Therefore, it is argued by the Respondent that the other directors, including Mr Norford, must have been aware of the dealings with the Respondent and that Mr Paul Haigh was the common director referred to in the reports. Further, for those documents to be signed on behalf of the Board of Directors, the Respondent asserts that there must have been a quorate meeting of directors or board approval to include

those details in the accounts. The Respondent asserts that the inclusion of that information is sufficient for the purposes of section 177 of the Act.

50. Further, Brand K's company information to year end 28 February 2021 was signed off by Mr Norford himself on 21 October 2021. That company information also includes reference to raw materials being purchased from a company with a common director. The Respondent therefore argues that Mr Norford was aware of the arrangement in October 2021 and, on Mr Norford's own admission, by November 2022 at the latest. Despite Mr Norford being so aware and asserting that he was "furious" about the arrangements, further deliveries of substrate powder were accepted by the Applicant from the Respondent. The statutory demand only concerns invoices for the supply of materials to the Applicant after November 2022.

51. The Respondent further argues that, in any event, the activities of the Respondent did not need to be declared as an interest by Mr Paul Haigh because the activities of the Respondent could not reasonably be regarded as likely to give rise to a conflict of interest. This is so because the Applicant did not have the expertise to resource raw materials for the substrate powder and then arrange for them to be blended.

52. In response, the Applicant argues that the mere fact that there is mention in accounting documents of a common director and raw materials being supplied is not sufficient to satisfy the duty owed by Mr Paul Haigh pursuant to section 177 of the Act. Apart from the disputed conversation with Mr Norford, there is no evidence that Mr Paul Haigh actually declared what he was doing and the profit he would make when the Respondent was inserted into the supply chain.

53. Although there is mention in the audit reports of related party details which set out Mr Paul Haigh's involvement with the Respondent as director, the evidence from Mr Walker is that Mr Paul Haigh told him that the arrangement with the respondent was being put in place because the Applicant could not get credit from suppliers. No explanation was given by Mr Paul Haigh as to why credit could not be obtained. However, Mr Paul Haigh reassured Mr Walker that "everyone knew he was putting the arrangement into place".

54. The argument that the Applicant ratified the arrangement by virtue of continuing to place orders after it became aware of the involvement of the Respondent is flawed. In order to ratify, the Applicant would have to be aware of all of the details concerning the transactions including the fact of the Respondent making significant profits. There is no evidence that any real detail concerning the activities of Mr Paul Haigh and the Respondent was ever declared. Further, there is no evidence of any declaration before the transactions were entered into as is required by subsection (4). Further, it would be for the Respondent and/or Mr Paul Haigh to persuade the court that he had declared the nature and extent of the interest in the Respondent to the other directors of the Applicant.

55. Although Mr Norford was aware of there being a potential issue with the Applicant's related party transactions since November 2022, Mr Norford explained that it was only as a result of an investigation that he discovered that Mr Paul Haigh had been making "a secret profit". Once the investigation was completed, Mr Paul Haigh was suspended.

56. In my judgment, there is a real prospect of the Applicant successfully arguing that Mr Paul Haigh has breached his director's duties as set out in section 177 of the Act. For the purposes of this judgment, it is not therefore necessary to consider other potential breaches of director's duties under the Act. Although the involvement of the Respondent company in providing raw materials is noted on the accounts, there is no undisputed evidence that Mr Paul Haigh had declared either the nature or the extent of his interest in the Respondent, nor that the declaration was made before transactions were entered into by the Applicant.

57. Further, I find that there is also a real prospect of the Applicant successfully arguing that all of the work done by Mr Paul Haigh as a director of the Respondent could and should have been done by him as managing director of the Applicant. It appears that the only reason put forward by Mr Paul Haigh as to why the work could not be done by or on behalf of the Applicant was that the Applicant had financial difficulties. That issue is plainly in dispute and oral evidence will be required to resolve it.

(4) Is there a genuine cross claim for secret profits, misuse of confidential information, corporate opportunities and/or conspiracy against the Respondent and/or Mr Paul Haigh?

58. Given all of the evidence referred to above and the many evidential disputes between the parties, the short answer to this question is yes. Plainly, as the director of the Respondent company and thus its controlling mind, knowledge of and actions by Mr Paul Haigh are known by the Respondent. In those circumstances, if Mr Paul Haigh was acting in breach of his director's duties to the Applicant, that inevitably was known by the Respondent. For all of the reasons set out above, I find that there is a real prospect of successfully arguing the asserted cross claims.

(5) If the Respondent establishes that there is a direct contract between the Applicant and the Respondent, is there a genuine cross claim under section 14 of the Sale of Goods Act 1979 for breach of the implied terms of satisfactory quality and fitness for purpose in respect of the initial sale of an unreliable early version of the lightweight substrate powder by the Respondent to the Applicant?

59. This potential claim arises out of an earlier version of the new lightweight substrate powder provided by the Respondent to the Applicant which proved to be unreliable. Defective products were produced using that material and then sold by the Applicant to third parties. Claims were made in respect of the defective products and there were thus losses to the Applicant. If, as the Respondent asserts, there was a contract between the Applicant and Respondent in respect of substrate powder, and it is shown that the earlier lightweight substrate powder was defective, there must be an arguable claim for damages under section 14 of the Sale of Goods Act 1979 in that the substrate powder provided was not of satisfactory quality nor fit for purpose.

(6) If the answer to the above questions are that the Applicant has a real prospect of successfully arguing its case, are the damages arguably likely to extinguish the debt claimed in the statutory demand?

60. The Applicant asserts that it can easily establish arguable damages exceeding the debt claimed in the statutory demand. If a claim for secret profits is established, Mr Paul Haigh was a trustee of the Applicant's assets. If he acted in breach of trust, the

Respondent must have received them knowing that they were paid in breach of trust and so it received the payments as a trustee. The Applicant therefore has a claim to the return of all of those sums unless the Respondent can persuade a court that a reduction in repayment is appropriate under the rule in *Boardman v Phipps* [1967] 2 AC 46. However, any reduction in repayment would require an account and enquiry to determine what, if anything, the Respondent was entitled to retain.

61. Mr Norford set out his calculations for the profit made by the Respondent during its trading history with the Applicant and concluded that the profit made was over £1.15 million. If a conspiracy is established so that the Applicant paid more for the substrate powder and resin by dealing with the Respondent than if it had dealt with third party suppliers directly, damages for conspiracy will be the profit made by the Respondent.

62. In addition, if the Respondent used the Applicant's confidential information or exploited the Applicant's corporate opportunities, any benefit obtained by the Respondent will be held on constructive trust for the Applicant and again an account and enquiry will be necessary to determine what damages are payable.

63. In addition to that, there would be an additional claim for losses sustained by the Applicant in the region of £419,000 as a result of the use of the earlier defective substrate powder when, after complaints were made by customers, Mr Paul Haigh issued credit notes and offered rebates to affected customers to compensate for the inferior quality of the shower trays produced using the defective substrate powder.

64. The Respondent asserts that the assumptions made by Mr Norford about gross profit are incorrect and that the total gross profit across the Respondent's trading period is just over £700,000. The debt is thus not extinguished. Mr Paul Haigh relies upon the accounts of the Respondent company in asserting that figure. The Respondent therefore asserts that those figures are more reliable than the estimates of Mr Norford.

65. In my judgment, there is a real prospect of the Applicant successfully arguing that the likely damages in respect of the various cross claims raised by the Applicant against the Respondent will exceed the debt claimed in the statutory demand. Whilst I accept

that the figures given for gross profit by the Respondent are taken from accounts, I have no information or evidence as to the basis on which those accounts were prepared. Mr Norford explained in his evidence exactly how he came to the figures relied upon as being profit. He used, at least in part, the Respondent's own documentation as well as on information obtained by those supplying the Respondent with raw materials. In those circumstances, I accept that there is a real prospect of the Applicant successfully arguing that the debt as set out in the statutory demand will be extinguished.

66. Further, the Respondent's figure ignores damages for any potential claim in respect of losses caused by substandard lightweight powder provided to the Applicant. There is clear evidence that those damages could be £419,000. Taken in combination with the Respondent's figure for gross profit, the debt would be extinguished. Further, it ignores the likelihood of there being damages in respect of the misuse of confidential information and sales being made to third parties. If a conspiracy is established by the Applicant, if the Applicant can establish that it would have been able to obtain a lower price from suppliers than was obtained by the Respondent, in addition to the profit that price difference might also be claimed.

67. For all of the reasons set out above, the Applicant's application for an injunction to restrain the presentation of a winding up petition is granted.

68. I am grateful to counsel for their very able assistance in this matter.