

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROEPRTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

In the Matter of Kieran Looney & Co Ltd (in Liquidation)
And in the Matter of the Insolvency Act 1986

Date: 2 February 2023

Before :

Deputy ICC Judge Kyriakides

Between :

(1) Anthony Davidson and Andrew McTear (acting as Joint Liquidators of Kieran Looney & Co Ltd)	<u>Applicants</u>
(2) Kieran Looney & Co Ltd	
- and -	
Kieran Joseph Looney	<u>Respondent</u>

James A Davies (instructed by **Freeths LLP**) for the **Applicants**
Kieran Joseph Looney acting in person
Hearing dates: 5, 6 and 7 July 2022

APPROVED JUDGMENT

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Deputy ICC Judge Kyriakides :

The Application

1. This is an application by the liquidators of Kieran Looney & Co Ltd (“**the Company**”) and/or the Company for:

1.1. a declaration that the Respondent, Kieran Joseph Looney (“**Mr Looney**”) is guilty of misfeasance within the meaning of section 212 of the Insolvency Act 1986 (“**IA**”) by causing the Company to make payments to himself and to third parties for his benefit totalling £2,169,604.91 (“**the Payments**”) in the period from 10 May 2011 to 4 February 2014 and for an order that he pay this sum or such other sum as the court thinks fit to the Liquidators;

1.2. alternatively, a declaration that Mr Looney operated an overdrawn director’s loan account (“**DLA**”), that at the date of the Company’s liquidation, he owed the Company the sum of £1,713,502 and for an order that he repay this sum.

Background

The Company and Mr Looney

2. The Company was incorporated on 9 April 2009 as a private company limited by shares. It has a share capital of £1,000 divided into 1,000 shares of £1.00 each, all of which have at all material times been held, by Mr Looney, who was its sole director.
3. The Company carried on business by providing consultancy and leadership coaching services to company executives. In his evidence Mr Looney explained that this had included providing services to blue chip companies, including BP and Citigroup.
4. Prior to the incorporation of the Company, Mr Looney had carried on business in the same field under the name of Kieran Looney Associates (“**KLA**”) in partnership with Reality Coaching Limited, a company which was owned by Mr Looney and his wife. According to Mr Looney, KLA ceased trading in 2009, with its final accounts being submitted to HMRC on 22 December 2009.
5. On 22 February 2016 a winding-up order was made in the High Court of Justice on the petition of HM Revenue & Customs (“**HMRC**”) presented to the court on 5 January 2016

("the Petition"). In the Petition, which was not defended by the Company, HMRC claimed that it was owed a sum total of £132,828.66 by the Company.

6. On 15 June 2016 Anthony Davidson and Andrew McTear were appointed by the Secretary of State as joint liquidators of the Company ("the Liquidators").
7. As at 27 November 2020, when Mr Davidson made his witness statement in these proceedings, only one proof of debt had been received in the liquidation. This was from HMRC and was for the sum of £132,504.31. I was, however, informed by Mr Looney during the course of the proceedings that he had also submitted a proof of debt for the sum of £2,131,797 shortly before the commencement of the trial and that he had not submitted one earlier, because he had not received a proof of debt form from the Liquidators, despite their having been informed that he was a creditor on 15 March 2019.

The Company's Accounts

8. Prior to its liquidation, the accountants engaged by the Company for the purposes of preparing its accounts were Fonseca & Co. Ltd ("**Fonseca & Co.**"). The accounts prepared and filed at Companies House prior to the Company's liquidation were as follows ("**the Original Accounts**"):
 - 8.1. accounts for the period ended 30 April 2010, which were signed by Mr Looney on behalf of the board of directors on 20 December 2010 and filed at Companies House on 1 February 2011;
 - 8.2. accounts for the period ended 30 April 2011, which were signed by Mr Looney on behalf of the board of directors on 15 December 2011 and filed at Companies House on 23 December 2011;
 - 8.3. accounts for the period ended 30 April 2012, which were filed at Companies House on 15 February 2013;
 - 8.4. accounts for the period ended 30 April 2013, which were filed at Companies House on 29 January 2014;
 - 8.5. accounts for the period ended 30 April 2014, which were filed at Companies House on 6 June 2014; and

- 8.6. accounts for the period ended 30 April 2015, which were filed at Companies House on 10 September 2015.
9. Following the winding-up order, on 14 March 2016 revised accounts for the years ended 30 April 2012, 30 April 2013, 30 April 2014 and 30 April 2015 (“**the First Revised Accounts**”) were filed at Companies House. These accounts were prepared by Nimal Fonseka (“**Mr Fonseka**”) of Fonseka & Co. without the authority of the Liquidators and were markedly different from the Original Accounts. In his oral evidence, Mr Looney accepted that Mr Fonseka was acting as his agent at the time.
10. On 2 June 2018 further revised accounts for the years ended 30 April 2011, 30 April 2012, 30 April 2013 and 30 April 2014, together with accounts which purported to show the Company’s financial position as at 30 April 2016, were provided by Mr Fonseka to the Liquidators (“**the Second Revised Accounts**”). These accounts were significantly different from both the Original Accounts and the First Revised Accounts. In particular, the accounts for 2011 to 2014 claim that significant sums were paid out by Mr Looney on behalf of the Company and that, as a result, Mr Looney was owed: as at 30 April 2011, the sum of £1,724,585; as at 30 April 2012, the sum of £2,477,966; as at 30 April 2013, the sum of £2,122,030; and as at 30 April 2014, the sum of £1,892,280.
11. A breakdown of how the loan account was calculated was subsequently sent by Mr Fonseka to the Liquidators prior to Mr Looney being interviewed by them. This document (“**the Loan Schedule**”) claimed that by 30 April 2015, the sum owed to Mr Looney had increased to £1,926,399, but, as a result of subsequent transactions, the final balance owed to him was, in fact, £1,094,664.
12. In his oral evidence, Mr Looney took full responsibility for the accounts shown to have been signed by him, namely, the Original Accounts for the years ended 30 April 2010 and 30 April 2011. He also accepted that as the other accounts had been prepared and filed by his agent, he should take full responsibility for them, although he also sought to distance himself from them and from Mr Fonseka by contending that he may not have seen, for example the Second Revised Accounts and the Loan Schedule. Despite this, he appears to

have adopted Mr Fonseca's position by claiming that he is a creditor of the Company on his DLA.

13. The most important differences between the Original Accounts, the First Revised Accounts and the Second Revised Accounts are set out in the table below.

14.	Fixed Assets	Debtors	Cash at bank	Creditors	Net Assets
2010 Original Accounts	£4,031	£3,985	£8,974	£183,623 (DLA is £179,056)	-£167,632
2011 Original Accounts	£3,225	£266,337	£2,207,674	£1,139,702 (DLA is £0)	£1,337,749
Second Revised Accounts	£3,225	£755	£103,498	£1,740,857 (DLA is £1,724,585)	-£1,633,379
2012 Original Accounts	£702,015, (including an addition at cost of £930,000 less depreciation)	£38,794	£517,902	£10,356	£1,248,355
First Revised Accounts	£2,752	£38,794	£17,902	£10,356 (DLA- £0)	£49,092
Second Revised Accounts	£702,015 (including an addition at cost of £930,000 less depreciation)	£38,794	£24,955	£2,488,322 (DLA- £2,477,966)	-£1,722,558
2013	£561,612	£222,258	£745,543	£100,334	£1,429,070

Original Accounts	(£935,375 less depreciation)	(DLA-£219,902)			
First Revised Accounts	£2,202	£222,258	£7,681	£100,334 (DLA-£35,444)	£131,807
Second Revised Accounts	£561,612	£2,867	£252,603	£2,186,920	-£1,369,838
2014 Original Accounts	£456,310	£2,867	£951,522	£93,217	£1,317,482
First Revised Accounts	£1,762	£2,867	£6,807	£93,217 (DLA-£0)	-£81,781
Second Revised Accounts	£456,510	£0	£3,633	£1,941,369 (DLA-£1,892,280)	-£1,481,426
2015 Original Accounts	£2,348 (including the disposal of an asset which had cost £930,000)	£334,035	£951,205	£41,380	£1,246,208
First Revised Accounts	£1,410 (not including any disposals)	£4,035 (DLA-£4,035)	£2,880	£161,380	-£153,055
Second Revised Accounts (including within the	£1,410	£0	£6,915	£20,350 (DLA £12,797)	-£12,055

2016 accounts)					
2016	£1,128	£0	£5,208	£9,981 (DLA- 9,695)	-£3,645

15. The various differences between the accounts appear to arise, inter alia, from the allocation and re-allocation of income received, and litigation expenses incurred, in relation to a contract which KLA entered into with Trafigura Beheer BV (“**Trafigura**”) on 14 January 2009, pursuant to which KLA agreed to provide management training for Trafigura’s senior management using the KLA Programs “Materials” (“**the Trafigura Agreement**”). The background to the Trafigura Agreement and the issues that arose in respect of it are set out in three judgments: the first is the High Court decision of Mr Justice Newey in the case of *Kieran Looney v Trafigura Beheer Nv* [2011] EWHC 125 (Ch); the second is the decision of the First Tier Tax Tribunal (Tax Chamber) in the case of *Kieran Looney and Kieran Looney Associates* [2018] UKFTT 619 (TC); and the third is the decision of the Upper Tax Tribunal in the case of *Kieran Looney and Kieran Looney Associates v HMRC* (2020) UKUT 00119. Some of the information set out below is taken from those judgments.
16. The Trafigura Agreement provided that it was to last for a period of three years and that KLA would receive an annual fee of £3 million. In the first year 80% of that annual fee was to be paid immediately with the remaining £600,000 being paid by 1 August 2009. The agreement also made provision for early termination, whereupon a fee in the sum of £1 million would become payable.
17. On or about 14 January 2009 Mr Looney incorporated Nower Inc, a Panamanian company of which he was the sole director and shareholder, for the purpose of receiving the payments payable under the Trafigura Agreement. The first year’s fee was paid into Nower Inc’s Swiss PKF bank account on 4 and 5 August 2009.
18. Following a breakdown of the relationship between the parties, Trafigura gave notice of early termination on 20 October 2009 and paid the £1 million termination fee to KLA on

29 October 2009, although Mr Looney contended that this sum should have been transferred to Nower Inc.

19. In December 2009 Mr Looney commenced proceedings against Trafigura alleging that Trafigura, by serving the early termination notice, had acted in repudiatory breach of the Trafigura Agreement and claimed damages for loss of earnings on the remainder of the agreement (“**the Trafigura Litigation**”). As part of his claim for repudiatory breach of contract, Mr Looney also alleged that Trafigura had infringed the intellectual property rights in the KLA Programs Materials (“**Materials Program**”) by developing its own training program.
20. Following a hearing that took place in December 2010, Newey J (as he then was) dismissed Mr Looney’s claim in a judgment handed down on 1 February 2011 and ordered him to pay Trafigura’s costs. His reason for dismissing the claim was that, as a matter of construction of the early termination clause, Trafigura, as a matter of law, was entitled to terminate the Trafigura Agreement.
21. It was Mr Looney’s case that he had been advised by Mr Fonseca to account for the income from the Trafigura Agreement in the accounts of the Company. Pursuant to that advice, it would appear from the Original Accounts for the period ended 30 April 2011 and from a document entitled “Statement of Case of the Respondent” that the income from the Trafigura Agreement was indeed accounted for in these accounts. It would also appear that the expenses incurred in relation to the Trafigura Agreement, including litigation expenses, were also included in the accounts.
22. On 26 May 2011 HMRC opened inquiries into the Company’s tax returns. The upshot of those inquiries was that on 2 January 2014 HMRC amended the return of KLA by adding in the £4 million income received from the Trafigura Agreement and the expenditure of £2,433,257 incurred in relation to it (which HMRC does not appear to have challenged). As a result of this, these items were removed from the Company’s accounts. Their removal appears to be reflected in the First Revised Accounts to 30 April 2012.
23. KLA appealed against the amendments made by HMRC to its returns. On 16 October 2018 the First Tier Tax Tribunal (Tax Chamber) dismissed the appeal. It found that there was no evidence that KLA had ever assigned, transferred or novated any of its rights

under the Trafigura Agreement to the Company and that HMRC had been right to conclude that the income from the agreement was the income of KLA. KLA appealed the dismissal of its appeal to the Upper Tax Tribunal, but its appeal was dismissed on 11 February 2020.

24. In light of the position of HMRC, it is not clear why the Second Revised accounts were produced by Mr Fonseka, although it appears that they were produced in the context of investigations being carried out by the Liquidators. The profit and loss account of the Second Revised Accounts for the periods ended 30 April 2011 and 30 April 2012 do not include the income from the Trafigura Agreement. However, whereas previously, the Original Accounts, at least for the period ended 30 April 2011, had included the expenses (including legal expenses) incurred by the Company in relation to the Trafigura Agreement, these expenses were recorded in the Second Revised Accounts for the periods ended 30 April 2011 to 30 April 2014 as having been paid personally by Mr Looney on behalf of the Company and as having been debited accordingly to his DLA. One of the issues that arises in this case is whether those revisions in the Second Revised Accounts properly reflect the true position of the DLA.

The Payments

25. Following their appointment, the Liquidators carried out investigations into the Company's business, dealings and affairs. This included obtaining and inspecting the Company's bank statements for the period from 1 March 2011 to 10 February 2016.
26. These investigations led the Liquidators to conclude that between 10 May 2011 and 4 February 2016 sums totaling £2,169,604.91 ("**the Payments**") had been made either directly by the Company to Mr Looney or transferred to third parties for his benefit. As against this, between 31 October 2014 and 10 February 2016, the bank statements showed that Mr Looney had paid into the Company sums totalling £550,800. The Payments and receipts are set out in four schedules attached to the Points of Claim (although it should be noted that the Payments shown, in fact, add up to the sum of £2,264,302.04 and not £2,169,604.91 as claimed in the Points of Claim, although the former figure was, in fact, used by the Liquidators when calculating their alternative claim based on the DLA).
27. The schedules attached to the Points of Claim are:

- 27.1. Schedule A (“**Sch. A**”), which sets out the payments made to Mr Looney totalling £1,400,367;
- 27.2. Schedule B (“**Sch. B**”) which sets out transfers made to third parties, which on their face have no connection with business of the Company. These transfers amount in total to the sum of £94,697.13. Although Sch, B is headed correctly, paragraph 9(b) of the Points of Claim mistakenly refers to Sch B in the terms of Schedule D;
- 27.3. Schedule C (“**Sch. C**”), which sets out transfers made to Mr Looney totalling £586,879.61;
- 27.4. Schedule D (“**Sch D**”), which sets out payments which are categorised as “drawings” to third parties. These payments total £182,358.30. Although this schedule has been headed correctly, paragraph 9(d) of the Points of Claim mistakenly refers to Sch D in the terms of Sch. B. If and to the extent required, permission is granted to amend paragraphs 9(b) and 9(d) to correct the mistakes made.
28. In his Points of Defence, Mr Looney accepts that the Payments and receipts accurately reflect the Company’s bank statements, but points out that the Liquidators have omitted a payment made by Mr Looney to the Company on 14 March 2011 in the sum of £6,500 and a payment made to him by the Company on 4 April 2011 in the sum of £47,000. The Liquidators accept the correctness of this in their Points of Reply, but have not sought to amend their Points of Claim to reflect the additional payment and receipt.
29. The Liquidators now seek recovery of either the sum of £2,169,604.91, alternatively, £1,713,502 (being the difference between £2,264,302 and £550,800).

The Procedural Background

Mr Looney’s application to rely on his witness statement dated 28 June 2022

30. On 26 July 2021 ICC Judge Prentis made a case management order. Paragraph 4 of that order provided that the parties were to file and serve any further evidence of fact by 4 pm on 26 November 2021. This deadline was extended by agreement between the parties to 4 pm on 3 December 2021.

31. The Applicants served their evidence within the period provided for, but no witness statement was filed and served by Mr Looney. On 30 June 2022 Mr Looney issued an application seeking relief from sanctions and an extension of time for filing and serving his witness statement. That application was opposed by the Applicants. Save for that part of Mr Looney's witness statement in which it was claimed that the Company owned the intellectual property rights in the Materials Program, for the reasons set out below, I gave relief from sanctions and extended time so that Mr Looney was able to rely upon his witness statement.

32. CPR 32.10 (which applies by reason of rule 12.1 of the Insolvency (England and Wales) Rules 2016) states:

“If a witness statement...for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission”.

33. Relief from sanctions was, therefore, required if Mr Looney was to be permitted to give oral evidence. This is to be decided by applying a three stage test (*Denton v TH White* [2014] EWCA Civ 906). The first stage is to assess whether the breach is serious or significant. The second stage is to consider whether there was a good reason for the breach. The third stage is to consider what the just result is, having regard to all the circumstances of the case and giving particular weight to the two particular factors referred to in CPR 3.9(1) (a) and 3.9(1)(b).

34. Applying the first stage, the service of Mr Looney's witness statement was almost seven months after the expiry of the relevant deadline. This, in my judgment, was a serious failure. Applying the second stage, the reason given by Mr Looney for that failure was that he did not realise that he had *“to set out the information for the court to consider in a witness statement.”* Whilst I accept that Mr Looney may genuinely have not understood that a witness statement was required if he was to give oral evidence, the authorities make it clear that the court will not apply a lower standard of compliance with rules and orders for litigants in person and that it is reasonable to expect a litigant in person to familiarise himself with the rules (*Barton v Wright Hassall* [2018] 1 WLR 1119 at [18]). In the premises, I do not consider that the reason given by Mr Looney for his default was a good reason.

35. However, this is not an end of the matter. I now need to consider what the just result is, having regard to all of the circumstances.

36. Mr Davies argued that the just result would be to refuse the application for the following reasons:

36.1. the Applicants would suffer significant prejudice if relief was granted. In particular, the witness statement sought to raise issues that had not been raised before and had not been pleaded. Mr Davies gave two examples of this:

36.1.1. the first related to the alleged justification for allocating expenses incurred in relation to the Trafigura Litigation to Mr Looney's DLA. In paragraph 20 of his Points of Defence, Mr Looney sought to justify this allocation by claiming that the Trafigura Litigation was for the benefit of the Company as income from the Trafigura Agreement had been allocated to the Company and it was Mr Looney's intention to allocate any damages awarded in the proceedings to the Company. However, in his witness statement Mr Looney sought to justify the allocation on the basis that: (i) the Company owned the intellectual property rights to the Materials Program that had been licensed to Trafigura under the Trafigura Agreement; (ii) Trafigura had copied that program; and (iii) as the Company owed the intellectual property rights to the program, any damages paid to Mr Looney in the Trafigura Litigation would have to be paid by him to the Company;

36.1.2. the second related to the purchase of a motor yacht in the names of Mr and Mrs Looney. It is the Liquidators' case that the yacht belonged to Mr and Mrs Looney because it was in their names and, therefore, that the sum paid for it could not be credited to Mr Looney's DLA. In his witness statement, Mr Looney seeks to explain his belief that the yacht was in their personal names because of Spanish legal requirements, an explanation that had not previously been proffered by him;

36.2. having regard to CPR 3.9(1)(a) and 3.9(1)(b), the effect of producing a witness statement so late is that the parties have been prevented from litigating efficiently and at proportionate cost. It was only in the witness statement that Mr Looney sought to explain certain matters, for example, the DLA. Had he produced these explanations at an earlier stage, then the parties could have sought to narrow the issues and re-assess their position regarding settlement;

36.3. preparation for trial is an intensive process and service of a witness statement shortly before trial is disruptive, risking other deadlines being missed and driving up costs.

37. Whilst the points made by Mr Davies are all good and valid points, I decided that, save for those parts of Mr Looney's witness statement in which he claimed that the intellectual property rights in the Materials Program belonged to the Company, the just result was to grant relief from sanctions and a time extension. Much of Mr Looney's witness statement would not have come as a surprise to the Applicants. There were only two new matters, which had been highlighted to me. The first was the alleged ownership by the Company of the intellectual property rights in the Materials Program. It seemed to me that it was too late in the day to raise this issue (which could not, in any event, be properly determined without an adjournment of the trial) and that the Applicants would be prejudiced if I allowed it in. In any event, it was not part of Mr Looney's pleaded case and no application had been made to amend that case. The second matter was the yacht. So far as it was sought to explain why the yacht was in the names of Mr and Mrs Looney, in my judgment, no prejudice was suffered by the Applicants since a belief regarding what the Spanish registration laws might have been without any proper supporting evidence had no evidential value and, as shown below, I have not taken it into account in my judgment.

38. Whilst the court takes seriously failures to comply with its orders, the failure in this case was not a deliberate choice on the part of Mr Looney; as he explains, it was not until recently, when he received advice, that he realised that he should have produced a witness statement. Whilst this is not a good reason for the purposes of stage 2, it is in my judgment a factor that I can take into account in deciding what the just result is.

39. In my judgment, once the evidence relating to the intellectual property rights is excluded, the position is that the prejudice that will be caused to Mr Looney if he is not permitted to rely on his witness statement and give oral evidence, outweighs that to the Applicants. Neither party contends that the trial should be adjourned if the witness statement is admitted and, as has proved to be the case, the admission of Mr Looney's witness statement and his giving oral evidence, has assisted me in relation to my judgment. Finally, I would add that, having had regard to the evidence and what had taken place prior to this trial, I doubt that the production of Mr Looney's witness statement at an earlier stage would have enabled the parties to reduce the issues between them or to reach a settlement.
40. For all these reasons, in my judgment, the just result was, and is, to grant relief for sanctions and extend time for filing and service of Mr Looney's witness statement, excluding the section relating to the Company's alleged ownership of the intellectual property rights in the Materials Program.

The Witnesses

41. I found Mr Davidson to be a straightforward and honest witness who sought to do his best to answer the questions put to him by Mr Looney. However, as is in the nature of these cases, Mr Davidson's evidence is of limited use in the sense that he has no actual knowledge of the events which are the subject-matter of the claims. His evidence is based on the documents coming into his possession and his investigations.
42. Likewise, I found Mr Looney to be on the whole a straightforward and honest witness, although at times he went off at a tangent when answering a question. He expressed concern to provide truthful evidence, insofar as it was within his recollection and knowledge, even if the evidence he gave was ultimately to his disadvantage. Like Mr Davidson, however, there were certain matters, in particular, some accounting and financial matters, which he was not able properly to deal with as they were not within his own knowledge and could only have been clarified by his accountant, Mr Fonseca.
43. One of the difficulties, therefore, in this case is the fact that Mr Fonseca was not called as a witness to explain the various sets of accounts and other documents produced by him on behalf of the Company and Mr Looney, the position of the Company in relation to

HMRC, and his lack of co-operation in dealing with certain requests by the Liquidators. The reason for not calling Mr Fonseca as a witness is explained by Mr Looney in his witness statement, where he states that he had not called Mr Fonseca as a witness, because he was 83 years old and was suffering from memory loss and that the inability to call him had also hindered him in the preparation of his case. I have no reason to doubt the truth of that explanation.

The issues

44. The issues which are to be decided in this case are as follows:

- 44.1. what the nature of the Payments made to Mr Looney were;
- 44.2. whether, by causing the Payments to be made to himself or for his benefit, Mr Looney acted in breach of his fiduciary duties to the Company;
- 44.3. if Mr Looney was in breach of his fiduciary duties, whether the breaches were capable of being, ratified by him and whether they were ratified by him;
- 44.4. whether the claims for breach of fiduciary duty are statute-barred;
- 44.5. whether Mr Looney is entitled to be excused from any breaches of duty under s 1157(1) of the Companies Act 2006 (“CA”);
- 44.6. if Mr Looney is not entitled to rely on the defence under CA s 1157(1), what sum, if any, Mr Looney should be ordered to pay to the Liquidators;
- 44.7. if the Payments made to Mr Looney were in the nature of loans, what the balance on his director’s loan account is and whether there was a breach of CA section 197.

45. I deal with each of these issues below.

The Nature of the Payments

46. The issue that I must decide is whether there was any lawful justification for the Payments. The Liquidators’ primary case is that there was no lawful justification for

them. Mr Looney, however, contends that the Payments were in the nature of loans made by the Company to him, that they formed part of his DLA and that his DLA is in credit. No alternatives are claimed by the parties. In particular, it is not claimed by Mr Looney that the Payments were either dividends or directors' remuneration paid to him or, save in the very limited respects referred to later on in this judgment, that they were made to discharge bona fide liabilities of the Company.

47. A director of a company is a fiduciary of its assets. As explained in the case of *Colin Thomas Burke and others v John Morrison and others* [2011] EWHC 804 (Ch) at [28], as a matter of law, once a liquidator has proved that a payment has been made to or for the benefit of a director, the evidential burden shifts to the director to explain what the payment was for. The Judge continued as follows:

“Depending on the other evidence, it may be that the absence of a satisfactory explanation drives the court to conclude that there was no proper justification for the payment. However it seems to me to be a step too far for Mr Aslett to say that, absent any explanation, in all cases the default position is liability for the Respondent directors. In some cases, despite the absence of any adequate explanation, it may be clear from the other evidence that the payment was one which was made in good faith and for proper company purposes”.

48. The Liquidators' evidence was that prior to commencing these proceedings, they investigated the Payments and that, in the absence of any or any proper explanation of those Payments, they concluded that they had not been made for a proper purpose. I accept that evidence. Letters were sent both to Mr Looney and to Mr Fonseca, who dealt with the correspondence from the Liquidators on behalf of Mr Looney, requesting both Mr Looney's response to the payments made to him as well as documentation to support Mr Fonseca's (and now his) contention that he was a creditor, and not a debtor, of the Company on his DLA. No proper response was received to the Liquidators' requests and none of the requested documentation was provided. Whilst Mr Looney relied upon the correspondence in support of his submissions that the Liquidators had failed to act co-operatively in relation to these proceedings and in a way that benefitted the Company, unfortunately, the opposite is the case. The correspondence from the Liquidators'

solicitors is not, as claimed, needlessly aggressive. The problem arises, as admitted candidly by Mr Looney in his oral evidence, from the lack of cooperation by Mr Looney's agent, Mr Fonseca.

49. Further, although not expressly alleged in these terms, it would appear to be Mr Looney's case that if he is found not to have discharged the evidential burden upon him regarding the Payments, this was because the Liquidators did not investigate the position properly, failed to make diligent efforts to secure evidence within their control and presented a trial bundle which sought to present a false and misleading picture of the Company, its affairs and conduct. In particular, he alleged that the Liquidators had failed to recover from the Official Receiver all of the books and records of the Company, including an electronic copy of the Company's Sage records, which had been delivered to the Official Receiver by Mr Fonseca, an allegation which was denied by Mr Davidson in his oral evidence, in which he stated that the Liquidators had received everything that the Official Receiver had received. I accept that evidence.

50. The difficulty with Mr Looney's submissions, some of which border on accusing the Liquidators of dishonesty, is that they are not backed up by any evidence. I, accordingly, reject them. Further, it is significant that at no time did Mr Looney ask the Liquidators if he could inspect the books and records delivered up by Mr Fonseca to the Official Receiver or for them to confirm that they had received these documents. Neither did Mr Looney make any attempt to obtain from Mr Fonseca any of the books and records he retained, in particular, copies of the Sage records, even though he frankly admitted in his oral evidence that it was likely that Mr Fonseca had these records and that he could have asked for them had he thought about it. I must decide this case on the evidence before me and Mr Looney must unfortunately take the consequences of his failure to investigate and provide documentation which he believes might have supported his case.

51. Subject to the discussion relating to the payments referred to in paragraphs 62 to 64 below, Mr Looney has not, in my judgment, discharged the evidential burden on him. I do not accept his case that the Payments made to him were in the nature of loans. My reasons for reaching this conclusion are as follows:

51.1. *Chitty on Contracts*, 34th ed. at [41-262] defines a contract of a loan of money as:

“a contract whereby one person lends or agrees to lend money to another, in consideration of a promise, express or implied to repay that sum on demand, or at a fixed or determinable future time, or conditionally upon an event which is bound to happen, with or without interest. In many circumstances, the question whether a particular transaction is, in law, a “loan” or not will be immaterial, since the transaction will take effect according to the intention of the parties, however the transaction is classified”;

51.2. in the present case, there was no evidence before me that when the Payments were made, it was the intention of the Company and Mr Looney that they should be made by way of loans. In particular:

51.2.1. in his oral evidence, Mr Looney candidly admitted that he just took money from the Company as and when he wanted to by drawing a cheque (and presumably procuring the various other transfers of money to be made) and that no thought was given by him regarding such Payments at the time they were made. He further admitted in his oral evidence that no formalities were carried out by him in relation to the Payments. Clearly, no thought was given by him as to whether any formalities were required and, if so, what considerations he should have taken into account in deciding whether or not to make the Payments. Such conduct is consistent with his making no meaningful distinction between himself and the Company;

51.2.2. the Payments do not appear to have been reflected as forming part of Mr Looney’s DLA in either the Original Accounts or in the First Revised Accounts. The first time that they appear to have been classified as forming part of Mr Looney’s DLA are in the Second Revised accounts for the years ended 30 April 2012, 30 April 2013 and 30 April 2014 as well as in the Loan Schedule. These significant revisions were made well after the Company had gone into liquidation and significantly during the course of the Liquidators’ investigations. In light of this, in my judgment, the Original Accounts and the subsequent First Revised Accounts, which remove the Trafigura income from the accounts, are a better reflection of the original intention regarding the Payments. That intention appears to have been that the Payments were not loans made by the Company to or for the benefit of Mr Looney, but were payments made to him or for his

benefit in respect of which there was no intention or agreement by Mr Looney to make any repayment.

Whether the Payments were made in breach of Mr Looney's fiduciary duties

52. Mr Davies submitted that by causing the Payments to be made, Mr Looney acted in breach of his duties as a director under CA s 171(b), s 172 and s 175.

The claim under CA section 171

The Law

53. CA section 171(b) provides that a director must only exercise powers for the purposes for which they were conferred. The test for the court to apply in deciding whether or not a director has acted in breach of this duty is set out in the case of *Extrasure Travel Insurances Limited and others v Alan Herbert Scattergood* [2002] EWHC 3039 (Ch) where Jonathan Crow, sitting as a deputy Judge of the High Court, stated at [92]:

“92. The law relating to proper purpose is clear, and was not in issue. It is unnecessary for a claimant to prove that a director was dishonest, or that he knew he was pursuing a collateral purpose. In that sense, the test is an objective one. It was suggested by the parties that the court must apply a three-part test, but it may be more convenient to add a fourth stage. The court must:

92.1 identify the power whose exercise is in question;

92.2 identify the proper purpose for which that power was delegated to the directors;

92.3 identify the substantial purpose for which the power was in fact exercised; and

92.4 decide whether that purpose was proper.

93. Finally, it is worth noting that the third stage involves a question of fact. It turns on the actual motives of the directors at the time: Re a Company, ex parte Glossop [1988] BCLC 570 at 577f-g.”

54. In the same case, the court held that a director of a company has the power to deal with a company's assets in the course of its trading and that, broadly speaking, the purpose for which the power is conferred on a director is to protect the company's survival and to promote its commercial interests. Although not strictly speaking a trustee, a company

director is treated as a trustee of the company assets coming into his hands or which are under his control (*Russell v Wakefield Waterworks Co.* (1875) LR 20 Eq 474,479). Accordingly, he is under a fiduciary duty to the company to apply its assets only for the proper purposes of the company.

55. In *GHLM Trading Limited v Maroo and ors* [2012] EWHC 61 (Ch), the court considered where the burden of proof lay where the allegation was that a director had misapplied company funds. At [149] Newey J held that once it had been shown that a company director had received company money, it was for him to show that the payment was proper. The issue of the burden of proof was also considered in *Reynolds v Stanbury* [2021] EWHC 2506 (Ch) where ICC Judge Barber summarised the position as follows:

“8. In my judgment the correct approach is as follows. Overall, the burden of proof is on the Applicant. He must prove his pleaded case. To the extent, however, that the Applicant’s pleaded case rests on the wrongful transfer to the Respondent (or those connected with her) of money or other assets belonging to SC1, a two-stage process is involved. First, it is for the Applicant to prove, within the bounds of his pleaded case, the transfer of given sums or other assets belonging to SC1. As part of this first stage, where ownership of the asset or money in question is in issue, it is for the Applicant to establish on a balance of probabilities that the asset or money in question belonged to SC1. It is only once the Applicant has established the transfer or payment of assets or money belonging to SC1 that the second stage is engaged. At the second stage, the evidential burden is on the Respondent to prove that the payment or transfer was proper.”

Discussion

56. It is the Liquidators’ case that the Payments were not made for a proper purpose and were a misapplication by Mr Looney of the Company’s monies. In particular, it is contended that the Payments were an unlawful return of capital to Mr Looney.

57. The Liquidators have proved the Payments and that the funds constituting the Payments were assets belonging to the Company. Accordingly, the evidential burden having shifted to Mr Looney, it was for him to satisfy the court that the Payments were proper.

58. Subject to the two exceptions referred to in paragraphs 62 to 64 below, and save for contending that the Payments were loans to him, a contention that I have rejected, Mr Looney has not sought to justify any of the Payments. In particular, he has not claimed that any of them were made to protect the Company's survival or to discharge any of the Company's bona fide liabilities or, indeed, otherwise to promote the Company's commercial interests and there is no evidence of the Payments having been made for such purposes.
59. Accordingly, in my judgment, subject to the discussion below about the two possible exceptions, Mr Looney has not discharged the evidential burden on him to satisfy the court that the Payments were made for a proper purpose. The Payments have not been shown to have been made for any purpose connected with the Company and its business, but were made in order to benefit Mr Looney and those connected with him.
60. The issue that then arises is whether the Payments were unlawful distributions of capital. If payments made to a shareholder are not made pursuant to a proper declaration of dividend pursuant to Part 23 of CA, they may constitute an unlawful return of capital at common law if they were in substance a distribution to the shareholder in his capacity as a shareholder.
61. In my judgment, the Payments, at least, insofar as they were made to Mr Looney or for his benefit, were unlawful distributions of capital to him. They were made to him or for his benefit as the sole shareholder of the Company, without the Company receiving any consideration in return and without the distribution falling within any of the exceptions permitted by the CA. The only payments, which are an exception to this, are the payments referred to in Sch B and Sch D made directly to family members (none of whom carried out any work for the Company); these payments were not made to Mr Looney or for his benefit and cannot, therefore, be classified as a distribution to Mr Looney in his capacity as a shareholder. However, whilst these payments were not unlawful distributions of capital, they were still improper payments, as was conceded by Mr Looney, who accepted that they were "*irregular*".
62. I shall now consider the two payments that Mr Looney claims were made for a proper purpose. The first payment is the payment by the Company of the sum of £167,758.30 to

HR Owen Dealership for the purchase of a motor car. There appears to be no dispute between the parties that the car was purchased in Mr Looney's name and that when it was sold, the sale proceeds were not paid to the Company, but were retained by Mr Looney. In his witness statement, Mr Looney stated that the car was purchased for use within the Company. In his oral evidence he said that he was entitled to a Company car, a statement which is not consistent with his witness statement.

63. The car is not reflected as an asset of the Company in any of the Company's accounts in whatever iteration and, if as claimed by Mr Looney, it was intended to be used for the Company's business, no explanation has been given by him as to why it was not purchased in the Company's name and why when it was sold, the proceeds were not paid into the Company's bank account, instead of being used towards satisfying personal costs orders made against him in the Trafigura Litigation. Further, no evidence was adduced by Mr Looney to show that he had any entitlement to a Company car and no justification was advanced by him to support his contention. Accordingly, in my judgment, Mr Looney has not satisfied the burden on him to show that the payment was made for the purposes of the Company business. In my judgment, it was made for an improper purpose to benefit himself and the monies used for its purchase were an unlawful return of capital to him.
64. The second exception concerns the payments totalling £39,762.60, which are referred to in paragraph 22.13.1 of Mr Davidson's witness statement and which appear in Sch. C. In his witness statement, Mr Looney stated that he assumed that the majority of these payments, which involved either transfers made to Caixa bank or to other entities in Spain, related to the motor yacht, which he claimed was owned by the Company, including its mooring at Club de Vela. In his oral evidence, he said that he could not, in fact, remember what the payments were for, and conceded that, except for the payments made to Club De Vela and Felui, who were Spanish lawyers, the payments were irregular.
65. That concession must be correct, because, save for the two payments, which are expressly stated to have been made to Club De Vela, being the sum of £292.22 made on 15 July 2014 and the sum of £4,918.70 made on 28 September 2015, there is no evidence that any of the other payments potentially related to the yacht, including the payment to Felui (despite the fact that the concession did not extend to this payment). However, even as regards the payments made to Club de Vela, no documents were produced by Mr Looney

to support what he said was his “assumption” and, as shown by the evidence, the yacht was, in fact, sold on 16 April 2015, over five months prior to the second payment being made to Club de Vela.

66. Accordingly, even if the yacht was owned by the Company, which I deal with below, Mr Looney has not satisfied the evidential burden of proof on him that any of the payments constituting part of the sum of £39,762.60 were payments which related to the yacht and, therefore, were payments made for a proper purpose.

The Claim under CA s 172(1)

67. Under CA s 172(1) a director is required to act in a way he considers, in good faith, would be most likely to promote the success of the company for the benefit of the members, having regard (amongst other matters) to the matters set out in that sub-section. This duty reflects the honesty, loyalty and good faith expected of a director towards his or her company and shows that the interests of the company are to be given primacy over those of the members.

68. The test to be applied in relation to the duty under CA s 172(1) is normally a subjective test, where the court will have regard to whether or not the director genuinely believed that the particular exercise of the duty was to promote the success of the company. However, where a director has not applied his mind at all to consider whether or not a proposed action was in the interests of the company, it has been held that the test is an objective one, namely, whether an intelligent and honest man in the position of a director of the company concerned could reasonably have believed that the director’s actions were for the benefit of the company (*Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch. 62).

69. In the present case, there was no evidence before me that when causing the Company to make the Payments, Mr Looney considered the interests of the Company at all. Indeed, in his oral evidence, he acknowledged that he transferred monies to himself as and when needed. It is, therefore, appropriate for me to consider whether or not he breached his duty under CA s 172(1) by applying the objective test referred to in *Charterbridge Corp Ltd v Lloyds Bank Ltd*.

70. In light of my findings in relation CA s 171(b), that none of the Payments was made for proper purposes and, indeed, that the majority of the Payments, namely, those made to Mr Looney or for his benefit, were unlawful, it must follow that an intelligent and honest man in the position of Mr Looney could not reasonably have believed that Payments were to promote the interests of the Company. Indeed, as I have found earlier on in this judgment, Mr Looney appears to have made no distinction at all between himself and the Company.

71. Finally, although not strictly necessary, I shall consider one further argument advanced by the Liquidators in support of their claim that Mr Looney had acted in breach of his duty under CA s 172(1). Mr Davies submitted that when the Payments were made, indeed, from 30 April 2011 onwards, Mr Looney had a duty to consider the interests of the creditors, because the Company was insolvent and Mr Looney knew or ought to have known that it was insolvent.

72. In support of this argument, reliance was placed on the proof of debt of HMRC, in which HMRC claims that it is a creditor for the following amounts:

72.1. the sum of £12,219.56 in respect of corporation tax dated 30 April 2011;

72.2. the sum of £42,031 for corporation tax dated 30 April 2013;

72.3. the sum of £75,011.82 for VAT dated 21 February 2016 (inclusive of tax and a surcharge; and

72.4. the sum of £3,241.93 for accrued interest dated 21 February 2016.

73. The Liquidators submitted that because those debts were not paid, the Company was clearly cashflow insolvent from 30 April 2011. They also relied on the First Revised Accounts and the Second Revised Accounts and claimed that these accounts showed that the Company was also balance sheet insolvent.

74. The evidence, in my judgment, does not support the Liquidators' claim that the Company was cashflow insolvent in the period from 30 April 2011 to 30 January 2014, but does show on balance of probability that the Company was cashflow insolvent from about the end of January 2014 onwards for the following reasons:

74.1. it is wholly unclear when the amount of corporation tax for 30 April 2011 was determined, taking into account the dispute that had arisen between HMRC, the Company and KLA concerning the proper attribution of the Trafigura income and expenditure. In this respect, I note that HMRC did not include this debt in its winding-up petition, despite the assertion in its proof of debt that the debt in respect of which HMRC seeks to prove is the same debt which was the subject of the petition, subject to revisions made due to changes in the amount of corporation tax claimable;

74.2. in the normal course of events, disregarding the dispute with HMRC, corporation tax for the year ended 30 April 2011 would not have become payable until the end of January 2012 and corporation tax for the period ended 30 April 2013 would not have become payable until the end of January 2014;

74.3. there is little information about the Company's financial position as at 31 January 2012. The Company's bank statements, however, show that as at that date the Company had a balance of £16,733.70 in its bank account. Whilst this sum appears to fall just short of the total amount claimed by HMRC of £12,219.56 and the creditors that were paid shortly after 31 January 2012, the bank statements show that the cashflow difficulty that may have existed had the sum claimed by HMRC been payable by the end of January 2012, was only a short term difficulty, since by the end of March 2012 substantial payments into the account had been made by some of the Company's clients and these were more than sufficient to discharge the liabilities to HMRC as well as the creditors of £10,356 recorded in both the Original Accounts for the year ending 30 April 2012 and the First Revised Accounts for that year;

74.4. as regards the claim for VAT, although the proof of debt states that it is dated 21 February 2016, the petition shows that for the period ended July 2013 a return was filed by the Company which showed that VAT in the sum of £45,670.20 was due

from the Company to HMRC. This sum would not have become payable, however, until 7 September 2013. Although I do not have any information regarding the creditor position as at that date, the bank statements show that the Company had sufficient funds to pay this debt. Further, the bank statements also show that the Company was at that time and until 31 December 2013 receiving substantial income from its clients;

74.5. that position appears, however, to have changed from 30 January 2014. As at the end of January 2014, when, based on the Company's own return (which, in his oral evidence, Mr Looney accepted would have been signed by him), corporation tax in the sum of £42,031 for the year ended 30 April 2013 became payable, the Company's bank balance was £3,769.30. Further, the bank statements show that this was not a temporary cashflow issue; whilst the Company continued to receive some income from clients, the income was very much reduced and clearly not sufficient to discharge the liability to HMRC and the Company's liabilities to other creditors up until the time when the Company went into liquidation;

74.6. to the extent that any reliance can be placed on any of the accounts, it would appear that the accounts for the year ended 30 April 2014 support the conclusion that the Company had insufficient current assets to discharge its current liabilities. All three iterations of the accounts for the year ended 30 April 2014 record a very low figure for current debtors (£2,867 in the Original Accounts and the First Revised Accounts and £0 in the Second Revised Accounts). Whatever any of iterations might state for cash at the bank, as at 30 April 2014, the bank statements record that it was only £3,632.67 (in fact, as properly recorded in the Second Revised Accounts). Creditors falling due within the year are recorded in the Original Accounts and the First Revised Accounts for the year ended 30 April 2014 as being £93,217, of which £49,089 was for creditors and accruals and £44,128 for taxes and social security. In the Second Revised Accounts, only creditors & accruals in the sum of £49,089 are recorded and the tax debt has been removed. No reason was given for this in the evidence before me. However, the returns of the Company for corporation tax and VAT referred above, show that, as far as the Company was concerned, it owed HMRC at this date the sum total of £87,701.20, a sum far in excess of the Company's current assets. Further, the bank statements do not on their face show that either of

these sums were ever paid to HMRC and Mr Looney did not himself seek to assert that any of the debit transactions recorded in the bank statements were payments of these debts to HMRC;

74.7. in my judgment, therefore, having regard to the test for cashflow insolvency in *Re Cheyne Finance plc* [2007] EWHC 2402 (Ch) (approved by the Supreme Court in *BYN Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc* [2013] UKSC 28), the Company was cashflow insolvent from 31 January 2014.

75. However, it is not so easy to determine whether the Company was also balance sheet insolvent and, if so, from what date. In light of my findings, save for the accounts to 30 April 2010, none of the accounts properly record the position vis-à-vis Mr Looney and some of them do not even properly record the Company's cash at the bank. Whilst, therefore, the First Revised Accounts (at least from 30 April 2014) and the Second Revised Accounts record that the Company was balance sheet insolvent, it is not possible for me, without proper accounts being drawn up, to make any findings concerning whether or not the Company was balance sheet insolvent and if so, from which date it was insolvent on that basis.

76. In conclusion, I accept that as a result of the Company being found to have been commercially insolvent from 31 January 2014, something which Mr Looney would or should have known from financial and commercial information available to him, such as the bank statements and his knowledge of the Company contracts with its customers, Mr Looney was, in respect of such of the Payments made from that date, under a duty to consider the interests of creditors (*BTI 2014 LLC v Sequana SA* [2022] UKSC 25). There is no evidence, or indeed, any claim by him that he did so. Accordingly, adopting the objective test referred to in paragraph 69 above, this is yet an additional reason for finding, at least in respect of the Payments made after 30 January 2014 that Mr Looney acted in breach of his duty under CA s 172(1).

The claim for breach of duty under CA s 175(1)

77. This claim does not really add much to either of the previous claims, but constitutes yet a further breach by Mr Looney of his duties to the Company in that there was clearly a conflict between his own interests and his duties to the Company as set out above.

Whether the breaches of duty were ratified

78. It was Mr Looney's case that, if there had been breaches by him of his duties as a director, these breaches were subsequently ratified.

79. Under CA s 239 a breach of duty by a director may be ratified, and he may thereby be excused, if a resolution to this effect is passed by the majority of the members of the company, excluding any vote of the director, if he is a member. CA s 239(6) provides that nothing in s 239 affects the validity of any decision taken by unanimous consent of the members of the company, thereby preserving the principle in *Re Duomatic* [1969] 2 Ch 365). Under this principle, a director's misconduct may be ratified informally if the members unanimously consent to this (and, for this purpose, the consent of the relevant director, if he is a member, can be taken into account). However, in order for there to be such an informal ratification, the members must have turned their minds to the conduct that is sought to be approved, have understood the matter and made a decision to approve it.

80. CA 236(7) preserves any rule of law as to acts that are incapable of being ratified. This provision, therefore, preserves the rule of law that where the wrong constitutes an unlawful return of capital, thereby infringing the principle of maintenance of capital, it will not be open to the members to ratify it. Likewise, it preserves the rule of law that where a wrong is committed in insolvency related circumstances which would require the directors to consider the interests of the creditors, such wrongs cannot be ratified by the members as the company's interests in these circumstances are to be equated with those of its creditors, and not its members.

81. In my judgment, the breaches of duty as found by me were not ratified by Mr Looney as the sole member of the Company for the following reasons:

81.1. first, Mr Looney claimed that he had ratified the Payments, although he was unable to state when and how he had ratified them. Even if he had ratified the Payments, there is a difference between ratifying the Payments themselves and ratifying his misconduct as a director of the Company. In this case, however, there is no evidence that there was ever a resolution by him as a member of the Company

either ratifying the Payments or ratifying his conduct or, for the purposes applying *Re Duomatic*, no evidence that he ever applied his mind to these issues;

81.2. secondly, the wrongs constituted by the payments which I have found to be unlawful returns of capital (being the majority of the Payments) were not capable of being ratified;

81.3. finally, the Payments made after 30 January 2014 were not capable of being ratified as, in accordance with my findings, the Company was insolvent after this date.

Whether the claims are statute-barred

82. Section 21(1) of the Limitation Act 1980, which applies to trust property, provides for a six-year limitation period, except in relation to two types of action. One of them is an action by a beneficiary under a trust to recover from a trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his own use (s 21(1)(b)).

83. In *Burnden Holdings v Fielding* [2018] UKSC 14, Lord Briggs (with whom the other members of the Supreme Court agreed), held that a company director, as a fiduciary steward of a company's property, is to be treated as being a trustee in possession of trust property from the outset. If he, therefore, misappropriates any of that property, he converts that property to his own use and any claim against him is not subject to any limitation period under section 21(1)(b) of the Limitation Act 1980.

84. In light of my findings regarding the misapplication by Mr Looney of Company monies, the claims made against him for breach of fiduciary duty fell within the provisions of s 21(1)(b) and are not statute-barred.

Whether Mr Looney should be relieved from liability under CA 1157

85. CA s 1157(1) states:

“If in proceedings for negligence, default, breach of duty or breach of trust against-

(a) an officer of the company.

(b)

it appears to the court that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit.”

86. It was not argued by the Liquidators that, in procuring the Payments to be made, Mr Looney had acted dishonestly and I was not referred to any authority on this issue. As to whether Mr Looney acted reasonably in all the circumstances, in *Dickinson v NAL Realisations (Staffordshire) Ltd* [2017] EWHC 28 (Ch) it was stated at [76] that where a director of a company had not given consideration at all to the interests of a company, as distinct from his own, it would be difficult to excuse him under CA ss 1157(1).

87. I have found in relation to the breaches alleged under CA s 172(1) that Mr Looney did just that and, applying the objective test, that he acted in a way that no reasonable director in his position would have acted. In light of these findings, Mr Looney does not meet the second of jurisdictional threshold in CA s 1157(1) that he acted reasonably.

88. Accordingly, the relief from liability that Mr Looney seeks under CA s 1157(1) is refused.

The amount of compensation that Mr Looney should be ordered to pay under IA s 212

89. It was agreed at the end of the trial that if I found in favour of the Liquidators, further submissions should be made regarding the amount of the award to be made against Mr Looney, in particular, having regard to the fact that the deficiency in the liquidation is likely to be less than the amount of the Payments and to the fact that Mr Looney is the sole shareholder of the Company who would be entitled to receive by way of a distribution any surplus.

90. The final issue relating to breach of duty, and which is relevant to the amount of compensation to be awarded, is whether Mr Looney would be entitled to set-off against any award, any balance due under his directors' loan account. Both parties agreed that Mr Looney made loan payments to the Company in sums totalling £557,300. Mr Looney contends that, in addition to this, further payments were made by him on behalf of the Company and should be included within his DLA. This issue is dealt with below.

91. If, as would appear to be the case, some monies are owed by the Company to Mr Looney, the authorities are quite clear that, whilst Mr Looney can prove for these sums in the liquidation of the Company, they cannot be set-off by way of insolvency set-off against any sum awarded by the court pursuant to IA section 212 (*Manson v Smith* [1997] 2 BCLC 161).

The Loan Account

92. Although, in light of my findings, I no longer need to deal with the issue of the Loan Account, as it was argued before me, it is only fair to the parties that my judgment should include findings on this issue. Before so doing, I should mention that the Liquidators also sought to argue that the loans were a breach of CA s 197. However, as the Liquidators have only sought by way of remedy the recovery of the balance on the DLA in the sum of £1,713,502 and not any other remedies provided for in CA s 213, Mr Davies conceded that this claim did not really add anything to the Liquidators' claim for repayment of monies alleged to be owed on the DLA, to which I now turn.

93. The first issue that I must consider is whether I can, in fact, on the information before me determine what the balance on the Loan Account is. The Liquidators' starting point for the DLA is taken from the accounts of the Company for the year ended 30 April 2010. These show that as at that date the Company owed Mr Looney the sum of £179,056. The bank statements that the Liquidators obtained then show the payments made into and out of the Company's bank account, which are referable to the DLA from that date.

94. Mr Looney contended that the Liquidators were wrong to take as the starting point the figure for the DLA shown in the 2010 accounts. He submitted that the Liquidators should have obtained the bank statements of the Company from the date of its incorporation as, only then, could a proper calculation be made of the balance due from or to Mr Looney on his DLA.

95. I reject Mr Looney's submission and accept that a proper starting point for calculating the DLA is the figure of £179,056 which appears in the 2010 accounts. These accounts were signed by Mr Looney and approved by the board on 21 December 2010. Unlike later accounts, no revised accounts have ever been submitted for this year.

96. In calculating the DLA for the purposes of these proceedings, the Liquidators have debited from the figure of £179,056 the amount of the Payments. Mr Davidson's witness statement also sets out what sums they agree should be credited to the DLA. They are the cash payments made by Mr Looney to the Company totalling £550,500 as shown in Schedule E, to which should be added the sum of £6,500, which was omitted by the Liquidators.
97. The resulting balance is a debit on the DLA of £1,707,002.04 (being the sum of £1,713,502 (which is the resulting sum of the total of Schedules A to D in the sum of £2,264,302.04 less the sums in Schedule E) less the further sum of £6,500).
98. Mr Looney does not accept that anything is owed by him on his DLA. He contends that the Liquidators have not credited his DLA with the sums referred to in the Loan Schedule and that had they done so, the true position would be that he is, in fact, owed a substantial sum by the Company.
99. Before considering the various items on the Loan Schedule, reference needs to be made to the correspondence that passed between the Liquidators' solicitors, Freeths LLP ("**Freeths**") and Mr Looney and his authorised agent, Mr Fonseka.
100. On 6 March 2019 Freeths sent a pre-action protocol letter to Mr Looney ("**the Letter before Claim**"). In that letter, among other matters, they referred to the various credits in the Loan Schedule, whether they accepted them and, if not, why they were not accepted. Their reasons are discussed further below.
101. Mr Looney did not respond to the Letter before Claim, but forwarded it to Mr Fonseka to deal with on his behalf. No proper response was provided by Mr Fonseka. Instead, on 15 March 2019 he wrote to Freeths stating that he had provided the Liquidators' forensic accountants with information that demonstrated that Mr Looney was a creditor of the Company. He concluded that accordingly the claim was denied and stated that Senstone Ltd (the company which he had moved to) would accept service of all court documents.

102. On 20 March 2019 Freeths wrote to Mr Fonseca and stated that whilst the Liquidators had been provided with the Second Revised Accounts (being the accounts in which it was claimed that there was a substantial debt owed by the Company to Mr Looney and claiming that he had paid legal and professional fees in the sum total of £2,011,978 on behalf of the Company (according to the Loan Schedule, these, in fact, totalled £2,354,978), Mr Fonseca had failed to provide any source documentation in support of the figures in the accounts, including any actual evidence of the sums claimed to have been paid to and on behalf of the Company referred to in the Letter before Claim. Freeths made the point that the Liquidators could not rely solely on the Second Revised Accounts, which appeared to serve Mr Looney's interests and that "*without source documentation (i.e. bank statements for your client's personal bank accounts evidencing payments made on behalf of the Company)*", they would be unable to accept Mr Looney's claims. They then requested that the documentation be provided by 4 pm on 10 April 2019, short of which they anticipated being instructed to issue court proceedings.
103. Although Freeths' letter had made it clear that documentation to prove the alleged credits was required, no such documentation was provided. Instead, in a letter dated 21 March 2019 Mr Fonseca requested that Freeths contact HMRC and send all court documents to Mr Looney with copies to Senstone Ltd. He also stated that HMRC had accepted the expenses for professional and legal fees ten years previously, but did not disclose that, if correct, this had occurred in relation to KLA, not the Company.
104. Mr Looney alleged that the correspondence from Freeths was "*adversarial, accusatory and aggressive from the outset*". In my judgment, this criticism is unwarranted. The correspondence shows that prior to issuing these proceedings, the Liquidators gave Mr Looney more than enough time to provide the source documentation, including his own personal bank statements, in order to evidence the claims made by him that the credits claimed by him on his DLA, which the Liquidators did not accept, were correct. The requests made by the Liquidators were reasonable. Mr Fonseca chose not respond to them.
105. In his oral evidence Mr Looney said that Mr Fonseca must have had source materials in order to have produced the Second Revised Accounts, but that he was not aware of Mr Fonseca's responses to the Liquidators and it did not occur to him to ask Mr Fonseca to

provide him with copies of the documents in his possession which were relevant to these proceedings. He candidly accepted that Mr Fonseca did not co-operate with the Liquidators as he should have and added that he was not seeking to attach blame to Mr Fonseca, but took responsibility for Mr Fonseca's conduct as his agent. I have no reason to doubt the truth of this evidence. However, this unfortunately does not excuse Mr Looney. He should have ensured that Mr Fonseca kept him informed of the correspondence passing between him and the Liquidators and should also have ensured that proper responses were given to the Liquidators' requests.

106. I now turn to the individual items in respect of which credits on the DLA are claimed.

Professional and Legal Fees: £2,354,978

107. Mr Looney contends that legal and professional fees in a sum total of £2,354,978 were paid by him on behalf of the Company. In his witness statement, he breaks these sums down as follows:

107.1. he claims that sums totalling £2,302,917 were paid by him in the period from 1 May 2010 to 30 April 2014 in respect of legal and professional fees relating to the Trafigura Litigation;

107.2. he claims that the sum of £70,000 was paid by him to Fonseca & Co. in the year ended 30 April 2012 for work carried out by them for the Company; and

107.3. he claims that the sum of £30,870 was paid by him to Chesham & Co. in connection with a legal claim against a former BPO executive, Wijnand Donkers, who received advice from the Company on his exit payment.

108. The burden of proof lies on Mr Looney to establish that the above sums were paid by him and that they were to discharge liabilities of the Company. For the reasons set out below, Mr Looney has not, in my judgment satisfied that burden.

109. As regards the payments alleged to have been made in respect of the legal and professional fees incurred in relation to the Trafigura Litigation, Mr Looney claimed that the reason why his payment of these fees should be credited to his DLA was because the

proceedings were brought for the benefit of the Company for the reasons already referred to in paragraph 36.1.1 of this judgment.

110. I do not accept, however, that it would be proper for these payments to be debited to Mr Looney's DLA, even assuming that they had all been made by Mr Looney. My reasons are as follows:

110.1. the litigation was brought by Mr Looney in his personal name and concerned with whether or not Trafigura had wrongfully repudiated the Trafigura Agreement and was liable to pay damages to Mr Looney. Having regard to the judgment, although it was contended that Trafigura had copied the Materials Program as part of Mr Looney's claim that Trafigura had unlawfully terminated the Trafigura Agreement, there was no separate claim which related to the protection of any intellectual property rights, and, indeed, had such a claim been made and had the Company been the owner of the intellectual property rights, the Company would or should have been a party to the litigation;

110.2. there had already been litigation with HMRC regarding the proper allocation of the income from the Trafigura Agreement and the expenses incurred in litigating over it. In that litigation the Upper Tier Tax Tribunal decided that both the income and the expenses were attributable to KLA, and not the Company. In this litigation, Mr Looney expressly accepts in his Points of Defence that the income from the Trafigura Agreement was wrongly attributed as income in the accounts of the Company, but bizarrely claims that the "*de facto*" allocation of the income should have been attributed to his DLA, a claim which Mr Looney did not proceed with at trial and rightly so, as there was no basis for any claim that he had paid the income received by him of £4 million into the Company. Having accepted though that the income from the Trafigura Agreement was not attributable to the Company, it must follow, as found by the Upper Tier Tax Tribunal, that neither could the legal and professional expenses incurred in relation to the Trafigura Litigation be attributable to the Company;

110.3. all of the evidence adduced before this court of the professional retainers relating to the Trafigura Litigation shows that they were made with Mr Looney in his personal capacity, and not with the Company;

110.4. in claiming that the Trafigura Litigation was for the benefit of the Company, it is not sufficient for Mr Looney to assert that he intended to pay any damages received into the Company. Had it been the intention that the Company was to be the beneficiary of the litigation, then Mr Looney would have assigned the rights and benefit of the Trafigura Agreement and the claims arising under it to the Company and the Company would have been the party to the litigation.

111. Likewise:

111.1. Mr Looney has not satisfied the burden of proof to establish that the Company incurred fees of £70,000 to Fonseca & Co, and that he paid these fees on the Company's behalf in the year ended 30 April 2012. No invoices from Fonseca & Co. or personal bank statements from Mr Looney have been adduced. Further, the Company's bank statements show that the Company itself paid the sum of £42,000 in that financial year to Fonseca & Co., a sum which was funded by Mr Looney and which has been included by the Liquidators in the credits to be made to his DLA in Sch E;

111.2. nor has he satisfied the burden of proof to establish that the Company retained and incurred fees to Chesham & Co. relating to Mr Donkers and, and that he personally discharged the Company's liability to Chesham & Co. In particular, he has produced no invoices from Chesham & Co. and no personal bank statements, which would evidence the payments alleged to have been made by him.

The Yacht: £930,000

112. The Loan Schedule includes a credit in the sum of £930,00 for the year ended 30 April 2012. This credit is claimed to represent monies which Mr Looney paid on the Company's behalf for the purchase of a yacht. It is not disputed by the parties that the yacht was acquired for this sum nor that the purchase price was funded personally by Mr

Looney. The Liquidators instead claim that the yacht was purchased as a personal yacht for Mr Looney and that this is evidenced by the fact that it was registered in the names of Mr and Mrs Looney personally.

113. Whilst Mr Looney accepts that the yacht was registered in his and his wife's personal names (which he believes had something to do with Spanish legal requirements, although no evidence concerning this was adduced), he nevertheless claimed that the yacht was held by them for the Company.

114. Mr Looney's claim is supported by the Company's accounts. The Original Accounts for the year ended 30 April 2012 show tangible fixed assets of £702,015. Whilst there is no breakdown of this figure in the Original Accounts, the same figure, which appears in the Second Revised Accounts, shows that it is made up of office equipment of £5,300, plus additions of £930,000, less depreciation of £233,360. On 16 April 2015 the yacht was sold for the sum of £800,000. The sale is recorded as a disposal of tangible assets in the Original Accounts of the Company for the year ended 30 April 2015.

115. In light of the above matters, I accept Mr Looney's case that the yacht was purchased for the Company and was a Company asset and accordingly, that the sum of £930,000 should be credited to his DLA. However, it is also common ground that Mr Looney never accounted to the Company for the sale proceeds of £800,000. Whilst it is right, therefore, to credit the DLA with the sum of £930,000, it should also be debited with the corresponding sale figure of £800,000, thereby reducing the Liquidators' claim from £1,713,502 to £1,583,502.

Miscellaneous Expenditure: £203,131

116. No explanation is provided by Mr Looney for the miscellaneous expenditure of £3,131 which it is claimed in the Loan Schedule he paid for on behalf of the Company in the year ended 30 April 2011 and no evidence has been adduced by him to show that he did indeed make the payments alleged. As regards the miscellaneous expenditure claimed to have been paid for by him in the year ended 30 April 2014, in his witness statement, Mr Looney claims that this was spent on marketing and advertising, both formally and informally, on behalf of the Company. No breakdown of the alleged expenses is provided; neither did Mr Looney produced any documentary evidence to prove that they

had been paid for by him. In my judgment, Mr Looney has, therefore, not satisfied the burden of proof on him to establish that such Company expenses were incurred and that he paid for them.

117. In conclusion, I find that Mr Looney has not established that he is a creditor of the Company and that, based on the evidence before me, he is in fact a debtor of the Company in the sum of £1,583,502.

118. Accordingly, I find in favour of the Liquidators and will hear submissions on the amount which Mr Looney should be ordered to pay.