[2020] EWHC 2808 (Ch)

Case No: 801 of 2017

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT IN LEEDS

INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF RJH STANHOPE LTD

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Before His Honour Judge Saffman sitting as a Judge of the High Court

Between :

MR ANDREW POXON (1)

MR MARTIN MALONEY (2)

(AS JOINT LIQUIDATORS OF RJH STANHOPE LTD)

Applicants

- and –

MR JOHN ROBERT HARRISS

Respondent

- -

- -

Mr James Couser counsel for the Applicants

Mr Andrew Shaw counsel for the Respondent

Hearing date: 8, 9 and 10 September 2020

Date draft circulated to the Parties: 24 September 2020

Date handed down: 4 November 2020

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I direct that, pursuant to CPR PD 39A para 6.1, no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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JUDGMENT

Introduction

1. This is a claim brought by Mr Andrew Poxon and Mr Martin Maloney, the liquidators of RJH Stanhope Ltd (the Company). It was initially brought against four individuals in their capacity as former de jure or (in the case of the first respondent) de facto directors of the Company. It is a claim for misfeasance/breach of director's duties.

2. It is no longer pursued against two of the former directors namely a Mr Chaudry and a Mr Douglas, the claim against them having been dismissed by consent with no order as to costs on 14 June 2019. The order dismissing the claim against those 2 respondents recites that terms of settlement had been agreed but it transpired from the evidence before me that the settlement consisted of no more than a drop hands settlement by which no money changed hands.

3. Since 14 June 2019 the claim therefore has been pursued only against the first and second respondents namely Robert John Harriss (Robert) and his son, John Robert Harriss (John). It is a claim for £87,231.

4. The hearing before me however is confined to a determination of the claim solely against John. This is because on 17 March 2020 a default judgment was entered against Robert in the sum of £87,231. The claim against him having been premised on the basis that, whilst he was not a formally appointed a director of the company, he was a de facto director/shadow director and thus subject to the same duties and responsibilities as a formally appointed, de jure, director.

5. The liquidators are represented by Mr James Couser of counsel and John is represented by Mr Andrew Shaw of counsel. I am grateful to both for the manner in which their respective cases have been presented.

Background

6. On 10 July 2009 Robert became subject to an undertaking that he offered under section 1A *Company Directors Disqualification Act 1986* that, with effect from 31 July 2009, he would not for a period of 7 years be a director of a company, act as receiver of a company's property or be concerned or take part in the promotion, formation or management of the company without the leave of the court.

7. With effect from 27 April 2011, presumably coincident with a discharge from bankruptcy, Robert gave a bankruptcy restriction undertaking pursuant to Schedule 4A *Insolvency Act 1986* by which he undertook, for a period of 5 years, not to be a director of a company or in any way, either directly or indirectly, be concerned or take part in the promotion, formation or management of a company without the leave of the court.

8. It is alleged in the Points of Claim filed in these proceedings that, in breach of these undertakings, he acted as a de facto and/or shadow director of the Company from 13 July 2011 until at least 17 November 2011. It is a fact that on 10 February 2016 he gave a further undertaking similar in effect to his undertaking of April 2011 and which was to have effect for a period of 8 years from 2 March 2016. The document filed at Companies House record that he was disqualified "*for conduct while acting for RJH Stanhope Ltd*".

9. The Company was incorporated on 5 May 2011. It is accepted in the Points of Defence to the claim that the Company had no assets, never traded and had no source or means of revenue.

10. On 3 September 2012 it entered into creditors' voluntary liquidation and a Mr Adamson and a Mr Askham were appointed as liquidators.

11. On 25 February 2013 Mr Adamson and Mr Askham were removed as joint liquidators at the initiative of the Company's main creditor, Ms Heather Birkhead. They were replaced by Mr Andrew Poxon, the first applicant in this claim and his colleague, Mr John Titley. Mr Titley was himself replaced as joint liquidator on 31 May 2019 by the second applicant Mr Martin Maloney.

12. John has admitted in the pleadings in this claim and indeed in the course of his evidence before me that he was a director of the Company from 13 July 2011 until it went into liquidation. This is so notwithstanding that an AP01 recording his appointment as director was not filed until 25 June 2012. That however purported to record John's appointment as a director from 13 July 2011 and, certainly for the purposes of this hearing, John has been obliged to concede that he assumed the obligations and responsibilities of a director from 13 July 2011.

13. As I have said, John was not the sole director of the Company. Mr Mohammad Chaudry and Mr Steven Douglas were co-directors. Indeed, they had been the only directors from the date of the incorporation of the Company until they were joined on the board by John in July 2011.

14. Mr Chaudry and Mr Douglas were partners in an accountancy practice. Their role within the Company was to carry out the back office, administrative, functions. It was readily accepted by John in the course of his evidence that Mr Chaudry and Mr Douglas were, "*to a degree*", simply nominee directors who acted to a large extent on John's directions. In his witness statement he speaks of them offering advice and

guidance but in his oral evidence he readily admitted that ultimately decisions relating to the Company were made by him.

15. It is right to say that in the course of the evidence I was referred to a deed of indemnity ostensibly dated 1 July 2011 and in which Messrs Chaudry and Douglas are described as "nominees" and by which they agreed to act as directors of the Company (and indeed other companies) and, in that capacity, to vote in accordance with the wishes and best interests of Robert and John. The quid pro quo for that agreement included an indemnity from Robert and John in respect of losses or costs incurred by Messrs Chaudry and Douglas whilst acting in their capacity as directors.

16. There is an issue as to when this deed of indemnity was executed and indeed, as I understand it, whether it is a valid deed at all, but in any event it has been signed by John and it does support the contention that the position of Messrs Chaudry and Douglas was a subordinate one and that when John says in his evidence that they were only nominees "*to a degree*" that might be understating the extent of their subordination.

17. On 14 July 2011 the Company received the sum of £400,000. The source of that sum was Ms Birkhead to whom I have just referred. It appears to be unchallenged evidence that Robert persuaded Ms Birkhead to part with £400,000 and he arranged for this to be paid into the Company's bank account.

18. Over the period 14 July 2011 to 17 September 2011 all this money was paid away by the Company. By far the largest sum, totalling about £329,000 was paid to RJH Project Management Ltd (Project Management) which had been incorporated in February 2011 for the purpose of project managing a building development in Margate (the Margate Development) which had been acquired by RJH (Margate) Ltd. (RJH Margate). This latter company had also been incorporated on the same date. John, Mr Chaudry and Mr Douglas were directors of both RJH Margate and Project Management as well as the Company.

19. Whilst Project Management was clearly the largest beneficiary of these payments there were other significant payments to other recipients. Mr Couser draws my attention to the unchallenged evidence of Mr Poxon from para 26 of his witness statement to the effect that the following payments were made by the Company either to discharge debts owed by Robert or which, at the very least, had no obvious connection to the interests of the Company were as follows:

Ryegate	£4,700
Lili Okwok	£18,950
Barbara Needham	£2,000
Paxton PF LLP	£24,000
Druce & Co	£2,000
S Gollings	£13,797.91
Savills	£160.80
Taylors Solicitors	£30,781.29

Total	£96,390

20. John admitted in his evidence that he authorised the majority of these payments by the Company including those to Project Management which itself was wound up by an order made on a creditor's petition on 17 January 2013.

21. In June 2012 Ms Birkhead took proceedings against the Company and Robert for the recovery of the £400,000. She asserted that the Company obtained this money wrongfully as a result of the wrongful actions of Robert. Her assertion was that she had no intention of making a payment to the Company. She had expected this money to be invested with a company called Kent Capital Ltd.

22. In her Particulars of Claim she asserted that she had realised the mistake that had been made on the same date that she made the payment namely 14 July 2011 and she immediately demanded repayment of the money. By the time that she issued her proceedings she had recovered no more than £29,074 from the Company.

23. In September 2012, following the liquidation of the Company, her solicitor, Mr Michael Green submitted a proof of debt on her behalf in the sum of £407,396.72 made up of the principal debt of £400,000 to which statutory interest was added and from which credit was given for the £29,000 odd received by her.

24. She was to all intents and purposes the only creditor of the company. It does not appear to be in dispute that her debt constituted fractionally short of 100% of the Company's creditor liability.

25. Notwithstanding the liquidation, on 1 November 2012 Ms Birkhead obtained a judgment against the Company for the amount of her claim of £407,396.72 plus costs to be subject to detailed assessment if not agreed.

26. Following that judgment, she amended her claim to include John, Mr Chaudry and Mr Douglas as defendants. Those proceedings were eventually compromised, certainly as regards the individual defendants, by a Tomlin order dated 31 March 2014. The Tomlin order was the result of a mediation at which John was represented by a solicitor and the order itself was professionally drafted and scrutinised.

27. The Tomlin order provides for a stay of the action against Robert with no order for costs upon the terms of the schedule which provides for Robert to pay Ms Birkhead £475,000 in full and final settlement of her claim against him. The schedule also provides for Robert to give security for his liability by way of a charge over a property he owned in Spain and it further provides that, upon that sum having been paid, the claim against Robert shall stand dismissed. It also provides that the proceedings against John and Messrs Chaudry and Douglas shall be discontinued forthwith and makes provision for Robert to pay the costs of Messrs Chaudry and Douglas.

28. It will be remembered that the Company was also a defendant in this action (and indeed that status is recorded in the names of the parties which form the heading to the Tomlin order) but it was not a party to the negotiations leading up to the Tomlin order nor is there any reference to the Company within the Tomlin order. Indeed, the schedule to the Tomlin order by which there was agreement to discontinue claims specifically relates only to the claims against John, Mr Douglas and Mr Chaudry.

Specifically, the Tomlin order contained nothing which specifically affected the status of the judgment of 1 November 2012 that Ms Birkhead had against the Company.

29. The sum of £475,000 was paid on behalf of Robert between March 2014 and November 2015. It is John's evidence that he in fact made this payment on behalf of his father.

30. That led to a revised proof of debt being filed in the Company's liquidation on behalf of Ms Birkhead. Credit was given for the £475,000 received but the amount from which that was deducted had risen from the judgment debt £407,396.72 to £631,502. 72 on the basis that Ms Birkhead's costs for the litigation for the recovery of her money were £224,106. It will be recalled that her judgment against the Company was for £407,396.72 plus costs to be subject to detailed assessment if not agreed.

31. A further revised proof of debt was lodged on 28 March 2019. This time it was in the sum of £295,048.25. It comprised the judgment debt of £407,396.72 plus statutory interest of £208,676.07 and the costs of the action against the company which were now said to be £13,704.79. As for the £475,000 paid, the proof of debt only gave credit for £334,739.33.

32. On 16 January 2020 the applicants adjudicated the claim in the sum of £87,231. Essentially the applicants have concluded that that is now the extent of Ms Birkhead's recoverable loss. Accordingly, and by the same token, that amount represents the liability of the Company in respect of which the applicants seek redress from the remaining respondent pursuant to section 212 *Insolvency Act 1986*.

33. Notice of that adjudication was given to Robert by letter dated 16 January 2020. It was given to John's solicitors by a letter of the same date. That adjudication has not been challenged.

34. As has been recorded, on 17 March 2020 the applicants obtained a default judgment against Robert in the sum of £87,231.

35. Finally, by way of background, it is the case that on 26 February 2016, presumably in the course of director's disqualification proceedings taken against him, John gave an undertaking not to act as a director of a company for 4 years. The schedule of his admitted unfit conduct records that, solely for the purpose of the CDDA and for any other purposes consequential to the giving of the disqualification undertaking, John did not dispute that his unfitness to act as director arose out of his knowing that Robert was subject to a bankruptcy restriction undertaking and a disqualification undertaking but nonetheless allowing Robert to act as a director of and/or to be concerned or take part in the management of the Company from 13 July 2011 until at least 17 November 2011 while Robert was disqualified from so acting.

The Statutory provisions relevant to director's duties;

36. It is as well to set out the statutory provisions said to be engaged in connection with the assertion of breach of director's duties in order to provide context for what follows**:**

> ***Insolvency Act 1986***
>
> ***212 Summary remedy against delinquent directors, liquidators, etc.***

(1)This section applies if in the course of the winding up of a company it appears that a person who—

(a)is or has been an officer of the company,

(b)…….

(c)…….

has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.

(2)…….

(3)The court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him—

(*a)to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or*

(b)to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.

(4)……..

(5)……

Companies Act 2006

172 Duty to promote the success of the company

(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.

S 173 Duty to exercise independent judgment

(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

S 174 Duty to exercise reasonable care, skill and diligence

(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.

S 175 Duty to avoid conflicts of interest

(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).

(3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.

(4) This duty is not infringed—

(a)if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or

(b)if the matter has been authorised by the directors.

(5) Authorisation may be given by the directors—

(a) where the company is a private company and nothing in the company's constitution invalidates such authorisation, by the matter being proposed to and authorised by the directors; or

(b) where the company is a public company and its constitution includes provision enabling the directors to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution.

(6) The authorisation is effective only if—

(a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and

(b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.

(7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

The claim against John

37. The claim against John is set out from paragraph 36 of the Points of Claim. It alleges that the conduct of John as a director of the Company contravened the obligations imposed by sections 172, 173, 174 and 175 of *Companies Act 2006*. It is contended that John's conduct makes him a delinquent director in the sense envisaged in section 212 of the *Insolvency Act 1986*. This claim is made by the liquidators pursuant to section 212.

38. By the Points of Claim it is asserted that:

    a. John knowingly permitted Robert to act as a de facto/shadow director during the period 13 July 2011 to 17 November 2011 at a time when he knew that Robert was subject to undertakings not to so act. It is contended that this is a breach of section 172 *Companies Act 2006*.

    b. In permitting Robert to so act John allowed the Company to become liable for monies had and received from Ms Birkhead, contrary to section 172

    c. John knowingly or negligently allowed the Company to make payment out of sums which the company held on trust for Ms Birkhead or for which it was otherwise liable to her such that the Company was unable to transfer the sums back to her or discharge its liability to her. It is alleged that this is contrary to the interests of the Company and thus breaches sections 172 and section 174

    d. John knowingly and/or negligently allowed the Company to make the payments which stripped it of the ability to repay Ms Birkhead despite the fact that the Company received no proper consideration, security or other benefit in respect of these payments. It is alleged this was contrary to the interests of the Company and thus offended section 172 and section 174.

    e. That over £328,000 was paid to Project Management, a company of which John was a director in contravention of the provisions of section 175.

39. In his skeleton argument and final submissions, Mr Couser further argues that:

    a. In breach of section 173, there has been a failure by John to exercise independent judgment. Instead, he is allowed himself to be suborned to his father's will.

    b. In not independently satisfying himself as to the basis upon which Ms Birkhead paid this £400,000 to the Company but rather instead simply relying on what he was told by Robert, he failed to comply the duties imposed upon him by sections 172 to 175 *Companies Act 2006*.

40. In his skeleton argument paragraph 2 and 3, Mr Couser summarises the case against John in the following way:

> *"2. at a time when (John) admits he was a director of (the Company), he admits that he allowed his father to act as a de facto and/or shadow director of the Company despite knowing that (Robert) was disqualified from doing so. This enabled Robert to perpetrate a fraud upon a third party (Heather Birkhead) and ultimately led to the Company entering into CVL on 3 September 2012. Had (John) not allowed his father to act as a de facto and/or shadow director the company would never have become mixed up in (Robert's) fraud.*
>
> *3. By allowing his father to act as a de facto and/or shadow director (John) has caused the Company to fail when it would otherwise have succeeded and, by so doing, has breached his statutory duties under ss171 to 177 companies act 2006……"*

41. In fact, as Mr Couser emphasised in his final submissions, this is not by any means the exclusive basis upon which this application is grounded. It is important to emphasise that the claim is made not just on the basis that it was inappropriate to permit Robert to act as he did with the result that the Company received £400,000 which it ought not to have had. The complaint against John also specifically extends to a complaint that it was wholly inconsistent with his director's duties to authorise the payment away of this money to the recipients of it in a manner which rendered the Company unable to pay it back to Ms Birkhead and therefore exposed the company to a claim that it simply could not meet.

42. He prays in aid the following in support of his contentions of breach of director's duties:

    a. That no reasonable director would allow a person whom he knows to be disqualified from acting as a director to act in the capacity in which Robert acted. The unchallenged evidence is that John knew that Robert was a person unfit to be involved in the management of the Company. It is asserted that that fact should have put John on enquiry as to the basis upon which Ms Birkhead had paid the not inconsiderable sum of £400,000 to the Company. In other words, that it was incumbent upon him to check with her the basis upon which she had put the Company in funds to the extent of £400,000.

    b. That this obligation was compounded by virtue of the fact that he was aware that the £400,000 had not come from a commercial entity but from an individual, indeed a family friend, who was providing this money out of a divorce settlement.

    c. That had John taken the trouble to contact Ms Birkhead he would have known that she wanted her money back on the basis of her assertion that she had been misled into paying it in the first place and she had discovered this on the day she made the payment.

    d. As I have said, approximately £329,000 of this money was paid to Project Management, a company of which John was a director along with Mr Chaudry and Mr Douglas. There is no evidence of the basis upon which this money was paid to that company or the terms of repayment or, if an investment, the terms

of the investment. It was simply paid away to Project Management almost immediately after its receipt by the Company. It is correct that the evidence suggests that by 20 July 2011, only a matter of 6 days after being credited to the Company's account it had paid £302,000 to Project Management and there is no paperwork to explain the basis of that payment.

e. That the Company itself was a non-trading company with no assets and no revenue. The manner in which the payments were made, particularly those to Project Management and which involved a complete absence of any agreement as to the terms upon which that company received the money made the Company's position wholly and unjustifiably vulnerable.

43. He argues that the conduct could not have been in the best interests of the Company which essentially is what the statutory provisions relating to director's duties requires.

44. He points out that John has accepted culpability for his actions in the sense that he has acknowledged his unfitness to act as director because, knowing Robert was subject to a bankruptcy restriction undertaking and a disqualification undertaking, he allowed Robert to act as a director at the relevant time.

The defence to the claim for breach of duty.

45. Mr Shaw argues that the allegation of breach of duty has simply not been made out.

46. Insofar as the complaint is that John allowed Robert to acquire and pay into the Company's account £400,000 Mr Shaw argues that raising funds is not necessarily the act of a director or somebody involved in the management of the company. It does not necessarily follow that, in doing what he did, Robert was acting in contravention of his undertakings.

47. In any event, it cannot be said that it was contrary to the interests of the Company to acquire £400,000 on its behalf. After all, even if, which is not accepted, the gain to the Company was illicit nonetheless, it is still a gain.

48. As regards the payment away of these monies, Mr Shaw draws attention to the fact that John gives an explanation for this in his witness statement from paragraph 21. What he asserts there was not subject to any challenge and therefore the court can conclude that authorising the monies to be disbursed as they were amounts to a breach of duty only if it concludes that the explanation given by John, even though true, is inadequate.

49. What does John say in his witness statement?

a. That he was not privy to the conversations between Ms Birkhead and Robert but that it was his understanding that Ms Birkhead would ultimately receive a return on her investment through a sale of properties in the Margate Development which was to be funded at least in part by her investment.

b. That he was not surprised that Ms Birkhead was agreeing to invest in a development. Using money from investors to fund developments such as the Margate Development was not an unusual financing option.

c. That he was not particularly concerned with or involved in the mechanics of how Ms Birkhead actually invested her money. It was not his area of expertise. His focus was more on getting the Margate Development physically

built rather than how it was financed. Paperwork and administrative functions were more the province of his co-directors Mr Chaudry and Mr Douglas who, as professional men, he trusted to ensure firstly, that the investment was "*effected properly and that suitable arrangements would be put in place to reflect the terms of Ms Birkhead's investment"* and secondly *"to ensure that suitable arrangements were put in place to reflect the onward transmission of the relevant part of the money from the Company to Project Management"*.

d. That when he authorised payments out, particularly those to Project Management he assumed that Mr Chaudry and Mr Douglas had put in place the necessary arrangements to which I refer immediately above.

e. That so far as he was concerned the payments made to Project Management were for legitimate commercial purposes. He believed that they were made "*firmly with the intention of allowing Project Management to invest in progress the Margate Development so as to ensure that it would be possible to achieve a return on Ms Birkhead investment and a profit on it generally*."

f. That, it is his unchallenged evidence that he thought that the monies emanating from Ms Birkhead would be utilised "*wholly and fully to enhance and progress the Margate Development and a return on Ms Birkhead's investment in that development"*. He asserts that that was clearly in the best interests of the company.

50. Mr Shaw argues that none of this establishes conduct contrary to the best interests of the Company. On the contrary, he asserts that it establishes that John was trying to promote the success of the Company.

51. He also argues that insofar as it is asserted that there has been a breach of the obligations imposed by section 175, that in fact section 175 is not engaged here by virtue of the provisions of section 175(3). The effect of this subsection is that the section as a whole does not apply to transactions with a company of which the person concerned is a director. The section is intended to deal with situations where a director undertakes an activity which is detrimental to such a company. For example by diverting opportunities away from it. It is not intended to deal with situations in which the relevant company is actually involved – as is the case here.

Conclusion as to breach of duty

52. In direct response to a question from Mr Couser, John accepted that from 13 July 2011 to 17 November 2011 he allowed his father to act as a shadow director. In my judgment there can be no doubt that that cannot be seen to be a course of action likely to promote the success of the Company. I am satisfied that to do so is a breach of the obligations set out in section 172. I am equally satisfied that it betrays a lack of reasonable care, skill and diligence and thus offends section 174 even taking account of the provisions of section 174(2)(b). There may well be issues as to whether this breach of duty resulted in loss but that is a separate issue.

53. Furthermore and in any event, I am satisfied that, in authorising the payment of the monies to Project Management without satisfying himself that the Company held the money from which this payment was to be made with the informed consent of Ms Birkhead and that she understood and agreed the manner in which it was to be disbursed, John contravened his duties as a director to act in the Company's best

interests and displayed a lack of the reasonable care, skill and diligence imposed upon a director by virtue of section 174. This is so because the money was channelled to the Company by a person who John knew to be unfit and unreliable.

54. I recognise that one might say that that conduct was prejudicial to the interests of Ms Birkhead but that is not the same as saying that it was prejudicial to the interests of the Company. However, the duty to promote the success of a company requires regard to be had to the need to foster the company's business relationships with suppliers, customers and others (section 172(1)(c)). Being reckless in the manner in which one deals with monies invested by an investor cannot be said, in my judgment, to promote the success of a company.

55. In my judgment, paying away this money in all the circumstances of this case was reckless. It was cavalier of John simply to rely on what he may have been told by Robert when it was clear that Robert was an unfit person in the commercial sense. A fact that John recognises he knew at the time.

56. In all the circumstances authorising payments out of the monies provided by Ms Birkhead which the most cursory independent enquiry would have revealed ought not to have been made left the Company exposed to what ultimately eventuated namely a demand for the return of the money which, because John had authorised the payment out of these monies, the Company could not meet and which ultimately resulted in judgment being entered against the Company.

57. Even if that were not so, authorising the payment of this money before satisfying himself that there was something in place as to the terms upon which it was paid was manifestly not in the interests of the Company. That too in my judgment displayed a lack of reasonable care, skill and diligence.

58. It is not sufficient to say that putting something in place was left to his co-directors. His evidence was that it was he who authorised payments. His evidence was that it was he who made the decisions. Even he was prepared to accept that Mr Chaudry and Mr Douglas were merely nominees albeit only "*to a degree*". As I have said, the deed of indemnity signed by John, whether valid or not, suggests that it was a very large degree indeed.

59. Additionally, it is important not to overlook that £96,000 odd was disbursed in circumstances which were questionable. That consisted of payments on behalf of Robert or to entities where there is little or no evidence that they were Company creditors.

60. Finally, I should add that Mr Shaw took me to extracts from a meeting that Mr Chaudry and Mr Douglas had with the Insolvency Service on 4 July 2013 in which they suggested that John did not really pull the strings, rather Robert did. If that is true then it is difficult to conclude other than that, in authorising these payments, John offended the obligation, set out in section 173, to exercise independent judgment.

61. I remind myself that Mr Shaw accepted that it is not necessary for the applicants to satisfy breach of each of the sections in the 2006 Act which deal with director's duties. If I am satisfied that John has contravened any of the sections from section 172 to section 175 that is enough for the purpose of this stage of the determination. It accordingly becomes unnecessary to consider whether section 175(3) bears the

interpretation that Mr Shaw asserts. Even if section 175 is not engaged, in my judgment sections 172, 173 and 174 have been engaged.

62. I emphasise that I have reached my conclusion even though I accept John's evidence contained in his witness statement as to his thinking because that evidence has not been challenged. The fact is however that I am satisfied that the explanation he offers in his witness statement is simply insufficient to exculpate him in terms of his director's duties, for the reasons set out above.

Causation

63. The question is whether the applicants have established that losses have been sustained by the Company by virtue of John's breaches of his obligations as a director.

64. Mr Couser's case is a straightforward one. The actions of John resulted in proceedings by Ms Birkhead and in a judgment entered against the Company on 1 November 2012 for £407,396.72 plus costs. Had John not permitted Robert to obtain £400,000 from Ms Birkhead then, he argues, the liability to her would not have arisen. Equally, had John not disbursed the money in a manner which breached his director's duties, the Company would have been in a position to repay the money.

65. True it is that John has paid £475,000 to Ms Birkhead but nonetheless she submitted a proof of debt in the liquidation which has ultimately been accepted by the applicants in their capacity as liquidators in the sum of £87,231 and which has not been challenged by John. Accordingly, this is, suggests Mr Couser, the crystallised loss to the Company because it is the amount owed to Ms Birkhead by the Company in liquidation. Indeed, asserts Mr Couser, on ordinary legal principles if any dividend were payable to creditors out of this liquidation Ms Birkhead would be entitled to a dividend based upon that liability. The claim under section 212 *Insolvency Act 1986* is premised on the basis that it is appropriate and just for John to restore that amount to the Company.

66. Mr Shaw argues that this is an erroneous approach. First, he argues, that it cannot be said that permitting Robert to raise the money from Ms Birkhead was causative of loss. Indeed quite the reverse is true. It put £400,000 into the Company's bank account.

67. He contends that all that could sensibly have caused any loss was the payment away of that money in circumstances which constituted a breach of John's duties as director. In fact, that is not an assertion with which Mr Couser disagrees. In his final submissions he conceded that it is not the receipt of the monies that actually matters, it was the payment away of the monies which are responsible for the loss to the Company.

68. Secondly, and this is an argument that he not only developed in his skeleton argument but also initially in his final submissions, he argues that the monies were paid away not by John but by Mr Chaudry and by Mr Douglas and so, if a loss has been caused, it has been caused by them. In fact, in his final submissions Mr Shaw ultimately accepted that if, as indeed was John's evidence, John himself authorised these payments and they were made by Mr Chaudhry and Mr Douglas pursuant to that authorisation then John cannot be less culpable than those who actually made the payment.

69. I agree that there is insufficient evidence for the court to be satisfied that the Company suffered any loss by virtue of the activities of Robert in securing the payment of £400,000 into the Company's bank account. However, I am satisfied that if the Company remains indebted to Ms Birkhead that that represents a loss to the Company and John's delinquent conduct was causative of that loss because his conduct caused the Company to be put into a position where it was unable to repay the debt with the consequence that legal proceedings followed and interest and costs were incurred for which the Company became liable.

70. Mr Shaw's third argument is however that the applicants have failed to establish that the Company has in fact suffered a loss at all. His premise is based upon the proposition that any liability that John has to the Company must be limited to the Company's liability to Ms Birkhead. This is because to all intents and purposes she is the only creditor.

71. In fact, in his final submissions and indeed the skeleton argument Mr Shaw raises this issue of loss as a stand-alone aspect of the defence to the application. His first limb having been the denial of a breach of director's duties and his second being an assertion of the failure of the applicants to establish a causal link between any breach of duty and loss.

72. It may appear to be a pedantic approach but it seems to me that the question of whether a loss has been suffered falls to be considered essentially as part of the question of causation. Causation requires a finding that a breach of duty has been causative of loss. If there is no loss, a claim fails because a breach of duty has not been shown to have been causative of loss. Such a claim therefore fails because causation has not been established.

73. In any event, it perhaps matters not whether the question of loss is treated as a separate limb of the defence or as a limb of the issue of causation. What matters is whether I am satisfied that the Company still has a liability to Ms Birkhead and how that impacts on the issue of John's liability for loss.

Does the Company have a liability to Ms Birkhead?

74. Various statutory provisions come into play in dealing with this question. As above, it is as well to set those out:

Insolvency Act 1986

> ***79 Meaning of "contributory".***
>
> *(1) In this Act the expression "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up, and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory.*
>
> *(2) The reference in subsection (1) to persons liable to contribute to the assets does not include a person so liable by virtue of a declaration by the court under section 213 (imputed responsibility for company's fraudulent trading) or section 214 (wrongful trading) in Chapter X of this Part.*

(3) A reference in a company's articles to a contributory does not (unless the context requires) include a person who is a contributory only by virtue of section 76.

112 Reference of questions to court.

(1) The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court.

(2) The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.

(3) A copy of an order made by virtue of this section staying the proceedings in the winding up shall forthwith be forwarded by the company, or otherwise as may be prescribed, to the registrar of companies, who shall enter it in his records relating to the company.

Insolvency (England and Wales) Rules 2016

Admission and rejection of proofs for dividend

14.7.*—(1) The office-holder may admit or reject a proof for dividend (in whole or in part).*

(2) If the office-holder rejects a proof in whole or in part, the office-holder must deliver to the creditor a statement of the office-holder's reasons for doing so, as soon as reasonably practicable.

Appeal against decision on proof

14.8.*—(1) If a creditor is dissatisfied with the office-holder's decision under rule 14.7 in relation to the creditor's own proof (including a decision whether the debt is preferential), the creditor may apply to the court for the decision to be reversed or varied.*

(2) The application must be made within 21 days of the creditor receiving the statement delivered under rule 14.7(2).

(3) A member, a contributory, any other creditor or, in a bankruptcy, the bankrupt, if dissatisfied with the office-holder's decision admitting, or rejecting the whole or any part of, a proof or agreeing to revalue a creditor's security under rule 14.15, may make such an application within 21 days of becoming aware of the office-holder's decision.

(4) …..

(5) ……..

(6) ……..

(7) ……..

75. As I have said, Mr Couser argues that there is a crystallised debt owed by the Company to Ms Birkhead. It arises by virtue of the fact that her proof of debt has been adjudicated and it has been conceded that she is a creditor in the sum of £87,000 odd.

76. Rule 14.8(3) *Insolvency Rules (England and Wales) 2016* (the Rules) provides a means by which an adjudication on a proof of debt can be challenged by various categories of people which includes both a member and a contributory. Mr Couser argues that John falls into both categories. It is not in dispute that John held at least one share in the Company and was accordingly a member. Furthermore, Mr Couser argues that he is a contributory falling squarely within the definition set out in section 79 *Insolvency Act 1986* which definition is incorporated into the Rules by virtue of Rule 1.2(2).

77. I do not understand that Mr Shaw demurs from the proposition that John is indeed a member of the Company and also a contributory. Whether he does or not however, it seems to me that John falls into both categories. In those circumstances ostensibly he was in a position to challenge that adjudication.

78. It is not in dispute that notice of the adjudication was given to John's solicitors (and thus to John) by letter dated 16 January 2020. It is not in dispute that John did not challenge the adjudication either within the 21 days stipulated in the Rule or at all.

79. Mr Shaw argues however that that adjudication does not bind the court and does not preclude the court in these proceedings from considering the extent to which the Company is indebted to Ms Birkhead. Indeed, he argues that the court is obliged to do so and the burden is on the applicants to establish, by evidence in these proceedings, that that liability exists.

80. Furthermore, he argues that in any event, Rule 14.8(3) has to be read in the context of Rule 14.7. That speaks of the officeholder admitting or rejecting a proof "for dividend". He argues that accordingly the applicability of Rule 14.8 is confined to issues relating to seeking a declaration from the court for that purpose only. Thus, not for the reasons for which John would seek to challenge it, namely to question his liability to the Company

81. Let me deal with this argument forthwith. Subject to what I say below concerning legitimate interest, I do not accept that in principle it was not open to John to challenge the adjudication. Rule 14.8(3) is quite clear. It gives a member or contributory such as John the right to make an application challenging an adjudication. There is no basis for concluding that there are any limitations on the circumstances in which that right arises. Even if there were and John is not eligible to make a challenge under Rule 14.8, there is the residual power under section 112 for a contributory such as John to make an application to the court to determine any question arising in the winding up of the Company. Additionally that right appears not to be restricted by a time limit of 21 days or indeed any time limit.

82. I have mentioned legitimate interest. Mr Shaw argues that, in any event, the right to challenge has to be considered in the context of established legal principles and that it is well established that, for a person to have standing to mount a challenge including a challenge to an adjudication, he must have a legitimate interest in the outcome of the proceedings. He argues that where a company is insolvent such that there will be no

funds available for distribution to members then such members will not be considered to have a legitimate interest in the proceedings.

83. In his opening he referred me to *Deloitte & Touche AG v Johnson* (1999) 1 WLR. In his skeleton argument he cites *Burnden Group Holdings Ltd v Hunt* (2018) 2BCLC 122 which itself makes reference to *Deloitte and Touche*. *Burnden* cites with approval the opinion of Lord Millett in *Deloitte & Touche* at page 1611 to the effect that:

> *"where the court is asked to exercise a statutory power, therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application….. This means that he has a legitimate interest in the relief sought"*

84. I am satisfied that John had a legitimate interest in challenging this adjudication. The fact is that this adjudication was made as recently as January 2020. These current proceedings have been on foot since July 2017. These proceedings made clear that what the applicant sought was an amount to cover the Company's liability to Ms Birkhead. It is axiomatic therefore that it was in John's interest to ensure that that liability was minimised, if not extinguished. The less the Company was liable to Ms Birkhead, the less would be John's liability to the Company in liquidation. Accordingly, it is difficult to see how his interest in this adjudication could have been anything other than legitimate. Therefore, I reject the suggestion that John was not eligible to challenge the adjudication.

85. Although I am satisfied therefore that the appropriate course of action was a challenge to the adjudication, the important question still remains as to whether that adjudication is binding on the court in these proceedings. In other words, is an adjudication which has not been challenged determinative of the amount owed by the company to the creditor?

86. Mr Shaw argues that it is not. He cites *Hollington v Hewthorn* (1943) KB 587 and *Rogers v Hoyle* (2015) QB 265 as authority of the proposition that findings of courts, tribunals and enquiries are inadmissible in subsequent proceedings. It was stated in *Rogers* that the foundation of the rule was the preservation of the fairness of the trial *"in which the decision was entrusted to the trial judge alone".* As was said by Legatt J in *Rogers* at paragraph 104:

> "*the responsibility of a judge to make his or her own independent assessment of the evidence entails that weight ought not to be attached to conclusions reached by another judge – all the more so whether party to whose interests to conclusions are adverse was not a party to the earlier proceedings*"

87. Mr Shaw argues that if there had been no adjudication then the court would have had to quantify the loss. He argues that it cannot be right that an administrative step by the liquidators to quantify the claim should oust the court's power to determine the true position. He argues this is particularly so where the evidence suggests that the liquidators are unable to justify or explain their adjudication and the evidence suggests that the adjudication is flawed.

Is the adjudication determinative?

88. Mr Couser argues that the Rules provide a basis for challenging the adjudication. If a person does not take the opportunity of availing themselves of the relevant Rule then that ought to be an end to it. Otherwise there is no finality. There is of course some strength in that argument, as there is in his observation that the adjudication gives rise to a liability on the part of the Company in liquidation to Ms Birkhead and that is a liability which she could enforce if the liquidators were minded to deprive her of any available dividend based upon it.

89. There is an additional dimension to this. Clearly Ms Birkhead has a legitimate interest in the amount to which she is permitted to prove in the liquidation. It is reasonable to assume that since she has not challenged the adjudication, she is content with it. It might be argued that where, as here, the costs of the liquidation are going to exceed any realisations, there is no such interest but we have it from Mr Poxon's own mouth that Ms Birkhead will benefit to some extent from any monies recoverable in this action. On that basis it seems clear to me that she does have a legitimate interest. If Mr Shaw is right her interest is being scrutinised without the opportunity of hearing what she has to say.

90. All these are powerful arguments for concluding that the adjudication is indeed determinative and binds the court. However, it appears to me that it if I were to conclude that it was, that would be contrary to the case law. Indeed, in this case it is not a question of the court not being bound by the decision of a previous judge who has heard evidence. This is a case where the adjudication has been made essentially as an administrative step without necessarily the benefit of any representations by a person directly affected, namely John. If the position is as stipulated in *Rogers* I asked myself rhetorically how much more so it must be the position where the decision in issue is not one by judge after a trial but merely an administrative step taken by a liquidator?

91. Furthermore, I do not think that concluding, as I do, that the adjudication is not determinative undermines the importance of Rule 14.8 and the need for people to comply with it. The position in this case is that I am presented with a specific claim under section 212. That requires a consideration of what it is just to order to be repaid, if anything. In my view, that means looking at the matter on a clean slate basis. The jurisprudence does not point in favour of treating the adjudication of £87,000 odd as the starting point and simply considering what it is just to deduct from it, if anything. That it seems to me would be to undermine the integrity of the principle which requires me to apply a judicial independent assessment as to what loss has been sustained by the Company by virtue of John's breaches.

92. Further, the purpose of the liquidators' adjudication and the courts obligation are different. The adjudication represents what the liquidators (and perhaps Ms Birkhead) accept is the extent of the Company's debt to Ms Birkhead. The court's obligation is to assess the loss to the Company. In short, the adjudication may be binding on the Company and Ms Birkhead but the question of whether it is binding on the court is a different one.

The adjudication

93. It is argued by Mr Shaw that the adjudication is erroneous on 2 grounds. First, as a matter of principle because, as a matter of law, there is now nothing owed by the Company to Heather Birkhead because her claim against the Company has been

settled and so the Company has no further loss. Secondly, it is contended that the adjudication is erroneous because the assumptions utilised by the liquidators in reaching it are flawed.

There is nothing owing as a matter of law by virtue of a settlement

94. This argument focuses on the Tomlin order dated 31 March 2014. I have summarised the terms of the schedule to the Tomlin order elsewhere. Mr Shaw emphasises the fact that the body of the Tomlin order makes it clear that there is no order for costs against Robert and the schedule to the order makes it clear that the payment of £475,000 is in full and final settlement of the claims against him and also makes it clear that claims against John (and Mr Chaudry and Mr Douglas) will be discontinued.

95. It is contended by Mr Shaw, and conceded by Mr Couser, that, in those proceedings, the liability of all the defendants to that claim settled by the Tomlin was a joint and several one.

96. He reminds me that it is a well-established principle of English law that "*the discharge of one joint debtor by accord and satisfaction discharges all other joint debtors in accordance with the general principle that a joint liability creates only a single obligation*" (*Morris v Wentworth Stanley* (1999) QB 1004 at 21).

97. As Mr Shaw puts it at paragraph 63 of his skeleton argument: "*hence, where one joint obligor is released from liability, all other joint (or joint and several) obligors are also released from liability* ***unless*** *(*my emphasis*) the right to pursue those not a party to the settlement are expressly or impliedly reserved".* The authority of that proposition is *Chelsea Building Society v Nash* (2011) BPIR 381wherein it was stated by Pitchford LJ at paragraph 36:

> *36* "*Accordingly, the current state of the law is that, in order for the creditor to reserve his rights against co-debtors he should expressly reserve those rights in his agreement. If he does not make an express reservation the court will need to determine whether a term is necessarily to be implied from the circumstances which existed at the time of the agreement."*
>
> And at paragraph 37:
>
> *37 "…. The second, and alternative, question was whether, notwithstanding the absence of an express reservation, it was necessary by virtue of the surrounding circumstances to imply such a reservation*."

98. Mr Shaw argues that there is clearly no express reservation of a claim against the other debtors and so the only basis upon which these debtors, including the Company, are not released is if it is necessary to imply a reservation of claim from the circumstances which existed at the time of the agreement.

99. That, argues Mr Shaw, is a matter of construction on the basis of ordinary principles of construction which have been developed in *Investors Compensation Scheme Ltd v West Bromwich Building Society* (1998) 1 WLR 896, *Kookmin v Rainey Sky* (2011) 1 WLR 2900 and *Arnold v Britton* (2015) 2 WLR 1593. I do not intend to indulge in an in-depth analysis of those cases. The principles of construction, it seems to me, are now clear. The aim of construction is to determine what the parties meant by the language used and that involves ascertaining what a reasonable person, having all the background knowledge which would reasonably have been available to the parties

concerned when they made their contract, would have understood the parties to have meant by their agreement.

100. Mr Shaw argues that the facts known to the parties at the time included the fact that

    a. Ms Birkhead had a judgment against the Company which she had obtained in November 2012.

    b. That the Company was in creditors voluntary liquidation and had no assets.

    c. That John (along with Messrs Chaudhry and Douglas) had only been added as a party to the claim against the Company and Robert after the Company had gone into liquidation and when her judgment against it was still unsatisfied.

101. Mr Shaw contends that the reasonable bystander would inevitably have concluded that John was joined into these proceedings because the prospect of a recovery from the Company was vanishingly remote. In those circumstances Mr Shaw's contention is that there is no express reservation of rights to pursue the Company nor any necessity to imply a reservation of such rights. The reasonable bystander would conclude that a settlement which provides for the payment of £475,000 by a joint obligor and which also specifically discharges John from liability would inevitably mean that the claim against the Company is compromised because otherwise, bearing in mind the financial position of the Company, there remained scope ultimately for John (and at that stage perhaps also the other directors) to remain liable to Ms Birkhead through their connection with the Company.

102. I should add that John's evidence was certainly that he thought that this settlement would see an end to all claims including claims against the Company.

103. It is a fact that the Company was not a party to the Tomlin order. Mr Couser relies on that but Mr Shaw says that it is irrelevant. He argues that as a matter of law unless there is an express or implied reservation of rights, neither of which he argues are present here, the settlement by one joint obligor releases all the joint obligors whether they were involved in the settlement or not.

104. Mr Couser argues that Mr Shaw's argument is flawed. First, he contends that the schedule to the agreement which provides for the payment of £475,000 in full and final settlement specifically states that it is in full and final settlement of Heather Birkhead's claims against Robert. It does not say full and final settlement of her claims generally. It specifically confined itself to saying that it is in full and final settlement of her claims against Robert.

105. Secondly, the schedule specifically agreed to a discontinuance of proceedings against three named defendants of which the Company was not one. He argues that if this is not an express reservation of a right to continue a claim against the Company (against whom of course Heather Birkhead had a judgment) then it must inevitably be an implied reservation of a continuing right against the Company.

106. Thirdly, that the Company was not a party to the mediation leading up to the Tomlin order, much less the Tomlin order itself. That there is nothing in the Tomlin order which can be seen as depriving Heather Birkhead of her right to prove in the liquidation of the Company and nothing in the Tomlin order which could preclude the Company from pursuing delinquent directors to recover its loss, especially where the Company was not a party to the agreement.

Conclusion as to the question of settlement.

107. I should say that I recognise that there is a challenge to these proceedings on the basis that they are an abuse of process and that challenge also engages with the Tomlin order. I shall deal with the abuse of process issue separately, as did Mr Shaw. My conclusions as to the question of whether the claim is settled at this stage focus on the issues outlined above.

108. I have considered very carefully Mr Shaw's arguments which were forcefully and articulately put but in the end I conclude that this Tomlin order did not settle Heather Birkhead's claims against the Company and that, insofar as there is not an express reservation of rights against the Company in the Tomlin order, it is implied.

109. I am satisfied that the Tomlin order does reserve a right on the part of Ms Birkhead to proceed against the Company. I am persuaded by the fact that paragraph 1 of the schedule to the Tomlin order specifically talks of the claim against the first defendant (Robert) being settled. It does not talk of the claim as a whole being settled. Further paragraph 4 specifically discontinues against all the defendants other than the Company. Further, this is all against the background of Ms Birkhead having the benefit of a judgment against the Company. The Tomlin order makes no attempt to interfere with the status of that judgment, as one might expect if the settlement had intended to render it meaningless.

110. Further, it is relevant although perhaps not determinative that the Company was not a party to this agreement. If Mr Shaw was right then the Company would be precluded from taking proceedings by virtue of an agreement to which it was not a party. That would be odd. I accept of course that Mr Shaw's argument is more nuanced. I appreciate that his argument is not so much that the Tomlin order restricts what the Company can do. His argument is that essentially it restricts what Heather Birkhead can do. In other words, it precludes her from pursuing the Company with the result that there is no need for the Company to pursue John. This is why I accept that the fact that the Company is not a party to the agreement is not determinative of the issue and, in my judgment, it can only have marginal relevance at best, where the issue is what the Company is permitted to do in terms of pursuing recalcitrant directors.

Arithmetical issues with the adjudication

111. I turn therefore to the second aspect of the challenge to the adjudication. Namely that in terms of the numbers contained in it, it is flawed. The adjudication is at file 6A Tab 142 of the court bundle.

112. It is in response to a proof of debt of £295,000. That figure was arrived at as follows

- The 1 November 2012 judgment debt against the company £407,396.72
- Statutory interest pursuant to section 189 *Insolvency Act 1986* £208,676.07
- Costs incurred in Ms Birkhead's action against the Company £13,714.79

£629,787.58

In respect of the £475,000 received pursuant to the Tomlin order the proof of debt gives credit for £334,739.33 leaving a proof of debt of £295,048.25. The £140,000

odd deducted from the amount received as a result of the Tomlin order was apparently to defray two thirds of the costs that Heather Birkhead had incurred in her action resulting in her judgment against the Company and the Tomlin order.

113. As regards the adjudication, I have to admit that when I first read it I found it to be extremely opaque. Reading and rereading served to render it perhaps marginally less so but even then I would be hard pressed to concede that it became wholly clear to me as to how the applicants reached the figure of £87,231 against the proof of debt of just over £295,000.

114. I was able to discern that the adjudication deducts £4,796.63 from the interest claimed on the judgment debt and all the statutory interest pursuant to section 189 on the basis that these are not recoverable in law. To the resultant figure of £402,600.09 there is added £13,714.79 making a total of £416,314.88. That much is clear.

115. It is the treatment of the £475,000 received as a result of the Tomlin order that in my view has remained fairly opaque. It seems clear that the liquidators give credit for only £329,083.88. As I understand it, that is on the basis that Ms Birkhead's costs in pursuing her action against the Company and the individuals amounted to £224,106 in respect of which she is entitled to look to the Company for two thirds of that namely £149,404[1]. How that resultant figure becomes £87,231 appears to relate to a finding that 79p in the pound in respect of Ms Birkhead's claim is appropriate but quite how that works was not immediately clear to me.

116. Mr Poxon's evidence about this adjudication was far from satisfactory. In general terms suffice it to say that, following his evidence, I was really not much wiser as to how the figure was calculated. Leaving that aside, on the assumption that that is my failure rather than that the adjudication is convoluted, the adjudication appears to assess Ms Birkhead's costs against Robert as two thirds of £224,106. Mr Shaw suggests at paragraph 77 of his skeleton argument that this is "*quite fantastic figure for a claim was settled well in advance of trial"*. Mr Poxon acknowledges that there is no discount given to take account of a possible reduction in costs if costs went to detailed assessment. He was not really clear as to where the two thirds figure comes from or how it is calculated. He is unsure as to whether the effect of the Tomlin order and what it has to say about costs was ever taken into account.

117. The adjudication appears to make some apportionments between principal, interest and costs in reaching the conclusion that a credit of only £329,000 was appropriate. Mr Poxon was unclear as to the basis of those apportionments other than that it was a pragmatic and broad brush approach.

118. Mr Shaw argues that any approach which fails to give credit for the whole £475,000 is a flawed one. He prays in aid *Crookes v Newdigate Properties Ltd and others* (2009) EWCA Civ 283 at paragraph 19 as authority for the principle that the claimant cannot recover in total more than his loss[2]. In addition, he cites *Heaton v Axa Equity and Law* (2002) 2 AC 329 and *Jamieson v CEGB* (2000) 1 AC 455 at page 476 as authority of the proposition that £475,000 represented the full measure

[1] It is not lost on me that the figures do not appear to add up arithmetically.

[2] Other than in restitution claims.

of damages to which Heather Birkhead was entitled and thus full credit for it must be given.

119. He argues that in this case a settlement of £475,000 was clearly a full measure of damages. It meant that in total in respect of a debt of £400,000 Ms Birkhead had received in excess of £504,000 when one takes account of the £29,000 received by her before the Company went into liquidation.

120. Furthermore, Mr Shaw asserts that on any view there is a basic error in the adjudication's treatment of costs. It seeks to allow costs that Ms Birkhead incurred in respect of the claim against Robert which the Tomlin order simply does not allow because it makes provision for no order for costs.

121. In his final submissions Mr Couser did not really have anything to say about the arithmetic in the adjudication. His position was simply that it is binding because it had not been challenged. His contention was an unchallenged adjudication fixes the amount for all purposes and that was that. That is a proposition which, for the reasons set out above, I have already rejected.

Conclusion as to the adjudication

122. Since I have concluded that the adjudication is not binding on the court it is incumbent upon the applicants to establish the extent of the Company's loss. For the reasons set out above, I am not satisfied that the adjudication does that nor am I satisfied that any shortcomings in it have been met by the evidence of Mr Poxon.

123. It seems to me however that that does not necessarily mean that John is out of the woods. The Tomlin order does not preclude Heather Birkhead from recovering her costs incurred in pursuing the Company. The fact that the Tomlin order provides for no order for costs in my view does not affect that position. There is specifically a judgment against the Company of 1 November 2012 which gives her the benefit of a costs order against the Company. Not least for the reasons already adumbrated, there is no cogent basis, in my judgment, for concluding that the Tomlin order affects that judgment.

124. I remind myself that Mr Shaw himself recognised that if he failed in respect of all other aspects of his defence but succeeded in his attack on the arithmetic the appropriate outcome of these proceedings may well be judgment for the applicants with damages to be assessed.

Abuse of process

125. Under CPR rule 3.4(2)(b) the court may strike out a statement of case if it appears that it is an abuse of the court process or is otherwise likely to obstruct the just disposal of proceedings.

126. As I understand Mr Shaw's arguments summarised in paragraph 87 of his skeleton argument, he asserts abuse of process on the basis that these proceedings are a collateral attack on the Tomlin order and have exposed John to a multiplicity of proceedings. Mr Shaw argues that this is coupled with substantial and unjustified delay in bringing proceedings and that the outcome has resulted in substantial unfairness to John who is now having to address a liability he thought he had settled and which relates to events some 9 years ago.

127. As regards the length of time that is taken to bring these proceedings, Mr Shaw makes the point, at paragraph 83 of his skeleton argument, that Ms Birkhead obtained a judgment against the company in November 2012. Mr Poxon has been in office since February 2013 and that he was appointed by Ms Birkhead voting on her judgment debt. The Company instructed the same solicitor, Mr Green, that acted for Ms Birkhead and so the applicants would have been aware at a very early stage of the circumstances in which Ms Birkhead pursued her claim against John and the terms of the settlement of the claim in the Tomlin order. Mr Shaw argues that in all the circumstances the applicants would have known that John would have considered proceedings against them settled by the Tomlin order yet they waited a further 2 years to bring proceedings.

128. The argument based on the multiplicity of proceedings derives from the well-established principle that it can be an abuse of process to litigate matters which have (or indeed should) have already been litigated. The principle has its roots in the old and well known case of *Henderson v Henderson* (1843) 3 Hare 100 but is perhaps best enunciated in *Barrow v Bankside Agency Ltd* [1996] 1 WLR 257 and *Johnson v Gore Wood* [2002] 2 AC 1. Those cases are authority for a principle that parties, and indeed the court, ought not to be troubled twice by identical matters and that the administration of justice is not brought into disrepute by the possibility of different findings on identical subject matter.

129. It was said by Sir Thomas Bingham MR (as he then was) in *Barrow* at 260B that the rule in *Henderson* is based on:

> "*the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is an abuse at which the rule is directed.*"

130. In *Johnson* Lord Bingham stated at 31A-B :

> "*The underlying public interest is the same: there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all."*

In the same speech (at 32H-33A) Lord Bingham stated:

> "*An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing.*"

131. Mr Shaw's fundamental point in this context is that these proceedings vex John twice. He has been a defendant in a previous action which he has settled and he is

now being dragged into further proceedings which essentially relate to the same subject matter. In those circumstances it is argued these proceedings are unfair and oppressive.

132. I myself had occasion to consider the question of abuse of process arising from a multiplicity of proceedings in *Walsh v Redmayne Bentley LLP and Hall and Raines* (2019) EWHC 2761 (Ch). Which has been cited to me in the course of counsels' arguments in this case.

133. In that case the claimants had earlier taken proceedings against Mr Hall and Mrs Raines. Those proceedings together with proceedings taken by Mr Hall and Miss Raines against the claimants were settled by Tomlin order by which Mr Hall and Mrs Raines agreed to a payment to the claimants of £275,000.

134. Subsequently the claimants took proceedings against Redmayne Bentley which had the completely inevitable consequence that Redmayne Bentley joined in Mr Hall and Mrs Raines for an indemnity in respect of any liability which Redmayne Bentley may have had to Mr Walsh and Mrs Walsh. I concluded that Redmayne Bentley were no more than a conduit for a further attack by Mr Walsh and Mrs Walsh on Mr Hall and Mrs Raines in order to recover from them in respect of the claim that Mr Hall and Mrs Raines had every reason to consider had been resolved by the Tomlin order. In that case I considered this to be an abuse.

135. Mr Shaw argues that the facts in this case are very similar and that the same conclusion therefore is appropriate. He argues that John is being vexed twice. He believed that the Tomlin order settled his liability to Ms Birkhead and that these proceedings simply resurrect a further claim in respect of that same liability.

136. It seems to me however that there are distinct differences between *Walsh* and this claim. The most obvious of which is that this claim is brought by the liquidators of the Company which was not involved in the negotiations leading to the Tomlin order nor the Tomlin order itself. This is in distinction to *Walsh* where Mr Walsh and Mrs Walsh who brought the subsequent proceedings were directly involved in the Tomlin order.

137. Furthermore, in *Walsh* the Tomlin order involved the relinquishment by Mr Walsh and Mrs Walsh of all their claims. In this case the Company has not agreed to relinquish any claims nor indeed for that matter did Ms Birkhead agreed to relinquish her claims against the Company. It does seem to me that the cases are different.

138. That however is considerably less important than the fundamental question whether John has been twice vexed. I can well understand that he may feel that to be the case but the fact is that this claim with which I am dealing is a claim brought by the Company whereas the earlier claim was one brought by Ms Birkhead. One is a claim brought against a person asserted to be delinquent director. The other is a claim brought against the Company for a debt. It is true that the debt arises by virtue of John's conduct as a delinquent director but nonetheless the claims are not the same.

139. For those reasons, I do not think that the circumstances in this case justify a strike out on the principles enunciated above. I do not see that John is vexed twice in the same matter. He is essentially vexed twice in different matters.

140. I have to say that it also strikes me that there would be some illogicality in concluding, as I have above, that the Tomlin order does not affect the Company to then find that essentially the Company through its liquidators, is guilty of abuse of process by bringing these proceedings. Such an outcome would involve a finding of abuse on the basis of the existence of a Tomlin order which I have found does not affect the Company.

141. Nor do I conclude that any delay in bringing these proceedings gives rise to an abuse or adds sufficient weight to other factors to give rise to a finding of abuse. It is not disputed that these proceedings have been brought within time namely within the 6 years of the conduct complained of and Mr Shaw does not seek to suggest that there is any sort of laches defence nor does he contend that there has been any sort of specific prejudice as a result of the delay. Perhaps the claims could have been brought earlier but in my view they have not been brought so as to render them an abuse.

142. In *Walsh* I also considered the principles set out in the case of *Aldi Stores Limited v WSP Group Plc* (2008) 1 WLR 748. That case is authority for the proposition that in complex commercial multi-party litigation where one party wishes to pursue other proceedings whilst preserving a right in existing proceedings the court should be advised in the course of the first proceedings of the fact that the right has been reserved to take subsequent proceedings.

143. I do not intend to rehearse the relevant parts of *Aldi* which make that clear. I have done so from paragraphs 77 of my judgment in *Walsh* which also makes reference to subsequent cases in which *Aldi* has been applied namely *Stuart v Goldberg Linde* (2008) 1 WLR 823 at (96), *Gladman Commercial Properties v Fisher Hargreaves Proctor and others* (2014) PNLR 11 at (64), *Otkritie Capital International Ltd V Threadneedle Asset Management Ltd* (2017) 2 costs LR 375, at (53) *Clutterbuck v Cleghorn* (2017) EWCA Civ 137 at (81) and *Manson v Vooght* (1999) BPIR 376 at page 387. Suffice it to say that it is not appropriate for parties to keep future claims secret. There must be a cards on the table approach. Parties must come clean if they intend to make future claims so that the court can decide whether one or more trials is required and when. The duty is mandatory because it serves a public interest in encouraging the efficient use of court resources and an inexcusable failure to comply with the duty is a relevant factor in an assessment of whether a subsequent claim is a abuse of process. Such an abuse will lead to striking out the proceedings unless there are special circumstances to impose something less draconian.

144. I do not see that these principles lead to a striking out of this claim. Even if Aldi is applicable on the basis this is complex commercial multi-party litigation, as I have said, the Company was not a party to the settlement of Ms Birkhead's initial claim. It has not sought to unjustifiably "*keep its powder dry*" in the context of the settlement leading to the Tomlin order.

145. As regards the position of Ms Birkhead, it cannot be said that the Tomlin order seeks to settle a claim by her against the Company while having another one waiting in the wings. The Tomlin order simply settles her claim against individuals but does not affect a judgment that she had had against Company which made her a creditor entitled to prove in the liquidation – and, in effect, that is all she has done.

Section 1157 *Companies Act 2006.*

146. **Section 1157 Companies Act 2006 states;**

1157 Power of court to grant relief in certain cases

(*1) If in proceedings for negligence, default, breach of duty or breach of trust against—*

(a) an officer of a company, or

(b)a person employed by a company as auditor (whether he is or is not an officer of the company),

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

(2) If any such officer or person has reason to apprehend that a claim will or might be made against him in respect of negligence, default, breach of duty or breach of trust—

(a) he may apply to the court for relief, and

(b) the court has the same power to relieve him as it would have had if it had been a court before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought.

(3) Where a case to which subsection (1) applies is being tried by a judge with a jury, the judge, after hearing the evidence, may, if he is satisfied that the defendant (in Scotland, the defender) ought in pursuance of that subsection to be relieved either in whole or in part from the liability sought to be enforced against him, withdraw the case from the jury and forthwith direct judgment to be entered for the defendant (in Scotland, grant decree of absolvitor) on such terms as to costs (in Scotland, expenses) or otherwise as the judge may think proper.

147. It will be seen that section 1157 enables the court to wholly or partially relieve an officer of a company from liability for losses incurred by that company through breach of the duties imposed on such the officer by the *Companies Act 2006*.

148. In his skeleton argument Mr Couser argues that this defence should be rejected on the basis that it is not pleaded and lacks particularisation. However, it was accepted by him in the course of oral argument that this defence need not be pleaded and can be raised for the first time at trial.

149. As Henderson J pointed out in *Philips v McGregor-Patterson* (2009) EWHC 2385 (Ch) at (36), it may be that the rule which obviates the need to plead this defence "*may be ripe for reappraisal".* But as Mr Couser, perhaps reluctantly, conceded, currently it is still the rule. It is axiomatic in those circumstances that it would be inappropriate to reject the claim for want of particularisation in the pleaded defence where there is no requirement to particularise it at all.

150. It is clear that John can only avail himself of this section if the court is satisfied that, when he breached his duties as the director, he acted honestly and reasonably. There is no suggestion that John's conduct has been dishonest.

151. The first question that I have to consider therefore is whether his behaviour was reasonable. It is common ground that, if his conduct relating to the breach of duty was reasonable then, and only then, can regard be had to "*all the circumstances of the case*" in reaching a conclusion as to whether he ought to be fairly excused wholly or partially from any liability.

152. I was referred to only one authority on the question of section 1157. That was *Re D'Jan of London Ltd Copp v D'Jan* (1994) 1 BCLC 561. That case concerned section 727 *Companies Act 1985* which was in terms similar to section 1157. As Hoffmann LJ (as he then was) observed in that case:

> "*it may seem odd that the person found to have been guilty of negligence which involves failing to take reasonable care can ever satisfy a court that he acted reasonably. Nevertheless, the section clearly contemplates that he may do so and it follows that conduct may be reasonable for the purposes of s727 despite amounting to lack of reasonable care at common law."*

153. As Mr Shaw put it in his final submissions, the appropriate way to consider section 1157 is to use an analogy with criminal law where there has been a finding of guilt but then questions arise as to mitigation of the penalty arising from that finding. Section 1157 is essentially the authority by which John's liability for his breaches can be mitigated.

154. Mr Shaw argues that, in considering whether John acted reasonably, regard has to be had to John's evidence contained from paragraph 21 of his witness statement because that evidence was not challenged. I have already summarised that evidence but, for ease, will briefly recap.

    a. Insofar as Ms Birkhead may have been misled into making her investment, John did not mislead her nor did he know that she had been misled. He believed that the Company had legitimately come into possession of the £400,000 on the basis that she was going to receive a return on her investment. His evidence is that it was not unreasonable for him to take that view because this form of finance was typical in the industry.

    b. Further, the receipt of the money into the Company was managed by Robert and that the process of acquiring capital in this way was not necessarily the exclusive act of a director. Furthermore, that John essentially left back office functions to his co-director's both of whom were qualified practising accountants and that he believed that they would ensure that suitable arrangements were in place to reflect the terms of Ms Birkhead's investment. His attention was consistently directed to the actual hands on work of building the Margate Project.

    c. Insofar as John's breaches of duty revolve around the paying away of this money rather than the receipt of it, John's evidence is that he had no reason to believe that the monies could not be used in the main for the purpose for which he authorised their disbursement. It was used predominantly to enable

> the Margate Project to be advanced by ensuring that creditors of Project Management were paid. Additionally, his unchallenged evidence is that he relied on his professional co-directors "*to ensure that suitable arrangements were in place to reflect the onward transmission of the relevant part of the money from the Company to Project Management"*.

155. Mr Shaw argues that in the same way that in *D'Jan*, the director was relieved of a proportion of his liability on the basis that "*His breach of duty in failing to read the form before signing was not gross. It was the kind of thing that could happen to any busy man*", so too can John's conduct be seen to be reasonable in the section 1157 context.

156. Mr Couser argues that John's conduct was egregious, if not in allowing his father to acquire the money on behalf of the Company, then certainly in paying it away without checking with Ms Birkhead that the Company had come into possession of the money with her informed consent. Further, in not ensuring that thereafter hers and indeed the Company's interests were protected.

157. He also reminds me that not all the monies were paid to Project Management. Indeed only £328,750 was paid to them. Substantial other payments were made simply to discharge debts owed either by Robert or in respect of which the Company had no obvious liability. These payments, amounting to over £96,000, have been recorded earlier in this judgment.

158. Finally, Mr Couser also draws a distinction between the situation here and that which applied in *D'Jan.* In that case the wrongdoing of the director essentially affected only him and his wife, John's wrongdoing affected an independent third party namely Ms Birkhead.

Conclusion as to reasonableness

159. It is interesting to note that, in his consideration of the effect of section 727, Hoffmann LJ had in mind the question as to whether the conduct of the errant director was "*gross*". Whilst I am satisfied that John's conduct was clearly a breach of his duties, despite Mr Couser's powerful arguments I do not think that they can be characterised as a gross breach. If that is the test of whether the conduct is sufficiently reasonable to engage section 1157 for the benefit of the director, then I am satisfied that John has successfully negotiated that hurdle.

160. I reach that conclusion also because it is important to bear in mind that in terms of Robert being given the freedom to acquire capital for the Company this money was paid into the Company only one day after John's appointment, before presumably John had the opportunity of even catching his breath, and the acquisition of that money did not cause the Company loss. It was the payment out of that money in circumstances where it was irrecoverable that caused the loss.

161. In my judgment the really errant conduct of John which caused avoidable loss was in accepting these funds at face value without checking with Ms Birkhead that the Company had legitimately received them and the terms upon which the Company had received them and then paying those monies away so quickly and without the necessary protections in place. But I have set out John's reasoning, at least in relation to the monies paid to Project Management. In my view, to use Mr Shaw's analogy, that is fairly strong mitigation even if the test does not revolve around

concepts of "*grossness*". This is particularly so when one also adds in the fact that there is no suggestion that John himself derived any personal benefit from the disbursing of these funds.

162. Accordingly, I am prepared to conclude that, albeit I have described this conduct as" reckless", it meets the threshold of reasonableness in the context of section 1157 to enable me to go on to consider all the other circumstances in order to form a view as to whether John should be relieved of some or all of the liability which attaches to him by reason of the finding that section 212 *Insolvency Act 1986* has been engaged. I recognise that, as Hoffmann LJ put it in *D'Jan*, it is odd that any behaviour capable of being characterised as reckless can be considered reasonable but, as Hoffmann LJ remarked "*that is what the section contemplates*".

163. The circumstances include not only the circumstances to which I have just referred but also:

    a. The fact that John has paid to Ms Birkhead the sum of £475,000.

    b. That he appears to be the only officer of the Company who has made good to Ms Birkhead.

    c. That his co-directors including two qualified accountants inexplicably have not been pursued with the vigour that the applicants have pursued John. In fact, these proceedings although started against Mr Chaudry and Mr Douglas have been dismissed by consent simply on a drop hands basis.

    d. That no steps have been taken by the applicants to seek to enforce the judgment that the applicants have against Robert dated 17 March 2020

    e. That John has recognised his breaches to the extent of having given a four-year directors disqualification undertaking

Are my findings as to reasonableness and all the circumstances sufficient to fairly give rise to the conclusion that John should be fairly excused from some or all of this liability and, if so, to what extent?

164. In my view they are but it is not appropriate or fair for him to be excused from all liability because, whilst one can understand perhaps how the payments to Project Management came about because John has explained them, it is much harder to understand his thinking in authorising the payments of £96,000 odd to which I refer above.

165. It seems that there is little guidance on the extent to which a director who successfully claims the benefit of section 1157 should be released from his liabilities. It is simply on such terms as the court thinks fit.

166. In *D'Jan* the errant director had received 40p in the pound by way of dividends as an unsecured creditor and the court concluded that he was entitled to retain that but should not receive any further dividends. I hope I do not do a disservice to Lord Hoffmann in taking the view that that was a fairly broad brush approach.

167. I propose to do the same. As I have said, it is difficult to find any basis upon which it is appropriate to excuse the payments out of £96,000 odd to the recipients other than Project Management. That represents just less than 25% or so of the monies provided by Ms Birkhead. The loss said to be sustained by the Company is

approximately £87,000 but as I have sought to explain, the methodology by which that figure is arrived at is itself questionable. I observe that 25% of that figure is £21,750.

168. Taking all matters into account and doing the best I can I have concluded that John's liability to compensate the Company for the loss caused by his breach of duty shall be in the sum of £15,000 and I shall make a declaration accordingly. That amount seems to me to fairly reflect the mitigating circumstances which I am satisfied exist here.

Final remarks

169. This judgment is in draft until formally handed down on a date fixed by the Court. CPR Practice Direction 40E shall apply and the parties are reminded of the directions in the box on page 1 of this draft. The time for appealing does not start to run until the date that the judgment is formally handed down.

170. In the event that it is contended by a party that there is an error in or omission from the draft judgment or any arithmetical miscalculations in it which may alter the conclusions reached then the party so contending may make oral representations to that effect at the adjourned hearing but notice of the intention to make such representations and the nature of those intended representations shall be notified to the other parties and to the Court by email by no later that 5 clear working days before the hearing. The submissions sent to the Court shall be headed with a prominent request to the Court Office to forward them immediately to me.

171. In the event that no issues arise, and the parties are able to agree the incidence of costs and the basis upon which they shall be assessed (either standard or indemnity) and an agreed Order is lodged at Court in accordance with the Practice Direction, I am content to excuse the parties from attendance at the handing down of judgment.

172. If an order cannot be agreed and a determination by the court is necessary and which the parties are agreed cannot be resolved within say 15 minutes, then I propose to hand down judgment on the day fixed for that and adjourn the consequential matters to another date. Counsel should ensure that by the hand down date I have up to date details of availability and an agreed time estimate for any further hearing.

Once again, I wish to express my gratitude to counsel for their very able assistance in this matter.

HHJ Saffman