Neutral Citation Number: [2024] EWHC 610 (Ch)

Case No: CR-2018-003323

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF LION HOUSE PORTFOLIO LTD (in liquidation) (crn.05074818)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 20/03/2024

Before :

ICC JUDGE PRENTIS

- -

Between :

(1) GARY PAUL SHANKLAND **(2) JAMIE TAYLOR** **(as the Joint Liquidators of Lion House Portfolio Ltd)** **(3) LION HOUSE PORTFOLIO LTD**	**Applicants**
- and-	
IAIN URQUHART McKEAND	**Respondent**

- -

Adam Deacock (instructed by **Gateley Legal**) for the **Applicants**
Iain McKeand in person

Hearing dates: 4-8, 11, 13 December 2023

- -

JUDGMENT

ICC JUDGE PRENTIS:

Introduction

1. Iain McKeand was an independent financial adviser, starting to trade in the mid- to late-1990s under the name "Mac Financial". From 2008 one of his operative vehicles was Lion House Portfolio Ltd ("Lion House"). It was wound up on 12 June 2018 on a petition presented on 20 April by Mark Batts, one of its unpaid lenders. On 7 September 2018 Gary Shankland and Jamie Taylor were appointed its liquidators (the "Liquidators"). In a note written for them on their appointment, containing a number of suggested lines of investigation against companies and people with whom he had been involved, Mr McKeand stated:

   Lion House "was set up as a vehicle for me to use for 2 main purposes:

   1. Provide loan note holders with a better return than they could get in the regulated market particularly in the early years due to the recession that the economy and the markets were suffering from.

   2. To allow me to buy companies and benefit from their growth and ultimate sale".

2. There is an ambiguity important to this case in the second point, Mr McKeand acknowledgedly drawing no distinction between his own person and that of Lion House, or indeed between them or any of the other companies which he controlled.

3. So far the outcome of the Liquidators' investigations has been this application against Mr McKeand, issued on 25 March 2022 and here for trial. The claims are all in misfeasance, brought under s.212 *Insolvency Act 1986* ("IA86"), for the misapplication or retention of property of Lion House, or otherwise acting in breach of duty to it by:

   3.1. Causing or permitting £1,757,168 to which Lion House was entitled to be paid to himself on about 28 November 2013.

3.2 Causing or permitting Lion House to advance monies to entities owned and controlled by him, being:

a. to Mac Capital LLP ("Mac Capital"), £162,277;

b. to Mac1 Sports Limited ("Mac1 Sports"), £220,991;

c. to Accrued Equities (UK) Limited ("Accrued Equities"), £939,573;

d. to Country Park Landscapes LLP ("Country Park"), £33,000.

3.3. Causing or permitting Lion House to pay to Now Technologies Limited ("Now Technologies") £149,861 for shares which it issued to him.

3.4. Causing or permitting shares in Fruehauf Ltd ("Fruehauf") (the "Fruehauf Shares") to be recorded in its register as his, and on about 28 September 2015 causing or permitting them to be transferred to Red Circle Investments Limited ("Red Circle"). This allegation contains the rider: "The [Liquidators] do not believe that the Fruehauf Shares were in fact transferred by [Lion House] to [Mr McKeand] but if they were then [Mr McKeand] caused [Lion House] to do so wrongfully and in breach of duty".

3.5. Receiving "benefits from Fruehauf as a result of his position as director of [Lion House] and/ or owner or controller of the shares".

4. As put by Adam Deacock for the Liquidators, the primary relief sought is monetary compensation rather than the restitution of property.

5. At the behest of the parties (and at the time, Mr McKeand was also represented by well-known counsel) statements of case were not ordered. One can see the advantage to both sides in that, as it gave them room for manoeuvre. It has, though, at trial caused uncertainty as to what each side's case is: the application notice, just summarised, is hardly explicative of the causes of action, and I will record later the parties' elucidations at trial; the witness evidence of course contains none of the particularities of pleading. There is especial difficulty over the Fruehauf Shares, now at £9m the largest element of the claims put at trial, if valued at the initial potential transfer date of 1 July 2015.

6. No doubt matters have also been complicated by Mr McKeand now being in person. Another well-known counsel, Jessica Powers, had been instructed but returned her instructions a week before trial commenced. The court has, though, had the benefit of a skeleton which she prepared and which Mr McKeand relied on. Mr Deacock also sought to derive assistance from a list of issues which he and Miss Powers had been compiling; but it was not directly adopted by Mr McKeand, and is of very limited use as it was never finalised, in particular as to the Fruehauf Shares.

The law

7. Neither side has spent long on this, and some parts are more conveniently addressed when they arise.

8. s.212 is a gateway provision, allowing here the Liquidators (although Lion House is also joined as applicant) to pursue alleged breaches of duty to Lion House and alleged obligations to account.

9. Although Mr Deacock refers to sections 172 through to 176 of the *Companies Act 2006*, his focus has been on s.172 and the duty it imposes on a director to "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", while keeping open at (3) a duty, where relevant, "to consider or act in the interests of creditors of the company".

10. As Miss Powers' skeleton emphasises, s.172 is a subjective duty, not to be second-guessed by the imposition of an objective test, save where "there is [no] evidence of actual consideration of the best interests of the company". In that situation "the proper test is objective, namely whether an intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company": John Randall QC sitting as a Deputy High Court Judge in *Re HLC Environmental Projects Ltd* [2013] EWHC 2876 (Ch) at [92], following Pennycuick J in *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62, 74.

11. When the creditor duty arises was the subject of *BTI 2014 LLC v Sequana SA* [2022] UKSC 25. Given the facts of our case, it is enough to note that the Supreme Court was unanimous in considering that the duty would arise where the company was to the knowledge of its directors insolvent. Insolvency, the parties are agreed, engages the tests in *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc* [2013] UKSC 28. Miss Powers expresses the balance sheet test as "whether, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, the company cannot reasonably be expected to be able to meet those liabilities. The more distant the liabilities, the harder balance sheet insolvency is to establish". As to cash-flow insolvency, these are "debts falling due from time to time in the reasonably near future. What is the reasonably future will depend on all the circumstances, and, in particular, the nature of the company's business". She notes that under either basis insolvency need not be a permanent state.

12. As expressed by Lord Briggs in *Sequana* at [176], "the creditor duty is a duty to consider creditors' interests, to give them appropriate weight, and to balance them against shareholders' interests where they may conflict". The nuances of the content of the duty will depend on the particular facts, beginning with the nature of the act which is under contemplation, and including the company's existing financial state and the financial and other consequences of the act for it over time.

Witnesses

13. Mr McKeand cross-examined each of the Liquidators' witnesses, if not at any length. Each came up to proof.

14. Mr Shankland gave typical and professional officeholder's evidence.

15. We heard evidence from three loan note creditors: Mark Batts, who works for a bank and with his wife is owed in excess of £1.2m; Barnaby Perks, who has been a CEO; and Duncan Bailey, a retired banker. Plainly, each was upset by

their losses, and their perceived misperceptions of Mr McKeand; but each gave reliable evidence.

16. A *Civil Evidence Act* notice was served in respect of another creditor deponent, Gary Sumray, who had also invested with his wife. Mr McKeand fairly said that he had no questions for him anyway.

17. Jessica Swift became a non-executive director of Lion House and of Fruehauf on 18 March 2014, ceasing at the former on 1 October the same year and the latter on 11 September 2019. She had also given an interview to the Liquidators on 24 July 2019, her transcribed answers at which she adopted. She answered Mr McKeand's questions vigorously and with an apparently clear recollection, and was not deflected by the allegations of impropriety he made against her (as against many others).

18. Aside from himself, Mr McKeand had two witnesses. Christopher George was not in the event called, and his evidence can be put to one side. Michael Whyke, an accountant and auditor from Anstey Bond LLP, who took over as accountant to Lion House in 2016, did give evidence; while he wished to assist the court his knowledge was very limited because he had received very little information at the time, and his conclusions, while supportive of Mr McKeand, were therefore superficial.

19. Mr McKeand has the gift of the gab, and one can understand how he became not just a trusted adviser but a friend to a number of the investors. He gave evidence which was always voluble and very often beside the point; it was marked by answers which were expedient rather than factual, modified to his latest perceptions of the issues in the case. To give one example, he maintained in the face of direct contemporaneous email evidence (and there is precious little of that) that when CorpAcq Limited ("CorpAcq") paid the £1,757,168 into his personal bank account (the "CorpAcq Payment"), it did so by accident. For reasons we will look at, that is an impossible position. Even allowing for the years passed since the events and the imperfections of memory, his evidence was given with an eye over his shoulder rather than any deep desire to give a true account. It is therefore not evidence on which I can without more depend.

20. Finally, the court received all proper assistance from its two experts, Dominic Dumville for the Liquidators and Andrew Strickland for Mr McKeand, and is grateful to them.

Facts and findings

Lion House's business model and operations

21. Mr McKeand was a footballer, has an MBA, and on his own account through Mac Financial developed a "solid client base" with a number of wealthy individuals.

22. Lion House was incorporated on 16 March 2004 as Lion House Properties Limited, changing to its present style on 27 May 2010. It was dormant until the year end 31 March 2007. Aside from Mr McKeand, who has been a director from incorporation, and Ms Swift, Robert Newman was a director from 1 September 2013 to 1 April 2014, and again from 2 to 3 April 2014, and Laura Sharrock was a director from 5 to 6 February 2014. Until a 1 May 2010 share allotment Mr McKeand was the sole shareholder. Since then its shares have been registered 50 in his name and 50 in the name of Berkeley Strategy Limited ("Berkeley Strategy"), a company he wholly owned but which was dissolved on 24 April 2018.

23. Those odd appointments in February and April 2014 of Mr Newman and Ms Sharrock are examples of a theme of Mr McKeand's, that Mr Newman was running everything without his knowledge, and mis-running it at that. Mr Newman has not given evidence for either side. In a letter from his solicitors of 9 July 2019, answering questions from the Liquidators, it was said that he was suffering from "a serious and sensitive pre-disclosed mental health condition". Even recognising that, without attendance or more detailed medical explanation of his condition little weight can be placed on his answers (though they are detailed). The same is true of others who provided information, by interview or otherwise, but no formal evidence, notably Stuart Mulraney.

24. No doubt for the time when he was involved with Lion House, as director between 2013 and 2014, and as accountant and tax adviser from 2013 to 2016, Mr Newman filled an important role. He was responsible for the backroom operations including the maintaining of accounts, supported by his team. The access given to those and their state will be looked at below. Mr McKeand was on his own admission not a numbers or details man, and needed such assistance. But there is no sense in which he, the founder of the business, its owner and front man, confident in his self-belief, was not at all times its guiding mind. In his own written evidence Mr McKeand describes the roles: Mr Newman was "involved in all aspects of the operation", others of the "team" being Ian Storey, succeeded by Ian Campbell, as corporate finance analyst; Ms Swift as accountant; and Ms Sharrock as in-house solicitor, replaced by Mr Mulraney. "Whilst all of these people held senior roles and were responsible for specific duties within the organisation, they all reported to me. I had regular meetings with all these people", which continued after his 2014 relocation to Dubai.

25. That Mr McKeand was the prime directing mind is shown by an email he wrote Mr Newman on 22 May 2015 with instructions. "Hi. See attached. All removals should be dated 4th April or earlier" (so backdated). Attached is a list of 33 companies in which Mr McKeand is involved, most with "remove" next to them, meaning as director; some with queries such as "what is happening here?" for Mac Cap, or "what was this for?" for a few; or "would like to make this offshore co [if] possible but remove for now"; or "remove as closing down" for Berkeley Strategy; a few have the direction to "close down"; but there is an instruction for three, including Lion House and Accrued Equities, "to keep". Perhaps on occasion Mr McKeand had forgotten his instructions, or not known how they were carried out; perhaps on occasion Mr Newman did act on his own initiative or make mistakes; but there can be no doubt that the directing mind on all strategic issues was Mr McKeand. He would hardly have had it otherwise.

26. Lion House's trade was intended to work in tandem with Accrued Equities': Lion House would cater to SIPP investors, Accrued Equities to the non-SIPP market, although that differentiation later disappeared. As Mr McKeand's note to the Liquidators continued:

> "Most of the initial money came from SIPPs. Around that time the regulator had clamped down on commissions available from pensions and so most financial advisers were not interested in working on people's pensions particularly if their fund amount was low as there was no financial reward in it for them.
>
> I decided that this provided an opportunity for me and an opportunity for the pension holders to move away from the regulated world and try and grow their pension funds".

27. Again, the driver of the business is Mr McKeand and no-one else.

28. Lion House's model was a simple one, even if its operational effect was more complicated. It borrowed on loan notes, and it loaned monies on loan notes. The margin on the two after expenses was its profit. Save in respect of its first investment, in CorpAcq, its borrowing was not specific to its lending. So it was bearing the burden of interest payments on money which was not yet invested.

29. Although there were always physical loan notes between Lion House and its lenders, there were not between it and its borrowers. "I don't need an agreement between myself" was Mr McKeand's view when asked about the lack of loan notes between Lion House and Accrued Equities.

30. Mr Deacock referred repeatedly to the margin, before expenses, as 2%. That is not a figure precisely justified by the evidence, although neither is there an aggregated alternative. In cross-examination Mr McKeand said that the most Lion House had to pay its lenders was 12%, which was for CorpAcq; otherwise it was borrowing at 6-12%; Ms Swift said it was typically borrowing at 10-12%. Its maximum lending rate was 17.5%, from Fruehauf. Otherwise, according to a 2014-2015 year accounting document which was referred to only in closing (the "2015 Interest Schedule"), its lending rate was typically 15%, although for Mac Financial Limited it was 10% and for Kennedy McKeand Agency LLP and three others it was 0%. The 0% rates may be explained by transactions in which Mr McKeand said interest would be agreed at the end of the lending period, as these were his own companies.

31. On any basis, margins were not generous given what they had to bear. Mr McKeand described the CorpAcq transaction which began it all as "extremely successful". Certainly CorpAcq repaid the 5-year lending before time and in full, but the margin was miniscule: Lion House's borrowing at 12% was improved by a return of a compounded 12% over that period. Further, it made no commission from the deal. Instead, Mr McKeand was issued personally with shares in CorpAcq "and I was very clear with the loan note holders that this was the deal". At 4 August 2014 he held some 26% of the A1 ordinaries, but none of any other class. The lenders dispute that then, or ever, were they aware of his personal turn, despite that being a purpose of the company. We will return to that when looking at the Fruehauf trust deed.

32. Ingrained in Lion House's business model was that it had to pay to its lenders, and its borrowers had to pay to it, periodic interest; and at the end of the term, the principal. As seen, the interest rates varied, and after CorpAcq the lending was never back-to-back. Mr McKeand says that in general Lion House's borrowers would pay interest monthly, which provided some cashflow. The dates for its payment of interest varied according to individual agreement, although it would usually be at least annual. Mr McKeand says that the obligation to repay the principal arose, typically, only at the end of a 5-year term.

33. So, together with its other investments, any investment made by Lion House had to have a prospect of generating sufficient ongoing return to ensure Lion House could meet its own interest obligations, and sufficient overall return to ensure it could meet its principal obligations.

34. According to its filed accounts, Lion House's business was from an early date struggling.

35. Those for the five months ended 31 August 2009 and signed by Mr McKeand on 14 March 2011 were positive. Since its last filed accounts the £2m CorpAcq loan had been made. Net current assets were £2,391,831, and the balance sheet was a positive £23,389. Disclosed as transactions with related parties were, materially, transactions with Mac1 Sports and Accrued Equities. Mr McKeand

was also identified as the sole shareholder and managing director of, among others, Accrued Equities. The post-balance sheet events included the April 2010 acquisition by Lion House of all the shares in Mac1 Sports for £100.

36. Note 1.4 stated that Mr McKeand considered the going concern basis "to be appropriate, on the grounds that the company's forecast cash flows show sufficient cash resources are available to enable the company to settle its liabilities for the foreseeable future". This was reinforced by a peculiar statement, which has been Mr McKeand's explanation at trial for why until the presentation of the petition on which it was wound up he never believed Lion House, or Accrued Equities, to be insolvent: "It is also expected that current Loan Note holders would roll over their investments at the end of any set terms and where this was not possible or appropriate then new loan note holders would replace them". It continued: "It is also anticipated that as the economy grows and banks return to lending that most if not all of these loan notes will be replaced by lower cost bank loans". Even at this early stage Lion House's solvency was anticipated to be tied to lenders not insisting on their future rights, or new lenders appearing, neither of which could with any certainty be predicted. There was also reference to assets "held under debenture" by Lion House "which would be used for repayment purposes should any borrowing company default". Nobody has been able to identify that security.

37. The accounts to the year end 31 August 2010 were signed by Mr McKeand on 7 April 2011. They contained an identical going concern note. Net current assets were £3,017,626 but the balance sheet a negative £6,874. Over the year £469,817 had been loaned to Accrued Equities, and remained outstanding.

38. The accounts to the year end 31 August 2011 were signed by Mr McKeand on 28 November 2012. In closing he said that he had not signed off all the accounts, nor had they been approved, as Mr Newman just inserted the electronic signature he held for him; but that cannot apply to these as Mr Newman was not yet involved, and I would anyway reject the suggestion that Mr Newman excluded Mr McKeand from the process of approval of the final accounts, which has within it an implied admission that Mr McKeand failed to inform himself of their content, or repeatedly to ensure that proper practice was

maintained in their approval. While net current assets rose to £3,810,191, the balance sheet deficit was now £199,731. The same going concern note appeared, but the auditor, Iain Stewart of Elliott Stewart & Co also added his own comment to it in his report, under the heading "Emphasis of matter".

> "In forming our opinion on these financial statements, which is not qualified, we have considered the adequacy of the disclosures made in the accounting policies… which set out the reasons for the preparation of these accounts on the going concern basis. These reasons contain assumptions and judgements which are materially uncertain, that [Lion House] will receive sufficient income to enable it to settle its liabilities for the foreseeable future. Should these assumptions and judgements prove to be incorrect, this may cast significant doubt about [its] ability to continue as a going concern. The financial statements do not include the adjustments that would result if the company was unable to continue as a going concern".

39. That report, also dated 28 November 2012, was addressed to the shareholders, Mr McKeand and his company Berkeley Strategy. He had been told.

40. The 31 August 2012 accounts were not audited, but were approved by Mr McKeand on 30 June 2013. Net current assets were £3,958,415, with a balance sheet deficit of £339,955. There was an obvious flaw in these, as no figure was inserted for creditors falling due within one year, which in the 2011 year totalled £1,038,908.

41. So the 31 August 2013 accounts, again unaudited, provided restated accounts for 2012, although they were not described as such. The balance sheet deficit is the same as that previously reported, but after the insertion of the missing figure of £5,702,776, Lion House for the first time showed net current liabilities of £501,664. That position had worsened by 2013 to a deficit of £552,683, and a balance sheet negative of £404,954. Restated 2012 debtors were £4,969,476 (they were £3,727,200 in the filed 2012 accounts), and those in 2013 £5,634,470. Mr McKeand signed the accounts, which had been approved by the board on 28 May 2014.

42. The 2014 accounts were signed by Mr McKeand on 28 May 2015. They too silently restated the previous year's accounts, with the same deficit but a swinging alteration from the negative £552,683 to a now positive £4,425,513, achieved through a recharacterisation of the one-year creditor figure from the £6,195,194 previously reported to £873,602; the difference in these figures was now largely attributed to post-one-year creditors. The debtor figure also changed between the two sets, to £5,291,495. Mr McKeand could not explain these alterations, which indicate that once they ceased to be audited Lion House's annual accounts were unreliable, including as to the dates on which its lending fell due.

43. The improvement in the 2014 accounts to a negative balance sheet of £165,913, and the nearly-similar net current asset figure of £4,207,904 may be attributed to a rise in debtors to £6,575,229. A large part of that was because Accrued Equities now owed Lion House £2,120,763 from £1,027,414.

44. The last annual accounts we have for Lion House are those to 31 August 2015, unaudited, approved by Mr McKeand on 27 May 2016, but fuller as they are financial statements. This time there was no hidden restatement of the previous year's figures. They had declined to net current assets of £3,581,496, coupled with a decline in debtors to £5,345,547; and a negative balance sheet of £886,313. Accrued Equities owed £1,943,255. £508,588 of bad debt had been written off. Sales had dropped from £760,775 to £464,532. After a profit of £239,041 the previous year, 2015 had brought a loss of £720,400.

45. Mr McKeand had knowledge of Lion House's ongoing financial position from its annual accounts. They show balance sheet liabilities every year from 2010. From at least 28 November 2012, the date of Mr Stewart's report, Mr McKeand's own view reported in the notes was confirmed: the difference between its continuing as a going concern or not was its ability to generate ongoing income coupled with fresh investment and existing investors agreeing to roll over amounts due; if he did not already know, Mr Stewart's report also told him that those matters were precarious.

46. Underpinning the accounts was the treatment of the debtors as recoverable. Although one must beware of future information, after liquidation Mr McKeand told the Official Receiver through his preliminary information questionnaire, completed on 9 July 2018, that the "company had no assets". It is also now facing creditor claims of more than £5m. Under its business model its assets were only ever going to comprise debtor collections and (to the extent that it owned them) the value of its shareholdings in other entities and the monies which those might generate, through dividends or by sale.

47. Using the 2013 and 2014 accounts, the Liquidators have on a straight line basis extrapolated figures for November 2013. The tangible assets are valued at cost, as they were in the annual accounts, which gives a figure of £144,655. Provisions are then made against the debtor figures, resulting in a balance sheet deficit of £1,948,678: substantially more than the filed accounts. Among the deductions is 50% of the assumed Accrued Equities debt being £1,300,751. As Mr Whyke points out, there is a mathematical error in the deficit figure, of around the value of the tangible assets; and the assumptions may be queried.

48. Before looking at the experts' reconstructions, it is helpful to look at the information available to Mr McKeand outside Lion House's own accounts, in particular the accounts which Accrued Equities was filing.

49. It had been incorporated on 4 August 2005 as Mac Financial Management Ltd, changing its name on 19 March 2008. Mr McKeand was originally a 50% shareholder, but became sole shareholder from 30 July 2009; he was also its director throughout, again solely after 1 October 2009, and as such signed off all its filed accounts. Those accounts were dormant up until 31 August 2008. It was wound up on 10 April 2018 on a petition presented by Bernadette Batts, wife of Mark, on 20 February that year; and on 7 September 2018 Gary Shankland and Stephen Penn were appointed its liquidators. Its unsecured creditors are around £2m.

50. The first trading accounts for Accrued Equities, to 31 August 2009 and signed off on 14 March 2011, reported a dismal position. While it had net current assets of £124,390, it already carried a balance sheet negative of £1,227,910. That

was largely because it had lost the £1,095,001 loaned to Chase Saunders Ltd as working capital: it had swiftly entered liquidation, so "the directors… considered it to no longer be recoverable". It had also made loans to other connected companies, including £120,900 to Lion House.

51. In their notes, these financial statements contained the same going concern items as Lion House's: sufficient forecast cash resources; roll-over or fresh loans; debenture; and replacement of loan notes by lower cost bank loans. A little more was said about this debenture: the assets under it were held by Accrued Equities or Lion House, and there was a cross-company guarantee agreement. As with the debenture, nobody could elucidate the guarantee.

52. Mr Stewart's report to Mr McKeand as shareholder was also dated 14 March 2011. It contained an "emphasis of matter- going concern" paragraph, the essential terms being the same as the next year's report in respect of Lion House. Mr McKeand's knowledge of the potential fallibilities of his business model can therefore be dated back to at least 2011, with reiteration the next year, covering both vehicles.

53. Accrued Equities was balance sheet insolvent throughout its trading life. The same statement from Mr Stewart and note appeared in its 2010 accounts, which recorded a loss for the year of £4,016 with a corresponding drop in the balance sheet, but net current assets of £2,363,857, debtors having increased to more than £3.1m.

54. The 2011 accounts and following were abbreviated. The balance sheet deficit grew again, to £1,298,713. Net current assets were £2,941,390.

55. The 2012 accounts improved to a deficit of £1,036,980 and net current assets of £3,063,514, although the next year showed another hidden restatement to £2,736,322. 2013's deficit was £1,266,752, and net current assets £2,504,892.

56. For 2014 we have a little more detail, in the related party transactions. Net current assets became "total assets less current liabilities" of £2,754,458, while the balance sheet dropped to negative £1,618,186.

57. As with Lion House, for 2015 we have financial statements. These show that in 2014 Accrued Equities lost £351,436, and in 2015 £827,832. Its balance sheet was now negative £2,446,018, while total assets less current liabilities were £1,892,726.

58. Asked how Accrued Equities was going to pay off its debts Mr McKeand's confident response was the same as the accounting note: "It can have the support of loan note holders not requiring to be paid, it can have the support of new loan note holders putting money in, it can have the support of any investments we have made or subsequently make to make more returns".

59. The fall back was that he would personally inject monies.

> "So, [Accrued Equities], as a going concern, would borrow more money, invest in new businesses. Those businesses have already taken—have already understood would be owned in full or in part by myself. As I treat the whole thing as one, then the interest payments would obviously satisfy the new loan note holders and contribute to the debt to the old loan note holders, but the ability for me to fund the business as a going concern would be there if these companies were profitable, which is, in fact, what happened because I put money into [Accrued Equities] and [Lion House] to cover these shortfalls".
>
> "The point is, the shortfall would be covered by myself, which it was. I put money into the company as the owner of the businesses because I wanted them to be a going concern and I wanted to make sure all the loan notes got paid".

60. So, as he owned or was to own the businesses to which Lion House and Accrued Equities were lending, he would try to ensure that the rates they received were sufficient; and if those businesses were profitable then he personally would derive monies from them which could be reinvested; and if not, he would meet the shortfalls anyway.

61. These are spinning plates. As he also said

> "There will be periods of time when cash investors are more plentiful and there will be periods of time when pension funders are more—you know, we didn't have control over that. We would then use that money, as we have explained before, to manage the businesses"; and
>
> "…had the people who owed the money… continued to pay their loan notes, the company would have kept going".

62. The filed accounts show balance sheet deficiencies for both Lion House and Accrued Equities from 2010. That speaks to an inability on their part to repay in full their loan note holders' principal and accrued unpaid interest. Yet even the ongoing interest payment obligations were subject to hand-to-mouth dealings, at the centre of which was Mr McKeand. On 30 June 2014 he was emailing Mr Newman from his Mac Capital address. It is not clear to which company it relates, and it does not matter. The subject was "cash".

> "Hi.
>
> I am hoping careys will sort their issues out with FCA this week and we can release some cash but if not we are going to be squeezed.
>
> Donovan is not responding to my calls.
>
> Bamford?
>
> How are we doing on the loans?
>
> I have about 250k that needs repaying as well as the new money we need in…
>
> Any thoughts?".

Careys was a SIPP manager; Donovan and Bamford potential investors.

63. There is also a schedule produced by Mr Newman and his team, probably in July 2014. It contains details of investors, including the investment date and amount, interest rate, and repayment date; and it includes notes against each. It is most likely a list of investors whose principals were falling due, to whom Mr

McKeand or someone had to speak to see if they wanted repayment or not. Whatever the precise date of the schedule, it tells of Lion House's inability to meet its existing debts. Among around forty names, owed a total principal of just over £2.7m, some have "Unable to contact client" and others "Currently in discussion". Around half have rolled over their lending, or intend to. Two are intending to lend more. However, Mr Driscoll, owed £70,000 payable in May and October 2013 has "agreed to roll on 6% until a further option becomes available", which I take to mean an option for repayment. Two have the note "Wants repayment- Client aware that will be paid when money allows": this for a principal debt of £25,000 falling due on 19 December 2013, and of £115,064 falling due on 18 May 2014. The note for Mr Brooks, owed £50,000 due on 18 November 2013 is to the same effect: "Wants repayment- Client aware that will be paid when money allows".

64. Where Accrued Equities was unable to meet payments, it sought them from Lion House. Mr Shankland's analysis is that from November 2013 all payments of interest made by Accrued Equities were funded by Lion House.

65. Mr Whyke believed that despite what the accounts said on their face, in 2015 both Lion House and Accrued Equities remained solvent. That was because of two matters: the real value of the Fruehauf Shares, to which we will come; and the mutual financial support of the companies, and of Mr McKeand.

66. Mr Whyke and his firm Anstey Bond were approached by Mr McKeand in 2016 after his falling out with Mr Newman. They were appointed accountants for Mr McKeand personally and the companies. Mr McKeand could provide no books and records for Lion House or Accrued Equities, as he said that Mr Newman was retaining them. Mr Whyke could see from Companies House Lion House's 2015 accounts, and noted the £886,313 deficit. He also had sight of a 31 August 2016 trial balance drawn up for Lion House, from where the figures below derive.

> "…the creditors of Lion House included Accrued Equities at £285,000, Berkeley Strategies at £187,000 and Mr McKeand himself at £694,000. I had several meetings and conversations with Mr McKeand… and he

confirmed that Lion House had the support of those creditors with which he was associated. I was therefore satisfied that Lion House was solvent with the support of Mr McKeand. Mr McKeand repeatedly confirmed his support of Lion House to me throughout the period of time that Anstey Bond LLP were the retained accountants for the company. I did not, however, obtain formal letters of support from Mr McKeand in this respect, because we were never in a position to actually prepare any accounts for 2016 or thereafter… Clearly, however, Mr McKeand did support both Lion House and Accrued Equities in terms of their solvency".

67. This, then, is not so much a provision of financial support, as a confirmation that rights as creditors would not be enforced. It is another example of Mr McKeand's treating everything as one. There is no overt consideration of the position of each corporate creditor; and given their own financial state, it might well be that the only proper course for their boards would be to enforce their rights.

68. This creditor support is also only one side of the accounts. Each of Mr McKeand, Accrued Equities and Berkeley Strategy was also a debtor of Lion House. Berkeley Strategy's debt was only £32,045, so overall it was a creditor of Lion House for £155,182. But Accrued Equities owed it £2,228,858, and Mr McKeand owed it £2,244,766. Their "support" of Lion House meant nothing unless they could repay in full their balances, or at least so much as needed to keep it solvent. Mr McKeand's ability to do that we do not know (he claims to be a creditor of Lion House, and to have put in large sums including from his pension, but says he is now impecunious) but Accrued Equities couldn't. In any event, this mutual non-enforcement was only a postponement of the days when the companies had to pay the principal and accrued interest on their loan notes.

69. In those circumstances, it is clear that the creditor duty was engaged by 28 November 2013. Lion House had been consistently balance sheet insolvent since 2009 even without adjustments for its principal debtor, Accrued Equities, which was stricken from the same time and with greater deficits. Mr McKeand knew that, from signing their accounts. He knew therefore that Lion House was not without more going to be in a position to meet its due payments of principal

and consolidated interest; and he knew from the accounting notes and from the auditor's reports that his ad hoc solutions of further lending coupled with creditor forbearance and renegotiation were speculative, and not bound to ensure Lion House's ability to meet its obligations. Given its business model, in deciding from that date to lend its money, his mind ought to have concentrated on how it was to produce the necessary returns to meet its obligations to pay its lenders their interest (over whatever period), and capital. Although those interest obligations would include those falling due in the short term, and so constitute a cash flow issue, looking at the annual accounts (because we have little else) this was not at the time a significant problem; the problem always lay in how the principal sums and accrued interest were to be met in the medium to long term. That was made manifest from at least 19 December 2013 when it was unable to repay a mere £25,000.

70. The experts were asked whether Lion House was solvent on 28 November 2013. Their task was not aided by the dearth of accounting documents, "having to make bricks without straw" as Mr Strickland put it. Mr Dumville's report considered that while there were net current assets of £378,416, there was a negative balance sheet of £4,337,888 before allowing for the Fruehauf Shares, which reduced it to a negative £1,082,810. Mr Strickland, performing the same task of looking at underlying recoverabilities, considered that Lion House had a positive balance sheet of £19,000, after allowing for a Fruehauf valuation of £1.7m. His cashflow was a positive £186,000.

71. By their joint report, Mr Strickland revised his figure to a negative £68,000, while noting that that would depend on the margins in valuation of the Fruehauf Shares. Fruehauf was critical both to Lion House's balance sheet and cash flow solvency. As his report said, "It is evident that the solvency of [Lion House] depended, to a large extent, on the capital value of the shares in Fruehauf Limited and the cash generating ability of that company"; and as he put it pithily in court, "Everything but everything depends upon Fruehauf". There is in the event no need to enter deeper analysis here, but it seems to me that theoretical availability of cash would have been a less persuasive analysis than Fruehauf's actual cash balances after the uses to which it in fact put it; and that the

assumption on which this is based, that its shareholders could control its corporate acts, would require considerable and specific evidence to be acceptable (although I note that the Liquidators utilise the same proposition for their benefit from the Fruehauf Shares claim).

72. Matters have become academic because in his oral evidence Mr Strickland with exemplary fairness considered the debtor amounts which ought to be attributed as recoverable on the basis of post-report evidence, and accepted that even after allowing £1.7m for the Fruehauf Shares, in November 2013 Lion House carried a balance sheet negative of £600,000.

73. The other reason for this no longer being an issue is that, for the reasons below, I do not consider that the Fruehauf Shares could ever have had material value to Lion House.

Books and records

74. Mr Shankland says that on appointment "no coherent books and records were handed over". The Liquidators did receive from the liquidators of Accrued Equities (of whom Mr Shankland was one) two PDFs entitled "LHP Accounts File 2015" and "LHP Accounts File 2016(1)", which had themselves come from Ageless Bird LLP, until 16 July 2016 known as Chancery Accounts LLP. This was Mr Newman's trading vehicle over which Stephen Penn was appointed voluntary liquidator on 6 October 2017, and which was dissolved on 2 July 2019. These files included some nominal accounts, limited in time frame and detail, mostly relating to the loan note lenders, and some trial balances for various of the entities for 2014-2016. Among the assortment of other documents is an inter-company balance matrix of unknown date, provided by Ms Swift but which she confirmed never made any sense to her; she had been given it by Jordan Palmer. So too had a Lion House "Capital cashflow forecast" which showed bank account movements from a positive £8,384 in August 2014 to a negative £831,635 in September 2015, and payment of capital to Stephen Oates on time as to £20,000 in July 2014, but only in August and September 2014 for the remaining balance of £100,000 which had fallen due in the July.

The 31 August 2015 trial balance had as a top line a negative on loan interest of £464,531. "So this is where I'm becoming aware that there are significant problems", said Ms Swift.

75. One of her tasks at Lion House was to "establish that proper financial control was in place, that things were balanced, and that we knew what our liabilities were, all the basic back-door-is-bolted stuff". She was never able to establish that because "I wasn't able to take control or establish proper lines of control over the transactions, how things were happening, the authorisation sequences, all the usual financial control stuff". One of the reasons she resigned was that "I couldn't get the information I required to satisfy myself that the accounts of [Lion House] were being kept properly. I couldn't get hold of any of the books or records…". That she was not concerned about solvency on appointment in 2014 was because she had seen a valuation of the Fruehauf Shares from late 2013 of about £12m. The basis for this valuation is unclear, and it is not referred to in Mr McKeand's evidence.

76. Mr Newman was in charge of the accounts. In Ms Swift's view he was being told by Mr McKeand what to do, but she did not go so far as to say that Mr McKeand was deliberately blocking her access through him: "…there was some politics involved in that. Newman didn't like me going anywhere near his patch, or alternatively he didn't like me looking too closely, I'm not sure which…. Nobody ever said I wasn't allowed access to things… I just never got access to things". Mr Newman did tell her: "this is to protect you".

77. Certain accounting entries were recorded on VT Transaction+ software, but these were notes and working papers rather than comprising a full accounting system.

78. Mr McKeand blames Mr Newman for the lack of records, and Ms Swift for not at the time raising her concerns as to book-keeping with him. He has not been able to produce any himself, for example from attachments to his emails, but says that both Lion House and Accrued Equities "maintained very detailed records and accounts. Mr Newman was paid to maintain these accounts. They very much existed and were in good and proper order". What they actually

comprehended is not stated. He considers he is at a "serious disadvantage" without them, and blames the Liquidators for not recovering them.

79. They have not been the first to try. On Mr Whyke's appointment in August 2016 Mr McKeand could provide no books and records as they were held by Mr Newman who was "uncooperative and belligerent", refusing any assistance, denying he held any but also relying on a lien. As Mr Newman had been struck off by the ICAEW (which Mr McKeand emphasises he was unaware of) their enforcement processes could not be used. Mr Palmer, a Chancery Accounts employee, did send PDFs of working papers, and Mr Whyke obtained the bank statements, but he needed more information to prepare the 2016 accounts and "we did not get very far at all"; indeed "my firm did not start to prepare the accounts".

80. We have no evidence from Mr Newman. His written response says that the accounting records for Lion House and Accrued Equities were "very incomplete"; and certainly that is how they appear at trial.

81. We have a smattering of documents, some of which are obviously products of significant work. There is no confirmation of Mr McKeand's belief that comprehensive records were kept as the other witnesses who might speak to that, Ms Swift and Mr Whyke, have not seen them, because each was prevented by Mr Newman. However, two things drive to a conclusion that from some point after the auditor's 28 November 2012 report records were not maintained fully. First, there are the significant variations in the figures for previous years in Lion House's filed accounts. Although not impossible, it seems unlikely that if comprehensive records were kept there should be such variances. Secondly, and much more importantly, although Anstey Bond was instructed in August 2016, as Mr Whyke confirmed in cross-examination those instructions were limited to the compilation of statutory accounts: neither they, nor anyone else, was instructed by Mr McKeand to maintain ongoing records. The responsibility after that date for lack of information is unquestionably Mr McKeand's; and if he knew that meticulous records were kept by his previous accounting team, it is strange that he did not insist on such process by the incoming team.

The Fruehauf Shares

82. Fruehauf was incorporated on 3 March 2010, and filed dormant accounts up to 31 March 2011. Mr McKeand was a director from 17 June 2011 until 4 April 2015, and again from 19 July 2016 onwards, but never sole director. Aside from Ms Swift, who held office between 18 March 2014 and 11 September 2019, there were (among others) David Snodin from 10 May 2010 to 21 October 2019, Terence Whyman from 10 May 2010 until 26 April 2016, and David Thomson from 3 June 2019 onwards. It remains in administration, an order having been made on 5 August 2021. The administrators are Carl Jackson, Brian Johnson and Tauseef Rashid. The Fruehauf Shares, worth £9m in July 2015 when it was thriving, are now valueless.

83. Mr Snodin and Mr Thomson were each interviewed by the Liquidators, but neither has given evidence. The same is true of Mr Mulraney, Fruehauf's in-house lawyer. On matters of such controversy as the Fruehauf Shares, without their having done so it would be inappropriate to place any weight on those transcripts.

84. It will be recalled that the application notice stated that:

> "The [Liquidators] do not believe that the Fruehauf Shares were in fact transferred by [Lion House] to [Mr McKeand] but if they were then [Mr McKeand] caused [Lion House] to do so wrongfully and in breach of duty".

85. Mr Shankland's evidence in support deposed to the non-transfer belief: no evidence of consideration, no stock transfer form, no trust deed, no record of authorisation of the transfer by Lion House, the Shares still an asset in Lion House's accounts. He then asserted the claim as though the Fruehauf Shares had been transferred, which was "plainly in breach of his duties… not likely to promote its success or in its interests or those of its creditors", whose interests had not properly been considered, and Mr McKeand's decision-making being tainted with non-independence and conflict.

86. Mr Shankland also wraps into these grounds Mr McKeand's accepting benefits from Fruehauf: "In making or causing [Lion House] to make the… transfers of the Fruehauf shares…. [Mr McKeand]… accepted benefits from… Fruehauf… as a result of his being, or doing or not doing anything as, director of [Lion House]". These benefits are the substantial consultancy fees paid to him by Fruehauf: £460,000 in the year 2014-2016; £360,000 for 2015-2016; then £400,000 the next, and £420,000 the year after. He is said to hold those sums as constructive trustee for Lion House. "Further [Mr McKeand] has unjustly been enriched at the expense of [Lion House]. [He] has used his position as the ultimate controlling party of Fruehauf to pay himself enormous and wholly unjustified fees which Fruehauf could not afford…". They were paid in breach of his duties to Lion House, and represented an unauthorised benefit as its director, or resulting from a conflict of interest.

87. In broad terms it is at least clear that in issue are both the transfer of the Fruehauf Shares to Mr McKeand and his receipt of benefits from Fruehauf before and after transfer.

88. In his second statement Mr Shankland shadowed a third line of attack.

> "The fact that the transfer of shares was defective does not eradicate that [Mr McKeand] thought and acted as though the Fruehauf shares had (for all intents and purposes) been transferred to his benefit. The shares were treated by [him] as if they were no longer assets of [Lion House]".

89. At trial the Liquidators' case has moved to a positive. "Ls' case is that R misappropriated the Fruehauf shares which the experts agree were worth £9m in July 2015" says their skeleton; and later: "Ls' position is that the Fruehauf shares were effectively misappropriated in July 2015, that R knew fully well of this and that LHP was thereby deprived of an asset". The consultancy payments "amount to an unauthorised profit at the expense of LHP. This is an additional claim in respect of the period before July 2015 and an alternative claim to the capital value of the shares, on the basis that until realisation of the shares LHP should have been paid any available money not R".

90. In closing Mr Deacock confirmed the case that "the transfer of the Fruehauf Shares… was contrary to the interests of Lion House… It was not realising any value for a very significant asset. Instead, the director, Mr McKeand, was pursuing his own interest to the detriment of Lion House. He also used his powers for an improper purpose… he has thereby deprived Lion House of a valuable asset and an asset which it required immediately in order to procure the repayment of its creditors". That last phrase is an addition to the written evidence. So too was the suggestion from Mr Deacock in closing that if the Fruehauf Shares were not to be valued at the date of their transfer, they ought to have been valued at a date between 1 July 2015 and February 2016, as any properly-acting director would have caused them to be sold at that time.

91. As to any effect of the trust deed, which has now been located, he submitted that the transfer would still be a breach of duty as there was no obligation under it for the shares to be transferred, and "Mr McKeand had a choice".

92. In this and other ways the Liquidators have put their Fruehauf case it is well to bear in mind that Mr McKeand was acting in a number of different guises not all of which involved a relationship with Lion House.

93. Mr Deacock also submitted that, were the trust deed ineffective or inapplicable, while the Fruehauf Shares "had value on the balance sheet in principle in November 2013… in practical terms, when assessing the solvency of Lion House, one has to understand that it was always Mr McKeand's plan" to transfer the shares. For the reasons above, that submission no longer matters as Lion House was balance sheet insolvent anyway on that date; but in its suggestion of compromised value it is another example of an extension to the Liquidators' case (and not one addressed by the experts). So too was the submission that as Mr McKeand "knew that he was always going to transfer the Fruehauf Shares… that would have made it all the more important for him to marshal the remaining assets of Lion House to ensure that they were available to pay Lion House's creditors".

94. As to the benefits, in closing Mr Deacock put the case that "As a fiduciary, Mr McKeand is not entitled to profit at the expense of his beneficiary, here the

company. He is only able to get these consultancy fees because, essentially, he represents the owner. That money, whatever money he was able to obtain, should have been paid for the benefit of Lion House". He accepted that the claim could only stand for the time when the owner was Lion House. An alternative case, again deriving from closing only, was that although paid to Lion House Properties DWC-LLC, these were disguised dividends to Red Circle (and therefore, I infer, to Lion House, were it treated as the true holder) rather than a genuine payment for services.

95. Mr McKeand's case at trial has largely focussed on the expedient position that if there were no transfer then the Fruehauf Shares remained the property of Lion House, so they were an asset on its balance sheet, and he cannot be liable to restore their July 2015 value. But his position is more complex than that, because of the deed of trust, the unreliability of his evidence, and the shifts in the case which he has been asked to meet. As Mr Shankland put it: "It's only upon it being subsequently pointed out that no valid transfer has taken place that [he] now suggests that it never took effect and he never intended for it to".

96. The Fruehauf share register shows that it was incorporated with a single share, issued to Invictas Group Ltd which was owned by Saul Loggenberg; he had introduced Fruehauf to Mr McKeand. On 1 July 2011 that share was transferred to Lion House. On 1 August 2011 99 shares were issued, 79 to Lion House and 20 to Glencairn Holdings Ltd ("Glencairn"), which Ms Swift said was an offshore company ultimately owned by Mr Loggenberg.

97. The disputed transactions are the next. On 1 July 2015 Lion House's 80 shares were transferred to Mr McKeand. So too were Glencairn's, so Mr McKeand became sole shareholder. Then on 28 September 2015 his entire shareholding was transferred to Red Circle, which had been incorporated on 16 September 2015 with Mr McKeand as sole director and shareholder. (On 2 December 2017 his shares were transferred to Rachel Turner, his now former wife; and on 18 March 2019 she replaced him as sole director.)

98. All those movements were reflected in Fruehauf's annual returns and confirmation statements.

99. The trust deed is dated 26 September 2011. Mr McKeand confirmed in cross-examination that it was executed on that date, by himself on his own account and for Lion House, witnessed by an SP Darlington, a management consultant.

100. While not the date on which the shares were originally transferred to Lion House, it is around the date on which it made a loan to Fruehauf. Fruehauf's accounts for its first trading period, 1 April 2011 to 30 September 2011, disclose net current liabilities of £1,167,779 and a negative balance sheet of £561,948, largely because within its creditors of £1,621,056 was £1,075,833 of loan notes, which I infer were owed to Lion House as the note says that while they were due for repayment within one year, "the loan note holders have the option to extend the repayment date for these indefinitely". On the face of these accounts Fruehauf did not have value.

101. By the trust deed Lion House declared that:

> "1. As of the date of this declaration being executed, we are the registered holder of the 80% of the share capital of Fruehauf…
>
> 2. We hold the shares… as the nominee and bare trustee of the… Beneficial Owner [Mr McKeand]…
>
> 3. We shall at all times hold the interest in the shares, all dividends and distributions of profits… and all other rights, powers, privileges and property attributable to the shares upon trust for the Beneficial Owner absolutely.
>
> 4. The rights, powers and privileges which may vest in or attach to LHP by virtue of the entry of LHP in the register of members… shall be exercisable only with the authority of and in accordance with the express directions of the Beneficial Owner…
>
> 6. LHP will dispose of, transfer, pay and deal with the shares… only in accordance with the authority and at the direction of the Beneficial Owner".

102. On its face the trust deed was effective immediately.

103. Mr McKeand's briefing note to the Liquidators included this, under the heading "Structure":

> "Initially it was thought best to have the shares in the acquired companies in the name of [Lion House] until such time as all the debt owed by those companies was repaid. That is why initially the shares were held in trust by [Lion House] for me".

104. The arrangement is clear enough, even if the motivation behind it is questionable.

105. Mr McKeand's evidence deposes to the same arrangement.

> "The structure, which was put together by Newman, involved either Lion House or Accrued Equities (or both) loaning the required amount to the target company to facilitate the turnaround or rescue of the business… As part of the arrangement, Lion House or Accrued Equities would also acquire the shares, or a proportion of the shares, in the target company".

This was elaborated later.

> "…on the advice of either Mr Murrell or Mr Newman (I cannot now recall which), the strategy in relation to Lion House and Accrued Equities was that, on the repayment of the monies due from the target company, the shares that were held by Lion House and by Accrued Equities would be transferred over to me. The intended end game was always for me to acquire the shares in these target companies in my own name. It was, as I say, Mr Murrell or Mr Newman who came up with this strategy, and from an accounting point of view I took that advice and understood that this was an entirely acceptable method for me to ac quire the shares in my own name after the loans had been repaid. As part of this arrangement, deeds of trust were prepared between either Accrued Equities or Lion House and myself, which were executed contemporaneously with the loan… and the issue of shares to Lion House as the lender… There was a template deed of trust that we used for this… The deed of trust for the Lion House shares in Fruehauf was, therefore, prepared and updated on the same basis… I

> adopted the process, as advised by the accountants, in relation to all of the companies…”.

106. There is the structure into which the trust deed fits.

107. The next stage was the repayment of the Fruehauf loans, which occurred on 9, 16 and 21 July 2015: £50,000 on the first two dates, £1.6m on the last. The 1 July alteration to the Fruehauf share register therefore anticipated the strict letter of the scheme, even if on the face of the trust deed Mr McKeand could at any point call for the shares.

108. It is at this point that Mr McKeand’s narrative breaks away from the scheme. After referring to the repayments he says this:

> “However, I did not attempt to transfer the shares from Lion House to me. Nor did I look to invoke the deed of trust. Then, some weeks or months later, Newman told me in a conversation that he had transferred the shares from Lion House to me. I did not want the shares to be transferred to me. My intention, instead, was that the shares could be transferred to… Red Circle. I told Mr Newman that he had jumped the gun, and that he needed to fix what he had done. Subsequently, Mr Newman transferred the shares on to Red Circle. The purported transfer of the shares to me, therefore, was an error on the part of Mr Newman and was never authorised”.

109. So, Mr McKeand did want the Fruehauf Shares transferred, but not to himself personally; and as one can read the reference to Red Circle as being to whichever vehicle might be incorporated for that transfer, rather than the one which was actually used (as Red Circle was incorporated only on 16 September 2015), the transfer to Red Circle met his desires. That transfer was itself, of course, away from Lion House. Further, the only justification for that or any transfer is the trust deed, the entry into which is itself unchallenged by the Liquidators.

110. Actually, I do not believe Mr McKeand on this: first, he was the boss, and this was his payday; secondly, and as it seems to me crucially, on (or perhaps about) 1 July 2015 it was not only the 80 shares in Lion House’s name which were

transferred to him, but also the 20 shares in the name of Glencairn. Glencairn was not his company, but Mr Loggenberg's. Plainly there must have been dealings with Glencairn or Mr Loggenberg which allowed that share transfer; and the two transfers on that same day are obviously linked.

111. There is some later evidence which shows just that. On 3 September 2018 Mr Mulraney as Fruehauf's in-house solicitor responded to a request of Mr McKeand's which must have asked for all dealings with the shares in Fruehauf, including the lines "21.7.2015 Glencairn Holdings and LHP transfer all shares (total 100) to Iain McKeand. 28.9.2015 Iain McKeand transfers all 100 shares to Red Circle". Mr McKeand queried this: "Hi- Just to clarify- I thought I bought out all Glencairn prior to all shares being transferred to me? Are you sure that was done at the same time?", to which Mr Mulraney said "Only way of knowing for certain is to check the share transfer forms- if any were executed". So, Mr McKeand was not challenging the transfers to himself: his query was rather directed at the transfers being on the same date; and it indicates that, at the least, and as would be expected, there were negotiations with Glencairn prior to transfer of which Mr McKeand was aware.

112. Mr McKeand's alternative line is to grab hold of the absence of stock transfer forms which, coupled with the absence of consideration, lay behind the Liquidators' original position of the transfers being invalid. His evidence continued:

> "I did not, at the time, give any thought to how Newman had purported to transfer the shares to me or to Red Circle or what he might have produced in terms of the relevant documentation for the transfers. Certainly, from 2015, I believe that there was a general acceptance within Fruehauf (including Mr Thomson and Mr Mulraney) that Red Circle (not me) was the shareholder. That said, I do not believe that a stock transfer form was ever prepared or signed for either purported transfer, nor any share certificate issued. No money was ever paid across. There was no board meeting as such and no resolution of the board to formally recognise the transfer. Mr Newman, it appears, just had the names added to the share register. There was no transaction to go with the entry on the register.

> I now realise that Mr Newman's actions in purporting to register the shares in my name, and then in the name of Red Circle, were of no legal effect…
>
> I therefore accept the liquidators' contention that the relevant shares in Fruehauf remain with and have always been the property of Lion House. The consequences of this, therefore, are that there has been no transfer to me of the shares (or to Red Circle). There is, as a result, no basis, in fact or law, for the liquidators to pursue a claim that I have misappropriated the shares…".

113. Aside from his restatement of legal advice, what comes from this is that, indeed, everyone treated the transfers as effective (which is why the Liquidators now say that, transfer forms or not, the transfers were binding). The lack of consideration is probably untrue in relation to the Glencairn shares, and untroublesome in relation to the Fruehauf Shares given the trust deed, and indeed Mr McKeand's case that this was all a means for his remuneration. I note that on 5 August 2021 he made a witness statement opposing Fruehauf's administration "on behalf of Red Circle… which is the 100% shareholder".

114. At trial, Mr McKeand faced every which way on the facts, and seemingly under the influence of the complaints of his not taking into account Lion House's interests in this and other transactions, took a novel (and given the trust deed, from his point of view unnecessary) position that in deciding whether to call for a transfer of the Fruehauf Shares he was taking into account the interests of all those who might have been affected. I do not believe him on that: the Fruehauf Shares were his planned personal profit.

115. His contortions began with his opening on the point.

> "So, in terms of the awkward question of the share transfer and the trust deed, the trust deed was an option as far as I was concerned. It wasn't a definite. Mr Newman did transfer the shares without my permission. That was when I started to worry about what he was doing. It was then transferred into Red Circle for safekeeping and I felt that was probably just- let's see what happens, let's see what's going on with Newman, let's see what's going on with the legal stuff and that's why it never changed. So,

> the benefit of Fruehauf was always going to be to repay all the loan note holders, including myself, as a first thing, as a first option, and they knew that. All of them."

116. The transfer to Red Circle for "safekeeping" is nonsense: in September 2015, from whom, and why? But it was on this account deliberate.

117. This passage also introduces two other trial themes of Mr McKeand's.

118. One is that there was a belief that the Fruehauf Shares could be sold, for the benefit of Lion House's lenders. Given his intermingling of personae, it was in his mind no bar to that that the title to the Fruehauf Shares had passed to him as well as their beneficial interest: "In my mind it was all one… I don't see a distinction"; the transfer to Red Circle "I didn't think… hurt either way because I was still the controller of both companies"; "I didn't actually want the shares to be transferred but, when it was, it was still in my view an opportunity to benefit Lion House, Accrued Equities and everybody else, and Fruehauf itself, which for a short time it did". Mr Batts and Mr Sumray both recall Mr McKeand telling them that they would be repaid from the Fruehauf Shares, and this after 2015. In 2020 he was telling Mr Perks (in some anticipation of his opening) that he had transferred the shares into his own name to keep them "'safe' from the liquidators": again a false reason, but a deliberate transfer.

119. The other is that either the transfer of the Fruehauf Shares was optional under the trust deed, which is under its terms right; or that the trust deed's taking effect was itself optional. Although that would be contrary to its clear terms of immediately-effective trust, there is some support for that as the evidence is that the Fruehauf Shares appeared in Lion House's accounts as its asset (including in those accounts which were audited), albeit valued at par. Typically for Mr McKeand neither alternative was ever categoric, and as with his other evidence it seemed motivated by expediency and, on this point, a digestion of legal advice, rather than direct recollection.

120. This is also from his opening.

> "I was informed that the best way to secure, from a tax point of view, was to have a trust deed available. My understanding was that that didn't take effect until I invoked it. So, again, it sat in a drawer… I mean, I didn't do this for the love of it. I did this to make money and I did this to own the businesses. It made sense to me to have some sort of criteria that suggested when you would move them. It didn't mean I will move them. It doesn't mean I'm going to. It means I could. That was all it was. In business, you try and create as many options for yourself as possible. Now, I owned the companies anyway, so you could argue it was slightly irrelevant. But it was only done on that basis".

121. That last remark in particular indicates that the option is that of moving the shares under the trust deed, rather than the coming into effect of the deed itself. Moreover, unless the trust deed were of immediate effect it is hard to see where any tax advantage lay: it was there so Mr McKeand could take advantage of an increase in capital value, and the earlier date it was effective the less the stamp duty.

122. His cross-examination slewed this way and that.

> "Q. I think you did produce a declaration of trust somewhere in the documents, but I think it's been made clear that you're not saying that that was ever effected, it was never considered to have been carried into effect?
>
> A. As you can imagine, when you're setting up a new entity, such as this, and a new idea that was relating to market situations, it was a fluid situation, in the sense that we had to review, we had to be aware of our potential issues with regulation, that's why we talked to the FSA, as it was then, on a regular basis, to make sure we were doing everything correctly.
>
> Q. Right.
>
> A. Therefore, I was advised that, if I wanted to move these companies out in the future, from a tax position- bear in mind I was still in the UK at the time- a trust document would be useful, but my understanding was that,

even though it may be signed, it was not in force. So, it was an option available to me, as far as I was concerned, but I never actually enforced it.

Q. I'm just trying to understand about that. Why would it be useful to you to have a document, as it were backdated… but not actually put into force. Why would that be useful for you for tax reasons?

A. Well, I'm not an accountant as is patently obvious. I was informed by my advisers that this was a document that would allow me to transfer shares without any tax implication".

123. Again, whatever Mr McKeand's understanding, the advantage derives from immediate transfer of the beneficial interest.

124. Mr Deacock took Mr McKeand to his note to the Liquidators and its statement, quoted above, that "It would be best to have the shares in the acquired companies in the name of [Lion House] until… the debt owed by those companies was repaid. That is why initially the shares were held in trust by [Lion House] for me".

"Q. The word 'until'… means that when the debt is repaid something happens, yes?

A. Not necessarily, no.

Q. That literally doesn't make any sense, Mr McKeand… You have said it holds the shares 'until' the debt owed by the companies was repaid. That implies that something will happen. And you have connected it with the trust for you. I put it to you, what you are saying there is that the shares will be held by Lion House until the debts are repaid and then they will be transferred to you?

A. I disagree with your analysis".

125. Mr McKeand then tried to retreat from the plain words in his witness statement, "The intended endgame was always for me to acquire the shares in these target companies in my own name".

"Q. Now, the sentence "The intended game was always" can only mean that this was the plan from the beginning?

A. Well, I've just told you that that's what we talked about at the beginning, yes, at the beginning. At the beginning.

Q. At the beginning, the intended endgame was for you to acquire the shares when the debt was paid?

A. Okay, we can be very pedantic about the use of the English language, but when I say "in my name", my name as far as I'm concerned, I own a company, it's in my name, I own it individually, it's in my name. So, I own the business. So the strategy of taking it out of a company would have been for beneficial reasons in terms of borrowing and all that kind of stuff and being able to grow the business as an independent entity, rather than being part of- almost like an incubator, which is a very normal strategy for a lot of businesses out there, as you may be aware of.

Q. Mr McKeand, that's not what you say in your witness statement.

A. That's your interpretation of what I say in my witness statement and I'm giving you a different interpretation".

126. Mr Deacock is right, and Mr McKeand's elaboration, later put by him in terms of transferring the shares "Only if it is the correct thing to do for all concerned", is an attempt at self-service. It is one which cannot stand against his note to the Liquidators, which predates any litigation being threatened against him, and his witness evidence. This excerpt is also, though, another example of a merger of identities in his own mind between himself and his companies; and a restatement that under the trust he could direct the movement of the Fruehauf Shares to whomsoever he wished.

127. He was asked about the transfer itself.

"Q. You are essentially accusing Mr Newman of having anticipated your instruction; is that a fair summary?

A. I don't know what his mind-set was. He did a lot of things off his own bat that I had no clue about…

"Q. You're not seriously saying, are you, that you didn't want the shares transferred to you…

A. At that time, no I didn't.

Q. 'I don't want the shares. I want them to stay in Lion House', is that what you're saying?

A. If I'd wanted them, I would have clearly expressed the requirement, and I would have discussed that it went into a company. Because I would never have held them in my own name, as such. I wanted them in a separate company…

Q. …just to clarify, so I understand what your evidence is, you're saying you didn't want them in your name, you wanted them in the name of the company?

A. What I'm saying to you is that the initial strategy of removing them from the group would have been to put them into my name, but what would be in my name personally would probably be the company because that gives you more protection rather than having them in [my own] name. I very rarely, if ever, would put anything in my name. That was the problem".

128. As I say, the likeliest position is that Mr McKeand was not only contemporaneously aware of the transfer of the Fruehauf Shares into his own name, but ordered it: the deal with Mr Loggenberg had been done and the ultimate vehicle for the shares, Red Circle, had yet to be incorporated: odd, if the purchase from Mr Loggenberg was intended to be by, or for the benefit of, a company.

129. He also desired the transfer into Red Circle. "Mr Newman transferred the shares into my name. When I found out he'd transferred the shares into my name, I asked him could we transfer them back. He said no. I said, 'Well, I don't want them in my name, I want them in the company', and he put them in the

company". As Mr McKeand said, he "moved on with it" once told that the shares could not be transferred.

130. I do not believe he was told that, but on any account he wanted the Fruehauf Shares, and those acquired from Mr Loggenberg, transferred to Red Circle. Further, his justification for moving the Fruehauf Shares out of Lion House was the trust deed. "As I have said numerous times, I treated everything in the round, we looked at all the benefits. That's why we had the trust deed because we were told that that gave flexibility to do that without actually doing anything wrong".

131. It may be the trust deed which lay behind Mr McKeand's confidence when the transfer of the Fruehauf Shares was challenged by Ms Swift.

> "I remember this very distinctly. I was in the office that I tended to use in Fruehauf and I'd heard about the transfer of the shares' ownership, and I said to you 'That will never stick', or words to that effect, and you said, 'We'll see'. Now, it's one of those things… that stays with you because, in my mind, it gave me an insight into what your thinking was".

132. The short point is that because of the deed of trust, from 26 September 2011 the Fruehauf Shares were no longer beneficially Lion House's but Mr McKeand's. The entry into the deed of trust is not challenged. As between Mr McKeand and Lion House, he as beneficial owner could at any point and did require the transfer of the Fruehauf Shares, which transfer all relevant parties treated as effective. As the Fruehauf Shares were beneficially Mr McKeand's, Lion House lost no value in the transfer. Neither, though, could they from September 2011 constitute an asset of value on its balance sheet, as confirmed by Mr Dumville and Mr Strickland. Mr Whyke, too, as an experienced auditor said that were the Fruehauf Shares subject to a contract to transfer, they would not be listed as an asset on the true and fair view of annual accounts.

133. I bear in mind the recollections of the lenders, which I accept, that Mr McKeand was not telling them that he would obtain an interest in the borrowing companies, and was telling them that they would be repaid from the Fruehauf Shares; but the first point is of limited assistance in determining whether actually he obtained an interest, and the second is answered by his "everything

in the round" submissions, which are supported by how the companies were actually run.

134. The collateral claim for benefits deriving from Fruehauf therefore does not arise. In any event, as finally formulated (as an unauthorised benefit received by Mr McKeand as a representative of Lion House and at its expense), it suffered from the defects that Mr McKeand was receiving this large remuneration for his services as consultant to Fruehauf, approved by the Fruehauf board of which he was not the only member. Any challenge would therefore seem a matter for Fruehauf, although none has been brought by its administrators; and that despite Mr McKeand's charges being in part calculated not by the value of services he was providing, but the cost of his living expenses in Dubai; and in February 2017 he was even telling Mr Snodin he needed an increase to compensate for the 20% drop in sterling. Further, I do not consider that, without more, one can simply treat the monies paid to Mr McKeand as monies which were alternatively available to be paid to Lion House; and the proposition that as shareholder Lion House could treat Fruehauf's free cash balances as its own is unsustainable.

The CorpAcq Payment

135. On 28 November 2013 Mr McKeand received into his current account the CorpAcq Payment of £1,757,168. The Liquidators seek an account from him as director of Lion House for the receipt of monies to which they say it was entitled. Mr McKeand says that the transaction was an error; and that except for £59,795, which he retained in part satisfaction of monies Lion House owed him, he has anyway transferred the balance to Accrued Equities, as a loan from Lion House. His skeleton reasserts the error, and invites the inference that he never "became beneficially interested in those monies [as] it appears more likely than not that they were treated as a loan" from Lion House to Accrued Equities.

136. There is no accounting evidence to support such inference at the time of their receipt. Nor is that what he says happened, at least in his witness statements. This is his story.

> "The sum of £1,757,158… was indeed paid into my personal bank account by CorpAcq. My recollection is that this was due to a mistake on the part of CorpAcq by sending it to the wrong account and that the money was meant to be paid directly into the account of Lion House. CorpAcq simply sent the money to the wrong account. I am particularly angered that the liquidators have included this amount in their claim against me, as I have already explained… that the money was paid to me by mistake".

He then says a little more about the mistake and his use of the proceeds.

> "It may be that the error was mine for providing CorpAcq with the wrong account number. Either way, it does not particularly matter. The money was sent to my personal bank account in error, which I recognised and rectified… [My identified bank statements show] the money coming in to my account in November and being paid across, our of the account, in December".

137. Mr McKeand did provide CorpAcq with the banking details, but there was no error. The details were for his own current account. He sent them to David Martin at CorpAcq by email of 28 November 2013, prefaced by "Hi Dave, If you are in agreement can you send payment today to…". The agreement was to the attachment which calculated the interest due under the CorpAcq loan notes to the end of the 5-year period, but which also gave a per day discount for earlier payment. This was, then, the payment under the CorpAcq loan notes, which Mr McKeand viewed as an "extremely successful" investment by Lion House.

138. Were this an error, Mr McKeand discovered it with amazing swiftness, and then behaved in a most surprising way. That same day he made seven transfers of £250,000 each, and one of £2,073. These were not, as might be expected, to Lion House's account. They were to his own savings account, and brought the balance on that account to £1,757,167.95, as it had £5,094.95 in at the beginning of the day. Obviously he was expecting the transfer. He knew his banking limits on his current account. He knew how much was in his savings account, which he tried to align with the amount received (to within £9.95).

139. Faced with this, in cross-examination Mr McKeand expanded his account. Having discovered the error the same day, he and Mr Newman discussed what to do with it and Mr Newman told him "Don't worry about doing it into [Lion House] and then across as I'll just do the intercompany balance". No such balance has been identified; nor any accounting entry which confirms that Mr McKeand's use of this money was for the benefit of Lion House.

140. Use was not immediate, but effectively all the sums were paid to Accrued Equities. On 18 December £1m was transferred through four payments of £250,000; £340,000 through two payments on 24 December; a payment of £66,362 on 7 January; £281,000 through two payments on 13 January; and a payment of £70,000 on 26 February. The total of those is £1,757,362, which is unlikely to be a coincidence. The exercise is not exact, though, as on 20 January Accrued Equities paid £10,000 to Mr McKeand which was then recycled. From these figures it is not clear to me where his averred retention of £59,795 fits in, although were there such a figure there is no justification for a finding that it at least matched his present lending to Lion House: the Liquidators have him owing Lion House £380,559 at this point.

141. So, give or take immaterial amounts including the interest accruing on these sums, Mr McKeand caused the CorpAcq Payment to be paid to Accrued Equities. What it did with the monies is not clear. Mr Shankland refers to £138,000 being paid to Lion House lenders, Bernadette Batts and Stephen Oates, on 7 February 2014; and large payments to FDD International Limited, of which Mr Oates was a director, including £400,000 on 30 December 2013.

142. Against the background of this money-go-round and Mr McKeand's untrue yet maintained explanation for the receipt of funds which represented around one-third of Lion House's balance sheet, the Liquidators' starting point is that Mr McKeand was the fiduciary recipient on behalf of Lion House of the CorpAcq Payment, and is obliged therefore to account for its use in his hands. I agree. That is in accordance with the decision of Lesley Anderson QC sitting as a Deputy High Court Judge in *Re Idessa (UK) Ltd* [2011] EWHC 804 (Ch) at [28], adopted by Norris J in *Toone v Robbins* [2018] EWHC 569 (Ch) at [37]. Further, as Norris J continued at [38], directors cannot rely upon their own

failure to maintain proper records to avoid liability for their receipt of company money; a point made earlier by Arden LJ in *Re Mumtaz Properties Ltd* [2011] EWCA Civ 610 at [17]. However, as also said in *Idessa*, a director who bears the burden of giving an account, but can point to no documents, is not without consideration of the wider evidence by default liable; although as Norris J concluded at [38], the benefit of any ensuing doubt must be given to those seeking to enforce the duties.

143. What this trial has established is the liability on Mr McKeand to account for his receipt of the CorpAcq Payment. But given especially the fragmentary documents, the uncertainties of case, and that Mr McKeand is in person, I do not consider it right to express a final view on the outcome of the account now. Two evidential matters weigh, being whose receipt and use this was treated as. Thus, first, so far as can be identified, how was Mr McKeand's receipt of the CorpAcq Payment reflected in Lion House's, or any other, books: as his receipt, Lion House's, or someone else's? Secondly, the evidence being that Mr McKeand paid the CorpAcq Payment, or nearly, to Accrued Equities, how were those payments treated in Lion House's, or any other, books? Given the circulation of monies, I do not think any position can be assumed at either stage. It may be that the questions are susceptible to short answer from documents within the trial bundles, or relevant Accrued Equities documents; it may also be that there is nothing.

144. Were the receipt and use of the monies demonstrably Lion House's, then the Liquidators put their case in compensation. I am satisfied that insofar as the CorpAcq Payment was loaned by Lion House to Accrued Equities, that lending was additional to the claim for £939,573 which represents the known post-28 November 2013 lending. As Mr Deacock submitted in closing, it is therefore vulnerable on the same grounds, which will be investigated below.

Post-28 November 2013 advances

145. The Liquidators say that the post-28 November 2013 net advances through bank accounts to Mac Capital of £162,277, Mac1 Sports of £220,991, Accrued

Equities of £939,573 and Country Park of £33,000 were not made in the best interests of Lion House, particularly given (and not just because of) the intrusion of creditors' interests through its insolvency: through his perception of all being one, there was a failure on the part of Mr McKeand to differentiate properly between Lion House's interests and those of the borrowers, and to ensure that there was ongoing commercial rationale for the lending; and they say he was over-influenced by his personal interests in the borrowers. Mr Strickland summarises the claim in saying that the payments after this date were made "without any legal or commercial justification" to entities which "were not viable". The objective director would not have made them. I agree.

Mac Capital

146. Mac Capital was incorporated on 29 May 2009 and dissolved on 12 January 2016 following voluntary strike off by application signed by Mr McKeand on its behalf on 3 September 2015. Mr McKeand was one of its designated members throughout. Its restated accounts for the period 1 June 2010 to 31 March 2011, signed by Mr McKeand on 8 February 2012, disclosed net current liabilities of £4,871 and net assets of £129. Its 31 March 2012 accounts, signed by Mr McKeand on 20 December 2012, had net current liabilities of £9,000 and an amount due from members of £171,546. The accounts to 31 March 2013, signed by Mr McKeand on 20 December 2013, had net current liabilities of £6,000, and an amount due from members of £297,218. By 31 August 2013 it owed Lion House £499,262, a debt which increased over the next year to £656,290. Its own 2014 accounts, signed by Mr McKeand on 17 December 2014, silently restated its 2013 accounts so that the net current liabilities became net current assets of £72,454, increasing in 2014 to £276,853 with amounts owed by members of a slightly-improved £280,109. Its finally-filed accounts, to 31 March 2015 and signed by Mr McKeand on 19 August 2015, had net current liabilities of £1,753, and a deficit from members in the same amount.

147. As with the other claims under this head, the Liquidators' net payment figure derives from an analysis of Lion House bank statements only. From 29 November 2013 until a last payment on 10 September 2015, Lion House

advanced Mac Capital £257,089 and received £94,811. There were no loan notes for these advances.

148. Mr McKeand has said throughout that Mac Capital was just a vehicle for services.

> “Mac Capital was set up by Don Murrell, who was an external accountant and tax adviser who we used. The idea was that it would be the vehicle through which I, and others like David Snodin, would invoice other companies in the group for services performed from time to time. So, Mac Capital could only have issued invoices and received cash. It did not borrow money and did not require funding. I therefore do not see how or why Accrued Equities or Lion House would have put money into Mac Capital, and I therefore do not believe that Mr Shankland can be correct here".

149. That case is inconsistent with the treatment of Mac Capital in Lion House’s accounts, showing it as a debtor rather than such payments being for services and therefore the clearing of a credit balance. Mr Strickland has found nothing to support its provision of services. The payments by Lion House usually contained narrative, little of which has a clear link to payment for services, and some are explicitly “loan” or “Tem loan MC Wages”, or “Mac Cap March Pay”. When Mac Capital repaid £70,000 on 28 April 2015 the narrative was “Repay”.

150. These payments are therefore most likely to be ad hoc loans, a heedless spinning of cash into Mac Capital as and when needed rather than a considered lending of the loan note holders’ monies. By 28 November 2013 Mac Capital already owed Lion House a substantial sum, and was itself of marginal solvency, depending on its ability to recover monies from its members. Mr McKeand’s observation in closing that the “information presented as regards the accounts of Mac Capital are highly dubious, having no real evidence to back them up” does not assist him, especially as he signed off all its annual accounts. No repayment has any obvious reference to interest, and Mr McKeand does not aver that an interest rate was agreed; and that despite Lion House’s business model, and the need to generate interest and capital.

151. I bear in mind with this part of their claim that the Liquidators are not bringing an action in wrongful trading, and that the challenged transactions with these four companies are with some only of Lion House's borrowers. Other transactions, not within the walls of this case, were successful. There is a certain force in the idea that at least in relation to Accrued Equities, non-payment would have brought the structure crashing down: we will look at that below. That is not the position with Mac Capital. These were just ad hoc loans made when Lion House itself had been consistently balance sheet insolvent for years, to the knowledge of Mr McKeand, who was also aware from Mr Stewart's reports of the vulnerabilities of its business model. Yet, perhaps because of Mr McKeand's own interest in Mac Capital, but certainly because of his inability to distinguish the different corporate identities, and his failure properly to consider the position of Lion House's lenders, no attention seems to have been paid to how these payments would benefit Lion House and enable it to meet its own obligations.

152. I conclude that the net balance paid to Mac Capital after 28 November 2013 is prima facie recoverable for breach of duty; but that itself begs the question of what is the net balance. I will address the measure of compensation for each below.

Mac1 Sports

153. Mac1 Sports was incorporated on 12 February 2007, changing its name on 8 April 2009 when it arose from dormancy. Mr McKeand was its sole director throughout. He was originally sole shareholder, but from 12 February 2011 it was a wholly-owned subsidiary of Lion House, which it remained, although on 14 July 2015 an intermediate holding company was inserted. It was dissolved on 20 December 2016 following a compulsory strike off.

154. Its first trading accounts were to 28 February 2010, approved on 12 November 2010. It had net current liabilities of £9,036, and a negative balance sheet of £285,014. The 2011 negatives were respectively £26,635 and £348,894; those for 2012 £86,713 and £379,792; and those for 2013, approved on 28 May that year, £96,347 and £386,016. By 31 August 2013 it owed Lion House £289,068,

rising to £324,977 the next year. Mac1 Sports' figures for 28 February 2014 were more negatives, again £96,347, and £397,349. Its last filed accounts, to 28 February 2015, boosted by an unelaborated addition of £231,255 as an intangible fixed asset, showed very similar net current liabilities of £96,319 and a negative balance sheet of £271,011.

155. The £220,991 of relevant lending began on 1 July 2014 and ran through to 31 May 2016. The narrative for the first transfer was "Loan Note", and after that 21 transfers were "Loan Note Drawdown"; there was also one, for just £1,375, marked "Infinity Websites- Mac1 Sports". There were no repayments. Although no loan note has been found, the 2015 Interest Schedule marked Mac1 Sports as paying 15%.

156. This, then, was more formal lending than for Mac Capital. In his witness statement Mr McKeand describes how in September 2013 he and Simon Kennedy, his erstwhile partner in Kennedy McKeand Agency LLP, a football player agency, fell out, so Mac1 Sports became the vehicle for Mr McKeand's efforts to restart the sports agency with some of the LLP staff and the benefit of an injunction against Mr Kennedy.

> "The company was therefore founded with an investment from Lion House and Accrued Equities. The decision to invest was not mine alone- Mr Newman agreed that it was a good concept… However, over a long period, rumours persisted amongst the players about [the LLP] and they were not keen to work with an agency that was involved in a legal battle. Eventually, it became clear that the business would not succeed. However, it was not dissolved until 2016".

157. There is a large timing issue here, given the substantial lending already made by Lion House to Mac1 Sports before September 2013, and its trade before that date. However, it may be noted that the LLP entered administration on 7 March 2014, and was wound up by the administrators on 12 August 2014. It is therefore possible that this was some sort of re-founding of the LLP business within the pre-existing Mac1 Sports, which was itself carrying out (it seems) football agency.

158. That said, there is no direct explanation for any post-foundation lending from Lion House, nor for the (assumed) loan note or the lending under it from July 2014. Thus there is nothing to indicate consideration of the position of Lion House, or the existing and consistently negative financial state of Mac1 Sports into which this new lending was going. Mr McKeand's protestations that "Mr Deacock… doesn't really know how a football agency works and how cash flows work… it is a very specialised situation", do not assist.

159. More generally, Mr McKeand says that Mr Newman "advised on the merits of all the business investments that were made. He did due diligence analysis on each opportunity", but the Liquidators have been unable to locate any such documents. Mr McKeand produces what he says is an example, an email of 23 January 2016 from Mr Newman, enclosing "Consolidated Projections with full detail for JG acquisition". We do not have those, nor detail on this proposal, but his email describes their contents over seven headings and gives a conclusion:

> "…the JG acquisition creates no value over the life of the 3 year projections. Any profit generated from JG is eaten up by financing costs and retaining the existing partners. Existing CA heavily subsidises the acquisition and would end up in almost exactly the same position by doing nothing as the cash generated from existing CA is used in JG".

160. That report seems directed at an ability to generate cash rather than capital. It seems improbable that there would be any report to found further lending, even under a new loan note, to a connected company. It is also not possible to apply to this connected lending Mr McKeand's statements that:

> "We were… acutely aware of the risky nature of the business of investing in distressed and turnaround opportunities… It was exactly because of this risk that we were extremely careful in evaluating opportunities that were presented to us. I was confident in the experience and the skill set of the team that we had assembled. That team was tasked with rigorously reviewing the details and the finances of every opportunity presented to us… Of course, the business depended on coming across opportunities to

invest- and those opportunities only came up occasionally and on an ad hoc basis. That is the nature of the business. As and when an opportunity arose, it was considered professionally and with the level of due diligence required".

161. Anyway, it is hard to think how a report into Mac1 Sports would have read in June or July 2014; and Mr McKeand gives no sufficient details of its business to think that this further lending had any prospect of even wiping part of its face by the making of interest payments.

Country Park

162. Mr McKeand's generalised statements on how a new investment would come to be made might have applied to the first lending to Country Park, but there is no evidence it did. It had been incorporated on 18 September 2009. Mr McKeand and his then wife were designated members from incorporation to 16 June 2014; Lion House from 13 January 2011; and a Justin Mannington from incorporation. There were a number of other members in the years 2010 to 2013.

163. Its first accounts to 30 September 2010 showed net current liabilities of £31,615 and an amount due from members of £173,829. The next accounts were for an extended period to 31 March 2012, and were signed by Mr McKeand on 11 December 2012. Net current liabilities were £88,835 and the amount due from members £317,226. The 31 March 2013 accounts, signed by Mr McKeand on 6 September 2013, had respective figures of £65,865 and £543,293. No other accounts were filed. On 21 January 2015 Stephen Penn was appointed liquidator following a special resolution. It was dissolved on 20 June 2018 following total asset realisations of £5,449.

164. As at 31 August 2013 Country Park owed Lion House £197,313.

165. Unhelpfully, the entries supporting the Liquidators' figure for £33,000 lending from November 2013 do not appear in the bundles, although Mr McKeand accepts that there were loans made and there has been no challenge to the figure. He says that Country Park "initially did well. However it was hit by market

conditions". The well-doing is not apparent from the fact of its accounts. Mr McKeand explained orally that it was a landscaping business which he had anticipated might be able to link to his "big, rich" football clients; but the "margins are quite difficult", and while he and Mr Newman had investigated gaining scale by buying a large company "outside of Manchester", that was not viable. "We tried to sustain it. But actually, very quickly, once certain events happened, made the decision that it wasn't". The lending had been under a loan note, he said, with an interest rate of 15%. There is no evidence that Lion House was obliged to continue lending after November 2013.

166. As with the other impugned lending, there is nothing which indicates a consideration of Lion House's negative financial position over a number of years, nor the borrower's: Country Park had lost money since incorporation. Nobody has pointed to the interest under the loan note actually being repaid, and lending by November 2013 was already substantial. At most it may be inferred that there was perceived light through the Manchester deal, but again that lacks detail, even as to its timing.

167. Again, I consider liability to be established.

<u>Accrued Equities</u>

168. Accrued Equities' financial position has already been explained. It had been holed under the water from its first year's trading and its disastrous investment in Chase Saunders Ltd, from when it carried a balance sheet negative of more than a million pounds. As at 31 August 2013 it already owed Lion House £1,027,414.

169. In fact, and as must or ought to have been known to Mr McKeand given his directorship of each, and the going concern note and auditor's report given in respect of each's accounts, which had only declined since, the position was worse, as it was unlikely that Accrued Equities could pay that sum. In their reports, Mr Dumville and Mr Strickland have each analysed its position based on their assessment of its recovery of its own debtors. That is an art. Mr Dumville regarded the Accrued Equities debt as irrecoverable in its entirety at 28 November 2013, the debt being, on a straightline basis between the knowns

of 31 August 2013 and 31 August 2014, £1,300,751. Mr Strickland considered that the figure ought to be compromised by £466,155, or 36%: so, only £834,596 would be recoverable.

170. Moreover, this was a shortfall just on the capital figure. There was no loan note between Lion House and Accrued Equities; nor was there any agreement as to an interest rate. Accrued Equities is not within the 2015 Interest Schedule at all.

171. Thus any lending from Lion House to Accrued Equities was immediately at the cost to Lion House of the interest rate it was paying on its own borrowing. It was only if Accrued Equities somehow came good that Mr McKeand would be in a position, wearing his different hats, of agreeing a rate after the event.

172. Mr McKeand has shown no appreciation of that harsh reality. Relying on his confidence in roll overs or fresh investment was no substitute for a rational decision. His view that Lion House and Accrued Equities were two sides of the same coin was wrong, but one which he maintained. He said he could not think of an instance when the interests of the two conflicted, as he owned them both.

> "We supported [Accrued Equities] because [it] had a lot of money outstanding owed to it. Why would you not? It doesn't make any sense not to. You know, you're looking at the same ownership, you're looking at the same loan note holders. So a loan note holder in [Accrued Equities] is probably a loan note holder in Lion House. I would say 90% match, 80-90% match. So of course you're going to support the companies. And we did it from day one, so it is not unusual".

> "Questions have been asked about, why would Lion House support [Accrued Equities]. Well, a number of reasons. One is, as I have said, almost 90% of the loan note holders were the same people. So they had beneficial interests in each company. It was in their best interests to keep both alive. [Accrued Equities] in particular had many loan notes outstanding that it would have expected to fully recover. Now, again, recover at what point and recover how? Would that be recovered because

the companies would do well and make lots of money? Or would that be recovered because we had to take them to court?".

"I believed that the money that was owed to [Accrued Equities]… was recoverable and would be in excess of the money required".

173. That is a wholly unrealistic view of Accrued Equities' financial position, and one which fails to take any account of its degradation, or that what might once have been sensible lending was no longer. The rose-tinted view was carried into Mr McKeand's broad statement "Given the solvency of [Lion House], the payments to the various related companies were totally justifiable and based on commercial considerations".

174. Mr McKeand also at times propagated a view that the inter-company balance between Lion House and Accrued Equities was a matter of accounting balances.

"I have explained that, unknown to me at the time, when loan notes were created to lend to target companies, Mr Newman often just issued a single loan note from either Lion House or Accrued Equities, even if the money was coming from both Lion House and Accrued Equities. As a result, on paper, Lion House ended up advancing money to Accrued Equities, when this was never my intention. I believe that this must be the reason why Accrued Equities is shown as receiving advances from Lion House. I cannot think of any other reason why Accrued Equities would be taking advances from Lion House. Again, none of this was done at my instigation".

175. There may have been some accounting adjustments, but (to the extent it was lending from Lion House) Mr McKeand made the payments of £1.757m in late 2013 and early 2014, and the £939,573 net bank position is made up of dozens of individual transactions going both ways: £2,109,851 from Lion House, £1,026,913 from Accrued Equities. As Mr McKeand agreed in cross-examination, Lion House made the transfers because Accrued Equities needed the money, to pay bills or its own lenders. He agreed as well that he thought of them as "basically being the same", and that available cash would go both ways, "depending on where it was needed".

176. So the post-November 2013 cash balance was generated by no more than need coupled with a desire to keep Lion House's lenders, who were also largely Accrued Equities', happy. I doubt they would have been happy to know that they were being paid with their own money, Mr McKeand accepting that by 2015 Accrued Equities was only able to continue to trade supported by its fresh loan note money and borrowing from Lion House; and as referred to already, Mr Shankland's analysis is that all Accrued Equities' interest payments from November 2013 derived from monies provided by Lion House.

177. As to the £1.757m lending no explanation has been provided.

178. In those circumstances, the point that were Lion House no longer to loan to Accrued Equities after November 2013 then the businesses would necessarily fail does not compel a conclusion that these transfers and transactions were commercially justifiable. The continuation of the businesses was not necessarily an end in itself when both were, and had for years been, balance sheet insolvent. Mr McKeand's mind, had it been uninfluenced by the mistaken belief that Lion House's principal debts could always be put off by agreement or replaced by further investment, ought to have been directed at how these payments, especially (if relevant) those representing the CorpAcq Payment, were likely to produce such a return as to meet its own obligations to repay interest and capital, particularly given that they carried no immediate interest requirements. No answer has been provided to that.

179. The Liquidators have therefore established liability in respect of the cash balance and (with the same proviso) the £1.757m lending.

<u>The measure of compensation</u>

180. There ought to be an inquiry into the compensation payable in respect of each of these breaches. It is not necessarily the case that the net position on the bank accounts equates to the level of loss to Lion House caused by these payments, because there may have been other positive accounting movements in its favour consequent on these transactions.

181. In particular:

181.1 according to its accounts, and despite (perhaps) the £1.757m being loaned as well as movements on the bank account, the net debt from Accrued Equities to Lion House increased from its 31 August 2013 £1,027,414 only to the next year's £2,120,763;

181.2 the debt then decreased to 31 August 2015's £1,943,255;

181.3 according the 2016 trial balance, there was then a small increase to £1,943,858;

181.4 the Mac Capital and Country Park debts disappeared entirely from Lion House's 2015 accounts, although that may well have been because they were written off rather than paid;

181.5 Mac1 Sports was not in the 2016 trial balance, perhaps for the same reason.

The Now Technologies shares

182. Now Technologies was incorporated on 15 February 2011. It entered CVA on 30 November 2016. That having failed, it was wound up on 3 May 2018 on a petition presented by its supervisor, Eric Walls, and dissolved on 11 January 2023.

183. Mr McKeand was never a director of this company, which he says was set up by Chris Gorman OBE "a respected businessman… as the vehicle for Music Qubed, a pioneering digital music company". Mr McKeand agreed to make a personal investment. In December 2015 705 shares were issued to him at £212.57, a total of £149,861.85. This sum was paid in its entirety by Lion House.

184. All this is agreed. Mr McKeand's explanation for his use of its money is that it "owed me a considerable sum of money and it was agreed that I could withdraw the necessary funds from the outstanding loan". He does not say who agreed it, and there is no corroborative evidence. Further, he was not recorded in Lion

House's 31 August 2015 accounts as a lender; and his own document provided in support of his proof of debt does not contain this as an entry. The Liquidators' analysis of his claims has Lion House owing him just £3,913 in December 2015.

185. I am not satisfied therefore that in causing Lion House to pay this sum he was doing anything other than illicitly using its funds for his own private purposes. He is therefore liable for it.

Other potential defences

186. Through his skeleton Mr McKeand suggests defences under *Duomatic* and under s.1157 CA06.

187. Given Lion House's insolvent position at the relevant times, *Duomatic* does not apply.

188. As to s.1157, it would be inappropriate to grant relief as to the Now Technologies liability as it was a self-serving transaction; so too was the receipt of the CorpAcq Payment insofar as it was Mr McKeand's. In any event, Mr McKeand has not been fully candid as to that, or in his evidence generally; and his other breaches of duty were significant both in scale and content. So s.1157 does not provide a defence.

Conclusions

189. Mr McKeand is liable to account to Lion House in the sum of the £149,861.65 he used to buy his shares in Now Technologies.

190. He is also liable to account to it for his receipt of the CorpAcq Payment, as to which directions must be given.

191. He is also liable to make contribution to Lion House for his breaches of duty in continuing after 28 November 2013 to make payments to Mac Capital, Mac1 Sports, Country Park and Accrued Equities, the last of which may include the

disbursement of the CorpAcq Payment to the extent it is shown by the account to be a disbursement on behalf of Lion House. Further directions are required to establish the losses caused thereby to Lion House.

192. The Fruehauf Shares were held under the trust deed for Mr McKeand. No claims lie in their regard, or for his receipt of benefits from Fruehauf.