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Case No: A30MA959

IN THE HIGH COURT
CHANCERY DIVISION
MANCHESTER DISTRICT REGISTRY

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

27th August 2015

B E F O R E:

HIS HONOUR JUDGE HODGE QC sitting as a Judge of the High Court

Secretary of State for Business, Innovation & Skills Claimant

-v-

Mr Philip Raymond Pawson Defendant

Approved Judgment
(Approved on 16 September 2015 with references unchecked)

For the Claimant: **Mr Giles Maynard-Connor** (instructed by Bond Dickinson, Newcastle-upon-Tyne)

For the Defendant: **Mr Jeremy Barnett** (instructed under the Direct Public Access Scheme)

Compril Limited
Telephone: 01642 232324
Facsimile: 01642 244001
Denmark House
169-173 Stockton Street
Middlehaven
Middlesbrough
TS2 1BY

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1. **His Honour Judge Hodge QC:** This the trial of a claim issued in November 2014 by the Secretary of State for Business, Innovation and Skills to disqualify the defendant, Mr Philip Raymond Pawson, a qualified chartered accountant and non-practising barrister, aged 58, from acting as a director of a company arising out of his conduct of the affairs of nine companies, formed and controlled by Mr Pawson, all with the same business model.

2. The claim is brought under section 8, rather than section 6, of the Company Directors Disqualification Act 1986. The claimant is represented by Mr Giles Maynard-Connor (of counsel), instructed by Bond Dickinson. The defendant is represented by Mr Jeremy Barnett (also of counsel), who is instructed by Mr Pawson on a direct access basis.

3. Mr Barnett rightly points out the comparative rarity of claims under section 8, rather than section 6, of the 1986 Act, because directors' disqualification proceedings normally follow on from the liquidation of an insolvent company or companies. None of the nine companies in issue, all of which bear the prefix "Recovery", was insolvent at the time of the winding up orders.

4. The trial took place over three days, starting at 10.30 on Monday 24th August and concluding at about 4.40 yesterday afternoon. This is my extemporary judgment, which I have started delivering at about 11 o'clock today, Thursday 27th August.

5. I make it clear that I have considered in detail all of the documents and the evidence presented to me. Inevitably, in a case as complex as the present, there will be particular documents, authorities and points, both factual and legal, to which I have been referred that I do not consider to be relevant to my determination in this case. The mere fact that I do not mention a particular matter does not mean that I have overlooked it, or that it has not been considered in the course of my deliberations. To mention every single point would make this judgment, in a difficult and complex case, unmanageable. That is particularly so in the case of an extemporary judgment, prepared overnight, in a case where the documentation extends to five, in some cases densely-packed, lever-arch files. Ideally, I would have wished to reserve my judgment; but the constraints of time and listing do not permit of that course.

6. These proceedings are the sequel to a judgment that was delivered by His Honour Judge Pelling QC, sitting as a Judge of the High Court Chancery Division in Manchester on 21st December 2011, on the trial of winding-up petitions presented by the Secretary of State on public interest grounds in relation to each of the nine companies. Judge Pelling acceded to the petitions to wind up each of those nine companies. My judgment should be read in conjunction with the judgment of Judge Pelling, an approved transcript of which was placed before me.

7. The history of the nine companies is set out in a chronology which has been prepared by Mr Maynard-Connor and which is agreed by Mr Barnett.

8. The first of the companies, Recoverymilford Ltd, was incorporated on 26th October 2007 and Mr Pawson was appointed sole director.

9. The second of the companies, Recoveryscholes Ltd, was incorporated on 12th February 2008 and Mr Pawson was again appointed as its sole director.

10. Recoverykingshill Ltd was incorporated on 17th June 2008. Again Mr Pawson was appointed its sole director.

11. The fourth company, Recoverywombourne Ltd, was incorporated on 12th May 2009. Again Mr Pawson was appointed its sole director.

12. On 1st September 2009 Mr Melvyn Duggan was appointed to act with Mr Pawson as director of Milford and Scholes. He was the director of only these two companies.

13. On 2nd December 2009, Recoverycookridge Ltd was incorporated. Again Mr Pawson was appointed as its sole director.

14. All five of those companies maintained websites. The full website is in evidence before me only in relation to Milford. But in the course of his evidence Mr Pawson accepted that the same statements had been made on the other websites. I will set out what appears on Milford's website after I have completed the chronology.

15. On 24th August 2010, three new companies were incorporated – Recoverylittlemilton Ltd, Recoverysaunderton Ltd and Recoveryweybridge Ltd.

16. On 4th October 2010, Recoverykensworth Ltd was incorporated. Mr Pawson was appointed as the sole director of each of those four companies on incorporation.

17. On 8th November 2010 the Secretary of State authorised investigations under the Companies Act into each of Kingshill, Scholes, Wombourne, Milford and Cookridge. Mr David Usher, Ms Lynn Cullen and Mr Leonard Fenton were appointed the investigators. By the time the investigators were appointed, the companies had failed to achieve a number of their stated objectives.

18. At this point it is convenient to refer, by way of background, to the introduction to Judge Pelling's judgment. None of the matters there set out were in issue before me and, in any event, the accuracy of Judge Pelling's introduction is amply demonstrated by the evidence before me. At paragraph 1, Mr Pawson was said to be the sole director of seven of the nine companies; it was said that he had acted for each of the companies at the trial of the petitions. He was said to be a chartered accountant who had practised all his life in industry. (I should just add that Mr Pawson told me that in fact he had worked at the Institute of Chartered Accountants in London for about three years, from 1986 to 1989, as the Under-Secretary to its Accounting Standards Committee.)

19. He had then been engaged in providing training and continuing professional development for accountants, until he incorporated the various Recovery companies. Judge Pelling recited that Mr Pawson was also a non-practising barrister, and that he had given evidence before him.

20. At paragraphs 2 through to 4, Judge Pelling set out the background to each of the companies:

> "2. Each of the companies was formed as a vehicle for the promotion of recovery schemes, arising out of a number of unlawful collective investment schemes. The common feature of each of the unlawful collective investment schemes was the marketing of plots of land for prices of between £5,000 and £25,000, at various sites. The plots were marketed as a land banking scheme, which offered the prospective of high yield returns at some time in the future, if and when planning permission was obtained, that would enable the sites to be developed and each plot owner to receive a proportion of the development value of the land in question. It was a common feature of these schemes that there was no realistic prospect of planning permission being obtained in the short term, usually because the land was located in the green belt and/or was an SSI protected site. These schemes had been promoted by Mr Ian McCullen, trading as English Land Partnership (ELP), or by a successor company called London Land and Property Exchange Ltd. The Financial Services Authority decided that each of the schemes was an unlawful collective investment scheme. In the result, Mr McCollum ceased trading in 2006 and was made bankrupt in 2008. London Land and Property Exchange Ltd was dissolved in 2009.
>
> "3. Mr McCullen had apparently retained a number of plots for his personal account at one or more of the sites in respect of which he had promoted schemes. The title to these plots passed to Mr McCullen's Trustee in Bankruptcy, on his bankruptcy. According to Mr Pawson, the Trustee either does not know, or is unwilling to disclose precisely what plots were owned by Mr McCullen and are now held by the Trustee.
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> "4. The companies, as I have said, are vehicles for the promotion of 'recovery schemes' by which the plot owners were invited to subscribe for shares in the vehicle concerned, in proportion to the number of plots they each owned. Each company had been formed as a vehicle for a single site, whose location features usually in the name of the company concerned. The object was to bring all, or at least a critical mass minimum number of the relevant plot owners together and invite them to subscribe for shares in the relevant company, at the rate of 5% of their original investment. The ostensible purpose of the capital was for it to be deployed (a) to acquire land formerly held by Mr McCullen, from his Trustee in Bankruptcy; (b) to fund the fees that would be incurred in seeking planning permission; and (c) to meet the costs of forming the company concerned. The underlying scheme depends upon at least a critical mass of plot owners not merely acquiring shares in the relevant company concerned, but also entering into an option agreement with the vehicle company concerned, under which the plot owner agrees to sell his or her plot to the company in the future, upon the exercise of the option. Mr Pawson maintained that the price payable, or to become payable under the option, which was to be arrived at by applying a rate of £400,000 per acre to the plot concerned, was one which would be less than the likely true development value of the land concerned, assuming planning permission could be obtained. It followed that each shareholder would share proportionately in the difference between the price at which the land could be

> sold by the vehicle company to an interested developer and the sum of the price that the company had to pay under the options to the shareholder/owners, and at any rate theoretically, the sums that would have to be paid to the Trustee in Bankruptcy to acquire the plots held by that officer. The share structure of each vehicle company is the same; the share capital is divided into A shares and B shares. Mr Pawson said in evidence that the B shares represented, or were intended to represent 30% of the issued share capital of each company; that the B shares all belonged to Mr Pawson beneficially as well as legally and the A shares were those that were, or were to be allotted, to the subscribing plot owners. As the number of subscribing plot owners increases, the number of B shares also increased, so as to maintain the 30% ratio. As will be obvious, the consequence of the scheme is that plot owners will recover 30% less of the difference between the price payable by a developer and the price payable by the company concerned, on the exercise of the option, and any sum payable to the Trustee, than would otherwise theoretically be the case if the land had been sold by the plot owner concerned directly to the developer concerned. Mr Pawson says this is reasonable, because it reflects the fact that individual plot owners will, in practice, not be able to obtain planning permission for the whole relevant site and the dividend payable to Mr Pawson, by reference to the B shares, is, in effect, his price for putting the schemes together and facilitating the realisation of the sites in the way I have described. In addition to the financial benefits to which I have referred, the B shares carry all the voting power in relation to each of the relevant companies. The A shareholders have no rights other than the rights to a dividend, *pari passu* with the B shareholders, as a final dividend, presumably upon dissolution of the company, once the sale has taken place."

21. Although in his judgment, Judge Pelling referred to Mr McCullen, in fact his name was Mr McCallum. His Trustee in Bankruptcy, who was appointed on 15th April 2008, was a Mr Pillmoor.

22. The websites for the first five of the nine companies, which were all in the same form, appear from Exhibit LXF1 to Mr Fenton's affidavit (at pages 235 and following of bundle 2). In describing the company, the website stated that its directors:

> "… had taken all reasonable care to ensure that every statement of fact or opinion included in the pages of this website is true and not misleading. The directors have not limited their liability with respect to the contents of this website."

23. Under the heading "what are the terms of the Recovery scheme?" the website stated:

> "Anyone considering subscribing for shares in this company should regard that subscription as made primarily to assist the furtherance of the company's objectives of gaining planning permission for the land. The subscription is not an investment that will make any material return until such time as planning permission is achieved and is not therefore an investment in itself."

24. Later, the website stated:

> "It is believed that the amount subscribed for shares will be sufficient working capital for the company to pursue its objectives and meet all of its obligations. It is not anticipated that the company will need to seek further working capital from

the shareholders. However, if it is necessary, it will only be in circumstances in which the company has made significant and tangible progress towards obtaining planning permission and the ultimate successful end is in sight."

25. Under the heading "what will the money raised from the share issue be used for?" The answer provided is as follows:

> "The cash raised from those who subscribe for shares in the company will be used to meet the every day running costs of the company, mainly a modest retainer for the director and professional fees for planning consultants and other professionals, associated with the planning process. Further, Ian McCallum who still holds a few plots at Great Kingshill has been declared bankrupt. This means that the company can negotiate with the Trustee in Bankruptcy in order to buy McCallum's plot holdings and complete the company's holdings in this area. As this land is unlikely to be of interest to any other purchaser, it is hoped to be able to buy it for a very modest amount of money."

26. Under the heading "Who is Philip Pawson?" he was described as a chartered accountant and a barrister, a member of the Bar of England and Wales. It was said that he had researched and proposed this recovery plan in order to ensure that it was compliant with the Financial Services and Markets Act 2000. He was said to be in no way connected with English Land Partnership or any of the other derivative organisations that continued to operate in the field.

27. Under the heading "How much will Philip Pawson receive from the company?" the website stated as follows:

> "A Leeds based firm of chartered accountants have advised that Philip Pawson's remuneration package should be largely performance-based. To this end, the firm have proposed that a retainer of £1500 per month should be paid as salary and the capital structure of the company should be such that Mr Pawson will receive 30% of the revenue from the sale of the land."

28. There is no reference on the website to the fact that Mr Pawson was proposing to charge in any way for the research which he was said to have undertaken in order to ensure compliance with the FSMA 2000.

29. The reference to a "Leeds based firm of chartered accountants", and their advice as to Mr Pawson's remuneration, is a reference to a letter from Ford Campbell Freedman LLP to Mr Pawson dated 19th December 2007. It is headed "Recoverymilford Ltd". The letter referred to a meeting on 12th December 2007 and set out the writer's thoughts on Mr Pawson's remuneration package and incentives from the company. Paragraph 1 reads as follows:

> "You will be the company's only executive director at the present time and will be involved in communicating with shareholders and plot holders, negotiations to obtain control over the remaining unsold plots and instructing advisers to deal with seeking residential planning consent. In the meantime, you will be involved in attempting to obtain income by way of letting the grazing rights. The whole process is likely to take some years and will involve regular communication with the shareholders/plot holders. A basic level of remuneration for yourself for carrying out these tasks would, in our view, be not less than £1500 per month, by way of salary."

30. In evidence, Mr Pawson accepted that at the time this letter was written it was only envisaged that there would be one Recovery company, namely Recoverymilford Ltd. Mr Pawson also accepted that he had not, in fact, been involved in attempting to obtain income for any of the plots within any of the Recovery companies, by way of letting grazing rights or otherwise.

31. Returning to the chronology, following the appointment of the Secretary of State's investigators into the first five companies, on 26th January 2011 the Secretary of State authorised investigations by the same three individuals into the remaining four Recovery companies, Little Milton, Weybridge, Saunderton and Kensworth.

32. On 16th May 2011, winding up petitions were presented against all nine companies, which led to a trial before Judge Pelling on 19th and 21st December 2011 and the making of winding-up orders against all nine companies on 21st December 2011.

33. At the time the investigators were appointed in relation to the first five companies, the percentage of the total number of plots held by each of the companies was as follows: Kingshill 27%; Milford 46%; Scholes 67%; Wombourne 30% and Cookridge 17%: see LXF1, page 440, within bundle 2.

34. By the time the investigators were appointed, no land had been acquired from Mr McCallum's Trustee in Bankruptcy; no formal planning applications had been submitted and the only contact with local planning authorities had been some enquiries by telephone; and the companies had not achieved their required critical mass (some 70% to 80% of the total number of potential plot holders) which had been intended before planning permissions could be pursued.

35. By the time the winding up petitions were presented on 16th May 2011, the cash at bank representing the assets and working capital of each company was as follows: Kingshill £307; Milford £904; Scholes £4,816; Wombourne £303; Cookridge £65; Little Milton £1,005; Saunderton £4,586; Weybridge £4,354; and Kensworth £18,405.

36. By the morning of the second day of the trial, it was common ground that Mr Pawson had received at least £158,000 in salary and legal opinion fees from the nine companies, and possibly as much as £159,250. The reason for the difference was that the other director, Mr Duggan, had said in evidence that he had received a total of £2,000 by way of remuneration from sums received by Mr Pawson, whereas Mr Pawson put the figure at only £750. In addition, Mr Pawson had received a VAT payment of £875 in respect of the first of the legal opinions for which he had charged. He had subsequently de-registered for VAT purposes and so had not charged VAT on any later opinion.

37. Mr Pawson had begun to receive remuneration at or about the time of the incorporation of the first of the companies, Milford, in October 2007; and he had ceased to receive remuneration at about the time of the first appointment of the company investigators, at the end of November 2010. Mr Pawson had therefore received a minimum of £158,000, by way of remuneration and legal

opinion fees over the three year period, equating to some £52,000 a year, or £4,000 a month. The sums in question represented something in the order of a little under 69% of the total shareholders' funds in the companies.

38. Returning to Judge Pelling's judgment, the three grounds for winding-up relied upon by the Secretary of State in relation to each of the nine companies were (a) a lack of commercial benefit to be derived from the schemes being operated by the companies concerned; (b) an allegation that the business model for each of the companies concerned was unsustainable; and (c) an allegation of a lack of commercial probity on the part of Mr Pawson.

39. Although a number of allegations were relied upon in relation to the alleged lack of commercial probity, only one of them was upheld at trial, which was that Mr Pawson had overcharged for legal advice given to each of the nine companies. To that extent, the allegation of lack of commercial probity was upheld by Judge Pelling, as were the other two grounds of lack of commercial benefit and an unsustainable business model. Reference should be made to Judge Pelling's judgment for the basis of those findings. Judge Pelling's conclusion was that on balance it was expedient in the public interest for each of the nine companies to be wound up, and that it was just and equitable that they should be wound up accordingly.

40. The allegations of unfitness made against Mr Pawson are set out in the supporting first affidavit of Mr Fenton, one of the company investigators, sworn on 6th November 2014. I quote from paragraph 17:

> "Mr Pawson caused the companies to operate schemes in a manner which, due to his actions/inaction, provided no commercial benefit to the shareholder members of the schemes and which became unsustainable in view of (1) the level of remuneration and benefits taken by him as against the available shareholder funds and the likelihood of obtaining further funding and (2) the actual steps taken to progress the schemes, as against the further action required and the likely cost of that action. The schemes in relation to Little Milton, Saunderton, Weybridge and Kensworth were promoted by Mr Pawson after September/October 2010 when he knew, or ought to have known, that the existing schemes had become unsustainable. Despite the companies operating from mid-2008/2009 to September/October 2010 respectively, they failed to achieve a number of their stated key objectives and without obtaining further shareholders or additional capital from existing shareholders, or Mr Pawson injecting funding personally, the companies were left with insufficient funds to carry out their stated objectives."

41. Mr Pawson particularises the matters of unfitness in a number of sub-paragraphs of paragraph 17. At sub-paragraphs 17.1 to 17.7, he sets out the details of the schemes; at sub-paragraphs 17.8 and 9 he addresses the alleged lack of commercial benefit; at sub-paragraph 17.10 he particularises the allegation of disproportionate remuneration and transactions to the detriment of shareholders; at sub-paragraph 17.11 he gives details of the alleged unsustainable business model.

42. In his second affidavit, sworn on 2nd March 2015, Mr Fenton confirms (at paragraph 8) that it was not intended to make any allegation in the present proceedings that Mr Pawson was unfit as a result either of holding himself out

as a barrister in connection with the companies' operations, or the purported charge made by Mr Pawson to Milford with regard to VAT.

43. The evidence in support of the petition originally comprised Mr Fenton's first affidavit, to which he exhibited the witness statements he had made in the companies' winding up proceedings. Evidence in answer took the form of an affidavit from Mr Pawson, sworn on 5th December 2014. The Secretary of State replied by way of a second affidavit of Mr Fenton and an affidavit from Mr Duggan, sworn on 26th February 2015.

44. In his skeleton argument on behalf of the defendant, Mr Barnett addresses the case of his client in respect of unfitness. He states that Mr Pawson maintains that the scheme was designed in order to assist plot holders recover value for their investments in land in an open and transparent manner. In particular, he says that Mr Pawson will contend:

    (a) That no representations were made as to the chances of success of the scheme; the alternative that the plot holders faced was to write off their investments, which had been lost due to the ruling of the Financial Services Authority;

    (b) Mr Pawson maintains that the level of remuneration was declared in clear and certain terms, prior to his accepting investments into the companies from the plot holders, and the amount of remuneration was proportionate and in the best interests of the shareholders. He invites the court to note that Mr Pawson reduced the amount of his drawings when it seemed appropriate to do so, but continued to discharge his responsibilities for each company until the date of winding-up.

    (c) Many of the investors took their own advice from other professionals, including independent financial advisers.

    (d) Mr Pawson will contend that the companies were capitalised to a realistic initial amount, bearing in mind the objectives and business strategy that was adopted.

45. Although Mr Pawson accepts that there came a time when further funding was necessary, he contends that the allegation that the business model was unsustainable has the benefit of hindsight.

46. Mr Pawson submits that the scheme provided a reasonable rate of return for plot holders in the event of sale to a developer. The first pay out would be to the plot holders, and not to shareholders, at the rate of £400,000 per acre; the second payout would be to shareholders and would represent the profit in the company earned from selling the land at a higher rate than £400,000 per acre, and also from selling the land purchased from the Trustee in Bankruptcy. This profit would be distributed to all shareholders according to their shareholding.

47. Mr Pawson invites the court to note that the directors would have 30% of the shares and consequently their return would largely be performance-based as they would not be participating in the first payout, in their capacity as directors, unless they actually held any of the plots in question.

48. Mr Pawson maintains that, at all times, he acted with the best interests of the plot holders in mind and he always anticipated being able to persuade other plot holders to join in with the rescue attempts, so putting the companies on a more secure financial footing. He will also assert that he gave up other work in order to build the companies into a viable business; and he maintains that the fact that Mr Duggan and other plot holders have persisted with their own version of the plan, which is related in the skeleton, demonstrates that Mr Pawson had been entitled to form the businesses and manage them in the way that he did. He says that, in reality, it is only with the benefit of hindsight that it can be said that his approach to management and remuneration was perhaps inappropriate. In support, he relies upon the contents of his affidavit.

49. There is no serious dispute between the parties as to the applicable law, which is summarised at paragraphs 10 to 20 of Mr Maynard-Connor's written skeleton and paragraphs 22 to 24 of Mr Barnett's skeleton. Under section 8 of the 1986 Act:

> "The Secretary of State may apply to the court for a disqualification order against a person who is, or has been, a director or shadow director of a company if it appears to him from investigative material that such an order is expedient in the public interest."

50. Section 8, sub-section 2, provides that:

> "The court may make a disqualification order where it is satisfied that the conduct of the relevant director, in relation to the subject company, either taken alone, or taken together with his conduct as a director or shadow director of one or more other companies, makes him unfit to be concerned in the management of a company."

51. Mr Maynard-Connor accepts that, unlike section 6, disqualification is not mandatory under section 8. The court has a discretion to disqualify even if satisfied that a defendant's conduct makes him unfit to be concerned in the management of a company. Mr Maynard-Connor has taken me to the leading, albeit unreported, judgment of Lloyd J in the case of *Re Atlantic Computers plc, Secretary of State for Trade and Industry v Ashman & Ors*, handed down on 15th June 1998.

52. He has taken me to Lloyd J's summary of the law at pages 13 through to 17. There Lloyd J recognised that the discretion under section 8 could be used to refrain from imposing any disqualification at all, although it seemed to him that that was likely to be an unusual course, although not one that could be excluded. He recognised that there might be circumstances, in particular concerned with the passage of time, which might make it appropriate to refuse to disqualify.

53. I was also taken to page 139 of Lloyd J's judgment, where reference was made to matters relevant to the court's discretion as regards disqualification orders. These were said to include the respondent's age and state of health; the length of time the respondent had been in jeopardy; whether he had admitted the charge; his general conduct as a director of the relevant or any other company, before and after the relevant time; and any period of disqualification imposed

on fellow directors. They also were said to include any period of *de facto* disqualification resulting from the existence of the proceedings.

54. Mr Maynard-Connor recognises that sections 6 and 8 further differ in that: (1) no limitation period is prescribed for proceedings under section 8; (2) for the purposes of section 8, there is no requirement that the subject company or companies has, or have, become insolvent; (3) that although section 8, sub-section 4 stipulates a maximum period of disqualification of 15 years, there is no minimum period of two years, although Mr Maynard-Connor indicates that the *Sevenoaks* banding still applies to the fixing of any disqualification under section 8.

55. That, of course, is a reference to the well known tripartite division into those cases that are not particularly serious, meriting disqualification for up to five years; those that are particularly serious, meriting disqualification in excess of ten years; and those that are serious, but not particularly serious, that merit disqualification for between six and ten years.

56. Having made those points, however, Mr Maynard-Connor says that, as under section 6, the purpose of section 8 is to improve the standard of conduct of company directors; and the purpose of a disqualification order is, by depriving the defendant of the liberty to take part in the management of a business carried on with the privilege of limited liability, to protect the public both from the misconduct of a business by that director, and also to exercise a deterrent effect in relation to other company directors.

57. The question of unfitness is one of fact. The court has to be satisfied that the director in question has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies. That is said to involve a two stage process: first inquiring whether the director has acted in a culpable manner; and, if so, whether his conduct justifies a finding of unfitness. In seeking to answer those questions, by section 9 of the Act the court is required to have regard to the statutory guidelines for determining unfitness, set out in Schedule 1. In this case, paragraph 1 is said to be of particular relevance, namely any misfeasance or breach of any fiduciary or other duty by the director in relation to the company; although unfitness is said to be an ordinary word and the list is not exhaustive. It is said that any misconduct on the part of Mr Pawson, whether or not referred to in Schedule 1, may be considered on the question of unfitness.

58. On that point, I was taken to the decision of Neuberger J in the case of *Re Amaron Ltd* [1998] BCC 264, at page 268, between letters F and G. There, Neuberger J recognised that the fact that the legislature had set out specific grounds in the Schedule to the 1986 Act did not mean that it had not intended other grounds capable, on appropriate facts, of being inherently more culpable than, on other facts, some of the grounds set out in the Schedule, to be of less importance. It seemed to Neuberger J that one should take each allegation of unfitness on its merits and consider it, irrespective of whether it fell within the Schedule or not. Moreover, Mr Maynard-Connor submitted that where a number of allegations are made against a director and are established on the evidence, the court must consider the effect of all such allegations cumulatively. Provided that unfitness is demonstrated cumulatively, it is no

defence if none of the allegations, individually, would be sufficiently serious to demonstrate the required unfitness.

59. In the course of his short oral opening, Mr Maynard-Connor also took me to the first instance decision of Jonathan Parker J in the case of *Re Barings plc (No 5)* [1999] 1 BCLC 433. That case subsequently went to the Court of Appeal, where the approach of Jonathan Parker J was endorsed in the judgment of the court, delivered by Morritt LJ: see, in particular, paragraph 35 of his judgment. Jonathan Parker J set out the law relating to the court's jurisdiction under section 6 of the Act at sub-section A of Section III of his judgment, beginning at page 482 and continuing up to page 486.

60. I have borne all of those twelve propositions in mind. I bear particularly in mind what is said at paragraph A 3 that:

> "The primary purpose of the jurisdiction under section 6 is to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies has shown them to be a danger to others..."

61. The fact that under section 6, in contrast to section 8, the court is under a duty to make a disqualification order where unfitness is shown, coupled with the fact that, again in contrast to section 8, a disqualification order under section 6 must last for a minimum of two years, highlights the significance which Parliament attaches to the fact that the company in question has become insolvent. This, of course, is not an insolvency case; and I bear that in mind.

62. I also bear in mind what is said at paragraph A4 that:

> "In every case the function of the court in addressing the question of unfitness is to 'decide' whether [the conduct of which complaint is made by the Secretary of State], viewed cumulatively and taking into account any extenuating circumstances, has fallen below the standards of probity and competence, appropriate for persons fit to be directors of companies…"

63. Mr Maynard-Connor submits that in the present case Mr Pawson's conduct has involved both a want of probity and a lack of integrity. It demonstrates not simply mere incompetence. It is said that the present case involves a professional person whose conduct demonstrates a number of breaches of duty to the company and, independently of that, demonstrates his unfitness to act as a company director.

64. Mr Barnett acknowledged in his opening skeleton that the list of matters itemised in Schedule 1 to the Act is not exhaustive and that any misconduct could be considered, provided it was sufficiently serious. Mr Barnett contends that, as with other disciplinary jurisdictions that consider fitness to practise, this is a matter for the exercise of judicial discretion; to undertake what is, in effect, a risk assessment exercise, extending the privilege of limited liability, bearing in mind the need to protect shareholders, creditors, the Revenue and the public interest. He cites from the judgment of Hoffmann J in the case of *Re Dawson Print Group Ltd* (1987) 3 BCC 322 at page 324 column 2:

> "There must … be something about the case, some conduct which if not dishonest is at any rate in breach of standards of commercial morality, or some

> really gross incompetence which persuades the court that it would be a danger to the public if [the respondent] were to be allowed to continue to be involved in the management of companies, before a disqualification order is made."

65. Mr Barnett also emphasises that misconduct must be serious, citing from the judgement of Peter Gibson J in *Re Bath Glass Ltd* (1988) 4 BCC 130*,* at page 133, column 2:

> "To reach a finding of unfitness the court must be satisfied that the director has been guilty of a serious failure or serious failures, whether deliberately or through incompetence, to perform those duties of directors which are attendant on the privilege of trading through companies with limited liability."

66. Mr Barnett has also referred me to observations of Sir Nicolas Browne-Wilkinson V-C in *Re McNulty's Interchange Ltd* (1988) 4 BCC 533*,* at 536. There, the Vice-Chancellor addressed the drawing of remuneration out of the company. He emphasised that there had been nothing to suggest, in that case, that, in the light of the information then available, the level of remuneration in question had been in any way improper. The truth of the matter was that in the field of advanced technology, there was a commercial invention which appeared to have a very good future, in relation to which there was a shortage of capital for research and development and the necessary finance, so it was thought, to cover that shortfall had been raised.

67. It might be that wrong commercial decisions had been taken; but the Vice-Chancellor deplored the suggestion that a director who had made what in retrospect appeared to be a commercial misjudgement had in some way acted in a manner which was culpable so as to justify disqualification. The Vice-Chancellor concluded this section of his judgment by inviting Official Receivers to consider, as a matter of policy, whether it was right to bring directors before the court when the aspects of their conduct which were called into question were mere mismanagement.

68. At this point, it is appropriate for me to refer to the witness evidence that I have heard. For the Secretary of State there were only two witnesses: Mr Fenton and Mr Duggan, the only other director (with Mr Pawson) of two of the nine companies in question. Mr Maynard-Connor submits - and I accept - that both Mr Fenton and Mr Duggan were credible witnesses whose evidence was clearly proffered in order to assist the court. Indeed, Mr Barnett did not suggest otherwise.

69. I also accept that their evidence was clear and, where possible, was corroborated by contemporaneous documents. Mr Maynard-Connor points out that Mr Fenton's substantive evidence was not challenged at all; including his account as to what he had been told about the absence of any written contract of employment in relation to Mr Pawson.

70. Mr Fenton gave evidence before me for about an hour, on the morning of the first day of the trial. There was, as I say, no challenge to any of his evidence. I found his evidence to be reliable and Mr Fenton to be honest. He made a number of concessions in favour of Mr Pawson. In this case, there was no allegation that any of the companies had been insolvent at any stage. There was no criticism of any of the company accounts which Mr Pawson had

prepared, and a number of the accounts had had the usual "going concern" qualifications. There was no reason to think that any of the accounts was incorrect. This was a case where Crown debts had been paid as and when they had fallen due. The companies had had no trade creditors.

71. Mr Fenton accepted that Mr Pawson had reduced the level of remuneration which he had been charging the companies; although Mr Fenton explained this by the fact that the companies had not simply had the funding to pay the agreed rate of remuneration. When it was put to him that Mr Pawson had had one eye on the companies to pay his salary at a level it could afford, Mr Fenton's response was that the companies had simply not had the funds to pay. That was a finding that was made by Judge Pelling; and even if I am not bound by that finding, it was entirely justified, having regard to the terms of the company accounts.

72. Mr Fenton later asserted that Mr Pawson had been dissipating the income of each of the companies on his own remuneration or on his legal opinion fee. Given the limited source of funds from shareholders, Mr Fenton's view was that Mr Pawson was not being very prudent. Mr Fenton also addressed the difference between Mr Duggan's new corporate recovery vehicles and Mr Pawson's Recovery companies. The difference was said to be that the directors of Mr Duggan's companies were not taking remuneration and depleting the income from the issued share capital. Mr Fenton made it clear that the Secretary of State's allegation was not that the business plan was doomed to failure of itself. The allegation was that that was so because of the way that Mr Pawson had been running his companies. I accept the evidence of Mr Fenton as reliable and accurate evidence, honestly given.

73. I also accept Mr Duggan's evidence. I found him to be an entirely honest witness, and also a disinterested witness, who had been doing his best to assist the court; and he has also been genuinely trying to assist his fellow plot holders, which includes himself and members of his family who also hold plots of land. He readily accepted that the intention of Mr Pawson's Recovery companies had been to provide a life-raft to remedy the consequences of fraud practised upon the plot holders. All of them had recognised that it was a long haul and that the chance of success was very limited. The plot holders had accepted it as the only way forward. He still supported the business objectives of Mr Pawson's Recovery companies.

74. I accept his evidence that he was not afforded the detailed access to the Recovery companies' accounts that he would have liked. I accept that he was not satisfied by the way that Mr Pawson was running the companies. As a result, having initially drawn (according to Mr Duggan) £250 from each of the two companies for four months, Mr Duggan had offered not to take any further salary until he had agreed a way forward, because he was not satisfied with Mr Pawson's decisions at the time. I accept Mr Duggan's evidence that when he had first become involved in the companies, he had thought that they were sufficiently solvent to achieve their aims; but that when he had looked more closely into the companies it had become apparent to him that the companies' operations were unsustainable, in the longer term, in the way in which Mr Pawson was operating them.

75. By the time of the appointment of the company investigators, Mr Duggan accepted that Mr Pawson had been planning to withdraw from all of the nine companies; but they had not yet agreed what the terms of his continued involvement would be. Mr Duggan said that after Mr Pawson had reduced the salary that he was taking, Mr Pawson had not reduced the level of his work; but Mr Duggan added the important qualification that that was because not much was actually being done at that time.

76. I have not been really assisted by any detailed consideration of the dealings between Mr Pawson and Mr Duggan. They do not seem to me to be relevant to the allegations of unfitness levelled against Mr Pawson. I am considering Mr Pawson's conduct, and not Mr Duggan's; but I see absolutely nothing to criticise in Mr Duggan's conduct.

77. Mr Duggan described Mr Pawson as "aggressive, abusive and dismissive" of plot owners; and he contrasted Mr Pawson's approach with Mr Duggan's own, which involved trying to generate team spirit. In my judgment, those criticisms of Mr Pawson are justified.

78. I reject any suggestion that Mr Duggan was seeking to use prospective plot owners to put himself into a stronger position, or that he was in any way seeking to undermine Mr Pawson's position. The reality was that Mr Duggan was seeking to moderate Mr Pawson's attitude, in the hope of thereby generating more support from potential shareholders, in the form of plot holders who had not yet joined the company. I accept that Mr Duggan is interested in the long term success of the recovery option.

79. I reject any suggestion that Mr Duggan's concerns came late in the day and were in any way manufactured. I find that Mr Duggan was genuinely concerned that Mr Pawson was discouraging people from joining the Recovery companies because of his attitude, and because he did not want what he considered to be "undeserving" people to join the Recovery companies, such as those who had had the misfortune to have been allocated plots which were burdened by restrictive covenants.

80. I accept Mr Duggan's evidence that by June to October 2010 he and Mr Pawson had concluded that the way forward in principle was for Mr Pawson to exit the companies and for the plot owners to manage them for the benefit of all the plot holders.

81. I find that Mr Duggan was concerned that Mr Pawson had been drawing his salary and had done very little for it; but Mr Duggan was attempting to adopt a pragmatic approach to move forward. I find that Mr Duggan and Mr Pawson disagreed on the tactics to be taken in relation to the acquisition of Mr McCallum's plots from his Trustee in Bankruptcy. Mr Duggan felt that it was essential that they should maintain a dialogue with the Trustee in Bankruptcy, whereas Mr Pawson's tactic was just to try and freeze him out.

82. I accept Mr Duggan's description of Mr Pawson as an "autocrat" who would run the business his own way and who refused to accept any suggestions or criticisms. I am satisfied that that is entirely borne out by the email traffic to which I was taken at some considerable length. I find that Mr Duggan's

refusal to support Mr Pawson's position, in the context of the Secretary of State investigation and the winding-up proceedings, was not motivated by any concern on the part of Mr Duggan that he might find himself subject to disqualification proceedings. I find that Mr Duggan's attitude was dictated by genuine concerns about the way in which Mr Pawson had been conducting himself, which were objectively justified. I find that Mr Duggan has not exaggerated his concerns about Mr Pawson's conduct.

83. I find that Mr Duggan has been making some progress in advancing the business recovery plan through the new companies he has established. As Mr Duggan acknowledged, it is "a slow burn"; but I find that there has been some movement on all possible fronts, in a way that Mr Pawson had failed to achieve.

84. I accept that the main imperative moving Mr Duggan is to secure the return of his original investment in the plots, rather than seeking to make a profit from the new companies. I accept his evidence that he has never contemplated the precise amount of any potential recovery. I reject any suggestion that Mr Duggan had any financial or other motive for seeing the Recovery companies wound up and that he never wished for that, other than because of the way in which they were being run by Mr Pawson.

85. I find that, even in the case of the only two companies of which he was the director, Mr Duggan had only limited involvement. He was not a signatory to the bank accounts; he had no involvement in their financial records or share register, their annual returns or the companies' day to day management. He had no involvement in developing or maintaining the company websites, beyond answering a few questions. It is worth bearing in mind that Mr Duggan is based in Surrey, whereas Mr Pawson lives in Leeds, and the companies' offices are his home.

86. I accept Mr Duggan's evidence that Mr Pawson did very little in relation to the companies; that he had no contact with potential developers or in-depth discussions with any planning consultants or any planning authorities. Mr Duggan's sole role had been in trying to introduce new plot holders to the companies, so as to subscribe for further shares and generate further share capital. I also find that Mr Duggan thought it remiss on the part of Mr Pawson that no option agreements had ever been put in place with any of the plot holders.

87. Where there is any conflict of evidence between Mr Duggan and Mr Pawson, I accept the evidence of Mr Duggan.

88. I should record, before leaving Mr Duggan, that he gave evidence before me for about two and a quarter hours, beginning just before 12.30 on the morning of Day 1 and concluding at about 3.45 that afternoon. Mr Pawson gave evidence before me for about five hours and 40 minutes in total, beginning at about 10.30 on Day 2 and concluding at about 11.15 on Day 3.

89. In the course of his closing, without endorsing the description, Mr Barnett recognised that the court might regard Mr Pawson as "arrogant" or "abrasive". In my judgment, that recognition was a realistic one; and I did find that both

descriptions applied to Mr Pawson. Mr Maynard-Connor submits that Mr Pawson's evidence was far from satisfactory and that he was not a credible witness. His evidence was said to be unreliable in material respects and, unless corroborated, Mr Maynard-Connor submitted that his evidence should be rejected. I accept those submissions and I make those findings.

90. Although Mr Barnett sought to distance Mr Pawson from any criticism of Judge Pelling's judgment when Mr Barnett made his closing submissions, it did seem to me that Mr Pawson's evidence was, as Mr Maynard-Connor submitted, on occasions, self-serving and founded upon uncorroborated assertions which, on occasions, did seek to contradict the findings that had been made by Judge Pelling, who Mr Pawson asserted in evidence had got certain things wrong. In particular, Mr Pawson challenged Judge Pelling's finding that Mr Pawson had had no intention of funding the companies.

91. When Mr Maynard-Connor referred Mr Pawson to the passage in his judgment (at paragraph 26 between letters C and D) where Judge Pelling rejected the notion that Mr Pawson would fund the companies himself to the extent necessary, Mr Pawson said that the judge was wrong. If it was necessary for him to do so, he would have contributed funds. He then sought to explain that he had simply not given any thought to the terms upon which he would do so and, in particular, to interest, because he already had money in the bank that was not earning interest and therefore he was not concerned about it.

92. Mr Maynard-Connor levelled particular criticism of Mr Pawson's evidence about his alleged written contract of employment. The only contract of employment produced by Mr Pawson was one between himself and Recoverykensworth Ltd, purportedly dated 1st October 2010. The version exhibited to Mr Pawson's affidavit was unsigned, either by the employer or by Mr Pawson as employee. However, in September 2014, when disqualification proceedings were threatened, and following an interview with the Secretary of State's officers, Mr Pawson had produced a version of the same contract, signed by himself as employee. Mr Pawson was asked why he had not previously mentioned the existence of this document. He claimed that it was because he had not been asked to produce any written employment contract, and because it was not an issue in the winding-up proceedings.

93. Mr Maynard-Connor points that that is clearly not the case: First, Mr Fenton had been unchallenged in his evidence in his first witness statement in the winding-up proceedings. He had said in terms (at paragraph 57) that Mr Pawson did not have a contract of employment with each company confirming his remuneration. In his second affidavit in these proceedings, Mr Fenton had said in terms that he had not been made aware of the existence of any contract of employment in the name of Mr Pawson at the time of his investigation. He referred to the notes of a meeting with Mr Pawson which had taken place on 10th November 2011 at (he believed) Mr Pawson's home address. At point 3 on the second page of his manuscript notes Mr Fenton had noted that Mr Pawson had told Mr Fenton that he had no written contract of employment: Mr Fenton had written "no written C of E". Mr Fenton also made the point that he could not see that reference to any contract appeared in any of the documents submitted in the winding-up proceedings, or in the transcript of the

meeting which had taken place between Mr Pawson and the Official Receiver on 4th January 2012. The first time that the Insolvency Service had become aware of a purported contract of employment between Mr Pawson and any of the companies had been during a meeting which had taken place on 28th August 2014. It was after that that the signed contract had been supplied, under cover of a letter of 1st September 2014.

94. Mr Fenton had not been challenged in cross-examination on any of that, despite the fact that (at paragraph 12 of his affidavit) Mr Pawson had said that it was false that he had had no contract with the companies:

> "First of all, in English law, when one works for a company and receives remuneration that is taxed at source under the PAYE regulations, it is not possible to argue that a contract of employment does not exist; because this denies the facts of an agreement between the company and the employee. Secondly, I had produced a written contract in the name of one company and all company contracts followed the same format."

95. He then attached the sample of the written contract with Kensworth. In his judgment in the winding up proceedings (at paragraph 24) Judge Pelling had said in terms that Mr Pawson did not have a formal contract of employment with any of the relevant companies. Yet, despite that, Mr Pawson then produced the contract in the manner I have indicated.

96. Mr Maynard-Connor submits that Mr Pawson's evidence about the contract was most unsatisfactory. He submits that the evidence that Mr Pawson gave was that the contract he had provided to the Insolvency Service in September 2014 had been printed off from a memory-stick, and he had added his signature to it as the employee, nearly four years after the event. Mr Maynard-Connor had also made the point that the contract was allegedly dated 1st October 2010, which was four days before Kensworth had been incorporated (on 4th October 2010). It is worth bearing in mind that the date appears in the typescript in the description of the employment contract and appears again in the attestation clause, where it is stated that the parties had duly affixed their signatures under hand and, in the case of the employer, seal on 1st October 2010.

97. My note reads that the contract had not been produced around the time of the incorporation of the companies; the question of a contract had come up with Mr Duggan in September 2009. The effect of Mr Pawson's evidence was, therefore, that in September 2009 he had produced contracts in writing for each of the then existing companies which must, on that evidence, have been either back-dated to the date of incorporation, or, alternatively, had been dated at the time they were produced in September 2009. None of that had been mentioned in paragraph 12 of Mr Pawson's affidavit, where he simply said that he had produced a written contract in the name of one company and all company contracts followed the same format.

98. Mr Maynard-Connor submits that that evidence from Mr Pawson is completely unreliable and should be rejected. He invites the court to find that Mr Pawson never had any written contracts of employment - which is what Mr Fenton says he had been told by Mr Pawson - and that the document provided to the Insolvency Service in September 2014, and also the unsigned copy

which Mr Pawson exhibits to his affidavit, have been created after the event, in an attempt to dissuade the Secretary of State from bringing these proceedings and then, once the claim was issued, in an attempt to avoid disqualification.

99. Mr Pawson says that he was entitled to sign the contract after the event because he was doing so, not on behalf of the company, but simply as employee. Mr Maynard-Connor makes the point that he was not, at the time he signed it, still an employee because the companies had been wound up. Nor did he tell anyone that he had only just signed the contract which he provided to the Insolvency Service in September 2014. Mr Maynard-Connor submitted that Mr Pawson's evidence on this point was "all over the place".

100. I agree with that description of Mr Pawson's evidence for the reasons that I have just given. He had made no mention of the version of events he now gives in paragraph 12 of his affidavit. I bear in mind that at that time Mr Pawson was acting as a litigant in person, preparing the affidavit himself; but he is a professional person, a qualified chartered accountant, and also a Member of the English Bar, called as such in 1999. I am afraid that I find that what Mr Pawson did was to seek to supply, falsely, a piece of evidence which he had perceived, from Judge Pelling's judgment, had been missing. Judge Pelling had mentioned in paragraph 24, as a criticism of Mr Pawson, the fact that he had been authorising the companies to make salary payments to him even though he did not have a formal contract of employment with any of the relevant companies, and he has sought to remedy that deficiency.

101. In my judgment, the manufacture of that contract of employment must cast doubt upon the credibility, and also the reliability, of all of Mr Pawson's evidence. It is not something which can be generously construed as amounting to bolstering a good case. It did involve seeking to plug a gap in the evidence that had been identified in Judge Pelling's judgment. Mr Maynard-Connor submits that this taints Mr Pawson's evidence generally, and I fear I must agree with that, although I should make it clear that I do have serious concerns about Mr Pawson's evidence generally, which will become apparent in a moment.

102. Mr Maynard-Connor also submits that Mr Pawson's conduct with regard to the employment contract is consistent with a willingness on his part to mislead and, despite his protestations to the contrary, to be not transparent with shareholders. Mr Maynard-Connor refers to Mr Pawson's repeated reliance on the Ford Campbell letter on the websites to justify his remuneration to investors when he knew that the advice had been given in relation to only one of (in the event) nine companies, something which was never disclosed to investors. Mr Maynard-Connor is also entitled to rely upon Mr Pawson's refusal to provide a copy of that letter when he was specifically asked by one of the shareholders in Milford for a copy.

103. Mr Adrian Nurse, a shareholder in Milford, had emailed Mr Pawson on 24th August 2008, noting the recommendations of the chartered accountants with respect to Mr Pawson's future remuneration, and asking for a copy of the report. Mr Pawson's response, on 25th September (following a chasing email from Mr Nurse), was that Mr Pawson had no intention of being

micromanaged, so he declined to send Mr Nurse, as an individual shareholder, any documentation which was confidential to the company. Mr Nurse's response, on 7th October, was to thank Mr Pawson for his reply. He continued:

> "Your manner is so unnecessary and I trust that your relations with other parties are not as arrogant and dismissive as they are with Recoverymilford Ltd's shareholders. If you consider that having sight of a document that is the basis of virtually the whole of the company's expenditure is 'micromanagement', then your judgment is questionable. It is important that the finances and activities of the company are seen to be fair and transparent, particularly as I understand that you are the only director of Recoverymilford Ltd and are not even a shareholder."

104. That of course was incorrect in relation to the B shares. The email continued:

> "You should be accountable and act in the best interests of the company, not yourself. If you are not prepared to provide me with a copy of the remuneration report, would you please provide me with a list of names and addresses of the current shareholders."

105. Mr Pawson's response, apparently on the same day, was:

> "No, Mr Nurse, I will not provide you with this information. As far as I am concerned, it is company confidential information. In any case, it would be against the Data Protection Act to do so. How would you feel if I passed on your name and address to anybody who happened to ask me for it. Your attempts at meddling are counter-productive, so I must ask you now to stop wasting my time with your communications. If you have evidence that I am putting my own interests before those of the shareholders, then let me know. Your subscription is to meet the genuine needs of running the company until we get a reply to our planning application. You have subscribed for shares and have therefore no expectation of getting any of this money back. Your return comes if and when the land is sold. Until that point in time, I have stewardship of all the company resources and will use them as I deem appropriate in pursuance of the company objectives."

106. I accept Mr Nurse's description of Mr Pawson's attitude as "arrogant and dismissive". It was particularly unnecessary given that the accountants' letter had in fact been written in relation to Milford, rather than one of the other companies.

107. Mr Maynard-Connor also relies upon Mr Pawson's re-charging of legal opinion fees when no opinion had ever been given and the fact that that was not disclosed to investors; his refusal, as I have found, to disclose financial information to Mr Duggan; and also Mr Pawson's submissions to the Institute of Chartered Accountants in England and Wales, which had not disclosed certain findings of Judge Pelling, in his judgment on the winding-up petitions, and had sought to maintain a stance that was contradictory to those findings.

108. Mr Pawson, so far as that latter matter is concerned, has made the point that he had not supplied a copy of Judge Pelling's judgment to the Institution because he did not have a copy of it. He also made the valid point that if the Secretary of State had wished to place it before the Institution of Chartered Accountants, then the Secretary of State should have done so. I accept both of those points.

But they do not answer the point that Mr Maynard-Connor really makes about Mr Pawson's response to the Institute's letter asking him for information, which is that in his response, dated 28th June 2012, at paragraph 10, under section B, Mr Pawson had said:

> "With regard to the depletion of the company funds, I assert that all company money was used for legitimate company purposes."

109. Mr Maynard-Connor's point, which does seem to me to be well-founded, is that at paragraph 43 of his judgment, Judge Pelling had concluded:

> "Charges have been made by Mr Pawson that cannot be justified."

110. That, of course, was a reference to the fact that Mr Pawson was found to have over-charged for legal advice given to each company by charging each company the same legal opinion fee of £5,000. Mr Pawson, before this court, sought to justify that on the footing that, as a result of observations made by Mr Duggan, he had been persuaded that it had been wrong to do that and that what he was doing was to set-off the reduction in his contractual remuneration (from £1500 to £750 a month) against the legal opinion fee.

111. He said that that was a point that he had not made clear to Judge Pelling. I do not accept that that was what Mr Pawson had thought, at the time, that he was doing; but even if it was, it does not meet Mr Maynard-Connor's point that, in responding as he had done to the Institute of Chartered Accountants, in terms, that all company money had been used "for legitimate company purposes", he was ignoring a finding to the opposite effect that had been made by Judge Pelling. I acknowledge that Mr Pawson had not had a written transcript of the judgment before him; but he had been present at the hearing - indeed, he had conducted the defence of the respondent companies; and I cannot accept that he had overlooked a finding by the judge that he (Mr Pawson) had wrongly charged the companies for his legal opinion, particularly if, as he now says, that was something which Mr Duggan had given him cause to reconsider in terms of the justification for doing so.

112. Finally, Mr Maynard-Connor also points to Mr Pawson's attempt to distance himself from the assertion (within the concluding paragraph of his affidavit, paragraph 58) that in March 2014 he had secured a current role as a *de facto* finance director of a privately owned, crowd-funding business. At the beginning of his evidence, Mr Pawson had sought to distance himself from that by asserting that he was not a *de facto* finance director of the company. He acknowledged, in cross-examination, that he understood the difference between a *de facto* and a *de jure* director; but when Mr Maynard-Connor put to him that Mr Pawson had used the term *de facto* director in his affidavit because that was what he was, Mr Pawson responded that he had put it in to his affidavit because, since he had been the only accountant within the company at the time, a third party might have regarded him as the finance director, but he was not concerned in the management of the company.

113. Mr Maynard-Connor stigmatises Mr Pawson's attempt in chief to explain why he had described himself in his affidavit as a *de facto* director as "ludicrous". He had accepted that he had understood what a *de facto* director was, and his

evidence as to his role and function had actually supported the description that he had used. I do not accept Mr Maynard-Connor's submission that this change was an attempt to seek to persuade the court to exercise its discretion not to make a disqualification order, in the event that unfitness was established, because it seems to me that it would have been in Mr Pawson's interests to have maintained his description as a *de facto* finance director in an attempt to persuade the court that it should exercise its discretion not to disqualify, so as to enable him to continue in that role. But what it seems to me that it does demonstrate is that Mr Pawson is prepared to change his evidence when, for whatever reason, he considers that it may suit him to do so. That I find to be consistent with the approach that Mr Pawson took throughout his evidence, which I will turn to after the luncheon adjournment. We will adjourn now until 2 o'clock, when I will resume the judgment.

114. I continue with my extemporary judgment in the case of *Secretary of State v Pawson*. Mr Pawson had made it clear in his evidence to the court that at all times, when operating the companies, he had been fully aware of his duties as a director. Indeed, that was a point that he had made in his very first email to Mr Duggan, on 15th September 2011, when he had said:

> "I am aware of my duties as a director under the Companies Act 2006; my duties are to the shareholders as a whole and to promote their interests."

115. Mr Pawson was asked about the £5,000 he had charged each of the companies for his legal opinion fee. It was put to him that no such opinion had been produced; and he did not accept that. He acknowledged that the document was not headed "Opinion", but there was a document and it was really the "business plan". He said that it was contained in an email to Mr Duggan. Later in the evidence it emerged that the document to which he was referring was the email of 18th January 2010 which formed exhibit 13 to Mr Pawson's affidavit for the purposes of these proceedings. It is a one-page email, containing advice on the Financial Services and Markets Act 2000. It considered the exceptions to the blanket prohibition in section 21 of the Act which, on the face of it, was said to forbid the company from communicating an invitation or inducement to engage in investment activity.

116. Having summarised the applicable exemptions, Mr Pawson stated that he was satisfied that his email constituted an accurate summary of what was a very complicated piece of legislation. In his opinion, they were very unlikely to breach the law with the types of communication he had seen from Mr Duggan. But he recognised that Mr Duggan might like to discuss the matter with Mr Pawson before sending out any letters.

117. In his evidence, Mr Duggan said that when he set up his new companies they had taken that advice as their starting point, but they had consulted their own legal advisers on the requirements of the legislation. From memory, he believed that that advice had cost some £2,000 to £2,500. He had shown the new companies' legal advisers Mr Pawson's advice, and they had confirmed that he had been right. I accept that that email was the advice for which Mr Pawson charged each of the companies £5,000. It would not seem to me that the advice was worth that amount to any one of the companies; but the thrust of the Secretary of State's criticism is that it should not have been charged to

each of the nine companies, and the fact that it was certainly should have been made known to shareholders when investing in the company.

118. As I have already mentioned, the website mentioned that Mr Pawson had researched and proposed the recovery plan in order to ensure that it complied with the 2000 Act; but the fact that Mr Pawson was charging the company for that advice, still less the fact that he was charging £5,000, was not something that was mentioned in the section of the website headed "How much will Philip Pawson receive from the company?".

119. Mr Pawson also confirmed that the advice as to the level of his remuneration from the Leeds accountants disclosed on the website had been given in relation only to Milford, and that at the time the accountants had advised they had probably believed that Milford would be the only Recovery company. It was put to Mr Pawson that it was therefore not accurate to refer to that advice on the websites of other companies, such as Kingshill. Mr Pawson said that the accountants had only advised on one company, but he did not consider the website to be misleading in that regard. What was good for one company, he considered to be good for the others, because it involved the same amount of work.

120. Mr Maynard-Connor pointed out that there would always be an overlap between the work being done for the nine individual companies because, for example, there would only need to be one set of negotiations with the Trustee in Bankruptcy on behalf of all the Recovery companies. Therefore one could not justify duplicating the same fee for all nine companies. Mr Pawson's response to that was that the fee was not limited to the work he was doing, and he then made the point that he had given up an income to work for the Recovery companies. He said that it was immaterial that the advice had been given in relation to a different company, and it was a reasonable amount of salary for the work that he was proposing to do.

121. In relation to his refusal to provide the letter to Mr Nurse, Mr Pawson said that he did not believe that that was in derogation of his duties as a director at all; he had declared on the website the salary that he would be taking, and that it had been endorsed by a firm of accountants. He said that it was completely transparent, and that the plot holders knew what they were signing up to. What he had been really intending to say by referring to the accountants' recommendation was that this had been an arms' length negotiation. He stood by his refusal to disclose the letter to Mr Nurse; he said that no director was going to be micromanaged by an individual shareholder. His duty was to the company as a whole and not to any individual shareholder. He accepted that Mr Nurse had been unhappy, but he said that he had had no right to be so.

122. Later on, and after the luncheon adjournment, it was put to Mr Pawson that, in paragraph 10 of his affidavit, he had referred to the independent advice from a firm of accountants who, after considering his business plan and understanding the role that he would take in the business, had recommended that a salary of £18,000 per annum would be appropriate. Mr Pawson then went on to say that he believed that this had been calculated at a modest rate of £25 per hour for 7.5 hours per day, two days a week and four weeks a month. He did not accept that it could reasonably be argued that remuneration at that

level was excessive and unfair, particularly when one considered that he was not requiring the company to incur any other overheads, such as heat, light, office accommodation, etc. Mr Pawson was working from his home office and meeting those costs out of his own remuneration.

123. The point was made that if the remuneration was based upon £25 an hour for 7.5 hours per day, two days a week, four weeks a month, then remuneration at that level for one company should not be replicated for each of the other Recovery companies. Mr Pawson's response was that he did not think that that was a reasonable inference from what he had said in paragraph 10 of his affidavit. It was estimated that that was the amount of time that would be taken; in the early stages, the time involved was much more. Mr Pawson said that he had wanted a contract like this because he was giving up other income so he needed a guaranteed income from the Recovery companies. He said that the Recovery companies also needed to know that his income would be limited to £18,000 per annum.

124. It does not seem to me that any of that justifies replicating the £18,000 per annum salary for each of the (eventually nine) Recovery companies.

125. Later, Mr Pawson said that his remuneration had taken into account the fact that he had been paid the £5,000 opinion fee. That had gone into his own trading name. Mr Maynard-Connor put to him that Mr Pawson had considered it necessary and reasonable to take both his remuneration and the legal opinion fees. Mr Pawson said that the legal opinion fees were part of the remuneration package and he felt that he was entitled to take it. He considered it reasonable and necessary to continue to pay his salary package. That was the case even though it was exhausting the companies' working capital. His answer was: "So what?" When he achieved his objective of buying the whole of the land from the Trustee in Bankruptcy, more share capital would flow in. Mr Pawson accepted that that could not be guaranteed, and that he was willing to take that risk on behalf of the companies.

126. He made the point that when the companies' fees were being depleted, he had reduced his salary, in some cases to half. He said that taking £160,000 over a four year period was not an unconscionable amount of money. It does seem to me that Mr Pawson should have disclosed, if it was the case, that in addition to his £18,000 remuneration, he was also being remunerated by way of the £5,000 legal opinion fee.

127. Mr Pawson later said that he had, in about September 2009, been persuaded by Mr Duggan that it had been wrong to charge each of the companies £5,000 for the legal opinion fee, and that what he had done was to reduce his remuneration, effectively by way of reimbursement of the legal opinion fee, so that he was not receiving more than £18,000 a year from any one company. I do not accept his evidence that he realised it was an error of judgment to charge the legal opinion fee. I do so for two reasons.

128. First, even as late as October 2010, over a year after his conversation with Mr Duggan, Mr Pawson charged £5,000 for the legal opinion fee for the last of the nine companies to be incorporated, Kensworth. As Mr Maynard-Connor pointed out, Kensworth had been incorporated on 4th October 2010; monies

started coming in from shareholders on 15th October; and Mr Pawson charged the legal opinion fee of £5,000 only seven days later, on 22nd October. At the end of the following month, on 29th November, Mr Pawson had charged the company by way of salary a gross sum of £2,000. Mr Pawson explained that that represented his salary for the months of both October and November, at a reduced rate of £1,000 a month, rather than the £1,500 a month to which he was contractually entitled. The fact remains, however, that he had charged an up-front opinion fee even as late as over a year after his conversation with Mr Duggan.

129. Mr Pawson's evidence about that was that he had felt at the time - and he now recognised it was an error of judgment - that the legal research he had done, and the knowledge he had gained, presumably some three years before (since Milford had been incorporated in October 2007), was "intellectual capital or property". He had felt that even though he had sold it to company A, he could sell it on to company B. He felt that he was entitled to sell it to every company which was going to benefit. He had realised that it was an error of judgment in September 2009, when he had spoken to Mr Duggan, so from that point he had reduced his salary, so that the £5,000 could be said to be within his contractual entitlement and was never in addition to it.

130. Later he explained that he had taken the £5,000 up-front because he had wanted the legal opinion fee to offset some of the costs of running his business. But the £18,000 salary to which he was entitled from Kensworth would have included the £5,000. Later still, and in answer to questions from the Bench, he said that, for the sake of consistency, even though he had been persuaded by what Mr Duggan had told him in September 2009, because every company had recorded a £5,000 legal opinion fee, he had decided to continue to put it in there and then take a reduced salary.

131. He took his salary, effectively, in advance. It was not something he said he was proud of, but over the course of the next few months it would have been mitigated by a reduction in his monthly salary from £1,500. He also told me that he had wanted some of his total remuneration entitlement to go into his own business, to keep the business going and to keep it open in the eyes of the Revenue as a going concern. He then added that he contemplated that the companies could, in future, fail, so he did not want to have to set up a new business. He wanted the income to go into his existing business, so that his office costs could continue to be offset against tax.

132. I simply cannot accept the logic of what Mr Pawson was telling me was his thinking. I do not accept it was his thinking at the time. The reality is that he continued to charge an up-front legal opinion fee of £5,000 over a year after, he also told me, that he had realised that that was an error of judgment.

133. In addition, however, at about this time, Mr Pawson was engaged in negotiations with Mr Duggan for Mr Duggan to take over part of Mr Pawson's B shares in the companies - apparently all nine of them - and to pass over the direction of the companies to Mr Duggan. In the course of that process, Mr Pawson sent an email to Mr Duggan on 7th September 2010, only about a month before the legal fee was debited to Kensworth. The email is at trial bundle 5, divider 147. Discussing the proposed form of their agreement, Mr

Pawson said it would be helpful if Mr Duggan could include the following three provisions:

> "1. I will continue to draw my salary until you take over control of the company. A monthly salary will be due for the month, no matter what date I am removed from office in that month, even if it is in the first week.
>
> (a) All unpaid salaries will become payable as soon as the company has sufficient funds.
>
> (b) (crucially in this context) I will be entitled to my £5,000 opinion fee from each company, whether it has been paid or not at the time when you take over control."

134. Mr Pawson sought to explain away that email on the footing that it was part of his negotiations to pass over control and part ownership of each of the companies to Mr Duggan. I cannot regard the email as consistent with what Mr Pawson was telling me was his thinking about the legal opinion fee. It made it quite clear that he was looking to £5,000 for an opinion fee from each company, whether it had been paid or not, at the time when Mr Duggan took over control. That seems to me to be inconsistent with Mr Pawson's assertions that the legal opinion fee was effectively being offset against his remuneration. I cannot accept Mr Pawson's evidence on that point.

135. During the course of his cross-examination, Mr Pawson asserted that during the initial stages of the companies' lives he had been working four days a week, but in the later stages he was not doing as much. That, he said, was why he had been willing to reduce his salary. It was put to him that it was because the companies did not have enough money to pay, and Mr Pawson disputed that. Then he added that if he was not going to be remunerated at that level, he was not going to continue working for the companies. When it was put to him that he had exhausted all the companies' funds, he made it clear that that did not apply to Kensworth which, of course, had only just been incorporated.

136. When it was later put to Mr Pawson that the shareholders had never expected the companies' working capital to be exhausted on Mr Pawson's own salary, Mr Pawson said that that was exactly what the working capital was for: "to pay my salary". He pointed out that the shareholdings had only achieved over 50% of plot holders in the case of one of the companies (Scholes), so that there was a lot more working capital potentially available to be invested by future shareholders.

137. Mr Pawson was asked if he had ever thought it was necessary to ensure sufficient working capital so that the companies could buy the land and retain planning consultants. Mr Pawson accepted that he had not given that consideration in relation to the payment of planning consultants, although he later said that he had intended to incentivise them by offering them a part of his B shareholding. With regard to the land, he said he could easily have supplied the £5,000, which he considered was all that the land was worth, if the companies had not had enough money. He then said this: that he had not made a judgment as to the long term consequences of taking money out of the

companies; he had been entitled to it. He had been in no position to stay with the companies if he was not entitled to remuneration at his agreed level.

138. He knew that the planning consultants would cost a lot of money, but he could use his shares to incentivise them. Once he had acquired the land from the Trustee in Bankruptcy, further substantial sums would come in. He said that he absolutely believed that further funds would come into the companies in the future. He then added that if he had not taken his salary out, he would not have been there with the companies. He was asked: how did exhausting the companies' entire capital promote the companies' success?; and his answer was that "by staying there; it was the honourable thing to stay there and take a reduced salary". He said he had absolutely no doubt that the Trustee in Bankruptcy would ultimately have done a deal. If he had not been able to be remunerated at the level that he was, then he would not have stayed with the companies. He had been working for the companies to the exclusion of other remunerative work.

139. He was reminded that in his email to Mr Nurse of 7th October 2008 he had said that up to the point in time when the land was sold, after the grant of planning consent, he had the stewardship of all of the company resources and would use them as he deemed appropriate in pursuance of the companies' objectives. He was asked if he had deemed it appropriate to use the companies' assets to meet his remuneration. His answer was that he had deemed it appropriate to pay his salary and legal opinion fees rather than keeping working capital in reserve.

140. Mr Maynard-Connor later put to Mr Pawson the financial statements for Milford for each of the years ending 30th September 2009 and 30th September 2010. In the director's report for the first of those two financial years, Mr Pawson had written that during the year ending 30th September 2009 considerable effort had been put in to bringing on board the outstanding plot holders, who had not then decided to become shareholders. Progress was said to have been slower than expected, and no doubt the credit crunch had not helped either. Mr Pawson then continued:

> "However, it is essential that more plot holders do join the recovery scheme before we can take the company to the next stage and start the planning process. Without that critical mass of land under our control, no approach to planning authorities or development consultants would be worthwhile."

141. That had been signed by Mr Pawson on 17th October 2009. By reference to the following years' financial statements, it was apparent that share capital increased during the financial year ending 30th September 2010 from £53,550 to £57,824. That was an increase of some £4,300. However, during that period, Mr Pawson had paid himself remuneration of £9,000. It was put to Mr Pawson that he had paid himself more than double the new capital that had been introduced into the company. Mr Pawson's answer was that that had been only half of his contracted entitlement, and there was no connection between his salary and attracting new shareholders into the company. In my judgment, that says a great deal for Mr Pawson's perception of the duties he owed to the shareholders of that particular company.

142. At the conclusion of his cross-examination of Mr Pawson, Mr Maynard-Connor put a number of propositions to him. First, Mr Maynard-Connor suggested that Mr Pawson had put his own interests ahead of the interests of the other shareholders in the company. Mr Pawson denied this. He said that the best thing for the body of the shareholders had been for him to stay on board, rather than for him to be obliged to leave the company. Secondly, Mr Maynard-Connor suggested that Mr Pawson had failed to promote the success of the company. Mr Pawson said that he had made an offer to the Trustee and, but for Mr Duggan's intervention, the Trustee would have realised very quickly that there was only "one game in town".

143. I reject completely Mr Pawson's suggestion that Mr Duggan's conduct had in any way "queered the pitch" in terms of Mr Pawson achieving any deal with Mr McCallum's Trustee in Bankruptcy. There had been an initial meeting between Mr Pawson and the Trustee in Bankruptcy on 28th October 2008; there had then been a second meeting, also attended by Mr Duggan on 30th July 2009. On 13th November 2009 Mr Duggan had sent an email to the Trustee in Bankruptcy, referring to the meeting that Mr Pawson and Mr Duggan had had with the Trustee the previous July, and inviting a further follow-on meeting with the Trustee to see how they were progressing with the Recovery company proposals. It was quite clear from that email, which had received the approval of Mr Pawson, that Mr Duggan and Mr Pawson were working together. In the event, a meeting was not held with the Trustee in Bankruptcy until 30th March 2010, and Mr Pawson chose not to attend the meeting.

144. It was not until 25th October 2010 that Mr Pawson formulated his first offer to the Trustee in Bankruptcy, a sum of £5,000, which was rejected fairly promptly. No further offer was formulated until June 2011 when, effectively, Mr Pawson repeated his offer of £5,000, but with the prospect of an overage payment on the grant of planning consent. I completely reject Mr Pawson's evidence that any intervention by Mr Duggan "queered the pitch" for Mr Pawson's negotiations with the Trustee in Bankruptcy.

145. The third of Mr Maynard-Connor's concluding suggestions was that in taking Mr Pawson's salary package out of the company, Mr Pawson had failed to take any reasonable care as to the companies' resources and the need to fulfil the objects for which the companies had been incorporated and for which the shareholders had invested in them. Mr Pawson's response was that he had taken way below his contractual entitlement; if the companies could not afford to pay him, he could not have stayed on board. That had been a constant theme of Mr Pawson's evidence: that he needed money out of the company because otherwise he could not afford to continue working for the companies.

146. I have already indicated what had been said on the company website about the objectives of the companies. The subscription was said to be primarily to assist the furtherance of the companies' objectives of gaining planning permission for the land. It was believed that the amounts subscribed for shares would be sufficient working capital for the company to pursue its objectives and meet all of its obligations. The cash raised would be used to meet the every day running costs of the company, mainly a modest retainer for the director and professional fees for planning consultants and other professionals

associated with the planning process. In the event, the cash raised from those subscribing for shares was used principally for Mr Pawson's own retainer. Although it had been said that that was on the basis of £1500 per month, what the shareholders were not aware of was that that proposal had assumed that there would only be one and not, as eventually transpired, nine Recovery companies. Although Mr Pawson did reduce his salary package, he did so by at most 50%, and in the case of Kensworth by two thirds, although that ignores the fact that a legal opinion fee of £5,000 had already been charged within days of the company beginning to receive money from incoming shareholders by way of share capital.

147. I am satisfied that Mr Pawson had regard principally to his own financial position and that he gave very little, if any, attention to the companies' resources in terms of their likely future needs. Effectively, the companies were run for Mr Pawson's financial benefit. I am prepared to accept that that may not have been Mr Pawson's original intention; but certainly, as matters developed, it became clear to Mr Pawson that that was what was happening. From April 2009, he was charging the existing companies only half his contracted level of remuneration; but as the position I have outlined with Milford showed, that was more than double the amount of incoming resources into that company. The result was that, by the time of the winding-up petitions, the resources of four of the companies had been almost exhausted. That concludes my review of the evidence of the three witnesses.

148. I turn then to the Secretary of State's case on unfitness. Mr Maynard-Connor submits that this is a clear case involving numerous and significant breaches of Mr Pawson's duties as director, which were to the detriment of the individual members of the public who had become shareholders of the companies. He submits that the underlying factual matrix upon which the Secretary of State relies is not, and cannot be, substantially disputed. I accept that submission; and, indeed, Mr Barnett did not cross examine Mr Fenton as to the underlying factual matrix, and did not seek to challenge Judge Pelling's judgment.

149. As Mr Maynard-Connor submits, the evidence now before the court is in substance materially the same as that which was before Judge Pelling. Mr Maynard-Connor recognises that his judgment does not bind the court in these proceedings; but, given the nature and extent of the issues that were determined by Judge Pelling, in the face of evidence and submissions from Mr Pawson, who was defending his own conduct as the companies' controlling director, Mr Maynard-Connor submits that the court should consider with caution any assertions or submissions made which seek to contradict Judge Pelling's findings, and should be slow to make any contradictory findings. On the evidence before me, I see no reason to differ from Judge Pelling's findings; indeed, Mr Fenton was, as I say, not challenged in the evidence that he gave, which was effectively the evidence before Judge Pelling.

150. I have already rejected Mr Pawson's allegation that he did have formal written contracts of employment with the various companies.

151. I find, on the evidence that Mr Pawson was in sole control of all nine companies, even after Mr Duggan was appointed the director of two of them. Mr Duggan's only role was to speak to plot holders, in the capacity of either

actual or, more particularly, potential investors in the two companies of which he, Mr Duggan, was a director. Mr Pawson was the sole executive and controlling director of the companies. Mr Maynard-Connor submits that, as such, he demonstrated a clear disregard for his duties as a director, and whilst in control he all but exhausted the companies' funds for his own personal gain, whilst nothing of any practical utility was achieved.

152. As a result, the companies' business plan and objectives became unsustainable, and the companies provided no commercial benefit to the individual shareholders who had invested in the companies, expecting that their monies would be used to further the objectives of the companies and not simply to provide Mr Pawson with what Mr Maynard-Connor describes as "a healthy income".

153. Mr Maynard-Connor submits that, in so acting, Mr Pawson failed to promote the success of the companies, and did not exercise reasonable skill and care and diligence; and he placed his own interests in conflict with those of the companies, in breach of the no-conflict principle.

154. Mr Maynard-Connor stresses that, as well as being the companies' managing director and sole controller, he is, and was, an experienced chartered accountant and a non-practising, but qualified, barrister. As a result, he knew, or ought to have known, that he could not, and should not, substantially exhaust the companies' funds for his own personal benefit. He should not be allowed to hide between the original Ford Campbell Freedman letter of advice, given when only one company was intended, particularly given that the websites did not disclose that the advice given by the accountants was intended to cover only one of the companies and yet Mr Pawson was charging each of them for the same services. To the extent that Mr Pawson later - and it would appear from about April 2009 - reduced his remuneration, that was because the companies could no longer afford to pay, given the lack of funds. Moreover, even although that had become apparent, the chronology shows that in December 2009 Mr Pawson incorporated Cookridge, and in August and October 2010 he incorporated four further companies, with exactly the same business model, and the same provision for the payment of legal opinion fees and remuneration at a contractual rate of £18,000 per annum.

155. Mr Maynard-Connor submits that unfitness is established and a disqualification order should follow. He recognises that that might result in Mr Pawson's expulsion from the Institute of Chartered Accountants in England and Wales, but he says that that is no good reason to exercise the discretion against disqualification. He would add that the same applies to Mr Pawson's status as a member of the non-practising Bar.

156. Mr Maynard-Connor submits that there are good reasons why a disqualification order should be made. Mr Pawson, at 58 years of age, is still able to work, and he could always make an application for permission to act in accordance with section 17. Mr Pawson's stated position is that he does not need to do so, because he is not acting even as a *de facto* director, and is not proposing to do so. If that is so, then a disqualification order will not impact upon Mr Pawson's future earning potential. So far as the period of disqualification is concerned, Mr Maynard-Connor submits that the

misconduct complained of, since it is by a professional person, is serious and justifies disqualification at the top end of the middle bracket of five to ten years.

157. Mr Barnett submits that there is no merit in the allegation that there was no commercial benefit to shareholders in that they failed to achieve their stated objectives. He submits that Judge Pelling's finding that the current business model was not deliverable does not touch upon the original intentions of Mr Pawson and the investors at the time the companies were first formed. The nature of the scheme was set out in full, and the investors considered that there was a good commercial reality or prospect of commercial benefit in the proposition.

158. Mr Duggan has formed a new company to achieve precisely the same objective as the Recovery companies. The fact that he has done so demonstrates that he, and the plot holders, consider that the business model is a realistic one. To the extent that the business model differs from that of Mr Pawson's Recovery companies, that is said merely to demonstrate that he, and Mr Duggan and the plot holders, now have a better appreciation of the commercial realities that they face in seeking to implement a life raft or rescue package. Mr Barnett is also able to pray in aid Mr Fenton's acknowledgement that it is no part of the Secretary of State's case that the business plan is doomed to failure.

159. So far as the allegation that the level of remuneration and transactions was to the detriment of the shareholders is concerned, Mr Barnett submits, in reliance upon the observations of Sir Nicholas Brown-Wilkinson V-C in *McNulty's Interchange Ltd* (previously cited), that if a director procures the company to pay him remuneration which is reasonable in the particular circumstances of the case, he should not be found to have acted improperly even if, with the benefit of hindsight, it turns out that the company cannot afford to pay remuneration at such a generous level.

160. This is not a case, Mr Barnett emphasises, of disguised payments, shams or deceptive transactions intended to mislead shareholders or auditors. It is not a case involving payments for personal services such as holidays, beauty treatments or other matters which could have had no possible benefit to the company. Here, the remuneration payments were genuine, and related to the services that were being provided.

161. So far as the allegation that this was an unsustainable business model is concerned, it is often alleged that a company was under-capitalised from the outset. That allegation is generally accompanied by the later insolvency of the company in question. Here, Mr Pawson was at all times aware of the companies' financial position; and he took steps to control expenditure by cutting his remuneration almost to zero, in order to ensure that the companies were in a position to meet their debts as and when they fell due. In that, he was successful because, at the time of liquidation, none of the companies was in an insolvent position.

162. Here there was every prospect that other plot holders would join the scheme, attracting further shareholder funds into the company, and achieving the

critical mass required to pursue planning applications. That was, on the evidence, Mr Barnett submits, the genuine view of Mr Pawson. He also prays in aid the following factors in support of his case that there was no serious misconduct:

1. This was a solvent liquidation.

2. There were no Crown debts.

3. No members of the public were affected by the operations of the companies, beyond the shareholders.

4. The plot holders had not been expecting a return from their initial investments and had been fully informed at the outset as to how the companies were to be managed and how Mr Pawson was to be remunerated.

5. There were only limited findings by Judge Pelling of a lack of commercial probity.

163. The plot holders have now invested in a new company, managed and operated by Mr Duggan, demonstrating their genuine intention to invest in a company for the purpose of recovering value from their lost investments.

164. Mr Barnett submits that, in all the circumstances, any findings of misconduct that can be properly made against Mr Pawson cannot be said to be so serious that disqualification is necessary. He is said to be a chartered accountant, well versed in the obligations of directorship, and at all times he managed a difficult venture with a clear understanding of his duties as a director and the expectations that his professional body would have had of him in acting as a director.

165. Mr Barnett also submits that, although the court is not bound by the findings of the Institute of Chartered Accountants in England and Wales, the defendant's conduct should be judged as that of a chartered accountant, and the court should recognise that no disciplinary action has been taken by Mr Pawson's professional and regulatory body, who conducted a thorough investigation and disciplinary process in respect of his conduct concerning the companies.

166. In his oral closing, Mr Barnett emphasised that the Secretary of State's case had reduced in ambit: the present focus was upon Mr Pawson's remuneration and its impact upon his probity. Mr Barnett submits that the remaining allegations do not go to the question of unfitness on the part of Mr Pawson. Mr Barnett submits that Mr Pawson had reduced his salary before the companies ran out of money; that is the very antithesis of unfitness on his part. If he had left he companies, they would have been forced into liquidation. Instead, he stayed at the helm, reducing his remuneration. That is said to show fitness on the part of Mr Pawson. As a result, the companies remained solvent at all times. That is a clear marker that Mr Pawson was alive to his duties to shareholders and creditors and so he does not represent a risk.

167. Mr Pawson always acknowledged that further funding would be necessary, but he always genuinely thought that such further funding would be forthcoming. The only reason that it was not was because he never secured the agreement of the Trustee. That is said - although I have rejected the suggestion - to be because Mr Duggan had intervened and had given the Trustee in Bankruptcy false hope of more for the land than Mr Pawson considered it to be worth.

168. In the course of his re-examination, Mr Pawson stressed that it was an important part of his case that the land had only been worth £5,000 in the hands of the Trustee in Bankruptcy and, even then, only to Mr Pawson, or to his companies, because only Mr Pawson knew how to unlock benefit of the land.

169. I have already rejected Mr Barnett's suggestion that Mr Duggan interfered with Mr Pawson's method of negotiation with the Trustee in Bankruptcy, to the detriment of its chances of success. Mr Barnett emphasises Mr Pawson's belief that the deficiencies of the Trustee in Bankruptcy's position dictated a rock bottom price for Mr McCallum's residual land holdings, the precise nature of which were not known to the Trustee in Bankruptcy. Part of Mr Pawson's strategy, which he genuinely believed, was that his was the only game in town and he could therefore dictate a rock bottom price.

170. Mr Barnett accepted a point that was put to him by the court: Although Mr Pawson was right, he did not in fact need to go that far. He merely needed to show that his views were genuinely held, and were views that he could reasonably entertain as a director.

171. Mr Barnett submitted that the companies remained solvent because of, and not despite, Mr Pawson's stewardship. He was alert to the position of creditors throughout. He ensured that the companies remained solvent by reducing his salary. When he saw that time was running out, he was prepared to hand over the companies to Mr Duggan, with enough funds for them to continue to be sustainable. The important question for the court was whether Mr Pawson was fit to be a director of a company. He had to be judged at the time of his actions. Mr Barnett suggested that it would be novel proposition for a director, who had been scrupulously fair to ensure that the company remained solvent, to be judged unfit to act as a director of a company.

172. Mr Barnett submitted that there were three touchstones of risk assessment: insight into any failings, remorse and remediation. Mr Barnett submitted that Mr Pawson had shown insight by accepting that he was wrong in relation to the charging of a £5,000 legal fee. He adapted his remuneration when this was pointed out to him, thereby recognising, and rectifying, the position, so there is no risk here. I do not accept that Mr Pawson saw the light in the way that is suggested. I do not accept that he was moderating his contractual entitlement to remuneration so as, effectively, to repay the £5,000 legal opinion fee.

173. Mr Barnett emphasises that this case is not about fraud, lack of honesty or lack of integrity. There had been no want of frankness to shareholders. Mr Pawson had been up front with them. If there was any commercial misjudgement on his part, then that is not sufficient to disqualify him, citing the observations of the Vice Chancellor in *Re McNulty*. Mr Barnett submitted

that a lack of probity or integrity requires an element of deceit, sharp practice or duplicity. He relies upon observations of Stadlen J, in the case of *R (on the Application of Margaret May) v the Chartered Institute of Management Accountants* [2013] EWHC 1574 (Admin) at paragraphs 154 to 157, in support of the proposition that integrity is broadly synonymous with honesty.

174. He submits that it would be absolutely wrong to disqualify on the basis of the contract of employment; that would be plainly wrong. Mr Barnett accepts that the finding of the Institute of Chartered Accountants in England and Wales is not binding on the court, but it is not something that the court should ignore. Mr Barnett also emphasises that, particularly in the present case, there would be a punitive element in any directors' disqualification. Disqualification is, in the present case, discretionary and not mandatory. Mr Pawson has not acted as a director since the winding-up of the companies; and he is not going to invite the court to allow him to continue to act as a director because he is not acting in that capacity in any way. So, Mr Barnett submits, any disqualification would be entirely punitive in its effect and would have repercussions for Mr Pawson's professional status, both as a chartered accountant and as a non-practising barrister.

175. Mr Maynard-Connor produced detailed written closing submissions. He submits that it is clear that Mr Pawson was in control of all of the companies. He submits that Judge Pelling was entirely right to find that the companies provided no commercial benefit to shareholders, and that they became unsustainable. By the time the last four companies were incorporated, in August and October 2010, the reserves of the existing companies had largely all but been exhausted, without achieving any of their key objectives. That remained the position at the time the companies were all wound up in December 2011.

176. The impact of the payments to Mr Pawson on the companies' finances is not contested, and was confirmed by Judge Pelling, and has already been summarised by me. The Secretary of State accepts that the companies were not insolvent and had no outstanding creditors, other, possibly, than Mr Pawson. But that is said not to be determinative. In truth, the companies had not traded and had no trade creditors, other than Mr Pawson. They were not spending money on anyone else. Mr Pawson was not open or transparent with shareholders. The simple fact is that the companies' working capital was all but exhausted on Mr Pawson's salary package. That was not the expectation or purpose for which the individual investors had invested.

177. Mr Maynard-Connor emphasises Mr Pawson's professional background as a chartered accountant and non-practising barrister; qualities that Mr Pawson had extolled on the website to potential investors, and matters which he had impressed upon Mr Duggan.

178. Despite his contractual salary, Mr Pawson did very little to promote the companies and their objectives. He took his salary because, as far as he was concerned, he was contractually entitled to it. He also re-charged legal opinion fees time and time again. Mr Pawson may have reduced his salary, but that was because the companies had insufficient funds until further funds came in, as recognised by the "going concern" note in the filed accounts and

as was found to be the case by Judge Pelling. The legal opinion fees charged to Kensworth and Weybridge, shortly after their incorporation, are particularly instructive. Mr Pawson was willing to take out more than was coming in from shareholders, as evidenced by Milford's 2009 and 2010 accounts (previously referred to).

179. In his negotiations with Mr Duggan, Mr Pawson was still pressing for his unpaid salary to be paid when further funds came in, and that on top of his legal opinion fees. Mr Maynard-Connor submits that in taking his salary package, Mr Pawson gave no consideration to the best interests of the companies and its members generally, nor to the long term consequences for the companies. When one of the shareholders questioned Mr Pawson's salary package, Mr Pawson was dismissive of his concerns.

180. Mr Maynard-Connor emphasises that the court does not have to find any breach of duty for unfitness to be established; but he submits that breach of duty has been made out. He says that Mr Pawson clearly failed to promote the success of the companies, did not exercise reasonable skill, care and diligence, and he placed his own interests in conflict with those of the companies and its shareholders.

181. Mr Maynard-Connor acknowledges that the starting point for breach of duty under section 172 is subjective, but in the present case he submits that the court is entitled to apply an objective test. He has taken me to the decision of Mr John Randall QC, sitting as a Deputy High Court Judge, in the case of *Re HLC Environmental Projects Ltd, Hellard v Carvalho* [2013] EWHC 2876 (Ch), reported at [2014] BCC 337. He has taken me to paragraphs 91 and 92.

182. He acknowledges that the duties to act in what the director considers *bona fide* to be the best interests of the company and its creditors are subjective ones. The question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the companies' interests, but that does not detract from the subjective nature of the test.

183. However, that general principle of subjectivity is subject to two qualifications of potential relevance in this case. The first is that the subjective test only applies where there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective, namely whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company.

184. The second is where a very material interest is unreasonably (that is to say without objective justification) overlooked and not taken into account. In such circumstances, the objective test must equally be applied. Failing to take into account a material factor is something that goes to the validity of the director's decision making process. That is not the court substituting its own judgment on the relevant facts (with the inevitable element of hindsight) for that of the

directors made at the time. Rather it is the court making an (objective) judgment, taking into account all the relevant facts known, or which ought to have been known at the time, because the directors have not made such a judgment in the first place. Mr Barnett submits that here the test is entirely subjective because the evidence shows that Mr Pawson did give consideration to the appropriateness of the level of his remuneration. He must have done so, because he reduced it.

185. Mr Maynard-Connor submits that once unfitness is established a disqualification order should be made. This is a serious case, involving a lack of probity and integrity, as well as incompetence to a marked degree, by an experienced professional chartered accountant, and a non-practising barrister, who should have known better, and who clearly abused his position to the detriment of the companies and the individual investing members of the public. The fact that Mr Pawson may be expelled from the ICAEW is not a good reason to exercise the discretion against a disqualification, and there are no other good reasons why a disqualification order should not be made. Mr Pawson can apply for permission to act under section 17, although it now appears that, as an employee who has declined to be a director, such an application may be unnecessary. Mr Maynard-Connor repeats that, given the misconduct which he says is now established, a disqualification at the top end of the middle bracket is justified.

186. Those were the submissions. I am afraid that I agree with the submissions of Mr Maynard-Connor. I am satisfied that even now, and notwithstanding his involvement in the earlier litigation before Judge Pelling, and the litigation before me, Mr Pawson cannot be trusted to put the interests of shareholders above his own personal interests. I am prepared to accept that there was no breach of duty in adopting the remuneration package that was originally applied to the first of the Recovery companies. But in my judgment it was seriously misleading to carry that remuneration package over into the other Recovery companies. As each new company was incorporated, and the remuneration package was carried over, the breach of duty became more clear and more serious. I am not satisfied that Mr Pawson gave any actual consideration to the best interests of any of the later companies when he decided to adopt the same remuneration package as in relation to an earlier company.

187. As such, the proper test is objective: namely whether an intelligent and honest man, in the position of a director of the company concerned, could, in the circumstances, have reasonably believed that it was for the benefit of the company to carry the remuneration package forward. I am entirely satisfied that an intelligent and honest man in the position of a director of the company concerned could not reasonably have believed that the transaction was for the benefit of the company. If Mr Pawson did give any consideration to whether it was in the companies' best interests, I am not satisfied that he did honestly believe that it was. Everything that he has told me in the course of his cross-examination points to the fact that Mr Pawson had formed the view that he needed to achieve a certain level of remuneration, and that he should receive that level of remuneration, whether or not it was for the benefit of shareholders. His overriding concern was to maintain his level of remuneration and, indeed, in the early stages, to improve upon the level of

remuneration which he had been receiving at the time the Recovery companies were established.

188. Mr Pawson told the court at the beginning of his cross-examination that at the time the companies were incorporated, he had been achieving a net profit before tax from his training business in the order of £50,000 to £55,000 a year, based on a turnover of around £80,000; and that he was receiving about £35,000 to £36,000 after tax. I have already indicated the level of remuneration that was received over the three year life of these companies.

189. So far as the reduction in Mr Pawson's remuneration was concerned, I am satisfied that he reduced his remuneration simply because of the straitened financial circumstances of the companies, as it became apparent that they were going to run out of money. The example of Milford is telling. He had recognised (in the notes to the 2009 accounts) the importance of attracting new capital into the company; but double the amount that was attracted in (in the 2010 financial year) was paid out to Mr Pawson. I acknowledge that he reduced his contractual entitlement by 50%; but I am satisfied that he gave no consideration as to whether even that level of reduction was appropriate in the interests of the company. His concern was to maintain a level of remuneration on which he could survive. He made it quite clear that if he did not receive a certain level of remuneration, then he simply would not carry on with the companies.

190. Even if I am wrong in finding that breach of duty was established, I am satisfied that Mr Pawson's conduct in this regard was, in any event, such as to make him unfit to act as a company director. I am not satisfied that he is a proper person to have the stewardship of shareholders' funds, or that he can be trusted to put the interests of shareholders above his own personal interests. That is demonstrated by his attitude with regard to the charging for legal opinions. I might have been prepared to countenance the £5,000 he charged for his initial legal research, as against the first of the companies to be incorporated, even though it was not mentioned (as I consider it should have been) in the section of the website which addressed the issue of how much Mr Pawson would receive from the company. But in my judgment it was wholly unacceptable for Mr Pawson to continue to charge the same amount to each of the succeeding companies. It was particularly unacceptable for him to do so in relation to the last of the companies, effectively doing so as soon as sufficient money had been received into the company from shareholders to enable him to do so.

191. I have already said that I do not accept his evidence that he was intending to tailor the level of his remuneration to reflect the legal opinion fee. That is inconsistent with what he actually did, and with what he was saying to Mr Duggan was his attitude towards the payment of remuneration and his legal opinion fee in the email to which I have already referred.

192. For those reasons, I am satisfied that the Secretary of State has made out his case. This is not simply a case of incompetence to a high degree. In my judgment, it goes beyond that, and it does indicate a lack of probity and integrity on the part of Mr Pawson. I do not consider that it was honest of Mr Pawson to be charging repeat legal opinion fees. Nor do I consider that it was

honest, at least in the commercial context, for Mr Pawson to be charging each of the companies the same amount on the basis of a letter from accountants which had clearly contemplated that only one company would be incorporated.

193. If I accept the explanation for the basis of the accountants' remuneration given at paragraph 10 of Mr Pawson's affidavit, then it becomes increasingly apparent that this was not honest on the part of Mr Pawson. He was effectively billing again and again and again for the same work. There was a considerable overlap in the amount of work that Mr Pawson was actually performing, little though it was, in terms of the negotiations with the Trustee in Bankruptcy. So if it is necessary for a lack of integrity for there to be dishonesty, then I am satisfied that, in those senses, dishonesty has been made out. But, in any event, if I am wrong in that, then clearly there was incompetence to a very high degree here; a lack of recognition of the interests of shareholders, and a promotion of Mr Pawson's interests to the detriment of those shareholders.

194. So I am satisfied that unfitness has been made out. I am satisfied that it is appropriate to exercise the discretion which I have under section 8 to disqualify. For the reasons that I have given, I am satisfied that this is a serious case, within the middle bracket. I would not agree with Mr Maynard-Connor that the case is one at the top end of the middle bracket; in my judgment - and this is essentially a qualitative assessment - the case falls just above the middle of the middle bracket, justifying a disqualification period of eight years.

195. So, for those reasons, I will disqualify Mr Pawson for eight years.

End of Judgment

We hereby certify that this judgment has been approved by His Honour Judge Hodge QC.

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