Neutral Citation Number: [2024] EWHC 2053 (Ch)

Claim No: BL-2020-000927

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (Ch D)

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 6 August 2024

Before:

RICHARD SPEARMAN K.C.
(sitting as a Deputy Judge of the Chancery Division)

- -

Between:

MANOLETE PARTNERS PLC

Claimant

- and –

(1) MOHAMMED JAWED KARIM
(2) MOHAMMED BASSER KARIM
(3) MOHAMMED FAHIM KARIM
(4) MARIAM KARIM

(5) ANNA RACKO KARIM
(6) RICHARD SLADE AND COMPANY LIMITED

Defendants

- - - - - - - - - - - - - - - - - - - -

Hugh Miall (instructed by **Collyer Bristow LLP**) for the Claimant

The First, Second, Third, Fifth and Sixth Defendants did not appear and were not represented

Sharaz Ahmed (instructed on Direct Access) for the Fourth Defendant

Hearing dates: 16, 17 and 22 April 2024

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Judgment

This judgment was handed down remotely at 10.30 am on Tuesday 6 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

INTRODUCTION

1. This is a claim brought by a litigation funder ("Manolete") as the assignee, pursuant to a written assignment dated 5 August 2019, of any and all claims of (a) Evershine Travel Limited (In Liquidation) ("the Company") and (b) the Liquidators of the Company, against each of the Defendants. The Company was incorporated on 19 October 1995, and carried on business providing travel services, as a package holiday tour operator, and as an online car rental operator and consolidator. It entered into insolvent administration on 19 January 2017, with an estimated shortfall to creditors of £17.58m, and moved into Creditors' Voluntary Liquidation on 18 January 2018.

2. The First Defendant ("Jawed" or "Joe"), the Second Defendant ("Basser") and the Third Defendant ("Fahim") are brothers. They were each directors of the Company. In addition, they were, and are, the beneficial owners of the Company's shares. The Fourth Defendant ("Mariam") was married to Jawed, although they are now separated. The Fifth Defendant ("Anna") was married to Basser, but they are also estranged. The claim against the Sixth Defendant ("Richard Slade") (which acted as solicitors to the Company, and, in addition, a number of the other Defendants as well) has been stayed in accordance with a Tomlin Order dated 5 October 2022 following a confidential settlement between the parties. Anna has previously been made bankrupt (and did not

file any defence to the claims), and the case against her was stayed pursuant to a consent order that was agreed with her trustee in bankruptcy dated 11 March 2024.

3. The claim concerns a large number of transactions which the Company entered into at the behest of its directors (principally Jawed, who took the lead in running the Company's affairs), in the years immediately prior to the Company entering insolvent administration, largely for their personal benefit or for the benefit of persons closely connected to them. Manolete's case is that by those transactions the directors caused or permitted the Company to pay away very substantial sums for purposes which had nothing to do with the Company's business or commercial activities. In essence, they treated the Company as if it was a bank, and its assets as if they belonged to them.

4. Manolete contends not only that these transactions were in any case contrary to the interests of the Company, but also that the Company was at all material times insolvent or bordering on insolvency. Manolete contends that the Company's statutory accounts were materially inaccurate in a number of respects because they included as assets large debts which were not, and cannot properly have been considered to be, assets of the Company, or, at least, against which heavy provision ought to have been made.

5. The directors deny this, and contend that the relevant debts were properly included in the accounts and that there were substantial prospects of those debts being recovered. The Defendants also contend that the claim is time barred, which Manolete disputes in light of the nature of the claims and the date of commencement of the administration.

6. The principal transactions which Manolete seeks to impugn, and the Defendants' core answers to Manolete's case in that regard, may be summarised as follows:

    (1) The transfers or payments of sums totalling (a) about US $1.45m and (b) £34,661 to companies or individuals connected with mining exploration projects in Africa, which Manolete contends were contrary to the Company's best interests, and which the directors contend were lawful investments made by the Company in furtherance of its commercial activities.

    (2) The use of Company monies for the personal benefit of one or more of the directors, including the payment of over £17,000 for a personal tax bill of Jawed; £172,825 in cash withdrawals which are not accounted for; cheque payments to the directors in the sum of £32,000; and credit card expenditure of over £922,000. The directors do not admit these claims, and also contend that any such sums were paid down or set off against sums due to them.

    (3) The payment of over $1m into trading accounts in the name of Jawed or Atlas Travel Insurance Services Limited ("ATISL") (a company controlled by him) through a US financial brokerage and clearing institution. The directors say

these payments represented a loan from the Company to ATISL and were discharged against amounts owed by ATISL to the Company and Jawed.

(4) The use of Company funds to make payments to or for the benefit of other corporate entities controlled by one or more of the directors, including (a) US $54,000 paid to a US Law Firm to discharge fees incurred by ATISL and (b) payments of over £675,000 in respect of management fees to ATISL, which were unjustified. The directors contend that (i) these legal fees were incurred by the Company (ii) these management fees were properly due and payable.

(5) The payment of almost £500,000 in total to the directors in alleged bonuses or further remuneration outside of payroll or salary without justification. The directors contend that these payments were properly approved and justified bonuses or remuneration for work done and were commercially justified.

(6) Payments made to third parties without justification or otherwise contrary to the best interests of the Company, including (a) US $381,000 paid to the directors' sister, (b) US $129,000 paid to the directors' cousin, and (c) £75,000 paid to another individual connected to Jawed. The directors contend that either (i) the sums paid were properly due and owing, or (ii) any unrecovered sums may be set off against sums due to Jawed.

7. Manolete has further claims which, together with the Defendants' responses, may be summarised as follows:

(1) Outstanding sums are due to the Company from one or more of the directors (including £12,660 owed by Basser and £65,000 owed by Fahim). These sums are claimed as debts or alternatively damages. The directors contend that these sums were written off due to unpaid remuneration.

(2) Dividends paid by the Company to the directors in the financial years ending 2014 and 2015 in the total sum of £267,500 were unlawfully made in breach of Part 23 of the Companies Act 2006 or in breach of duty. The directors deny this.

(3) £58,100 was paid to Mariam without proper justification and contrary to the best interests of the Company. The Defendants contend this payment was justified.

(4) In addition, a payment of £250,000, comprising part of the above disputed bonus payments, was made at the instigation of Jawed into a bank account in the name of Mariam, and was then used towards the purchase of a property in the joint names of Jawed and Mariam. Manolete seeks to recover this sum or its traceable product from Jawed and Mariam, but they assert that Mariam's receipt of these monies was purely ministerial, and that the tracing claim should be rejected.

(5) £76,712 (or part of it) was paid to Anna without any proper justification and contrary to the best interests of the Company. The directors contend this payment was justified.

8. Mr Hugh Miall appeared on behalf of Manolete. None of the directors appeared or were represented. Mr Sharaz Ahmed appeared (on the third day of the trial alone) for Mariam. I am grateful to both Counsel for their clear and helpful submissions, and to the solicitors for Manolete for the exemplary preparation of the hearing bundles.

9. The arguments at trial largely revolved around analysis of contemporary documents, unsurprisingly, as (1) those documents are extensive – although it is right to bear in mind that they are not necessarily complete, because not all of the Company's documents may have been preserved and made available to the liquidators, and, furthermore, the Defendants have not necessarily provided full disclosure; (2) neither the liquidators nor Manolete have any contemporary knowledge of material events; and (3) on behalf of the Defendants, only Mariam appeared and adduced oral evidence.

10. Overall, this probably caused little, if any, disadvantage to the Court for the reasons explained by Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse (UK) Limited* [2013] EWHC 3560, culminating in the statement at [22] that "the best approach for a judge to adopt in the trial of a commercial case is … to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts". Nevertheless, Leggatt J went on to make clear that he was not suggesting that oral testimony serves no useful purpose, and to say that its value includes "the opportunity to gauge the personality, motivations and working practices of a witness". Because the directors did not appear and were not represented, I was deprived of the opportunity to gauge these matters so far as they are concerned.

THE WITNESSES

11. The only witness called by Manolete was Mr Lee Antony Manning, who was appointed as a joint administrator of the Company on 19 January 2017, and who later, until his retirement on 26 April 2018, became one of the joint liquidators of the Company. He made a witness statement for trial, upon which he was not cross-examined as none of the Defendants were present when he was called to give evidence. Manolete also served notices to adduce as hearsay evidence (1) a witness statement dated 3 July 2018 made by Mr Manning in proceedings under section 236 of the Companies Act 2006 relating to the Company and (2) a witness statement of Mr Matthew David Smith, who was also appointed as a joint administrator and, subsequently, as a joint liquidator of the Company. Mr Manning was the lead appointee until the date of his retirement, when Mr Smith succeeded to that position.

12. The directors and Mariam filed a fully pleaded Defence, settled by Counsel, and they, or some of them, made witness statements in connection with various interlocutory matters. However, none of the directors filed a witness statement for trial, or appeared or were represented at the trial. It was nevertheless clear that they knew of the trial date, because they were informed of it by emails sent by Manolete's solicitors.

13. Further, Jawed sent a series of emails to the Court relating to the hearing:

    (1) On 16 April 2024, Jawed wrote saying that he had been informed that a timetable hearing was scheduled to take place on that day and that "Unfortunately, due to financial constraints, I have been unable to secure legal representation for myself and [Basser] and [Fahim]", that this had "made it exceedingly challenging to adequately prepare for the hearing and to manage the substantial workload associated with both the pre-trial preparations and the trial proceedings themselves", and that "Given these circumstances, I am left with no choice but to represent myself at the trial. Additionally, I will also be responsible for executing the defence on behalf of [Basser] and [Fahim]". Jawed went on to say that mental health issues, and other medical concerns, including high blood pressure and dizziness, meant that "I am unable to attend today's hearing"; and he requested that the trial hearing could be scheduled in such a way as "to allow me time to recover".

    (2) I caused a reply to be sent to Jawed on 16 April 2024, explaining that (a) this was the day on which the start of the trial had been listed to take place, and that the trial had accordingly already started, at 10.30 am that day, and (b) Manolete's lawyers had informed me that Jawed and all of the live Defendants were aware of this, both from an email that Manolete's solicitors sent to Mariam on 15 April 2024 and copied to Jawed, Basser, and Fahim and because those solicitors had forwarded to the live Defendants the relevant exchange with Chancery Listing.

    (3) On 17 April 2024, Jawed wrote repeating much of the same text and asking that "the hearing be adjourned to allow me the necessary time to recuperate and address my health concerns appropriately". On the same day I replied as follows:

        > "The Judge notes that an Order was made in this case on 13 November 2023 by Master Pester, which stipulated at paragraph 3 the medical evidence which would be required '[i]f there is to be any further application for any further adjournment of the trial or a stay of the proceedings on the grounds of any of the Defendant's ill health'. The Judge has been informed that the First Defendant was sent an electronic version of the trial bundle by email dated 22 March 2024 (with later iterations being sent thereafter) and the relevant Order is at pages 241-243 of that bundle. The letter from the First Defendant does not comply with that stipulation, and in any event provides an insufficient basis for an adjournment (of uncertain duration) of this trial which has been fixed to be tried within the current trial window for some time

and is currently in progress. The application for an adjournment is therefore refused."

(4) On 18 April 2024 Jawed renewed his application for an adjournment. He acknowledged the effect of the Order of Master Pester dated 13 November 2023, and "the importance of adhering to procedural requirements" but nevertheless "implore[d] the court to reconsider the exceptional recent challenges posed by my health condition". He went on to provide details of those challenges, to provide some details of the medical help that he had been receiving, and to provide a letter from NHS Hounslow IAPT dated 18 January 2024 which "has brought to light significant health concerns that have arisen since my previous submission on 13 November 2023" and "[which] have rendered me medically unfit to participate in the court hearing as scheduled". He wrote that "Denying this request [i.e. for a short adjournment] not only jeopardizes my fundamental right to a fair trial but also exacerbates the existing strain on my health", foreshadowed the production of further medical evidence, made a number of points on the merits of Manolete's claims, and proposed "As an alternative, if an adjournment is not awarded, I am happy to respond in writing to their submission, provided I am given the transcript. I believe I am capable of responding in writing, as I have good days and bad days due to my mental health, but it also takes time". The NHS letter dated 18 January 2024 provided in support of that application was signed by a Trainee Psychological Wellbeing Practitioner, who concluded, on the basis of a single telephone appointment with Jawed, that he should undertake cognitive behavioural therapy based guided self-help, and informed him that he would be contacted as soon as a treatment appointment became available, that "Guided self-help sessions typically last for 30 minutes and are usually fortnightly" and that "Individuals are generally offered 4-6 sessions depending on their needs". Jawed provided no information as to what had occurred between the date of this letter and the start of the trial.

(5) On 18 April 2024 I replied as follows:

> "The Judge considers that the further material deployed in support of the renewed request for an adjournment of the trial (which is currently in progress) (1) still fails to comply with the provisions of paragraph 3 of the Order of Master Pester dated 13 November 2023 and (2) in any event, does not disclose sufficient grounds to warrant an adjournment, bearing in mind (among other things) that the application (a) is made so late in the day, without any or any sufficient explanation as to why it was not or could not have been made sooner, and (b) is not supported by sufficient cogent medical evidence from an ostensibly reliable third party/medical source. Any further application by the First Defendant for an adjournment of the trial must be pursued by way of an appeal against the Judge's refusal. The Judge also notes that reference is made to materials that are said to support the case of the First to Third Defendants. The Judge confirms that he will consider these materials when ruling on the trial outcome."

(6) My reason for ruling that any further application for an adjournment should be made by way of appeal against my refusal of the first two applications was that I did not consider that it could be right that Jawed could make a series of applications relying on different or additional evidence on each occasion, when all that evidence was, or should have been, available to be deployed all along.

14. Mariam made a witness statement for trial, and also served a witness statement made by Ms Hena Massumi, in each case shortly out of time. Although no formal application for relief from sanctions was made in respect of these lapses, Mr Miall indicated that Manolete would not oppose any such application, and I allowed the witness statements to be adduced and allowed Mariam and Ms Massumi to be called as witnesses at trial. I will address their reliability when I come to consider their evidence below.

BACKGROUND FACTS

15. The Company was acquired by Jawed and Basser on 12 April 1999. Then, initially, it operated package holiday tours. From 2001, it became an online car rental operator.

16. Until 19 October 2001, Jawed and Basser held legal title to all the shares in the Company. From 20 October 2001 to 30 March 2012, Jawed and Fahim held legal title to the shares. On 30 March 2012, the allotted shares of the Company increased to 350,000, which were held by Jawed and Fahim equally. On 1 December 2014, Jawed transferred the 175,000 shares held by him to Basser. It appears, however, that Jawed, Basser and Fahim contend that they were always the equal beneficial owners of all of the shares. In any event, they were each directors of the Company at all material times.

17. In addition to the three directors, the Company had a number of staff, including an accounts team. Further, an external accountant, Mr Fintan Crowley, provided annual accounting and auditor services to the Company (and also to the directors personally).

18. The annual accounts of the Company, which were prepared for the years up to 31 March 2015, disclose the following key figures:

Year to 31 March	**Date Approved**	**Turnover**	**Net Current Assets**	**Net Assets**	**Profit**	**Retained Profit**
2012	01.11.12	Unknown	99,343	713,482	52,381	363,482
2013	20.12.13	19,665,418	(113)	779,911	126,429	429,911
2014	16.02.15	22,322,689	35,624	704,862	29,951	354,862
2015	11.03.16	25,785,877	199,263	799,861	257,499	449,861

19. Manolete contends that, even without closer examination of the underlying position, these figures disclose that the Company had very limited working capital and small profit margins, and therefore that its business required careful attention, particularly in relation to the management of its creditors, expenses and other outgoings.

20. Manolete further contends as follows. In spite of this, little financial information was recorded, produced and utilised on an up-to-date basis such that it was possible to discern with reasonable accuracy, at any time, the financial position of the Company. No management accounts were used. No cash-flow forecasts existed. Although the Company used Sage software, it seems that many records were reviewed and adjusted only when the statutory accounts were being prepared. Those accounts were very late in being produced for the years ending 2014 and 2015. The directors appear to have taken financial and management decisions on the basis of an impression of turnover and a general estimate as to the costs which were likely be incurred. There is a notable lack of documents concerning corporate governance or decision making.

21. Owing to its business model, the Company had regular cash-flows into and out of its accounts, and a significant cash balance, in spite of its limited working capital and profit margins. That was because the Company sold car hire bookings to clients on an ongoing basis, providing a steady flow of (cash) income. However, the Company was then obliged, again on a continual (albeit slightly delayed) basis, to pay the car hire companies in respect of each booking. The margin between those sums was of the order of 10%-15%. The Company had to pay overheads and administrative expenses out of this margin. As a result, the Company's net profits were small. Upon its administration, in spite of being insolvent, it had cash of £1.7m in its accounts.

22. Following the appointment of administrators on 19 January 2017, the statement of affairs prepared by Jawed in March 2017 showed that the Company had assets with a realisable value of £1.75m, against estimated unsecured creditors of £19.28m. The estimated deficit to creditors was thus £17.58m. This was not due to any single event. Rather, as Mr Manning indicates, it seems that the Company was probably insolvent for a long time, but that without effective accounting records or oversight, and with inaccurate annual accounts, but also ostensibly healthy cash-balances, the Company continued to trade while (i) it built up substantial debts and (ii) its assets were depleted.

23. Manolete contends that the conclusion that the Company was probably bordering on insolvency, or insolvent, from 2012 on a balance sheet basis, and from autumn 2014 (at the latest) on a commercial basis can be reached having regard to the following matters, each of which must have been known, or certainly ought to have been known, to the Company's directors, who were bound to ensure that they were familiar with the Company's business affairs and financial position:

(1) The annual accounts of the Company from 2012 to 2015 recorded as assets certain debts which were not owed to the Company at all. Alternatively, those debts were entirely speculative, unlikely to be realised or repaid (or certainly not at any time in the foreseeable future) and ought to have been discounted as assets altogether or at the least made subject to significant provision. Quite apart from rendering the accounts materially inaccurate, without those assets the Company was bordering on insolvency from 2012 (and had no retained profits).

(2) The Company was unable to pay all its trade creditors as those debts fell due from (at the latest) autumn 2014.

24. Manolete further contends that, if the above is right, the primary consequences are:

(1) It will be recalled that section 172 of the Companies Act 2006 ("CA") provides:

> "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to–
>
> (a) the likely consequences of any decision in the long term,
>
> (b) the interests of the company's employees,
>
> (c) the need to foster the company's business relationships with suppliers, customers and others,
>
> (d) the impact of the company's operations on the community and the environment,
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f) the need to act fairly as between members of the company.
>
> (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.
>
> (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

(2) As part of their duty under section 172 of the CA, the directors were required to consider the best interests of the creditors of the Company, in accordance with the principles considered in *BTI 2014 LLC v Sequana SA* [2022] UKSC 25 [2022] 3 WLR 709, namely, in sum: (a) the duty to consider the interests of creditors arises where the Company is insolvent or bordering on insolvency (Lord Reed at [48], Lord Hodge at [207], [247]) or where it is probable that an insolvent liquidation or administration will occur of which the directors are or ought to be aware (Lord Briggs at [203]); and (b) where an insolvent liquidation

or administration is inevitable, the interests of the creditors entirely usurp those of the shareholders, but even prior to that stage there is a balance to be conducted between the interests, with greater weight being given to creditors the more parlous the position of the Company (Lord Reed at [81], Lord Hodge at [247]).

(3) Any reliance by the directors on the statutory accounts, including in relation to the payment of dividends, is undermined.

LEGAL FRAMEWORK

25. In addition to section 172 of the CA, to which I have already made reference, Manolete relied on a number of other statutory provisions, as well as decided cases.

26. First, section 171 of the CA, which provides:

> "A director of a company must
> (a) act in accordance with the company's constitution, and
> (b) only exercise powers for the purposes for which they are conferred."

27. Mr Miall placed particular reliance on the proposition that section 171(b) is concerned not with an *excess* of power (by doing something not permitted by a relevant instrument) but with *abuse* of power (by doing a permitted act for an improper reason).

28. Mr Miall submitted, citing *Re HCL Environmental Projects Ltd* [2014] BCC 337 at 364-5, that (1) the test to be applied in considering whether there has been a breach of this duty is to (i) identify the power whose exercise is in question; (ii) identify the proper purpose for which that power was delegated to the directors; (iii) identify the substantive purpose for which the power was in fact exercised; and (iv) decide whether that purpose was proper, and (2) in considering this duty, whether the director honestly believes that exercising the power is in the interests of the Company is irrelevant.

29. Mr Miall further submitted that (i) a common example of a breach of this duty will be in the misapplication of company property; (ii) directors are treated as if they are trustees of the company's assets under their control; (iii) to apply property otherwise than for the specific purposes of the company will be a breach of the rule; and (iv) in this context, the duties under section 171(b) and section 172 are closely aligned.

30. Second, returning to section 172 of the CA, in *Regentcrest Plc (in liq.) v Cohen* [2001] BCC 494 at [120], Jonathan Parker J described the nature of the duty as follows:

> "The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see Palmer's Company Law (Sweet & Maxwell) para.8.508). The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of

> the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test."

31. Mr Miall submitted, however, that this is subject to three qualifications set out by Mr John Randall QC, sitting as a deputy High Court judge, in *Re HLC Environmental Projects Ltd* [2014] BCC 337 at 363, as stated by ICC Judge Mullen in *Re Pantiles Investments Ltd* [2019] BCC 1003 at [18] (omitting citations):

> "(a) Where the duty extends to consideration of the interests of creditors, their interests must be considered as 'paramount' when taken into account in the directors' exercise of discretion …
>
> (b) … the subjective test only applies where there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective, namely whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company …
>
> (c) … it also follows that where a very material interest, such as that of a large creditor (in a company of doubtful solvency, where creditors' interests must be taken into account), is unreasonably (i.e. without objective justification) overlooked and not taken into account, the objective test must equally be applied. Failing to take into account a material factor is something which goes to the validity of the directors' decision-making process. This is not the court substituting its own judgment on the relevant facts (with the inevitable element of hindsight) for that of the directors made at the time; rather it is the court making an (objective) judgment taking into account all the relevant facts known or which ought to have been known at the time, the directors not having made such a judgment in the first place …"

32. Mr Miall pointed out that in the event that a decision appears from the surrounding circumstances to be obviously unreasonable or perverse (on an objective basis), this may well lead the Court to conclude that the decision was not taken genuinely in the interests of the Company but for some other illegitimate reason.

33. Third, section 173 of the CA provides:

> "(1) A director of a company must exercise independent judgment.
> (2) This duty is not infringed by his acting

(a) in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors, or

(b) in a way authorised by the company's constitution."

34. Mr Miall submitted that (1) a director will fail to exercise independent judgment if they merely do what they are told to do by a majority, or a dominant personality, of the board or accede to the demands of the controlling persons without more, (2) in the context of family companies, it is no excuse to say that the running of the company was left to a spouse or other relative, and (3) a director cannot shrug off their responsibilities by claiming that they were not expected to perform any actual duties: see *Re Galeforce Pleating Co Ltd* [1999] 2 BCLC 704 at 716; *Re Westmid Packing Services Ltd* [1998] 2 BCLC 646 at 653.

35. Fourth, section 174 of the CA provides:

> "(1) A director of a company must exercise reasonable care, skill and diligence.
>
> (2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with
>
> (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
>
> (b) the general knowledge, skill and experience that the director has.

36. Mr Miall submitted that the standard of care expected is well settled. There is both an objective test which sets the basic standard and a subjective test which, depending on the circumstances, might raise the standard of care expected by reference to any greater knowledge skill or experience that the director has. It may additionally be noted that a director is expected to apply to the management and custodianship of the company's property the same degree of care as they might be expected to apply in relation to their own property. See *Lexi Holdings plc v Luqman* [2008] 2 BCLC 725 at 737.

37. Mr Miall further submitted that a director cannot avoid the duty under section 174 on the basis that they delegated their functions to others or paid no or little part in the running of the company. A director has an ongoing duty to acquire and maintain a sufficient knowledge of the company's business to allow them properly to discharge their duties. See *Re Barings Plc (No 5)* [2000] 1 BCLC 523 at [36].

38. Fifth, turning to distributions under Part 23 of the CA, Mr Miall submitted as follows.

39. A company may make distributions of its assets to its members (defined in section 112 of the CA) provided that those distributions are made in accordance with Part 23.

40. As to the process for lawful distributions:

(1) A distribution can only be lawfully made by a company out of profits available for the purpose (section 830(1) of the CA, as defined in section 830(2)).

(2) Whether a distribution can lawfully be made must be determined by reference to the relevant financial information (in particular statements of profits, losses, assets and liabilities, share capital and reserves) in a company's relevant accounts in accordance with section 836 of the CA.

(3) Relevant accounts means a company's last annual accounts, save that where the distribution would be found to contravene Part 23 of the CA by reference to the last annual accounts, justification may be found by reference to interim accounts.

(4) Where the relevant accounts are the company's last annual accounts, those accounts must satisfy the requirements of section 837 of the CA.

41. Compliance with the statutory requirements and processes is mandatory. A failure to do so renders the distribution *ultra vires* and unlawful: *Bairstow v Queens Moat Houses plc* [2002] BCC 91. Where accounts do not give a true and fair view of the items relevant to a dividend distribution, it is irrelevant that, had different figures been presented, a dividend could have been made: *Allied Carpets Group plc v Nethercott* [2001] BCC 81 at 85.

42. A director will be liable to repay an unlawful dividend (or its value) to the company (i) if he knows that the dividend was unlawful, (ii) if he knows the facts which rendered the payment unlawful, (iii) if he must be taken to know all of those facts, or (iv) if he ought to have known, as a reasonably competent and diligent director, that the payment was unlawful. See *Queens Moat Houses plc v Bairstow* [2000] 1 BCLC 549 at 559H-560B.

43. A recipient shareholder who knows or has reasonable grounds for believing a distribution to be made in breach of Part 23 of the CA is liable to repay it (or part of it) or its value (as the case may be) under section 847 of the CA. It suffices that the shareholder knows or has reason to believe the facts giving rise to the contravention: *It's a Wrap (UK) Ltd v Gula* [2006] BCLC 634.

44. Sixth, turning to the topics of (i) directors as fiduciaries, (ii) accounting, and (iii) burdens of proof, Mr Miall made the following submissions.

45. Like all fiduciaries, directors are required to account for their dealings with trust property. This obligation means that, where a *prima facie* case is made out that a director has received company money or its benefit, then it is for that director to show that the payment was proper. Similarly, where credit entries are made to a director's

loan account, those entries will fall to the director to be justified. See *Gillman & Soame Ltd v Young* [2007] EWHC 1245 (Ch), [82]; *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch), [149].

46. That principle applies even when there are many payments or transactions in issue. Thus, even where there were 215 unexplained transactions, the Court of Appeal held that it was not necessary for the company to demonstrate that each transaction was illegitimate, but on the contrary that it was for the director to justify the payments: *Ross River & Anr v Waveley Commercial Ltd* [2014] 1 BCLC 545 at [120].

47. It is, particularly in this context, also apposite to note that a director cannot rely on the inadequacy of his own record keeping to justify an inability to offer a proper explanation for what has happened to the company's assets: *In re Mumtaz Properties Ltd* [2012] 2 BCLC 109 at [16]-[17], [57].

48. I have applied the law as stated above in making the rulings that I have made below, and (wherever I have done so) in accepting Manolete's submissions on the facts.

IMPUGNED DEBTS

49. Mr Miall began his opening of Manolete's case by addressing substantial debts which, as Manolete claims, were improperly recorded as assets in the Company's accounts.

Pinnacle Developments

50. The Company's statutory accounts for the financial years ending 31 March 2012 and 31 March 2013 include as an asset of the Company a debt of £700,000 owed by Pinnacle Developments SA ("Pinnacle") in relation to a hotel development in Wembley. The amount of this debt was reduced in the 2014 accounts to £600,000.

51. However: (1) there is nothing to show that the Company ever lent money to, or otherwise invested in, Pinnacle; (2) as Jawed admitted in the course of interviews with the administrators, there is no contract or other agreement between the Company and Pinnacle; and (3) the owner and director of Pinnacle has denied any relationship between Pinnacle and the Company, or that it ever owed money to the Company.

52. Moreover, Jawed's explanation of this asset has not been consistent. In October 2017, and again in December 2017, he suggested that the debt amounted to a *quantum meruit* claim against Pinnacle in respect of work that he and other employees of the Company undertook in relation to the hotel project. However, there is no documentary basis for such a position. No invoices were ever raised, and there are no records to support the suggestion that employees of the Company were deployed to assist Pinnacle. In

addition, as Jawed's remuneration in 2015 was £69,400, running up a liability of this amount to Pinnacle would involve many man years of work, which seems incredible.

53. Separately, it has been suggested that Jawed was intending to repay £700,000 from a share of the profits from Pinnacle that he expected to receive. The Defence suggests that Jawed assigned (in equity) his right to that share to the Company, although (i) no evidence has been led to support that and (ii) it is unclear what steps were taken to effect an assignment, or even that Jawed had an operative legal chose in the first place.

54. Manolete contends that (1) this boils down to nothing more than a suggestion that Jawed would make payment to the Company out of any profit share that he received; (2) that would not make Pinnacle the debtor, but Jawed himself; and (3) in any event, any payment would plainly be contingent on a profit share existing and being paid.

55. In fact, Jawed was not a shareholder of Pinnacle, and appears to have had no agreement with that entity. He was at one time a director of Pinnacle, but he was removed in 2012 and fell out with its owner, Mr Akbary. In addition, the accounts of Pinnacle to 30 November 2013 indicated that it had net liabilities of £21.2m, total creditors of over £90m, and had made losses of £18m over two years. For these reasons alone, there was no basis to consider that any profit would be recoverable within any reasonable period.

56. Other points support the suggestion that any such debt was unlikely to be repaid, in whole or part. The debt was reduced from £700,000 to £600,000 in the 2014 accounts, on the basis that a 'credit note' had been issued. However, no such note has ever been produced or explained, and Jawed subsequently said that he had no idea about it.

57. The sum was further reduced to £200,000 in the 2015 accounts, and the auditor records that Jawed informed him that he had paid the other £400,000 of the sum then shown in the accounts as being owed to the Company, having received this from Pinnacle. This sum was therefore included as a lodgement in the accounts and appears as part of the Company's cash balances. However, Jawed has denied having ever received such money, or that he told the auditor that he had done so. In addition, there is no evidence of any payment having been made. Further, Jawed did not include the debt as an asset of the Company in the statement of affairs.

58. Accordingly, Mr Miall submits, and I agree, as follows:

    (1) However one tries to explain these entries in the accounts, in reality there was no realistic prospect of any of these sums being paid to the Company during the period in which they appeared in the accounts, and none of them should have appeared in its accounts as an asset.

(2) Even if any debt owed to the Company existed, it was always contingent, and there was no realistic prospect of it being recovered in any reasonable period. At the very least, a heavy provision ought to have been applied against the same.

(3) In fact, any true debt could only have been one owed by Jawed to the Company. However, there is no proper basis for concluding that he had any intention of repaying any such debt (and he has not done so). If a valuable debt does exist, then it would still be owed by him, and Manolete would claim it accordingly.

(4) In any event, the sum of £400,000 included as a cash asset of the Company in the 2015 accounts did not exist (no sum having ever been paid by Jawed).

African Mining

59. In the 2014 and 2015 audit files, a debt of £380,000 is recorded as an asset, labelled "Joe Karim re funds transferred to Africa" and "funds withdrawn by Joe Karim re Africa". The explanation for these entries, in brief, is that the amount reflects transfers made to fund investments by Jawed in two African mining ventures. The documents show that the sums in question were originally posted as loans to Jawed in the directors' loan account, but because that account became "hugely overdrawn" the balance (£380,000) was transferred to a separate debtors account.

60. Manolete argues that these wordings suggest that sums to this value were withdrawn or used by Jawed to fund personal investments in mining projects in Africa. Those ventures were an iron ore mining project in Ghana run by GEM Global Ventures ("GEM"), in which he had a shareholding, and a gold mining venture in Guinea run by a company called Pinnacle Ventures in which he was hoping to acquire an interest.

61. Jawed denies that this was a loan to him at all, and says it was a loan from the Company to GEM and Pinnacle Ventures. If that is right, then the accounts (and the audit file) are inaccurate, as there was no loan of £380,000 from him. In any event, his position shows that he did not intend to repay such sums to the Company.

62. In fact, there are no documents supporting the existence of any loan to either GEM or Pinnacle Ventures. Indeed, there has been no attempt to explain, if this was a loan to GEM or Pinnacle Ventures, what the specific loans were and how the total of £380,000 is reached. Manolete says this is a figure reached by reference to what was outstanding on the directors' loan account when a reconciliation took place in 2014-2015.

63. In addition, the ventures were entirely speculative, and there was no or no cogent basis for asserting a realistic prospect of a recovery from GEM or Pinnacle Ventures at any time. Jawed accepted in interviews in 2017 that the prospect of obtaining a recovery was hopeless. He did not include the debts as assets in the statement of affairs of the

Company. There is no factor which appears to make the position materially different in 2014 or 2015. GEM's own literature suggests that for the initial iron ore project, an investment of $71m would be required, with no production until (at least) 2019 and then a further 4 years to obtain a positive cash return. However, the evidence suggests that no actual work on the prospective site has ever taken place.

64. Jawed admitted in interview that both ventures depended on finding a joint-venture partner, that one was never found, and that there was not even a known candidate in either case.

65. Mr Miall accordingly submits, and again I agree, that:

(1) A debt allegedly owed by GEM/Pinnacle Ventures ought not to have been included in the Company's 2014 and 2015 accounts as an asset of the Company. No loan(s) were made to those entities, and even if the same had been made there was no realistic prospect of recovering the same at any material time.

(2) If there was any debt, it was one owed by Jawed to the Company (and it would still be owed now). However, as Jawed has made clear, he did not intend to repay any such sums to the Company (and in practice any voluntary repayment would have depended on the venture making money, which never happened).

(3) Therefore, no debt (of any value) should have been recorded in the assets of the Company in respect of these ventures, and certainly not without a heavy discount or provision made against it given its speculative nature and the absence of any realistic prospect of repayment.

Accounting consequences

66. The proper treatment of these alleged debts in the Company's accounts has a profound effect on its financial position as set out in those documents. It renders the net asset and retained profit figures otiose, and indicates that the Company was insolvent or very nearly insolvent from 2012, with significant working capital shortages:

Year to 31 March	**Date Approved**	**Turnover**	**Net Current Assets**	**Net Assets**	**Profit**	**Retained Profit**
2012	01.11.12	Unknown	(600,657)	13,482	52,381	(336,518)
2013	20.12.13	19,665,418	(700,113)	79,911	126,429	(270,089)
2014	16.02.15	22,322,689	(944,376)	(275,138)	29,951	(625,138)

2015	11.03.16	25,785,877	(780,737)	(180,139)	257,499	(530,139)

INABILITY TO PAY DEBTS

67. The second topic that Mr Miall addressed in opening related to Manolete's case that the Company was unable to pay its debts as they fell due from no later than the end of 2014 onwards: from that time, it was, or was incipiently, commercially insolvent.

68. Mr Miall made the following points, all of which were supported by the documents.

69. The Company was falling behind in paying, and in some instances failing to pay, its trade creditors from mid-late 2014. That resulted in frequent demands for payment, complaints and, ultimately, statutory demands. For example:

    (1) In December 2014, Budget UAE was complaining that its invoices dating back to August 2014 had not been paid and that as a result bookings would be charged to customers directly. Further complaints about failure to pay invoices dating from July 2014 were made by, among others: Check24; Drive & Go; GM Rentacar; Megadrive; Zitautu; Noleggiare; Record; and Hertz.

    (2) Moneysupermarket reduced the Company's credit limit to nil in January 2015 owing to the failure to file accounts on time, whilst £53,308 was overdue. In February 2015 Travelzoo demanded prepayment before further bookings were taken, which the Company said was a 'sticking point'.

    (3) By April/May 2015, customers were stopping sales of car hire through the Company owing to unpaid bills. As of 1 June 2015, Enterprise was owed $610,397, of which only $174,786 was current (0-30 days) and $205,944 was over 90 days old.

    (4) Similar demands and complaints were consistently made during 2015 and into 2016, with other creditors stopping sales or refusing due to unpaid debts.

    (5) Statutory demands were served on the Company by Blue SAS (€160,781.55) on 2 November 2015, and by Clicktripz LLC on 25 June 2016; and a legal demand letter was sent by Kayak Software Corp on 1 March 2016. (It is right to record that these debts, or some of them, were disputed by the Company, and that the merits of any such disputes cannot be determined on the materials presently available to the Court; but, having said that, it seems to me legitimate for Manolete to rely upon the existence, size, and number of these demands.)

70. In addition, accounting material obtained from the Company's computer records indicates the scale (and increasing difficulties) it faced in paying its creditors on-time:

(1) As early as the end of the 2013-14 financial year, the Company appears to have begun accruing significant aged creditors. At 31 March 2014, Sage records suggest the Company had trade creditors of £3.17m, of whom only £1.65m fell into the 0-30-day window. Some £190,000 of debt was more than 3 months old.

(2) The 2014 accounts disclose total creditors (falling due within 1 year) of £3.68m against total cash of £2.465m as at 31 March 2014.

(3) An aged creditors schedule as at 31 March 2015 discloses creditors of £2.17m, of which only £79,720 fell within the 0-30 days bracket. Over £600,000 was more than 6 months old, with a further £188,638 being over 3 months old, and £353,124 being 2-3 months old. At the same time, immediately available cash balances only amounted to (at best) £2.08m.

(4) Snapshots of aged creditors later in 2015 show the position did not improve. At 14 September 2015, it appears the balance of creditors had increased to £6.36m, of which £4.16m were in the 'current' bracket. Two months later, total creditors stood at £6.07m, and sums over two months old had increased to £2.6m.

(5) Although there appears to have been some recovery in terms of total creditor figures, in early 2016 there were still £1.47m of debts over two months old. Between April and November 2016, the Company accrued creditors of over £10m, half of whom remained unpaid for more than two months.

71. Accordingly, the Company was accruing aged creditors from at least the financial year 2013-14. It began to fail to pay creditors on time from, at the latest, mid-late 2014, and the situation did not improve. While the Company continued trading, it appears that it was able to do so because of the regular cash-flows into the business. In substance, however, it was accruing debts to its trade creditors without having any future means to discharge those debts; and, as a result, its aged creditors increased severely.

72. Mr Miall made the point that, in these circumstances, the present case is similar to the facts of *Bucci v Carman (Liquidator of Casa Estates (UK) Ltd)* [2014] BCC 269.

73. In that case, the facts, as summarised in the headnote, were as follows. The company ("Casa UK") was incorporated in 2005 and its principal business was introducing investors to property in Dubai. Day-to-day management was done by Mr Bucci, whose wife, the appellant Mrs Bucci, was company secretary. Casa UK had an agent and intermediary in Dubai called "Casa Dubai". By a written agreement dated 1 January 2007 Casa UK agreed to pay Casa Dubai a monthly sum in the nature of a retainer equivalent to £10,000 and Casa Dubai, in turn, agreed to pay Casa UK commission on sales at an average rate of 6 per cent. The business model was that Casa UK would receive moneys from an investor who wanted to invest in property in Dubai and, in

theory, it would then transmit the moneys to Casa Dubai in Dubai, for onward transmission to the developer. In reality the arrangements between Casa UK and Casa Dubai were subject to a set-off arrangement involving investors' money, the retainer to Casa Dubai and commission to Casa UK, so that the gross sums were not actually paid by and between Casa UK and Casa Dubai. Matters were made more complicated as Casa UK did not retain a separate client account to hold customers' deposits, but mixed depositors' money with its own. Casa UK made a loan of £474,259 to another company, "GUL", owned and controlled by Mr and Mrs Bucci but which had been loss-making since its inception. In late 2008 the Dubai property market collapsed and that pushed Casa UK into insolvent winding up. The respondent liquidator considered that payments by Casa UK to Mrs Bucci made during 2007 and 2008 were recoverable as transactions at an undervalue under section 238 of the Insolvency Act 1986.

74. HH Judge Purle QC dismissed the liquidator's case, but Warren J upheld it on appeal, and the Court of Appeal rejected Mrs Bucci's further appeal. Part of the reasoning of the Court of Appeal is summarised in the headnote as follows:

> "It seemed counterintuitive that a company that managed to stave off cash-flow insolvency by going deeper and deeper into long-term debt was not insolvent. It may be able to trade its way out of insolvency, and thus avoid going into insolvent liquidation, but that was a different matter. If, as Warren J held, Casa UK was only able to continue to pay its debts as they fell due by taking new deposits and using them to pay off old debts, in any commercial sense it was insolvent, whether on a cash-flow or a balance-sheet basis."

IMPUGNED TRANSACTIONS

75. Mr Miall submitted that, for the reasons set out below, each of the following transactions gave rise to either indebtedness or a liability to pay compensation to the Company, on the part of one or more of the live Defendants. In light of the points made by him, and the absence of evidence at trial to the contrary, I accept those submissions.

African Mining Payments

76. Between 2012 and 2016, the directors caused the Company to pay US$1,415,180 and £34,661 (including the £380,000 referred to in [59] above) to various persons in relation to the African Mining investments which were pursued by Jawed personally.

77. The payments include sums paid directly to GEM and Pinnacle Ventures SA, in which Jawed had or aspired to have a personal interest. They also included numerous payments to 'consultants', other mining companies, and some cash withdrawals which Jawed later said were used "for certain officials that we needed to dispose of and, you know, deal with" which, on the face of it, suggests that these payments were bribes.

78. Save for a payment to International Sureties Ltd, which they say were not related to Africa, the directors admit that payments were made to these recipients in relation to

the African Ventures: see the Defence at §27(3). Jawed has previously accepted that the payments made to various of the consultants were connected to GEM or Pinnacle.

79. Manolete submits, and I accept, that these payments, and the African ventures, had nothing to do with the Company's business:

    (1) The Company had no interest in either GEM or Pinnacle Ventures. (Jawed was a shareholder in GEM, and aspired to be a shareholder in Pinnacle Ventures.)

    (2) There are no documents which support the suggestion that loans were being made to either GEM or Pinnacle Ventures or to the individuals who received payments (or that equity investments were being made in either entity).

    (3) On the contrary, the Company's accounting practice was to record such sums as (informal) loans to the directors; and it was only because the loan account became so overdrawn that the sum of £380,000 was transferred to a separate loan account (albeit notably not in the name of GEM or Pinnacle Ventures).

    (4) There is no documentary evidence to support a suggestion that these payments were made in connection with or in furtherance of the Company's business or its interests. In fact, it had nothing to do with speculative African mining projects.

    (5) Consistent with that position, and unsurprisingly, the Company did not receive, and has not received, any benefit from making those very significant payments.

80. In these circumstances, these payments can only properly be characterised either (1) as loans made to Jawed to allow him to further his personal investments in GEM and Pinnacle Ventures (which accords with the way in which the Company, under Jawed's own direction, accounted for such payments) or (2) if they were not loans to Jawed, then as defalcations from the Company's monies for the personal benefit of Jawed and thus for an improper purpose - they were not payments made to promote the success of the Company on any view, and there is no evidence that any of the directors genuinely believed that they were (or ever considered whether they were). I agree.

Personal Debts of Basser and Fahim

81. The 2015 audit file for the Company records a debt owed on the directors' loan account of £12,660.38. Based on what he said in interviews, it would appear that Jawed (at least) considered this was a sum owed by Basser, but was also one which has been accounted for as remuneration owed to Basser in lieu of being paid.

82. The 2015 Audit File also revealed various payments recorded as outstanding bankings (i.e. in the process of being repaid). These included a sum of £65,000 due from Fahim but which, in fact, is not recorded as having been paid in any bank statements.

83. Through their solicitors, the directors contended that both these sums were repaid by Basser and Fahim foregoing their monthly remuneration from April to November

2015. The Defence pleads that the sums were written off as the like amounts were not paid as remuneration. Manolete responds to that case as follows:

(1) No evidence has been advanced that regular salary payments to either director have been missed.

(2) It is unlikely that Basser and Fahim would not have identified this issue had it arisen.

(3) In relation to Fahim, the amount said to have been unpaid vastly exceeds his annual salary of £9,000.

(4) Accordingly, these sums remain outstanding and must be repaid to the Company.

(5) If these payments were not loans to Basser and Fahim, which result in indebtedness, there has been no explanation for them.

(6) Accordingly, in the alternative, these payments must be treated as being payments simply for the personal benefit of Basser and Fahim and therefore a misappropriation of Company monies for an improper purpose which was contrary to its best interests and for which the directors are each liable.

84. I accept these submissions of Manolete in relation to these sums.

Jawed's personal tax payment

85. On 18 March 2014, the Company paid £17,331.53 to Jawed. This is described in the Company's bank statement as "JOE PERSONAL TAX 178340H006VF". The Defence (at §35) admits that this sum was paid to Jawed to facilitate the payment of a personal tax bill. Nevertheless, the directors contend that the payment has or ought to have been accounted for in the directors' loan account and paid back.

86. In response, Manolete contends, and I accept, that (1) there is no contemporary, reliable or independent material which establishes that this is how that payment has been treated, and (2) in the absence of such evidence, it should be treated as giving rise to a debt from Jawed, alternatively as a payment contrary to the best interests of or not for the proper purposes of the Company, and therefore liable to be compensated for by each of the directors.

Cash, Cheque and Credit Card Payments

87. Between 14 December 2011 and 19 November 2014, as appears from the Company's bank statements and the Schedule drawn up by the liquidator of the Company, £172,825 was withdrawn in cash from the Company's bank accounts. This heavy use of cash is inconsistent not only (1) with the business activities of the Company, but also (2) the confirmation provided by the Company's accountant that the Company had no significant petty cash requirements.

88. The directors have failed, and have apparently been unable, to account to the Company or its liquidators for these cash payments (save that Jawed has previously acknowledged that cash has been used in connection with his African investments).

89. In these circumstances, Manolete contends, and I accept, that it is appropriate to conclude that the monies were not used for the Company's purposes, but were instead used for the personal benefit of one or more of the directors, accordingly giving rise to indebtedness on their part or a liability to make repayment on their part.

90. The liquidators have also identified very many cheque payments, the purpose of which has not been explained. However, as Manolete has been unable to obtain copies of most of these cheques, Manolete has limited its claim to those cheque payments where copies have been obtained (excluding cheques for cash which are dealt with above), which indicate that £32,000 was paid to Jawed, Basser and Fahim themselves.

91. Manolete's case, which I accept, is that (1) the directors have been unable to explain why these payments were made, and (2) in the absence of any such explanation or documentary evidence, they ought to be treated as payments for one or more of the directors personally, or otherwise contrary to the best interests of the Company.

92. Company funds were also used to discharge (very significant) credit card charges incurred by the directors or their families. The outlay on these credit cards over the relevant period amounted to £922,341, across three separate accounts. The credit card statements which have been provided demonstrate that these facilities were used for the directors' and their family's day-to-day personal expenditure, including in the USA (which is consistent with the directors' general treatment of the Company's assets).

93. The directors admit that their personal credit cards were paid by the Company, but say that, up to 31 March 2015 personal expenditure was charged back to their loan account and paid down (see Defence §42(2)).

94. However, Manolete's case, which on the materials before me I accept, is as follows:

    (1) No records have been located by Manolete demonstrating this exercise before the 2013-14 financial year.

    (2) It appears that there has been some re-charging in the 2013-14 and 2014-15 years. Whilst Manolete does not conceded that exercise was accurate, it does not pursue a claim for these years.

    (3) However, no such exercise occurred for the period after 31 March 2015.

    (4) As the credit cards are personal to the directors, they ought to have disclosed the complete statements for the whole period and explained which charges were for business purposes. They have not done so.

(5) As such, it should be inferred that the charges for these periods were for their personal benefit and not in the interests of the Company.

(6) The charges for the relevant periods amount to £583,269.06 (made up of £117,949.65 for FY 2012, £202,124.45 for FY 2013, £179,873.53 for FY 2016, and £83,321.43 for FY 2017).

Payment of £65,000 to Basser

95. Between September 2013 and November 2014, as appears from the Company's bank statements and the Schedule drawn up by the liquidator of the Company, £65,000 was paid to Basser in 13 instalments of £5,000 each. The directors contend that these were mostly payments to HMRC, or otherwise Basser's remuneration.

96. Manolete contends, however, that there is no evidence which supports any entitlement to these payments: they are not, for example, reflected in Basser's tax return (see [10/3120ff] in the trial bundle). The directors' contentions are unsubstantiated, and Basser was in any event paid a salary. Accordingly, Manolete submits, and I accept, that these payments (1) are simply defalcations, and (2) should be treated as giving rise to a debt owed by Basser to the Company, alternatively as payments made contrary to the Company's best interests (for which both he and his brother directors are liable).

Payment of Legal Fees of ATISL

97. Between 2013 and 2016, the Company made payments totalling US$54,000 to DeRouen Law, a US Law Firm which appears to have been instructed to act for ATISL in proceedings in Louisiana, USA. In the Defence (at §44), the directors suggest that the fees were incurred for the benefit of the Company, on the basis that there was an attempt to join it into the US proceedings; and indeed, when interviewed, Jawed contended that the Company had in fact been joined into the proceedings.

98. Manolete's case, however, is that (1) the documents provided to the liquidators concerning these proceedings make no mention of the Company, but instead show that the proceedings involved a suit against ATISL in which ATISL challenged jurisdiction, and (2) on this basis, and absent any other evidence, it must follow that these payments were made for the benefit of ATISL only and accordingly amount to a misapplication of Company property which cannot have been thought would promote the success of the Company (if that had ever been considered). I agree.

Securities Clearing Payments

99. Between 23 March 2011 and 5 August 2015, very substantial payments totalling $1,035,665 were made to a US financial clearing entity called COR Clearing LLC, via a broker named E1 Asset Management. These payments were made into two accounts: (1) $963,875 into an account in the name of ATISL (registered to Jawed's home address), and (2) $71,790 into an account in Jawed's name.

100. The documents show that, subsequently: (1) the ATISL monies were used for (largely unsuccessful) investments, before the remaining investments were transferred to Jawed's account, and (2) Jawed then used his account for trading, withdrawing $501,000 in total between January and August 2018. Jawed confirmed that he carried on trading activity through E1/COR which had nothing to do with the Company.

101. The directors contend that these sums would or ought to have been accounted for in inter-company accounting and set-off against sums owed by the Company to ATISL (or, in the case of Jawed, incorporated into his loan account and paid down).

102. However, Manolete's case, which I accept, is as follows:

    (1) The evidence before the Court does not contain any or any sufficient inter-company accounting documentation which records the payments made by the Company to ATISL and explains how they have been accounted for.

    (2) Although a separate, subsequent reconciliation of the inter-company position was provided by the Company's accountant to the liquidators, this only covers a much later period, and concerns charges and payments in respect of advertising charges and management fees.

    (3) There is no loan account record for Jawed for the period in which he received the sums from the Company into his account with E1. Accordingly, there is no basis upon which it can be maintained that the Company owed Jawed any funds against which these payments could be set-off. As such, even on the directors' case Jawed would continue to owe these sums to the Company.

    (4) The proper conclusion on the evidence is that this is another example of Company funds being misdirected or misappropriated by the directors for, ultimately, their own (and particularly Jawed's) personal benefit.

    (5) Given that it appears that Jawed carried out trading through the ATISL account, and received the assets of that account in 2015, these payments should be treated as loans made to him which he must repay to the Company, alternatively as misappropriations of Company monies contrary to its best interests.

Payments to ATISL

103. Between 6 March 2014 and 23 November 2016, the sum of £2,187,054 was paid by the Company to ATISL. As at 8 January 2018, the liquidators of the Company had identified payments to ATISL totalling £1,655,054.

104. When asked about these payments, the directors explained (through their solicitor, by letter dated 4 July 2018) that (1) £1,199,369 were payments for advertising charges incurred by ATISL for the Company's benefit, and (2) the remaining £455,684 was paid in respect of 'management charges' payable to ATISL by the Company. The

directors contended that whilst no invoices were ever raised by ATISL for any such services, the Company maintained a ledger recording the Company's liability to ATISL and they provided a copy of the same (apparently from ATISL's records).

105. Subsequently, it was discovered that a further £532,000 was paid to ATISL by the Company which sums are not recorded in the ledger referred to by the directors, despite those payments falling within the same period as is covered by the ledger.

106. However: (1) in interview, the Company's accountant, Mr Crowley, informed the liquidators that he did not know about the existence of the ledgers and was not involved in their preparation, and (2) a reconciliation produced by Mr Crowley identified that ATISL owed the Company £271,837 as at 31 December 2016 (and Manolete's case is that this figure did not change prior to ATISL's dissolution in August 2017, when the document was prepared). Mr Crowley's reconciliation identifies that six quarterly "management charges" were paid by the Company to ATISL from September 2015 to December 2016, each in the sum of £67,464.60, in addition to the advertising charges (on which ATISL charged an uplift from the amount charged by Google).

107. Manolete contends:

    (1) These alleged management fees have not been evidenced or explained. There are no invoices from ATISL to the Company, and Manolete is unaware of any documentary evidence supporting the contention that ATISL provided services or employees to the Company which would justify such payments.

    (2) Absent such an explanation, the position is that in addition to the £271,837 owed by ATISL to the Company as at the end of December 2016, the sum of £404,787.60 was paid to ATISL between 30 September 2015 and 31 December 2016 at a time when it was (or ought to have been) clear that the Company was unable to service its payments to trade creditors and was insolvent.

    (3) Accordingly, the directors caused or permitted ATISL (which was allowed to be struck off in August 2017) to be overpaid the sum of £676,624.81 by the Company for no benefit to the Company.

    (4) Further, this took place at a time when the Company ought to have been protecting its monies for the benefit of its creditors. Such payments were, in any event, permitted or made contrary to the Company's best interests.

108. This is an aspect of the case where I suspect that if the directors had engaged with these proceedings, in particular by serving witness statements for trial and/or attending at the trial, it is not impossible that some different gloss might have been placed on these transactions. It seems clear that some payments were properly made to ATISL, and if advertising (or indeed management) charges were a necessary incident of the Company continuing to trade, and at the time when those payments were made there

was a realistic prospect that the Company could trade its way out of difficulty and repay its creditors, it does not appear to me to be fanciful to contemplate the possibility that there might be in existence an answer, or at least a partial answer, to Manolete's case. However, the directors have not engaged, and, in addition, Manolete's case concerning these payments has to be viewed in the context of (1) the broader picture concerning the misuse of the Company's funds that the directors caused or permitted and (2) the inconsistencies of explanation concerning these payments identified above. In these circumstances, on the materials before me, I accept Manolete's contentions.

Alleged Bonuses or Additional Remuneration

109. In addition to receiving an agreed sum by way of salary, further sums totalling £498,201 were paid to the directors, purportedly as 'gross remuneration' outside payroll or as bonuses. These payments comprised:

    (1) £308,975 paid to Jawed between June 2015 and January 2017 (including an alleged bonus of £250,000, which was paid to Mariam on 21 March 2016).

    (2) £121,113 paid to Basser between April 2015 and January 2017 (including an alleged bonus of £20,000 which was paid on or about 29 December 2015).

    (3) £68,113 paid to Fahim, made between October 2015 and January 2017.

110. The directors admit these payments and say that they were justified by reference to the work carried out by them and the Company's improving financial position (Defence, §55).

111. Manolete contends, however, that this is not borne out by the evidence:

    (1) There is no contemporaneous evidence that the directors ever actually considered the financial position of the Company or otherwise considered or discussed the making of additional payments or bonuses, let alone justified it by reference to relevant material.

    (2) As set out in a letter from their solicitors dated 21 August 2017, the directors sought to justify the bonus payments to them by producing minutes of resolutions approving those payments. In expansion of Manolete's submissions, it is right to record the following: (a) the letter states: "The payment of £250,00 to [Mariam] was a bonus payment to [Jawed] but paid to his wife at his request and direction (see copy board minute enclosed)"; (b) the enclosed board minute refers to a meeting held on 15 March 2016 which records, among other things: "After careful consideration by the Directors, the following resolution was adopted: It was resolved, that the company shall give a one off bonus to Joe Karim in the amount of £250,000, it was further resolved to make such payment

to Joe Karim or his nominee"; and (c) the date of 16 March 2016 is significant as it shortly precedes the date on which the sum of £250,000 was paid to Mariam.

(3) However, as admitted in the Defence, and as appears from the contemporary documents surrounding their preparation, those minutes were in fact prepared only days before that letter was sent in August 2017, and long after the Company entered administration. In expansion of Manolete's submissions, the key email is one dated 12 August 2017 from Jawed to Mr Crowley, which reads: "Here is the Minutes, please amend and email it to me – I wonder if Minutes require any signatures by the Directors and if so can it be one director (me only). In addition, can you produce 2 more, but in different version for Fahim and Wais".

(4) The clear inference is that there was never any board meeting or discussion concerning these bonuses, and that the creation of the minutes was a retrospective attempt to justify the payments.

112. In any event, Manolete contends that these payments could not have been justified in light of the Company's financial position:

(1) The Company did not produce management accounts, or even cash-flows, to monitor ongoing financial performance.

(2) The Company's accounts for the year ending 2014 (which were the only accounts available until 11 March 2016), and insofar as they were accurate, disclosed an ultimate profit of just £29,951 (0.13% of turnover). Although turnover increase by £3.5m to the year end 31 March 2015, so did expenses, returning a profit of just £257,499 after a tax rebate (1% of turnover).

(3) It is clear (as set out above) that significant creditor pressure was building from mid-late 2014 as suppliers went unpaid and began to impose restrictions on sales or credit, as the directors (and possibly Mariam) ought to have known.

(4) The alleged bonus of £250,000 awarded to Jawed and paid to Mariam on 21 March 2016 was paid just 10 days after Jawed signed the 2015 accounts (from which it was clear the payment would extinguish the profit from that year) and less than a year before the Company went into administration owing over £17m to creditors.

(5) As discussed further below, that payment of £250,000 was used by Jawed and Miriam as part of a deposit for the purchase of a jointly owned property.

113. Accordingly, Manolete contends that far from being in the Company's best interests and for proper purposes, these so-called bonuses and additional remuneration were simply payments made for expediency, to benefit the directors personally, and contrary to the best interests of the Company. If it were necessary to go beyond a claim for

breach of duty, Mr Miall submitted that the payments to the directors would also be liable to remedy through one of two different routes:

(1) If the Court was to conclude that the payments were made without any commercial justification, then these must be payments made to each of the directors at an undervalue contrary to section 238 of the Insolvency Act 1986 ("IA") in that they were not made for any benefit of equal or substantial value to the Company, and where it is presumed the Company was or became insolvent as a result under section 240 of the IA.

(2) If the Court was to conclude that the payments were made to the directors as creditors of the Company, then they were preferences made contrary to section 239 of the IA at a time where, as explained above, the Company was insolvent. There is a statutory presumption that the payment was motivated by a desire to prefer the directors as recipients.

114. I accept Manolete's primary case with regard to all of these payments, and would, if that was necessary, accept its fall back arguments as well. The creation, in August 2017, of board minutes in a belated attempt to provide contemporaneous support for payments which had been made by no later than January 2017 is one particularly egregious example of the directors' cavalier and disingenuous approach towards the management of the Company's financial affairs, the proper custodianship of its assets, and consideration of the interests of its creditors. Another comprises the timing of the £250,000 payment that was made on 21 March 2016, especially having regard to the financial state of the Company which Jawed (at least) plainly knew about at that time.

Unlawful Dividends

115. Dividend payments of £267,500 are recorded in the Company's financial records as having been paid to the directors in the 2014 and 2015 financial years – as credits to pay down the directors' loan account in the amounts of £105,000, ostensibly on 31 March 2014, £40,000 on 30 June 2014, and £122,500 on 30 November 2014.

116. The most recently available accounts for each of these payments were, on the face of it the 31 March 2013 annual accounts dated 20 December 2013, although Manolete contends that (i) the accounts for the year ending 31 March 2014 were not produced until 16 February 2015, (ii) there were no interim accounts by which the dividends might have been justified, and (iii) in reality, the dividends were not declared or paid on the dates alleged at all, but were accounting entries created much later.

117. On their face, the 2013 accounts showed accrued profits of £429,911. However, if, as set out above, those accounts wrongly included the debt asset of £700,000 allegedly owed by Pinnacle Developments, that has the following consequences which would render the alleged dividend unlawful: (1) deducting that sum (or any amount over £429,911) from the available assets, the distributable reserves are extinguished; and

(2) the accounts would not have been properly prepared, nor would they give a true and fair view since they materially misstate the Company's financial position. Manolete contends that this is something the directors knew or ought to have known.

118. Manolete further contends as follows:

(1) There is, in any event, no evidence that the directors declared or approved the dividend by reference to, or even considering, the relevant accounts or financial position of the Company. Jawed's explanation during interviews was that a decision was made on the basis of a rough and ready estimate of turnover and whether they considered the company was "doing alright", although he had earlier suggested that the dividends declared just tidied up amounts withdrawn from the Company during the year.

(2) The latter approach is supported by what the Company's former accountant told the liquidators. Mr Crowley explained that the directors did not seek or take advice from him when deciding what dividends to declare. He said that he was simply told to include a figure to cover the drawings made by the directors from the Company which was then inserted into the accounts when they were prepared. He also said that board minutes referring to dividend payments were retrospectively created at the time of finalising the accounts, suggesting there was no such meeting or resolution.

(3) It therefore appears that there was no recognisable attempt to follow the statutory process for the declaration of dividends at all, and it is impossible to see how the directors complied with Part 23 of the CA. As was said by Sedley LJ in *First Global Media Group v Larkin* [2003] EWCA Civ 1765 at [38]: "… these payments were not dividends. They derived from no recognisable statutory procedure for the declaration either of final or of interim dividends".

(4) Even if the dividends can be said to have been declared in accordance with Part 23 of the CA, the directors knew or ought to have known of the material irregularities in the accounts and/or that the Company's financial position was materially different to the position recorded in the accounts at the time the dividends were (actually) declared. In these circumstances, even if strictly a dividend could lawfully be declared under the statute, it was nonetheless less contrary to the best interests of the Company to declare such dividends or pay them, and thus deplete its assets.

119. Manolete therefore seeks orders for the repayment of the dividends, or for equitable compensation in relation to their payment, on the following grounds: (i) the breach of duty of each of the directors; (ii) on the basis that the directors are recipients under section 847 of the CA; (iii) on the basis of the directors' unconscionable receipt of the

Company's property for which they are liable to account in equity in a sum equal to the value of the distribution.

120. I consider that Manolete is entitled to the relief it seeks, on each of the above grounds.

Payments to Third Parties

121. Manolete also claims relief in reliance on further payments that were made to the following third parties, all of whom were related or closely connected to the directors. So far as concerns the monies that were received by Mariam, relief is claimed by Manolete (on various bases) not only against the directors but also against her.

Gulalai Rahmany

122. Gulalai Rahmany is the sister of Jawed, Basser and Fahim, and was originally a dental hygienist. She lived in the USA, and was not an employee of the Company. Between January 2012 and October 2016, the total sum of US$381,000 was paid to Ms Rahmany. The directors' case in justification of these payments is that she worked as a Regional Business Consultant for the Company in the USA; and they have also been suggested she worked as a 'mystery shopper' to do market testing.

123. Manolete contends that this case is not supported by any independent evidence. No consultancy agreement exists, and nor is there any reliable evidence which corroborates the position that Ms Rahmany carried out work, let alone work of this value, for the Company. The Company's own schedule of employees and consultants does not include her. The invoices produced by her in response to the liquidators' enquiries give no details at all, and only account for US$64,000 of the payments. Moreover, the directors have not led any evidence seeking to justify these payments.

124. In light of these considerations and the pattern of the directors causing or permitting payments to themselves or family members without there being any benefit to the Company or its business in doing so, Manolete invited me to conclude that these were payments for Ms Rahmany's personal benefit only and not for a proper purpose or in the best interests of the Company. In the above circumstances, I make that finding.

Farid Amin

125. Farid Amin is the directors' cousin. He was paid $129,100 between November 2014 and August 2015. The directors have accepted that £12,233.78 was paid by mistake to him and that those monies were never recovered. It is their case that the remainder of the monies paid were informal and unrecorded loans to assist Mr Amin in releasing a family property in Afghanistan. They accept that they have lost touch with Mr Amin and cannot recover the monies from him. They admit these payments were not made in the best interests of the Company, but were made for Mr Amin's personal benefit

(see Defence, §65). Manolete does not necessarily accept that account in its entirety, but relies on the fact that on the directors' own case the payments were improper.

126. Although the directors contend that these sums ought to have been accounted for in the directors' loan account and paid down, Manolete has been unable to identify debts on the directors' loan account (noting that adequate financial records appear to have been lacking, especially after March 2015) which clearly correspond to such payments, save only Manolete identified a document in disclosure which suggests that $110,000 of the sums paid to Mr Amin had been taken into consideration in this account. Accordingly, it only pursued this claim to the value of the remainder, namely $19,100.

127. Manolete contends:

    (1) These payments were clearly not for the benefit of the Company and ought not to have been made from its funds.

    (2) They were also made negligently or recklessly as they were made either in error (as to £12,233.78) or without any loan agreement or terms as to repayment, without security, and where on the facts there was a very high risk of default.

    (3) Absent proper evidence that these payments were adequately accounted for, the directors ought to be ordered to repay their value.

128. I accept those submissions of Manolete.

CJ Rabheru

129. Mr Rabheru was a shareholder and/or officer of GEM Global Ventures, who between October 2012 and March 2014 was paid £75,000 for 'consultancy' services allegedly relating to the Company's export strategies.

130. At one time Manolete made claims for relief in relation to these payments. During the course of the trial, however, Manolete elected not to pursue these claims.

Anna

131. Anna is (or was) the wife of Basser. She was a full-time employee of the Company, for which she was paid a salary, originally £15,000 p.a., but reduced in 2014-2016 to £10,000 p.a. In spite of being a full-time salaried employee, however, between 19 January 2015 and 18 January 2017, Anna received 74 additional ad-hoc payments outside payroll totalling £76,712 (i.e. over 7 years' worth of salary payments).

132. In relation to these 74 payments, Anna has provided copies of seven invoices totalling £12,533.32, six of which are for 'consultancy fees' of varying amounts, and one of which (dated 17 November 2016) is for an annual bonus of £4,000.

133. The Defendants' case is that Anna was paid a mix of salary and consultancy fees for the work that she carried out for the Company.

134. In response to that case, Manolete relied on the following points:

    (1) No details of the work carried out by Anna which justified these significant further payments have been provided, and no evidence has been led on it.

    (2) The invoices provided by Anna for some of the payments provide no information whatsoever, save that one invoice identified an hourly rate of £91.66, charged for 20 hours. No explanation has been given as to how this rate was reached.

    (3) As an employee with a salary, even if a modest one, there was no basis for Anna to be paid additional sums for consultancy services. If an increase in salary had been warranted it ought to have been paid through payroll.

    (4) It is unclear why Anna would have invoiced for an annual bonus (which, again, ought to have been paid through payroll). There is no evidence of a board decision to approve a bonus, and it was paid just one day after a similar sum of £4,000 was also paid to Mariam.

    (5) Even leaving aside the invoiced sums, there are still £76,712-£12,533.32 = £64,178.68 of unexplained payments.

135. In the result, during the course of the trial Manolete decided not to pursue these claims.

136. I consider that decision was sensible. In particular, while recognising the force of Manolete's arguments, a finding that there was no entitlement to the sums which formed the subject of invoices would or might appear tantamount to holding that there was concerted dishonesty in concocting documents to support the payment of sums in respect of which it was known that no entitlement to payment existed. I would have been reluctant to make such a finding when the proceedings against Anna have been stayed, such that she could not be expected to participate in the trial to defend her position, and in circumstances where success under this head of claim might well make no practical difference to Manolete, on the basis that the Defendants probably have insufficient assets to meet all the other claims on which Manolete has succeeded.

Richard Slade & Co

137. Richard Slade & Co (i.e. Richard Slade prior to its incorporation) ("RSC") was the solicitor to the Company, as well as to the directors personally and to other entities connected to them. Between February 2012 and December 2014, payments totalling £423,109.99 were made to RSC by the Company, although during this period the Company was only invoiced for legal fees totalling £35,791.20.

138. The remaining payments, totalling £387,281.79, were used to discharge invoices for legal services rendered to the directors personally, as well as to ATISL and Atlas Choice Corporation, a US entity owned by one or more of the directors. RSC wrote to the liquidators of the Company on 27 June 2018 expressly acknowledging that funds of the Company were used to pay invoices of third parties, before subsequently providing the names of those parties. The Defence (at §70(2)) pleads "It was not unusual or improper for legal services rendered to [the directors] or their businesses to be paid by the Company, nor, in the premises, were the payments of £387,281.79 contrary to its interests", and does not admit that the payments made by the Company have not been properly accounted for or settled.

139. In answer to that pleaded case, Manolete contends:

    (1) *Prima facie*, a payment that is made to benefit an entity or person other than the Company is contrary to its interests and not for a proper purpose.

    (2) Further, there is both (i) a lack of any evidence concerning any discussions of these payments or why they ought to be made by the Company; and (ii) other documentary evidence which strongly suggests Jawed (at least) was seeking to have invoices from RSC concerning personal matters paid by the Company so that it could reclaim (and thus he could avoid paying) VAT on those services.

    (3) No evidence has been led that these payments have somehow been accounted for. Like other payments made directly or indirectly for the benefit of the directors, they cannot be distributions, and there is no suggestion they are or have been treated as loans. If they were, they would have to be repaid.

    (4) If the Company was insolvent or bordering on insolvency, there is even less basis on which the directors might contend that procuring the Company to pay third party legal fees was not improper.

    (5) Accordingly, these payments were not made for a proper purpose or in the best interests of the Company, and were made in breach of duty by the directors.

140. I accept those submissions of Manolete.

Mariam

141. Between 17 January 2012 and 21 March 2016, £58,100 in total was paid to Mariam. The live Defendants' case is that this comprised payments for consultancy services that she provided to the Company. Specifically, Mariam's case is that she acted as a social media consultant and provided administrative services to the Company.

142. A further sum of £250,000 (as already mentioned above) was paid to Mariam on 21 March 2016. The live Defendants' case with regard to this sum is, as set out above, that (i) it comprised a bonus for Jawed, and (ii) it was received by Mariam purely ministerially on behalf of Jawed and was paid away by her at his direction.

143. Manolete's case in opening with regard to the sums totalling £58,100 was as follows:

    (1) When asked about the services provided by Mariam during interviews, Jawed indicated that whilst Mariam did look at social media, she generally assisted him when required, suggesting she was "kind of – maybe a PA" (a statement with which Basser agreed) and that she performed tasks such as painting and cleaning when needed. On another occasion Jawed suggested that Mariam "only was doing odd – from home as you know that and then she was doing some cleaning jobs and some painting jobs".

    (2) There is (and this does not appears to be disputed by the live Defendants) no evidence of any contract (whether or employment or consultancy) or even agreement in this respect.

    (3) Although a statement was made to the liquidators that such invoices were within the Company's books and records, no invoices have ever been discovered or produced, and there is no record of any work being done, or of any work product.

    (4) Further, Mariam does not appear on a list of staff or consultants to the Company.

    (5) The amounts of the payments, what they were for (specifically), and their frequency and dates remain unexplained.

    (6) Not only were these payments made improperly and in breach of duty but also, turning to the claim against Mariam, the circumstances are such as to render her retention of these monies unconscionable such that she is liable to repay them.

144. Manolete's case in opening with regard to the payment of £250,000 was as follows:

    (1) As set out above, (a) this was not a bonus properly so called, and (b) in any event, it is a sum that ought not to have been paid by the Company.

(2) It is notable that when asked why it was paid to Mariam, Jawed did not wish to explain the position and refuted that the payment had anything to do with the purchase of a property by him and Mariam.

(3) In fact, however, that is precisely what the £250,000 was used for. On the same day as Mariam received that sum, she transferred £245,139 to Ward Gethin Archer (solicitors), and it is clear that these funds formed part of her available balance which enabled her to provide a deposit for a property purchase, believed to be 172 Holland Gardens, Brentford (jointly owned by her and Jawed).

(4) That is not ministerial receipt. In any event, the money was intended to be used and was used by Mariam not simply for Jawed's benefit but for their joint benefit. Accordingly, even if Mariam had received it originally for Jawed, plainly she was an immediate subsequent recipient in her own right.

(5) The proper characterisation of this payment is that it was a payment for the joint personal benefit of both Jawed and Mariam.

(6) Further, it was made at a time when the Company was plainly insolvent, and must therefore amount to a payment in breach of fiduciary duty (whether or not it was, in fact, a properly authorised bonus, which Manolete refutes).

145. So far as concerns the claim against Mariam, Manolete's case in opening was that the payment of £250,000 was not only made improperly and in breach of duty but also the circumstances are such as to render her retention of this sum unconscionable such that she is liable to repay the same. In particular, Mr Miall submitted that it is apparent from her evidence and disclosure that Mariam "continues to retain the benefit of that payment, despite becoming aware of the circumstances in which it was paid to her. It is difficult to see how her continuing retention of the benefit is not unconscionable".

146. On behalf of Mariam, in his Skeleton Argument for trial, Mr Ahmed summarised her pleaded case (as set out in §86 of the Defence) as follows: (a) knowledge at the point of receipt is denied to make it unconscionable; (b) Mariam was engaged in a bona fide engagement with the Company to supply commercial services; (c) £40,600 was received prior to 15 June 2014, therefore a claim for this is time barred; (d) £250,000 was in fact a bonus; and (e) the claim for unconscionable receipt must fail.

147. With regard to the parties' pleaded cases, Mr Ahmed further submitted that Manolete's case that that there had been deliberate concealment by Mariam of facts relevant to the Company's right of action against her (a) was inadequately pleaded and (b) in any event, first surfaced in the Reply, which was served approximately 2.5 years after the Defence, and was unsupported by any material sufficient to make good such a case.

148. Turning to the substance of Manolete's claim for £58,100, Mr Ahmed made three preliminary points (i) although the Company went into difficulties in 2017, the Claim was not issued until 2020; (ii) Manolete had and continues to have access to all the accounts "and so forth"; and (iii) the evidence of Mr Manning adds very little, as he was not present in 2012-2015; all he can do is point to payments made; the actual fact of work done/services rendered is not something Mr Manning is able to assist with.

149. Mr Ahmed next relied on the following contents of Mariam's witness statement dated 6 November 2023:

> "6. The Company was well-structured, with its finances professionally managed by an accounts department and guided by their long-standing financial advisor, Fintan Crowley of Crowley Young. The absence of any wrongdoing on my part is evident considering these circumstances. I played no role in the management of the company; my role was limited to the extent of supplying services.
>
> 7. It is concerning that my inclusion in this claim seems to be primarily due to my familial relationship with the First Defendant. I firmly believe that this inclusion is unjust and improper. The Claimant has unfairly and improperly joined me in these proceedings, and I believe this has only been done to apply pressure on me and the remaining Defendants. I am married to the First Defendant, Mohammad Jawed Karim, who is my husband. It is crucial to highlight that personal relationships should not automatically invalidate the legitimate services I provided to the company in a professional capacity. The claim should be assessed based on the facts and merits of the case, rather than personal associations.
>
> 8. In October 2017, after the collapse of the family business, I returned to Chanel, where my role is as a Team Manager. We needed to support our living expenses, especially given that the First Defendant had no employment since the collapse of the business to contribute to ongoing expenses.
>
> 9. Leveraging my previous experience and qualifications, my gross earnings for the year ending April 2023 were £52,596.18. I anticipate a further increase to over £60,000 in the next year.
>
> <u>Regarding Alleged Payments of the £58,100</u>
>
> 13. With regard to the Claimant's first allegation, I concede that from January 17, 2012 to April 24, 2015, I received payments from the Company totalling £58,100, equivalent to an annual sum of £14,750, in exchange for bona fide consultancy services rendered to the Company. These payments were made in return for legitimate consultancy services I provided, forming a valid and professional engagement. For further details pertaining to my role within the company [16/1025-1082/5397].
>
> 14. I want to make it absolutely clear that I strongly deny any insinuation that I failed to provide services that matched the payments I received. The services I rendered were entirely legitimate, and the company processed my invoices

through its accounting system, methodically recording each invoice number. I diligently submitted these invoices to the company. However, due to the passage of time, I no longer have my copy, but they unquestionably show that I was fairly compensated for my work. This documentary evidence leaves no room for doubt, as it underscores the legitimacy of my services with the company, all in strict accordance with established industry standard.

15. I understand the Company's accounting ledger substantiates the fact that payments were made in accordance with the invoices I submitted, as evidenced in [15/953-11024/5029]. This was paid because I have tendered services to the company.

16. It is important to highlight that there was no written contract governing my role as a freelance consultant with the Company. Our association was predominantly familial, typical of family owned businesses, characterised by trust and mutual respect, which obviated the necessity for written contracts. Therefore, the absence of a written contract should not be interpreted as a lapse in the provision of my services. I understand that oral contracts are equally enforceable.

17. Additionally, in response to a questionnaire received from the administrator, namely Deloitte, I accurately stated that the invoices were held by the Company. This not only affirms my claims of providing legitimate services but also indicates the Company's awareness and acknowledgment of the services rendered, as evidenced in [16/1025-1082/5119]. I sent invoices that the company checked, approved, and paid for. This was done by their accounting team.

18. Given that the First, Second, and Third Defendants were the sole owners of the Company during the relevant period, their interests were closely aligned with those of the Company."

Mr Ahmed submitted:

(1) The important points made by Mariam include the following: (a) she has an educational background; (b) she was able to obtain employment for an attractive salary following her departure from the Company; (c) she plainly had the expertise and the skill set and, therefore, the ability to offer services to the Company; and (d) the work done and the services rendered by her were invoiced and were paid for – and the payments were set out in the company ledger.

(2) The extent of the remuneration was consistent with and proportionate to the services being offered by Mariam. The sums are neither large nor extraordinary.

(3) Manolete has access to all the financial documents, including invoices. Mariam would be paid upon raising an invoice. The process of invoices being rendered and then upon receipt of those invoices sums being paid is not in dispute. Manolete has in its possession the invoices raised by Mariam. No issue is taken with those invoices *per se*. Manolete has known the nature of the services rendered by Mariam, as she sets it out in her questionnaire and in her Defence.

(4) Manolete is unable to establish (a) duplication of work (i.e. another employee carrying out the same tasks) and (b) why a social media consultant would not be required for the Company which was operating worldwide and was visible over social media.

(5) Mariam relies upon her witness statement and the evidence of Ms Massumi. It is plain that Mariam was present at the 'office' occasionally and at home was carrying out work for the benefit of the Company. She left in March/April 2015, which was years prior to the liquidation of the Company. In fact, the accounts presented for the years up to that ending 2015 show that turnover had increased substantially, which was indicative of work being undertaken to increase sales. The increase in sales would require more labour, investment and work.

(6) In sum, the monies received by Mariam were legitimately earned for services rendered and work done. There was a commercial benefit to the Company in that its sales increased, and input by Mariam was of value to the Company. It cannot be said that the payments were unconscionable.

150. With regard to the claim for £250,000, Mr Ahmed submitted that this claim was "entirely misconceived". Whether or not this sum represented a bonus or not was a matter between Manolete and Jawed, and had no bearing on Mariam for the following reasons:

(1) In an email dated 18 March 2016, Jawed wrote to Mariam "please go to the bank tomorrow morning and transfer…", and, although the money was paid into Mariam's bank account, in accordance with those instructions from Jawed it was immediately transferred out, and she was no longer in receipt of those monies, and she was not the beneficiary of them.

(2) As Mariam had in her personal bank account sufficient monies, there was no reliance on the £250,000 to complete the purchase of property. The conveyance had been set up prior to transfer of the £250,000, and Mariam and Jawed had a accumulated savings of £300,000 held in various accounts, which had been ear marked as a deposit for the purchase.

(3) In the events which happened, the £250,000 was used for the deposit instead of the £300,000 that was held in the joint accounts and "In consideration of the £250,000 [Mariam] consented to releasing £300,000 to [Jawed]. There was no benefit to [Mariam] since the money despite being paid into [her] account was returned by [her] to [Jawed] from the saving that were held prior".

(4) "It therefore follows there was no benefit to [Mariam], it was not within her knowledge and therefore, the issue is between [Manolete] and [Jawed] to pursue him for [the] money".

151. Mr Ahmed next relied on the following contents of Mariam's witness statement dated 6 November 2023:

> "Regarding Alleged Payments of the £250,000
>
> 26. According to my defence, I disputed the initial statement in the Claimant's allegation in paragraph 85 of their claim. As set out in paragraph 62.1 of the Particulars of Claim and acknowledged in paragraph 52 of the First Defendant's defence, the £250,000 payment on March 21, 2016, was indeed a bonus disbursed to the First Defendant, although it was deposited into my bank account [11/611-688/3596].
>
> 27. The Claimant further alleges that on March 21, 2016, the Company paid me £250,000, which they claim was a gratuitous payment and not in the best interests of the Company or its creditors.
>
> 28. I deny these allegations and would like to highlight that the £250,000 payment was indeed a bonus intended for the First Defendant. The Claimant's decision to include me in this claim, solely based on our family relationship, appears improper and serves to exaggerate their claim while unfairly pressuring all Defendants.
>
> 29. I firmly deny any wrongdoing in connection with the £250,000 payment. The Claimant has failed to prove that this payment was made to me in breach of any legal obligations or without a legitimate reason.
>
> 30. The funds transferred to me by the Company were done so at the direction of the First, Second, and Third Defendants, without my full knowledge or consent.
>
> 31. On Friday, the 18th of March, I received an email from the First Defendant advising me to go to the bank in the morning and transfer the money to Ward Gethin Solicitors. I assured him I would do so and requested that he confirm when the funds were in my account and the amount. On Monday, the 21st of March, I visited the bank as I had been informed that the funds were available in my account and was advised to arrange a transfer of £245,139 by way of text, which I promptly followed that instruction. Additionally, on the 22nd of March, I received further instructions to transfer an additional sum of £347 to the same solicitors, which I promptly acted upon, as exhibited in[11/611-688/3594].
>
> 32. Furthermore, I initially believed these funds were from the First Defendant's personal account. Upon inquiry, it became clear that this was, in fact, the First Defendant's bonus payment from the Company.

33. The funds transferred to me by the Company at the direction of the First, Second, and Third Defendants were provided with the authority to be used as they were and were received with the understanding that they would be accounted for in the manner described.

34. In essence, my position underscores that I did not initiate the payment but acted in accordance with the instructions received from the First Defendant after the payment transfer without my knowledge. This indicates that my involvement in the transaction was largely passive, as I executed the transfer as directed.

35. As mentioned earlier, the sum I received was transferred per Jawed Karim's instructions to a third party. I have no rightful claim to this money. Any dispute the Claimant has with Jawed Karim remains unresolved. There is no valid reason for my involvement in these proceedings. Furthermore, there is no evidence to suggest that the Claimant can establish that I ever had an interest in, or that the money was paid to me for my benefit. As previously stated, this is a matter for the Claimant to resolve with Jawed Karim, not involving me.

36. [I would] like to highlight that the administrator was also informed by the First Defendant regarding the receipt of a £250,000 bonus. This bonus coincided with a joint property purchase by the First and Fourth Defendants, and our combined personal funds exceeded £550,000. Of this amount, £245,000 was earmarked for the property acquisition. Importantly, the £250,000 bonus was not retained for my personal benefit; rather, it was transferred to a third party at the direction of the First Defendant. I direct the court's attention to my bank statement and the First Defendant's bank statement, both displaying a combined balance of £361,951 prior to the £250,000 transfer, as evidenced in [11/1611-688/3600]. (emphasis added)

37. The payment did not cause any financial hardship to the Company, as evidenced by the substantial liquid cash in the Company's multiple bank accounts during the relevant period."

152. Finally, picking up some of the points from that evidence, Mr Ahmed submitted that the sum of £250,000 was a genuine bonus, further or alternatively that Mariam had no reason to doubt that it was a genuine bonus. In particular:

(1) Mariam had left the Company as a consultant months before it was paid (in March/April 2015), she had no insight into the Company's financial affairs, and she had no reason to suppose that all the hard work that Jawed had put in and the huge sacrifice that he had made with regard to his family life would not be rewarded with a bonus.

(2) Moreover, if this was not a genuine bonus, why was it used to pay the deposit on the purchase of the property? If it was not genuinely earned, Jawed could have concealed the monies by directing them to another destination and not to

his family home. This treatment of the money supports the argument that the bonus was legitimate and also that Mariam had no reason to suppose otherwise.

(3) The email from Jawed to Mr Crowley regarding the bonus and the retrospective creation of the board minutes is a red herring so far as Mariam is concerned. It is her knowledge that is important. In any event, it does not mean that Jawed was not entitled to a bonus in 2016. Matters of formality were beyond Mariam's knowledge and would not invalidate the fact that a bonus was due. The measure in her mind was the sacrifice of family life and Jawed's absence from the family.

153. When Mariam was called as a witness, and after she had confirmed that the contents of both her trial and her interlocutory witness statements were correct, Mr Ahmed sought to ask her some questions by way of clarification of that evidence, the first of which was "Now, just confirm, please, from 2012 up until 2015, March/April 2015, what work did you do in terms of earned permanent employment or earned work?"

154. I intervened to stop this line of questioning, on the basis that the ground should have been covered, and indeed had been covered, albeit not with the degree of detail that Mr Ahmed may perhaps have hoped to elicit, in Mariam's witness statement for trial.

155. One of the very early questions that Mr Miall asked Mariam in cross-examination was as follows: "So it's right, then, that you were not involved in deciding what payments the company should make or for what reason; is that also right?"

156. To that question Mariam gave the following answer (which I suspect comprised in substance the answer that she wanted the opportunity to give to the first question that Mr Ahmed sought to ask by way of clarification, and which I stopped him asking):

> "As far as I know, I was working for the company, and I was giving my invoices, and then I can briefly talk about my roles and then what I was doing. And I was looking after monitoring the review centre, which was very important that they didn't have anyone to review the centre. There was hundreds of reviews was coming up, it was bad ones and good ones, and from my knowledge that I was looking into, concentrating in the bad reviews and giving feedback to Joe.
> I found that -- during that time I was studying my business management degree, and then I found that that will help the business, it was a family business, that will help, my skills putting it, and then trying to make the company work better. And my contribution was reading the reviews, and making notes of the feedbacks and passing it to Joe, and also looking at some of the positive reviews as well, and giving it to Joe to reward the staff of doing well. And because these days I remember that reviews very important, that if somebody's trying to purchase something or do something, the first thing they were going to look at the company's reviews to get feedback, how it is and everything. And if -- I'm recalling that it was many of reviews, negative ones whereas it was consist of frustrations of the clients waiting for hours in the queue and how that could be improved for the next time; and also the wrong vehicle was given to the client and the frustrations. All of this

that I was spending time to read, understand the review and give my feedback to Joe. And then I thought that was very beneficial in terms of the service, customer service of the company.

And beside that I was doing some administration work for Joe, because he was -- he didn't have any PA. So he was coming home with a lot of letters that he didn't have time to open them, and I was trying to organise these letters and help him to put it in the file so he could then go through. I was dealing with that as well.

And then I was social media, it was the Facebook and Twitter. And that was -- social media is like, at that time in 2012, it was start getting really big in today's -- in the world. And then I was monitoring Facebook page, reading the reviews, and then again, same thing, making notes and then giving the feedback to Joe what needs to be done, the errors, everything. So I was spending quite time of the -- that side of the business part because nobody was looking into it.

And again, because I was studying business and then -- and that -- during that time that I've gained from my studies that it is very important for the image of the business to look into this media side and all that.

So -- and then apart from that, I was one of the key holders, and sometimes I had to open and close the office. And that was when Joe and his brothers, they were all going in the meeting, and they were not able to open the office, I was making sure that I arrive on time, open the office, and to make sure that the operation started on time and everybody -- all the staff is inside and they are starting the job on time.

And beside that as well I've been taking part in housekeeping, and that's something that when the housekeeper was on holiday or call in sick, I mean, it was a job I was -- I understand that I was wife of the first defendant, Joe, but it didn't mean I did everything. Even I did cleaning, taking part, going to the office, big office, taking the rubbish out from the bin, and hoovering the floor and cleaning while the housekeeper was away, call in sick or on holiday.

And then I also participated in the painting as well in the office, and then I spent all day painting the office and helping out with everything, so I have – I have taken a lot of part in that sort of thing."

157. In his closing arguments, Mr Ahmed submitted that Mariam was a credible witness who had given candid evidence and made appropriate concessions where called for. Mr Miall submitted that her evidence disclosed that she had points that she wanted to make that she had thought about and prepared, particularly about the scope and content of the work that she had done, but that this evidence had expanded over time and was exaggerated by the time of the trial, and that when the questions got difficult she did not respond or answered a different question or said that she did not recall or otherwise dissembled. In my judgment, Mr Miall's submissions concerning Mariam are to be preferred, and the first aspect of them is forcefully illustrated by the above exchange.

158. With regard to the payments totalling £58,100, the main thrust of Mariam's evidence was that she had always wanted to embark on tertiary education, was proud that she had done so, was keen to use her skills to make a contribution to the Company (and thus her husband's livelihood and the welfare of the family), and took pride in the work that she had done to that end, as a result of which she had fully earned all that money.

159. Mariam explained that she was originally from Afghanistan, but had left there at the age of 10. She then lived and went to school in Russia for two years before coming to

England, and then had to start at school in England not speaking English to begin with. She was unable to progress to tertiary education immediately, and had started a family, but later, when her children were a little older, she saw the opportunity to realise her dream of further study, and had enrolled part time for a degree in business studies at the University of West London, graduating in or about April 2013. The modules she took included business management, marketing, accounting and perhaps companies.

160. Mariam was unable to produce any documents in support of her case. This included any record of the basis upon which she charged, the work that she had done, or communications with Jawed or anyone else on behalf of the Company concerning her invoicing or her work product (all of which she said was achieved in person at home, hence obviating the need for emails or other written communication). Furthermore, it seems that Mariam never filed any tax returns disclosing these payments, which she plainly ought to have done if they represented earnings. I did not find the suggestion that in some way she relied on others to do this at all convincing. Mr Miall understandably placed reliance on these matters in inviting me to reject her account.

161. In addition, he pointed out that the round sums that Mariam was paid were not consistent with genuine consultancy fees, which would be likely to vary somewhat in amount, and were more consistent with Jawed simply making regular payments to her.

162. Nevertheless, when appraising Mariam's evidence and her credibility, I had well in mind not only that she was plainly intelligent and well educated but also that there was, it seemed to me, a risk that in attempting to assess her reliability I might fail to take account of phenomena which were a product of her complicated background which I might not be familiar with or accord appropriate significance, to say nothing of family dynamics which I could not easily assess in the absence of Jawed. For these reasons, for a while I was in two minds about whether to accept her evidence or not.

163. However, those uncertainties were resolved adversely to Mariam when she was asked in cross-examination about the answers that she had given in the questionnaire which she completed for the administrators of the Company on 10 August 2017:

    (1) In questions 5(b), (c) and (d), Mariam was asked to provide an explanation for three payments each in the sum of £2,700 that the investigation of the administrators had identified as having been made to her by the Company on 20 February 2015, 18 March 2015, and 24 April 2015. In relation to each of these payments, Mariam answered "Consultancy payment".

    (2) Then, in answer to question 7 ("Please outline any further payments you have received from the company, and provide copies of all invoices/document support (sic) (i.e. contracts or service agreements) to support these payments made to you from the Company") Mariam answered "I cannot recall any other payments at this time. If you are aware of any other payments which you think may have been made to me, let me know and I will check my records".

(3) When considering that answer, it is necessary to bear in mind that Mariam accepted (inevitably) that £50,000 is a lot of money; that she is an intelligent and educated woman; that, according to her case, she had worked hard for many months (between January 2012 and April 2015) doing work for the Company which was of significant value to it and that she was proud to have carried out; and she also accepted in cross-examination that she would not have forgotten the invoices that she had rendered and the payments that she had received.

(4) Against that background, I find it impossible to believe that Mariam could not recall very clearly when she was asked about the matter in August 2017 that she had received considerably more from the Company than three payments each in the sum of £2,700 (adding up, as it happens, to £8,100, and so taking no account of exactly £50,000 of further monies that she had been paid by the Company).

(5) Mr Ahmed submitted that the answer that Mariam gave to question 7 was an honest one because it was qualified by the words "I cannot recall … at this time". However, that does not meet the point that, as it seems to me, she must, in fact, have remembered very well that she had received many other payments.

(6) The only real qualification, to my mind, lay in the caveat that if the administrators became aware of any further payments, then Mariam might be compelled to admit them. The reference that Mariam made to "checking her records" falls to be compared to her case before me that she has no such records.

(7) Mr Ahmed further submitted that, by the time she answered this questionnaire, Mariam's life had moved on – she had long ceased working for the Company, and had assumed financial responsibility for the family, with attendant pressures on her – but that, again, does not explain how she could have forgotten that she had worked for more than three years, doing (on her case) everything that she says she did to warrant being paid £58,100, and receiving that sum for her work.

(8) For these reasons and in these circumstances, I consider that the only plausible explanation as to why Mariam answered as she did is that she hoped to conceal from the administrators that any payments were made to her by the Company other than those that they already knew about; that she would have had no reason to conceal those matters if (as she maintained in evidence) she had believed that she was truly entitled to receive those payments; and that the reason why she hoped to conceal these matters was that (contrary to her evidence before me) she knew that she had no entitlement to the payments that she received. I so find.

164. Before leaving the topic of Manolete's claim for £58,100, it is right to mention that Mariam's case was supported by the evidence of her niece, Ms Massumi, who worked for both ATISL and the Company, and who now works in occupational health. The thrust of Ms Massumi's evidence was that she had witnessed Mariam doing work in her flat, and that when questioned by her Mariam had explained that she was working for the Company doing the type of tasks that Mariam described in her own evidence.

Ms Massumi was cross-examined about a reference to a witness statement of Jawed the contents of which she had verified as true but which in fact she admitted she had never seen, and about the language and indeed differences of language used in her witness statement, but she maintained that she had prepared the witness statement herself and that it was true. Ms Massumi was not involved in the management of the Company and could not say anything about the basis on which Mariam had carried out the work to which she had made reference, or about Mariam's entitlement to payment.

165. Although I consider that Ms Massumi was an honest witness, I am unable to place any significant reliance on her evidence. This is partly because of its rather vague and general nature, perhaps unsurprisingly as her witness statement is dated 17 March 2024 and she is recalling events that occurred prior to and up to 2015 and which she had no reason to focus on in the intervening period, and partly because of the points put to her in cross-examination. Further, in paragraph 3 of her witness statement she says: "In addition, I do recall that they [i.e. Jawed and Mariam] bought a new flat sometime in 2016 and she was quite exciting (sic) when she moved there, and I do recall she mention[ed] that this was a gift from [Jawed] and remember that I made comment, you so lucky". It has never been suggested by anyone else that the flat in question was a gift from Jawed to Mariam, and it is unclear from where Ms Massumi got the idea that it was a gift. The inaccuracy of this recollection casts doubt on her evidence overall.

166. In any event, there is no real tension between Ms Massumi's evidence and Manolete's case. Mr Miall made clear that he was not suggesting that Mariam did not do anything at all along the lines that she suggested in evidence, but rather that her evidence as to what she did was greatly exaggerated, and that (in the absence of any contract, or any clear basis of remuneration, and so forth) there was no or no sufficient nexus between whatever she may have done and the claim to have earned the sums that she was paid by the Company to make out an entitlement to £58,100 or any quantifiable part of it.

167. I therefore rule in relation to the payment of £58,100 to Mariam, both (i) that payment of those monies was made improperly and in breach of duty by the directors and (ii) that her retention of this sum is unconscionable and she is liable to repay the same.

168. Turning next to the payment of £250,000, by the conclusion of the trial the focus of Manolete had shifted from a debate about the proper legal characteristics of Mariam's receipt of this sum into her bank account, to considering what became of the money after it was paid into that account, and a claim to trace it into the property in the joint names of Jawed and Mariam at 172, Holland Gardens, London TW8 0AY ("No 172").

169. In this regard, on the last day of the trial Manolete applied for permission to amend the Particulars of Claim to add a claim that (1) on the same day as the sum of £250,000 was transferred into her bank account, Mariam transferred £245,139 of that sum to Ward Gethin Archer (a firm of solicitors) which latter sum was used as a deposit for the purchase of No 172 on or about 30 March 2016, (2) No 172 remains legally and beneficially owned by Jawed and Mariam jointly, and (3) Manolete is entitled to trace

the latter sum into No 172 in circumstances where (a) the sum of £250,000 of which it forms part was paid by the Company to Mariam in breach of fiduciary duty and (b) neither Jawed nor Mariam have given any consideration or value for the receipt of that sum of £250,000 or its benefit. The amendment further seeks orders and declarations that (i) the transfer of £250,000 to Mariam and/or Jawed on 21 March 2016 is set aside and/or void in equity, (ii) Manolete is entitled to trace the sum of £245,139 into No 172, and (iii) they hold No 172 to the extent of that interest on trust for Manolete.

170. Mr Miall submitted that (1) this case raised no new issues of fact and required no additional evidence to that which had already been heard, (2) although it was sought to be introduced late in the day it was essentially based on Mariam's own evidence which had first revealed the destination of the £245,139 as recently as November 2023, and (3) it would be manifestly unjust to deny Manolete the opportunity to vindicate its rights by pursuing a claim to which there was no obvious answer and which, in essence, arose out of the explanation that Mariam had given in defence to its original claim.

171. Mr Ahmed resisted this application, essentially on the following grounds. First, it was very late. Second, Mariam would be denied the opportunity to run an available defence, raising issues of constructive trust or estoppel. Third, the prejudice to Mariam occasioned by allowing the amendment would be greater than the prejudice occasioned to Manolete by refusing it, in particular because he suggested Manolete could issue new proceedings to pursue its tracing claim. Mr Ahmed also suggested that if the Defendants were given more time to think about the matter they might wish to file further evidence, for example concerning discussions between Jawed and Mariam.

172. In the course of hearing these submissions, I indicated that I was minded to grant Manolete permission to amend, but I also allowed Mr Ahmed a further 7 days to take further instructions and to identify any legal proposition or factual scenario that he considered might amount to a defence to the proposed new claim. He did not do so.

173. Having reflected on the matter, I consider it right to grant Manolete permission to amend, essentially for the reasons advanced by Mr Miall. In particular, I do not consider that Manolete can be criticised for failing to advance this new claim before it had sight of Mariam's trial witness statement in November 2023, and I was unable at the time of the hearing and am unable now to see that Mariam suffered any prejudice by the delay between that date and the date of the trial in it advancing that claim.

174. I do not propose to lengthen this judgment further by detailed citation of the decided cases which set out the principles to be applied when considering an application for permission to amend, in particular when it is made as late as this one has been. As I said in *Buckingham Homes Ltd v Rutter* [2019] EWHC 1760 (Ch) at [20]:

> "The principles that apply to contested applications for permission to amend were not in dispute, and are so well known as not to require detailed citation. A helpful summary was provided by Coulson J (as he then was) in *CIP Properties (AIPT) Limited v Galliford Try Infrastructure Limited* [2015]

> EWHC 1345 (TCC) at [19], based on a consideration of a number of recent cases, most of which post-dated the Jackson reforms to the CPR . It is clear from that summary that the determination of such an application is a multi-factorial exercise, in which different considerations will assume different significance in different cases."

175. No doubt further cases have been decided since then in which those principles have been considered, and perhaps restated to some extent using different words. In my opinion, however, nothing of substance has changed since I carried out my analysis in that case. Among the factors to be considered are those identified by Hamblen J (as he then was) in *Brown v InnovatorOne plc* [2011] EWHC 3221 (Comm), namely (1) the history as regards the amendment and the explanation as to why it is being made late; (2) the prejudice which will be caused to the applicant if the amendment is refused; (3) the prejudice which will be caused to the resisting party if the amendment is allowed; and (4) whether the text of the amendment is satisfactory in terms of clarity and particularity. In my judgment, on the facts of the present case, all of those factors, both separately and cumulatively, militate in favour of granting permission to amend.

176. For the avoidance of doubt, I have also paid regard to all the other considerations that are flagged up as relevant or potentially relevant in the decided cases that I referred to in my earlier judgment. Factoring in those considerations points to the same result.

177. Turning to the substance of Manolete's new case against Mariam, this rests on the central propositions that:

    (1) As Mariam gave no consideration for the receipt of the sum of £250,000 that was paid into her bank account and later paid by her to Ward Gethin Archer and subsequently used towards the purchase of No 172, regardless of her state of knowledge at the time of those transactions, she was not at any time a *bona fide* purchaser for value of that sum of £250,000 or any part of it.

    (2) As soon as Mariam was put on notice that the sum of £250,000 was paid out by the Company improperly and in breach of fiduciary duties owed to the Company, and regardless of whether she had such notice from the time when that sum was first paid into her bank account or at any later time (down to and including the determination by the Court that the payment was, indeed, made improperly and in breach of duty), and certainly absent any additional factor such as a change of position by her or any action(s) to her detriment taken by her in reliance on her having an entitlement to the monies or any part of them, she had no defence to a proprietary claim by the Company (and now by Manolete) for the recovery of the money or its traceable product (i.e. here, a partial share in No 172).

178. In my judgment, Mariam has no answer to that claim.

179. So far as consideration is concerned, I consider that it is irrelevant whether Jawed and Mariam could have funded the purchase of No 172 using monies other than the

£250,000 that was wrongfully extracted from the Company. The fact is that, even if they could have done so, they did not do so. They used that £250,000. Further, because they used that £250,000 towards the purchase, they retained £250,000 of other monies that they might have used instead of it, and so they were no worse off by using that £250,000 than they would have been if they had used some other £250,000.

180. Indeed, if and to the extent that they or either of them were now permitted to retain the benefit of the £250,000 that was wrongfully extracted from the Company, they would be better off than they would have been if they had not used it towards the purchase of No 172: they would retain not only (i) the benefit of ownership of No 172 free from any claim by Manolete, but also (ii) the monies that they would otherwise have had to use towards that purchase. At the same time, in those circumstances, Manolete would be unable to vindicate its rights in relation the substantial sum of £250,000 that was misappropriated from the Company. That seems a manifestly unfair and unreasonable result. In my judgment, the equities are all one way, and all in favour of Manolete.

181. In fact, Mariam gave inconsistent evidence concerning her state of knowledge at or around the time that the payment of £250,000 was made into her account. Initially she said "we have savings and then I believe that that was part of the saving that he just asked me to transfer money and then the property, so this is what I assume it was, yes". In answer to a question from me ("So did he refer to the fact it was a bonus before he sent you this email saying that the money was coming in, and then pay it out?") she said: "No, it hasn't been mentioned". Later, in answer to a question from Mr Miall ("You were never actually told it was a bonus payment at the time, were you?") she said: "Yeah, that's ... trying to think. Probably, I mean, as I mentioned, that I -- he did mention to me a bonus, so I don't remember the exact time, but yes, I remember recalling saying "bonus", yes". If, as I consider is probable, the entire idea of seeking to explain this payment as a "bonus" only arose many months later (see [111] above), Jawed cannot have told Mariam that the payment of £250,000 represented a bonus at this time. Conversely, if that was what Jawed told her, then, viewed objectively, I consider that ought to have put her on inquiry, as there was no obvious explanation as to why he should want a bonus payment (earned by him) paid into Mariam's account, particularly where (i) he had, and they jointly had, other accounts into which it could have been paid and (ii) it was apparently intended to be used to fund the purchase of No 172, which they had previously planned to fund using monies from those other accounts. Having seen her give evidence, I consider it unlikely that Mariam would have done what Jawed said unquestioningly. If necessary I would find, on balance, that she had sufficient notice of the trust to which the £250,000 was subject at the time that money was paid into her account to mean that she was not a *bona fide* purchaser without notice even at that time. However, my ability to make a dependable assessment of these matters was hampered because I was deprived of the opportunity to look at the other half of the marital equation as Jawed did not give evidence. Further, whether or not Mariam's receipt was "ministerial" was not fully explored during the trial.

182. As to the suggestion that Mariam provided consideration by giving up rights to other monies that she owned in exchange for allowing the £250,000 "bonus" payment to be used towards the purchase of No 172, this is simply not made out on the evidence. First, if my understanding is correct, very little of the other monies available to her and Jawed were in accounts in her name or even in their joint names: most were in Jawed's name, or possibly the name of one of his brothers. So she had little, if anything, available to give up. Second, there is no suggestion of this in her witness statement. Third, it is contrary to her oral evidence. The following exchanges are in point:

In cross-examination:

Q. Right. Now, you accept, Mrs Karim, I think, that the money that was actually used to fund the deposit came from the £250,000 from the company. You saw it on the bank statement; it comes in and goes straight out again, right?
A. Yes.
Q. So this money in these accounts was never used to pay for the property, correct?
A. Yes, as I can see, yes.
Q. Fine. And there is no suggestion or evidence anywhere that there has ever been any sort of clawback, or a return of funds or anything like that, is there?
A. No, but these are the things that you need to discuss with my husband.

In re-examination:

Q. Okay. We know, and I think you accept, that the savings that were available to you and available to your husband did not go towards the deposit to purchase the property, we know that.
A. Yes.
Q. We've seen the documents. So what I would like to know from you is this: what happened to those savings?
A. I don't know.

183. Turning to the second principal limb of Manolete's case, I consider that this is plainly right as a matter of law. It is sufficient to refer to *Independent Trustee Service Ltd v GP Noble Trustee Ltd* [2013] Ch 91. In that case, £52m was wrongly extracted from a number of pension funds. Mr Morris masterminded the scheme(s) by which that extraction took place, and personally ended up with a substantial part of those funds. Mr Morris and his wife got divorced, and she obtained an order by consent against him for lump sum and periodical payments. He paid £1.48m to her to satisfy his liability under the consent order, which, unbeknown to her, was paid from the money that had been misappropriated from the pension funds in breach of trust. ITS, the trustee of the relevant pension schemes appointed by the Pensions Regulator, had commenced proceedings to recover the trust assets. At that time Mrs Morris was a *bona fide* purchaser for value without notice; she had given value in the form of agreeing not to pursue any further claims for ancillary relief in return for the sums paid under the

consent order. However, she later succeeded in having the consent order set aside, on the basis that Mr Morris' disclosure in the ancillary relief proceedings had been deliberately and materially deficient. She subsequently obtained a new order for financial provision on the basis that ITS's claim to the sum of £1.48m still held by her would be determined in ITS' proceedings in the Chancery Division against Mr Morris. By then Mrs Morris had notice of the breach of trust. ITS' claim was upheld on appeal.

184. Put shortly, the Court of Appeal held that where a former husband had used money misappropriated from pension funds in breach of trust to make a payment to his former wife pursuant to a consent order in ancillary relief proceedings, she lost the benefit of the *bona fide* purchaser defence under the consent order when it was set aside. The position of a wife who, like Mariam, never had a *bona fide* purchaser defence in the first place is even clearer. That position was addressed by Lloyd LJ at [75]-[78]:

> "75 If the £1.48m had been paid to Mrs Morris without having been required under the courts order (an unlikely hypothesis, of course, but useful to test the position) she would not have given value, and she would therefore have been a volunteer, albeit innocent. The beneficial title of the beneficiaries under the pension schemes would still have subsisted in the money after the payment to her. Therefore, she would not have had a defence to a proprietary claim by the trustee for the recovery of the money. Being innocent, she would not, on the other hand, be liable to a personal claim.
>
> 76 Thus, to the extent that she had any of the money, or its traceable product, in her hands at the time she received notice of the trustees claim, she could be ordered to pay it over to the trustee. On the other hand, to the extent that, before she had notice of the claim to the funds, she had disposed of any of the money without receiving traceable proceeds, she would not be liable to the trustee. That is shown by the decision of Millett J in *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 290-291, and by that of Megarry V-C in *In re Montagu's Settlement Trusts* [1987] Ch 264. Millett J held that a volunteer who has received trust property is not liable to account for the trust property if he has parted with it without having previously acquired knowledge of the existence of the trust. Thus, it is clear that, if the proprietary claim against the respondent is justified, it only extends to money (or its traceable proceeds) which was in her hands at the time she was given notice of the trustees claim. This could be significant as regards the relief to which the trustee would be entitled. (It is not necessary for present purposes to consider what amounts to sufficient notice to the holder of the assets in this context.)
>
> 77 So, in the case of an innocent volunteer recipient of money which is the product of a breach of trust, the legal title is in the recipient but the equitable title remains in the beneficiaries of the relevant trust throughout. Conventionally, in a situation where the legal title to an asset is held by A but the beneficial ownership is in B, A is regarded as holding the asset on trust for B. To say that, however, is only the beginning of the analysis because it does not tell you what duties A owes to B in respect of the asset. The fact that A is not liable to account to B for the asset if A has parted with it (without receiving traceable proceeds) at a time when he had no knowledge of B's

> interest shows that this is not a case of a trustee who is subject to strict liability.
>
> 78 This situation is inherently unstable in two respects. For so long as A has no notice of B's interest, B's interest is fragile because A may dispose of the property in a way which leaves no traceable product. On the other hand A's immunity from claims in respect of his dealings with the assets is also at risk because it can be brought to an end (for the future) if notice is given to him of B's interest."

APPROPRIATE FORM OF RELIEF

185. I accept Mr Miall's submissions under this heading, which were to the following effect. As a preliminary point, Mr Miall recognised that some of the claims are brought in the alternative, and he naturally accepted that there must not be double recovery.

186. First, payments which can properly be characterised as payments to each of the directors personally (including for their benefit) are liable to be treated as giving rise to indebtedness on the part of the directors to the Company. Manolete has demanded them, and they have not been paid. In particular, this claim should also include, in respect of Jawed, the sum of £700,000 connected to Pinnacle Developments, if I conclude (as I have) that this was in fact a debt due and owing by him to the Company.

187. Second, in relation to the duty under section 171(b) of the CA, the primary power with which this case is concerned is the power to deal with the Company's assets. The proper purpose for which that power is delegated to the directors is to advance the Company's business and commercial interests (in accordance with the objects set out in its memorandum). It is apparent from the facts of the transactions which involve the disposal of the Company's assets (aside from the dividends, which are addressed below) that the substantial purpose of each of those transactions was to benefit a person other than the Company. None of the transactions can be said to have been entered into to advance the business purposes or commercial interests of the Company.

188. Third, in causing or permitting each of the impugned transactions, each of the directors breached their duty under section 172 of the CA:

    (1) Each of those transactions amounted to a misuse (usually a misappropriation or payment away) of the Company's assets in circumstances where the very nature of that transaction must have been intended to, and did in fact, benefit some person other than the Company.

    (2) Concurrently, by paying away or disposing of the Company's assets for purposes other than those which were proper, the directors failed to take any (or any proper) care of those assets, as they were required to do as fiduciaries and stewards of the assets.

(3) There is nothing to show that any of the directors considered the issue of whether the transactions were (or that any of them was) likely to promote the success of the Company. In any event, the nature of the transactions was so obviously contrary to the Company's interests that it would be wrong to conclude that the directors had acted genuinely in a way which they considered would promote the success of the Company.

(4) An intelligent and honest person in the position of the directors could not, in the circumstances, have reasonably believed that entering into each (or any) of the transactions was in the best interests of the Company.

(5) Still further, the Company was insolvent or bordering on balance sheet insolvency from 2012 and was similarly commercially insolvent, or bordering on commercial insolvency, from autumn 2014 onwards. The directors have not contended, nor is there any evidence to support a contention, that they gave any consideration to the interests of the Company's creditors. Having regard to those interests makes it even clearer that the transactions cannot have been in the best interests of the Company.

189. Fourth, the directors must also have been in breach of their duty of care and skill under section 174 of the CA insofar as they failed to take proper care of the Company's assets, or failed to take any proper care in considering whether or not the transactions were commercially justifiable at all, or otherwise would benefit the Company.

190. Further breaches of section 174 of the CA arose in relation to specific transactions where the payments were made in circumstances where no director, acting with proper care and skill could reasonably have thought it prudent to enter into the transaction. For example, the African Mining payments were plainly directed at a highly speculative venture which had no commercial case to support it, without any terms or clear basis for the payment, and where there was a very high risk that no returns would ever be realised. The loss and damage occasioned to the Company by reason of those transactions equates to the value of the sums that were misappropriated or misapplied.

191. Sixth, as the directors were fiduciaries, Manolete is able to assert a proprietary claim in relation to any monies received by the directors or to their use.

192. Seventh, Manolete's claim in relation to the dividends that were not lawfully declared is: (i) as directors, for breach of duty under section 172 of the CA and section 174 of the CA in causing or permitting the dividends to be declared and paid when they were unlawful, or when the directors knew or ought to have known it was not in the best interests of the Company (including its creditors) to declare and pay those dividends; (ii) as shareholders, under section 847 of the CA to recover the value of the dividends unlawfully made in circumstances where they knew or had reasonable grounds for

believing that the dividends were unlawful; and (iii) in unconscionable receipt (although Mr Miall accepted that this probably does not add anything to (i) and (ii)).

193. Eighth, for the reasons and in the circumstances that I have addressed in detail above, Manolete is entitled (i) as against Mariam, to repayment of the sum of £58,100 and (ii) as against Jawed and Mariam, to all the relief claimed in Manolete's amended case.

194. Lastly, Mr Miall submitted that these proceedings are a form of accounting process (as noted in the authorities, the directors' failure or inability to account for monies results in a requirement for them to make a payment to the same value), and said that Manolete wanted to reserve its position on whether further relief might be required in respect of the pleaded claim for an account, although it seemed unlikely that it would be.

LIMITATION ARGUMENTS

195. The Defendants have raised a defence of limitation of actions in relation to claims in respect of transactions pre-dating 15 June 2014. On behalf of Mariam, Mr Ahmed made the following submissions in support of that defence:

    (1) Manolete has made reference to preferential payments, which pursuant to section 240 of Insolvency Act 1986 ("IA") must have been given 2 years prior to the onset of the insolvency. On that basis, the bulk of the payments that Manolete seeks to set aside are outside that 2 year period. The last payment was made on 24 April 2015, and the onset of insolvency was in 2017.

    (2) If, however, Manolete's position is that all the payments are subject to a claim for unconscionable receipt, then a period of 6 years would apply. However, there is no proper pleading of unconscionable receipt against Mariam. The pleading gets nowhere close to asserting positively the purported knowledge of Mariam in respect of either the sum of £58,100 or the sum of £250,000. The knowledge must be indicative of some form of concealment or deception, and none is pleaded against Mariam, and even if it was there is no evidence to support it. The general averment of deliberate concealment in the Reply fails to assert a positive claim against her, or to identify the deliberate concealment complained of.

196. Manolete's short answer to that defence and to the arguments raised by Mr Ahmed is that there is no relevant time-bar in this case, either (i) because no applicable limitation period applies or (ii) because section 32 of the Limitation Act 1980 ("LA") applies to delay the commencement of the relevant period until 19 January 2017.

197. With regard to proposition (i), Mr Miall submitted:

    (1) Any sums repayable to the Company by the live Defendants as debts were repayable on demand and repayment was not demanded until 8 October 2019. Thus the applicable limitation period has not expired in relation to such claims.

(2) In relation to the obligations of the directors and each of them to account in equity for payments made to or by them, there is no relevant limitation period for an account without more: *Barnett v Creggy* [2014] EWHC 3080 (Ch) at [82].

(3) Although the live Defendants have not pleaded any limitation defence to the breach of duty claims, for the avoidance of doubt no limitation period applies to the claims against the directors concerning payments or the use of company property for their (direct or indirect) benefit or use, by reason of section 21(1)(b) of the LA (see *Burnden Holdings (UK) Ltd v Fielding* [2018] AC 857). This includes claims for the return of or repayment of improperly declared dividends, or monies paid to companies ultimately owned by the directors.

(4) Mariam's contention that a shorter limitation period than 6 years might apply by reason of provisions of the IA is wrong. The claim against her is brought in unconscionable receipt and has nothing to do with the IA.

198. With regard to proposition (ii), in relation to each claim sections 32(1) and (2) of the LA apply such that time did not commence running until, at soonest, 19 January 2017 when administrators were appointed. As to this, Mr Miall submitted:

(1) The claims (including as against Mariam) arise from the deliberate commission of breach of duty by directors, which could not be discovered by the Company prior to the appointment of administrators (because the wrong-doers' knowledge cannot be attributed to the Company: *Burnden Holdings (UK) Ltd v Fielding* [2017] 1 WLR 39 at [49]). The position in the present case is comparable to that in *Re Pantiles Investments Ltd* [2019] BCC 1003 (see *ibid* [66]-[68]).

(2) For the purposes of section 32(1) of the LA, the reference to a defendant includes any person through whom the defendant claims and his agent. Thus, a person who is asserted to be a recipient of monies transferred to them by a wrongdoer (which includes Mariam in the present case) is affected for the purposes of limitation by any fraud or deliberate concealment of that wrongdoer: *GL Baker Ltd v Medway Building & Supplies Ltd* [1958] 1 WLR 1216 at 1223.

199. I have little hesitation in preferring the submissions of Mr Miall on this topic. In my judgment, none of the claims brought by Manolete are time barred, and it would be an affront to the proper administration of justice if they were. So far as concerns the directors, to allow their limitation arguments to succeed would allow them to rely upon their own serious and repeated wrongdoing to defeat attempts at recovery by those who have suffered as a result of that wrongdoing and whose trust they have betrayed. So far as concerns Mariam, it would, at lowest, confer windfalls on her in relation to (i) sums that she did not earn and (ii) the unfettered retention of rights in No 172 in spite of the fact that monies misappropriated from the Company were used to buy it.

CONCLUSION

200. For these reasons, Manolete succeeds on all the claims that it pursued to the conclusion of the trial. I ask Counsel to agree an order which reflects this determination of these proceedings. I will deal with submissions on any points which remain in dispute as to the form of the order, and on any other issues such as costs and permission to appeal, either when judgment is handed down, or (if Counsel agree) on the basis of written submissions alone, or else on an adjourned hearing on some other convenient date.