Neutral Citation Number: [2021] EWHC 1006 (Ch)

Case No: CR-2017-004535

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF TMG BROKERS LIMITED (IN LIQUIDATION)

The Rolls Building
London, EC4A 1 NL

Date: 23 April 2021

Before :

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

- -

Between :

(1) BRIAN BAKER (As Liquidator of TMG Brokers Limited)
(2) TMG BROKERS LIMITED (In Liquidation)

Applicants

- and -

(1) MR DENNIS STAINES
(2) MR ALOYSIUS IKECHKWU OBINWA MADU

Respondents

- -
- -

Clara Johnson (instructed by **Taylor Rose MW**) for the **Applicants**
The Respondents in person

Hearing dates: 19 to 21 January 2021

- -

Approved Judgment

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

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Insolvency and Companies Court Judge Burton :

Introduction

1. This is the hearing of an application by TMG Brokers Limited (the "**Company**") and its liquidator Mr Baker, seeking declarations in relation to certain payments, pursuant to section 212 of the Insolvency Act 1986 and consequential orders against the First Respondent Mr Staines, and the Second Respondent, Mr Madu, both of whom were directors and shareholders of the Company.

2. The payments in question were:

    i) from the Company's bank account with Bank Frick & Co in Liechtenstein (the "**Frick Account**") to Mr Madu made during the period 12 September 2013 to 1 December 2016, totalling £175,053.32 (the "**Frick Payments**");

    ii) cash withdrawals from the Frick Account, which the Liquidator considers were most likely made by Mr Madu of €50,409.11 (the "**Frick Cash Withdrawals**");

    iii) £213,791.94 directed to be paid by one of the Company's debtors to the account held by a connected company, TMG Pay Limited ("**TPL**") with Barclays Bank in England, which company and bank account were also under the control of the Respondents (the "**TPL Account**"). Of the £213,791.94 paid into the TPL Account which the Applicants seek to recover (the "**TPL Payments**") they refer in particular to the following "**Identified Payments**":

    iv) £132,873 paid to Mr Madu;

    v) £13,786 paid to Mr Staines;

    vi) £6,552 was out in cash in Italy, where Mr Madu resides; and

    vii) £53,747.91 used to discharge TPL's liabilities.

    This left an unaccounted for balance of £6,831.84 (the "**Balance**").

3. The Applicants claim that:

    i) the Frick Payments and Frick Cash Withdrawals were ultra vires, disguised distributions of capital, or that in causing or permitting the payments, the Respondents acted in breach of the fiduciary duties which they owed to the Company as its directors; and

    ii) the TPL Payments were diverted away from the Company in breach of the Respondents' fiduciary duties.

4. The Liquidator's first witness statement refers additionally, to a payment of US$6,525.28 (the "**US$ Payment**") paid to Mr Madu from the Frick Account. This amount was not included in the Applicants' Application Notice. The Respondents are entitled clearly to know the claim against them. As such the US$ Payment forms no part of the claim now before the Court.

Background

5. The Company was incorporated on 12 October 2012 with an issued share capital of £20, made up of 10 shares with a nominal value of £2. The Company's most recently filed annual return, made up to 12 October 2015, states that Mr Staines held two shares and Mr Madu held eight shares.

6. The Company filed dormant accounts for the years ending 31 October 2014, 2015 and 2016.

7. Despite those accounts, the Company in fact provided online credit card payment processing services which sat between a merchant who was providing goods or services to credit card holders (usually members of the public – the "**End Customer**") and a regulated acquiring bank (or "**acquirer**") who would collect the payments due from the relevant issuer, Visa or Mastercard. It appears from evidence given by the Respondents during recorded interviews on 9 and 23 February 2018 with Mr Alcock, a member of the Liquidator's staff (the "**Alcock Interviews**") that the Company also sought to engage in commodities trading, but that none of the proposed transactions completed.

8. For the purposes of its card-processing services, initially the Company worked with an acquirer owned by ABN Amro, called European Merchant Services. However, on 14 May 2014, the Company entered into a contract with another acquirer, One Stop Money Manager Limited ("OSMM"). Shortly afterwards, OSMM became the only acquirer working with the Company.

9. Broadly the arrangement operated, or should have operated, as follows:

    i) The End Customer would use the Company's portal to pay the amount claimed by the merchant for the goods or services the merchant was providing, by credit card. The credit card issuer would pay that amount into OSMM's bank account (which, like the Company's Frick Account, was also held with Bank Frick & Co in Liechtenstein).

    ii) Once a week, the Company would extract from OSMM's portal, a report of the week's transactions. Once a week, OSMM would retain a 2.8% processing fee as well as an additional 10%, the latter going towards what is described as a "Rolling Reserve" held by OSMM for 6 months to guard against situations where an End Customer requested a "chargeback".

    iii) Two weeks later, OSMM would credit the remaining 87.2% of the payment to the Company's Frick Account.

    iv) The Company would then pay the majority of funds, net of its own fee (4.5%) to the merchant.

10. From October 2014, when the Company was working exclusively with OSMM, the majority of its business was the provision of card processing services to merchants who were in the business of seeking to recover compensation due to End Customers who had been mis-sold payment protection insurance ("PPI").

11. The Company worked, in particular, with three such PPI recovery merchants, all either trading names of, or separate companies, associated with Thomson Legal Limited: Versus, Money Advice Centre and Taylor & Taylor (together the "Thomson Legal Merchants"). End Customers were cold-called by one of the Thomson Legal Merchants and generally asked to pay an upfront fee of between £300 and £500 for the merchant to investigate whether any PPI Refund was due to them. The End Customer was informed that if the merchant's investigation revealed that they were not due to receive a PPI Refund, the upfront fee would be repaid to them.

12. A "chargeback" could arise in circumstances where, for example, an End Customer was found not to be entitled to receive a PPI refund or where an End Customer claimed that it had not purchased or received the merchant's services.

13. Chargebacks were deducted automatically from the Company's account with OSMM. If OSMM considered the Company was incurring too many chargebacks, it could close the account. However, where the Company received advance notice of a fee needing to be repaid to an End Customer, to avoid a chargeback, the Company could instead directly refund the money to the merchant.

14. It is not in dispute that in mid-February 2015, Mr Madu, sent an email to OSMM instructing it to make all future payments (which would otherwise have been paid to the Company's Frick Account) to the TPL Account. The email referred to the account simply as "TMG" and provided no other indication to OSMM that the account was in fact held by another company, TPL.

15. TPL was incorporated on 11 November 2011. From around 18 April 2017, Mr Staines was the holder of 25 of its shares and Mr Madu, 75 shares. A compulsory winding-up order was made against TPL on 24 May 2018.

16. Both Respondents stated in their witness statements that it was a feature of the PPI compensation business that PPI merchants were only in business for a short period of time. The Thomson Legal Merchants stopped trading in November 2015 after informing the Respondents that following a Ministry of Justice audit, they were told that they could not continue trading as agents under a licence held by a separate company in Manchester. The Respondents state that the Thomson Legal Merchants then informed their End Customers of the customer's right, under section 75 of the Consumer Credit Act 1974, to make a claim against the credit provider. They say that this led almost immediately to an enormous number of chargeback claims. The claims were initially met from the Rolling Reserve held by OSMM, but once that had been exhausted, on 16 June 2017 OSMM presented a winding-up petition against the Company for £158,000.

17. The Alcock Interviews record that the Company instructed a direct-access barrister and sought an adjournment on the basis of evidence set out in a witness statement made by Mr Madu regarding funds which the Company was due to receive from a pending oil trade. The funds did not materialise. A winding-up order was made on 20 November 2017 and the Liquidator was appointed on 8 December 2017.

18. On 5 February 2018, Mr Staines attended an interview with the Official Receiver and provided a Preliminary Information Questionnaire ("PIQ") of the same date. In the PIQ he described his role as "Technical Support Website Admin" and Mr Madu's role as

"Sales & Marketing". He stated that neither he, nor Mr Madu, received any salary or benefits from the Company and that they did not have a service contract or contract of employment. He attributed the Company's failure to the closure of the Thomson Legal Merchants and their decision to tell End Customers to "chargeback all transactions".

19. On 22 April 2018, the Liquidator served a statutory demand on Mr Staines claiming £1,267,825.25. He applied to set aside the statutory demand. After he made a payment to the Liquidator of £49,622.28, no further action was taken in relation to the statutory demand until the commencement of these proceedings by Notice of Application dated 22 January 2020.

The Respondents' defence

20. The Respondents each filed one witness statement.

21. Mr Staines' witness statement was made on 10 July 2020. It recited that he had repaid the £49,622.28 claimed in the statutory demand to the Applicants who alleged, he believes wrongly, that he gave no consideration for the funds. He said:

> "I had understood that the payments comprising the sum of £49,622.28 were my "salary" payments for the period March 2015 to January 2015 [sic]. However during the course of [the Company's] liquidation I have discovered that the payments had not been properly dealt with in the [Company's] account with the consequence that I could not prove that they were, in fact, my salary. I believe that the fault for this lay with [Mr Madu] but, in any event, after taking advice, I also agreed to repay this sum".

22. Mr Staines said in his witness statement that he did not believe that the amount he repaid had been taken into account in the Liquidator's claim, that of the sums claimed by the Liquidator, he only benefited from the amount he had already repaid and should not be liable to pay anything more and that he did not understand why sums paid by the Company to TPL had been included in the claim which might, as a result, have "led to some double accounting". He denied that he had breached any duties owed to the Company. He explained that Mr Madu had ultimate control over the Company and any payments to him were made without reference to him and without his consent. He said that he did not even know that Mr Madu had a Company Maestro card. He consequently asks the Court to exercise its discretion, pursuant to section 212 of the Insolvency Act 1986 ("**IA 1986**"), "so that, if I am liable to repay these sums (or any part of them), I am released from some or all of that liability".

23. Mr Staines referred in his witness statement to section 1157 of the Companies Act 2006 ("CA06") and said:

> "In view of the matters set out above, I believe that I did act honestly and reasonably in respect of the relevant payments, all of which were made at a time when [the Company] was solvent. Accordingly, should the court find that I am jointly liable for the payments with [Mr Madu] then I would respectfully ask that I am relieved from that liability".

24. Mr Staines said that he had been hampered in responding to the Applicants' claim as a result of the Liquidator's failure to serve his evidence on him prior to 16 March 2020:

> "I had to ask for the hearing bundle download link to be renewed as it had expired. I had not previously given written notice to the Liquidator of acceptance of electronic service and this did not constitute proper service of the statement. I accepted the electronic service on this occasion on the 18th March 2020".

25. Additionally, in his skeleton argument, Mr Staines referred to the principle in ***Re Duomatic*** [1969] 2 Ch 365. He submits that whilst there is nothing to record that the £13,786.93 of the TPL Payments he received were used to repay expenses, he believes that the Respondents proceeded on the basis that that was their purpose and following ***Duomatic*** that the Respondents' conduct as shareholders in the Company can be taken as being akin to a binding resolution.

26. Mr Madu's witness statement was made on 25 July 2020. He states that he was not served with the Liquidator's statement until March 2020 having previously only been sent an unsigned, undated version. Much of the statement repeated, verbatim, the contents of Mr Staines' witness statement. Mr Madu denies that he wrongly received payments from the Company for no consideration. His statement provides no explanation or justification for the payments. He said:

> "Some of the amounts referred to in the application appear to be correct but some amounts have been added from [TPL's] accounts. I do not understand the reason for this but it seems likely that this will reduce the alleged indebtedness. It is also possible that this has led to some double accounting and amounts may have been included twice (no credit has been given for the payment of £49,622.28 that has already been made)".

27. Mr Madu denies that he breached his obligations to the Company, and like Mr Staines, said that he has been advised that the relief sought is discretionary and that as he acted honestly and reasonably, pursuant to section 1157 CA06, he should be relieved of any liability.

Relevant legal principles

28. The Applicants claim that the Frick Payments and Frick Cash Withdrawals were ultra vires, disguised distributions of capital. Section 829 CA06 provides that subject to certain exceptions, a "distribution" for the purposes of Part 23 of the CA06 is any description of distribution of a company's assets to its members, whether in cash or otherwise.

29. In ***Progress Property Company Ltd v Moorgath Group Ltd*** [2010] UKSC 55 , Lord Walker commenced his judgment with a succinct summary of the principles:

> "A limited company not in liquidation cannot lawfully return capital to its shareholders except by way of a reduction of capital approved by the court. Profits may be distributed to shareholders (normally by way of dividend) but only out of distributable profits computed in accordance with the complicated provisions of the Companies Act 2006 (replacing similar provisions in the Companies Act 1985).
>
> Whether a transaction amounts to an unlawful distribution of capital is not simply a matter of form. As Hoffmann J said in *Aveling Barford Ltd v Perion Ltd* [1989] BCLC 626, 631: "Whether or not the transaction is a distribution to shareholders

> does not depend exclusively on what the parties choose to call it. The court looks at the substance rather than the outward appearance." Similarly Pennycuick J observed in Ridge Securities Ltd v Inland Revenue Commissioners [1964] 1 WLR 479 , 495:
>
> "A company can only lawfully deal with its assets in furtherance of its objects. The corporators may take assets out of the company by way of dividend, or, with the leave of the court, by way of reduction of capital, or in a winding up. They may, of course, acquire them for full consideration. They cannot take assets out of the company by way of voluntary distribution, however described, and, if they attempt to do so, the distribution is ultra vires the company"."

30. The statutory requirements relating to distributions are set out in Part 23 of the CA06. Section 830 (Distributions to made only out of profits available for the purpose) provides (so far as relevant):

> "(1) A company may only make a distribution out of profits available for the purpose.
>
> (2) A company's profits available for distribution are its accumulated, realised profits, so far as not previously utilised by distribution or capitalisation, less its accumulated, realised losses, so far as not previously written off in a reduction or reorganisation of capital duly made".

31. Section 836 CA06 (Justification of distribution by reference to relevant accounts) and section 837 CA06 provide that whether a distribution may be made by a company without contravening Part 23 is determined by reference to the company's last annual accounts which have been properly prepared in accordance with the Act and that unless the company is exempt from audit, the auditor must have made his report on the accounts.

32. In addition to the statutory requirements in Part 23, section 851(1) CA06 has the effect of preserving the long-standing common law prohibition on distributions from capital, which was re-affirmed by the Supreme Court in ***Progress Property Co Ltd v Moore*** [2010] UKSC 55.

33. The Applicants claim that the Respondents breached the fiduciary duties they owed to the Company. Mr Baker's witness statement refers to the statutory duties owed by a director pursuant to sections 171, 172, 173 and 174 of the CA06.

34. Section 171 CA06 (Duty to act within powers) provides:

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

35. Section 172 CA06 (Duty to promote the success of the company) provides:

> "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the

> company for the benefit of its members as a whole, and in doing so have regard (amongst other matters to):
>
> (a) the likely consequences of any decision in the long term,
>
> (b) the interests of the company's employees,
>
> (c) the need to foster the company's business relationships with suppliers, customers and others …"

36. Subsection (3) provides:

> "The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

37. The duty imposed by section 172 comprises both subjective and objective elements. In ***Re HLC Environmental Projects Ltd*** [2013] EWHC 2876 (Ch) John Randall QC sitting as a deputy High Court judge explained that the general principle of subjectivity is subject to three qualifications:

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

38. The first qualification at (a) above, refers to the interests of a company's creditors. In ***BTI 2014 LLC v Sequana S.A***. [2019] EWCA Civ 112, David Richards, LJ considered when the interests of creditors should intrude upon the section. Longmore LJ and Henderson LJ agreed with his analysis that:

> "Judicial statements should never be treated or construed as if they were statutes but, in my judgment, the formulation used by Sir Andrew Morritt C and Patten LJ in *Bilta v Nazir*, and, by judgeS in other cases, that the duty arises when the directors know or should know that the company is or is likely to become insolvent accurately encapsulates the trigger. In this context, "likely" means probable".

39. Section 173 requires a director to exercise independent judgment.

40. Section 174 (Duty to exercise reasonable, care, skill and diligence) provides:

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

41. Mr Justice Briggs (as he was) explained the subjective and objective elements of this test in ***Lexi Holdings plc (in administration) v Luqman and others*** [2008] 2 BCLC 725:

> "The objective test sets the basic standard. It is no excuse for a director to say that, in fact, she did not have the general knowledge, skill or experience reasonably to be expected of a person carrying out her appointed functions. The subjective test potentially raises the standard by reference to any greater general knowledge, skill or experience which the particular director actually has."

42. The Applicants have provided evidence of the Company's money being paid to the Second Respondent and TPL. In ***Re Idessa (UK) Ltd (in liquidation)*** [2012] 1 BCLC 80, Lesley Anderson QC sitting as a Deputy Judge of the High Court explained that this results in the burden of proof shifting from an applicant to a respondent. At paragraph 28 she states:

> "I am satisfied that whether it is to be viewed strictly as a shifting of the evidential burden or simply an example of the well-settled principle that a fiduciary is obliged to account for his dealings with the trust estate, that Mr Aslett is correct to say that once the liquidator proves the relevant payment has been made the

> evidential burden is on the respondents to explain the transaction in question".

43. It has been held, in relation to loans to another company, that it is not a breach of fiduciary duty for a director to advance money for the benefit of a related company if he honestly believes that the company will repay the money: ***Re Pantone 485 Ltd*** [2002] 1 BCLC 266.

44. ***Toone v Robbins*** [2018] BCC 728 cited by Ms Johnson for the Applicants, is an important authority regarding the burden of proof. Once the Court has decided that, absent clear evidence one way or the other, an issue must be determined by reference to the burden of proof, in circumstances where there is no dispute that the payment has been made to a director, the benefit of any doubt must be given to the company's liquidators and not to the recipients of the money.

45. Ms Johnson referred to Mr Madu's failure to provide the Company's books and records and drew to my attention paragraphs 16 and 17 of Arden LJ's judgment in the Court of Appeal in ***Re Mumtaz Properties Limited*** [2011] EWCA Civ 610:

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

46. Applying this principle in ***Toone v Robbins***, Mr Justice Norris held:

> "Directors who receive money from the company cannot be heard to say:- 'We have received company money but our record keeping is so bad that the basis upon which we received it is unclear. So by reason of our defaults we ask you to assume in our favour that we took the money lawfully'."

47. The law has established that actual knowledge on the part of one director that the payments were being made to another director, is not essential. In ***Neville v Krikorian*** [2006] BCC 937 Lord Justice Chadwick said:

> "…To my mind, it can properly be said that a director who knowingly allows a practice to continue under which lending by the company to his co-director is treated as acceptable, has

> authorised the individual payments which are made in accordance with that practice notwithstanding that he did not have actual knowledge of each individual payment at the time that it was made".

48. Whilst ***Neville v Krikorian*** concerned repayments of alleged unlawful loans made by one director to his son contrary to section 330 CA06, in ***Lexi Holdings v Luqman*** Briggs J held that the principle should apply to "any improper practice, including misappropriations of company money".

49. Pursuant to s.212 of the IA 1986, if in the course of a winding-up of a company it appears that a person who is or has been an officer of the company has been guilty of misfeasance or breach of any fiduciary or other duty in relation to the company, the Court may, on the application of the liquidator, examine into his conduct and compel him to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of duty as the court thinks just. The relief is discretionary.

50. The CA06 provides what is often described as "the statutory defence". Section 1157 of the CA06 empowers the Court to relieve a director from liability if it appears to the Court that the director:

> "…acted honestly and reasonably, and that having regard to all the circumstances of the case…ought fairly to be excused."

51. In addition to the points already noted, ***Toone v Robbins*** is authority for the proposition that a misfeasant director may not avail himself of the defence in respect of monies which he personally received. Following ***Coleman Taymar Limited v Oakes*** [2001] 2 BCLC 749, the question of whether a director acted honestly, is to be answered subjectively and whether he acted reasonably is to be answered objectively, in the latter case, by reference to the knowledge, skill and experience which might reasonably be expected of a person carrying out the functions in question.

52. There are no limits to the matters which the court, when considering the statutory defence, may take into account in a director's favour, even if technically an offence is made out. A director's conduct may be reasonable for the purposes of section 1157 CA06 notwithstanding that it amounts to a lack of reasonable care for the purposes of section 174: ***Re D'Jan of London Ltd*** [1994] 1 BCLC 561. Mr Staines referred in his skeleton argument to the summary and application of this principle by the Court of Appeal in ***Dickinson and others v NAL Realisations (Staffordshire) Limited and others*** [2020] 1 WLR 1122 where, Newey LJ said, at paragraph 34:

> "The courts' approach to relief under section 1157 of the 2006 Act can be illustrated by reference to *In re D'Jan of London Ltd* [1994] 1 BCLC 561, where relief was sought and granted under section 727 of the Companies Act 1985. Hoffmann J observed at p 564:
>
> > 'It may seem odd that a person found to have been guilty of negligence, which involves failing to take reasonable care, can ever satisfy a court that he acted reasonably. Nevertheless, the section clearly contemplates that he may do so and it follows that conduct may be reasonable for the purposes of section 727 despite amounting to lack of reasonable care at common law.'

Hoffmann J went on:

> 'In my judgment, although Mr D'Jan's 99% holding of shares is not sufficient to sustain a *Multinational* defence, it is relevant to the exercise of the discretion under section 727. It may be reasonable to take a risk in relation to your own money which would be unreasonable in relation to someone else's. And although for the purposes of the law of negligence the company is a separate entity which Mr D'Jan owes a duty of care which cannot vary according to the number of shares he owns, I think that the economic realities of the case can be taken into account in exercising the discretion under section 727. His breach of duty in failing to read the form before signing was not gross. It was the kind of thing which could happen to any busy man, although, as I have said, this is not enough to excuse it. But I think it is also relevant that in 1986, with the company solvent and indeed prosperous, the only persons whose interests he was foreseeably putting at risk by not reading the form were himself and his wife. Mr D'Jan certainly acted honestly. For the purposes of section 727 I think he acted reasonably and I think he ought fairly to be excused for some, though not all, of the liability which he would otherwise have incurred.'

The burden of proving honesty and reasonableness lies on those seeking relief (see *Bairstow v Queens Moat Houses plc* [2001] 2 BCLC 531, para 58)."

53. Mr Staines also referred in his skeleton argument to the ***Duomatic*** principle. Neuberger J (as he was) summarised the principle in ***EIC Services Ltd v Phipps*** [2004] 2 BCLC 589:

> "The essence of the ***Duomatic*** principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, estoppel, and whether members of the group give their consent in different ways at different times does not matter."

54. Later in the same judgment, (at para 135) Neuberger J said:

> "Before the ***Duomatic*** principle can be satisfied, the shareholders who are said to have assented or waived must have the appropriate or 'full' knowledge. If a shareholder is not aware that his 'assent' is being sought to the matter, let alone that the obtaining of his consent is at least a significant factor in relation to the matter, he cannot, in my view, have the necessary 'full knowledge' to enable him to 'assent'".

55. The informal unanimous consent of shareholders does not enable a company to avoid compliance with a provision for the protection of creditors or to validate an unlawful distribution, nor can the company in general meeting ratify a breach of duty if the company is insolvent or may thereby become insolvent. In ***West Mercia Safetywear Ltd v Dodd*** [1988] BCLC 250, Dillon LJ cited with approval a statement in ***Kinsela v Russell Kinsela Pty Ltd*** (1986) 4 NSWLR 722:

> "In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arises. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But when a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration."

56. ***Ultraframe (UK) Ltd v Fielding & Ors*** [2005] EWHC 1638 (Ch) is further authority that the principle cannot be invoked to validate ultra vires acts such as an unlawful distribution of capital.

Witness evidence in court

The Liquidator

57. Mr Baker gave evidence during the first morning of the trial. His evidence is based on what he and his staff have established from the Company's and TPL's bank statements as well as the information set out in Mr Staines' PIQ, the notes of Mr Staines' interview with the Official Receiver and the Alcock Interviews.

58. When cross-examining Mr Baker, Mr Staines took issue with only two points. First, he sought to challenge Mr Baker's statement that the Company failed to make adequate reserves for chargebacks. He did this by referring to OSMM's Rolling Reserve of 10% and asked Mr Baker whether he considered that a 10% retention, which he asserted is common in the industry, is inadequate and thus that he was suggesting that OSMM was not running its business with adequate reserves. Mr Baker was careful to reply that he was unable to comment on industry standards or the business practices of OSMM but that it was clear to him that the Company retained or had access to inadequate reserves, as demonstrated by the Company's significant liability to OSMM which resulted in it being wound up.

59. Mr Staines also asked Mr Baker to explain what led him to the belief (set out in Mr Baker's 2nd witness statement) that the copy of the witness statement that was first made available to Mr Staines electronically, was signed, when Mr Staines' evidence was that it was not signed, and why it was sent to him electronically (when he had not consented to service by email) instead of being sent by post with the application notice. Mr Baker replied that he was no longer sure what led him to believe so certainly that it was signed and that he would have to defer to his solicitors regarding the manner in which they served the documents.

60. Mr Madu's cross-examination of Mr Baker was similarly brief. He asked Mr Baker whether he did not think it pertinent for the Applicants to acknowledge that once the Respondents realised that the OSMM reserves would be inadequate to meet all chargebacks, they requested permission to make refunds instead. Mr Baker replied that he did not recall being informed that such a request was made. When asked whether he thought the Company should have been given permission to make refunds instead

of being subjected to chargebacks, Mr Baker replied that such matters were for OSMM to decide.

61. I am satisfied, despite the challenge to the accuracy of his evidence regarding service of a signed copy of his witness statement, that Mr Baker was a reliable witness. By the time of the trial, any issues concerning proper service of a signed copy of the Liquidator's witness statement had been superseded. The Respondents were clearly aware by then of the evidence in support of the claims against them following service of signed copies in March 2020.

I accept the evidence of Mr Baker which was given in a straightforward manner and not undermined during cross-examination.

Mr Madu

62. Mr Madu resides in Italy. Due to the current Covid-19 pandemic, it was agreed that he would give his evidence remotely, in accordance with the terms of an agreed witness protocol.

63. Mr Madu's replies during cross-examination suggested to me that he does not appreciate the serious nature of the claims against him or was simply untroubled by them. He did not deny receiving any of the payments or benefiting from the cash withdrawals which the Applicants claim he received.

64. His evidence to the court, both written and oral, starkly lacked detail and explanation. For example, when asked why he approved the Company's annual accounts, which had been prepared for successive years on the basis that the Company was dormant, when it clearly was not, he simply answered that there was nothing he could say to that. He said that he did not believe it had been done deliberately "but I can see what you're saying". When reminded that he had said in his witness statement that the Company was solvent when the payments were made to him and asked to explain that statement in circumstances where the Company's accounts showed it was dormant, he replied: "If that's what the documents show, it's what they show".

65. At the end of cross-examination, when Counsel suggested that if the payments he received personally had not been made, the Company would have had sufficient funds to pay the petition debt claimed by OSMM, he replied: "If we had a situation like that, yes, if that was the situation".

66. The only explanation which Mr Madu gave to explain his failure to provide any of the Company's books and records, despite the Liquidator's repeated oral and written requests and his own promises to provide them, was that the information was lost during a computer rebuild.

67. I have no doubt that Mr Madu could have provided both the Liquidator and the Court with a much fuller explanation of the circumstances surrounding each payment and possibly also the reasons why he might, at the time, have considered such payments to be justified. As such, his evidence was unhelpful. Taking large payments from a company, with no explanation or justification, is not the conduct of an objectively honest person. His decision not to advance any explanation for his conduct and the

evasive manner in which he has given evidence, led me to approach the scant explanations he did seek to provide, with caution.

Mr Staines

68. Mr Staines was cross-examined on his evidence during the second day of the trial. Counsel sought to highlight a discrepancy between his statement in the PIQ, that neither he nor Mr Madu received any payments from the Company, with his witness statement where he said that he had understood the payments to be in respect of "salary". He sought to explain the discrepancy by saying that when he was interviewed by the Official Receiver in relation to the Company's liquidation, he thought the money had been paid to him by TPL as "it's where all my work gets done". This was consistent with other statements made during the Alcock interview.

69. He denied that, as stated by Mr Madu, he had full access to the Company's Frick Account. He said that he merely had access to the OSMM portal and that he calculated the amounts that needed to be paid to merchants, less charge backs and refunds and left Mr Madu to send that money to the TPL Account before he sent the relevant funds to each Thomson Merchant. However he conceded that he knew that the Company's money was being sent to the TPL Account and when Counsel suggested that he could not, therefore, have believed it was TPL's money he replied: "If you look at it like that, then yes, but that's not what I believed".

70. Mr Staines said both to the Official Receiver and during cross-examination that he did not know how much money was being paid to Mr Madu. When Counsel asked Mr Staines whether he thought Mr Madu was entitled to be paid substantially more of the Company's money than him, because Mr Madu held substantially more shares, he replied that he could not comment. When Counsel suggested that, as a shareholder, he felt that he was entitled to receive the payments, he said that he was doing physical work for the Company and was entitled to be paid as an employee. He conceded that at the time he paid no tax on the monies received.

71. Mr Staines accepted during cross-examination that he had full access to and sight of the TPL Account but claimed that he did not see or notice that Mr Madu had paid himself £132,000 because he only checked the account to ensure that the right amount was coming in, to pay to the Thomson Merchants.

72. Mr Staines said that he signed the Company's accounts which showed it to be dormant because Mr Madu asked him to do so and he believed that all tax and audit matters would be reflected in TPL's filed accounts. He accepted that he knew the Company was in fact trading and that it was therefore wrong for him to sign accounts stating otherwise, but insisted that he did not do so dishonestly.

73. He admitted that he had no knowledge of the duties he owed as a director and said that he had not sought advice to try to learn about his duties. When asked whether he accepted that it was a breach of his duties to allow £300,000 of the Company's money to be paid to Mr Madu, he replied: "I can't say yes or no".

74. When asked what steps he took in November and December when the large number of chargeback claims were being made, to stop any further payments out in favour of

himself or Mr Madu, he conceded that he took no such steps other than to try to prevent the chargebacks from being made, in particular, by sending out a "representment letter".

75. Mr Staines also conceded that if the sums now claimed by the Liquidator had continued to be in the Company's account, the Company would have had sufficient funds to meet the petition debt. He sought to qualify the reply by saying that OSMM held a substantial Rolling Reserve and that in his 20 years' experience in the credit card industry, he had never seen something go so badly wrong.

76. Mr Staines recognised that his skills and experience led to him to focus on the technical side of the busines and were not suited to taking responsibility for a company's financial affairs. I formed the impression that he sought to present his evidence as honestly and fully as he felt he could, whilst at the same time, simply saying that he could not comment in relation to questions which he felt might expose him to a risk of potentially being held liable for amounts not paid directly to him. I find that where he did provide detailed answers, his evidence can be relied upon.

The Company's Insolvency

77. The authorities refer to: (i) a director's duty to act in the best interests of a company's creditors being engaged when a company is insolvent or likely to become insolvent; and (ii) limitation on reliance on the Duomatic principle when a company is insolvent or of doubtful solvency. The Liquidator states:

> "From this period *[from which I understand him to be referring to the period between 13 February 2015 and 20 April 2016]* the chargebacks under the Agreement increased significantly, and sums owed to [OSMM] by the Company likewise increased. However, the Company did not have the means to pay the debt due to [OSMM] because its assets had been diverted away to [TPL]; Mr Madu and Mr Staines had authorised payments to themselves and payments to [TPL]'s creditors (as set out above) from monies that should have been repaid to the Company; and no monies were retained in the Company to pay its creditors, with the result that if [OSMM] (or any creditor) took action to recover its debts, there would be no means of the debt being repaid. This meant that the winding up of the Company was inevitable.
>
> Even on their own evidence, Mr Madu and Mr Staines knew that the Company would be hit with a significant number of chargebacks from at least November 2015 but evidently took no steps to ensure that monies were available to pay the debts that would fall due as a result. As set out above in paragraph 18 above, Mr Staines has admitted that the Company could not pay the chargebacks because it did not have the funds to do so".

78. The Applicants have provided copies of the Frick Account statements showing payments to the TPL Account before the instruction was given to OSMM to make payments directly to the TPL Account and schedules summarising those payments. The schedules state that the following total amounts were transferred to the TPL Account, for the periods shown from each Frick currency Account:

Period	Currency	Total
21.06.2013 – 03.02.2016	£ (GBP)	£ 1,103,296.92
25.02.2014 – 18.08.2014	US$	US$ 157,410.26
06.09.2013 – 16.09.2014	Euro	€ 6,178.42

79. The Applicants have not provided copies of any statements for the TPL Account. The only evidence of the amounts paid by OSMM to the TPL Account is Mr Baker's witness statement which states that £1,257,859 was paid by OSMM into the TPL Account and that he has also identified a further sum of £988.64 paid into the account from the Company's dollar account, making a total of £1,258,848.64. He states:

> "My staff have reviewed the bank statements for [the TPL Account] and a summary of the payments into and out of the account between 13 February 2015 and 20 April 2016 are described below and set out in summary form."

80. The schedule was entered in evidence together with a schedule which I believe originates from OSMM showing the amount paid each week initially to the Company's Frick Account and latterly to the TPL Account. The Respondents have not denied that the TPL Payments set out in the Liquidator's schedule were made.

81. The Respondents assert that the Company was solvent when each of the payments claimed by these proceedings were made.

82. Without seeing the TPL Account statements, I am unable to identify the dates or discern any pattern of payments from the TPL Account in favour of the Company's creditors, TPL's creditors, Mr Staines and Mr Madu. The schedule of chargebacks nevertheless clearly shows a general trend of chargeback claims being made each week from September 2014 to June 2015 of between zero and two. From mid-June 2015, that increased to around five or six claims per week, (some weeks, just three) but then, from 21 September 2015, the claims increased to 17 and tended to be no less than 10 claims each week after that, often in their twenties, thirties and forties. Sixty six chargeback claims were made in the week commencing 14 December 2015. They also appear to show that no further payments were made by OSMM to the Company after 14 December 2015.

83. The Applicants contend that the diversion of Company monies to the TPL Account meant that TPL received the benefit of the payments but carried none of the liabilities that arose as a result of chargebacks. The Company's arrangement with TPL for the use of its bank account is not documented. It is clear that a significant amount of the money paid into that account was applied in discharging the Company's liabilities: the Applicants have given credit for £1,045,056.50 in respect of such payments. I do not accept that the Company immediately became insolvent as a result of instructing OSMM to divert all payments due to it to the TPL Account. TPL appears to have recognised an obligation to apply at least some of the money for the Company's benefit. However, in my judgment, from November 2015, once the Company's principal

customers ceased trading, bearing in mind that significant sums had been paid out to the Respondents and that the number of chargeback claims was rising and likely to increase exponentially (as happened) objectively, the Respondents should have appreciated that the Company's ultimate insolvency was more likely than not.

The Frick Payments and Frick Cash Withdrawals

Mr Madu's liability in respect of the Frick Payments and Frick Cash Withdrawals

84. The Liquidator has provided evidence in the form of the Company's sterling bank statements for the Frick Account showing frequent payments of sizeable amounts (not less than £2,500 at a time) to Mr Madu. The Company's statements for its Euro account with Bank Frick show very frequent cash withdrawals, often for €253.50 and €353.50. The Liquidator's witness statement explains why Mr Madu was the most likely recipient of the cash withdrawals. It does not include a full schedule of the payments but provides the total amounts now claimed by the Applicants against the Respondents. It is clear from the Liquidator's letter to Mr Madu dated 1 March 2018 that he was provided with schedules of each payment giving rise to the total claimed. In response, Mr Madu wrote on 19 March 2018, referring to the schedules of payments and saying "Checking, Will get back to you". It is not in dispute that he did not do so.

85. Mr Madu has not denied receiving the Frick Payments and Frick Cash Withdrawals.

86. In my judgment, the Applicants have discharged the burden of proving that the payments were made or, in the case of the Frick Cash Withdrawals, were more likely than not, paid to Mr Madu. Consequently, the evidential burden of proving that the payments were for a lawful and proper purpose lies with the Respondents. Following ***Toone v Robin*** the benefit of the doubt goes in favour of the Liquidator.

87. When Mr Madu was asked, during his Alcock interview, about the substantial payments made to himself, he failed to provide any clarification, saying that the payments would probably have been to reimburse expenditure like travel but that "Top of my head I couldn't tell you. I'd have to find out". When asked directly during the interview about the £175,053.32 Frick Payments, he again said that he would need to find out what they were for.

88. Since then, no further documentary evidence has been provided by Mr Madu to explain or justify the purpose of the payments. During cross-examination, he confirmed that he did not deny receiving the payments and again said that they were to cover expenses like travel costs, but that because he has been unable to retrieve any records, he has been unable to account for each individually. He explained that he and Mr Staines drew down expenses "every now and again" and that they had proceeded in the hope that turnover would improve to the point that in the third year of trading "there was something to earn from".

89. When Counsel suggested that when making the payments, Mr Madu had no regard to the Company's finances, he replied that it was not done intentionally and that he accepted that the Company should have had better accounting arrangements.

90. Mr Madu has entirely failed to meet the evidential burden of proving that the payments were for a lawful and proper purpose. Due to the Respondents' failure to deliver up

the Company's books and records, following ***Re Mumtaz Properties Ltd,*** the Court my infer that if they had been made available, they would have supported the Applicants' case that there was no lawful basis for the payments. They exceed any amount which could reasonably have been required to meet travel or other expenses reasonably incurred by Mr Madu in pursuit of the Company's business. I do not accept Mr Madu's explanation that his apparent computer breakdown accounts for his failure to provide documentary evidence to support his suggestion that the payments were to cover expenses. To the extent that the alleged expense payments were to reimburse funds paid out by him personally, there would, most likely, have been alternative sources of information to substantiate the payments. Where payments were made directly with Company funds, for at least some of the items, invoices, plane tickets and receipts could have been obtained from third parties. Mr Madu's failure to provide even one receipt for such expenditure leads me to conclude that at least the majority of the very substantial amounts paid to him by the Company were not for expenses. I am fortified in reaching this conclusion by Mr Staines' statements during his interview with Mr Alcock:

> "I had expenses but not every month, so …besides, you know, there wasn't enough margin in those accounts to … you know, when you're earning three per cent, you can't pay that amount out".

91. There is no evidence of the Company complying with Part 23 CA06 to make lawful distributions of capital to the Respondents.

92. As Mr Madu has failed to show that the Frick Payments and Frick Cash Withdrawals were for a legitimate business purpose, I find that they were made in breach of his statutory and common law duties as a director of the Company. In relation to his statutory duties, in my judgment, by making the payments to himself for no apparent, legitimate purpose, Mr Madu breached the duty which he owed to the Company pursuant to section 171 CA06, only to exercise his powers for the purpose for which they were conferred.

93. Mr Madu has failed to provide any evidence that when procuring that the Company made those payments to himself, he considered the best interests of the Company, or, when he knew or should have known that the Company was insolvent or likely to become insolvent, its creditors. I have found that the Respondents should have known that the Company was likely to become insolvent as soon as the Thomson Merchants ceased trading in November 2015. Nevertheless, Mr Madu failed to reimburse the very substantial amounts he had by then taken from the Frick Account and continued to make payments to himself from the Frick Account. For example, on 3 June 2016 he transferred to himself from the Frick Account £13,177.59, and US$6,256.28. His conduct in relation to his duties under section 172 CA06 must be viewed objectively.

94. Objectively viewed, an intelligent and honest man in Mr Madu's position, in the circumstances I have described, could not reasonably have believed that the Frick Payments and Frick Withdrawals were for the benefit of the Company or, following November 2015, its creditors. Consequently he breached his duty, pursuant to section 172 CA06 to act in a way which would be most likely to promote the success of the Company or, once he should have realised that the Company was or was likely to become insolvent, to treat the Company's creditors' interests as paramount.

95. Applying the subjective and objective elements comprising a director's duties under section 174 CA06, in the light of the absence of any credible explanation given by Mr Madu for the payments he received, in my judgment, in making the Frick Payments and the Frick Cash Withdrawals he breached his duty to exercise reasonable skill, care and diligence.

Should Mr Staines be jointly and severally liable for the Frick Payments and the Frick Cash Withdrawals?

96. Mr Staines has already repaid the amounts he received from the Frick Account. He contends that Mr Madu should solely be liable to repay the Frick Payments and Frick Cash Withdrawals on the basis that Mr Madu controlled the Frick Account and he alone benefitted from the payments. In his skeleton argument, Mr Staines says: "Just as R1 has repaid the monies he received (£49,622.28) R2 should repay these amounts".

97. Mr Staines claims, contrary to Mr Madu's evidence, that he did not have access to the Frick Account. During his Alcock Interview he said that Mr Madu was always responsible for transferring money from the Company's Frick Account to the TPL Account:

> "CA: So [Mr Madu] did that, those movements?
>
> DWS: Yeah, I didn't have access to the Bank Frick account.
>
> CA: You didn't?
>
> DWS: No
>
> CA: Okay. So [Mr Madu] was the sole signatory on that?
>
> DWS: I don't know. I mean, I think I was, but I never had access to the account. I can't say yes or no, because I don't know".

98. During cross-examination, Mr Madu said that whilst he was not 100% sure, he believed he was probably the one who made the Frick Payments and who arranged for the £49,000 odd to be paid to Mr Staines. He said that he would have instructed Bank Frick to have made the payments by email, possibly with a follow-on telephone call. He claimed to have lost access to the emails during the rebuild of his computer. He also said that Mr Staines would have been copied into the emails he sent to Bank Frick with his instructions to make such payments.

99. Mr Staines denied seeing or receiving such emails. Those he received from Frick Bank were, he said, "all about processing payments". He asserted that when considering the Frick Account he focussed only on the reports received from OSMM showing what should have been received and retained by them and the amount that was due to be paid to the Thomson Merchants. I find Mr Staines' statement that he did not have online access to the Frick Account and never saw the Frick Account statements to be credible and find on the balance of probabilities that he did not see them.

100. Mr Staines stated in his PIQ that neither the Company, nor any person nominated by it, held any cash dispenser cards, credit or charge cards. When asked during the Alcock Interview about Euro cash withdrawals, he said that they couldn't have been made by

him, as he did not have a card. When asked who could have made the payments, he replied that it must have been Mr Madu.

101. Mr Madu did not allege that Mr Staines knew he had a Maestro card. I find, on the balance of probabilities, that Mr Staines did not know that Mr Madu had a Maestro card from which he could withdraw cash from the Frick Account.

102. Mr Staines admitted to being ignorant of the duties he owed as a director of the Company, and admitted signing accounts showing the Company to be dormant when it clearly was not.

103. Mr Staines' lack of knowledge or involvement with the Company's finances was such that in his witness statement he said that it was only when he attended the interview with Mr Alcock that he became aware of the amount Mr Madu had paid himself. He said that he also found out that the Company's earlier processing bank, EMS had not been deducting a rolling reserve of 10% which explained how Mr Madu was able to make such payments to himself.

104. However, he also admitted that because he had received payments, arranged by Mr Madu, he had assumed that Mr Madu would be paying himself the same amount. Without apparently addressing his mind to the legal or contractual basis upon which such payments were being made, he acquiesced in the practice.

105. Whilst I have found that Mr Staines did not see the Frick Account statements, as a director of the Company, he was at all times entitled to ask to see them. He knowingly allowed a practice whereby Mr Madu would make payments from the Frick Account to the Company's director shareholders, without questioning the basis upon which such payments were made. Following ***Neville v Krikorian***, whilst he did not appear to have actual knowledge of the frequency or amounts which made up the Frick Payments in favour of Mr Madu, having acquiesced in a practice of payments being made to the Respondents without apparently knowing or understanding or even, it seems, asking about the basis for such payments, he should be treated as having authorised each such payment, making up the total of £175,053.32.

106. Having found that Mr Staines did not know that Mr Madu held a Maestro card for the Frick Account nor that Mr Madu had taken it upon himself to make frequent withdrawals of cash from the account, it follows that he did not knowingly acquiesce in a practice of allowing such cash withdrawals to have been made.

107. Directors will not be held to be in breach of the duty owed pursuant to section 174 CA06 simply for trusting other persons who are in a position of trust for the purpose of managing the company: see ***Dovey v The Metropolitan Bank of England and Wales*** [1901] A.C. 477 (at page 486). However, a director with grounds for suspecting the honesty of a fellow director will be liable if he fails to act on those suspicions: ***Lexi Holdings (in administration) v Luqman*** [2009] EWCA Civ 117.

108. Despite:

i) knowing that Mr Madu sent payments to Mr Staines without, apparently, any clear explanation for the basis upon which such payments were being made;

ii) saying he thought he was entitled to receive salary payments from TPL, but not disclosing his receipt of such payments to HMRC;

iii) assuming Mr Madu was making similar payments to himself;

iv) complying with Mr Madu's request that he sign the Company's accounts showing the Company to be dormant when he knew that was not the case, and that the Company was actively conducting business through the Frick Account,

Mr Staines never asked to be given access to the Frick Account or to see the Frick Account statements.

109. In my judgment, these circumstances should have put Mr Staines on enquiry, to check, at least once, that the only other person in control of the Company's finances, was properly handling them. Had he done so, it would have been immediately apparent that large sums of money were being paid to Mr Madu. Mr Staines chose to limit the scope of his enquiry to checking the OSMM reports. He appears neither to have prepared, nor called for management or other accounts to be prepared, considered or approved by the Respondents.

110. The fact that the trust which Mr Staines professes to have placed in Mr Madu has been shown to be misguided, does not excuse Mr Staines from performing the duties which he owed as an appointed director to the Company and its creditors. Agreeing that another director will be primarily responsible for a company's financial affairs, does not absolve the other directors of all financial responsibility. A director cannot so comprehensively abrogate his duties and responsibilities. Mr Staines' complete reliance and misplaced trust in Mr Madu to be responsible for the proper application of the Company's money, resulted in him breaching the basic standard, viewed objectively, to exercise reasonable skill, care and diligence pursuant to section 174 CA06. His breach of duty resulted in €50,409.11 of the Company's money being dissipated to Mr Madu with no corresponding benefit to the Company.

111. As the Company's only filed accounts showed it to be dormant, for the purposes of Part 23 CA06, there could not possibly be said to have been sufficient distributable profits from which a dividend could properly have been declared. The Respondents' decision to file accounts falsely stating that the Company was dormant, resulted in the accounts not being capable of being considered as the company's last annual accounts, properly prepared in accordance with the Act, in reliance upon which a decision could have been made to declare a dividend.

112. In summary I find that:

i) The Frick Payments and Frick Cash Withdrawals were ultra vires, disguised distributions of capital;

ii) in making the Frick Payments and the Frick Withdrawals, Mr Madu breached his duties to the Company pursuant to sections 171, 172 and 174 CA06; and

iii) by failing to exercise the basic standard of reasonable skill and diligence expected of a director, Mr Staines breached his duties to the Company pursuant

to section 174 CA06 with the consequence that the amounts of the Frick Payments and Frick Cash Withdrawals were lost to the Company.

The TPL Payments

113. It is not in dispute that OSMM was instructed to pay monies due to the Company into the TPL Account. The Liquidator claims that OSMM did so as a result of Mr Madu's "deception" by deliberately referring in his payment direction only to "TMG" rather than "TMG Brokers Limited" or "TMG Pay Limited" and thus intentionally failing to inform OSMM that the payee bank account belonged to an entirely separate entity.

114. Both Respondents state in their witness statements that they did not understand why the Applicants were seeking to recover from them amounts "that have been added from [TPL's] accounts".

115. In his skeleton argument, Mr Staines stated that he wished to rely upon a further witness statement to explain some of the TPL Payments. I refused to permit Mr Staines to enter such late evidence.

116. However, several of the issues Mr Staines wished to raise were included in his skeleton argument and touched upon in his and Mr Madu's answers during cross-examination. Out of fairness, despite having insufficient notice of the points, Ms Johnson sought to deal with them.

Diverting the Company's money to the TPL Account

117. Mr Staines stated during his interview with the OR that it was Mr Madu who decided to divert the payments due to the Company to TPL and that he agreed, because Mr Madu was the majority shareholder.

118. During his interview with Mr Alcock, Mr Madu stated that the Company's money was diverted to the TPL Account because it was more time efficient for customers, and cost-effective for both customers and "us", for monies to be paid through a UK bank account. He said:

> " … we did have a UK bank account for [TPL] during the time of this, having this facility, yes. But we didn't have one for [the Company] that we could use. So to do … as I said, to make payments, we're paying people in Wales, we're not paying people in Outer Mongolia, so if you're paying someone who's in Australia or New South Wales, somewhere like that, you could be paying from somewhere offshore. It's a toss-up as to where it's going to come cost wise. But if you're paying someone in the UK we say we've made a payout to you, they expect to see it today. So that was the logic of doing that".

119. He went on to explain in the interview that the Company could not get a UK bank account:

> "It would have been far easier for us if we had one. But I can't remember after which attempt we gave up the ghost on trying to get one. The only way that I can recall that we would have a chance of getting one at that time was if we omitted the fact that we were doing processing".

120. Mr Madu's witness statement provides a different reason for the payments being sent to TPL's account. He said TPL was the company which owned the platform software and continued:

> "It was done as a precautionary measure as Processing companies often go out of business, loose licences or cut services & as such one needs to have a back up [sic]".

121. During cross-examination he repeated that the TPL Account was used to hasten payments to customers because Frick Bank treated each transfer as an international payment, resulting in them taking 2-3 days to reach clients, in addition to the two-week delay before OSMM released the money. When shown his email to OSMM with instructions to send money to the TPL Account, which referred to payments simply being made to an account held by "TMG" he said that there was no intended subterfuge and that he and Mr Staines simply referred to the companies as "TMG". He said that he thought that he had a telephone call with OSMM about paying monies to the TPL Account as well as the email but that he could not precisely recall whether that was the case. It was put to him that describing separate legal entities in this way would prevent parties from knowing which company was being referred to. He replied that he and Mr Staines would know, but when he was reminded that the email was sent to OSMM he replied: "True. It could and should have been better written".

122. In my judgment, Mr Madu's statements regarding the difficulties the Company experienced in trying to open a UK bank account because of its processing operations, suggest that contrary to his denial of intended subterfuge, he intentionally omitted the full name of the TMG group company to which he asked OSMM to send future payments. I apprehend that he knew that a regulated entity such as OSMM might not have been prepared to send the Company's money, the bulk of which was to be paid to merchants, to an entirely different company. Moreover his statement that it was a precautionary measure because processing companies often go out of business, suggests he intended to ring-fence Company money away from the claims of potential future creditors.

123. When Mr Madu was asked what records he kept to ensure that monies passing between the two companies were properly accounted for, he said that he believed they knew from OSMM's online portal what money was due to be coming in and what was due to be paid to whom and that in addition, the companies' landlords would have sent invoices. He acknowledged that the Company's record keeping should have been better and said that he had looked for records but could not find them.

£13,786.93 paid to Mr Staines

124. According to Mr Staines' skeleton argument, among the issues he wished to address in the witness statement which I did not permit him to put before the Court, was an explanation that the payment to him of £13,786.93 was to reimburse expenses he incurred whilst attending to the Company's business.

125. As the Applicants have proved that the payment was made to Mr Staines, the onus is on the Respondents to show that it was made for the benefit of the Company. The Respondents have failed successfully to enter any evidence showing that this payment was a proper use of the Company's money.

£132,873 paid to Mr Madu and cash withdrawals in Italy totalling £6,552.35

126. Mr Madu has not denied receiving these sums and has advanced no credible evidence to show that the payments were a legitimate use of the Company's money.

£53,747.91 to discharge TPL's liabilities

127. Mr Staines' skeleton argument noted that:

> "The larger sum of £53,747.91 represents monies paid out by TPL to develop an eWallet for a customer and in respect of the Company's other expenses. A customer paid TPL an amount to supply a branded version of this eWallet. The amount of £53,747.91 was paid out in costs associated with that development and other costs of the Company. R1's recollection as to the amounts set out on [396] is as follows:
>
> - Leo - £3981.91 – this is the virtual office for both the Company and [TPL] – the payee was Leo Offices;
>
> - OPPE - £27,860 – this is the software development company that [TPL] used to build the eWallet – Based near Derby.
>
> - Pemb - £18,600 – This was rent for the Company's physical serviced office in Egham, Surrey – Pembroke Business Offices. R1 worked in this office.
>
> Save to the extent that the Company and [TPL] shared offices, there was no benefit to [TPL]".

128. This statement made, not in sworn evidence, appears to conflict with other information provided by Mr Staines. During his Alcock Interview, he referred briefly to offices / office facilities used by the Company:

> "We only had a serviced office in Egham, the Runnymede Malthouse. We left there January 2017. Didn't really need it, to be honest, when there's only two of you, or one of me".

He described 45 Pont Street (which I understand to be the same office as referred to in his skeleton argument under the reference "Leo") as a virtual office, never physically occupied by the Company but from which they had a mail-forwarding service and occasionally rented rooms for meetings.

129. During cross-examination, Mr Staines said that the virtual office in Pont Street was used for forwarding calls and post and was set up for the benefit of TPL "although I believe [the Company] was also registered there".

130. I understand that the references to Pembroke Business Offices' premises in Surrey are the same as those described as "Runnymede Malthouse". During cross-examination, Mr Staines said that this office was used for the payments systems gateway and that all of the operations were with a view to building the proposed eWallet. He conceded, consequently, that the landlord of this office was a creditor of TPL and not the Company.

131. Mr Madu contended during cross-examination that some of the £53,747.91 paid to TPL was for the office space which, he said, was used by both companies and some, was therefore for the Company's benefit. When Counsel responded that he had produced no documentary evidence to show that the offices and payments made from the Company to TPL were for the Company's benefit, he simply replied: "That's why I said we should have given more clarity before now".

132. The Respondents have failed to provide any evidence regarding the extent to which, if at all, the Company benefited from the use of either the virtual or serviced offices. The responses given by Mr Staines during cross-examination suggest that almost all benefit for each office, was derived by TPL. To the extent that the Company did benefit from either office, an apportionment would need to be undertaken. The court has been provided with no information to facilitate such an exercise. The Respondents have failed to meet the evidential burden of proving that the Company derived any benefit from the payments made to Leo and Pembroke.

133. As for the £27,860 paid to OPPE, Mr Staines' own evidence was that the Company was only ever a sales arm, that the software used by the Company was owned by TPL and TPL was responsible for designing the proposed eWallet. There appears little doubt, even from the way he described the payment in his skeleton argument, that the sum paid to OPPE was for the benefit of TPL and not the Company.

The Balance of £6,831.84

134. In my judgment, Mr Madu knowingly and intentionally concealed from OSMM that the money due to be paid to the Company was being diverted to another company, TPL, which was not officially engaged in PPI processing. Whilst there may have been some benefit to the Company and the Thomson Legal Merchants in effectively using TPL as a paying agent, the Respondents appear nevertheless to have treated the monies as readily available to meet TPL's liabilities (for rent and development costs) and for their own purposes. In doing so, they failed to appreciate that their decision to dissipate the Company's money in this way exposed it to liabilities to OSMM which it was unable to pay.

135. The fact that the majority of the Company's money paid to TPL (£1,045,056.50) was used to discharge the Company's liabilities supports the Respondents' contention that they believed that the money was diverted to the account for legitimate business purposes. As the Respondents were also sole directors and shareholders of TPL, until its insolvency, they were in a position to transfer the money back to the Company if and when required.

136. However it is striking that the majority of the amounts claimed in these proceedings by the Applicants as the TPL Payments were not returned to the Company but were extracted by Mr Madu, apparently for his own benefit. He has provided no defence or explanation for the amounts paid directly to himself and has only latterly, without any supporting evidence, suggested that an unquantified proportion of the amounts paid out to landlords, were for the Company's benefit.

137. Neither Respondent addressed the figures in any detail and in particular, neither identified the Balance or sought to explain how, having been diverted away from the Company to TPL, it might have been spent for the Company's benefit. The Applicants'

evidence that the Balance – which was included in the total claim for TPL Payments but not separately identified - was transferred away from the Company, was not contradicted or undermined. The Respondents have failed to meet the evidential burden of proving that having been transferred to the TPL Account, it was then applied for the benefit of the Company. I conclude, therefore, that the Balance was paid in breach of the Respondents' duties.

Summary regarding the TPL Payments

138. It follows from my consideration of each of the Identified Payments and the Balance comprising the TPL Payments that as the Respondents failed to discharge the evidential burden to explain or justify that they were payments properly made on behalf of the Company, in my judgment, the TPL Payments comprised unlawful extractions of the Company's money, paid in breach of the Respondents' fiduciary and statutory duties.

Duomatic and section 1157 CA06

139. Mr Staines seeks to rely on the Duomatic principle in relation to the £13,766.93 payment which he has latterly claimed was used to repay expenses he incurred on the Company's behalf.

Mr Staines' reliance on the Duomatic principle

140. The Duomatic principle requires that everyone entitled to vote on the question applied his or her mind to it and decided in favour of the step taken. The difficulty for Mr Staines is that he has provided no evidence even to show that the payment – which it must be remembered was made not from the Company's own account but from the TPL Account - was, as he now says, to discharge Company expenses and no evidence to show that it was considered and accepted as such by Mr Madu. Even Mr Staines' witness statement says nothing about this particular payment.

141. I have been unable to discern from the schedules of the TPL Payments, when the amount(s) which make up the £13,766.93 were paid. Consequently I make no finding on whether, at the relevant time(s) the Company was insolvent or likely to become insolvent (as a result of the Thomson Merchants going out of business in November 2015). Nevertheless, the absence of evidence regarding the shareholders' knowledge of the nature or purpose of the £13,766.93 paid to Mr Staines results, in my judgment, in the Court being unable to conclude that the shareholders had sufficient knowledge of the payment to have assented to it. The *Duomatic* principle does not apply.

142. Both Respondents seek to rely on section 1157 CA06 on the grounds that they acted honestly and reasonably in all the circumstances.

Mr Staines' reliance on section 1157 CA06

143. Mr Staines did not consider that he had access to the Frick Account and did not appear ever to have requested such access. Despite having full access to the TPL Account, he appears to have failed to have taken any steps to check any transactions on that account outside the scope of the Thomson Legal Merchant payments. As a result, he failed to identify or question:

i) the very substantial amounts Mr Madu was extracting from both accounts; and

ii) the extent to which the Company's money, now paid into the TPL Account, was being used to discharge TPL's liabilities.

144. If Mr Staines had observed the basic standards expected of a director pursuant to section 174 CA06 to exercise reasonable skill and care, he would, at the very least, have seen what Mr Madu was doing and been in a position to observe his fiduciary and statutory duties by taking necessary steps to try to restore or preserve the Company's assets and thus ensure that it retained sufficient funds to meet its liabilities.

145. Mr Staines' conduct does not strike me as dishonest. It was naïve and, particularly once it appeared likely that the Thomson Merchants would close down, grossly negligent.

146. I am sympathetic to the position Mr Staines now finds himself to be in, and have considered at length whether there are grounds, notwithstanding his negligence, to be as indulgent as was the Court to the director in ***D'Jan*** who signed documents without reading them. However, the inescapable fact remains that having agreed to be appointed as a director of the Company, he failed to exercise any oversight of the Company's finances beyond reconciliation of the OSMM and merchant transactions. His lack of engagement in the Company's overall finances, including his decision to sign accounts showing the Company to be dormant, seemingly unquestioningly and without taking advice, resulted in Mr Madu being able to deprive the Company and its creditors (in particular, OSMM) of amounts which otherwise would have been available to meet the debts due to them. Mr Staines may have thought that the Company was faring sufficiently well not to concern himself about its finances. He said he did not think that was part of his job. Whilst he did not articulate such a defence, he might perhaps have considered such oversight not to have been necessary as he and Mr Madu were the only shareholders and he might have considered that it was therefore their money at stake. However, his complete absence of enquiry even in the face of being asked inexplicably to sign dormant accounts, leads me to conclude that he had no way of knowing whose money his lack of engagement might be putting at risk.

147. Consequently, in my judgment, whilst for the purposes of section 1157 CA06 I am satisfied that Mr Staines acted honestly, his negligence was such that I am unable objectively to conclude that he acted reasonably. As such, he is not entitled to the relief afforded by section 1157. The interests of the Company's creditors must come first and it will be for Mr Staines, should he wish to do so, to pursue his own remedies against Mr Madu.

Mr Madu's reliance on section 1157

148. I consider that Mr Madu is primarily responsible for the significant losses experienced by the Company and its creditors. I have held that in making or permitting each of the payments claimed in these proceedings, Mr Madu acted in breach of his fiduciary and statutory duties pursuant to sections 171, 172 and 174 of the IA 1986. Following ***Toone v Robbins*** section 1157 cannot be relied upon by directors to provide relief in respect of money unlawfully received by them. The section therefore provides no relief in respect of the Frick Payments, Frick Cash Withdrawals, nor £132,873 and £6,552.35 paid out of the Company's money in the TPL Account. Moreover, Mr Madu has failed

to advance any evidence from which I can discern that in making or permitting any of the other payments claimed in these proceedings, he acted either honestly or reasonably.

Conclusion and the Court's discretion under section 212 of the IA 1986

149. Mr Staines does not deny that he received £13,768 from the TPL Account. He sought, far too late in the proceedings, to enter evidence to justify the payments by showing that they were to reimburse legitimate Company expenditure. To the extent that he is able, convincingly to prove from any documentary evidence which he sought to enter too late in the proceedings with his proposed, second witness statement, that the amounts expended were for the Company's (as opposed to TPL's or any other party's) benefit, in seeking to enforce this judgment, I would expect the Liquidator to give credit for them. I shall describe this as the "Concession".

150. Beyond that, no reasons have been advanced to reduce the amounts that should be repaid to the Company. In exercising my discretion under section 212 IA 1986, I consider it just for the Respondents to be jointly and severally liable to repay the Frick Payments, Frick Cash Withdrawals and TPL Payments. Pursuant to the Concession, the Liquidator shall not seek to enforce any part of the Judgment debt in this matter which comprises the £13,786 paid to Mr Staines and for which, within the next fourteen days, he can produce convincing evidence to show that the payment(s) making up that amount were for the Company's legitimate benefit.

151. I shall invite Counsel, when handing down this judgment, to address me on the rate, amount and period for which the Court may wish to consider such interest should be calculated.