

Neutral Citation Number: [2022] EWHC 2498 (Ch)

Case No: BL-2021-MAN-000043

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS & PROPERTY COURTS IN MANCHESTER**  
**INSOLVENCY AND COMPANIES LIST (Ch D)**

**IN THE MATTER OF SERVICO BUILD TEC LIMITED (IN LIQUIDATION)**  
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

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

Date: 10 October 2022

Before:

**HIS HONOUR JUDGE STEPHEN DAVIES**  
**SITTING AS A JUDGE OF THE HIGH COURT**

Between:

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**ASERTIS LIMITED**

**Claimant**

- and -

**(1) MR DALE HEATHCOTE**  
**(2) SERVICO CONTRACT UPHOLSTERY LIMITED**

**Defendants**

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**Douglas Cochran** (instructed by **Primas Solicitors, Warrington**) for the **Claimant**

**Chelsea Carter** (instructed by **BBS Solicitors, Manchester**) for the **Defendants**

Hearing dates: 12-14 September 2022  
Draft judgment circulated: 3 October 2022  
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**APPROVED JUDGMENT**

***Remote hand-down:*** This judgment was handed down remotely at 10:30am on 10 October 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

**His Honour Judge Stephen Davies**

**His Honour Judge Stephen Davies:**

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[Summary](#)

1. This case concerns two separate claims brought by the claimant as assignee of Servico Build Tec Limited (“the Company”) against the first defendant (“Mr Heathcote”) and against the second defendant (“Contract”) in relation to his conduct as director of the Company, of which he was sole director at all relevant times until it went into creditors’ voluntary liquidation on 14 December 2018.
2. The first (“the rewards claims”) concerns two transactions, benefitting Mr Heathcote in the sums of £270,000 (‘the first reward’) and £250,000 (‘the second reward’) respectively, made pursuant to an Employee Benefit Trust tax avoidance scheme (“the EBT Scheme”) promulgated by a specialist business known as Qubic Tax (“Qubic”). The EBT Scheme was designed to allow Mr Heathcote to obtain rewards from the Company without tax becoming payable either by the Company or by him. In summary, the claimant contends that the rewards: (a) were neither authorised nor justifiable as remuneration to Mr Heathcote for his services as director and had no other proper basis and, thus, made in breach of his duties to the Company as its director; and/or (b) represented transactions at an undervalue defrauding creditors under s.423 of the Insolvency Act 1986; and/or (c) were made in breach of what is commonly referred to as the insolvency or creditors’ interests duty. Although other claims for other breaches of director’s duties are pleaded Mr Cochran did not suggest that they add anything to these three key arguments.
3. The primary relief claimed is an order that Mr Heathcote repays or restores the rewards to the Company or pays damages or compensation in the amount of the rewards, together with interest. The alternative relief claimed is an order that Mr Heathcote restores the amount of the Company’s liability to tax arising out of the EBT Scheme or pays damages or compensation in such amount.
4. The second (“the payment claim”) concerns a payment (‘the Payment’) of £65,000 made by the Company to Contract on 31 October 2018. In summary, the claimant claims that the Payment was a preference payment under section 239 of the Insolvency Act 1986 (“the s.239 claim”) and that: (a) Contract is liable to restore that payment to the claimant as assignee of the Company; and (b) Mr Heathcote is also liable to do the same because he caused the Payment to be made in breach of his duties as director. Again, it is not suggested that the various other pleaded claims add anything to this key case.
5. On days one and two of the trial I heard oral evidence from 4 witnesses of fact, followed by oral evidence given concurrently from the two accountancy experts instructed by the parties. On day three I had the benefit of excellent written and oral submissions from both counsel after which I adjourned to produce this judgment. I also allowed the parties the opportunity to adduce short supplemental evidence if needed on a late produced document relevant to the rewards claim, which I admitted into evidence subject to that condition, and to which I refer below.
6. In short, my decision is that the rewards claims fail but the payment claim succeeds. My reasons follow.

[Witnesses](#)

7. Mr Gareth Howarth is the liquidator of the Company; he was the only witness for the claimant. As often occurs in such cases, he made reference to a large number of contemporaneous documents for no obviously good reason other than to take the court through the claimant's case. He was cross-examined on some in a way which helped me understand the details. The key point where his oral evidence was important related to an argument advanced by the defendants that he had sanctioned the payment the subject of the s.239 claim. I have no doubt that his evidence was reliable on this point when he denied having done so, by reference to the contemporaneous documents and the inherent probabilities.
8. Mr Dale Heathcote is the first defendant and the sole director of the Company prior to its insolvency. He and his former wife were at the relevant times the directors and shareholders of Servico Holdings Limited ("Holdings") which was the sole shareholder of the Company. He and his former wife were also the directors of Contract of which Holdings was also the sole shareholder. It is apparent that his former wife took no active part in the affairs of any of these companies and was content to delegate the management of the companies to her husband. There were a number of other companies forming part of the Servico group of companies but there is no need to say any more about them.
9. The Company specialised in flatpack furniture assembly particularly for the retail sector. It is not seriously contested by the claimant and I am satisfied that at the time the rewards were made the Company was successful and profitable largely, according to Mr Heathcote, because of a profitable contract it had secured with the retail business Next. Nor does the claimant seriously dispute and I am satisfied that the Company later became loss-making largely due to the loss of that contract.
10. Mr Heathcote came across to me as a perfectly decent and honest man who obviously had a good grasp of his business but little knowledge of financial, accountancy or legal matters. His recollection of events dating from 2013 onwards was in my view lacking in detail and largely impressionistic. I cannot place any weight on his oral evidence as to the details, especially where inconsistent with the contemporaneous documents or the inherent probabilities.
11. Ms Holly Coleridge was his PA from September 2017 and also helped out in the accounts department due to the frequent absence of the group bookkeeper. As her evidence unfolded it became clear that she had little if any relevant direct knowledge of the key issues relating to the payment claim and no knowledge of the issues relating to the rewards claim.
12. Mr Neil Jones is an accountant with a Stockport practice, Bennett Verby and has acted on behalf of Mr Heathcote and his companies in connection with their financial and tax affairs since August 2011. He also came across to me as a perfectly decent and honest man who had obviously struck up a good rapport with Mr Heathcote over the years. He came across as being very good at getting and retaining business but someone who tended to delegate the detail to others at the firm, specifically: (a) a former employee, Zoe Evans, in relation to the reconciliation of the inter-company accounting in the run-up to the Payment, who was not called to give evidence; (b) his tax partner, Mr Nick Lowe, who was also not called to give evidence. It was not immediately apparent from the evidence which I did receive whether or not Mr Lowe had a significant role in relation to the entry into and implementation of the EBT scheme, in contrast to the later HMRC investigations, and in the absence of documentary or other evidence to suggest that he did I proceed on the basis that he did not. It seemed to me that Mr Jones was unable to recall with significant reliability key details, not surprisingly given the passage of time. In the circumstances and as with Mr Heathcote I am unable to place very great reliance on his oral evidence where inconsistent with the contemporaneous documents or the inherent probabilities.
13. The claimant instructed as its accountancy expert Mr David Kitson and the defendant Mr Anthony Tesciuba. As I have said they gave their evidence concurrently and, having asked questions to clarify my understanding of their respective opinions, it became clear that there was little if any difference of

any significance between them on the important issues in the case. Counsel agreed that this was so and, in the circumstances, had no need to put any questions to them in cross-examination.

### Relevant legal principles

14. I must summarise the important applicable legal principles. Since counsel were very substantially agreed as to these principles, which are well-established, I do not need to undertake a detailed analysis of every relevant principle.

#### Justification for the provision of the rewards

15. Mr Cochran's starting point, from which Miss Carter did not dissent, was that where a company confers a reward upon a director which is challenged it is necessary for the director, as a fiduciary, to explain and to justify the payment as a proper one: see the judgment of Newey J in *GHLM Trading Limited v Maroo and Others* [2012] EWHC 61 (Ch) at paragraphs 143 to 149.
16. Since Mr Heathcote justifies the rewards as constituting remuneration provided for his services under what he says he believed was a legitimate tax avoidance scheme it is necessary to say something about remuneration.

#### Remuneration

17. It is common ground that under the Company's articles, adopted from the Model Articles, any of its directors were entitled to undertake such services as they decided and to receive such remuneration as they determined for their services to the company as directors or for other services undertaken for the company and that such remuneration might take any form and include any arrangements in connection with the payment of (amongst other things) an allowance in respect of any such director.
18. It is also common ground that the question of whether remuneration is provided and if so in what amount is a matter for the company alone and not for the court. I was referred to the decision of Oliver J in *Re Halt Garage Ltd* [1982] 3 All ER 1016, a case where the liquidator challenged remuneration paid to husband and wife directors authorised in general meeting of the company, where he held (and I adopt gratefully the summary in the headnote in the report) as follows:

“(1) Where payments of remuneration to a director were made under the authority of the company acting in general meeting pursuant to an express power in its articles to award director's remuneration and there was no question of fraud on the company's creditors or on minority shareholders, the competence of the company to award the remuneration depended on whether the payments were genuinely director's remuneration (as opposed to a disguised gift out of capital) and not on an abstract test of benefit to the company. The amount of remuneration awarded in such circumstances was a matter of company management and, provided there had been a genuine exercise of the company's power to award remuneration, it was not for the court to determine if, or to what extent, the remuneration awarded was reasonable”.

“(2) There was no evidence that, having regard to the company's turnover, the husband's drawings were patently excessive or unreasonable as director's remuneration, or that they were disguised gifts of capital rather than genuine awards of remuneration. Accordingly, the court would not inquire into whether it would have been more beneficial to the company to have made lesser awards of remuneration to him, since that was a matter for the company”.

19. The case is also authority for the proposition that a court is not precluded from examining the true nature of payments merely because they are given another label, whether that is remuneration or otherwise: see the judgment at p.1043. That principle was recently applied by Chief ICC Judge Briggs in *Re Implement Consulting Group Ltd (in liquidation)* [2019] EWHC 2855 (Ch), where a claim of a similar nature to the present was made in the context of directors adopting another tax avoidance

scheme. Although Mr Cochran suggested that there were similarities between that case and this he did not, rightly in my judgment, suggest that the decision was authority for a particular legal principle relevant to this case. As Miss Carter submitted and as Mr Cochran fairly acknowledged, the key difference between that case and this is that in that case the liquidator's primary case, which was accepted by the judge, was that the payments made pursuant to the tax avoidance scheme were in reality returns of capital to shareholders by way of dividend, which had not complied with the formalities under the Insolvency Act 1986, so that they were unlawful. In this case, since Mr Heathcote was not a shareholder of the Company it could not be argued, and was not argued, that the rewards were in reality returns of capital and rendered unlawful on the same basis as in that case. Moreover, his alternative decision in relation to the breach of creditors' duty claim turned very much on the particular facts of that case, including the facts that the payment which he held breached that duty was made after the directors had become aware that HMRC was challenging the scheme and when the company was in a poor financial state.

s.423 Insolvency Act 1986: Transactions defrauding creditors

20. In *BTI 2014 LLC v Sequana S.A.* [2019] EWCA Civ 112 David Richards LJ explained at paragraph 29 that section 423 is a wide-ranging provision designed to protect actual and potential creditors where a debtor takes steps falling within the section for the purpose of putting assets beyond their reach or otherwise prejudicing their interests.
21. In this case it would apply if the rewards were properly to be classed as either gifts to Mr Heathcote or transactions on terms that provided for the Company to receive no consideration or for a consideration the value of which, in money or money's worth, was significantly less than the value, in money or money's worth, of the consideration provided by the Company (subsection (1)). The court looks at the value received from the point of view of the company: see *Delaney v Chen* [2010] EWCA Civ 1455 at [15].
22. I would also have to be satisfied that the Company's purpose was either that of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him or of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make (subsection (2)).
23. It was held in *Sequana* that it is not necessary to establish that the company was insolvent or on the verge of insolvency as at the date of the transaction. The section is focused on the subjective purpose of the company; see the decision of the Court of Appeal in *Sequana* at paragraph 66. It does not, however, have to be the sole or dominant purpose: see the decisions of the Court of Appeal in *Hashmi v Inland Revenue* [2002] EWCA Civ 981 at paragraphs 23-25 (per Arden LJ) and *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176 at paragraph 14. Further, the Court of Appeal said in *Hill v Spread Trustee Company Ltd* [2006] EWCA Civ 542 at paragraph 102 that: "where the debtor enters into a transaction knowing that his entry into that transaction, together with the happening of some other event, will prejudice a creditor. I consider that the court does not have to consider the relative causal effect of the two matters. If the transaction is entered into with the requisite purpose, the fact that some other event needs to occur does not mean that the transaction cannot itself be within section 423(3)" (per Arden LJ, with whom the other members of the Court agreed – save in relation to a limitation issue not material to this case).
24. If satisfied that these requirements are met, then the court may "make such order as it thinks fit for: (a) restoring the position to what it would have been if the transaction had not been entered into; and (b) protecting the interests of persons who are victims of the transaction". A victim is defined as a person who is, or is capable of being, prejudiced by the transaction (subsection (5)). In *Chohan v Saggar* [1994] 1 BCLC 706 it was said by Nourse LJ (with whom the other members of the Court of Appeal agreed) at p.714 that: "The object of ss 423 to 425 being to remedy the avoidance of debts, the 'and'

between paras (a) and (b) of s 423(2) must be read conjunctively and not disjunctively. Any order made under that subsection must seek, so far as practicable, both to restore the position to what it would have been if the transaction had not been entered into and to protect the interests of the victims of it. It is not a power to restore the position generally, but in such a way as to protect the victims' interests; in other words, by restoring assets to the debtor to make them available for execution by the victims. So the first question the judge must ask himself is what assets have been lost to the debtor. His order should, so far as practicable, restore that loss”.

25. Non-exhaustive examples of the orders which may be made under s.423 are to be found in s.425 and include an order requiring “any person to pay to any other person in respect of benefits received from the debtor such sums as the court may direct” (s.425(1)(d)). The order made in the *Sequana* case, including what was in effect an indemnity against future losses which might be incurred by the victims, illustrates the breadth and flexibility of the orders which may be made under s.423.

The creditors’ interests duty

26. This duty has been considered in many cases, most recently at appellate level by the Court of Appeal in the *Sequana* case referred to above. The decision of the Court of Appeal was upheld by the Supreme Court on 5 October 2002, in between delivery of this judgment in draft and judgment being handed down. It is not suggested that this judgment needs revision as a result of anything said in the Supreme Court. There is also a helpful summary of the relevant principles to be found in the judgment of Zacaroli J in *Burnden Holdings (UK) Ltd (In Liquidation) v Fielding* [2019] EWHC 1566 (Ch) at paragraphs 342 – 352 which I gratefully adopt. In summary:

(a) the duty to consider or act in the interests of creditors is engaged when the company is or is likely to become insolvent, where “likely” means probable. (As David Richards LJ said in *Sequana* at paragraph 220 “the duty arises when the directors know or should know that the company is or is likely to become insolvent ... [where] “likely” means probable, not some lower test”.)

(b) a company is insolvent if it is unable to pay its debts;

(c) the two primary tests to establish whether that is so are: (1) the cash flow, or commercial insolvency, test, found in s.123(1)(e) of the Insolvency Act 1986, which asks whether the company is able to pay its debts as they fall due; and (2) the balance sheet test, found in s.123(2) of the Insolvency Act 1986, which asks whether the company’s assets are sufficient to discharge its liabilities;

(d) as regards the balance sheet test, the court is required to make a judgment whether it has been established that, looking at the company’s assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to be able to meet those liabilities. If so, it will be deemed to be insolvent although it is currently able to pay its debts as they fall due. The more distant the liabilities, the harder this will be to establish; and the focus must be on their commercial value. Further, while the amounts recorded in the financial statements of a company for its assets and liabilities constitute evidence of, and may even be a starting point for considering, their value, the focus must be on their commercial value.

27. David Richards LJ in *Sequana* also noted at paragraph 119 that a failure to have regard to the interests of creditors is not of itself a breach of duty, if the directors could have reasonably concluded that the proposal should be approved even if creditors’ interests were taken into account. However at paragraph 222 he also expressed the view that “where the directors know or ought to know that the company is presently and actually insolvent, it is hard to see that creditors’ interests could be anything but paramount”.

28. In *Re PV Solar Solutions Ltd (in liquidation)* [2017] EWHC 3228 (Ch) ICC Judge Barber said at paragraph 74, by reference to earlier authority, that the duty imposed on directors to act bona fide in

the interests of the company (or, in cases of insolvency or dubious solvency, its creditors) is ordinarily regarded as a subjective one. She noted that this general principle of subjectivity was also established by earlier authority as being subject to three qualifications, of which the second and third are of potential relevance to this case.

29. The second qualification 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 could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company.
30. The third qualification is that where there is a very material interest, such as that of a large creditor (in a company which is insolvent or of doubtful solvency) which is without objective justification overlooked and not taken into account, the objective test must equally be applied.

Remedies for breach of directors' duties

31. Although this was not the subject of submissions it is of relevance in that had I found for the claimant on the rewards claims I would have needed to consider the appropriate remedy.
32. Section 178 of the Companies Act 2006 provides that: "(1) The consequences of breach ... of sections 171 to 177 are the same as would apply if the corresponding common law rule or equitable principle applied; (2) The duties in those sections (with the exception of section 174 (duty to exercise reasonable care, skill and diligence)) are, accordingly, enforceable in the same way as any other fiduciary duty owed to a company by its directors".
33. As regards breaches of fiduciary duty, equitable principles apply. All equitable remedies involve the exercise of a discretion and the remedy should be appropriate to the nature and facts of the individual case.
34. Claims for breach of fiduciary duty against directors are subject to the same core principles as claims for breach of trust. In that respect the general rule, as stated by Lord Toulson in the Supreme Court in *AIB Group (GB) v Redler* [2015] AC 1503 at paragraph 64 is that: "Where there has been a breach of that duty, the basic purpose of any remedy will be either to put the beneficiary in the same position as if the breach had not occurred or to vest in the beneficiary any profit which the trustee may have made by reason of the breach (and which ought therefore properly to be held on behalf of the beneficiary)".
35. In *Target Holdings v Redfern* [1996] AC 421 Lord Browne-Wilkinson said at p.432 that: "At common law there are two principles fundamental to the award of damages. First, that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to be put 'in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation ... in my judgment those two principles are applicable as much in equity as at common law. Under both systems liability is fault-based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong."
36. In the context of a claim such as the present, a question arises as to whether the claimant, if successful, is: (a) entitled to have restored to it as assignee of the Company the amount of the rewards; or (b) limited to recovery of the amount of the loss suffered by reference to the Company's liability to tax arising out of the adoption of the EBT Scheme and the payment of the rewards, on the footing that Mr Heathcote could lawfully have procured the Company to pay the amount of the rewards as remuneration so long as they were properly declared and accounted for as taxable remuneration.

37. This topic has been considered by the Court of Appeal in *Interactive Technology v Ferster* [2018] EWCA 1594 and again in *Auden McKenzie v Patel* [2019] EWCA Civ 2291. Both cases involved company directors. In *Ferster* the director had dishonestly caused the Company to pay substantial unauthorised remuneration to him of at least £4.48 million in excess of his salary. The director argued that the company was limited to the losses suffered as a result of the director's actions. In *Patel* the director had caused a company to pay out over £13 million on sham invoices raised by companies which were controlled by him or his sister. The director argued that if the payments had not been made unlawfully, then they would have been made lawfully as the company's shareholders at the time (the director and his sister) could have caused the same amounts to be made lawfully, so that the company had suffered no loss.
38. In his judgments in these cases David Richards LJ – with whom the other members agreed - drew a distinction between what are described as substitutive performance claims and reparation claims. The former is applicable where trust property is misapplied in an unauthorised transaction case whereas the latter is applicable in cases of breach of duty not involving misapplication of trust property or careless mismanagement of trust property. In the former case the claimant is entitled to an order for the payment of a sum representing the value of the trust property, whereas in the latter case the claimant is only entitled to an order for the payment of a sum representing its loss. In this regard there is no difference between a claim for equitable compensation and a claim for an account.
39. In neither case did the court have to decide on the application of the principle to the particular facts, although in both cases David Richards LJ was clearly of the view that since both were, on proper analysis, substitutive performance claims, it was difficult to see how they could afford a defence.
40. These judgments were subjected to careful analysis by Mr David Holland QC, sitting as a deputy High Court Judge, in *Davies v Ford and others* [2021] EWHC 2550 (Ch). His conclusion is to be found at paragraphs 106 – 108.
41. At paragraph 106 he said this: “To my mind, what these authorities [show is that equitable compensation for breaches of fiduciary duty which involve the misappropriation of existing trust property is generally assessed on the substitutive basis. In such instances, the aim is to restore to the trust what has wrongfully been paid away and it is not open to the trustee or fiduciary who has been in breach to argue the counterfactual, that is that the trust property would have been lost or paid away even if he or she had not been in breach. ...”
42. At paragraph 107 he said this: “However, in cases of breach of trust or fiduciary duty which do not involve the misappropriation of existing trust property, such as (per David Richards LJ in the *Patel* case) breaches of duties of loyalty, and those which involve the trustee in making profits at the expense of the trust or the use of information or opportunities available to the trustee in that capacity or breaches of duties of skill and care, resulting in loss to the trust, equitable compensation will be assessed on the reparative basis. This requires the court to determine what would have happened but for the breach of fiduciary duty. The breaching trustee or fiduciary is entitled to argue the counterfactual”.
43. At paragraph 108 he concluded: “This seems to me to be a principled approach as, with the latter type of breach, the court is not seeking to replace property or assets which already belonged to the trust or company and were wrongfully diverted away, but rather to assess sums or profit which the trust or company did not make because the opportunity to make the profit was wrongfully diverted away. The court can be asked to consider how the principal or company would have acted if the trustee or fiduciary had not acted in breach of duty”.
44. I shall consider briefly below how I would have applied these principles had I found in favour of the claimant on the rewards claim.

s.239 Insolvency Act 1986



45. To establish a preference under s.239 it must be shown – as applicable to this case that: (a) a payment is made or given to one of the company’s creditors by the company; (b) in the period of 2 years before the liquidation of the company; (c) the payment has the effect of putting the person into a better position than they would otherwise have been in the event of the insolvency of the company; (d) in deciding to make the payment the company was influenced by a desire to produce such an effect; and (e) the company was insolvent when the payment was made.
46. In this case the only dispute is as to (d). As to this, a company which has given a preference to a person connected with the company (within the meaning of s.249) at the time the preference was given is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire (s.239(6)).
47. The burden is on the company giving the preference to rebut the presumption. The test is a subjective one (*Re MC Bacon Ltd* [1990] BCC 78 at [87]). *Re Oxford Pharmaceuticals Ltd* [2010] BCC 834 at [76] provides useful guidance on the application of the test: “...it is common ground that the onus is on MIL and Dr Masters to rebut the presumption that OPL was, in making any of the payments, influenced by a desire to better the position of MIL in the event of an insolvent liquidation. In practical terms, this involves MIL and Dr Masters satisfying me on to the balance of probabilities that OPL was acting solely by reference to proper commercial considerations in making the payments, and that a desire (i.e. a subjective wish) to better the position of MIL in the event of an insolvent liquidation did not operate on the directing mind or minds of OPL, i.e. Dr Masters, at all...”
48. If satisfied that a preference has been made by the company and that the company was influenced in deciding to give it by a desire to put that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position they would have been in if that thing had not been done, the court shall make such an order as it thinks fit to restoring the position to what it would have been if the company had not given that preference (s.239(3)).

### Rewards claim

#### Relevant facts

49. Although the two rewards the subjects of the rewards claim were made in October 2014 and October 2015 it is also relevant to the rewards claim that a similar reward was also made in October 2013 in the sum of £350,000, albeit that it is not the subject of a separate claim. Perhaps for that reason, there is little documentation about it in the trial bundle. Although both Mr Heathcote and Mr Jones referred to it as being provided under a different scheme it appears, in the light of the minute dated 18 October 2013 referred to below when read with the disclosure notice for the YE 31 Oct 2013, that in fact it was treated as part of the same EBT Scheme as the two rewards at issue. This is consistent with the notes to the abbreviated accounts for YE 31 Oct 2013, which refer to the EBT Scheme as having been established “since the year end” and to HMRC treatment of this reward. I am satisfied that the discussions between Mr Heathcote and Mr Jones about this 2013 reward were in the same essential terms as the discussions about the subsequent 2014 and 2015 rewards and concluded with a decision to use the Qubic EBT Scheme.
50. The only relevant contemporaneous document appears to be a board minute which purports to record a board meeting of the Company attended by Mr Heathcote as the sole director on 18 October 2013. I have no doubt that Mr Jones is right when he told me that it was drafted by Qubic. The most surprising aspect of the document is that the date below Mr Heathcote’s signature is 5 May 2017.
51. That date appears to be explained by the fact that in March 2017 Qubic had chased the Company’s accountants for various documents, including relevant board meeting minutes, and had made it clear that it would be acceptable to provide a minute which was signed and dated at the current time so long

as it accurately reflected a board meeting which had taken place on a date before the year end in question.

52. Notwithstanding this, Mr Heathcote and Mr Jones both gave evidence that the minute had been produced and signed on 18 October 2013, although I do not think that they had any genuine recollection of this meeting and had simply convinced themselves that this is what had happened because they were fearful of admitting that it had in fact been produced and signed over 3 years later.
53. I am satisfied that there was, prior to the Company's year end of 31 October 2013, a meeting between Mr Heathcote and Mr Jones at which it was discussed that the Company had made sufficient profits in that year to justify making a substantial payment to Mr Heathcote by way of some form of bonus. I am also satisfied that it was agreed that the bonus should be paid in the most tax-efficient way, which involved using the Qubic EBT Scheme if possible. The result was Mr Heathcote making a decision that the Company would provide him with a reward of £350,000 using the EBT Scheme for that financial year.
54. I consider the evidence that the minute was also produced and signed at that time as wholly implausible, not least given the date that it was signed. I am satisfied that Mr Heathcote signed it on that date on the basis that he believed that it sufficiently accurately recorded the essence of what in fact had been discussed and decided at the time. I do not consider that either he or Mr Jones gave much thought to the matter, essentially just following Qubic's advice and adopting their suggested wording.
55. The only relevance of the minute for present purposes lies in paragraph 2, which is in identical terms to the entry in the minute for the October 2014 reward. It reads: "It was stated that if the Company deemed it suitable, then it would consider rewarding employees for the period ending 31 October 2013 with an incentive albeit in a manner that it would not constitute remuneration. It was proposed at this stage that the value of this incentive/award would be approximately £350,000". Although the parties have been unable to locate or produce an equivalent minute for the October 2015 reward I have no doubt that one was produced in the same terms.
56. The experts were agreed that, despite this statement, "the intended outcome of the Scheme means that the first and second rewards are properly regarded as remuneration". Mr Tesciuba suggested that Qubic intended this wording to convey to HMRC the meaning that the Company did not consider that any reward amounted to taxable remuneration. That seems to me to be entirely consistent with Qubic's approach to the EBT Scheme and I accept, insofar as relevant, that this was what the minute was intended to convey and what it would have conveyed to an informed reader of this minute at the time. I have no doubt that Mr Heathcote was not intending at the time, and nor had he decided, that the reward was not a form of remuneration provided to him by the Company. I am satisfied that he intended and believed that it was a form of bonus, provided to him to reflect his success – as the sole director and the man running the Company single-handed – in achieving substantial profits for the Company. I am also satisfied that he had no real interest or understanding of the details and that if he had been advised by Mr Jones and Qubic that it was not possible to save tax he would have been quite happy for it simply to be paid to him as a director's bonus, whereas if he had been advised that it was more tax-efficient for the bonus to be provided as some form of directors loan or as a dividend to Holdings he would equally have followed that advice.
57. Although the full accounts are not in the trial bundle, Mr Kitson has provided a helpful summary in his report, from which it can be seen that even after this payment the Company still made pre-tax profits of £274,305, sufficient to declare a dividend of £30,800 and to leave shareholder funds of £187,519.

58. Although not revealed by the accounts, there is no evidence that Mr Heathcote received any other remuneration from the Company in the YE 31 Oct 2013 or any other of the years in question. He was clear in cross-examination that he did not and I accept this evidence, consistent as it is with the accounts. Although Mr Cochran floated a suggestion that director's remuneration was included within an entry for management charges, there is no basis for this suggestion and I do not accept it.
59. Mr Tesciuba had produced a very helpful calculation to show the worst-case scenario if the EBT Scheme was successfully challenged by HMRC on the basis that it was taxable remuneration in terms of the Company's liability to account by way of PAYE for income tax and by way of NIC. In short, PAYE/NIC on the £350,000 reward would have amounted to £377,500<sup>1</sup>, however the net amount (after allowing for a consequential reduced corporation tax liability) was £314,842. By contrast, if the Company had chosen to declare a dividend in the same amount (as the experts agree it could have done based on its accounts) its liability for corporation tax would have been £84,000, although as the experts made clear that payment would also have been subject to tax in the hands of Holdings as the owner of the Company shares and thus the recipient of the dividend.
60. It follows that if HMRC had immediately been entitled to and had demanded immediate payment of the full additional tax liability as at that date the Company would have had insufficient funds to make such payment.
61. Moving on in time, the next significant document relevant to this case is a letter from Qubic to the Company dated 7 November 2013, setting out further details of "trust arrangements which are capable of rewarding employees of the Company in a discretionary manner, which follows on from our earlier correspondence".
62. This was a lengthy letter in what was obviously standard form, providing details of the operation of the scheme and containing various recommendations. It is probably fairly described as three-pronged in nature and purpose, firstly providing information about the operation of the scheme, secondly containing various warnings about what could go wrong and recommendations to seek further advice, whilst thirdly and simultaneously seeking to avoid frightening the Company off from proceeding further, given the material interest which Qubic had in the Company entering into the scheme.
63. The letter explained that the scheme, identified by Qubic "alongside leading tax counsel", enabled a company to enter into a trust arrangement under which individual employees of the Company who also controlled the Company could receive benefits without falling foul of the rules on disguised remuneration, so as to avoid corporation tax and also so as to avoid the employees becoming liable for personal tax.
64. In summary, the way in which the scheme would work was that the Company would contract to purchase an asset, such as gold, to be provided to the employee as beneficiary. Because this was a straightforward purchase by the Company it was believed that it would not attract any liability to corporation tax.
65. The beneficiary would be able to keep or sell the gold as he wished, subject however to an obligation to pay - if requested - a related amount to the trust in order to provide benefits for a class of beneficiary employees. Because of this obligation and because of the connection between the Company and the employee it was believed that the transaction would not attract any personal tax liability for which the

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<sup>1</sup> Although initially illogical that the additional tax liability on a reward of £350,000 could have exceeded the value of the reward, as Mr Tesciuba explained that is because the reward, being a transfer of gold, was valued for tax purposes by taking its value and then grossing up that value to reach a before tax valuation upon which tax was then payable. It is the combination of higher rate tax and NI which means that the total tax payable is more than the value of the gold.

Company would be liable to account by way of PAYE and/or NIC under the disguised remuneration rules.

66. The letter was suitably qualified by warnings that as well as the tax aspects “there may be other aspects in addition to the accounting and tax issues which may arise and which further consideration, including the advice of professional and/or expert third parties, should be given at the first available stage and whenever appropriate”.
67. The letter did not, however, identify which other specific aspects might arise and which other professional or expert advice might be appropriate. It seems to me that the only obvious advice which someone such as Mr Heathcote might think he needed was advice from the Company accountants on the basis that they were able to give suitable tax advice on schemes of this kind. Whilst I have no doubt he would not have thought about this, it would have been obvious to an informed observer that the Company accountants might feel the need to recommend further advice from a specialist tax lawyer as to the legal risks of such a scheme being successfully challenged by HMRC, who themselves might have asked to see the advice from leading tax counsel referred to in the Qubic letter.
68. The letter also identified the threat of retrospective tax legislation, given historical governmental unhappiness with “the avoidance of PAYE/NI tax on bonuses”, whilst also stating that “evidently it is not possible to predict a future event” such as this.
69. The letter also warned that “HMRC may enquire into these arrangements, which may be in respect of both the company’s return and the beneficiary’s personal return. On occasion, enquiries may be carried out over a number of years and during this time it is possible that there may be limited exchange of information and views. Generally, enquiries are agreed via settlements whilst it has been established by HMRC that if there is a viability to the planning in question, then their staff should not continue allocating time and resource to extending the exchange of views”.
70. It may be said that this warning was reassuring in that it indicated that usually it would be possible to deal with an enquiry via a settlement – which is a view shared by Mr Kitson, who evidently has experience in this kind of situation.
71. The letter also advised “full disclosure to HMRC”, stating that the Qubic EBT Scheme had already been disclosed to HMRC.
72. The letter ended by asking the Company to “sign the memo in order to confirm that you have provided the details as requested and to confirm you have carefully reviewed the contents of this document and are fully aware of the responsibilities which are, and are not, attached” and by advising it to “take independent third party advice where appropriate”. Qubic also provided the details of the solicitors who it recommended would act in relation to the trust deed, which was duly executed by the Company on 28 November 2013 in accordance with the requirements of the scheme.
73. In his witness statement Mr Jones explained the background to the contact with Qubic as follows: “Servico Build Tec Ltd was performing very well and generating a good level of profits from its trade with Next and other smaller clients. Dale wanted to explore the opportunity of more tax efficient ways to reward himself from the profit that the Company was making and so we introduced him to a specialist company called Qubic Tax.... They provided Dale with advice and the option of the planning scheme that was used.” He described Qubic as a “fully regulated and approved supplier of what were perceived to be legally acceptable tax avoidance scheme where monies could be extracted from the Company by senior individuals in the most tax efficient manner possible. Qubic Tax was a company we have used on several occasions for a range of our clients”. He stated: “It is not unusual to believe that HMRC were unhappy with such schemes and ... are regularly looked at by HMRC and are often challenged”.

74. In cross-examination Mr Jones said that he did warn Mr Heathcote of the risk that the scheme would be challenged. He was not sure that there was any discussion at the time about contingency plans. He said that in his view Mr Heathcote's personal wealth was sufficient. I am satisfied that the most there was in terms of discussion was that Mr Jones said something along the lines that if the worst came to the worst Mr Heathcote would simply have to arrange for HMRC to be paid the PAYE/NIC that the scheme intended him to be able to avoid paying. I am satisfied that both he and Mr Heathcote proceeded on the basis that if anything went wrong there would be sufficient funds available, whether from the Company's continued profitable activities or from Mr Heathcote's own assets, to be able to pay any PAYE/NIC liability arising. I am also satisfied that neither specifically considered or discussed the likely amount of the prospective liabilities or whether the Company could afford to pay any such PAYE/NIC liability from its own reserves. Mr Jones accepted that he did not calculate the likely amount of any tax liability if HMRC was to challenge the scheme. He did know, as the experts confirmed, that it could only be a liability to PAYE/NIC on the benefit received by Mr Heathcote if it was treated as taxable remuneration or a liability to corporation tax if HMRC was prepared to treat it as a dividend but not both (although, as Mr Kitson clarified, in such a case the beneficiary would also be subject to tax on the dividend received by him).
75. It is plain in my judgment from the evidence of Mr Jones and Mr Heathcote that both believed at the time that the rewards were simply payments made in a tax-efficient manner amounting, in substance, to payment of a bonus at year end correlating to the profits made by the Company as a result of its success which was, they believed, almost entirely due to his efforts. They knew that it was not going to be a payment of dividend. Mr Jones at least would have known that the problem with a dividend was that it could only be paid to Holdings as the shareholder and would, therefore, need to be dealt with further – with further potential tax liabilities arising - before it could reach Mr Heathcote personally. Beyond that they probably did not apply their minds to the specifics.
76. The way in which the reward was provided both in 2014 and 2015 was as follows: (a) the Company contracted for (but did not pay for) gold to be provided by a third party gold dealer known as Asset Hound Limited, to Mr Heathcote; (b) Mr Heathcote undertook a liability to the trust equal to the value of the gold; (c) Mr Heathcote took title to and then arranged for Asset Hound to sell the gold on his behalf; (d) with the agreement of the Company, Mr Heathcote agreed to Asset Hound paying itself what it was owed by the Company from the proceeds, so to discharge the liability of the Company, before paying the balance to Mr Heathcote; (e) the Company reimbursed Mr Heathcote the amount of the liability for the gold that he had settled on the Company's behalf; (f) at the conclusion of these steps, Mr Heathcote remained as a creditor of the trust to the value of the remuneration received plus interest, but in reality it was well understood that the trustee, Qubic Trustee Limited, would not seek payment from him. The reality was that Mr Heathcote was better off to the value of the reward.
77. As an aside, the industry of Mr Tesciuba revealed that because the Company had in fact paid the gold dealer a deposit, comprising of its commission charges and also a small part of the purchase price, but had erroneously failed to deduct the latter from the amount which it reimbursed Mr Heathcote, he had received a small amount (£7,800 in total) more than he ought to have done. When this came to the attention of Mr Heathcote and his advisers the amount was paid before trial. Although there was some suggestion that the making of this payment amounted in some way to some admission that Mr Heathcote had no right to retain any of the rewards, there is no obvious factual or other basis for this submission and I reject it.
78. In the Company's accounts for YE 31 Oct 2014 and 31 Oct 2015 the payments of £270,000 and £250,000 were shown as "directors remuneration" in the schedule of administration expenses. This was inconsistent with the wording of the minutes for 2013 and 2014 to which I have referred, but Mr Jones was clear in evidence that this treatment in the accounts also followed the form advised by Qubic. This evidence seems to me to be consistent with the fact that the existence of the EBT Scheme was

also disclosed in the notes to the accounts and that the Company tax computations for these years also made disclosure in relation to the rewards in a form of wording provided by Qubic, so that there could be no question of HMRC being unaware of the transactions in question. The form of disclosure summarised the essential basis of the EBT Scheme and concluded: “This disclosure is made on the basis that HMRC may not agree this and so that they can raise enquiries, should they wish to do so. We describe the planning undertaken in outline and why we consider, based on specialist advice, the tax position is as above”.

79. There is no suggestion or evidence that HMRC ever raised any concern about the correctness of the tax treatment for the YE Oct 2013, 2014 or 2015 until its letter of April 2016, referred to below.
80. The accounts for YE 31 Oct 2014 show that the profit before tax was £114,047, the profit after tax was £91,378, from which a dividend was declared and paid of £58,094, leaving shareholder funds of £220,803. Of course, the pre-tax profit already takes into account the payment of £270,000 made by the Company for the gold.
81. Mr Tesciuba’s worst-case scenario calculation for this year revealed that the additional tax liability amounted to £285,788 and the net additional tax liability after corporation tax saving amounted to £263,528. If the reward had been declared as dividend, as it could have been, the additional corporation tax would have been £59,400.
82. On that basis the Company would, as with the previous year, have had insufficient funds to pay the additional tax liability on the worst-case scenario. It is also worth pointing out at this stage – as Mr Cochran observed in oral closing submissions - that if the worst-case scenario had materialised at this point both for YE 31 Oct 2013 and YE 31 Oct 2014 the Company would have had no realistic chance of paying both year’s additional tax liabilities from the available funds.
83. The accounts for YE 31 Oct 2015 show that the profit before tax was £102,237, the profit after tax was £83,462 and a dividend was declared and paid of £50,000, leaving shareholder funds of £254,265. Again, the pre-tax profit already takes into account the payment of £250,000 already made by the Company for the gold.
84. Mr Tesciuba’s worst-case scenario for this year revealed that the additional tax liability amounted to £262,942 and the net additional tax liability after corporation tax saving amounted to £247,005. If the reward had been declared as dividend, as it could have been, the additional corporation tax would have been £50,000.
85. On that basis the Company would just about have had sufficient funds to pay the additional tax liability on the worst-case scenario. However, again it is worth pointing out that if the worst-case scenario had materialised at this point for YE 31 Oct 2013, YE 31 Oct 2014 and YE 31 Oct 2015 the Company would have had no realistic chance of paying both year’s additional tax liabilities from the available funds.
86. The risk that HMRC would become interested duly materialised on 14 April 2016, when HMRC’s counter-avoidance team wrote to the Company and its accountants, notifying that it was going to check the Company’s return for YE 31 Oct 2014 to look at the deduction for directors remuneration and the Company’s use of a tax avoidance scheme. Over the following 4 years or so, the scope of the enquiry expanded to include the Company’s tax returns for 2013 and 2015 as well as Mr Heathcote’s personal tax returns.
87. The position maintained by HMRC as early as in its letter and appendix dated 15 July 2016 was that the scheme simply did not work. The appendix made clear that HMRC’s principal technical argument was that the theoretical obligation to pay the trust at some future date did not reduce the employment income paid in the form of the gold. Rather, the provision of gold by a third party as the Company’s

agent was employment income chargeable under PAYE. The letter and attached factsheet, entitled “Spotlight 30: gold bullion schemes”, made it clear that regardless of the strict legal position the government would legislate in any event to provide that all obligations arising from disguised remuneration schemes would be taxed as earnings if not already taxed or repaid by April 2019. In short, both of the risks identified by Qubic, firstly a tax enquiry and secondly the threat of what was in effect retrospective legislation, were materialising. HMRC said in its letter that the Company’s only options were to settle or to litigate.

88. Over the period of the expanded enquiry the Company, through its advisers Qubic and its accountants, maintained the stance that the EBT Scheme did work as intended. Nonetheless, in the YE 31 Oct 2016 the Company did not make use of the scheme nor declare a dividend. Although it had still made a pre-tax profit, that was less than in previous years because, according to Mr Heathcote, the Company had failed to obtain a renewal of the profitable Next contract due to being undercut by a competitor. Things went from bad to worse in the following year when, for the first time, the Company failed to make a pre-tax profit. Despite this the Company declared a dividend. Although it is not material to this case to investigate the circumstances in which that occurred, it is worth noting that the experts were agreed that whichever were the relevant accounts at the time of declaring the dividend (YE 31 Oct 16 or YE 31 Oct 17) there were sufficient available reserves to do so.
89. On 3 October 2018 Qubic provided the Company with advice about the impact of the 2019 Loan Charge Rules first mentioned in HMRC’s letter dated 15 July 2016 and which were enacted in November 2017. In short, its advice was that the only options were for Mr Heathcote to repay the trust, for the Company or Mr Heathcote to pay the 2019 loan charges or for the Company to settle the underlying tax position. It made clear that options 2 or 3 were likely to involve payments of £522,000 and £567,000 respectively, whereas option 1 would involve a payment of £870,000. It was made plain that Mr Heathcote would be liable to pay PAYE/NIC if the Company was unable to do so. It was suggested that there may be some option for negotiation if the Company was financially unable to pay.
90. In due course, seemingly as a result of the advice from Qubic and the appreciation that the Company’s financial position was such that it was unable to pay its liabilities to HMRC, the Company was placed into creditors’ voluntary liquidation (“CVL”) and Mr Howarth was appointed as liquidator. As detailed in the Company’s statement of affairs, upon being placed into CVL, the estimated deficiency to the Company’s creditors was £688,674.80, with the Company’s liability to HMRC being by far the largest unsecured liability, including an estimated £450,000 in respect of the EBT Scheme.
91. On 17 January 2019 HMRC submitted a final proof of debt against the Company. This totalled £425,889 of which £196,223 related to PAYE and NIC for the tax year April 2013-14, into which the tax liability in respect of the first £350,000 payment fell. (Although there is a different regime for PAYE and NIC it is unnecessary for present purposes to delve into the detail of the differing regimes since, for all practical purposes so far as this case is concerned, the effect is the same.)
92. On 25 August 2022 HMRC submitted a further final proof of debt against the Company. This was the late produced document. It included a revised amount in respect of PAYE and NIC for the tax year April 2013-14, breaking the total down into PAYE, NIC and interest on each. Of more immediate relevance to the rewards claims here is the fact that it also now included amounts for the tax years April 2014-15 and 2015-2016, where the respective totals were £174,167 and £156,943. These were comprised respectively as to: (a) 2014-15, PAYE of £111,500 and NIC of £45,984; and (b) 2015-16 PAYE of £103,142 and NIC of £42,738, with the remainder being comprised as to interest on each. In short, the total liability for both rewards amounted to £331,110.
93. At my suggestion Mr Kitson and Mr Tesciuba sought to agree a joint statement to explain the impact of the above. The experts are agreed as to the essential points as summarised above and, in particular,

that they are determinations raised against the Company as the party which ought to have accounted for and paid PAYE and NIC on the value of the gold bullion the subject of the rewards.

94. There was a disagreement in that Mr Kitson had understood the effect of the relevant provisions as being that unless Mr Heathcote reimbursed the Company the amount of PAYE and NIC within a specified period he would also come under a direct liability to HMRC for these amounts, whereas it was Mr Tesciuba's view that the relevant provisions only had the effect that the charges would be cancelled if the employee paid them to the Company within the specified period, without the employee also coming under any liability to HMRC direct for such charges. Whilst Mr Tesciuba agreed that HMRC had an option to pass to the employee the responsibility for such charges, he was unaware of HMRC having done so in this case. Mr Kitson did not suggest that there was any evidence of HMRC having done so. I do not think that this disagreement is of any particular relevance to the issues I have to decide and it was disappointing that both Mr Tesciuba and the defendants' solicitors expressed themselves in vociferous terms in criticising Mr Kitson for including this comment in his initial draft of the joint statement.
95. The experts were agreed that what HMRC had done, in line with the Loan Charge Rules referred to above, was to open an enquiry into Mr Heathcote's 2018/19 tax return. His amended tax return for 2018/19 reports a Loan Charge of £870,000.00 (i.e. the total of all three rewards) and elects for spreading. The enquiry remains open and Mr Heathcote is in settlement negotiations with HMRC in respect of the tax due.
96. In the end, therefore, the experts were agreed that the liability the subject of the 25 August 2022 further final proof of debt is a liability of the Company whereas the liability the subject of the Loan Charge Rules enquiry is a liability of Mr Heathcote.
97. HMRC, as the largest unsecured creditor in the liquidation of the Company, would – prior to the assignment - have had at least some prospect of receiving something from the Company in the liquidation should Mr Heathcote satisfy any judgment which may be given in relation to the rewards claims. However, under the assignment any net proceeds of sale are to be divided between the claimant and the liquidator in an agreed percentage. Although the agreed percentage figure is not shown in the draft assignment to be found in the trial bundle, Mr Cochran confirmed in oral closing submissions that it was unlikely that HMRC would receive anything from any judgment which might be obtained against Mr Heathcote in relation to the rewards claims. This, I assume, reflects the fact that any percentage share to which the liquidator might be entitled is extremely modest. Indeed, if and insofar as Mr Heathcote is compelled to pay such a judgment that would inevitably make it more difficult for him separately to pay HMRC his liability in relation to the Loan Charges Rules enquiry. In the absence however of clear evidence as to the agreed percentage figure and as to Mr Heathcote's means and the negotiations with HMRC, the precise extent to which HMRC may be prejudiced by virtue of any successful recovery under the rewards claims can only be conjecture.

Are the rewards recoverable as provided by the Company without lawful justification?

98. This is the first of the arguments advanced by Mr Cochran. It has an attractive simplicity, starting from the proposition that since the entitlement to remuneration can only be determined by the directors (here, Mr Heathcote himself as the sole director), the only basis and justification for the provision of the rewards was the minutes of the board meetings in question which authorised, in terms, a reward by way of incentive "albeit in a manner which would not constitute remuneration". If the authorisation made clear that the reward would not be remuneration, he contended that it could not now be open to Mr Heathcote to contend that it was in fact remuneration. If it was not remuneration then, since Mr Heathcote does not contend that it was a loan (which would of course be repayable anyway) and nor



can he contend that it was a dividend (since he was not a shareholder and since the necessary formalities were not complied with), there is no possible lawful basis for the rewards the cost of the provision of which is, therefore, recoverable on that simple basis.

99. However, in my judgment the argument fails because it seeks to place too much emphasis on the board minutes which, as I have found, are not true contemporaneous documents nor do they reflect the contemporaneous intention. Further, the argument misconstrues the board minutes in any event by contending that they reflect a clear intention that the rewards were not remuneration as opposed to a statement of intention that they would not constitute taxable remuneration. Standing back and looking at the reality, it is plain on my findings that the rewards was always intended to be, in reality and substance, a reward in the nature of a bonus in tax-efficient form provided by the Company to Mr Heathcote for his services as director.

100. On my findings, the board minutes in question are documents drafted by Qubic, produced and signed after the event, whereas the actual authorisation at the time was for the Company to provide bonus rewards to Mr Heathcote pursuant to and in accordance with the EBT Scheme. It is clear from the evidence as to the genesis and circumstances of the payments that Mr Heathcote decided, based on his discussions with Mr Jones as to the profits made by the Company over the relevant financial years, that the Company should pay him a bonus for his services by reference to the profits made by the Company in that year, and that this should be done in a tax-efficient manner using the EBT Scheme. This was plainly separate from and additional to the payment of a dividend, which could only have been – and was - made to Holdings as sole shareholder of the Company. It is true that Mr Jones accepted in cross-examination that the exercise he went through with Mr. Heathcote with regard to the size of the rewards was similar to the exercise to be undergone in respect of declaring a dividend. However, in my judgment that is not only unsurprising but is equally consistent with a discussion about what bonus the Company should pay Mr Heathcote, as the man running the Company and responsible for its successful profitable trading in the financial years in question.

101. There was no need for formality in terms of directors meetings in the context that the Company was a small private company, with Mr Heathcote as the sole director who was also the sole decision maker for the sole shareholder, Holdings.

102. Insofar as Mr Cochran argued that there was no consideration for the provision of the rewards, if – as I have concluded – they were set by reference to profits already earned in the financial years to 31 Oct 2014 and 31 Oct 2015, that argument fails on the basis that by October or November 2013 it had already been decided that, going forwards, the Company would be considering the provision of rewards to Mr Heathcote at the end of that year via the EBT Scheme, set by reference to the profits earned by the Company in that year. It cannot seriously be argued that Mr Heathcote provided consideration for such payments by his services provided over the year in the expectation that if they bore fruit, in the form of substantial profits earned by the Company, he would be rewarded by such rewards. There is no need for a formal specific agreement in relation to such payments: see the decision of the Court of Appeal in *Currencies Direct Ltd v Ellis* [2002] 2 BCLC 484 at p487.

103. In his written closing submissions Mr Cochran observed, in the context that the rewards involved the provision of gold bullion, that company directors who wish to deal with non-cash property belonging to a company must comply with a particular set of statutory provisions (to be found at s.190-196 of the Companies Act 2006). He submitted that Mr Heathcote had not complied with these provisions. He did not, however, develop this argument in oral closing submissions. It was not a point which had been pleaded or foreshadowed in his opening submissions or raised in cross-examination. It is also clear from my brief perusal of these sections that the questions as to whether or not the basic obligation for member approval of certain dealings would apply to the EBT Scheme and whether or not the sanction for non-compliance would bite on the facts of this case are not entirely straightforward,

so that I do not consider that it would be fair to Mr Heathcote to investigate or to determine this point against him without his having been able to consider and answer the point at trial.

104. The claimant did however contend, both in its Reply and in submissions, that the rewards were excessive remuneration. It accepts the principles established in the *Re Halt Garage* case, but appears to argue that: (a) the amount was unreasonable as being set at year end by reference to the profits earned in that year rather than by reference to the value of the services provided; and (b) that the payments represented a dissipation of the Company's capital to enrich Mr Heathcote. However, as to (a) there can be no objection as such to a bonus payment being set by reference to the profits earned by the Company in the year in question, and as to (b) there is no evidence in this case that, having regard to the Company's turnover, the rewards provided to Mr Heathcote by the Company were patently excessive or unreasonable as director's remuneration or that they were disguised gifts of capital rather than genuine awards of remuneration.

105. In the latter respect, the profit and loss account for YE 31 Oct 2014 records gross profits of £570,291, where the £456,244 of administrative expenses deducted to arrive at profit before taxation already includes the £270,000 for directors remuneration. The figures for YE 31 Oct 2015 are similar. In both years the Company was left with substantial shareholder funds even after the cost of the rewards was deducted and even after dividend was paid. It must be borne in mind that this was, essentially, a one-man company, albeit that the shareholder was a holding company whose shares were held by Mr Heathcote and his then wife, because his then wife was plainly perfectly content for Mr Heathcote to be the sole director of both the Company and the holding company. This is not a case where it could be said that there was a disconnect between the value of Mr Heathcote's services and the amount of the rewards relative to the profits earned through his services such that the shareholders were in some way prejudiced by the size of the rewards.

106. Further, as I have said, the informed reader would have understood that the board minutes are not to be read as only authorising a reward on the basis that it could not be remuneration for Mr Heathcote's services as director. They would have understood that they were to be read as seeking to clarify that it was intended that the reward would be provide in a manner which would not constitute taxable remuneration. No informed reader could seriously have envisaged that the reward was intended as between the Company and Mr Heathcote to be some form of gift which could be recovered by the Company at any time if it wished. Insofar as there was any doubt on the point, that was clarified by the description in the statutory filed accounts identifying the rewards as directors remuneration.

107. I therefore find against the claimant on its primary case.

The claim under s.423 Insolvency Act 1986

108. I can deal with this relatively shortly, since the conclusions I have reached in relation to the claimant's complaint that the rewards did not represent genuine remuneration and were excessive are fatal to the claimant's contention (which it must prove to succeed under s.423) that the rewards were either gifts, or made for no consideration, or for a consideration significantly less than the value of the consideration provided by the defendant.

109. Furthermore, even if that was not the case, the claimant has been unable to satisfy me that the rewards were entered into for the purpose of putting assets beyond the reach of HMRC (as putative claimant) or of otherwise prejudicing its interests in relation to such claim. As the authorities to which I have referred establish, this is a subjective test.

110. There is no evidence whatsoever that at the time the rewards were provided the Company (whether through Mr Heathcote, as its sole director, or otherwise) had any such intention.

111. In particular, there is no evidence that Mr Heathcote (whether through advice from Mr Jones or otherwise) had any idea of the scale of the potential worst-case additional tax liability relative to the value of the rewards.
112. Further, there is no evidence that Mr Heathcote (whether through Mr Jones or otherwise) had any sense that this was a very high-risk tax avoidance scheme. Both he and Mr Jones were plainly impressed – probably overly impressed - by Qubic’s claims. There is no evidence that he (whether through Mr Jones or otherwise) was aware that this was a very high-risk scheme but decided to procure the Company to provide these rewards, knowing that if it all went wrong the Company would almost certainly have nothing with which to pay HMRC the additional tax liability. On the contrary, at the time of the rewards the Company still had a healthy turnover (albeit reduced in 2015 compared to 2014) and healthy gross profits as well as a reasonably healthy operating profit.
113. I accept Mr Heathcote’s evidence that he had no reason to believe that the Company was about to lose the substantial Next contract and that in consequence its turnover would nosedive. I also accept Mr Jones’ evidence that he was sanguine about any subsequent challenge, almost certainly because he had not really applied his mind to the true likely extent of any additional tax liability for the years in question and believed, again without really applying his mind to it, that if there was a problem some accommodation could be reached whereby payment could be made under some settlement funded from continued profitable trading and, if necessary, from Mr Heathcote’s own personal resources.
114. Finally, HMRC had not, by the time the rewards were provided, said or done anything to indicate that they intended to challenge the EBT Scheme, even though it had been registered with HMRC since before November 2013 and even though its existence had been declared in the Company’s tax computations as provided to HMRC.
115. Section 423 is only intended to catch those who have the subjective intention required by the section, rather than those who may be foolish and ill-advised but nonetheless genuine. In some cases, there will be an ample basis for drawing adverse conclusions against a defendant from the totality of the evidence and concluding that on the balance of probabilities they did have such intention, notwithstanding their protestations to the contrary. However, that is not the case here as regards Mr Heathcote, so that I am satisfied that this claim would have failed for this reason as well.

The claim for breach of creditors’ duty

116. The first question is whether the creditors’ duty arose at the time of the first and the second rewards, i.e. in October 2014 and in October 2015.
117. It is common ground and clear that, if no account is taken of the potential additional tax liabilities arising in the event that HMRC successfully challenged the EBT Scheme and thus established that the rewards were subject to PAYE/NIC, the Company was solvent at both dates. The experts agreed that: “On the face of it, Servico was both solvent and a going concern on both dates. It is a matter for judicial determination whether Mr Heathcote might and perhaps should have “taken into account” the overwhelming contingent liabilities arising under the Scheme (using the terminology of IA 1986, s123(2))”.
118. As is well known, and as is summarised above, s123(2) of the Insolvency Act 1986 provides that: “A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company’s assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities”.
119. A question which was not investigated or argued before me, but which I raised briefly in closing submissions, was whether the Company’s liability to HMRC for PAYE/NIC was an actual or a contingent or prospective liability. The curious feature of this case is that although HMRC has – as

already discussed - served final proof of debt claims against the Company there has been no final determination of those claims and it has not, so far as I have been made aware, been authoritatively determined that the Qubic EBT Scheme, whether in the form advised or in the form implemented by the Company if different, is ineffective to produce its intended legal result so that a company in the position of the Company is liable to account for PAYE/NIC on the value of such rewards. That, presumably, is because the implementation of the 2019 Loan Charge Rules has rendered the question academic in this (and probably other) cases, since Mr Heathcote is personally liable to HMRC under those Rules for the amount of the PAYE/NIC regardless of any liability on the part of the Company.

120. Sensibly, Mr Cochran did not urge me to decide this point from scratch, not least because both counsel had proceeded on the basis that the real question was whether or not the Company was balance-sheet insolvent at the material times, applying the approach in *Eurosail* referred to above, where the court is required to “make a judgment whether it has been established that, looking at the Company’s assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to be able to meet those liabilities. If so, it will be deemed insolvent although it is currently able to pay its debts as they fall due. The more distant the liabilities, the harder this will be to establish”.
121. Beginning with YE 31 Oct 2014, I have already summarised the Company’s financial position as set out in the accounts and also set out the worst case scenario, from which it is clear that if the potential additional tax liability had materialised at that time both for YE 31 Oct 2013 and YE 31 Oct 2014 there would have been no prospect of it being repaid, given a combined total liability of around £579,000 (i.e. £315,000 and £264,000 respectively), compared to shareholder funds of around £220,000, producing a shortfall of around £359,000. Even if one adds back to shareholder funds the dividend actually declared and paid of around £58,000 (as I think is reasonable on this hypothesis, since it would have been reasonable for Mr Heathcote to proceed on the basis, when considering the Company’s financial position at the time and before declaring a dividend that this amount was included in the funds available to the Company), producing an available amount of around £278,000, that would still leave an substantial shortfall of over £300,000.
122. By comparison, if, as a result of a challenge by HMRC, the Company had proposed and HMRC had agreed that the transaction could be reversed and lawfully treated as dividend, the total liability for corporation tax would have been in the region of £145,000 for both years, which the Company could have afforded to pay off relatively easily. If, as Mr Kitson agreed, HMRC would usually have been willing to negotiate a settlement so long as the Company approached matters constructively, the Company had immediately available substantial funds and a reasonable prospect of adding to those funds through profits made in forthcoming years.
123. It is also worth noting that on the basis of the recent final proof of debt figures the actual PAYE/NIC liability for YE 31 Oct 2013 (net of interest) is only £196,215 and the figure for YE 31 Oct 2014 (net of interest) is only £157,490, thus a combined total of £353,705, compared to available funds of around £278,000. It is reasonable to proceed on the basis that this is HMRC’s genuine assessment, which gives credit for the corporation tax saving identified by Mr Tesciuba, and that there is no obvious reason as to why it would not also have been its assessment had it made such an assessment at that time.
124. The same essential parameters apply to YE 31 Oct 2015, although by this point the potential total additional tax liability had increased by around £247,000 to around £826,000 and, in contrast, only around £254,000 shareholder funds were available and, even adding back the dividend actually declared and paid, still only around £304,000. By contrast, the total liability if converted to dividend would have been in the region of £195,000, so that the Company could still have afforded to pay this sum. The prospects of negotiating a settlement were still present, although of course more challenging.

Taking the actual figures now claimed by HMRC the additional tax liability rises by £145,880 to £499,585, compared to available funds of around £304,000.

125. Without an in-depth analysis of the tax position and/or expert advice from a tax specialist as to the likely advice which would have been given had one been consulted at the time it is very difficult if not impossible to put any precise contemporaneous assessment on the likelihood of a challenge being made and being successful, or of HMRC introducing retrospective legislation which would have imposed the additional tax liability on the Company in any event, or of the prospects of the Company successfully negotiating with HMRC an agreement under which it would only have to pay a charge based solely on the corporation tax payable by the Company on dividend or, alternatively, a reduced settlement figure for the total PAYE/NIC liability with time to pay.
126. In my judgment however, taking (as I think is reasonable) the actual figures contained in the most recent final proof of debt, factoring in what was at least a reasonable prospect of the Company being able and HMRC being willing to treat the rewards as dividend, and factoring in HMRC's usual willingness in the case of a viable trading business to agree a reasonable staged payment schedule rather than driving such a business into liquidation, I do not think that as at either October 2014 or October 2015 the Company had clearly been demonstrated to have been insolvent on a balance sheet basis.
127. In reaching this conclusion I have taken into account, in addition to the evidence referred to above: (a) the absence of any evidence of any contemporaneous challenge at this time by HMRC, whether to this company's adoption of the Qubic EBT Scheme or to the Qubic EBT Scheme more generally; (b) the absence of any enquiry having been opened by HMRC into the relevant tax returns over the relevant periods; and (c) the absence of any evidence that HMRC had already signalled its intention to introduce retrospective legislation which would render the Company liable for the additional tax liability regardless of the success or otherwise of any challenge to the scheme under the existing law.
128. Finally, I bear in mind that, under the law as stated by the Court of Appeal in *Sequana*, I would need to be satisfied that at the relevant times the Company was either insolvent or probably going to become insolvent. Here, the fact that the Company was able to carry on business for another three years after the final reward was provided militates against a suggestion that Mr Heathcote knew, or ought to have known, that the Company was, or was probably going to become, insolvent either as at October 2014 or as at October 2015.
129. In the circumstances I do not need to consider whether or not Mr Heathcote breached that duty, if it had been engaged. However, if I had decided that the duty was engaged that can only have been on the basis that I was satisfied that the prospect of the Company coming under a liability to pay the additional tax liability was so significant that no reasonable director could have ignored and made no provision against that risk. The only obvious way in which that could properly have been done was to ensure that sufficient funds were retained in the Company to pay in the event of a challenge. That does not mean that no payment at all could have been made, only that the payment would have needed to be reduced to allow sufficient funds to be retained to meet any additional tax liability. Working on a fairly rough and ready basis, in the YE 31 Oct 2014 an additional tax liability of £157,490 is now claimed on a payment of £270,000 and in the YE 31 Oct 2015 an additional tax liability of £145,880 is now claimed on a payment of £250,000. In effect, the additional tax liability is approximately 60% of the payment made. It would appear to follow that the Company could, properly, have paid approximately £170,000 in YE 31 Oct 2014 and approximately £160,000 in YE 31 Oct 2015 whilst leaving more than sufficient to guard against any additional tax liability arising from those payments. On that basis, the breach would lie in paying an additional £100,000 in the first year and an additional £90,000 in the second year. Whilst I appreciate that this is less than Mr Tesciuba's worst-case scenario,

I do not think that it is either realistic or reasonable to find that this amount could and should have been retained, bearing in mind the totality of the evidence, including what has actually been assessed.

130. In a case like this, where it is apparent from the evidence that no proper thought was given by Mr Heathcote to the risk of paying as much as the Company did in relation to the reward, the court has to apply an objective test. In the circumstances I would have been satisfied that Mr Heathcote had breached this duty by causing the Company to pay the full rather than the net amount to procure the rewards.

What relief would I have awarded?

131. For completeness, and in case this case should go further, I should explain briefly what my decision would have been had I found that the claimant had made out its claims.

132. If the claimant had succeeded on its primary claim (i.e. that the rewards were not remuneration) then there can be little doubt that this, being a claim for breach of director's fiduciary duty, would be a proper case for an order for payment of the total value of £520,000 paid out on an unjustified basis.

133. If the claimant had succeeded on its alternative claim for breach of the creditors' duty then it seems to be that, whilst the same principle applies, the order would only be for payment of £190,000, i.e. the amount actually paid out in breach of duty. I do not consider that the restorative principle as explained by David Richards LJ in the cases to which I have referred requires the court to hold that the whole of the rewards should be returned to the Company when the breach of duty only arises in relation to the specified part which should have been retained.

134. The final question is what order would have been appropriate had I only found for the claimant on the s.423 claim. I would have been inclined in such a case only to have ordered Mr Heathcote to pay HMRC direct if and to the extent that the Company's liability to HMRC for the PAYE/NIC for the two years in question was either conclusively determined in favour of HMRC or reasonably conceded by the Company. That is because the victim is HMRC, not the Company, in circumstances where Mr Heathcote is under a separate primary liability to HMRC in any event. Even if the assignment had not taken place I would have considered it unjust to HMRC, and counter to the policy behind s.423, to make an order which would have the effect of HMRC receiving only a pro rata distribution of any payment made by Mr Heathcote to the Company, in circumstances where that would have prejudiced HMRC's prospects of obtaining the whole sum by reference to Mr Heathcote's direct liability to HMRC for the additional tax liability. The fact of the assignment having taken place only reinforces the merit behind such an approach, since it appears probable that making an order for payment of such a sum would result in HMRC likely receiving very little or possibly even nothing at all from any payment made to the claimant.

135. The more complex question, which I need not decide nor express any view upon, is whether or not on a proper application of the legal principles in play the court would have had the discretion to decline to award the claimant more relief in relation to the other claims than it would have awarded under the s.423 claims, had it found for the claimant on all such claims.

Payment claim

136. I can fortunately deal with this claim much more briefly.

137. The background is that on 4 May 2018 Contract entered into an invoice discounting agreement with RBS Invoice Finance Limited ("RBS"). It would appear, as is common in such cases where the existence of the invoice discounting agreement is disclosed to the borrower's customers, that Contract's customers were directed to pay RBS direct or, if they paid Contract direct, Contract should remit those payments to RBS because it received its payments under the facility direct from RBS.

138. On 24 October 2018 RBS wrote to Contract complaining that a number of payments had been made by Contract's customers into Contract's bank account which had not been passed on to RBS. A total of 18 such payments were identified, totalling £43,894.87, of which two, totalling £17,212.73, had been made on 28 September 2018 and the balance on various dates in October. Although RBS did not say so in terms, it is clear that they expected this to be rectified.
139. On the same day as Contract received the two payments totalling £17,212.73 Contract also transferred £28,000 to the Company. It appears that before these payments were received the inter-company account showed that the Company already owed Contract £67,328. No further payments were made by Contract to the Company subsequently.
140. It is common ground that on 31 October 2018 Mr Heathcote caused the Company to transfer £65,000 to Contract. As a result of the defendants' supplemental disclosure on the last day of trial it is now known that on the same day Contract made two separate payments of £40,000 to RBS.
141. It is clear that the transfer of £65,000 was made within the requisite period of two years before the liquidation of the Company. It is not disputed that the Company was insolvent at the time the payment was made. It is also clear that at that point Contract was a creditor of the Company and that the payment had the effect of putting Contract into a better position than it would otherwise have been in the event of the insolvency of the Company. It cannot be disputed that Contract is connected to the Company, so that it must be presumed, unless the contrary is shown, that in deciding to make the payment the Company was influenced by a desire to produce such an effect.
142. The defendants' explanation and case is that upon sight of the RBS letter and upon further enquiries being made with the then book-keeper it became known that she had not kept the financial affairs of each of the Servico group companies separate with the result there were a number of inter-company balances which needed to be reconciled to allow the true state of affairs of each company to be understood. In particular, it became known that the book-keeper had been responsible for transferring monies from Contract's bank account to the Company's bank account for cash-flow purposes, using monies paid by customers into Contract's bank account which should have gone to RBS.
143. It is said by the defendants that in discussions with Mr Howarth, who was not yet of course the Company liquidator but was, in his capacity as an insolvency practitioner, advising the Company on its options, he agreed that these inter-company ledgers should be regularised to show the true position and that the necessary reconciling inter-company payments could be made. Mr Howarth was prepared to accept that it was possible that discussions about the desirability of regularising the inter-company ledgers may have taken place but was emphatic that what was being referred to – and what he had no reason to object to - was only the process of regularising the ledgers themselves to reflect the true state of the inter-company liabilities. He was emphatic that he was not asked to, nor would he have agreed, and he did not agree, to any proposal that the Company – as a company about to enter liquidation – should make an inter-company payment to Contract. Although Mr Heathcote and Mr Jones had appeared to suggest in their witness statements that Mr Howarth had agreed to this course they were rather less sure that he had actually agreed to the payment being made in their oral evidence. I have no doubt that he did not, since no responsible person in his position could have believed that this could be appropriate and that both Mr Heathcote and Mr Jones are simply mistaken when they suggested that he had done so. It is worth noting that the subsequent correspondence where Mr Howarth asked Mr Heathcote for an explanation for the payment is inconsistent with Mr Howarth having previously agreed that it should be made.
144. It had appeared to be the defendants' case that the sum transferred of £65,000 was the actual amount of the total payments made by the book-keeper from Contract to the Company in respect of payments made by Contract's customers to Contract which should have been paid direct or paid over to RBS. However, the only documentary evidence produced by the defendants to support this argument

comprised the RBS letter of 24 October 2018, which only produced evidence of £43,894.87 such payments, of which only £17,212.73 correlated with a specific inter-company transfer of £28,000. It was not surprising, therefore, that the defendants' witnesses were cross-examined about this. Mr Heathcote had no real knowledge of the details and nor, as I have said, did Ms Coleridge, so that it was left to Mr Jones to provide an explanation. His witness statement attached what was described as a "Servico Group intercompany balance per Xero<sup>2</sup>" which, he had suggested in his witness statement, was the result of his "working through the records for each company and ... sort(ing) out which monies belonged ... where". He said that this "illustrates the extent of the inter-company balances and the steps needed to take to ensure the funds were moved as between the companies to correct the bookkeeper's errors".

145. In cross-examination he was unable to explain the discrepancy between the £65,000 and the £43,894.87, suggesting simply that the remainder must have come from some other source available to him at the time. When he was asked to explain how the Xero inter company balance document he had produced showed that this was the case, his explanation was that the document identified an approximate figure of £65,000, which represented the difference between the £95,000 odd balance owed to Contract and the £30,000 odd balance owed to another company within the Servico group, known as Smart. This explanation was not in my view remotely consistent with his explanation as it appeared from his witness statement. He was unable to say whether the £95,000 figure included the RBS related payments because he did not have the underlying documents. If the total paid by Contract to RBS on the same day of the transfer of £80,000 represented the total of the RBS related payments that was plainly inconsistent both with his evidence and with the document. Under further questions he accepted that this document was not in fact the product of his work but that of a former employee of his firm who had produced the document. He was asked why, if there was this concrete sum indirectly owed by the Company to RBS, the Company had not simply paid RBS direct. He was unable to give any answer other than to say the money was paid in good faith to restore the money to the right company.
146. In my judgment Mr Cochran was right to submit in closing that none of this affords the defendants any defence to the s.239 claim.
147. The simple fact is that what happened in my judgment was that a decision was made by Mr Heathcote, in consultation with Mr Jones and Ms Coleridge, not only to undertake a reconciliation of the inter-company ledgers but then to make inter-company payments to reflect those reconciliations. However: (a) I am satisfied that there was no explicit linkage between the decision to make the £65,000 inter-company transfer from the Company to Contract and the belief that the former book-keeper had used funds paid by customers to Contract which should have been remitted to RBS but which was used to make payments from Contract to the Company; (b) I am also satisfied that even if there was such a linkage there was no proper legal or other basis for making the payment on that basis.
148. As to (a), in my judgment the most likely explanation, on the balance of probabilities, is that when Mr Heathcote and Mr Jones discovered that: (i) the book-keeper had made a number of transfers from Contract to the Company to assist the Company's cashflow; (ii) one, the transfer of £28,000, was contemporaneous with Contract receiving some £17,000 odd from its customers which should have gone to RBS; (iii) Contract was substantially indebted to RBS, in part as a result of these and other direct payments, and RBS was pressing for this to be regularised; (iv) the inter-company reconciliation shows that the Company owed Contract some £95,000 but Contract owed Smart some £30,000, the decision was made to transfer the net balance to Contract to assist it in paying off some of Contract's indebtedness to RBS to avoid the risk that RBS might terminate the facility, with potentially serious adverse consequences to Contract as a company which it was not intended should go into an insolvency

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<sup>2</sup> Xero being the proprietary bookkeeping software package used by the Servico Group companies.



procedure. This was not, therefore, a repayment of monies paid by Contract to the Company which had all come from monies received by Contract from its customers who should have paid RBS direct.

149. As to (b), the defendants have produced no basis for a contention that the Company had received monies which in law belonged to RBS and thus which the Company was obliged in law to refund to RBS. I cannot be satisfied on the evidence before me that any of the payments made by Contract to the Company has any direct connection to payments received by Contract from customers which should have been paid to RBS. At most, the evidence might just about suggest some connection between the £28,000 and the £17,212.73, but even that is exiguous and based only on the fact that there is a coincidence of date between the payments in question. But, even if they did, all that this would show is that the Company owed an inter-company debt to Contract and – separately – Contract owed a debt to RBS under its agreement with RBS. If the Company paid, as it did, the inter-company debt to Contract, that is no less a preference just because both the Company and Contract intended through Mr Heathcote, as the common director of both, to use it to repay RBS some of what it was owed by Contract. It still had the effect of placing Contract in a better position than it would have been in the event of the Company's insolvency, where at most it would have had to prove in the Company's liquidation. It plainly put Contract in a better position, because it was able to reduce its liability to RBS in circumstances where Contract was clearly dependent on RBS' support to continue trading. Mr Heathcote told me that Contract is still in business and still has the contract with RBS, so that the payment achieved its objective.
150. In those circumstances it seems to me to be plain and obvious that the Company's intention in making the payment was to put Contract into a better position than if it had waited for the Company to go into insolvency and prove in the liquidation. Despite it being portrayed as being a case of both companies being keen to honour Contract's obligations to RBS (which I am sure they did, for entirely good commercial reasons) that does not alter the essential fact that this desire was at the very least a powerful influencing factor. Even if the Company had satisfied me that Mr Howarth had approved this payment that would not have made any difference to then outcome, but anyway I am satisfied that he did not.
151. It follows in my judgment that the claimant is entitled to judgment for the sum of £65,000 against Contract on the basis that it was the recipient of this sum and against Mr Heathcote on the basis that it was a breach of his duties as director of the Company to cause the Company to make this payment to Contract.