Neutral Citation Number: **[2022] EWHC 855 (Ch)**

Case No: CR-2021-000081

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

IN THE MATTER OF GLAM AND TAN LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Rolls Building
Fetter Lane
London
EC2Y 1NL

Date: 08/04/2022

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

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Between:

(1) NICHOLAS BARNETT **Applicants**

(as Liquidator of Glam and Tan Limited)

(2) GLAM AND TAN LIMITED – IN LIQUIDATION

- and –

MRS DANIELLE LITRAS **Respondent**

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- -

THOMAS COCKBURN (instructed by **LOCKE LORD (UK) LLP**) for the **Applicants**
MRS LITRAS IN PERSON

Hearing dates: 30 and 31 March 2022

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Approved Judgment

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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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10:30 hrs on 8 April 2021

Chief Insolvency and Companies Court Judge Briggs:

1. Following incorporation Glam and Tan Limited ("the Company") started to trade in November 2014 as a beauty salon. Its sole de jure director was the Respondent to this application, Mrs Litras. She was absent from the business for 9 months from July 2016. Soon after her return HMRC issued a notice of distraint. The Company did not survive, entering creditors' voluntary liquidation in July 2017 with an estimated deficiency of £132, 428.

2. Mrs Litras was not able to provide the liquidator, Mr Barnett, with a full account of the financial dealings of the Company. Mr Barnett is a partner in a firm known as Libertas along with Mr Cottingham who acts as a senior manager. It is common ground that the last drawn accounts are those for the year ending 30 June 2016. The Company only filed two sets of accounts, the other being for the year ending 30 June 2015. A schedule of the impugned payments was sent to Mrs Litras on 11 October 2019. She has provided responses, with the aid of her accountant, however Mr Barnett was and remains unsatisfied by those responses.

3. The Application before the court seeks a payment of £143,358.47 "to the Company or such other sum as the court deems fit". The Application notice dated 14 January 2021 claims certain declarations and the sum specified pursuant to alternative heads of claim: misfeasance, transaction at an undervalue and preference.

4. During closing Mr Barnett sought permission to amend the Application to increase the sum by £14,700 due to an admission made by Mrs Litras during cross examination. Permission to amend was given.

The impugned payments

5. On 11 October 2019 Mr Barnett wrote to Mrs Litras enclosing a schedule of transactions ("Scheduled Payments") "from the Company's bank account statements which I do not consider to be business expenses and I would kindly ask you to repay… [a]lternatively please provide an explanation for each payment…" The Scheduled Payments include three separate types of payments. The first is payments were made to third parties such as: L Theodossiou (the mother of Mrs Litras), Mr G Litras (Mrs Litras' husband), A Litras (her husband's cousin), Ticketmaster, HM Passport, Pro Visas Immigration, Sainsburys, Tesco, Asda, Chozen Noodle, Pets at Home and Oak Veterinary. The second, payments apparently made to herself. The third payments that were made for the benefit of the Company.

6. The second class of impugned payments are contained in a separate schedule, sent on 13 October 2019 (the "Salary Schedule"), and comprise payments made by the Company to Mrs Litras otherwise than for salary. These have been described as dividend payments. The payments were made by a transfer of cash (the "Cash Payments") received by the business where that cash had not been deposited into the Company's bank account. It appears that the business received considerable cash during its trading life. As an example, Mr Spyrou (of Freemans Partnership LLP) informed Mr Barnett that in the third quarter of 2016, £15,000 was attributed to unbanked cash and was received by Mrs Litras.

7. Mrs Litras passed the letter of 11 October 2019 to her accountant who "requested" some documentation with the aim of making a full response. That response was made on 10 November 2019 and purported to give "a transaction by transaction analysis of what each payment/transfer related to". As regards the Scheduled Payments Mr Spyrou assisting Mrs Litras explained that sums paid to Ms Nicolaou (£6,500), Mr Litras (£8001.47) and his cousin (Andrew Litras) (£4,145) were loans. The "salon" payments were for items such as machine leases, cleaning, maintenance and telephone. Some impugned payments were treated as dividends for the year 2016/2017. It was accepted that some impugned payments were for personal benefit such as payments made to the vet. As regards the Salary Schedule it was said that the difference between the payslips and receipt of payment was explained by a combination of "wages, dividends for 16/17 and 17/18 as well as repayments of the directors' loan owed by the company brought forward from 30 June 2016 totalling £10,260.05". The Cash Payments received by Mr Litras from the business were also treated as the receipt of a dividend.

8. The "transaction by transaction analysis of what each payment/transfer related to…" resulted in the following:

   i) Approximately £27,000 was paid out of the Company's bank account as dividends said to be justified on the basis of the 2016 / 2017 tax return;

   ii) Approximately £19,000 of loans were made by the Company on an unsecured and undocumented basis to N Nicolaou, G Litras and A Litras;

   iii) Approximately £6,000 for various salon expenses;

   iv) £8,312.25 for personal expenses and said to be recoverable by the Company;

   v)Any further cash withdrawals (approximately £15,000 taken in cash from the business in the first quarter of the financial year 2016/2017) were to be treated as dividends; and

   vi) It should be added that the liquidator estimates that £45,000 of cash was received by the Company in the second, third and fourth quarters of the financial year 2016/2017.

9. The correspondence between the accountants and Mr Barnett continued with some discussion of settlement (the detail of which was, quite properly, not disclosed to the court). By the end of 2019 it was apparent to Mr Barnett that settlement would not be reached so he caused a letter before action to be sent. That letter is dated 10 January 2020. Mr Barnett claimed that Mrs Litras was responsible for the losses to the Company and personally benefited by receiving money she was not entitled to or received dividends that were unlawful. In his letter Mr Barnett claimed:

   i) £60,321.21 representing sums paid to Mrs Litras in the period 25 July 2016 to 26 July 2017;

   ii) £16,042.77 representing unwarranted additional salary;

   iii) £15,000 representing cash receipts (taken as dividends or drawings) in the first quarter of the 2016/2017 financial year;

iv) £45,000 representing an unaccounted sum likely to be received by the Company in the first three quarters of the financial year 2016/2017.

10. In his first witness statement Mr Barnett says that the Company's lack of books and records has made it difficult to reconstruct its financial dealings. He relies upon the "transaction by transaction analysis" provided by Mrs Litras' accountant and a schedule of "total sales" for the period 10 November 2014 to 30 June 2016 provided by Mr Spryrou. The "total sales" schedule shows sales of £298,482 of which £134,157.21 was received in cash as recorded in the petty cash book (but not banked).

11. Mrs Litras makes the following response which I take from her first witness statement (this was expanded upon considerably in oral evidence and in some respects altered):

i) Her estranged husband, George Litras, was of a controlling and violent nature ("if I never did as I was told there were consequences"), and acted as de facto director. He made financial decisions for the Company;

ii) Mr Litras was in control of the Company in the 9 months she was on maternity leave and "withheld any letters and financial information" from her;

iii) Evidence relating to some impugned transactions was destroyed in a flood at the business's premises;

iv) The decision to cause the Company to make loans to Mr Litras, his cousin and Mrs Nicolaou (Mr Litras' mother) was forced upon her by her husband;

v) Some of the personal receipts were used for business purposes: "there were times when I had to buy stock and pay rent out of my personal bank account as the business bank card was not with myself but with Mr George Litras.";

vi) The vast majority (all but £8,312.25) was spent on the business;

vii) Mrs Litras had repaid the £8,312.25; and

viii) £6,154.89 of salon expense receipts were destroyed in the flood.

12. Mrs Litras asserts that "any discrepancies of cash takings are [Mr Barnett's] estimation and not actual". I understand this to mean that Mr Barnett has the burden of proof on this issue, and she challenges him to discharge it. Mr Barnett accepted that the calculation of £45,000 involved linear bias that failed to have regard to 1) seasonal differences in the business and 2) the loss of business due to it failing.

13. Mr Barnett informs the court that he has contacted creditors and no creditor had any dealings with Mr Litras acting as a director or otherwise. His name does not appear on any headed note paper, bank account, debit card or any of the existing company records. He says that it is clear to him that Mr Spyrou only dealt with Mrs Litras. He disputes that the sum of £8,312.25 was repaid to the Company (saying there is no evidence of repayment).

Issues of law

Company claims

14. The Companies Act 2006 codifies the duties of a modern-day director in Chapter 2 of Part 10. The duties include a duty to exercise their powers for the purpose for which they are conferred (s.171 of the Companies Act 2006); to exercise the powers in what the directors consider in good faith to be likely to promote the success of the company for the benefit of the members as a whole (s.172)); a duty to exercise independent judgment (s.173); a duty to exercise reasonable skill and care (s.174) and a duty to avoid a situation giving rise to a direct or indirect interest which conflicts, or which might possibly conflict, with the interests of the Company (s.175).

15. It has been submitted that a director's duties are "non-delegable". In my judgment the proposition is put too high. A director is entitled to delegate certain duties as long as the delegation is reasonable. There has been some consideration by the courts as to what constitutes reasonable delegation and whether all the powers of a director can be delegated.

16. In *Re Barings plc (No 5)* [2000] 1 BCLC 523 Jonathan Parker J (as he was) explained that directors have a collective and individual duty to maintain sufficient knowledge and understanding of the company to enable them to discharge their duties. The delegation he spoke of concerned specific duties rather than a delegation of all duties. Accordingly, exercising the power of delegation "does not absolve a director from the duty to supervise the delegate's discharge of the delegated functions".

17. The determination of reasonableness is fact sensitive. Such matters as the relationship between the one delegating and the one to whom power is delegated is an obvious and important factor. The nature of the tasks delegated, and whether the individual is qualified and trusted to undertake those tasks are other factors.

18. Mr Barnett seeks relief on the basis that Mrs Litras has breached her duties owed to the Company and has chosen the gateway provided by section 212 of the Insolvency Act 1986 to pursue his claim. The liability under s.212 is imposed on those who are in a position to prevent damage to creditors by taking proper steps to protect their interests. The provision provides that a liquidator may take action where a director 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."

19. Where the court finds that a director has misapplied, retained assets or become accountable to the company or breached the duties of a director, relief *may* be granted (s.212(3)):

> (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."

20. The relief in (a) relates to the misapplication or retention of any money or other property of the company whereas (b) is the remedy for breach of duty.

21. Where a company seeks the return of improper distributions the claim is that of the company. Section 212 of the Insolvency Act 1986 operates "in the course of winding up of a company" and permits a liquidator to "examine into the conduct" of a person who "is or has been concerned or has taken part, in the promotion, formation or management of the company." A "distribution" is widely defined by section 829 of the Companies Act 2006 (the "Act") to mean "every description of distribution of a company's assets to its members whether in case or otherwise." Part 23 of the Act provides that a company may make a lawful distribution where it has "available profits" which are justified by reference to "relevant accounts". The term "available profits" has a technical meaning provided by section 830(1) of the Act:

> "accumulated, realised profits, so far as not previously utilised by distribution or capitalisation, less its accumulated, realised losses, so far as not previously written off in a reduction or reorganisation of capital duly made"

22. So unrealised profits cannot be offset against actual losses.

23. I have been taken to two recent authorities. First, *BM Electrical Solutions Ltd* [2020] EWHC 2749 (Ch) where the Deputy High Court Judge, Lance Ashworth QC, found that claimed dividends were unlawful and said:

> "45. For a dividend to become payable it must be declared. Once it is declared it becomes a debt due by the company to the member. However, unless formally declared there is no liability on the company to pay it (Bond v. Barrow Hermatite Steel Co. [1902] 1 Ch 353 at 362)."
>
> 46. Accordingly, if Mr Belcher cannot point to a dividend having actually been declared, it is not open to him to say now that payments he has received should be treated as having been declared as dividends. However, even if he could do so, he would have to go on to show that any such dividend was lawfully declared in accordance with Part 23 of the Companies Act 2006 by reference to the last relevant accounts or some interim accounts. If he cannot do that, any distribution to him would be unlawful and he would be liable to pay it back to the Company.
>
> 47. If there was no distribution, the monies paid to Mr Belcher must have been paid as a loan and, as such, must have been repayable to the Company."

24. Secondly, *TMG Brokers Ltd* [2021] B.C.C. 756, where there was considerable discussion about the application of the duomatic principle, and relief under the honest and reasonable provision under the Act, the court found that where a distribution is made prior to the requisite declaration, that distribution will be made in breach of director's duties.

25. In *Paycheck Services 3 Ltd, Re, Holland v Revenue and Customs Commissioners* [2010] 1 WLR 2793 the Supreme Court considered section 212 in the context of a determination of a claim made by HMRC for an order that the respondents contribute to the assets of the company. In order to be successful, the applicant needed to demonstrate that the respondents were de facto directors. Once that was established the issue of remedy arose. The list of issues included [19]:

> "The scope of the discretion under section 212 of the Insolvency Act 1986. In particular: (a) whether the discretion is wide enough to allow the court to reduce the award to nil or some other sum (as Mr Holland contends) . . . or (b) whether it is more circumscribed as HMRC contends . . . so that the judge did not have power to limit Mr Hollands liability to the amount of HRCT that fell due during the relevant period (approximately £144,000)."

26. Lord Hope (giving the majority judgment) found that the facts when applied to the legal test led to a conclusion that Mr Holland was not a de facto director and section 212 had no application. It follows that the issue of remedy was not required to be determined. Nevertheless he commented that a director is strictly liable for unlawful dividends [47]:

> "…the better view seems to me that in cases such as this, where it is accepted that the payment of dividends was unlawful, a director who causes their payment is strictly liable, subject of course to his right to claim relief under the statute."

27. Turning to section 212 Lord Hope [49] viewed the word "may" in subsection (3) as giving the court a discretion to limit the award in light of all the circumstances (but not providing the court with a power to reduce the contribution to nil). There were two dissenting judgments. Lord Walker disagreed with the majority on the first issue but in respect of the remedy he commented that section 212 (3) permits the court to [124]: "adjust the remedy to the circumstances of the particular case." Lord Clarke agreed [146]. Although obiter, the remedy comments were argued before the Supreme Court, and at the very least are highly persuasive; Mr Barnett is content they represent the law.

Liquidator claims

28. As Mrs Litras was the recipient of some of the impugned payments, Mr Barnett claims alternative statutory causes of action as liquidator. I mention these only for completeness: they were not relied upon at trial. First, he says that the sums of money transferred to Mrs Litras were gifts that took place within 2 years prior to the commencement of winding up, and at a time, relying on the statutory presumption, that the Company was insolvent. Secondly it is said that if Mrs Litras can make out that she was a creditor of the Company, the transactions are voidable as a preference. The court shall not make an order to restore unless the decision to make the impugned payments was influenced by a desire to put her into a position which in the event of the company going into insolvent liquidation, would be better than the position she would have been in if the payments had not been made. The desire to prefer is presumed in this case.

Directors' duties, and evidence

29. It is well known and self-evident that a liquidator comes to an insolvent company as a stranger. His duty is to investigate its failings, collect-in and distribute its assets to the

creditors of the Company according to the insolvency scheme. The courts acknowledge his absence of first-hand knowledge of the events that led to the insolvency by placing the burden of proof on a defendant director (who does or should have first-hand knowledge) to demonstrate why or how an event took place, if no minute exists, or where there is no other documentary evidence to support the position of a defendant director.

30. In *Murad v Al-Saraj* [2005] EWCA Civ 959 Arden LJ (as she was) at [77] referred to the principle that:

> "for policy reasons, on the taking of an account, the court lays the burden on the defaulting fiduciary to show that the profit is not one for which he should account …The shifting of the onus of proof is consistent with the deterrent nature of the fiduciary's liability. The liability of the fiduciary becomes the default rule".

31. A few years later Arden LJ applied her reasoning in *Re Mumtaz Properties Ltd* [2011] EWCA Civ 610 at [16] to [17]:

> "The approach of the judge in this case was to seek to test the evidence by reference to both the contemporary documentary evidence and its absence. In my judgment, this was an approach that he was entitled to take. The evidence of the liquidator established a prima facie case and, given that the books and papers had been in the custody and control of the respondents to the proceedings, it was open to the judge to infer that the liquidator's case would have been borne out by those books and papers.
>
> "It was not open to the respondents … to escape liability by asserting that, if the books and papers and other evidence had been available, they would have shown that they were not liable in the amount claimed by the liquidator. Moreover, persons who have conducted the affairs of limited companies with a high degree of informality … cannot seek to avoid liability or to be judged by some lower standard than that which applies to other directors, simply because the necessary documentation is not available …"

32. In this case, Mrs Litras claims that some relevant records were lost in a flood. There was no elaboration about the flood in her written evidence. Her written evidence was produced by herself. In cross examination she provided detail about the flood claiming that the liquidator's office knew of the flood. That was not accepted, but by the end of trial Mr Barnett accepted that there had been a flood in the premises, and that documents and computer records had been lost as a result. Mrs Litras explained in oral evidence that she had made a claim on the insurance. The insurers had estimated the damage to the premises and paid £14,700. She could not recall the precise figure but thought this was accurate. The insurers paid the money after the company entered liquidation.

33. I turn to the oral evidence where I shall assess the likelihood that the documents required to meet the case against Mrs Litras existed.

The evidence

34. Mr Barnett gave evidence. He was questioned about why the liquidation had taken so long, the accuracy of the figures claimed and his connection with Mr Litras. Mr Barnett accepted that he had not had a meeting with Mrs Litras to ask her to go through the impugned payments. He was content to rely on the correspondence response provided by Mr Spyrou in November 2021 and rely on Mrs Litras's inability to provide documentation from July 2016 when she left the business for maternity leave. Mr Barnett said that he did not know that there had been a flood at the salon premises or that the flood caused the loss of documentation, until he saw mention of the flood in the statement of Mrs Litras provided in these proceedings. It was put to him that his office had been informed.

35. His evidence was honestly given but it became clear that his manager, Mr Cottingham, had more day-to-day dealings with the liquidation.

36. Mr Cottingham was not asked many questions by Mrs Litras. Of note he was asked about his association, which was denied, with Mr Litras. He agreed that, knowing of the lack of documentation, Mrs Litras was not asked to a meeting to go through the impugned transactions list.

37. Mrs Litras was cross examined for about a day in total. Her evidence was mostly consistent. In my judgment she gave her evidence truthfully not blanching when she made admissions knowing, as she pointed out, that those admissions would expose her to a liability. There is no doubt that Mrs Litras did not fully understand the process of a liquidation or the technical nature of the laws relating to insolvency. She said on more than one occasion that she had paid for the Company to be liquidated and Mr Barnett had failed in that objective. As Mr Barnett explained in his cross examination, winding up is a process not an event. A company enters liquidation whereupon a liquidator is charged with carrying out functions according to statute. The winding up of a company is not complete until a final report has been filed and a company dissolved. He accepted, with humility, that the winding up of the Company had taken longer than he would have wished, but also pointed out that the lock-downs imposed by Government for the pandemic in 2020, and the need to complete this litigation (to collect in assets) contributed to any delays.

38. Mrs Litras was tested about her failure to communicate fully with the inquiries made by the liquidator's office. She responded, truthfully, that correspondence sent had not been received: the liquidator knew her e-mail address and had not sent correspondence by e-mail on occasions. Another issue that concerned Mrs Litras was Libertas' involvement with her estranged husband. Mr Cottingham was concerned in the liquidation of a company in which Mr Litras was the director and shareholder. I understand that Libertas has a working relationship with Mr A Litras but the extent of that relationship was not explored at trial. Mrs Litras was anxious that information provided to Mr Cottingham or any other officer or manager at Libertas would be passed on to her husband. She was concerned that any information he obtained would be weaponised and used against her in divorce proceedings that involved any financial settlement and her five children. There is no evidence that Libertas did or would have provided information concerning the Company and Mrs Litras' dealings with the Company to Mr Litras, but Mrs Litras was able to piece together "coincidences" that led to her distrust. I am not persuaded that the coincidences she cited make for rational distrust but that does not mean her distrust was

not real to her, and her concerns have to be viewed in light of the evidence I discuss below.

39. Mrs Litras gave evidence that she has become estranged from her husband. Her evidence was that he had become accustomed to beating her. She spoke of "consequences" if she did not do as he asked, how he controlled all the financial aspects of their personal life and through actual violence and threats of violence would at times control the finances of the Company. As this aspect of her case was not covered in any detail in her witness statement, its accuracy was tested during cross examination. The examination simply reinforced her evidence: she provided significant details of occasions when she suffered "consequences" and how the "consequences" escalated over time. She was beaten in private if she did not do what was asked by Mr Litras. This included noncompliance with financial requests. The beatings were restricted to her body so that her face was unmarked, and she could continue to work. Confined to taking place in private the beatings escalated over time so she was hit and bullied in public. She explained how Mr Litras has the bank debit card and access to the online account; how he would compel her to make transfers; how cash receipts had to be handed over to him if she wanted to avoid "consequences", and how he would stand over her to watch her make an online transfer for his benefit.

Discussion

Scheduled Payments

40. Mr Cockburn took Mrs Litras through the Scheduled Payments that total £60,321.21. £2,887.51 of this sum was no longer in issue by the time the application was issued. She properly and truthfully accepted that £24,963.05 of the identified payments represent payments were made for her benefit. Of that sum, £3,255.45 represents payments she was unable positively to identify as payments for the benefit of the Company. This included items such as a payment of £700 to a travel company. I find that it is more likely than not that the payments she was unsure about were payments made for her own benefit.

41. I accept the evidence given by Mrs Litras that some of the impugned payments were for the benefit of the Company. These include payments for a TV licence as the business had a television which, she said, screened Netflix and terrestrial television for clients of the salon. I accept that payments made to supermarkets for nail varnish removal, cotton wool and other items used in the salon, "Salon Supplies" and "Nails Bio sculpture", for a cleaner and to pay "Card enforcement" charges were business expenses. There were some expenses said to have been used for "team building" that were on the fringes. This is not because "team building" is not a legitimate expense, but due to the number of occasions Mrs Litras claimed expenses for "team building" took the expense claimed to the fringe of credibility. She was asked about the number of occasions to which she replied: "I looked after my staff". Overall I have concluded her evidence was credible and have no reason to doubt the evidence she gave on this issue. I conclude that of the £60,321.21 Scheduled Payments a sum of £7508.18 represents genuine business expenses.

42. The remaining sum of £24,962.47 were for the benefit of Mr Litras and his associates. I accept the evidence provided by Mrs Litras that she did not personally receive this sum or part of this sum. They have been described as loans made by the Company. Her position is that she was forced to make the loans through fear of violence. The first observation I make is that if that is correct, and I accept it is, then Mrs Litras' position as director was

untenable; her option was to resign, liquidate or dissolve the Company. Nevertheless, she gave credible evidence that she feared disturbing the status quo, was planning "to make my get-away" from Mr Litras, and resignation would have been met with "consequences".

43. The second observation is that the liability case against her appears overwhelming. Mr Cockburn advances the case on the following basis: First, the impugned payments were not connected with the trading of the Company. There is no evidence that the loans were intended or did in fact benefit (or promote) the Company. Secondly, an objective and reasonable director exercising reasonable care, skill and diligence would not have advanced Company funds as loans without any corresponding documentation or security. Thirdly, the Company was in financial difficulty at the time the impugned payments were made. And lastly, in her report to creditors, Mrs Litras stated that her husband was owed £40,000 for financing the Company. It is unlikely that he would have required a loan if he could have had recourse to the loan he made to the Company. In cross examination it became less clear where or how the £40,000 loan had been made. It is not recorded in any of the existing books and records nor is it mentioned in correspondence with the Company's accountant. Mrs Litras was not prepared to support the position recognising, as she did, that if the loan did exist, it would not justify making new loans back to him or his family.

44. It is true that some of the evidence is contradictory, however the court must, in my judgment, rest its decision on the evidence that does exist. By making the impugned payments for no commercial purpose Mrs Litras breached her directors' duties imposed by section 172 of the Companies Act 2006 as she could not have reasonably believed that the transactions, by their nature (unconnected to the Company's trading), terms (no evidence that they were interest bearing and no express terms contemplated), the timing (ad hoc payments were made including payments at a time the Company suffered from financial pressures) and by reason of a failure to document or secure the loans, were for the benefit of the Company.

Scheduled Salary

45. Mrs Litras accepts that she received sums in excess of her salary as quantified by the Company records. Mr Barnett has calculated, using a schedule, that "wages personal" total £23,940 as against a salary of £7,897.23. Mr Spyrou informed Mr Barnett that the difference of £16,042.77 may be accounted for as dividend payments made by the Company to its sole member. Mrs Litras did not shirk from accepting that she had received the "wages personal" and was not able to justify them as dividends. There was no declaration of a dividend, no qualifying accounts and the Company did not have realisable profits to make dividends at the times the extra drawings were made. Mrs Litras thought that she had paid tax on the extra drawings but her pay slips fail to provide evidence to support that position. Directors who cause their company to make ultra vires payments are in the same position as trustees who make payments in breach of trust, and are liable to make good the money so misapplied. The impugned payments were, in any event, treated as salary and it appears that the accountant had simply sought to describe them as unlawful dividends. I find that these payments, as I believe Mrs Litras accepted, were made in breach of duty, however they were described.

Cash Payments

46. Mrs Litras, first through Mr Spyrou and secondly in oral evidence, accepted that she received £15,000 of cash up until the third quarter of 2016. Mr Spryou treated the £15,000 as dividends for the year ending 30.06.17. The difficulty for Mrs Litras in respect of the Scheduled Salary is repeated here. There was no declaration of a dividend and no basis upon which the Company could have made such a declaration, as there were no qualifying accounts nor other evidence of distributable profits sufficient to make the dividend payments.

47. An issue arises in respect of cash receipts after this date. Mr Barnett's position is that Mrs Litras has failed to provide the Company's petty cash book or the cash takings that she provided to the accountant Mr Spyrou to prepare the Company's VAT return for quarter ending 30.09.16. In evidence Mrs Litras said that the petty cash book had been provided to the liquidator's office and was provided by Mr Spyrou. Mr Barnett argues that in the absence of the petty cash book the court is entitled to infer that she took the Company's cash receipts at the same rate as before 30.06.16 in the period 1 July 2016 to 25 July 2017. On a linear basis this calculates at £54,882. As I have mentioned, the calculation is not premised on a principled basis as it fails to take into account the failing business and seasonal differentiations. Mrs Litras was prepared to accept that there were cash receipts but said that she did not receive the cash. Mr Litras would pass the salon after work to collect any cash or he would take the cash from her if she took it home. I was curious as to why she took cash home (on the occasion that Mr Litras did not collect it from the salon) and did not bank the cash receipts on the day they were received. Her response was that she would have suffered "consequences" if Mr Litras did not receive the cash.

48. The cash received by the Company constitutes an asset of the Company that should have been available for the Company to use in accordance with its interests. The retention of cash receipts by the Company's director or the gift of Company assets to third parties, amounts to a breach of fiduciary duty for which Mrs Litras must account.

49. This reasoning applies equally to the retention of insurance money paid to the Company against an insured loss. It does not matter that the Company had entered liquidation at the time the insurance money was paid. The money should have been paid directly to Mr Barnett as liquidator.

The application of Section 212(3) of the Insolvency Act 1986

50. Mr Barnett accepts that where the Court finds in favour of the applicant, on an application such as this, s.212(3) provides the Court with a discretion to order the director to pay to the company the relevant property or any part of it or to contribute such sum as the Court thinks just. It confers a discretion on the Court to determine precisely what or how much the director should contribute.

51. I have mentioned the jurisdiction above by reference to *Paycheck Services 3 Ltd, Re, Holland v Revenue and Customs Commissioners*. There is sparce authority that deals with the application of the jurisdiction. *Re Loquitur Ltd* [2003] EWHC 999 is one such case. In that matter the court was asked to decide whether former directors of a company should pay £5.9 million for misfeasance or breach of duty in paying an unlawful dividend. The directors were held to be in breach of their duties owed to the company, however Etherton J (as he was) found [249] that it would not be "just" in all the circumstances to make the directors liable for the whole sum. The circumstances are case specific. However, it is of interest that those circumstances, included "a disastrous fire at the Estate" that "both

destroyed the majority of the premises on the Estate and undermined the plans of the Respondents for its improvement and development, and also led to expensive litigation". The Court found that it would not be just because these circumstances were beyond the control of the directors.

52. Having regard to the evidence, I do not consider it to be just, that Mrs Litras should be made personally liable to contribute the sums wrongfully paid out when her free will had been subjugated to the will of her husband under threat of violence. The impugned payments, contained in the Scheduled Payments and the Cash Payments taken by Mr Litras or paid to Mr Litras under fear of violence, represent losses, I find, that were beyond her control. They are to be contrasted with the Scheduled Payments paid by the Company for the direct benefit of Mrs Litras (£24,963.05) together with the Cash Payments (£15,000) and Scheduled Salary (£16,042.77), dressed as dividends that were in fact unlawful, and the insurance money that should have been paid to Mr Barnett as liquidator (£14,700). These payments totalling £70,705.82 remain her liability.

Conclusion

53. In conclusion Mrs Litras was in breach of directors' duties and is to contribute to the losses of the Company by restoring the sums I have set out above, together with interest at 1% above base to judgment.

54. I invite the parties to agree an order to be submitted to the court for approval.