FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 18
CA105/20

Lord President
Lord Pentland
Lord Tyre

OPINION OF THE COURT

delivered by LORD TYRE

in the Reclaiming Motion

by

DMWSHNZ LIMITED (in liquidation) and MARK WILSON and JAMES ASHLEY DOWERS, the liquidators thereof,

Pursuers and Respondents

against

BANK OF SCOTLAND PLC

Defenders and Reclaimers

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Pursuers and Respondents: D Thomson KC, Watt; Anderson Strathern LLP
Defenders and Reclaimers: Borland KC, Roxburgh; Addleshaw Goddard LLP

26 July 2024

Introduction

[1] DMWSHNZ Limited ("the company"), formerly known as BOS Holdings (New Zealand) Limited, was until 2003 a subsidiary of the defenders, who were in turn a member of a group whose ultimate parent was HBOS plc. In 1998, the company sold its 100% shareholding in a subsidiary called Countrywide Banking Corporation Limited for

NZ$850,000,000, payable under and in terms of loan notes. The sale gave rise to a capital gain which was not immediately chargeable to corporation tax but would become chargeable on redemption of the loan notes. The defenders wished to mitigate that tax liability. They sought advice from Ernst & Young plc.

[2] At that time the defenders were secured creditors of an insolvent split capital investment trust called Geared Income Investment Trust plc ("GIIT"), as were Lloyds TSB Bank plc. Ernst & Young proposed a restructuring which would permit some of the company's capital gains to escape taxation by being set against losses incurred by GIIT. The proposed scheme included the appointment by the defenders and Lloyds of administrative receivers to GIIT, the creation of a subsidiary of GIIT called GIIT Realisations 3 Limited ("GIIT 3"), the purchase by GIIT 3 of shares in the company, and the making of elections to transfer, for tax purposes, the losses incurred by GIIT, and the gains realised by the company on redemption of the loan notes, to GIIT 3 where they would be set off against one another. In consideration of the making of the election, the company made a payment equating to the potential tax liability to GIIT 3, where that sum was used to pay a dividend to GIIT which in turn made a distribution to the defenders as secured creditors.

[3] The scheme failed. HMRC refused to accept that the election to transfer the company's gains to GIIT 3 was effective in terms of the relevant statutory requirements. Appeals by the company to the First-tier Tribunal, the Upper Tribunal and the Court of Appeal ([2015] EWCA Civ 1036) were unsuccessful, and leave to appeal to the UK Supreme Court was refused. The company was left with a tax liability which it had no funds to meet. In 2004 it entered members' voluntary liquidation.

[4] In this commercial action the company and its liquidators seek payment of £26,602,775 from the defenders on the ground that the defenders were shadow directors of

the company who breached their fiduciary duty and duty of care to the company by procuring its participation in the scheme for their benefit, and without regard to the best interests of the company. Alternatively, they seek payment of £26,607,758 from the defenders on the ground that the defenders have been unjustifiably enriched at the company's expense because, standing the ineffectiveness of the election, no sum was payable to GIIT 3.

[5] The case called before the commercial judge for debate of the defenders' preliminary plea that the company's pleadings in support of both grounds of action were irrelevant, and that the action should be dismissed. In his opinion dated 13 July 2023 ([2023] CSOH 47) the commercial judge rejected the defenders' arguments in relation to both grounds, and refused the motion to dismiss the action. The defenders now reclaim (appeal against) that decision with the leave of the commercial judge. As regards the company's first ground of action, the principal issue arising is the application of the law relating to shadow directorship to a company with only corporate directors.

Project Raindrop

[6] For the purposes of these proceedings, the pursuers' pleadings which are unduly long and repetitive, especially for a commercial action, are taken *pro veritate*. There is no material dispute as to the steps taken to implement the proposed tax avoidance scheme, but it should not be assumed that all of the details of the following narrative, which is based on the pursuers' averments, are a matter of admission.

The proposed scheme

[7] By April 2002 Ernst & Young's corporate recovery department were developing a

plan to realise value from losses suffered by failed split capital investment trusts. Their team included Mr Patrick Brazzill and Ms Margaret Mills, both insolvency practitioners. The target market was banks who could appoint receivers. At a meeting in August 2002 the defenders' Mr Kerr Cruickshank indicated to Ernst & Young that they had a use for capital losses in relation to the Countrywide capital gain. Ernst & Young advised that receivership was a pre-requisite and that appointment of receivers from within that firm would facilitate implementation of the plan. On that basis the defenders in due course supported the appointment of Mr Brazzill and Ms Mills as receivers, and proceeded on the assumption that the receivers would implement the scheme in accordance with their directions.

[8] The scheme devised by Ernst & Young, and supported by senior English tax counsel, consisted of a pre-planned series of steps. It was described in correspondence between Ernst & Young and the defenders as "tiptoeing through the raindrops of complex anti-avoidance rules without getting wet". The scheme came to be referred to as Project Raindrop. The defenders were aware, having been so advised by counsel, that HMRC would challenge it if they could, and were further aware that if the scheme failed, the company would be left with HMRC as a creditor and no means to pay. Ernst & Young made clear that the scheme would not be implemented without the receivers having the benefit of an indemnity by the defenders against any personal liability that they might incur for unpaid tax arising in connection with it.

Implementation

[9] On 8 April 2003 the defenders and Lloyds appointed Mr Brazzill and Ms Mills as joint administrative receivers of GIIT. Members of Ernst & Young's tax advisory team worked with the receivers to implement the scheme.

[10] Implementation of the plan proceeded during October to December 2003 as follows:

(i) On 3 October, the directors of the company resigned and were replaced by three new directors including Mr Cruickshank.

(ii) On 9 October, the company transferred to a separate company in the defenders' group its interest in the amount of loan notes that it no longer required.

(iii) On 15 October, the company's share capital was restructured into 99,999 A ordinary shares and one B ordinary share. The new articles in essence gave the defenders the right to appoint a director with power to veto the sale of the company's remaining loan notes. Mr Cruickshank was appointed as that director.

(iv) Assets consisting of securities were hived down from GIIT to two newly incorporated subsidiaries (GIIT 1 and GIIT 2). The defenders' share went into GIIT 1. GIIT then transferred 26% of its shares in GIIT 1 to a company outside its capital gains group, thereby triggering a capital loss on the assets hived down to GIIT 1.

(v) GIIT 3 was incorporated as a further subsidiary of GIIT. GIIT was appointed sole director of GIIT 3.

(vi) The defenders lent GIIT £99,999 to fund the purchase of the company by GIIT 3 from the defenders, which purchase was effected on 22 October. GIIT and GIIT 3 were appointed directors of the company and, with the exception of Mr Cruickshank, the previous directors resigned.

(vii) On 28 November, the loan notes were repaid to the company, bringing the held-over capital gain into charge to tax.

(vii) On 1 December, Mr Cruickshank resigned as a director of the company, leaving GIIT and GIIT 3 as its only directors. The company then entered into an agreement with GIIT 3 to make a joint election to deem the disposal on repayment of

the loan notes to have been made by GIIT 3. The agreement provided for the company to pay £26,607,758 to GIIT 3 in exchange for making the election. On the same date GIIT 1 and GIIT 3 submitted an election to treat losses accruing on deemed disposals of assets by GIIT 1 as accruing to GIIT 3.

(viii) On 5 December, the company paid £26,607,758 to GIIT 3. On 8 December GIIT 3 paid a dividend of £26,502,776 to GIIT, being the election consideration received from the company under deduction of a small amount in respect of GIIT 3's liabilities. The following day GIIT paid a distribution of £26,602,775 to the defenders as secured creditors, which sum was made up of the dividend received from GIIT 3 plus repayment of the loan of £99,999.

(ix) On 8 December, the defenders executed a deed of indemnity in favour of the joint receivers, agreeing to indemnify them against any liability which they might incur personally for unpaid tax arising as a result of or in connection with "the reconstruction", ie Project Raindrop. The indemnity was stated to be conditional on the reconstruction having been implemented in terms of the steps set out in a schedule to the deed.

[11] The decision by the company to enter into the agreement with GIIT 3 was taken at a board meeting on 1 December 2003, the persons present being listed as "[GIIT 3], Director (acting by Patrick Brazzill as administrative receiver of [GIIT], without personal liability)", and "{GIIT} (in administrative receivership), Director (acting by Patrick Brazzill as administrative receiver without personal liability)". Mr Brazzill was the only natural person present. Having received Mr Cruickshank's letter of resignation, the meeting unanimously agreed that it was in the best interests of the company to enter into the agreement with GIIT 3, and the two directors were authorised to cause the company to enter into it. The

agreement to enter into the joint election was executed on behalf of the company by Mr Brazzill acting as joint administrative receiver of GIIT on behalf of the company's directors GIIT and GIIT 3, and on behalf of GIIT 3 by Mr Brazzill acting as joint administrative receiver of its director, GIIT.

The meaning of shadow directorship

[12] Section 741(2) of the Companies Act 1985, which was in force at the material time, defined a shadow director as follows:

> "(2) In relation to a company, 'shadow director' means a person in accordance with whose directions or instructions the directors of the company are accustomed to act. However, a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity."

(A similar definition is now contained in section 251(1) and (2) of the Companies Act 2006.)

[13] Further guidance is provided by English case law. In *Re Hydrodan (Corby) Ltd* [1994] BCC 161, a wrongful trading application under section 214 of the Insolvency Act 1986, it was held that the directors of a parent company which was alleged to be a shadow director of a subsidiary would not themselves, without more, be shadow directors of the subsidiary. Millett J considered that a clear distinction had to be drawn between a *de facto* director and a shadow director. At page 163 he identified the following facts which had to be proved to establish that a defendant was a shadow director of a company: (1) who were the directors of the company, whether *de facto* or *de jure*; (2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so to act. What was needed was, first, a board of directors claiming and purporting to act as

such and, secondly, a pattern of behaviour in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others.

[14] In *Secretary of State for Trade and Industry* v *Deverell* [2001] Ch 340, an application by the Secretary of State for directors' disqualification orders, the Court of Appeal (Morritt LJ, others concurring) expressed its conclusions at paragraph 35 in a number of propositions, including the following:

> (1) The definition of a shadow director is to be construed in the normal way to give effect to the parliamentary intention ascertainable from the mischief to be dealt with and the words used. As the purpose of the Act is the protection of the public and as the definition is used in other legislative contexts, it should not be strictly construed.
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> (2) The purpose of the legislation is to identify those, other than professional advisers, with real influence in the corporate affairs of the company. But it is not necessary that such influence should be exercised over the whole field of its corporate activities.
>
> (3) Whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained by the court in the light of all the evidence. Evidence of the understanding or expectation of either giver or receiver may be relevant but it cannot be conclusive. In many, if not most, cases it will suffice to prove the communication and its consequence.

[15] The Court of Appeal also warned at paragraph 36 against the use of epithets or descriptions in place of the statutory definition. To describe the board as the cat's paw, puppet or dancer to the tune of the shadow director implied a degree of control in excess of

what the statutory definition required. A person might be a shadow director notwithstanding that he took no steps to hide the part he played in the affairs of the company: lurking in the shadows was not an essential ingredient. What was needed was that the board was accustomed to act on the directions or instructions of the shadow director.

[16] In *Revenue & Customs Commissioners* v *Holland* [2010] 1 WLR 2793, an application for a payment under section 212 of the Insolvency Act 1986, the UK Supreme Court held, by a 3-2 majority, that the mere fact of an individual acting as director of the sole corporate director of a company was not enough to make the individual a *de facto* director of that company; so long as the individual's acts were entirely within the ambit of the discharge of his duties and responsibilities as director of the corporate director, it was to that capacity that his acts had to be attributed. It should be noted that the issue in *Holland* was not whether the defendant was a shadow director but rather whether he was a *de facto* director; unlike section 214, section 212 of the 1986 Act does not apply to shadow directors.

[17] Finally in *Re Coroin Ltd (No 2); McKillen* v *Misland (Cyprus) Investments and Others* [2013] 2 BCLC 583, David Richards J at first instance observed (at paragraph 594) that in order to make out the case that an individual was a shadow director of a company, his instructions had to be given to the directors so as to affect their decisions as directors.

The commercial judge's decision

The shadow director case

[18] The commercial judge gave careful consideration to the authorities summarised above. The issue of whether the defenders were a shadow director was ultimately a question of statutory interpretation. The decision in *Hydrodan* was not a useful starting

point in the present case, given the context of distinguishing between shadow and *de facto* directors in which it was decided. *Deverell* provided more useful guidance: that the purpose of section 741(2) was to identify those with real influence in the corporate affairs of a company, and that the question whether any particular communication from an alleged shadow director ought to be classified as a direction or instruction was one that had to be answered in light of all of the evidence. It was clear from that proposition that there need not always be an express instruction: an instruction might be inferred from conduct.

[19] The pursuers averred circumstances in which the defenders had exercised real influence over the company. Those averments, if proved, were capable of justifying the conclusion that the defenders were a shadow director within the meaning of section 741(2). Taken as a whole, they were habile to prove that Mr Brazzill was directed to act as he did, and that the directions emanated from the defenders via Ernst & Young, who were closely involved in the planning, evolution and implementation of Project Raindrop. Whether the deed of indemnity, which was formally entered into after the transactions had been effected, influenced the receivers to act in a particular way was a question of fact. This, and other questions which arose, could only be decided after the court had heard evidence.

The unjustified enrichment case

[20] As regards the pursuers' claim based on unjustified enrichment, it was averred that the dividend paid by GIIT 3 to GIIT, and the onward distribution by GIIT to the defenders were paid in error, without lawful basis, and without intention of donation. The error was the assumption that the tax election had been effective. As a general rule, a pursuer could only make an unjustified enrichment claim against the person who was directly enriched at his expense. There were however exceptions to that rule, including where the agent of one

of the parties had been interposed between them, or where there was a set of coordinated transactions which were treated as a single transaction on the basis that it was unrealistic to treat each one individually (*Investment Trust Companies* v *Revenue and Customs Commissioners* [2018] AC 302, Lord Reed at paragraph 48). A similar approach might be taken in the present case with the defenders being held, on a realistic view of the various transactions, to have been enriched at the company's expense. The commercial judge was unable to conclude that if the pursuers succeeded in proving all of their averments, their unjustified enrichment claim was bound to fail.

Submissions for the defenders

The shadow director case

[21] On behalf of the defenders it was submitted that the key question in relation to the shadow director case was whether an instruction given to an administrative receiver appointed to the property of a company could amount to direction of the board of a second company of which the first company was a corporate director. The court should answer that question in the negative. The decision of the Supreme Court in *Holland* made clear that the separate legal personalities of corporate entities had to be respected. In the present case the receivers had separate legal capacities from each of GIIT, the directors of GIIT, GIIT 3, and the company. They could not be treated as if they were directors of GIIT. It was not asserted by the pursuers that the receivers acted outside their authority as receivers. That being so, their actings had to be attributed to their receivership capacity and not to any other capacity. The pursuers had not identified anything "more" (per Millett J in *Hydrodan*) to cause them to be treated as shadow directors of the company.

[22] The receivers were not agents of GIIT in the ordinary sense. The agency of an administrative receiver was simply a device to render the borrower rather than the creditor liable for the acts of the receiver. A receiver was neither an officer nor a manager of the company to whose property he was appointed. If in the present case the defenders issued instructions to the receivers, those instructions would not be received by them in a directorial role as regards the company.

[23] The commercial judge had erred when he decided that *Hydrodan* was not a useful starting point, and in relying on *Deverell* for the proposition that it was not necessary to identify instructions or directions given to the directors of the company and that the better approach was to ask whether the alleged shadow director had exerted a real influence on the corporate affairs of the company. That was not what the court in *Deverell* had held; nor was it consistent with the plain wording of section 741(2). Had Parliament intended that a "real influence" in relation to the company's affairs would be sufficient to establish shadow directorship it would have said so. In *Holland,* the Supreme Court had rejected a submission that, for the purposes of establishing whether a *de facto* directorship existed, it was sufficient that the alleged *de facto* director had been the guiding spirit of the company on the basis that such an approach was productive of uncertainty. The same reasoning fell to be applied in the case of shadow directors.

[24] The commercial judge's approach failed to recognise the distinction between a company and its directors on the one hand and the role of a receiver on the other. The authority of an administrative receiver was not co-terminous with that of the board of directors. A receiver had different duties, namely to try to secure repayment of a secured debt for the benefit of the creditor. The directors of a corporate body, which was itself the director of a second company, were not *ipso facto* shadow directors of the second company

(*Hydrodan*). That scenario would not be enough to prove that the directors of the body corporate had assumed a role in the management of the second company (*Holland*). The same had to be true of a receiver who was managing the property of a corporate director, or any person who was instructing the receiver in that situation. In the present case, the parties directing action on the part of the company were GIIT and GIIT 3, not the receivers or the Bank. The party directing and procuring action on the part of GIIT 3 was GIIT. The commercial judge had apparently concluded that the defenders' instruction of Mr Brazzill, as the natural person who was making decisions on behalf of GIIT and GIIT 3, was sufficient to establish the defenders as a shadow director of the company. That conclusion ignored the separate legal personalities of the different entities involved and amounted to an error of law.

[25] The commercial judge further erred in holding that the pursuers' averments to the effect that the receivers were compelled to act in a particular way by the deed of indemnity were relevant for proof. His conclusion ignored the fact that the receivers entered into the deed in their capacity as the administrative receivers of GIIT. In addition, as a matter of timing, the deed could not have compelled the receivers to implement the scheme because it was executed on 8 December 2003, after the critical steps to implement Project Raindrop had been taken.

The unjustified enrichment case

[26] The commercial judge also erred in failing to hold that the unjustified enrichment case was irrelevant. The pursuers' position was that there had been no legal justification for the payment it made to GIIT 3 on 5 December 2003, but it was clear on their own averments that there had been. The pursuers averred that the company had entered into an agreement

with GIIT 3 to make a joint election, that the agreement provided for the payment in exchange for the making of the election, and that the election had been submitted to HMRC. There was no better justification for an enrichment than that it was obtained and retained in the exercise of a contractual right ((*Dollar Land (Cumbernauld) Limited* v *CIN Properties Limited* 1998 SC (HL) 90, Lord Hope at 94). The requisite "unjustified" factor was therefore absent.

[27] The pursuers referred in their submissions to the election agreement having been impugned by a "mutual error", but no error rendering the agreement void or voidable was averred. The parties had been aware that it was uncertain whether the claim would be accepted by HMRC. They might have been disappointed by the outcome but that did not impugn the validity of the agreement.

Submissions for the pursuers

The shadow director case

[28] The commercial judge correctly held that the pursuers' case was relevant for proof. They had averred circumstances from which it was to be inferred that the company's board was directed by the defenders by means of their control of the administrative receivers. It was unnecessary to offer to prove that the company's directors were directly instructed by the defenders. Nor did the pursuers require to offer to prove that the receivers were acting as shadow directors or as *de facto* directors. Control by the defenders was effected by their control of natural persons in such a way as to control the corporate directors.

[29] The rules of agency rendered a company liable in respect of acts performed by its agents. The powers of an administrative receiver included the power to generally carry on the business and to exercise the managerial functions of the company. A creditor who issued instructions to a receiver incurred liability for acts that the receiver took consequent

on those instructions. The pursuers' case was that members of Ernst & Young's tax team were agents of the defenders. They instructed the receivers as to the implementation of Project Raindrop on behalf of the defenders. Their actions were ascribed to the defenders. Mr Brazzill was acting as agent of the company's corporate directors, GIIT and GIIT 3. His actions were ascribed to those companies. GIIT and GIIT 3, acting through Mr Brazzill, caused the company to enter into the joint election with GIIT 3. It was therefore the defenders who, through a chain of persons, ultimately instructed the corporate directors to implement Project Raindrop.

[30] The commercial judge was correct to conclude that *Hydrodan* did not specify the manner in which instructions must be transmitted to a company's board of directors in order for the person issuing the instructions to become a shadow director. Nor did *Re Coroin*. The judge was also correct to conclude that *Deverell* provided the more helpful guidance in the circumstances of this case. He did not err in his treatment of *Deverell*. There was nothing in the observations of the Supreme Court in *Holland* that created a barrier to inquiry in the present case. Those observations would be relevant if the pursuers were seeking to argue that Mr Brazzill had acted as a *de facto* or shadow director, which they were not.

[31] As regards the deed of indemnity, the timing of execution was immaterial: its terms had been settled before the critical events occurred. The pursuers' contention was that the receivers took care to implement Project Raindrop in accordance with the defenders' instructions in order to ensure that the defenders would indemnify them at the end of the process. The commercial judge did not err in law in deciding to hear evidence before determining the relevancy of the averments regarding the deed of indemnity.

The unjustified enrichment case

[32] The commercial judge correctly held that the unjustified enrichment case was relevant for proof. The essence of the claim was that (a) the transactions comprising Project Raindrop had been entered into on behalf of the defenders by the receivers (and by GIIT and GIIT 3 acting by the receivers), and (b) that those transactions had been based on the erroneous mutual assumption that the election was valid. The commercial judge had been correct to conclude that in these circumstances the defenders might be held to have been enriched at the expense of the company on a realistic view of the transactions, planned as they were from the outset. On that analysis, the agreement was not a legal justification for the payment made by the company to GIIT 3.

Decision

The shadow director case

[33] Company legislation contains numerous provisions treating shadow directors as directors. Some of these, such as liability for wrongful trading and company directors' disqualification proceedings, are illustrated by the case law summarised above. The policy is clear: to impose the same duties and liabilities on persons in accordance with whose directions or instructions the appointed directors of the company are accustomed to act. The process of interpretation and application of the statutory definition must accord with that policy. A purposive construction requires consideration of the whole circumstances of a particular case, while paying due respect to the separate legal personality of corporate entities.

[34] A peculiarity of the present case is that the company's directors included no natural persons. It appeared to be the position of the defenders that in such circumstances the

shadow director provisions could never apply to it, because any person exercising influence over the corporate directors would have a separate capacity to which their actings had to be attributed. Such an interpretation, if correct, would subvert the purpose of the legislation, even in its present form where at least one non-corporate director is required. It is not correct. Nor would it be in accordance with purposive construction to adopt a narrow approach to the characterisation of a receiver's agency.

[35] The court agrees with the commercial judge's view that the analysis by Morritt LJ in *Secretary of State for Trade and Industry* v *Deverell* provides helpful guidance on the application of the legislation to the situation of a company with corporate directors. The expression "real influence in the corporate affairs of the company" meets the statutory definition of directions or instructions in accordance with which the company's directors are accustomed to act. Although, as Morritt LJ made clear, it must be proved that the company did in fact treat the communications from the alleged shadow director as instructions, there is nothing in the definition to exclude instructions given indirectly, as we understood counsel for the defenders ultimately to concede. In the present case the pursuers do not aver that the directors of its own corporate directors were shadow directors of the company, nor that the administrative receivers were shadow directors. Rather they offer to prove that the Bank, which instigated and instructed the planning, putting in place and execution of a scheme intended to avoid tax on the company's chargeable gains, is the person meeting the statutory definition of a shadow director.

[36] At paragraph 36 of his opinion, the commercial judge listed the key averments made by the pursuers: that Project Raindrop was conceived solely for the defenders' benefit; that it was made clear by the defenders on numerous occasions to Ernst & Young that the step plan must be followed; that the (Ernst & Young-appointed) receivers were aware of the step plan;

that the effect of the deed of indemnity was to oblige them to follow the step plan; that part of the step plan was the entering into of the joint election agreement and the payment of the consideration to GIIT 3; that the natural person who made the necessary decisions on behalf of the directors of the company was one of the receivers; and that no independent advice was taken by the receivers. The pursuers' case is summarised in their averments in article 17 that "in implementing Project Raindrop, GIIT, GIIT 3, and latterly the [company] were controlled by the [receivers]. The [receivers] were, in implementing Project Raindrop, subject to the influence of and acting according to the instructions and directions of the defenders." The court agrees with the commercial judge's view that the foregoing averments, if proved, are capable of justifying the conclusion that the defenders were a shadow director of the company.

[37] The observations of Millett J in *Re Hydrodan* and of the Supreme Court in *Revenue & Customs Commissioners* v *Holland* are of limited assistance in the circumstances of the present case. The requirement for "more" in *Hydrodan* related to the question whether the director of a company was *ipso facto* a shadow director of a subsidiary of which the parent is a corporate director. That is not what is averred in the present case. In so far as the requirement for "more" may have relevance here, it is capable of being satisfied by the averments listed above regarding the extent of the defenders' involvement in the conception of Project Raindrop and their control, through the medium of the receivers, of its implementation. *Holland* was concerned with *de facto* directors and not shadow directors. The observations of the majority cannot simply be applied *mutatis mutandis* to shadow directors for whom, as already discussed, policy considerations require a different approach to the according of respect to separate legal personality.

The unjustified enrichment case

[38] In order to succeed in a claim for redress of unjustified enrichment, a pursuer must show that the defender has been enriched at his expense, that there is no legal justification for the enrichment, and that it would be equitable to compel the defender to redress the enrichment: *Dollar Land (Cumbernauld) Limited* v *CIN Properties Limited* (above); Lord Hope at page 99. The pursuers in the present case aver that payment of the election consideration to GIIT 3 was made on the basis of a mutual hope or expectation that the election would be effective, and not with any intention of donation. The payments by GIIT 3 to GIIT and by GIIT to the defenders were made on the assumption that the election had been effective. That assumption having proved to be erroneous, the defenders were enriched at the company's expense and were due to make recompense to them for such enrichment.

[39] The defenders for their part found upon the fact that the payment was received by GIIT 3 from the company in exercise of a contractual right under the election agreement, and that the disappointing outcome did not affect the validity of the agreement. Whether or not that amounts to legal justification for the defenders' enrichment cannot be determined without enquiry. It is sufficient at this stage to say that the pursuers' case based upon unjustified enrichment is not bound to fail.

[40] In *Shilliday* v *Smith* [1998] SC 725, Lord President Rodger noted (page 727) that some of the situations in which persons are to be regarded as having been unjustly enriched at another's expense fell into recognisable groups for which Scots law had used Roman law terminology such as *condictio indebiti* and *condictio causa data, causa non secuta*. He continued:

> "…It is unnecessary in this case to examine all the groups and it is sufficient to note that the term *condictio causa data, causa non secuta* covers situations where A is enriched because B has paid him money or transferred property to him in the expectation of receiving a consideration from A, but A does not provide that consideration. The relevant situations in this group also include cases where B paid

> the money or transferred the property to A on a particular basis which fails to materialise — for example, in contemplation of a marriage which does not take place."

Later in his opinion (at page 730), under reference to Stair, *Institutions*, I vii 7, Lord Rodger identified two situations in which property had to be restored: where property comes into someone's hands on a particular basis which then ceases to exist; and where property comes into the person's hands on the basis of some future event which fails to materialise. Whether the pursuers can bring the circumstances of the present case within these or any of the other circumstances in which the law provides a remedy for unjustified enrichment will be a matter for determination after proof.

[41] Before the commercial judge there were submissions by the defenders that the party averred to have been enriched by payment of the election consideration was GIIT 3, and that any claim for unjust enrichment ought to be directed against that company rather than being directed against the defenders, missing out the intermediate parties, GIIT 3 and GIIT. That argument was not maintained in the reclaiming motion.

Disposal

[42] By interlocutor dated 13 July 2023, the commercial judge repelled the defenders' second plea in law, that the pursuers' averments ought not to be admitted to probation, and refused the defenders' motion to dismiss the action. He put the case out by order to discuss what further orders were to be made, but on 27 July 2023 he granted the defenders' motion to reclaim without making any order for further procedure. He did not therefore pronounce an interlocutor allowing proof before answer.

[43] The pursuers' pleas in law are difficult to follow; senior counsel provided an explanation of which pleas were said to relate to the shadow director case and which to the

unjustified enrichment case. The defenders have a plea of prescription but did not seek a preliminary proof. The court will refuse the reclaiming motion and adhere to the commercial judge's interlocutor. It will allow a proof before answer, leaving all pleas (other than the defenders' second plea) standing.