Neutral Citation Number: [2022] EWHC 1349 (Ch)

Case No: CR-2018-010206

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

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

Date: 01/06/2022

Before :

ICC JUDGE MULLEN

- -

In the Matter of Mobigo Ltd (in liquidation)

And in the Matter of the Insolvency Act 1986

Between :

STRATFORD HAMILTON **(joint liquidator of Mobigo Ltd (in liquidation))**	**Claimant/** **Respondent**
- and -	
(1) JAMES KEVIN MCATEER **(2) TERESA DELGAUDIO**	**Defendants/** **Applicants**

- -
- -

Ms Faith Julian (instructed by **Wedlake Bell LLP**) for the **Claimant**
Mr Robert Amey (instructed by **JMW Solicitors LLP**) for the **Defendants**

Hearing date: 24th March 2022

- -

Approved Judgment

I direct this judgment may be treated as authentic.
The deemed time of hand down is 10:30am

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ICC JUDGE MULLEN

ICC JUDGE MULLEN :

Introduction

1. By an application dated 11th November 2020 ("the Substantive Application") Mr Stratford Hamilton, the joint liquidator of Mobigo Ltd ("the Liquidator" and "the Company" respectively), brought proceedings under section 212 of the Insolvency Act 1986 against Mr James McAteer and Ms Teresa Delgaudio ("the Directors"). That collective description requires a little further explanation. Ms Delgaudio is the current de jure director of the Company. Mr McAteer was its previous de jure director but, on the Directors' case, Ms Delgaudio had no involvement in the running of the Company at all and Mr McAteer continued to act as de facto director.

2. The Substantive Application sought declarations that the Directors breached their duties to the Company and an order that they make such contribution to the assets of the Company as the court thought just. It was supported by the Liquidator's statement dated 7th November 2020. The Directors filed evidence in answer in May 2021, in the form of witness statements from themselves and from a Mr Darren Hodes, who is said to have provided technical support to the Company. The Liquidator filed evidence in reply on 2nd July 2021.

3. On 5th July 2021 ICC Judge Jones, unsatisfied by the particularisation of the Liquidator's case, directed him to file a further statement, repeating the content of his statement of 7th November 2020 but indicating which of the duties owed by the Directors under sections 171-177 of the Companies Act 2006 were alleged to have been breached and identifying the passages in the witness statement relied upon in support of the relevant allegation. The Liquidator did so on 16th August 2021.

4. The Directors filed an application on 26th November 2021 seeking to strike out the Substantive Application in whole in or in part ("the Strike Out Application") on the basis that:

   i) it is an abuse of process or otherwise likely to obstruct the just disposal of the proceedings; and/or

   ii) because it discloses no reasonable grounds for bringing the case.

   In the alternative, they seek reverse summary judgment. In the further alternative, they seek to strike out parts of the Liquidator's evidence on the basis that it is inadmissible under the rule in *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 ("*Hollington v. Hewthorn*") or is otherwise inadmissible opinion evidence. The Strike Out Application was supported by the witness statement of Mr McAteer, dated 25th November 2021. The Liquidator filed a statement in answer, dated 15th February 2022, and Mr McAteer filed a further statement in reply, dated 25th February 2022.

5. It is the Strike Out Application that I have to determine. In accordance with an order made by ICC Judge Barber on 14th January 2022 the Directors have filed a list of issues and a list of facts for the purposes of the hearing. Mr Robert Amey, counsel for the Directors, and Ms Faith Julian, counsel for the Liquidator also filed full and helpful skeleton arguments.

The Substantive Application

6. The Company was incorporated on 7th April 2014. Mr McAteer was its sole director and shareholder. He is recorded as having resigned as a director on 11th April 2015 and Ms Delgaudio, who is his son's partner, was appointed as the Company's sole director on the same day. The notices of resignation and appointment were not, however, filed at Companies House until 4th February 2016. Ms Delgaudio says that she had no involvement in the running of the Company. Nonetheless, she was paid £400 a month, which, she says, was to increase when she had been trained and took over its running. That did not happen and Mr McAteer remained in control, though Ms Delgaudio continued to be shown as the Company's sole director at Companies House thereafter. The Company apparently had no employees and relied entirely on third-party service providers.

7. The Company did not file any accounts and, on 15th March 2016, Companies House gave notice of intention to strike it off the Register of Companies at the expiration of two months from the date of the notice. That action was temporarily suspended but the Company ceased trading in about September 2016 and was struck off the Register and dissolved on 19th September 2017. It was restored to the register and wound up by an order of this court dated 23rd January 2019. The Liquidator was, with Mrs Julie Swan, appointed as joint liquidator of the Company by the Secretary of State on 11th March 2019.

8. The petitioner for the winding up of the Company was the Phone-paid Services Authority Limited ("PSA"), a company limited by guarantee that operates as regulator of premium rate services ("PRS") charged to a person's telephone bill. It does so with the approval of the Office of Communications ("OFCOM") given under the Communications Act 2003. OFCOM approved the Code of Practice promulgated by the PSA ("the Code") and issued a condition requiring PRS providers to comply with the Code and with directions given by the PSA as the relevant enforcement authority pursuant to section 120 of the 2003 Act.

9. PRS are, according to the evidence that I have, provided via three levels of operator. At the top level are the "Network Operators" and sitting below them are the "Level 1 providers" and "Level 2 providers". Level 2 providers provide the service to the consumer in the form of the content for which those consumers pay and generate the traffic of consumers telephoning or texting the premium rate numbers. Level 1 providers provide Level 2 providers with access to the networks controlled by the Network Operators. Charges are made by the Network Operators to the consumers as part of their telephone bills and the payments are filtered down via the Level 1 providers to the Level 2 providers. The Company was a Level 2 provider and registered with the PSA on 29th April 2014, shortly after its incorporation. It used a company called IMImobile Europe Limited ("IMImobile") as its Level 1 provider under an agreement dated 31st July 2014, but the provision of the services under the contract with IMImobile was carried out by IMImobile's subsidiary, Tap2Bill Limited ("Tap2Bill"), as its agent (together "IMI/Tap2Bill").

10. The principal service offered by the Company, according to the Liquidator's information, was a pornographic video subscription service ("the Service"). The Service began in earnest in December 2014 but generated negligible revenue until the end of March 2015. Use of the Service accelerated sharply thereafter, peaking in

September 2015. March 2015 is also the month in which IMI/Tap2Bill conducted a risk assessment on the Company and concluded that it was "high risk", in part because the Service offered was a pornographic video service but the risk assessment also referred to Mr McAteer being regarded as a "very high risk" individual as a result of his involvement in previous companies subject to malware app investigations.

11. On the basis of that assessment IMI/Tap2Bill concluded that service testing should take place every four weeks. The nature of this testing is not clear but it appears that testing of some sort was carried out at the end of September 2015. According to an email from Tap2Bill to the PSA on 30th November 2015, a further result of the designation of the Company as high risk was that Tap2Bill handled all customer service calls for the Company. These similarly increased from three in March 2015 and peaked at 228 in September 2015. These were a mixture of complaints and enquiries about the Service, but Tap2Bill does not seem to have distinguished between the two. The nature of any complaints is not known and it seems that only a handful of complaints were received by the PSA itself.

12. On 11th December 2015, an anti-fraud software body called Empello alerted a Network Operator of suspicious activity in relation to the Service. In short, it appeared that 170 consumers had been subscribed to the Service as a result of a technique called "i-frame masking" or "clickjacking". I-frame masking software had been introduced into the Service so that consumers were presented with what appeared to be a video and a "play" button. If they attempted to click on that button they were, in fact, clicking on an overlaid "transparent" page that subscribed them to the Service without the customer being aware that this was what would happen or that it had happened.

13. On 13th December 2015 the Network Operator issued a "red card" to IMI/Tap2Bill, with the result that the latter suspended the availability of its service to the Company on the morning of 14th December 2015. The Company was alerted to this by email on the morning of the same day. That was acknowledged by the Company. An email from IMImobile later that afternoon stated:

> "We have suspended the whole Mobigo service until we are comfortable that we know what has occurred. As soon as you can give us a full report on how service was accessed without the tester seeing our PFI pages/buttons, we will get closer to that point."

14. The Liquidator's evidence is that it does not appear that either the Company or IMI/Tap2Bill notified the PSA of these events. It was instead notified by the Network Operator on 15th January 2016. This triggered an investigation by the PSA and it sent an email to Mr McAteer attaching a five page letter containing a number of information requests. The Company was given a deadline of 18th March 2016 to respond and the letter concluded with the words in bold type:

> "Failure to supply the information specified above may result in a breach of paragraph 3.1.4 and/or 4.2.5 of the Code being upheld against you."

A hard copy version of the letter was also sent to the Company's registered office at 145-157 St John Street, London EC1V 4PW. Neither the email nor the letter received an answer and the hard copy was returned to the PSA on 25th May 2016. Further emails were sent to the Company on 1st April 2016 and 14th September 2016, the former of which warned again of a breach of the Code if a reply was not received. The final deadline for response of 21st September 2016 passed without there being any response from the Company.

15. In default of a response, a warning notice ("the Warning Notice") and a case report ("the Case Report"), containing a detailed account of the case, were issued by the PSA executive body on 7th February 2017, notifying the Company of the commencement of proceedings before the PSA tribunal. The breaches relied upon related to the adequacy of information provided to the user, the general fairness and equity of the treatment of customers, the rules surrounding consent to charges and the failure to reply to correspondence from the PSA. The Warning Notice set out the sanctions recommended by the PSA executive. These included:

> "The Executive recommends that a formal reprimand is imposed.
>
> The Executive recommends that a fine of £175,000 is imposed.
>
> …
>
> The Executive recommends a 'naming' investigation against James McAteer."

16. An accompanying letter required a response by 21st February 2017. This too went without answer and the PSA tribunal considered the referral to it without the involvement of the Company on 21st April 2017. It published its decision on 5th May 2017. It found that there were four breaches of the Code and categorised each of those breaches as "very serious". It fined the Company £250,000 and issued a formal reprimand. It prohibited the Company from providing or having anything to do with the provision of PRS for five years and directed that the Company should refund all consumers that claimed a refund. The Company was also required to pay certain administrative charges. Nothing was paid to the PSA and, as I have explained, the Company was wound up on the petition of that regulator. On the evidence before me, it is now the only creditor.

17. Mr McAteer's position is that the introduction of the i-frame masking software was the work of a third party that had gained access to the site and, when he discovered what had happened, in December 2015, he engaged Mr Hodes to assist him in investigating the issue. He identifies this third party as an entity called "Sinum Vendo". He is supported by the evidence of Mr Hodes in relation to the clickjacking. Mr Hodes says that he investigated the clickjacking at the time that it was identified in December 2015 and that he established that the process of IMI/Tap2bill was "intrinsically insecure" and that a "rogue publisher" had hijacked the Service. He resolved the issue that had led to the breach. He expresses the view that the Company had taken "every reasonable precaution" in relation to the security of the Service.

18. Mr McAteer, however, decided that it would be better for the Company "to step away from mobile phone products and focus on other means of generating income". The Company nonetheless ceased trading in about September 2016. Mr McAteer says that was not aware of the PSA investigation or the fine and only found out about this at the time of the winding up. Had he received the materials from the PSA he could have defended the proceedings. As to why the documents were not seen by him he says that he did not use his Company email address on a day-to-day basis but he does not know why letters sent to the registered office address were not forwarded. He says that the Company maintained payments to the registered office provider until 30th June 2016. Its servers were taken off-line and "cancelled" in October 2016, with the result that it lost all of its emails so it is not possible to see what was received by it.

19. The Liquidator does not appear to accept that the Company was an innocent victim of a "rogue publisher" and raises various points as to the credibility of this account and the reliability of Mr Hodes. Further, he says that, if the Company was genuinely an innocent victim then, on the assumption that the Directors did in fact receive the correspondence from the PSA, it would have engaged with the PSA to make out this case and mitigate any fine.

20. The relief claimed in the Substantive Application is principally directed towards the imposition of the fine by the PSA ("the PSA Claim"). He summarises his case as to this as follows:

> "85. I ask that the court makes finding that the Respondents or either or both of them were in breach of such duties or either of them in that they (or any one of them):
>
> (a) failed to ensure that all reasonable steps were taken to ensure that the Service in its operation abided by PSA's Code of Practice;
>
> (b) caused or allowed the Company to operate a service in breach of PSA's Code of Practice;
>
> (c) failed to ensure the Company responded to requests from PSA;
>
> (d) caused or allowed the Company to fail to respond to requests from PSA;
>
> (e) failed to ensure the Company responded to the Warning Notice from PSA;
>
> (f) caused or allowed the Company to fail to respond to the Warning Notice from PSA;
>
> (g) caused or allowed the Second Respondent's name and email address to be put forward as a contact address for PSA in the knowledge that she knew little or nothing about the business, its obligations and the responsibilities and powers of PSA;

> (h) caused or allowed the Company to fail to maintain any or any adequate Registered Office or otherwise ensure that correspondence was received and read;
>
> (i) caused or allowed the Company to fail to maintain any or any adequate system whereby emails from PSA would be read and responded to;
>
> (j) misrepresented to the Registrar of Companies and generally that the First Respondent had resigned as a director on 11th April 2015 when it was known that he had not so resigned and had instead remained in primary control of the Company throughout;
>
> (k) caused or allowed the Company's emails and other correspondence to be lost;
>
> (i) failed to take such necessary steps so as to retain the Company's books and records;
>
> (m) conspired to present the Second Respondent as being in sole control of the Company when in truth the First Respondent remained in primary control;
>
> (n) substantially neglected their duties as directors from 11th April 2005, alternatively, on or about 4th February 2016, onwards;
>
> (o) failed to engage with Imi/Tap2bill in relation to the requests that, if answered, might have led to the restoration of the Service; and
>
> (p) in the premises, failed to act with reasonable care, skill and diligence and/ or failed to act in the way they considered, in good faith, would be most likely to promote the success of the Company."

In his amended witness statement the Liquidator states that each of those acts or omissions amounts to a breach of the duty imposed by section 172 CA 2006 (which is the duty to promote the success of the Company), including a duty to consider the interests of creditors, and section 174 CA 2006 (which is the duty to act with reasonable care, skill and diligence). The consequences of these breaches are set out as follows:

> "86. By reason of the matters set out above, the Company:
>
> (a) breached or further breached its obligations pursuant to the Code of Practice; and / or
>
> (b) was not in a position to respond to and defend, or properly respond to and defend, the allegations set out in the Tribunal proceedings

> and thereby suffered loss and damage in the form of the imposition of a fine, alternatively an increased scale of fine, and administrative charges payable to PSA as a matter of law."

21. The other part of the Substantive Application relates to various payments made by the Company ("the Misapplication Claim"). The first category is payments to the Directors themselves. The Liquidator identifies in his statement –

    i) £38,152.43 paid to Mr McAteer between 8th September 2015 and 20th January 2016.

    ii) £3,200 paid to Ms Delgaudio between 22nd February 2016 and 30th August 2016.

    iii) £44,800.00 paid to an unidentified recipient with a Barclays account, whom the Joint Liquidator infers to be Mr McAteer, between 3rd June 2015 and 5th October 2016.

22. The second category is payments to JC Commercial Consultancy Limited ("JCC") between 17th February 2016 and 15th August 2016 totalling £221,010.00. These broadly correspond with payments into the account from a company called Crowtel Ltd ("Crowtel"). I say "broadly" because the payments in from Crowtel amount to £222,000. Three of the eight payments in from Crowtel are in different sums which are paid out to JCC on the same day.

23. In relation to these the Liquidator's case is as follows:

> **"**87. I also allege that the Respondents breached their fiduciary duties including the aforesaid duty to consider the interests of creditors) by:
>
> (a) continuing to pay themselves from the Company after the Service had been suspended; and/ or
>
> (b) paying large sums to a third party (JC Consultancy) in circumstances wherein there is no evidence that any (or any proper) value was given,
>
> and that the Company suffered a loss in this misapplication of funds."

24. Mr McAteer's evidence is that the payments to him represented reimbursement of expenses and remuneration for consultancy services provided by him. The payments to Ms Delgaudio represent her remuneration as director and the unidentified payments were to a company called Cosmik Limited ("Cosmik"), of which he was a director. These were either in consideration of advertising and marketing services provided to the Company or represented short term loans made by the Company to Cosmik. He points out that many of the payments particularised pre-date the suspension of the Service in December 2015, which is the cut-off point for the Liquidator's claim in relation to the payments to the Directors.

The Strike Out Application

25. The Directors seek to strike out the Substantive Application or be granted reverse summary judgment upon it as follows –

    i) First, they challenge the PSA Claim. The principal basis on which this is argued is that this element is an abuse of process in that is seeks to enforce the PSA fine against the Directors personally. A secondary line of argument is that the Substantive Application is defective in that does not set out what the Directors should have done but failed to do. That secondary argument is not alleged in the Strike Out Application or the evidence in support of it.

    ii) Even if that is not right, they argue that, if the Directors were in breach of duty, their actions were approved of by Mr McAteer as sole shareholder and have thus been ratified under the *Duomatic* principle. No wrong can now be alleged against them in circumstances where the shareholder has approved their conduct.

    iii) In relation to the Misapplication Claim the Directors say that these transactions have been explained. They relate to remuneration or legitimate commercial transactions entered into long before the PSA fine was imposed. To the extent that there is any breach of duty, or failure on the part of the Directors to vote to authorise the transactions, those breaches have similarly been ratified by Mr McAteer under the *Duomatic* principle. Again, though not mentioned in the Strike Out Application or evidence in support, complaint is made that these allegations appeared for the first time in the Substantive Application, rather than having been canvassed in a pre-action letter.

    iv) If the court is not persuaded to strike out or grant summary judgment on the claim as a whole they invite the court to strike out part of the Liquidator's evidence. First, the Directors seek to exclude the decision of the PSA tribunal itself under the rule in *Hollington v. Hewthorn.* Secondly, the Warning Notice and Case Report, together with IMI/Tap2Bill's documents in which Mr McAteer is described as "very high risk", are challenged as inadmissible opinion evidence.

    v) Finally, certain allegations that are either repetitious or cannot be said to have led to any loss to the Company.

The legal principles

26. The principles applicable to striking out and summary judgment are well known and are uncontroversial. CPR 3.4 provides as follows, insofar as it is material:

> "(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.
>
> (2) The court may strike out a statement of case if it appears to the court –

> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

27. PD 3A paragraph 1.4(3) gives an example of CPR 3.4(2)(a). The claim may:

> "contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant."

The term "abuse of the court's process" for the purposes of CPR 3.4(b) is not similarly defined in Part 3 or its accompanying practice directions but, as Lord Bingham noted in *Attorney General v Barker* [2000] 1 FLR 759, at paragraph 19, it generally entails using the court's process "for a purpose or in a way significantly different from its ordinary and proper use".

28. In *Alibrahim v Asturion Foundation* [2020] EWCA Civ 32, at paragraph 64, Arnold LJ approved a two-stage approach by which:

> "first, the court should determine whether the claimant's conduct was an abuse of process; and if so, secondly, the court should exercise its discretion as to whether to strike out the claim."

This was cited with approval in *Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA Civ 1015, at paragraph 63, by Coulson LJ. It is at the second stage that the court will conduct a balancing exercise to identify the proportionate sanction. Striking out is draconian and should be seen as a last resort (*ibid.* at paragraph 45). It is a remedy to which the court resorts in plain and obvious case where it can be certain that the claim will fail.

29. CPR 24.2 provides as follows:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

30. Again, the approach to this is well-known and is not controversial. In *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), at paragraph 15, Lewison J held that the court must consider whether the party has a "realistic" (being one that carries some degree of conviction), as opposed to a fanciful prospect of success, and in so doing ought not to conduct a "mini-trial". Ms Julian highlighted his observation at paragraph 15(vi) that:

> "Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63".

Lewison J's formulation was approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2010] Lloyd's Rep IR 310 at paragraph 24.

31. As is evident from the use of the word "may" in both CPR 3.4(2) and CPR 24.2, the power to strike out or to grant summary judgment is discretionary, though that discretion must of course be exercised judicially and in furtherance of the overriding objective to deal with cases justly and at proportionate cost. Factors that may be relevant include the lateness of the application and whether novel points of law are raised. As ICC Judge Barber noted in *Hall (as Liquidator of Ethos Solutions Ltd) v Nasim & 62 others* [2021] EWHC 142 (Ch) at paragraph 26:

> "It is generally not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact: *Farah v British Airways*, The Times, 26 January 2000 CA referring to *Barrett v Enfield BC* [1989] 3 WLR 83, HL [1999] 3 All ER 193"

The challenge to the PSA Claim

32. There are two elements to the PSA Claim. First, it is said that it is an abuse in that it offends the principle in *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472 and, secondly, that any breaches of duty were ratified under the *Duomatic* principle.

33. I should start by explaining what the duties relied upon in this case are. The first is that set out in section 172 CA 2006:

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

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

The duty is thus, in ordinary circumstances, to promote the success of the company for the benefit of its members but that may be overridden by a duty to consider or act in the interests of the creditors. That duty arises when "the directors know or should know that the company is or is likely to become insolvent" (*BAT Industries plc v Sequana SA* [2019] EWCA Civ 112, *per* David Richards LJ at paragraph 220). I shall return to what the effect of that is in due course.

34. The second duty said to have been breached in relation to the PSA Claim is that set out in section 174 CA 2006, which provides as follows:

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

> (b) the general knowledge, skill and experience that the director has."

Abuse of process

35. Mr Amey, in reliance upon *Safeway,* argues that it is not open to the Liquidator to pursue a breach of duty claim against directors of a company subject to a regulatory penalty on the basis that those directors caused the company to incur the penalty. In *Safeway* the Office of Fair Trading investigated the well-known retailer for breaches of the Competition Act 1998. Safeway chose to admit the breaches and then sought to sue certain of its directors and senior employees for an indemnity, alleging that their breaches of duty caused the company to contravene the 1998 Act and incur the penalty. The defendants sought summary judgment, relying on the maxim *ex turpi causa non oritur actio,* sometimes known as the "illegality defence". The judge, Flaux J, as he then was, held that the *ex turpi causa* maxim did not apply to preclude the recovery sought. The Court of Appeal upheld the defendants' appeal.

36. The Latin maxim means *"*an action does not arise from a dishonourable cause". Neither in Latin nor in English is the principle underlying the maxim particularly clear but Lord Mansfield CJ explained it in *Holman v Johnson* 1 Cowp 341, 343, as follows:

> "No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*[1]."

37. Longmore LJ explained the principle on appeal in *Safeway* at paragraph 17:

> "The modern law has now culminated in *Gray v Thames Trains Ltd* [2009] AC 1339 when Lord Hoffmann said, at para 30, that it expressed not so much a principle as a policy, and at para 32, that it was a rule which may be stated in a narrower form and a wider form. In its narrower form it is that a claimant cannot recover for damage which is the consequence of a sentence imposed upon him for a criminal act; in its wider version it is that a claimant may not recover for damage which is the consequence of his own criminal act. Both versions of the rule are often in play, as they are in the present case because it is said that recovery of the penalty likely to be imposed by the OFT is recovery for the consequence of a sentence for the criminal (or quasi-criminal) act of entering into an illegal

[1] "The Defendant's position is better"

> agreement, whereas recovery of the costs of the OFT investigation is recovery for the consequences of making the illegal agreement. The main difference between the application of the two forms of the rule appears to be that there is no question of any causation problem in the application of the narrower version, whereas difficult problems of causation may (in theory) arise if it is only the broader version of the rule on which reliance can be placed: see *Gray's* case [2009] AC 1339, para 51. The rationale of the maxim is the need for the criminal courts and the civil courts to speak with a consistent voice. It would be inconsistent for a claimant to be criminally and personally liable (or liable to pay penalties to a regulator such as the OFT) but for the same claimant to say to a civil court that he is not personally answerable for that conduct."

38. Section 36 of the Competition Act 1998, as it then stood, set out at subsections (1) and (2) the power to impose a penalty on an undertaking for infringement of the prohibitions contained in Chapters I and II of that Act. Subsection (3) then provided:

> "The OFT may impose a penalty on an undertaking under subsection (1) or (2) only if the OFT is satisfied that the infringement has been committed intentionally or negligently by the undertaking."

Longmore LJ considered the penalty under section 36 of the 1998 Act to be the liability of the undertaking subject to the penalty only – a liability personal to it rather than a vicarious liability for the actions of its employees. He said at paragraph 23:

> "No one is liable for the penalty imposed by the 1998 Act except the relevant undertaking. The liability is therefore personal to the undertaking. If there is a liability it cannot be imposed on any person other than the undertaking, and the undertaking is personally liable for the infringement. If a penalty is imposed it will only be because the undertaking itself has intentionally or negligently committed the infringement. In those circumstances it is the undertaking which is personally at fault (there can be no one else who is), and once the maxim is engaged the undertaking cannot say that it was not personally at fault in order to defeat the application of the maxim. The whole hypothesis of the undertaking's liability is that it is personally at fault."

Lloyd LJ agreed, again noting that it was only the undertaking that was a party to the relevant arrangement that could be liable to a penalty under section 36 of the 1998 Act and only it could appeal the imposition of a penalty. Pill LJ similarly agreed, adding that the policy of the statutory regime would be undermined if undertakings were able to pass on regulatory penalties to their directors or employees' insurers. He said at paragraph 44:

> "Only if the undertaking itself bears the responsibilities and meets the consequences of their non-observance are the public

> protected. A deterrent effect is contemplated and the obligation to provide effective preventive measures is upon the undertaking itself."

39. The decision in *Safeway* has not avoided criticism. *In Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No 2)* [2015] UKSC 23 the Supreme Court considered the illegality defence again. The first and second defendants there were the only directors of the company. The claim brought against them by the liquidator of Bilta was that they had conspired to defraud the company by trading in carbon credits and dealing with the resulting proceeds in such a way as to deprive the company of its ability to meet its VAT obligations. The sixth and seventh defendants applied for summary judgment on the grounds that the claim by the company was precluded by the application of the *ex turpi causa* maxim. Since the company was a party to the fraud it could not claim against the other conspirators for losses which it had suffered as a result.

40. At first instance, Sir Andrew Morritt C refused the application on the basis that the defence of *ex turpi causa* was not available to the defendants. That was upheld by the Court of Appeal and by the Supreme Court. Lord Neuberger of Abbotsbury PSC (with whom Lord Clarke of Stone-cum-Ebony and Lord Carnwath JJSC agreed) noted at paragraph 7 that Lords Sumption, Toulson and Hodge JJSC were of the view that, as he put it:

> "Where a company has been the victim of wrongdoing by its directors, or of which its directors had notice, then the wrongdoing, or knowledge, of the directors cannot be attributed to the company as a defence to a claim brought against the directors by the company's liquidator, in the name of the company and/or on behalf of its creditors, for the loss suffered by the company as a result of the wrongdoing, even where the directors were the only directors and shareholders of the company, and even though the wrongdoing or knowledge of the directors may be attributed to the company in many other types of proceedings."

41. Lord Neuberger chose to say no more about the respective approaches of Lord Sumption and Lords Toulson and Hodge but suggested that the expression "the fraud exception" – the principle that the dishonesty of an agent cannot be attributed to his principal in an action for breach of duty brought by that principal against him so as to engage the illegality defence – be abandoned, as it was not limited to cases of fraud. Lord Sumption noted that it "applies in certain circumstances to prevent the attribution to a principal of his agent's knowledge of his own breach of duty even when the breach falls short of dishonesty" and preferred the term "breach of duty exception" (paragraph 71). Lords Toulson and Hodge thought the question of whether the exception applied is "simply an instance of a wider principle that whether an act or a state of mind is to be attributed to a company depends on the context in which the question arises" (paragraph 181).

42. Lord Neuberger, at paragraph 9, agreed with Lord Mance's view that the question of whether the fraud or breach of duty exception applied was an open one and:

> "whether or not it is appropriate to attribute an action by, or a state of mind of, a company director or agent to the company or the agent's principal in relation to a particular claim against the company or the principal must depend on the nature and factual context of the claim in question".

43. It is perhaps helpful to interpolate here the relevant parts of those paragraphs of Lord Mance's judgment with which Lord Neuberger also expressed agreement:

> "38 One way or another, it is certainly unjust and absurd to suggest that the answer to a claim for breach of a director's (or any employee's) duty could lie in attributing to the company the very misconduct by which the director or employee has damaged it. A company has its own separate legal personality and interests. Duties are owed to it by those officers who constitute its directing mind and will, similarly to the way in which they are owed by other more ordinary employees or agents. All the shareholders of a solvent company acting unanimously may in certain circumstances (which need not here be considered, since it is not suggested that they may apply) be able to authorise what might otherwise be misconduct towards the company. But even the shareholders of a company which is insolvent or facing insolvency cannot do this to the prejudice of its creditors, and the company's officers owe a particular duty to safeguard the interest of such creditors. There is no basis for regarding the various statutory remedies available to a liquidator against defaulting officers as making this duty or its enforcement redundant.
>
> …
>
> 41 As Lord Hoffmann made clear in *Meridian Global*, the key to any question of attribution is ultimately always to be found in considerations of context and purpose. The question is: whose act or knowledge or state of mind is for the purpose of the relevant rule to count as the act, knowledge or state of mind of the company? Lord Walker NPJ said recently in Moulin Global, para 41 that: 'One of the fundamental points to be taken from Meridian is the importance of context . . . in any problem of attribution.' Even when no statute is involved, some courts have suggested that a distinction between the acts and state of mind of, on the one hand, a company's directing mind and will or 'alter ego' and, on the other, an ordinary employee or agent may be relevant in the context of third party relationships…
>
> 42 Where the relevant rule consists in the duties owed by an officer to the company which he or she serves, then, whether such duties are statutory or common law, the acts, knowledge and states of mind of the company must necessarily be separated from those of its officer. The purpose of the rule itself means that the company cannot be identified with its officers. It

> is self-evidently impossible that the officer should be able to argue that the company either committed or knew about the breach of duty, simply because the officer committed or knew about it. This is so even though the officer is the directing mind and will of the company. The same clearly also applies even if the officer is also the sole shareholder of a company in or facing insolvency. Any other conclusion would ignore the separate legal identity of the company, empty the concept of duty of content and enable the company's affairs to be conducted in fraud of creditors.
>
> 43 At the same time, however, if the officer's breach of duty has led to the company incurring loss in the form of payments to or liability towards third parties, the company must be able as part of its cause of action against its officer to rely on the fact that, in that respect, its officer's acts and state of mind were and are attributable to the company, causing it to make such payments or incur such liability. In other words, it can rely on attribution for one purpose, but disclaim attribution for another. The rules of attribution for the purpose of establishing or negating vicarious liability to third parties differ, necessarily, from the rules governing the direct relationship inter se of the principal and agent."

44. Lord Neuberger further agreed with Lords Toulson and Hodge that the appeal should be dismissed on the basis of the statutory policy underpinning the duty preserved by section 172(3) of the 2006 Act. He said:

> "18 As well as dismissing this appeal on the attribution issue on the same grounds as Lord Sumption JSC, Lords Toulson and Hodge JJSC would also dismiss the appeal on the grounds of statutory policy. They suggest it would make a nonsense of the statutory duty contained in section 172(3) of the Companies Act 2006 (and explained by them in their paras 125—127), if directors against whom a claim was brought under that provision could rely on the *ex turpi causa* or illegality defence. That defence would be based on the proposition, relied on by the appellants in this case, that, as the directors in question (here the first and second defendants, Mr Nazir and Mr Chopra) were, between them, the sole directors and shareholders of Bilta, their illegal actions must be attributed to the company, and so the defence can run.
>
> 19 I agree with Lords Toulson and Hodge JJSC that this argument cannot be correct. Apart from any other reason, it seems to me that Lord Mance JSC must be right in saying in his para 47 that, at least in this connection, the 2006 Act restates duties which were part of the common law. It also appears to me to follow that, if Lords Toulson and Hodge JJSC are right about the proper approach to the illegality principle, then their reasoning in paras 128—130 would be correct."

45. Again, it is helpful to interpolate the passages from Lords Toulson and Hodge's judgment at this point:

> "128 It is argued on behalf of the appellants that it would offend against the doctrine of illegality for the claim to succeed. It is said that the fact that the errant directors were in sole control of the company makes it unlawful for the company to enforce their fiduciary duty towards it. If this were the law, it would truly deserve Mr Bumble's epithet – 'an ass, a idiot'. For it would make a nonsense of the principle which the law has developed for the protection of the creditors of an insolvent company by requiring the directors to act in good faith with proper regard for their interests.
>
> 129 It has been stated many times that the doctrine of illegality has been developed by the courts on the ground of public policy. The context is always important. In the present case the public interest which underlies the duty that the directors of an insolvent company owe for the protection of the interests of the company's creditors, through the instrumentality of the directors' fiduciary duty to the company, requires axiomatically that the law should not place obstacles in the way of its enforcement. To allow the directors to escape liability for breach of their fiduciary duty on the ground that they were in control of the company would undermine the duty in the very circumstances in which it is required. It would not promote the integrity and effectiveness of the law, but would have the reverse effect. The fact that they were in sole control of the company and in a position to act solely for their own benefit at the expense of the creditors, makes it more, not less, important that their legal duty for the protection of the interests of the creditors should be capable of enforcement by the liquidators on behalf of the company.
>
> 130 For that reason in our judgment this appeal falls to be dismissed. The courts would defeat the very object of the rule of law which we have identified, and would be acting contrary to the purpose and terms of sections 172(3) and 180(5) of the Companies Act 2006, if they permitted the directors of an insolvent company to escape responsibility for breach of their fiduciary duty in relation to the interests of the creditors, by raising a defence of illegality to an action brought by the liquidators to recover, for the benefit of those creditors, the loss caused to the company by their breach of fiduciary duty. In everyday language, the purpose of the inclusion of the creditors' interests within the scope of the fiduciary duty of the directors of an insolvent company towards the company is so that the directors should not be off the hook if they act in disregard of the creditors' interests. It would be contradictory, and contrary to the public interest, if in such circumstances

> their control of the company should provide a means for them to be let off the hook on the ground that their illegality tainted the liquidators' claim."

46. Lord Neuberger then dealt with *Safeway* as follows:

> "31 I turn, finally, to *Safeway Stores Ltd v Twigger*. Lord Sumption JSC has accurately summarised the effect of the decision in his para 83. Lords Toulson and Hodge JJSC deal with it a little more fully and much more critically in their paras 157—162. I would take a great deal of persuading that the Court of Appeal did not arrive at the correct conclusion in that case. However, I do not believe that it would be right on this appeal to express a concluded opinion as to whether the case was rightly decided, and, if so, whether the reasoning of the majority or of Pill LJ was correct. It is unnecessary to reach any such conclusion and the points were not argued in detail before us: indeed, they were hardly addressed at all."

47. Lord Sumption considered *Safeway* as follows:

> "83 *Safeway Stores* was an action against a number of directors and senior employees of a supermarket group who by exchanging pricing information with competitors had caused the company to contravene section 2 of the Competition Act 1998. Under section 36 of the Act, the company became liable to a penalty, provided that the OFT was satisfied that it had committed the infringement 'intentionally or negligently'. Safeway was not a one-man company, but the statutory scheme had the peculiarity, which was critical to the reasoning of the Court of Appeal, that the offence was not capable of being committed by the individuals directly responsible. The Act imposed the prohibition and the resulting penalty only on the company. It was held that this required the attribution of the infringement to the company and its non-attribution to the defendants. On that ground, it was held that to apply the breach of duty exception so as to allow recovery of the penalty from the defendants would be inconsistent with the statutory scheme. The decision is not authority for any proposition applying more generally."

48. Lords Toulson and Hodge dealt with *Safeway* as follows:

> "157 The leading judgment was given by Longmore LJ. His reasoning was as follows: (i) The company's liability to the OFT was not a vicarious liability for the wrongful conduct of its directors or employees, because the Competition Act 1998 did not impose any liability on the directors or employees for which the company could be held vicariously responsible. The liability under the Act was imposed on the company itself, which acted (as any company must) through agents. (ii) The

liability was therefore the 'personal' liability of the company, so that its claim against the directors and employees was based on its own wrongdoing. (iii) Its claim was therefore barred by illegality. (iv) It was not open to the company to argue that it was a victim of the directors' and employees' misconduct, and to rely on the *Hampshire Land* principle, because the statutory scheme imposed responsibility on the company. (v) It was unnecessary to consider the position if the company's liability had been strict, because the OFT could only impose a penalty under the Competition Act 1998 if the infringement had been committed intentionally or negligently by the company.

158 If that reasoning is sound, it would support Mr Maclean's argument that the doctrine of illegality should apply in the present case, although this would have nothing to do with Bilta being a one-man company.

159 We disagree with the reasoning. We have been greatly helped by the analysis provided by Professor Watts in a characteristically lucid article, 'Illegality and Agency Law: Authorising Illegal Action' [2011] JBL 213.

160 Safeway's direct liability (or 'personal' liability in the words of the Court of Appeal) under the Competition Act 1998 arose through the acts of its directors and employees as its agents, but should the company therefore be denied the right to hold its errant directors and employees to account? We agree with Professor Watts's proposition, at p 220, that

> 'it simply does not follow that because under the law of agency a principal becomes directly a party to an illegal agreement as a result of its agents' acts, it is thereby to be deprived of its rights under separate contracts, not otherwise illegal, with its employees and other agents to act in its interests and to exercise due care and skill. Indeed, it would not follow even if the 1998 Act were found to have invoked some sui juris concept of direct liability other than the law of agency.
>
> 'In the absence of some countervailing policy reason, it is not just for someone who falls foul of a statute by reason of the acts of its employees or other agents to add to its burdens and disabilities by depriving it of any recourse against those employees or other agents.'

161 Unless there are special circumstances, the innocent shareholders should not be made to suffer twice. The reasoning in *Safeway*, if taken to its logical conclusion, would also mean that the company could not lawfully dismiss the errant employees or directors; for to rely on their misconduct would be to rely on its own misconduct, as Professor Watts has

> observed. It might be argued that unfair dismissal is different, but that could only be on public policy grounds.
>
> 162 Reference to public policy takes us to the only basis on which we consider that the decision of the Court of Appeal in *Safeway* may have been justified. Pill LJ considered that the policy of the Competition Act 1998 would be undermined if undertakings were able to pass on their liability to their employees. That may have been a sound reason for striking out Safeway's claims, and we express no view as to the merits of the decision. We accept that there may be circumstances where the nature of a statutory code, and the need to ensure its effectiveness, may provide a policy reason for not permitting a company to pursue a claim of the kind brought in *Safeway*."

49. In dealing with the rules of attribution generally, Lords Toulson and Hodge said at paragraph 206:

> "where the company pursues a claim against a director or employee for breach of duty, it would defeat the company's claim and negate the director's or employee's duty to the company if the act or the state of mind of the latter were to be attributed to the company and the company were thereby to be estopped from founding on the wrong. It would also run counter to sections 171 to 177 of the 2006 Act, which sets out the director's duties, for the act and state of mind of the defendant to be attributed to the company. This is so whether or not the company is insolvent. A company can be attributed with knowledge of a breach of duty when, acting within its powers and in accordance with section 239 of the 2006 Act, its members pass a resolution to ratify the conduct of the directors. But, as this court discussed in *Prest v Prest* [2013] 2 AC 415, para 41, shareholders of a solvent company do not have a free hand to treat a company's assets as their own. Further, as we have discussed, actual or impending insolvency will require the directors to consider the interests of the company's creditors when exercising their powers. This might prevent them from seeking such ratification. Similarly, where a company ratifies a breach of duty by an agent or employee, it must be attributed with the relevant knowledge. But otherwise, as the courts have recognised since at least *Gluckstein v Barnes* [1900] AC 240, it is absurd to attribute knowledge to the company and so defeat its claim."

50. The prevailing view of the Supreme Court Justices therefore was that the particular circumstances of *Safeway*, in particular the policy underpinning the regulatory regime, justified the decision in that case but that it is not authority for the more general proposition that misconduct attributed to a company in a claim by a third party bars an action by the company in a breach of duty claim against its directors. While Lord Neuberger was not persuaded that *Safeway* was not correctly decided he did not dissent from the limitations on the scope of that decision referred to by Lords

Sumption, Toulson and Hodge. He approved the observation of Lord Mance that "the context is always important" and Lords Sumption, Toulson and Hodge similarly identified the importance of the context to the decision in *Safeway*.

51. I was briefly referred to two other cases in which *Bilta* was considered further by the Supreme Court. First, in *Singularis Holdings Ltd (in Liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50, which again stressed that whether the knowledge of a director could be attributed to the company was always to be found in consideration of the context and the purpose for which attribution was relevant. Secondly, in *Aquila Advisory Ltd v Faichney and others* [2021] UKSC 49, Lord Stephens, with whom Lord Lloyd-Jones, Lord Sales, Lord Burrows and Lady Rose JJSC agreed, said:

> "59 I therefore agree with the Court of Appeal (at para 24) that:
>
> '*Bilta* confirms that a director sued by a company for loss caused by a breach of fiduciary duty cannot rely on the principles of attribution to defeat the claim even if the scheme involved the company in the fraud or illegality'."

52. I have quoted from the above cases in as limited a fashion as I can but sufficiently I hope to make it clear that the Supreme Court has consistently stressed that the rules of attribution of wrongdoing to a company in a claim against it by a third party do not bar a claim by the company against its directors for breach of duty and that the prohibition in *Safeway* arose from the unusual nature of the statutory regime.

53. I cannot be satisfied on this application that the context, in the sense of the regulatory framework and the particular conduct of the directors concerned, excludes the possibility of recovery from the Directors in an action for breach of duty. In *Safeway* there were grounds for locating the liability for the penalty with the relevant undertaking alone. Section 36 of the 1998 Act provided that a penalty could be imposed only if the OFT was satisfied that "infringement has been committed intentionally or negligently by the undertaking" and only be imposed upon the undertaking. That necessarily required a "personal" liability on the part of the undertaking. Here I find no similar limitation on the basis of the evidence and arguments in this application.

54. I note that the Code is not a statutory code, in the sense that it is not a statute although it is approved by OFCOM under statute. It is a less formal document designed to promote proper outcomes for consumers. I would expect clear words to exclude the possibility of an action that Lord Sumption described at paragraph 89 of *Bilta* as "the paradigm case for the application of the breach of duty exception." The Code does not, for the purposes of this application, appear to me to provide such clear words. Section 4.8 of the Code refers to the power of the tribunal to impose a fine "on the relevant party", which is defined in section 4.3 as "the party under investigation" and "party" itself is defined in section 4.2.3 as "any Network operator, Leve1 1 or Level 2 provider". It is true that there does not appear to be any power to fine an individual within a corporate party, although other sanctions are available, but there is equally nothing to satisfy me on this application that the penalty imposed is wholly personal to the party and should not be recoverable by a company from its directors. There are no words equivalent to the phrase "committed intentionally or negligently by the

undertaking" to suggest a restriction to a "personal" liability of the company. Those words were central to the decision in *Safeway* (see Longmore LJ at paragraph 23 and Lloyd LJ at paragraph 36). The Code here has no similar requirement that the fine can only be imposed if the provider itself can be regarded as having intentionally or negligently committed the infringement. A penalty may be imposed whether the breach arises as a result of an action that can be characterised as "personal" or as a vicarious liability arising from the breaches of its employees or agents.

55. Nor is there anything to suggest to me an underlying regulatory policy, of the sort contemplated by Pill LJ, to prevent a company from looking to its directors for compensation in a claim for breach of duty. Pill LJ's concern appears to have been the risk of a wrong-doer off-loading liability and depriving the regulatory regime of its teeth. It might be said that would be the very effect of preventing recovery here.

56. That does not appear to me to be a point that I can decide in this application. The *Bilta* case demonstrates the complexities of this area. The justices were not entirely of one accord as to the decision in *Safeway* but stressed the relevance of the factual context. Any decision on its operation in this case must be taken in the context of the facts found at trial.

57. Even if that is not right, this case is potentially distinguishable from *Safeway*. Lords Toulson and Hodge, in a passage with which Lords Neuberger, Clarke of Stone-cum-Ebony and Lord Carnwath, agreed, quoted at paragraph 45 above, stressed that it would be contrary purpose and terms of section 172(3) CA 2006, to permit the directors of an insolvent company to escape responsibility for breach of their fiduciary duty in relation to the interests of the creditors by raising a defence of illegality to an action brought by the liquidators to recover, for the benefit of those creditors, loss caused to the company by their breach of fiduciary duty

58. That gives rise to the question of whether the duty to consider the interests of creditors had arguably arisen here. In *BAT Industries plc v Sequana SA* [2019] EWCA Civ 112, David Richards LJ held at paragraph 220 of his judgment that the duty to creditors arises "when the directors know or should know that the company is or is likely to become insolvent" and that "likely" means "probable" and not some lower test. Mr Amey also relied upon the words of Rose J, as she then was, at first instance at [2016] EWHC 1686 (Ch) at paragraph 479 in a passage subsequently approved on appeal. She said:

> "It cannot be right that whenever a company has on its balance sheet a provision in respect of a long term liability which might turn out to be larger than the provision made, the creditors' interests duty applies for the whole period during which there is a risk that there will be insufficient assets to meet that liability. That would result in directors having to take account of creditors' rather than shareholders' interests when running a business over an extended period. This would be a significant inroad into the normal application of directors' duties. To hold that the creditors' interests duty arises in a situation where the directors make proper provision for a liability in the company's accounts but where there is a real risk that that provision will turn out to be inadequate would be a significant lowering of the

> threshold as currently described and applied in the cases to which I have referred. I can see no justification in principle for such a change."

59. The Liquidator's statement deals with this question at paragraph 83:

> "As to the extent of the directors' fiduciary duties (particularly as set out by section 172 CA 2006), the evidence points to (i) such duties extending so as to require that the directors consider the interest of creditors, and (ii) such a duty arising quite early on in the history of the Service and certainly from no later than:
>
> (a) 14th December 2015, when the Service was suspended with the First Respondent thereafter doing nothing to engage in an attempt to lift the suspension; or
>
> (b) at the latest, when PSA commenced its investigation and thereafter wrote to the Company on 11th March 2016 requesting an urgent response.
>
> 84. I will leave my lawyers to argue this point. However, to my mind, it is clear that from an early stage the directors knew, or should have known at no later than the point the Service was suspended, that the Company was likely to face a substantial fine from PSA that it would have no way of paying."

60. There may be circumstances where insolvency, though distant, is inevitable. It might be very distant but the intentions of the directors in the intervening time will be of significance. If, for example, they resolve to do nothing either to prevent the imposition of a fine that is very likely to be imposed or to maintain the business of the company so as to be able to make proper provision for paying that fine in due course then its insolvency must be likely and the duty to consider the interests of creditors arises. Here there is a plain question of fact to be determined as to whether the Directors knew or ought to have known that the Company was likely to become insolvent. The fine was not imposed until 2017 but, even on the assumption that the Company was not itself responsible for the clickjacking there is a respectable argument that if, from 15th December 2015 when it was made aware of it, the Company took no steps to reinstate the Service, or find sufficient alternative income streams, and engage with its regulator to mitigate a fine likely to be imposed, it would become insolvent as a result of that fine. Questions of what the Directors knew or ought to have known about the consequences that would flow from the suspension of the Service and what provision should properly have been made as a result are ones that must be decided at trial.

61. Finally, I should deal with Mr Amey's argument that applying a "broad, merits-based judgment" the claim would be barred by *Johnson v Gore Wood* abuse of process. He did not elaborate on this submission but I cannot see how that case, insofar as it relates to *Henderson v Henderson*-type issue estoppel, which is the context in which the "broad merits-based judgment" expression was used, is of any application. This is not an action in which the same defendant is vexed twice in respect of the same matter.

62. I reject Mr Amey's characterisation of the action as an attempt by the PSA to attempt to enforce the fine against the Directors "by the back door" and Mr McAteer's contention that the proceedings seek to "pierce the corporate veil". The claim by the PSA against the Company for the fine and a claim against the Directors by the Company for breaches of duties owed to it are separate claims between different parties. It does not follow that any liability of the Directors would be coordinate with the level of the fine. That will however be a matter for the trial judge and whether the Directors' conduct in relation to the PSA Claim has in fact been causative of any loss to the Company does not feature in the Strike Out Application or the list of issues produced by the Directors. I am not satisfied on the evidence before me in this application that the PSA Claim is an abuse of process or doomed to fail.

Duomatic principle

63. The *Duomatic* principle refers to the principle enunciated by Buckley J in *Re Duomatic Ltd* [1969] 2 Ch. 365, 373C as follows:

> "where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be."

Thus an action of the company may be regarded as approved by the members even where the formalities for such approval have not taken place. The principle does not however apply where the company is insolvent. In the Australian case of *Kinsela v Russell Kinsela Pty. Ltd. (in liq.)* (1986) 10 ACLR 395, 401 Street CJ said:

> "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 arise. 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 where 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."

64. As I have explained, the duty to consider the interests of creditors arises "when the directors know or should know that the company is or is likely to become insolvent". In such circumstances the *Duomatic* principle will not apply (*West Mercia Safetywear Ltd v Dodd* [1988] 4 BCC 30, 33). It is for the party invoking the principle to prove, if it be disputed, that the company was solvent at the material time (*Re Lexi Holdings Plc* [2007] EWHC 2652 at paragraph 193)

65. There is, as I have explained, a question as to the solvency of the Company from the moment that the Service was suspended. For the reasons that I have set out at paragraph 61 above, that must be established at trial. I cannot be satisfied as to the solvency of the Company on the evidence before me alone.

66. There are other reasons why this question has to be considered at trial. In *Ball (Liquidator of PV Solar Solutions Ltd) v Hughes* [2017] EWHC 3228 (Ch), Registrar Barber, as she then was, said:

> "142. As rightly submitted by Mr Curl however, the Duomatic principle will only come to the aid of persons seeking to uphold a transaction if, as a substitute for a resolution at a general meeting, the shareholders had actually applied their minds to the question whether to ratify the transaction: *Re Duomatic* [1969] 2 Ch. 365 at 373 B–C; *In Re Queensway Systems Ltd* [2006] EWHC 2496 (Ch); [2007] 2 B.C.L.C. 577 at [30]. Here, he argued, there was no evidence that the respondents had applied their minds to the question whether to ratify the transactions in question; quite the contrary."

Thus the evidence that Mr McAteer applied his mind to ratifying any breaches of duty related to a failure to comply with the Code or engage with the tribunal will need to be considered at trial. It is not accepted by the Liquidator.

67. There are further questions as to whether the principle requires that the shareholder's approval be expressed by some outward manifestation and, if so, whether it was so manifested here. In *Rolfe v Rolfe* [2010] EWHC 244 (Ch), Newey J, as he then was, said at paragraph 41:

> "Secondly, I do not accept that a shareholder's mere internal decision can of itself constitute assent for *Duomatic* purposes. I was not referred to any authority in which it had been decided that a mere internal decision would suffice. Further, for a mere internal decision, unaccompanied by outward manifestation or acquiescence, to be enough would, as it seems to me, give rise to unacceptable uncertainty and, potentially, provide opportunities for abuse. A company may change hands or enter into an insolvency procedure; in either event, it is desirable that past decisions should be objectively verifiable. In my judgment, there must be material from which an observer could discern or (as in the case of acquiescence) infer assent. The law applies an objective test in other contexts: for example, when determining whether a contract has been formed. An objective approach must, I think, also have a role with the *Duomatic* principle."

68. Newey J was cited with approval in *Schofield v Schofield* [2011] EWCA Civ 154 by Etherton LJ, as he then was, at paragraph 32:

> "What all the authorities show is that the appellant must establish an agreement by Lee to treat the meeting as valid and effective, notwithstanding the lack of the required period of

> notice. Lee's agreement could be express or by implication, verbal or by conduct, given at the time or later, but nothing short of unqualified agreement, objectively established, will suffice. The need for an objective assessment was well put by Newey J in the recent case of *Re Tulsesense Ltd, Rolfe v Rolfe* [2010] EWHC 244 (Ch), [2010] 2 BCLC 525 at [41]"

69. In *Satayam v Burton* [2021] EWCA Civ 287 Nugee LJ considered the extent to which there was a requirement that such assent be manifested outwardly. He said at paragraph 45:

> **"**I will assume for present purposes that Mr Temmink is right that there is such a requirement, although we heard little argument on the question, and it is not necessary to decide the point. There is undoubtedly some authority in support of it: see *Re New Cedos Engineering Co Ltd* [1994] 1 B.C.L.C. 797 at 813e–g per Oliver J, where he said that he found it difficult to believe that Buckley J contemplated that the company could be bound by the 'lonely soliloquies' of a sole shareholder; and *Rolfe v Rolfe* [2010] EWHC 244 (Ch) at [41] per Newey J where he said that it was desirable that decisions of a company should be objectively verifiable. But in the present case the judge found that the transfer was 'expressly authorised' and carried out 'at the direction of' Mr V Sharma (Jmt at [63]: see [27] above). No attempt has been made to show that that was not a finding open to him on the evidence. We have not seen all the evidence, but there happens to be included in the material before us an email from Mr V Sharma to Mr Burton dated 6 October 2012 which includes 'Agreed you transfer the croydon properties to jvb7' which certainly suggests not only that Mr Sharma knew about the proposed transfer but expressly assented to it, and not merely in his private thoughts."

70. Mr Amey submits that the authorities that refer to outward manifestation were cases where there was doubt about whether the shareholders genuinely assented. It seems to me that, whether there has to be an outward manifestation of shareholder approval or whether the court has to be satisfied on the evidence that the shareholder genuinely considered the matter and approved or ratified the actions of the officers at the necessary time, those are matters that have to be established at trial. I cannot say that the Liquidator has no real prospect of successfully resisting this at that trial.

<u>The pleading of the breaches</u>

71. Mr Amey final point was that the breaches are not properly pleaded in that they do not identify the breaches of duties owed to the Company, simply citing breaches of the Code, and the Substantive Application does not say what action should have been taken by the Directors. He referred me to *Mortimore on Company Directors* (3rd ed) at paragraphs 14.07-14.08 which explains the approach to breach of this duty:

> "In order to ascertain whether a breach has occurred, it is first necessary to determine the extent of the duty. That depends on

> 'how the particular company's business is organised and the part which the director could reasonably have been expected to play' …
>
> In the event that concern arises as to the conduct of a director, therefore, it will be necessary to form a clear understanding of the factual context so as to be able to identify the extent of the duty owed by the director and the manner in which it was breached, in order both to formulate the claim properly and determine whether it can be substantiated…"

72. *Bullen & Leake & Jacob's Precedents of Pleadings* (19th ed) says at paragraph 85.09:

> "Proper particulars need to be given of breach, setting out the respects in which it is said the defendant has fallen short of the standard to be expected of a reasonably competent professional in the relevant field of expertise. The onus of proving causation is on the claimant."

73. This is, at least on its facts, a simple case. The Liquidator's statement in relation to the PSA Claim does in various places refer to a failure to ensure compliance with the Code. Reference is made to the paragraphs that detail the correspondence with the PSA and to the documents from the PSA that particularise the alleged breaches of the Code. The Liquidator's amended statement identifies these as breaches of the duties set in sections 172 and 174 CA 2006. While there are criticisms that one could make of the drafting – it is certainly not ideal – it is self-evident that the Liquidator's case is that the duties to promote the success of the company and to act with reasonable care and skill were breached by failing to observe the Code and cooperate with the regulator, thereby exposing the Company to a regulatory fine or a fine of greater magnitude. Again, this element of the Strike Out Application fails.

The Misapplication Claim

Monies paid to the directors and to Cosmik

74. The Liquidator tabulates these in his statement. The first table set out the payments to Mr McAteer:

Date	**Amount paid to Mr McAteer**
08.09.2015	£492.43
01.10.2015	£3,000.00
13.10.2015	£3,500.00
22.10.2015	£725.00
27.10.2015	£4,000.00
16.11.2015	£500.00
24.11.2015	£1,000.00
24.11.2015	£4,000.00
02.12.2015	£2,000.00
10.12.2015	£2,000.00
21.12.2015	£1,000.00
22.12.2015	£4,000.00

04.01.2016	£1,000.00
05.01.2016	£1,000.00
08.01.2016	£2,000.00
22.01.2016	£3,500.00
26.01.2016	£4,000.00
20.01.2016	£435.00
Total	**£38,152.43**

He then sets out the payments to Ms Delgaudio:

Date	**Amount paid to Ms Delgaudio**
22.02.2016	£400.00
23.03.2016	£400.00
22.04.2016	£400.00
25.05.2016	£400.00
24.06.2016	£400.00
05.07.2016	£400.00
29.07.2016	£400.00
30.08.2016	£400.00
Total	**£3,200.00**

The payments to and from a Barclays account that Mr McAteer identifies as payments to and from Cosmik are tabulated as follows:

Date	**Monies received**	**Monies paid**
03.06.2015		£2,000.00
07.08.2015		£2,000.00
07.08.2015		£25,000.00
10.08.2015		£1,500.00
04.09.2015		£8,000.00
13.01.2016	£1,865.84	
26.01.2016	£4,000.00	
12.02.2016		£1,000.00
11.03.2016		£2,000.00
09.05.2016		£1,000.00
05.10.2016		£2,000.00
22.12.2016	£2,010.10	
Total	**£7,875.94**	**£44,800.00**

75. Mr Amey makes the point that this is not a case where payments were made with borrowed money or where creditors were going unpaid. In relation to the payments to Mr McAteer, ten of the listed payments were made before the suspension of the Service. He is right about that it seems but paragraph 87(a) of the Liquidator's amended statement limits his claim to payments made after the suspension, so nothing turns on that. Mr Amey contends that, after the termination of the Service, the Company continued to trade other lines of business profitably until September 2016. Moreover, the payments are reasonable in amount in the context of the Company's turnover. The payments to Mr McAteer were around 5% of the turnover of the company, which was in the region of £740,713.14 over its trading life. The payments to Ms Delgaudio, Mr Amey says, were "clearly *de miminis"* and the payments to the

unidentified Barclays account have been explained and evidenced by the provision of documents from Cosmik.

76. The payments to Ms Delgaudio are admittedly very small but they are nonetheless surprising in the context of her claim that "she had no involvement in the running of the business at any time." Whether or not the payments were of a level that one would expect to see in the context the turnover of the Company, there is a realistic case that by 15th December 2015 the Company was likely to become insolvent and the question remains whether the payments reflect proper remuneration or transactions that were authorised by the Directors or otherwise ratified. There are no board minutes, remuneration agreements or contracts to show that these were indeed proper company transactions. These are records that should have been preserved and it is incumbent on the directors to explain the transactions. In *Re Shahi Tandoori Restaurant Ltd* [2021] EWHC 337 (Ch), ICC Judge Prentis said at paragraph 32

> "…a director is anyway under the separate fiduciary obligations to cause the company to keep proper records of its transactions, and to provide an account of his own dealings with company property, of which he is treated as being a trustee. The failure to keep or produce documentary records is not a matter which a director can pray in aid when facing liability for dealings with the company's property: *Re Mumtaz Properties Ltd* [2012] 2 BCLC 109. Once a transaction between the company and its director is demonstrated, the burden is on the director to explain it, albeit that that may be by reference to other evidence: *Re Idessa (UK) Ltd* [2011] EWHC 804 (Ch), [2012] BCC 315; *Toone v Robbins* [2018] EWHC 569 (Ch), [2018] BCC 728."

77. It appears to me to be right for Ms Julian to say that the Liquidator is entitled to test the evidence. The Directors have received monies from the Company and they have caused the Company to make payments to a company associated with Mr McAteer. As fiduciaries they must account for their dealing with the Company monies. It may be that, having heard the evidence, the court will be satisfied that the monies were properly expended and I have sympathy with the complaint that these allegations were raised only in the Substantive Application itself. That might have costs consequences but it is not a ground for striking out the claim.

Payments to JCC

78. The second limb is an allegation misapplication of the Company's money by causing or permitting the company to make payments to JCC. The payments are tabulated in the Liquidator's statement as follows:

Date	**Amount received from Crowtel Ltd**	**Amount paid to JC Consultancy**
17.02.16	£16,400.00	£16,400.00
16.03.16	£25,000.00	£25,000.00
13.04.16	£18,000.00	£18,000.00
13.05.16	£18,600.00	£18,600.00
09.06.16	£50,000.00	£50,000.00

10.06.16	£30,000.00	£28,810.00
20.03.16	£34,000.00	£34,100.00
15.08.16	£30,000.00	£30,100.00
Total:	**£222,000.00**	**£221,010.00**

79. As to these payments, the Liquidator says:

> "Without access to any Company books and records, then, with the exception of the payments from Imi/Tap2bill and the payments to the directors, it is difficult to say what the numerous payments into and out of the Company's bank related to. It seems highly unlikely that more than a very few payments after the Service was suspended on 14th December 2015 directly related to the Service. Accordingly, I must infer that the Company was engaging in some other business. Certainly some of the payments such as those listed immediately above from Crowtel Ltd duly paid on to 'JC Consultancy' do arouse some suspicion."

80. Mr McAteer's evidence is that the payments to JCC were part of a genuine commercial business arrangement by which JCC's customer data was supplied to the Company, and the Company engaged Crowtel to make use of its SMS marketing platform. Crowtel advised the Company of its share of the income generated and the Company invoiced Crowtel for that amount, plus commission. The Company in its turn informed JCC of its share and JCC raised an invoice. Crowtel then paid the Company and the Company paid JCC.

81. In the absence of the company records, said to be lost when the Company's servers were taken off line, Mr McAteer exhibits correspondence with a Mr Mark Nelson of Crowtel who confirmed the arrangement and provided some copies of invoices. Mr McAteer exhibits his own calculation of the sums received from Crowtel and the amounts paid out to JCC, which he calculates as £263,015.94 and £222,510. The Liquidator's position is that, again, he does not accept this account and wishes to test it and that it does not in any event take into account the VAT payable to HMRC, which he says, creates a loss of £8,210.22.

82. In this regard Mr Amey notes that HMRC are out of time to raise assessments under section 77 of the Value Added Tax Act 1994, which requires such assessments to be made not more than four years after the relevant accounting period. No claim has in any event been raised by HMRC who have, apparently been in correspondence with the liquidator. Mr Amey referred me to *Re Ethos Solutions Limited* [2021] BPIR 550, 578 in which ICC Judge Barber said at paragraph 99:

> "In the circumstances of this case, I am further satisfied that it was an abuse of process for the Liquidator to issue a claim in respect of unpaid PAYE and NIC for the year ended 31 December 2011. In this regard I remind myself that it is an abuse of process to issue a claim form in the absence of knowledge of any valid basis for a claim and any ability to formulate the claim at the time of issue: *Nomura International Plc v Granada Group Ltd* [2008] Bus. L.R. 1 (Cooke J). This is

> particularly so where, as in *Nomura*, a claim is issued to protect the claimant's position on limitation. At the time of issuing these proceedings, shortly before the sixth anniversary of the Company entering into liquidation, no return or assessment in respect of the year ended 31 December 2011 existed and there had been no intimation by HMRC, whether by proof or otherwise, of a claim in respect of that year, still less confirmation from HMRC as to how it would go about formulating any such claim. It was not for the Liquidator to second-guess how HMRC might proceed. That is not the proper basis for a claim."

83. That is not the position here, however. The Liquidator's case is not that the Company is subject to a VAT liability that is now recoverable from the directors in an action for breach of duty but that it shows that this was a loss making activity and sheds light on the Company's financial position. Again, I agree with Ms Julian's submission that consideration of these transactions needs to take place at trial so that the directors may be cross-examined on them to determine whether they were in fact genuine commercial transactions. Whether these transactions in fact caused no loss to the Company can only be decided once this is known. Simply because these monies are similar in amount to the monies received from Crowtel it does not follow that they are were properly paid out or represent part of a proper commercial arrangement.

Conclusion on the Misapplication Claim

84. Again, these are not suitable for summary judgment for the reasons I have given. The questions as to the *Duomatic* principle that I have referred to in paragraphs 63 to 70 above apply equally to the Misapplication Claim and so that principle does not provide a complete answer to the Liquidator's claim at this stage.

The court's power to strike out inadmissible evidence

85. CPR 32.1 provides:

> "(1) The court may control the evidence by giving directions as to –
>
> (a) the issues on which it requires evidence;
>
> (b) the nature of the evidence which it requires to decide those issues; and
>
> (c) the way in which the evidence is to be placed before the court.
>
> (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.
>
> …
>
> (3) The court may limit cross-examination."

86. The Directors seek to exclude the PSA tribunal judgment and documents associated with it under the principle in *Hollington v Hewthorn.* This was explained in *Rogers v Hoyl*e [2014] EWCA Civ 257 by Christopher Clarke LJ. The relevant point in that case was the admissibility of a report of the Air Accident Investigation Branch of the Department of Transport ("AAIB"). Christopher Clarke LJ said:

> "32 In this case the Court of Appeal held that the conviction of the defendant in the magistrates' court for careless driving was inadmissible in a subsequent action in which the plaintiff and his son (who had since died) claimed damages on the ground of the defendant's negligent driving. The rule extends so as to render factual findings made by judges in civil cases inadmissible in subsequent proceedings (unless the party against whom the finding is sought to be deployed is bound by it by reason of an estoppel per rem judicatam).
>
> 33 This doctrine is not new. It is to be found in the *Duchess of Kingston's* case (1776) 2 Sm LC, 13th ed (1929), p 644, 645 where Sir William de Grey, Lord Chief Justice of the Court of Common Pleas said:
>
> 'What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding on a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court on facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, founded on particular reasons, but, not being applicable to the present subject, it is unnecessary to state them.'
>
> 34 The rule also applies to the findings of facts of arbitrators: *Land Securities plc v Westminster City Council* [1993] 1WLR 286; of coroners or coroners' juries: *Bird v Keep* [1918] 2 KB 692; of persons conducting a wreck inquiry: *Waddle v Wallsend Shipping Co Ltd* [1952] 2 Lloyd's Rep 105, where Devlin J suggested that the law should be changed; and *The European Gateway* [1987] QB 206 where Steyn J repeated the suggestion; and to the findings of individuals, of however great distinction, conducting extra statutory inquiries such as Lord Bingham's report into the supervision of the *Bank of Credit and Commerce International SA: Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1. The judge treated the rule as applicable to judicial findings, being, for this purpose, 'an opinion of a court or other tribunal whose responsibility it is to reach conclusions based solely on the evidence before it': para 108. If that definition

> was intended to exclude a tribunal whose remit is to carry out its own investigation it is too narrow.
>
> …
>
> 36 In so far as the rule precludes reliance on criminal convictions in subsequent civil proceedings it has been abrogated by statute: the Civil Evidence Act 1968. But it still applies in relation to findings of fact in civil proceedings: *Land Securities plc v Westminster City Council* [1993] 1WLR 286, 288E—F, per Holmann J; *Secretary of State for Business Enterprise and Regulatory Reform v Aaron* [2009] Bus LR 809, paras 20—29, where Thomas LJ dealt with the rule and the exception to it in respect of Companies Act investigations where the investigators' findings of fact are admissible in disqualification proceedings; *Calyon v Michailaidis* [2009] UKPC 34."

It seems to me that the findings of the PSA tribunal are within the ambit of the rule.

87. The principle extends not only to previous findings of fact but to the legal effect of previous judgments. In *Ward v Savill* [2021] EWCA Civ 1378, the claimants had obtained a judgment in one set of proceedings, wherein the judge had determined that the defendant had committed a fraud, and declared that monies held by him were the traceable proceeds of that fraud and were held on trust for the claimants. The claimants then commenced a second set of proceedings against the defendant's wife relying upon the previous judgment and claiming that property in her name represented the traceable proceeds of the fraud. The Court of Appeal rejected this argument:

> "[81] Turning to the first ground of appeal, the starting point is the scope of the rule in *Hollington v Hewthorn*. The relevant passage in the judgment of the Court of Appeal is that at pp 596-7 of the Law Report… It is quite clear from that passage that the appellants' purported distinction between factual findings in a judgment which are not binding on a stranger to it and the legal effect of a judgment, which the appellants contend is binding on a stranger, is not a distinction recognised by the rule … the rule is not limited to findings of fact but extends to the legal consequences of those findings, as determined by a court in its judgment.
>
> …
>
> [86] That the rule in *Hollington v Hewthorn* is not limited to the inadmissibility of findings of fact in an earlier judgment against a stranger to it, but encompasses also the legal effect of that earlier judgment, is consistent with the wider principle of procedural fairness enunciated in *Gleeson v Wippell* … and applied by this Court in *Powell v Wiltshire*, that the suggestion that a stranger to an earlier judgment is bound by it is contrary

> to fundamental principles of natural justice. That wider principle is not limited to factual findings in the earlier judgment, but extends to the legal effect of the earlier judgment…"

88. Mr Amey says that the tribunal documents are inadmissible in their entirety. He cited *Calyon v Michailaidis* [2009] UKPC 34, in which it was argued that a Gibraltar court should admit into evidence a previous Greek judgment as *prima facie* evidence, subject to the right of any litigant to argue that the Greek judgment was wrong. The Privy Council rejected that. Referring to *Hollington v Hewthorn* Lord Rodgers of Earlsferry, giving the opinion of the board, said:

> "[25] Giving the judgment of the Court of Appeal, Lord Goddard CJ pointed out, at pp 594-595, that:
>
> 'The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision.'
>
> …
>
> [26] … Lord Goddard went on:
>
> 'This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who was not a party. If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as some evidence of a fact which must have been found owing mainly to the impossibility of determining what weight should be given to it without retrying the former case.'
>
> [28] … *Hollington* continues to embody the common law as to the effect of previous decisions: 'In principle the judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties', *Land Securities v Westminster City Council* [1993] 1 WLR 286 , 288E-F per Hoffmann J. In *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1, 238D-E, Lord Steyn held that, in proceedings against the Bank for misfeasance in public office, reliance by the court on the conclusions and findings of the Bingham Report on the collapse of BCCI was ruled out 'by settled principles of law', even though the report was 'self-evidently an outstanding one produced by an eminent judge.'
>
> …
>
> [33] For all these reasons the Board sees no basis for admitting evidence of the Greek judgment, far less for holding that it

> should be regarded as furnishing prima facie evidence, for the purposes of these proceedings, that Mrs Michailidis and Mrs Papadimitriou were the owners of the Collection at the time when it was sold."

89. Mr Amey complains that, in an attempt to avoid the effect of *Hollington v Hewthorn*, the Liquidator has stated that he relies upon the documents not as evidence of the truth of their contents but merely as evidence of their "existence, legal effect, and significance". He seizes on the words "legal effect" as falling foul of the decision in *Ward v Savill* but that does not seem to me to be what is meant. The Liquidator comes to the Company as a stranger. His understanding of what has happened derives from the documents made available to him. The bulk of the PSA Claim relates to the failure to engage with the PSA executive and tribunal and deal with the allegations, thus giving rise to a fine. The PSA tribunal documents do no more than evidence what the tribunal did and the basis on which it stated that it was acting. It is binding on the Company as to the imposition of the fine but the Liquidator does not, on my reading of his evidence, say that the tribunal findings are binding on the parties in these proceedings, either as to questions of fact or law; he merely relies upon them as evidence of what happened to lead to the imposition of the fine in the eyes of the tribunal. The tribunal findings are not evidence of anything other than what the tribunal did and the reasons that it gave for imposing the fine on the Company. That is an important part of the factual background that led to these proceedings and is of obvious relevance to the question of what it was open to the Directors to do to resist or challenge the fine.

90. The Directors also seek to strike out the Warning Notice, the Case Report and the IMI/Tap2Bill's documents in which Mr McAteer was described as "very high risk", together with associated documents. I cannot see that these can be regarded as previous findings falling within the rule in *Hollington v Hewthorn*. They are documents produced prior to the tribunal and, in the case of the Warning Notice and Case Report, set out the PSA executive's case. The Directors' alternative case is that these documents are inadmissible opinion evidence. In relation to opinion evidence different considerations apply to those which apply to judgments. Christopher Clarke LJ said in *Rogers v Hoyl*e:

> "41 In so far as an expert gives evidence of fact (eg where he found the wreckage to be) his evidence is as admissible as that of any other person. Where his evidence is evidence of opinion it is admissible because it is the product of a special expertise which the trial judge is unlikely to possess and which, even if he did, it is not his function to apply."

He went on:

> 51 I regard these expressions of opinion as ones to which a court is entitled to have regard. It is open to an expert, that is to say someone who has the appropriate special expertise, to express an opinion based on the facts as he understands, or assumes, them to be, if and in so far as his conclusion is informed by, or a reflection of, that expertise. This includes matters such as the causation of an accident. The AAIB appears

to me, as it did to the judge, to be a body with the requisite expertise, charged as it is in the Regulations and the EC Regulations with responsibility for investigating air accidents and having considerable qualified expertise and experience in doing so.

52 It is not, however, the function of an expert to express opinions on disputed issues of fact which do not require any expert knowledge to evaluate. However, as the judge observed, it is common to find in many expert's reports opinions of that character, which are not helpful and to which the court would not have regard. As to those he thought it preferable, at para 116:

'to treat this as a question of weight rather than admissibility, particularly since there is no clear point at which an expert's specialised knowledge and experience ceases to inform and give some added value to the expert's opinions. It is a matter of degree. The more the opinions of the expert are based on special knowledge, the greater (other things being equal) the weight to be accorded to those opinions.'

53 In so far as an expert's report does no more than opine on facts which require no expertise of his to evaluate, it is inadmissible and should be given no weight on that account. But, as the judge also observed, there is nothing to be gained, except in very clear cases, from excluding or excising opinions in this category. I agree with what he said in para 117 of his judgment:

'Such an exercise is unnecessary and disproportionate especially when such statements are intertwined with others which reflect genuine expertise and there is no clear dividing line between them. In such circumstances, the proper course is for the whole document to be before the court and for the judge at trial to take account of the report only to the extent that it reflects expertise and to disregard it in so far as it does not. As Thomas LJ trenchantly observed in *Secretary of State for Business Enterprise and Regulatory Reform v Aaron* [2009] Bus LR 809, para 39:

"It is my experience that many experts report views on matters on which it is for the court to make its decision and not for an expert to express a view. No modern or sensible management of a case requires putting the parties to the expense of excision; a judge simply ignores that which is inadmissible".'

54 The judge concluded that the whole of the report was admissible, it being a matter for the trial judge to make use of the report as he or she thought fit. Even if he had concluded that it contained some inadmissible material he would not have

> thought it sensible to engage in an editing exercise. The trial judge should see the whole report and leave out of account any part of it that was inadmissible.
>
> 55 Subject to the second and third grounds of appeal, I agree with this conclusion. It is not apparent to me that any part of the report should be regarded as simply expressing an opinion on matters of fact (as opposed to recording evidence) in relation to which the expertise of the AAIB has no relevance. But even if any part of the report was (or proves on close analysis hereafter) to have that character, the correct approach is as outlined by the judge."

91. There is also a distinction to be drawn between opinion evidence from an expert instructed by a party for the purposes of the proceedings which is subject to Part 35 of the CPR and evidence which is not. The latter does not require the permission of the court and is *prima facie* admissible, though the court has power to exclude it. The permission requirements of the CPR are forward-looking in this regard (*Llumina, Inc v Tdl Genetics Ltd* [2019] F.S.R. 35).

92. Here I see no basis to exclude these documents. To the extent that the documents produced by the PSA executive contain expert opinion evidence there is no requirement for permission to rely on it under CPR Part 35. To the extent that those documents contain inadmissible opinion evidence, they nonetheless also set out the course of the PSA executive's investigation of the Company's conduct in a highly specialised and technical area and are of potential evidential value. The approach that the court conventionally takes in relation to documents that may contain inadmissible opinion evidence is to allow the documents in so that the trial judge can give such weight to the admissible parts as he or she thinks appropriate and leave the inadmissible elements out of account. The IMI/Tap2Bill documents are similarly part of the overall factual background, in particular the approach taken to the supervision of the Company by IMI/Tap2Bill in accordance with their own procedures for assessing risk. The trial judge is again able to put out of his or her mind any element of inadmissible opinion evidence. There is no risk of unfairness to the Directors in the trial judge being able to see the documents obtained by the Liquidator that led to the formulation of his claim.

Duplicated allegations and allegations not causing loss

93. I have to say that these are somewhat trivial points. By way of example, complaint is made that paragraph 85(c) alleges that the Directors:

> "failed to ensure the Company responded to requests from PSA"

while 85(d) alleges:

> "caused or allowed the Company to fail to respond to requests from PSA".

94. Similarly 85(h) is:

> "caused or allowed the Company to fail to maintain any or any adequate Registered Office or otherwise ensure that correspondence was received and read",

while 85(i) is:

> "caused or allowed the Company to fail to maintain any or any adequate system whereby emails from PSA would be read and responded to"

95. I struggle to see any relevant difference between (c) and (d) and they could well have been combined with (h) and (i). The allegation that Directors were in breach of duty by failing to respond on behalf of the Company to correspondence from the regulator or by failing to maintain an functioning service address at which it could be contacted could have been more concisely expressed. The statement is not a pleading, however. The section 212 procedure is an abbreviated procedure that allows the parties to present their cases in the form of witness statements without, usually, the provision of statements of case. The witness statements will often be prepared with limited legal input and will involve setting before the court what the office-holder's investigations have uncovered. There will inevitably be some infelicities of drafting but the meaning of these allegations is clear in the context of the Liquidator's statement. I do not accept that any of them will complicate or prolong the trial. I also bear in mind that the Liquidator's claim has been expressed in this form since it was issued in November 2020 and yet it was not until November 2021 that the application was issued. That is too late, long after close of evidence, to raise these points in any event.

96. Similarly, the allegations as to misrepresentations to Companies House and to failure to maintain books and records do not, on their face, give rise to any loss but may be relevant in the context of Mr McAteer's submission that he acted honestly and reasonably at all times and ought fairly to be excused any liability to which he might be found to be subject pursuant to section 1157 CA 2006. They might have been better deployed in the evidence in reply if they were to be relied upon in that context. Again, however, the statement is not a pleading. I am not prepared, on an application made more than a year after the proceedings were commenced to take an unduly strict approach to the way in which the alleged failings of the Directors have been set out.

Conclusion

97. The Strike Out Application fails and is dismissed. The questions as to the application, if any, of *Safeway* and the *Duomatic* principle must be considered in the context of the complete factual picture not least because both raise questions of law that are developing and are particularly fact-sensitive. The documents which the Directors seek to exclude form an important part of the factual background and the decision of the PSA tribunal is not relied upon as evidence of the truth of its contents. I decline to exclude them. Nor do I consider that I should exercise my discretion to strike out or grant summary judgment in any event on an application made a full year after the Substantive Application was made. While the Directors rely on the amendment of the Liquidator's original statement to explain the delay in bringing their own application, that amendment addressed only peripheral questions of drafting. The central complaints – that the Liquidators could not seek to pursue the Directors for breach of duty in relation to the imposition of the fine and that the claims in relation to

payments to the Directors and others were unsustainable could have been brought much sooner. In my judgment the Substantive Application must proceed to trial.