[2020] EWHC 2473 (Ch)

CR-2017-008845

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF IT PROTECT LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 24/09/2020

Before :

ICC JUDGE BARBER

- -

Between :

(1) TIMOTHY JAMES BRAMSTON
(2) ADAM HARRIS
(As Joint Liquidators of IT PROTECT LIMITED)

Applicants

- and –

(1) WARREN PYE
(2) DAWN MONTAGUE **Respondents**

- -

Jessica Brooke (instructed by Mills & Reeve LLP) for the **Applicants**
Max Cole (instructed by Edward Harte Solicitors) **fo**r the **Respondents**

Hearing dates: 25 and 26 June 2020

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10 a.m. on 24 September 2020

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ICC Judge Barber

1. This is a misfeasance application brought by the Applicants pursuant to s.212 of the Insolvency Act 1986 against the First Respondent as de jure director of IT Protect Ltd ('the Company') and against the Second Respondent as de facto director of the same. The Second Respondent's role as a de facto director is disputed.

2. By their application, the Applicants seek declaratory relief and payment of the sum of £144,613. This sum is said to represent the loss suffered by the Company as a result of a £40,000 monetary penalty imposed on the Company by the Information Commissioner on 11 January 2017 and alleged misappropriations of (or failure to account for) sums totalling £104,613 paid out of the Company's bank account after the date on which the penalty was imposed.

Background

3. The First Respondent is a bricklayer who left school at the age of 16. The Second Respondent's background is largely in catering. The Respondents have been in a relationship since 2007 and have lived together at 34 Stoneage Close, Bognor Regis since 2009. They have two children.

4. The Second Respondent has an older brother called Steven Montague. Steven was a salesman who had been involved in a number of different business ventures. The Second Respondent described him as 'an excellent salesman'. The First Respondent described him as 'very persuasive'.

5. The Respondents maintain that the Company was set up by and at the instigation of Steven. Their case is that Steven told them that he had a good idea for a new business. He asked the First Respondent to lend him some money to get the business up and running. He also asked the First Respondent to be the director of the Company, explaining that he could not take an appointment himself as he had a 'bad credit history'. The First Respondent agreed.

6. The Company was incorporated on 24 October 2013 and commenced trading shortly thereafter as a telephone sales business, selling call-blocking devices to consumers from premises known as 52 High Street, Bognor Regis. The Company usually employed between 5 and 10 call centre staff. The Company operated banking facilities with Barclays plc, account number 33458849, sort code 20-20-67 ('the Barclays Account'). The Company received revenue into the Barclays Account from Checkout Pay, a payment institution, on a weekly basis.

7. At all material times, the First Respondent was the Company's sole director and shareholder. The Company's registered office was 34 Stoneage Close, the Respondents' home.

8. The First Respondent was a director in name only. He admits that he had no involvement in the Company and did not pay any attention to it. As far as he is concerned, he simply helped Steven set it up.

9. Both the Second Respondent and Steven worked for the Company. The Second Respondent's role within the Company and the length of time that she worked in that role are in dispute.

10. Telephone sales is a highly regulated area. Under regulation 26(1) of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ('PECR'), the Information Commissioner is required to maintain a register of individuals who have given notification that they do not wish to receive unsolicited calls for direct marketing purposes. Prior to 30 December 2016, this responsibility fell to OFCOM. The Telephone Preference Service ('TPS') is a company set up by OFCOM to maintain this register. Under regulation 21(1)(b), a person is prohibited from making unsolicited calls for direct marketing purposes to subscribers to the register, unless the subscriber has consented to receiving calls from that person. Under regulation 26(3), for payment of a fee, a person can request the list of numbers registered to the TPS.

11. Between 6 April 2015 and 16 May 2016, the Information Commission's Office ('ICO') and TPS received a total of 157 complaints (35 and 122 complaints respectively) from subscribers to the TPS who had received unwanted calls from the Company. TPS referred the complaints received to the Company and on 69 occasions the Company failed to respond. Some of the complaints alleged that the Company had preyed on the elderly and/or had given the misleading impression that it was calling on behalf of BT.

12. In January 2016, the West Sussex Trading Standards authority informed the ICO that it was investigating a number of companies (including the Company) selling call blocker and TPS-style products on the West Coast.

13. On 1 March 2016, the ICO wrote to the Company at 34 Stoneage Close referring to the complaints received from subscribers to the TPS and warning the Company that the ICO could issue monetary penalties of up to £500,000. The ICO sought evidence of the Company's compliance with the PECR.

14. Both Respondents maintained that any post for the Company sent to their home address would be passed on to Steven.

15. Steven dealt with the ICO's enquiries on behalf of the Company. The information provided to the ICO was limited. In summary:

    (1) The Company said that it obtained its caller data from a third party, The Data Partnership ('TDP').

    (2) The Company maintained that all the individuals contacted by the Company had consented to receiving its calls. Consent was obtained by way of a lifestyle survey carried out by telephone by an entity referred to as 'Social Talk'. (Social Talk was previously known to the ICO as the operator of an offshore call centre, which had been the subject of complaints by TPS-subscribers complaining about unsolicited calls). Since 2015, a recorded message had been played at the end of the survey asking consumers to 'opt-in' to receiving calls from specified third-party organisations, including the Company. The Company could not provide audio recordings evidencing this consent as the recordings were no longer retained due to their age.

(3) The only evidence of the consent of consumers was a spreadsheet of the ICO and TPS complaints with 'opt-in' time stamps dating from 2006, 2008, 2010, 2011, 2013, 2014 and 2015.

(4) The Company also provided a sales order from TDP. This stated that the data purchased had not been screened against the TPS register, and that call recordings evidencing the consumer's consent to receiving calls from the Company would be retained for only six months.

(5) The Company confirmed that it did not screen the data provided by TDP against the TPS register.

16. On 1 June 2016 the ICO compiled a report on the Company. The report raised concerns as to whether Social Talk had obtained the consent of TPS-registered consumers to conduct the initial lifestyle survey. The report also raised concerns about the recording played following the survey, as it did not allow the consumer to consent specifically to the organisations referred to in the recording.

17. On 14 September 2016, the ICO issued a notice of intent to raise a £40,000 monetary penalty against the Company.

18. On 11 January 2017, the ICO issued the Company with a £40,000 monetary penalty notice ('MPN') for breach of regulation 21 PECR. The penalty was required to be paid by 14 February 2017, and the Company had the option of reducing the penalty to £32,000 if payment of this amount was received by 13 February 2017. The MPN drew attention to the right to appeal to the First-Tier Tribunal (Information Rights). The Company lodged an appeal. Steven dealt with the appeal.

19. On 10 March 2017, the Company ceased to trade, but continued to receive run-off revenue into its bank account from Checkout Pay until November 2017. A number of sums were paid out from its bank account after cesser of trading.

20. On 21 August 2017, the Company's appeal against the MPN was dismissed. On 26 September 2017, the ICO made a further demand for payment of the MPN by 3 October 2017.

21. On 27 November 2017, the ICO presented a winding up petition against the Company. On 7 February 2018 the Company was wound up.

22. By the date of winding up, all creditors of the Company (including employees) had been paid except the ICO. At the date of winding up, the Company had nil known assets and its only creditor was the ICO, owed £40,000.

23. On 20 February 2018, the First Respondent, Second Respondent and Steven attended on the Official Receiver ('OR') for interview regarding the Company. On the same day, a Preliminary Information Questionnaire ('PIQ') was partially completed; ostensibly in the name of the First Respondent, but in the handwriting of Steven. It was left unsigned. In his interview with the OR, the First Respondent confirmed that he had not completed the PIQ and did not know if the information in it was true.

24. Shortly thereafter, on 23 March 2018, the Applicants were appointed as joint liquidators of the Company. By letters dated 24 May 2018 and 11 June 2018, the Applicants wrote to each of the Respondents and to Steven requesting inter alia information regarding their roles in the Company. These letters prompted a short email of reply dated 18 June 2018, sent by the Second Respondent on behalf of herself, the First Respondent and Steven.

25. On 20 July 2018, the First Respondent signed a disqualification undertaking for a period of seven years. The ground of unfitness admitted (for the purposes of the undertaking only) was that between 6 April 2015 and 16 May 2016, he failed to ensure that the Company complied with its statutory obligations under PECR, which led to the ICO issuing a fine of £40,000, which remained unpaid.

The Application

26. On 8 March 2019, the Application was issued against the First Respondent alone. On 24 April 2019 the First Respondent was ordered to file and serve evidence in response by 31 May 2019. On the application of the Applicants, the Second Respondent was joined by order dated 17 July 2019.

27. The Application has proceeded by application notice supported by witness statement. No pleadings were directed. The application notice has been amended twice, most recently on 3 December 2019.

28. In its re-amended form, the application notice states that the First Respondent was de jure director of the Company, alleges that the Second Respondent was a de facto director of the same, and seeks the following relief:

> 'ICO Penalty
>
> (a) a declaration pursuant to section 212 of the Insolvency Act 1986 that by causing or allowing the Company to cold call members of the public in contravention of [PECR], which resulted in the Company being issued with a monetary penalty .. in the sum of £40,000, issued by the [ICO] on 16 January 2017, the Respondents were misfeasant and acted in breach of their fiduciary or other duties in relation to the Company pursuant to sections 171, 172, 174 of the Companies Act 2006 or otherwise;
>
> (b) an order that the Respondents be required to pay the sum of £40,000 …;
>
> Payments to the Second Respondent and to Steven Montague
>
> c) a declaration pursuant to section 212 of the Insolvency Act 1986 that by causing or allowing the Company to make payments to the Second Respondent and Steven Montague, being persons connected with the Company totalling £15,422.20 at a time when the ICO penalty remained unpaid, the Respondents were misfeasant and acted in breach of their

fiduciary and other duties in relation to the Company pursuant to sections 171, 172 and 174 of the Companies Act 2006 or otherwise;

(d) an order that the Respondents be required to pay the sum of £15,422.22 …;

Non-Business Expenditure

e) a declaration pursuant to section 212 of the Insolvency Act 1986 that by causing or allowing the Company to incur non-business expenditure in the sum of £18,932.76 at a time when the ICO penalty remained unpaid, the Respondents were misfeasant and acted in breach of their fiduciary or other duties in relation to the Company pursuant to sections 171, 172, 174 of the Companies Act 2006 or otherwise;

f) an order that the Respondents be required to pay the sum of £18,932.76..;

Void Transactions

(g) a declaration pursuant to section 127 of the Insolvency Act 1986, that the payments made by the Company to the First Respondent in the sum of £3230 on 28 November 2017 (£2000) and 1 December 2017 (£1230) are void dispositions and ought to be repaid to the Company;

(h) an order that the First Respondent be required to repay the sum of £3200 to the Company;

Unexplained Transactions

(i) declarations pursuant to section 212 of the Insolvency Act 1986 that in causing or permitting the Company to make the payments set out below the Respondents have

1. Misapplied or retained or become accountable for the sum of £70,240 or such other sum as the court determined; and/or

2. Have acted in breach of their fiduciary or other duties in relation to the Company pursuant to sections 171 to 174 of the Companies Act 2006 or otherwise; and/or

3. Have acted in breach of trust in respect of the assets of the Company held by them on trust for the Company:

3.1 bank transfers to an unknown account believed to be an account in the name of the First Respondent totalling £24,740;

3.2 payments to the First Respondent in the sum of £8100; and

> 3.3 database purchases in the sum of £37,400.
>
> (j) an order that the Respondents be required to pay the sum of £70,240 to the Applicants or otherwise contribute such sum by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just;
>
> (k) further or in the alternative a declaration that the First Respondent was in breach of his duties as a director and misfeasant under section 212 Insolvency Act 1986 in abdicating his duties and responsibilities as a director and/or failing to supervise and thereby enabling the actions and omissions detailed in paragraphs (a) (c) e) (g) (i) above of the application…'

The Evidence

29. For the purposes of this hearing I have read and considered the following written evidence:

(1) The First, Second and Third witness statements of Mr Timothy Bramston dated 28 February 2019, 9 July 2019 and 26 September 2019 respectively;

(2) The First Witness statement of Mr Adam Harris dated 15 June 2020;

(3) The First Respondent's statement dated 30 August 2019;

(4) The Second Respondent's statement dated 30 August 2019;

together with their respective exhibits.

30. I also heard oral evidence from the First and Second Respondents. By a consent order dated 11 December 2019, the Applicants' attendance at trial (and so for cross-examination) was dispensed with.

31. The First Applicant, Mr Bramston, ceased to act as a joint liquidator of the Company with effect from 18 May 2020. By his statement dated 15 June 2020, the Second Applicant, Mr Harris, sought to adopt the evidence of Mr Bramston. On behalf of the Respondents, Mr Cole objected to admission of Mr Harris's statement, citing a decision of Fraser J in ICI Limited v Merit Merrell Technology Limited [2017] EWHC 1763 (TCC) at [51]-[52]. I accept that the manner in which Mr Harris sought to adopt the evidence of Mr Bramston was in certain respects unsatisfactory. His confirmation at paragraph 6 of his statement, for example, that he has 'seen' (not read, checked or taken any steps to verify) the statements of Mr Bramston leaves much to be desired. In this case however, the objections raised are largely academic. In the light of the consent order dated 11 December 2019 which, construed as a whole dispenses with cross-examination of the Applicants, little purpose would be served by denying the admission of Mr Harris's statement; in its absence, Mr Bramston's

statements would still stand as evidence. I shall therefore admit Mr Harris's statement.

The witnesses

32. As a witness the First Respondent was open and straightforward. He freely admitted his lack of involvement with the Company. Whilst he was confused at points about certain dates (he could not recall, for example, precisely when he was told of the ICO penalty), I am satisfied that he did his best to answer questions put to him truthfully and to the best of his ability.

33. The Second Respondent was in the unenviable position of having to admit that she had lied on two previous occasions. On the evidence as a whole, however, I am satisfied that she came to court wishing to make a clean breast of things. She was very clear in her oral testimony about her role in the Company and the tasks which she undertook. She admitted that she had received a total of £11,000 from the Company after it had ceased trading and explained what tasks were undertaken post-cesser of trading. She accepted the limits of her own knowledge, confirming, for example, that she was not party to the conversations in which Steven had requested loans from the First Respondent and so was not in a position to confirm whether the sums subsequently received by the First Respondent from the Company were in the same amount as the initial loans. She also volunteered further evidence regarding payments made by the Company to Peace of Mind Plans Limited, candidly explaining that she had not included such evidence in her witness statement because, as she put it, 'I was worried that I might get my brother into trouble'. Overall, I am satisfied that the Second Respondent did her best to answer questions put to her truthfully and to the best of her recollection.

The case against the Second Respondent

34. The Applicants' case against the Second Respondent rests on the premise that she was at all material times a de facto director of the company. At trial I directed that the Applicants could not rely (against either Respondent) upon ss 238 and 239 IA 1986 in the alternative. Whilst mentioned in the letter before claim, ss238 and 239 were not mentioned at all in the application notice, notwithstanding two amendments of the same. A passing reference was made to ss 238 and 239 in Mr Bramston's third witness statement dated 26 September 2019, but this was evidence in reply. It is unacceptable to raise such matters, which raise a raft of distinct evidential considerations, by way of reply evidence; particularly when the application notice was re-amended on 3 December 2019 (after the reply evidence was served) and made no mention of the same. The Respondents are entitled to know the case they are to meet.

De facto directors: Applicable principles

35. On the approach to be adopted by the court when determining whether a person has acted as a de facto director of a company, I was reminded of (and respectfully accept) the following guidance as set out in the caselaw:

(1) There is no one decisive test; the question is very much one of fact and degree: Re Paycheck Services 3 Limited [2010] 1 WLR 2793 at [39].

(2) All relevant factors must be taken into account, including whether there was a holding out by the company of the individual as a director, whether the individual used the title, whether the individual had proper information on which to base decisions, and whether the individual had to make major decisions: Re Paycheck at [31].

(3) Whether a person is held out as a director and/or claims or purports to be a director are relevant, but not necessary, factors. What is important is not what the individual calls him or herself, but what he or she did: Re Paycheck at [32], [90].

(4) A number of tests have been suggested, including whether the person was directing the company's affairs, either alone or with others, and whether the person was part of the corporate governance structure. However, it is difficult to define "corporate governance", and difficult to identify those activities which are the responsibility of the director or the board: Re Paycheck at [91].

(5) In Re Mumtaz Properties Ltd [2012] 2 BCLC 109 at [47], the Court of Appeal found it useful to consider whether the individual was "one of the nerve centres from which the activities of the Company radiated". This test was later relied upon in Ingram v Singh [2018] EWHC 1325 at [105].

(6) Where a company's affairs have been conducted on an informal basis, without any observed corporate governing structure, a focus on corporate governance is of less relevance and assistance: Ingram v Singh at [105].

36. On behalf of the Second Respondent, Mr Cole of Counsel also took me to the guidance given by Arden LJ in Smithton Limited v Naggar [2014] EWCA Civ 939; which again, I gratefully accept. At [33] to [45], Arden LJ put the matter thus:

> 'Practical points: what makes a person a de facto director?
>
> 33. Lord Collins sensibly held that there was no one definitive test for a de facto director. The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. However, a number of points arise out of Holland and the previous cases which are of general practical importance in determining who is a de facto director. I note these points in the following paragraphs.
>
> 34. The concepts of shadow director and de facto are different but there is some overlap.
>
> 35. A person may be a de facto director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as a director.
>
> 36. To answer that question, the court may have to determine in what capacity the director was acting (as in Holland).

> 37. The court will in general also have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the defendant acts were directorial in nature.
>
> 38. The court is required to look at what the director actually did and not any job title actually given to him.
>
> 39. A defendant does not avoid liability if he shows that in good faith he thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.
>
> 40. The court must look at the cumulative effects of the activities relied on. The court should look at all the circumstances "in the round" (per Jonathan Parker J in Secretary of State v Jones).
>
> 41. It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case.
>
> 42. Relevant factors include:
>
> i) whether the company considered him to be a director and held him out as such;
>
> ii) whether third parties considered that he was a director.
>
> 43. The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision.
>
> 44. Acts outside the period when he is said to have been a de facto director may throw light on whether he was a de facto director in the relevant period.
>
> 45. In my judgment, the question whether a director is a de facto or shadow director is a question of fact and degree ….'

The Applicants' case on de facto directorship

37. Mr Bramston's first witness statement does not address the Second Respondent's role within the Company at all. Mr Bramston's second witness statement relies simply upon passages quoted from the notes of the OR's interviews with the Respondents and Steven Montague. Mr Bramston's third witness statement again relies upon quoted passages from the notes of the OR's interviews with the Respondents and Steven Montague, and highlights the fact that the Second Respondent was paid the same (relatively modest) salary as Steven Montague; a factor which, Mr Bramston

maintains, 'would suggest that she held an equal role to Mr Montague in the Company'.

38. There is virtually no documentation contemporaneous to the Company's period of trading in evidence.

39. The Applicants adduced no evidence of interviews with (or enquiries made of) other members of staff (whose names had been provided to them), the Company's accountant, the Company's landlord, the Company's bankers, the Company's suppliers, or any other third parties, to establish how the Second Respondent was held out by the Company internally and externally and what she actually did in relation to the Company.

40. On behalf of the Second Respondent, Mr Cole maintains that this was an extremely thin basis on which to mount a case of de facto directorship.

41. The Applicants sought to lay the blame for the lack of contemporaneous Company documentation at the Respondents' door, and on that basis to rely upon Re Mumtaz Properties Ltd [2011] EWCA 109 per Arden LJ at [14] to [17]:

> "14. In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its nonproduction, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.
>
> 15. That was the predicament in this case. The liquidator could not show that Munir and Zafar were de facto directors from the company's books and papers because the directors had not handed over the necessary documents to the administrators. The judge held, in the context of Munir's denial that he was a de facto director despite the fact that he had acted as chairman of the meeting convened to pass a resolution for voluntary liquidation, that, had it been necessary to do so, he would have been entitled to draw adverse inferences against the respondents to the proceedings:
>
> '[26] It is accepted by the applicant [the liquidator] that he can only place this example before the court. However, as regards this, the explanation is quite simple. The company's books and records are not within the possession or control of the applicant despite his enquiries to ascertain the whereabouts of the books and records, and hence the applicant could only prepare his case on the papers he has in his possession. The respondents

> each asserted they did not have the books and records and that these were with either the accountant or Kiran Mistry. Both of these individuals, who were witnesses for the respondents, confirmed in cross-examination that any company documents they had, had been passed to the applicants and that they did not have possession of any of the missing books and records and these remained with the company. Therefore the books and records of the company must have remained with the company. The respondents have chosen not to deliver them up to the applicant not to disclose them within the proceedings. The court can draw adverse inferences against the respondents for this but does not need to do so as this single piece of documentary evidence is compelling and, indeed in my judgment, overwhelming'.
>
> 16. The approach of the judge in this case was to seek to test the evidence by reference to both the contemporary documentary evidence and its absence. In my judgement, this was an approach that he was entitled to take. The evidence of the liquidator established a prima facie case and, given that the books and records had been in the custody and control of the respondents to the proceedings, it was open to the judge to infer that the liquidator's case would have been borne out by those books and papers.
>
> 17. Put another way, it was not open to the respondents to the proceedings in the circumstances of this case to escape liability by asserting that, if the books and papers or other evidence had been available, they would have shown that they were not liable in the amount claimed by the liquidator. Moreover, persons who have conducted the affairs of limited companies with a high degree of informality, as in this case, cannot seek to avoid liability or to be judged by some lower standard than that which applies to other directors, simply because the necessary documentation is not available."

42. It will be seen from the passage from Mumtaz quoted above that the judge at first instance had available to him clear evidence that Munir was acting as a de facto director; Munir had acted as chairman of the meeting convened to pass a resolution for voluntary liquidation. The judge at first instance in Mumtaz also had clear evidence, had he considered it necessary, from which to infer that the directors had chosen not to hand over to the liquidators the books and records of the company. The directors had said that the books and records were either with the accountant or with Kiran Mistry, but both of these individuals had given evidence (which appears to have been accepted by the trial judge) that any company documentation they had, they had passed to the liquidators, that they didn't have possession of the missing company books and records and that these remained with the respondents. It was in that context that Arden LJ said (with emphasis added):

'*if* the judge is *satisfied* that certain contemporaneous documentation is likely to have existed were the oral evidence correct, *and that the party adducing oral evidence is responsible for its nonproduction, then* the documentation may be conspicuous by its absence and the judge *may* be able to draw inferences from its absence.

43. In this case, Mr Cole submits that on the evidence before the court, the court cannot be satisfied that the Second Respondent is responsible for non-production of the books and records of the Company, or any other contemporaneous Company documentation which might otherwise shed light on her role within the Company. I agree.

44. In his first witness statement (at paragraph 14), Mr Bramston states simply 'The Respondent [in context the First Respondent] has failed to provide the books and records of the Company to the official receiver or to the liquidator.' None of Mr Bramston's statements, as adopted by Mr Harris, address what steps were taken to locate and collect in the books and records of the Company or suggest that the Second Respondent was responsible for their non-production.

45. In his interview with the Official Receiver (the notes of which the Applicants relied upon in numerous other respects), the First Respondent stated that 'the Company had an office' (which it did, a fact readily verifiable from other sources) and that there was 'no paperwork' relating to the Company kept at his house.

46. In her interview with the OR (the notes of which the Applicants relied upon in numerous other respects), the Second Respondent had stated:

> 'The emails were all encrypted with passwords and codes. They were sent to the company email, which I don't remember. Steve [Montague] will know. … The book-keeper was Joy Emms. She is not responding to us. She would have pretty much all the company records I would have thought. We never got any receipts or anything back that we posted to her. I don't have any company records myself.' At an earlier stage of her interview, she also stated 'Steve has the 30 phones in his outhouse. They are landline phones from a call centre. The 2 laptops I presume Steve has.'

47. In his interview with the OR, (the notes of which the Applicants also relied upon), Steve Montague had stated 'I still have hundreds of emails with the ICO' and that 'The company email was itprotect@gmail.com' adding:

> 'I believe it is still active. The password was Lennon09'; adding 'My sister sent the paperwork to the accountant. I am not aware of any physical papers still with me or my sister. Everything was sent to Joy Emms and she didn't send anything back. I will provide all the company records from my email to the Official Receiver on a memory stick… Most of the company records are on the email.…'

48. Mr Cole submitted that the responses given in interview on the issue of the location of the Company's books and records suggest that the Respondents did not have them, that Steve Montague would provide the OR with access, via a memory stick, to all copies of company records stored on his email, and that the Company's accountant, Joy Emms, had the 'physical' books and records.

49. In contrast to the facts as presented to the court in Mumtaz, I was taken to no evidence from the Company's accountant to suggest that she did *not* have the physical books and records. The Applicants' evidence did not even address whether they even made any enquiries of Ms Emms, still less what the results of such enquiries were. The Applicants' evidence did not suggest that Steve Montague had not provided the OR with access, via a memory stick, to all copies of company records stored on his email, as he had promised when interviewed. Indeed, when these issues were explored in submissions, Ms Brooke simply stated on instruction that the Applicants had been 'unable to contact' Ms Emms, and that they had been 'unable to access' the Company's email account via the password given.

50. The follow-up correspondence from the Applicants to the Respondents is also telling. The first communication from Mr Bramston to the First Respondent dated 24 May 2018 invoking the liquidators' powers under s.235 IA 1986 simply sought explanations for various transactions; it did not require the First Respondent to deliver up the Company's books and records, or any related Company documentation. Similar letters dated 24 May 2018 were sent by the Applicants to the Second Respondent and Steven Montague; again, no request for delivery up of company books and records was made. On 11 June 2018, a further round of letters was sent by the Applicants to the Respondents and Mr Steven Montague, threatening an exercise of s.236 powers. Again, in none of these letters was there any mention of a requirement that the Respondents and Mr Montague deliver up the Company's books and records.

51. Such contemporaneous correspondence suggests that, prior to issue of this application at least, the Applicants were not proceeding on the basis that the Respondents were withholding books and records of the Company.

52. Overall, on the evidence before me, I am not satisfied that the Second Respondent is responsible for non-production of the books and records of the Company, or any other contemporaneous Company documentation which might otherwise shed light on her role within the Company.

53. I also remind myself that the absence of documentary evidence does not necessarily lead to a default position of liability: see In re Wolverton Investments Ltd (unrep 18 May 2015), Chief Registrar Baister at para 59-60, citing Re Idessa UK Ltd [2012] 1 BCLC 80 at paras 24-28. The court must look at the facts quite closely and in the round.

54. For all of these reasons, when considering the Second Respondent's role within the Company, I shall decline to draw adverse inferences against her in light of the paucity of Company documentation in evidence.

55. I turn then, to consider the Applicants' case on de facto directorship.

56. In support of their contention that the Second Respondent was a de facto director, the Applicants rely upon (1) the unsigned PIQ dated 20 February 2018; (2) the Official Receiver's notes of interviews held with each of the Respondents and with Steven Montague on 20 February 2018; (3) the Second Respondent's email to the Applicants dated 18 June 2018: and (4) the parity in salaries drawn from the Company by the Second Respondent and Steven Montague. I will deal with each of these in turn.

The PIQ

57. The PIQ stated (a) that the Second Respondent was a person who acted as a director of the Company between February 2013 and March 2017, as was Steven Montague; (b) that the Respondents and Steven Montague were each paid gross remuneration of £20,000 in 2015; (c) that the Second Respondent and Steven Montague were both signatories to the Company's bank account and that two signatures were required for the account.

58. In my judgment very little weight can be attached to this document. Whilst the PIQ bears the name of the First Respondent, it is clear on the evidence (and I so find) that he did not complete it. The PIQ does not bear his signature - or indeed any signature. It is also only partially complete; less than half of the questions have been answered. In his interview with the OR, the First Respondent confirmed that he did not write the answers given in the PIQ and did not know if the information in it was true.

59. The Second Respondent's evidence, which in this regard I accept, is that the handwriting in the PIQ is that of her brother, Steven. Whilst in his interview with the OR, Steven stated that he filled in the PIQ 'with' the Second Respondent, on the evidence which I have heard and read, it is clear (and I so find) that she did not dictate any of the answers relied upon or play any material part in the completion of the PIQ. It was Steven's work.

60. Ms Brooke invited the Court to infer that the PIQ was a joint effort from the fact that the OR's interview notes include references to the PIQ. I reject that invitation. In my judgment such references are equally consistent with the OR having based some questions in interview on the responses set out in the PIQ. They do not establish on a balance of probabilities that the Second Respondent played any material part in compiling the responses set out in the PIQ or that she had even read the PIQ prior to her interview.

61. In her interview with the OR, when questioned about certain of the answers given in the PIQ, the Second Respondent actively disagreed with a number of them. Whilst the interview notes do not disclose whether she was questioned about the response given to para 2.2 of the PIQ (which addressed de facto/shadow directors and named her), she rejected the suggestion (at para 2.3 of the PIQ) that the First Respondent was paid a salary by the Company and also stated (contrary to para 8.12 of the PIQ) that she was not a bank signatory and that the First Respondent had to sign the cheques. Quite why, on the Applicants' case, she would be party to completing the PIQ on one footing, only to reject the answers in the PIQ when interviewed the same day, was never explained.

62. Some of the responses given in the PIQ are plainly wrong. By way of example:

(1) Paragraph 8.12 and 8.13 of the PIQ stated that both the Second Respondent and Steven Montague were signatories to the Company's bank account, and that it was a dual signatory mandate, when on the evidence overall it was clear (and I so find) that the mandate was sole signatory, and that the First Respondent was the only signatory to the Company's bank account. Both Respondents gave evidence that the First Respondent had to sign batches of cheques for use by the Company. Indeed, on the Applicants' own evidence (Bramston (3) para 19), the First Respondent was 'sole signatory'.

(2) Paragraph 2.2 of the PIQ states that the Second Respondent and Steven Montague acted as directors of the Company from February 2013, when the Company was not even incorporated until October 2013.

In short, the PIQ is not a reliable document. It is incomplete, unsigned and demonstrably inaccurate in material respects.

The OR Interview Notes

63. The Applicants also relied on the notes taken by the OR of interviews conducted with each of the Respondents and with Steven Montague on 20 February 2018.

64. On behalf of the Respondents, Mr Cole urged caution when considering these interview notes. He submitted that a close textual analysis of the interview notes was inappropriate, highlighting in particular the following factors:

(1) The First Respondent's interview commenced at 11.30 and ended at midday; a total of 30 minutes. The hand-written notes of the interview spanned one and a half small (17cm x 14 cm) pages.

(2) The Second Respondent's interview commenced at 12.15 and ended at 13.05; a total of 50 minutes. The hand-written notes of the interview spanned four small (17cm x 14 cm) pages.

(3) Steven Montague's interview commenced at 13.30 and ended at 14.35; a total of 1 hour 5 minutes. The hand-written notes of the interview spanned six small (17cm x 14 cm) pages.

65. Mr Cole maintained that it was clear from the length of the interview notes when compared with the time spent on each interview that the notes were not a verbatim account. He further submitted that little can be read into the language used by each interviewee without sight of the questions asked; as he put it, 'the language depends in part on the question'. From a summary note it was also not possible to pick up on the nuances of the conversation, he argued, or where the emphasis lay in any given exchange. Mr Cole went on to submit that little can be drawn from the fact that each interviewee signed the notes of their interview at the conclusion of the same; as he put it: following the interview, they would read through the notes and say – 'that's pretty much what I said'. They had no sophisticated knowledge of the legal process, or of the context in which their responses might later come to be read.

66. I accept that these are legitimate factors to take into account when considering the weight to attach to the interview notes. They are plainly not verbatim accounts and the language of the responses will undoubtedly have been influenced by the questions put.

67. With these considerations in mind, I turn to consider the interview notes.

The First Respondent's interview

68. On behalf of the Applicants, Ms Brooke drew my attention in particular to the following:

(1) In the First Respondent's interview with the OR he said that

(a) the Second Respondent and Mr Montague 'ran' the Company;

(b) both the Second Respondent and Mr Montague had 'access' to the Company's bank account.

(2) Ms Brooke further contended that the language used by the First Respondent in interview was indicative of the Second Respondent and Mr Montague running the company together jointly; by way of example, 'I just signed a load of blank cheques for them', 'Steve and [the Second Respondent] said they were considering shutting the company down'.

69. In considering the probative value of these notes, I take into account the factors highlighted at paragraphs 64 to 65 above. I also consider the wider context. On his own admission, the First Respondent did not involve himself with the affairs of the Company and did not understand the business. He also knew nothing of what being a director involved. Against that backdrop, his statement (according to the interview notes) that the Second Respondent and Steven Montague 'actually ran the company' can in reality be afforded little probative weight in determining the issue whether the Second Respondent acted as a de facto director.

70. Moving next to the First Respondent's comments regarding access to the Company's bank account: by his written evidence, which in this regard I accept, the First Respondent had confirmed (1) that he had opened the Company's bank account at Steven's request and had given the bank card and account details (including log-in codes) to Steven; (2) that he had not personally accessed the Company's account 'at any stage for any purpose'; (3) that he had never seen the Second Respondent accessing the Company's bank account from home and that he 'never went to the office'. In oral testimony he accepted that he had said in interview that the Second Respondent and Steven both had 'access' to the Company's bank account, but explained that his words were not meant in the way that they were being taken; as far as the Second Respondent was concerned, all that he had meant to convey was that 'if Dawn needed to pop to the shop she could take a card'.

71. This testimony was broadly consistent with that of the Second Respondent. Her evidence, both written and oral, was that she did not have online access to the Company's bank account or her own card for that account; that Steven dealt with all payments from the Company's account; and that the only time that she had use of a

Company bank card was if she was sent out by Steven on an errand, to get petty cash or to buy stationery. On those occasions Steven provided her with the Company's bank card and she returned it to him after she had used it.

72. The First Respondent's comment in interview (according to the interview notes) that he had 'just signed a load of blank cheques for them' takes matters little further. The use by the First Respondent (according to the interview notes) of terms such as 'they' or 'them' does not point unequivocally to the roles adopted by the Second Respondent and Steven in relation to the Company; it may simply reflect the fact that they both worked for the same company. It does not establish that the Second Respondent undertook the functions of a director.

73. The First Respondent's comment in interview (according to the interview notes) that 'Steve and [the Second Respondent] said they were considering shutting the company down' was also explored in cross-examination. The First Respondent very honestly admitted in cross-examination that he simply didn't know whether it was 'a single or joint decision'.

74. In oral testimony the Second Respondent was adamant that she played no part in that decision, saying 'It [the interview note] says that, but Steven was going to shut down the Company. He was forced to. We didn't do it together. He was forced to shut it down.'

75. Even if Steven had consulted the Second Respondent about shutting the Company down, however, that of itself would not warrant a conclusion that she was acting as a de facto director of the Company. In this regard I remind myself that the mere fact that a person is consulted about directorial decisions does not in general make him a director: Smithton Ltd v Naggar [2015] 1 WLR 189.

The Second Respondent's interview

76. Ms Brooke also relied upon the Second Respondent's interview with the OR, in which she is noted as having said:

(a) 'I did the daily running of the office, sorting out staff, and Steve did data and the bank. I used to send the wages off to the bookkeeper';

(b) 'Me and Steve together decided to start the company …There were quite a few people doing [telesales] in Bognor and we jumped on the bandwagon';

(c) 'We thought we were running everything right and correctly';

77. Ms Brooke further contended that the language used by the Second Respondent in interview was indicative of the Second Respondent and Mr Montague running the Company together jointly. By way of example: 'We didn't know the Company was going to stop'; 'We had someone from Trading Standards [come to visit] … She said she would be on our side'; We paid top end for all our data'; 'We got the data by email and printed it off to give to staff to call'.

78. Ms Brooke also maintained that the fact that the Second Respondent attended on the OR for interview at all was significant, suggesting that the Second Respondent saw herself as occupying an integral role in the Company.

79. Again, the use by the Second Respondent and Mr Montague of terms such as 'we', 'us' and 'our' does not in my judgment point unequivocally to the roles adopted by each in relation to the Company; it may simply reflect the fact that they both worked for the same company. References to 'staff' in context are clearly references to the telephone call operators employed by the Company.

80. The term 'run' is also of little assistance without consideration of the context in which the term is employed. The Second Respondent's statement (according to the interview notes) that she 'did the daily running of the office', for example, does not unequivocally point to a directorial role. As made clear by Millet J in Re Hydrodam (Corby) Ltd [1994] 2 BCLC 180 at pp182-3, to establish that a person is a de facto director of a company

> 'it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level.'

81. I also remind myself of the guidance given in In re Richborough Furniture Ltd [1996] 1 BCLC 507, in which Timothy Lloyd QC (sitting as a deputy High Court judge) said at p524:

> '… if it is unclear whether the acts of the person in question are referable to an assumed directorship, or to some other capacity … the person in question must be entitled to the benefit of the doubt'

82. The quotes from the notes of the OR's interview with the Second Respondent relied upon by the Applicants were in any event somewhat selective. By way of example, the notes also include the following:

> (1) 'I did the daily running of the office, sorting out staff, and Steve did the wages and the bank. I used to send the wages off to the bookkeeper *and she would send the wages with the tax and that back to Steve…*' (emphasis added).
>
> (2) 'Steve dealt with all the letters from the ICO …. I am not 100% sure where the data was from. You would have to ask Steve.'
>
> (3) 'The merchant money came in dribs and drabs. Steve dealt with it and made sure everyone was paid off. I think Steve was still appealing the ICO at that point… I didn't really get

> involved with the ICO. Steve did all that. I knew what was going on because he explained it to me'
>
> (4) The emails were … sent to the company email, which I don't remember. Steve will know.'
>
> (5) 'I didn't have access to the bank online. I used the card if I was going to get stationery, but Steve dealt with paying everyone.'
>
> (6) 'I was not a bank signatory that I know of. Warren had to sign the cheques.'
>
> (7) 'There are no debts to the employees. Steve dealt with the tax but he told me everything was paid.'

83. The Second Respondent's comment in interview with the OR that she and Steven had 'together decided to start the company' was the subject of some focus in cross-examination. In oral testimony the Second Respondent said that, ahead of the interview, Steven had 'advised' her to say it - and that it was not true: in reality, the Company had been Steven's idea and it was his business. In her words: 'I didn't set up the Company with my brother – I was working on another job'. This was consistent with her written testimony. Her written evidence was that she was working for a company called PR Electronics between March 2013 and 27 May 2014; and that she was not involved at any level with the Company until the end of May 2014. In oral testimony she expressed regret for what she described as her own 'naivety' in misrepresenting the position to the OR during her interview and said that she 'didn't understand the seriousness of it' at the time.

84. I accept that any admission by a witness to having lied on a prior occasion, particularly when, on the occasion in question, the witness had been given the perjury warning, is a factor which must weigh heavily with the Court when assessing the overall credibility of that witness. Nonetheless, on the evidence which I have heard and read, on a balance of probabilities I am satisfied that it was Steven alone who decided to set up the Company; it was not a decision taken jointly by the Second Respondent and her brother. I so find. I also accept the Second Respondent's explanation for having misrepresented the position to the OR.

85. In reaching these conclusions I take account, in particular, of the following:

> (1) The First Respondent, whose evidence was entirely straightforward and which I accept, gave a clear account of the circumstances which led to the incorporation of the Company. His evidence was that it was Steven who approached him about setting up the Company, saying that he had had an idea for a new business, and it was Steven who asked him to become a director, explaining that he could not become a director himself as he had a 'bad credit rating'. It was Steven who asked the First Respondent to lend some monies to the Company to assist with start-up costs and on a later occasion to fund the purchase of supplies and furniture for the Company. It was Steven who chose the name of the Company and who dealt with all the arrangements

for setting up the Company. It was Steven who asked the First Respondent to set up a bank account for the Company, and it was to Steven that the First Respondent passed the card and details (including log-in codes) for the Company's bank account.

(2) Also highly significant, in my judgment, is the fact that the Second Respondent was not appointed as a director of the Company, whether at its inception or at any time thereafter. I was taken to nothing in the evidence to suggest that anything stood in the way of the Second Respondent taking an appointment as a director. I consider it legitimate to conclude that there was nothing to stop her so doing had she so wished. Indeed, during the trading life of the Company, the Second Respondent took two de jure appointments; as sole director of Peace of Mind Plans Limited in November 2016 and as a director (together with Steven) of Monty's Bakery Limited in January 2017. There was no pattern shown in the evidence of the Second Respondent habitually choosing to remain 'behind the scenes'. Had the Company been the joint venture of Steven and the Second Respondent from the outset, on a balance of probabilities I am satisfied that the Second Respondent would have been appointed as a director of the same; at least together with (if not rather than) the First Respondent.

(3) I also take into account the sibling relationship between the Second Respondent and Steven Montague. It was clear from the Second Respondent's evidence overall that, historically at least, she trusted her brother Steven and viewed him as more experienced in business matters. Whilst it is more likely than not that Steven acted entirely out of self-interest in drawing his sister into an 'I am Spartacus' fiction designed to deflect the focus from him, I accept that at the time the Second Respondent followed his guidance. Whilst this does not excuse her behaviour, it does explain it.

86. I would add that, even if, contrary to my findings, the decision to set up the Company had been the joint decision of the Second Respondent and Steven, that of itself would not lead inexorably to any conclusions as to the role they would each play within the Company once it had been set up.

87. With regard to the circumstances in which the Second Respondent came to attend on the OR for interview, I accept the Second Respondent's evidence that she attended because the OR asked her to. The Applicants adduced no evidence of any communications with the OR which suggested the contrary. I reject the submission that her attendance at interview was indicative of her own view of the 'integral role' she played in the Company.

Steven Montague's interview with the OR

88. I was also referred to the notes of Mr Montague's interview with the OR.

89. Mr Montague did not file any written evidence and was not called as a witness. I was told that in recent years Mr Montague had suffered from alcoholism and mental health problems; he had made several suicide attempts and had been compulsorily retained in a residential psychiatric unit on at least one occasion. He was considered to be in too fragile a state to give evidence. It was therefore not possible to explore with him the responses which he had given when interviewed by the OR.

90. The passages from Steven Montague's interview with the OR relied upon by the Applicants were as follows:

(a) 'Warren [the First Respondent] was the registered director because we decided to open it together between the three of us. We had some friends who ran a similar company. I don't know why Dawn and I weren't registered directors, that's just the way it happened'; and

(b) That the First Respondent, the Second Respondent and Mr Montague were all bank signatories.

91. Ms Brooke also maintained that the language used by Mr Montague in interview was indicative of the Second Respondent and Mr Montague running the Company together jointly. By way of example: 'We sold the office furniture to pay creditors'; 'We sold off everything we could to pay HMRC'.

92. For the reasons already given, on the evidence which I have heard and read, on a balance of probabilities I am satisfied that it was Steven alone who decided to set up the Company. In asserting that it was a decision taken jointly by the Respondents and himself (and thereby implying that it was a joint venture), Steven Montague was misrepresenting the position. The most likely explanation for this is that he was attempting to 'play down' or 'dilute' his own role.

93. His responses in interview must be seen in context. By the time of the interview, Steven had partially completed a PIQ which contained material inaccuracies and had told his sister to lie in her own interview.

94. His claim in interview not to know why he had not become a registered director himself and his assertion that it was 'just the way it happened' were plainly untrue. As I have already found, Steven sought out the First Respondent and asked him to be a director, explaining that he could not be a director himself because of his 'bad credit history'. On the evidence as a whole, I am satisfied that, in claiming in interview not to know why he did not become a director of the Company himself, Steven was deliberately misrepresenting the position.

95. As I have already found, his assertion at interview that he and the Respondents were all bank signatories was also untrue.

96. Again, for reasons already given, the use by Steven Montague of terms such as 'we', 'us' and 'our' in interview does not in my judgment point unequivocally to the roles adopted by the Second Respondent and Steven Montague in relation to the Company.

97. Overall, very little weight can be attached to the responses given by Steven Montague in his interview with the OR when considering the role of the Second Respondent in relation to the Company.

The email of 18 June 2018

98. The Applicants also relied upon an email dated 18 June 2018 sent by the Second Respondent (on behalf of the Respondents and Steven Montague) to the Applicants in response to the Applicants' letters of 24 May 2018 and 11 June 2018, in which the

Applicants had (inter alia) asked for information regarding the roles and responsibilities of each of the Respondents and Mr Montague in the affairs of the Company. The Second Respondent's email of 18 June 2018 read as follows:

> 'Dear Mr Brampton
>
> Referring to your letter 24th and 15th June, us three are responding to your questions as requested.
>
> Warren director, Steve Montague required all data paid wages and dealt with all the hmrc and the it. Dawn Montague admin and staff and sent of invoices and wages to Joy Emms. Joys Emms was responsible for the filings at companies house. We where not appointed to be directors but we ran the company.
>
> We did appeal the ICO with no result, the ICO penalty was not paid due to having to pay other creditors including hmrc and as far as we where concerned this was completely unjust! As all information was sent to them.
>
> ….
>
> Alan Montague and Chelsea Pye Dawn Montague Steve Montague C Ling Ella Jade Lorraine B Edwards Niamh where employees. Alan Montague was packing goods Checking post and voice mails after closing, Chelsea we had to pay her maternity after we shut.
>
> Persons associated with it protect where paid till the 10th of November due to them still working to pay off creditors and customer service or the existing customers.
>
> Hope this as answered questions
>
> Yours sincerely
>
> Dawn Montague
>
> Steve Montague
>
> Warren Pye'

99. Again, the Applicants laid great store by the comment 'we ran the company'. In oral testimony the Second Respondent said that her brother Steven had advised her to 'keep saying the same' and that she had followed his advice when stating 'we ran the company'. The email, she explained, was 'not completely true'; adding 'I did run the company, but the day to day office. The day to day running, the admin and all that'.

100. On the evidence overall (and having regard in particular to the factors considered in Paragraph 85 above), I accept the Second Respondent's explanation.

101. Moreover, even if I am wrong in that conclusion, references to 'running the company' are of limited assistance in determining whether the Second Respondent acted as a de facto director. The term is equivocal. Members of a management team, for example, may together be described as 'running' a company, although not all members of that team will be directors or act as such. What is important is not what the individual calls him or herself, but what he or she actually did: Re Paycheck at [32], [90]; Smithton at [38]. The question whether or not an individual acted as a director is to be determined objectively and irrespective of that individual's own belief: Smithton at [39].

Parity of Income

102. Mr Bramston's third witness statement highlights the fact that the Second Respondent was paid the same (relatively modest) salary as Steven Montague, which Mr Bramston maintains 'would suggest that she held an equal role to Mr Montague in the Company'.

103. From the bank statements in evidence, the usual weekly salary paid to each of the Second Respondent and Steven appears to have been £599, whilst the salaries paid to other members of staff (taking 10 February 2017 as an example) ranged from £354 and £474.

104. As noted by Mr Cole, salary was not a factor mentioned in any of the authorities cited to me on the issue of de facto directorship. Whilst I do not discount the possibility that, in some contexts, salary may be a relevant factor when taken collectively with others, parity of salary alone will not suffice. The level of salary commanded by an employee is dictated by a range of factors, including the economic value of that employee to the business. The fact that two individuals employed by a business earn the same salary does not necessarily mean that they do the same job. In the present case the Second Respondent's role may simply have been considered equally valuable in economic terms to that occupied by Steven.

105. Of far greater importance, in my judgment, is the evidence before the court of what the Second Respondent actually did in relation to the Company: Re Paycheck at [32], [90]; Smithton at [38].

106. The Second Respondent's evidence, which in this regard I accept, was that she did not start working for the Company until the very end of May 2014. Until that point, she worked for a company called PR Electronics.

107. The Applicants invited me to reject the Second Respondent's evidence on this issue. I decline that invitation. For reasons already given, I have accepted the First Respondent's account of the circumstances in which the Company was set up. It was Steven's idea to set up the Company and it was his business. Had it been a joint venture between the Second Respondent and Steven from the time that the Company was incorporated, there was nothing to stop the Second Respondent taking appointment as a director and becoming a shareholder. She did neither. The

Applicants adduced no evidence to establish on a balance of probabilities that the Second Respondent was involved with the Company at any point prior to the end of May 2014. Having considered the evidence as a whole, on a balance of probabilities I accept her account of when she started working for the Company and the circumstances in which she did so.

108. Her evidence was that she started working for the Company at the end of May 2014 at the invitation of her brother Steven. She said that Steven wanted her "to join his new business and deal with the day to day administration of the business, staff and other practical day-to-day issues that might arise." Her evidence, which I accept, was that she was "never asked to be a director" and that she was "never referred to (internally or externally) as a director"; it was Steven who "managed the business", "managed the call centre operations … did the hiring and firing, contacted and dealt with the data suppliers, did all the billing and dealt with the planning and development of the business."

109. By her testimony of the tasks which she herself undertook, the Second Respondent describes an essentially administrative role which includes data entry, filing, dealing with suppliers, dealing with staff issues and wages, looking after stationery and petty cash.

110. At paragraph 7 of her statement, she described her functions within the Company as follows:

> "I did data entry for Steven, did the filing, took calls from suppliers on routine matters and prepared the bills that Steven wanted sending out. Generally I would deal with any staff issues arising, sending weekly wages to the accountants for payments, organising and sending out the post and filing the sale sheets. My other duties were to maintain the office equipment and stationery levels. I looked after petty cash and I was asked from time to time to draw out some cash. I did not have a company bank or credit card and did not have access to one so that on each occasion that I was asked Steven had to provide me with his card and I would return this to him. I did not have access to the company's bank account."

111. At paragraphs 8 to 10 of her statement, she continued:

> "8. I did not know how well the company was doing at any particular time. I was never involved in any financial management decisions of the company. These were decisions that were purely taken by Steven. He had access to all of the financial information on his tablet or laptop.
>
> 9. I was never involved with the company's accountants regarding the company's accounts or tax position. These were always dealt with my Steven. I never even saw the accountants or had sight of the accounts drawn up.

> 10. I did not deal with any data suppliers or their contracts. This was purely dealt with by Steven. Steven also dealt with all the contracts for the utilities, the rents, data companies and Royal Mail amongst others."

112. By her written evidence, the Second Respondent further confirmed that she was "not involved in the training or management of the staff" this being usually undertaken by one of the other staff, a woman called Bobby.

113. The Applicants filed evidence in reply, in the form of Mr Bramston's third witness statement. This, however, devoted only three paragraphs to the Second Respondent's role and relied simply upon the OR interviews and parity of income, as already addressed.

114. In cross-examination, the Second Respondent held her ground. When pressed to explain what her role was in "sorting out" the staff, for example, she explained: "I was giving them their packs and data in the morning and giving them pens and pencils, taking their orders; that's what 'sorting out staff' means." At a later stage in her oral testimony, she explained that she "wouldn't sit with the staff"; she would "just set up in the morning", adding that "Steve gave [her] the data to hand out and the scripts".

115. She accepted that she had some involvement in complaints from customers. She explained that if a letter of complaint came in, she would open it and pass it on to Steven. If a complaint was made by email, she said that it would usually go straight to Steven.

116. She was not a signatory to the Company's bank account; "only Warren" (the First Respondent) was signatory.

117. When it was put to her that she had attended meetings with or had discussions with Trading Standards, the Second Respondent was adamant that she had not, explaining that her reference during the OR interview to Trading Standards was simply "what was repeated to me after Steven had the meeting. Steven told me what was said at the meeting."

118. When asked about her dealings with the Company's accountant, Joy Emms, she explained that she would send "weekly wages" to Ms Emms but did not play a part in any of the other accounting information passing between Ms Emms and the Company; in her words she "just emailed wages". She accepted that there was a laptop at the Company's premises for her to use but was insistent that the only financial information which she sent out from that laptop related to wages.

119. Overall, by both her written and oral testimony, the tasks which the Second Respondent maintained that she undertook in relation to the Company were all consistent with an administrative and not a directorial role.

120. On behalf of the Applicants Ms Brooke urged me to reject that evidence as self-serving.

121. I accept that the Second Respondent would have every incentive, in the context of these proceedings, to play down any managerial or directorial functions which she may have undertaken. I am mindful of that.

122. That said, the burden of proof lies with the Applicants. On the evidence which I have heard and read, the Applicants have not established on a balance of probabilities that the Second Respondent acted as a de facto director in relation to the Company. Their evidence does not establish on a balance of probabilities that she undertook *any* tasks of a directorial nature or that she was held out, whether internally to staff, or externally to the outside world, as a director. Their evidence does not establish on a balance of probabilities that the Second Respondent was 'one of the nerve centres' of the Company. The Applicants cannot blame this all on the paucity of Company books and records. They adduced no evidence from other members of staff, the Company's accountant, the Company's landlord, the Company's bankers, the Company's suppliers, or any other third parties, to establish how the Second Respondent was held out by the Company internally and externally and what she actually did in relation to the Company. Their case on de facto directorship was, as Mr Cole put it, 'extremely thin'.

123. Ms Brooke submitted that even if the evidence adduced by the Applicants did not establish on a balance of probabilities that the Second Respondent acted as a de facto director of the Company, that evidence raised a prima facie case which shifted the evidential burden on to the Second Respondent.

124. I do not accept that the evidence adduced by the Applicants is sufficient to raise a prima facie case shifting the evidential burden. Even if I am wrong in that conclusion, however, on the evidence which I have heard and read, the Second Respondent has discharged that burden. I accept her evidence that she was not held out, internally or externally, as a director of the Company. I accept her evidence on the range of tasks that she undertook in relation to the Company. Those tasks point clearly to an administrative role and not a directorial role. Standing back and viewing the evidence as a whole, I am satisfied that the Second Respondent's role in the Company was administrative and not directorial. I so find.

125. For all of these reasons, the Applicants' application against the Second Respondent shall stand dismissed.

126. I turn next to the case against the First Respondent.

The First Respondent

127. The Applicants proceed under s.212 IA 1986 against the First Respondent in respect of all sums claimed. The re-amended application notice, so far as material, is set out at paragraph 28 of this judgment.

128. In broad terms, by their primary case, the Applicants allege that the First Respondent (1) 'caused or allowed' the Company to cold call members of the public in breach of the PECR, resulting in a monetary penalty; and (2) 'caused or allowed' (or in one instance 'caused or permitted') the Company to make certain payments.

129. By their alternative case, the Applicants allege that the First Respondent was in breach of his duties as a director and misfeasant under s212 IA 1986 in 'abdicating his duties and responsibilities as a director and/or failing to supervise and thereby enabling the actions and omissions' set out in the application notice.

Directors' Duties: ss171-175 Companies Act 2006

130. The duties to which company directors are subject are set out at ss171-175 Companies Act 2005 ('CA 2006') and include the following:

131. Under s.171 CA 2006, a director must act in accordance with the company's constitution and only exercise his powers for the purposes for which they are conferred.

132. Under s.172 CA 2006, 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. This duty is subjective, unless the director fails to consider whether the challenged act or omission was in the best interests of the company, in which case the proper test is whether an intelligent and honest man in the position of a director of the relevant company could, in all the existing circumstances, have reasonably believed that he acted to benefit the company: Re HLC Environmental Projects Ltd at [91-92].

133. From when the director knows, or should have known, that the company is or is likely to become insolvent, either on a cash flow or balance sheet basis, the s.172 duty requires him to consider the interests of the company's creditors as a whole. In this context, 'likely' means probable: BAT Industries Plc v Sequana SA [2019] 1 BCLC 347 at [213-220].

134. Under s.174 CA 2006, a director must exercise reasonable care, skill and diligence. This means the care, skill and diligence that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and the general knowledge, skill and experience that the director has. This test is both objective and subjective.

Relevant Caselaw

135. The Applicants rely upon the following principles drawn from case law:

(1) The statutory obligations of company directors are inescapable personal responsibilities; a total abrogation of these responsibilities is impermissible. No director can leave the management of the company's affairs to others without committing a breach of duty: Re Westmid Packing Services Ltd (No 3) [1998] 2 BCLC 646 at 653B and 654F; Lexi Holdings plc v Luqman [2007] EWHC 2652 at [219], [224].

(2) Directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them to properly discharge their duties as directors: Re Barings plc (No 5) [2001] 1 BCLC 523 at [36]; Raithatha v Baig [2017] EWHC 2059 at [35]; Weavering Capital (UK) Ltd v Dabhia [2012] EWHC 1480 at [183-188], [207-209].

(3) Directors must not allow themselves to be dominated, dazzled, manipulated or deceived by a co-director: Re Westmid Packing Services Ltd at 653B and 654F.

(4) A director cannot escape liability for loss caused by the improper acts of a co-director by alleging that they had a confined area of responsibility, and that when acting within their limited role they were not alerted to the wrongdoing of their co-director: Weavering Capital (UK) Ltd v Dabhia [2012] EWHC 1480 at [153-160].

(5) Nor can a director escape liability for loss arising from a co-director's wrongdoing by asserting that they trusted the co-director implicitly, or that they were, or would have been had they questioned the co-director about the wrongful acts, satisfied by the explanation provided by the co-director: Lexi Holdings plc at [37-54] (Court of Appeal); Weavering Capital (UK) Ltd v Dabhia [2012 EWHC 1480 at [176], [207-209]; Weavering Capital (UK) Ltd v Dabhia [2013] EWCA Civ 71 at [34].

(6) where a director knows of an improper practice being perpetrated by those managing a company's affairs, and does nothing about it, he may properly be treated as having permitted not merely those examples of that practice of which he is actually aware, but also the subsequent continuation of that practice, even if not aware of the specific instances of it, where he does nothing to satisfy himself that the practice of which he is aware has come to an end: Lexi Holdings v Luqman (No 1) [2007] EWHC 2652 at [202].

(7) Where a director is the recipient of a benefit from the company, the evidential burden is on the director to prove that the payment was proper: Re HLC Environmental Projects Ltd at [115].

The First Respondent's position

136. The First Respondent maintains that he had no involvement in the Company's affairs and no knowledge of any wrongdoing.

137. His case as put by Mr Cole may be summarised thus:

(1) to make out a case of 'causing or allowing', or 'causing or permitting', the Applicants must prove either *activity* on the part of the First Respondent, or *conscious (ie knowing)* inactivity. Mr Cole maintained that the Applicants could prove neither; and

(2) to make out a case based on total abrogation of responsibility, the Applicants must (a) particularise what the First Respondent ought to have done which would have made any difference to the loss actually suffered; and (b) establish what would have happened had the duty been complied with - and that, but for the breach, the transaction or loss would not have occurred. Mr Cole maintained that the Applicants had done neither.

Caused or Allowed

138. Mr Cole first took me to the case of Cohen v Selby [2002] BCC 82 at [24]. This case involved a misfeasance application brought under s.212 against a father and son, who were de facto and de jure directors respectively of a company which bought and sold

jewellery. The son, who was a full-time student, played no part in the management of the company and had no knowledge of its affairs. In December 1993, the father took uninsured jewellery on a selling trip to Europe. The jewellery was stolen on a ferry. The company had no funds to pay for the lost jewellery and went into CVL. The company's liquidators brought misfeasance proceedings. At first instance the deputy judge found that the son knew nothing of what was going on but found both father and son liable. The son was found liable on the ground of total dereliction of duties. The son appealed.

139. During the course of his judgment on appeal Chadwick LJ made reference to an allegation made in paragraph 10 of the points of claim that 'in causing or permitting the [jewellery] to be taken overseas whilst uninsured … [the son] acted negligently and in breach of [his] fiduciary and common law duties [to the company]'. At paragraph [24] of his judgment, Chadwick LJ noted (with emphasis added):

> 'It was accepted … that [the son] … did nothing which could be said to fall within the ordinary meaning of the phrase, in para 10, 'causing or permitting the same to be taken overseas'. *He knew nothing about it.*'

140. A similar approach was taken by Briggs J at first instance in Lexi Holdings Plc v Luqman [2007] EWHC 2652 (Ch) when hearing a summary judgment application against a 'non-active' director called Monuza, whose brother, a fellow director, had committed fraud against the company. At [225] Briggs J said (with emphasis added):

> 'It is not suggested that the Claimant can establish beyond the possibility of a real defence that [Monuza] was *aware* of improper practices by her brother *to an extent sufficient to affix her with liability as someone who authorised or permitted* his misconduct.'

141. The need for knowledge in this context (subject to the caveat flagged in paragraph 135(6) above) was again acknowledged by Popplewell J in Madoff Securities International Limited (In Liquidation) v Raven [2013] EWHC 3147 who said at [192] (with emphasis added):

> 'it has long been established that a trustee who *knowingly* permits a co-trustee to commit a breach of trust is also in breach of trust. A director who *has knowledge* of his fellow director's misapplication of company property and stands idly by, taking no steps to prevent it, will thus not only breach the duty of reasonable care and skill (which is not fiduciary in character: Ultraframe v Fielding [2005] EWHC 1638 (Ch), [1300]-[1302]), but will himself be treated as party to the breach of fiduciary duty by his fellow director in respect of that misapplication by having *authorised or permitted* it: Walker v

> Stones [2001] QB 902, 921D-E; Gidman v Barron and Moore [2003] EWHC 153 (Ch) at [131]; Neville v Krikorian [2006] EWCA Civ 943 [49]-[51] and Lexi Holdings v Luqman (No 1) [2007] EWHC 2652 (Ch) at [201]-[205]'

142. In this case, Mr Cole submits, the First Respondent knew nothing at any material time of the Company's breaches of the PECR and of any of the misappropriations of Company monies forming the basis of this application. On that ground alone, he argues, the allegations that the First Respondent 'caused or allowed' or 'caused or permitted' the Company's breaches of the PECR and the misappropriations of Company monies relied upon must fail.

143. This, he argued, left simply the Applicants' alternative case: abdication of responsibilities and/or failure to supervise.

Abdication of responsibilities/failure to supervise

144. When addressing the Applicants' alternative case, Mr Cole again referred me to the case of Cohen v Selby, the facts of which are summarised above. In Cohen, the appeal was allowed on the ground that the breach of duty found by the deputy judge (total dereliction of duty) went outside the pleaded case: loc cit., [31]. In allowing the appeal on that ground, however, Chadwick LJ (Rix LJ and Sir Andrew Morritt VC concurring) was at pains to stress that the failure to allege the breach of duty on which the judge relied went 'beyond a mere pleading point', adding (at [32]):

> 'If the duty had been alleged in the terms of 'an abject surrender of his duties as a director' Mr Andrew Selby [the son] would have been entitled to have particulars of what it was that he ought to have done that would have made any difference in relation to the loss actually suffered. That would… have raised difficult questions of causation. The judge did not address the issue whether there was a sufficient causal link between any breach of duty by Mr Andrew Selby and the loss of the jewellery. If the matter had been properly pleaded he would have been bound to do so. It is not at all clear… how he could have come to the conclusion on the evidence actually adduced that a sufficient causal link between the breach which he found and the loss which was suffered had been established.'

145. Chadwick LJ had earlier noted that s.212 IA 1986 does not of itself create any new rights or obligations and that, whilst it was open to a liquidator to proceed under s.212 where all that is alleged is common law negligence, 'if he does so, he must establish a cause of action at common law; that is to say, he must show that the breach of duty of which he complains has caused loss or damage': Cohen at [21]. When exercising the power conferred by s.212(3)(b) to compel a director to 'contribute such sum to the

company's assets by way of compensation in respect of the … breach of … duty', in a case where the breach complained of is a breach of the common law duty to take reasonable care, Chadwick LJ continued at [21]:

> 'the court has to be satisfied that the negligence has caused a loss in respect of which compensation can be awarded. The position, in this respect, is the same as it would be if the company had brought an action in its own name'.

146. I was next taken to the judgment of Popplewell J in the case of Madoff Securities International Ltd (In Liquidation) v Raven [2013] EWHC 3147 (Comm) at [290] to [293]. Whilst the matters addressed are strictly obiter (see [289]), they do helpfully summarise the approach to be adopted by the court on causation:

> '[291] The Claimant contended that if it established a breach of any fiduciary duty by a director Defendant, the appropriate remedy was restoration of the trust (subject to relief from sanctions in an appropriate case), without enquiry into the counterfactual hypothesis of what would have happened if the duty had been fulfilled. This applied not only to unlawful payments of dividends but to any breach of fiduciary duty resulting in misapplication of the company's property. On the Claimant's case, such counterfactual enquiry was only necessary for the purposes of its claim for the breach of the duty to exercise reasonable care skill and diligence.
>
> [292] I accept the submissions of the claimant as correctly stating the law where the breach comprises an act of misapplication, rather than an omission. It is well established that the directors of a company are in a similar position in respect of the company's property as trustees (see JJ Harrison (Properties) Ltd v Harrison [2002] BCC 729 per Chadwick LJ at [25]) and the basic remedy for a misapplication of company property in breach of fiduciary duty, as with trustees misapplying trust property, is restitution; the liability is not merely to compensate the company for the loss said to have been caused by the breach assessed on a tortious basis…. There is therefore no room for an enquiry as to whether the transfer would have been made but for the breach or what would have happened had the transfer not been made.
>
> [293] On the other hand where the breach which leads to the misapplication of company property comprises an omission, such as total inactivity, it is necessary for the company to establish what would have happened had the duty been complied with, and that but for the breach the transaction or loss would not have occurred: see Bishopsgate v Maxwell (No 2) (sup) at 264c-f; Lexi Holdings Plc v Luqman No 2 [2008] 2 BCLC 725 per Briggs J at [28], [40] and [2009] BCC 716 per Sir Andrew Morritt C at [18], [36], [38]'.

147. In considering causation in a case of total inactivity, the court must distinguish between what, consistently with his duty as a director, that director should have done and what, in all probability, he would have done: Lexi Holdings plc per Sir Andrew Morritt C at [38]:

> '[Counsel] submits that if consistently with his duty to the company, whether as director or auditor, a person should have performed a particular action then he is liable for the consequences of not doing it. It is no answer to prove that he would have done something else for that would be to enable one breach of duty to be used to excuse another. If, hypothetically, a director should have done something then it is no answer to prove that in all probability he would have done something different. I would accept that submission in the abstract …'

148. The Applicants submit that in considering their alternative case (abdication of responsibility/failure to supervise), the court should adopt the approach adopted by the Court of Appeal in Lexi Holdings at [38-54], as follows:

(1) First, to consider what the First Respondent knew, or ought to have known, had he performed his duties as a director.

(2) Second, to consider what steps the First Respondent should have taken, consistently with his duties, in light of the knowledge that he had or should have had.

(3) Third, to consider what would have happened if the First Respondent had complied with his duties, and whether the Company would still have suffered loss.

Correct Approach

149. Having considered carefully the submissions of counsel and the authorities to which they have helpfully referred me, my conclusions on the correct approach to the evidence are as follows.

150. To make out their primary case, that of 'causing or allowing', or 'causing or permitting', the events and transactions complained of, the Applicants must prove either *activity* on the part of the First Respondent, or *conscious (ie knowing)* inactivity: Cohen v Selby [2002] BCC 82 at [24]; Lexi Holdings Plc v Luqman [2007] EWHC 2652 (Ch) per Briggs J at [225]; Madoff Securities International Limited (In Liquidation) v Raven [2013] EWHC 3147 per Popplewell J at [192].

151. This is subject to the caveat that, where a director knows of an improper practice being perpetrated by those managing a company's affairs, and does nothing about it, he may properly be treated as having permitted not merely those examples of that practice of which he is actually aware, but also the subsequent continuation of that practice, even if not aware of the specific instances of it, where he does nothing to

satisfy himself that the practice of which he is aware has come to an end: Lexi Holdings v Luqman (No 1) [2007] EWHC 2652 at [202].

152. To make out their alternative case, (that of abdication of responsibility/failure to supervise, leading to loss), the Applicants must identify and establish to the satisfaction of the court:

(1) what the First Respondent knew, or ought to have known, had he performed his duties as a director;

(2) what steps the First Respondent should have taken, consistently with his duties, in light of the knowledge that he had or should have had; and

(3) what would have happened if the First Respondent had complied with his duties, and that, but for the breach, the transaction or loss complained of would not have occurred:

Cohen v Selby at [32]; Madoff Securities International Ltd (In Liquidation) v Raven [2013] EWHC 3147 (Comm) at [290] to [293]; Bishopsgate v Maxwell (No 2) [1994] 1 WLR 261 at 264c-f; Lexi Holdings Plc v Luqman No 2 [2009] BCC 716 per Sir Andrew Morritt C at [36], [38]-[54].

153. The counterfactual analysis involved in this three-step process involves both evidence and submissions. As put by Briggs J in Lexi Holdings 2007 EWHC 2652 at [235], whilst the causation question which arises from a case of culpable neglect does involve a hypothetical analysis (namely, as to that which would have occurred if the duties breached had been performed), nonetheless, 'it is an analysis which has to be conducted against a matrix of detailed fact'.

The ICO Penalty: Causing or allowing

154. I shall deal first with the Applicants' primary case against the First Respondent in relation to the ICO Penalty.

155. On the evidence which I have heard and read, I am satisfied that the First Respondent (1) did not know of the provisions of the PECR relevant to companies undertaking direct marketing by telephone prior to the date on which the Company began trading or at any material date thereafter (2) did not know prior to commencement of trading that the Company's proposed use of third party data put the Company at risk of breaching PECR; (3) played no active part in the Company at any material time; and (4) did not know at any material time prior to being informed of the MPN that the Company was trading in breach of the PECR or had ever so traded. I so find.

156. On the evidence which I have heard and read, the Applicants have not made out their primary case, as set out in paragraph (a) of the re-amended application notice, that the First Respondent 'caused or allowed' the Company to 'cold call members of the public' in breach of the PECR. He played no active role in the Company at any material time and knew nothing about how the Company conducted its business. At no material time was he aware that the Company was 'cold-calling' members of the public in breach of the PECR.

ICO Penalty: abdicating duties and/or failing to supervise

157. The next question therefore is whether the Applicants can make out their alternative case. According to paragraph (k) of the re-amended application notice, this is that the First Respondent was 'in breach of his duties as a director and misfeasant under s.212 Insolvency Act in abdicating his duties and responsibilities as a director and/or failing to supervise and thereby enabling' the Company to cold call members of the public in contravention of the PECR, which resulted in the ICO penalty.

158. To make out their alternative case, the Applicants must identify and establish to the satisfaction of the court:

(1) what the First Respondent knew, or ought to have known, had he performed his duties as a director;

(2) what steps the First Respondent should have taken, consistently with his duties, in light of the knowledge that he had or should have had; and

(3) what would have happened if the First Respondent had complied with his duties, and that, but for the breach, the transaction or loss complained of would not have occurred:

159. With regard to (1): as I have already found, the First Respondent knew nothing of the requirements of the PECR or of the Company's breaches of the same at any material time prior to being told of the MPN. In my judgment, however, as sole director of the Company, the First Respondent ought to have known of the provisions of the PECR prior to the Company beginning to trade (or at the very latest on receipt of the initial complaints, of which he ought to have known, referred to the Company by TPS in April 2015). He should have kept himself apprised of ongoing regulatory requirements throughout the course of the Company's period of trading. In this regard I accept the Applicants' submission that it is incumbent upon all directors to acquire and maintain sufficient knowledge to enable them properly to discharge their duties as directors. Directors can only properly discharge their duties if they have knowledge and understanding of any legislation applicable to the company's sphere of business, and the steps required to comply with the same. This is particularly so where, as in this case, statute sets out strict rules governing the sphere in which the Company operated. If the First Respondent was unable to access or to understand the guidance published by the ICO on how to comply with the PECR, he should have sought professional assistance and advice prior to commencement of trading or, at the very latest, on receipt of initial complaints from TPS in April 2015.

160. With regard to (2): Mr Cole submits that the Applicants have not adequately particularised or evidenced their case on what steps the First Respondent should have taken, consistently with his duties, in light of the knowledge that he should have had. I have some sympathy with this submission. There were no pleadings in this case and the evidence in support of the application relies heavily (and rather lazily) upon the conclusions set out in the ICO report.

161. Reading that evidence as a whole, however, it is in my judgment tolerably clear that the steps which the Applicants maintain that the First Respondent should have

undertaken were to ensure that the Company either (1) used TPS screened data (ie data which excluded TPS subscribers completely) or, (2) if relying on 'opt-in' consent obtained by third parties, undertook 'due diligence checks' on the opt-in data supplied. The due diligence identified in the ICO report (and adopted by Mr Bramston in his first statement at paragraph 52) comprised the following: (a) asking the third party consent supplier (in this case TDP) to provide sample audio recordings which could then be checked to ensure that consent to the opt-in had been properly obtained, (b) checking that consent was reasonably recent (no more than 6 months old) and (c) checking that the consent extended either to the Company specifically or to organisations fitting the Company's description.

162. Having considered the evidence and submissions on what steps the First Respondent should have taken, consistently with his duties, in light of the knowledge that he had or should have had, I am satisfied that on or prior to the commencement of trading, the First Respondent should have taken steps to ensure that the Company either (1) used only TPS screened data or (2) if using 'opt-in' data supplied by a third party provider such as TDP, ensured that the Company undertook 'due diligence checks' (of the kind identified in paragraph 161(a)-(c) above) on the opt-in data supplied, with a view to confirming that the same was PECR compliant.

163. Moreover even if TDP had somehow managed to pass the initial due diligence checks prior to the Company's commencement of trading, on receipt of complaints referred by TPS to the Company in April 2015, the First Respondent ought to have concluded that the data supplied by TDP was not reliable. Having so concluded he should have taken steps to ensure that thereafter the Company either (1) used only TPS screened data or (2) if continuing to use 'opt-in' data supplied by a third party provider, that the Company selected an alternative provider having taken reasonable steps to confirm by way of due diligence checks that the alternative provider selected was PECR compliant.

164. With regard to (3): what would have happened if the First Respondent had complied with his duties, and whether, but for the breach, the transaction or loss complained of would have occurred: On the evidence which I have heard and read, I am satisfied on a balance of probabilities that had the First Respondent complied with his duties, the loss caused to the Company by the MPN would have been avoided.

165. Had the First Respondent ensured that the Company undertook due diligence of the caller data purchased from TDP in the manner described in paragraph 161(a)-(c) at the outset, on a balance of probabilities he would have discovered that the data purchased from TDP contained one or more of the following (a) consents which had not been properly obtained (b) consents which were more than 6 months old and (c) consents which did not extend to the Company. Having established in this way that the data supplied by TDP was not PECR compliant, the First Respondent could and should have taken steps to ensure either that (a) the Company used only TPS screened data or (b) that the Company ceased use of data supplied by TDP and purchased PECR compliant opt-in data from an alternative supplier. Had these steps been taken timeously, on a balance of probabilities the ICO penalty would have been avoided.

166. Moreover, even if TDP had managed to pass the initial due diligence checks undertaken at the time of the Company's commencement of trading, had the First

Respondent taken prompt steps to select an alternative PECR compliant provider on learning of the complaints referred to the Company by TPS from April 2015 onwards, on a balance of probabilities I am satisfied that the IPO penalty would have been avoided.

167. The breaches which ultimately triggered the ICO penalty spanned over a year and involved over 150 complaints. Had appropriate action been taken on commencement of trading, or promptly on receipt of the initial complaints referred to the Company by TPS, on a balance of probabilities I am satisfied that the ICO penalty would not have been imposed.

168. For the reasons which I have given, the Applicants have made out their alternative case of misfeasance in relation to this head of claim. On the evidence before me I am satisfied that in failing prior to commencement of trade (or at the very latest promptly after the initial complaints referred to the Company by TPS in April 2015) to take appropriate steps (1) to inform himself of the PECR requirements applicable to the company's intended sphere of business and (2) to take reasonable steps to ensure that the Company traded only with PECR compliant data, the First Respondent acted in breach of the duties owed by him to the Company pursuant to s.174 CA 2006 and thereby caused the Company loss.

169. In the light of my conclusions I shall order the First Respondent to compensate the Company in a sum equivalent to the ICO fine together with any interest properly due in respect thereof, pursuant to s.212 IA 1986. I shall hear submissions on interest on the handing down of judgment.

Payments to the First Respondent

170. I shall deal next with the payments made by the Company to the First Respondent. It is common ground that the First Respondent received for his own benefit three payments from the Company, as follows:

(1) 20 March 2017: £7,500

(2) 20 March 2017: £2,500

(3) 18 July 2017: £600

171. Where a director is the recipient of a benefit from the company, the evidential burden is on the director to prove that the payment was proper: Re HLC Environmental Projects Ltd at [115]; Idessa (UK) Ltd v Morrison [2011] EWHC 804 (Ch) per Lesley Anderson QC at [28] and GHLM Trading Ltd v Maroo [2012] EWHC 61 per Newey J at [149].

Payment of £600: 18 July 2017

172. I shall deal with the third payment first. On the evidence which I have heard and read, I am satisfied on a balance of probabilities that the third sum (of £600) was a payment made to the First Respondent from Company funds in respect of maintenance work which he had carried out at Steven Montague's private residence. I so find.

173. I accept the First Respondent's evidence that he paid no attention to the source of this payment at the time that he received it and did not knowingly accept Company funds for a building job privately undertaken for Steven Montague.

174. Nonetheless, I was taken to no evidence to justify the payment of £600 to the First Respondent as a legitimate use of Company funds. As a director of the Company in receipt of a benefit from the company, the evidential burden is on the First Respondent to prove that the payment was proper: GHLM Trading Ltd v Maroo [2012] EWHC 61 per Newey J at [149]. The First Respondent has failed to discharge this burden. Accordingly the sum of £600 must be repaid to the Company.

20 March 2017: £2500 and £7500

175. The remaining two payments (of £2500 and £7500 on 20 March 2017) fall for separate consideration. These payments were made to the First Respondent from Company funds at his request. He knew the source of the funds. In my judgment it is clear (and I so find) that he 'caused or allowed' these two payments from Company funds.

176. The First Respondent maintains that the two payments in question represent repayment of loan advances made by him to the Company to assist with start- up costs. On the evidence which I have heard and read, I accept the First Respondent's explanation for these payments.

177. By his written evidence (at paras 9-11) the First Respondent states that Steven Montague asked him to lend the Company £2500 when it was first being set up and later asked him to inject further loan monies into the Company to assist with buying supplies and furniture for the Company (para 14). The First Respondent admitted that he was 'not very good with dates' but stated that he agreed to make further payments which 'came to just under £10,000.' He could not recall precisely how much he lent in total but believed it to be in the region of 'between £10,000 and £12,500' in approximate terms.

178. At paragraph 22 of his witness statement, the First Respondent addressed repayment of his loan, stating:

> 'When I found out about the end of the business I mentioned to Steve that it was probably about time that I had my money back. I had already waited some time for the repayment. I was paid the sums referred to in paragraph 30 of Mr Bramston's first witness statement (ie £2500, £7500 and £600). This was in repayment of my loans to the Company. There may be some more outstanding. I did not receive any other monies at all'.

179. Pausing there, he was clearly mistaken about the reason for the payment of £600. On the evidence overall, however, I am satisfied that this was an innocent mistake.

180. When pressed in cross-examination to explain why he had adduced no documentary evidence of the loan advances of £10,000 subsequently repaid to him, the First

Respondent stated that he had made the loan advances in cash, explaining that he had done some private building work and had made the loan advances from 'building money'. As it was a 'family' arrangement, he hadn't felt the need to document it or agree a specific time frame for repayment .

181. I accept the First Respondent's explanation for making the loan advances in cash and failing to document the same. Given his trade it is entirely unsurprising that he would have such sums available in cash. Given the family connections it is also unsurprising that he would not have asked for a receipt.

182. The Applicants placed some store by the response to paragraph 2.5 of the PIQ partially completed by Steven Montague on 20 February 2018. This stated that no loans had been made by officers of the Company. In my judgment, for reasons already explored, little weight can be attached to this document. When taken to the relevant passage from the PIQ in cross examination, the First Respondent stated that it was 'incorrect'.

183. The Applicants also relied upon the notes of Steven Montague's interview with the OR on the same day (20 February 2018), in which Steven is said to have stated:

> 'Warren [the First Respondent] paid the start-up costs of £1,500 and he was repaid. I know Warren had £10k to pay back his loan right near the end. I could be incorrect but that was my initial thought of what the figures were. … I transferred the £10k to him because he said he was owed it. I don't know why he was owed it.'

184. Again, for reasons already explored, little weight can be attached to the notes of Steven Montague's interview with the OR. It will also be noted that even the first line of the quoted extract from the interview is inconsistent with the PIQ which he had partially completed the same day. In cross examination the First Respondent stated that Steven's comments on this issue in interview were 'incorrect.'

185. In the notes of his own interview with the OR on 20 February 2018, the First Respondent stated :

> 'We did have start up costs for the call centre of about £10k that I lent them. I got repaid that but I couldn't tell you when.'

186. Overall, on the evidence which I have heard and read, I am satisfied that the sums of £2500 and £7500 paid by the Company to the First Respondent on 20 March 2017 were repayment of loan monies which the First Respondent had advanced to the Company to assist with start-up costs. Setting up a call centre would inevitably involve some initial outlay. There was no evidence before me to suggest that start-up costs were funded from any other source. On the evidence before me, it is most unlikely that Steven Montague could have funded the same himself, given his bad credit history. It is entirely plausible that he would have asked the First Respondent,

who he was asking to take an appointment as director of the Company, to lend the Company some money as well. The timing of the two payments to the First Respondent, set against a backdrop of no other payments to him by the Company throughout its trading life prior to these, also lends support to the First Respondent's explanation. I accept the First Respondent's evidence that the payments to him of £2500 and £7500 on 20 March 2017 represented repayment of loan monies advanced by him to the Company to assist with start-up costs.

187. Notwithstanding the fact that the payments of £2500 and £7500 represented repayment of loan monies advanced by him to the Company, however, the First Respondent was misfeasant in causing or allowing these payments to be made to him from Company funds on 20 March 2017.

188. By the time of the loan repayments of 20 March 2017, the Company was or was likely to become insolvent. This was due to a combination of payments wrongfully made from the Company bank account which were not for the benefit of the Company, including (by 20 March 2017) 'in branch cash withdrawals' of £10,400, 'bakery equipment' of £3762, 'miscellaneous' of £4,300, 'personal expenditure' of £2009, and payments totalling £37,400 to a company known as Peace of Mind Plans Limited. The sums paid to Peace of Mind were paid on to another company and used to fund a business which has since ceased trading. All these sums, which totalled £57,871, were likely to be irrecoverable. But for these wrongful payments, the Company is likely to have been in a position to pay off all its creditors; by the date of winding up, the only debt outstanding was the £40,000 ICO penalty. Nonetheless, as matters stood, by 20 March 2017, the Company had ceased trading and was or was likely to become insolvent.

189. From the First Respondent's own written testimony, it is clear that, by the time of repayment of the sum of £10,000 on 20 March 2017, the First Respondent knew that the business was at an 'end'. At paragraph 22 of his witness statement, the First Respondent stated:

> 'When I found out about the end of the business I mentioned to Steve that it was probably about time that I had my money back'.

190. As director of the Company he ought also to have known by 20 March 2017 that the Company was or was likely to become insolvent. From the notes of his interview with the OR, it is clear (and I so find) that the First Respondent knew prior to cesser of trading that the Company had been fined. Whilst the First Respondent was unsure of the exact date on which he was told that the Company had ceased trading, I am satisfied that by 20 March 2017, he knew of the ICO penalty and knew that the Company had ceased to trade. By then he had, in his own words, 'found out about the end of the business' and asked for his money back. A simple review of recent banking transactions, projected run-off income, outstanding debts and projected liabilities (including the ICO penalty then under appeal) would have made clear that, as of 20 March 2017, the Company was or was likely to become insolvent.

191. By 20 March 2017, it was therefore the First Respondent's duty pursuant to s.172(3) CA 2006 to have regard to the interests of the creditors as a whole. On the evidence which I have heard and read, I am satisfied that in causing or allowing the payments to himself of £10,000, the First Respondent gave no thought to their interests. The objective test therefore applies: *Re HLC Environmental Projects Ltd* [2013] EWHC 2876 (Ch). The Court must ask itself whether a reasonable and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transactions (in this case the two payments totalling £10,000) to the First Respondent were for the benefit of the creditors as a whole.

192. Applying that test, it is clear (and I so find) that as at 20 March 2017, a reasonable and honest man in the position of a director of the Company could not reasonably have believed that the two payments to the First Respondent totalling £10,000 were for the benefit of the creditors as a whole. The First Respondent should not have been seeking and accepting repayment of the sum of £10,000 for his own personal benefit at that time. In causing or allowing that sum to be repaid to him at such a time, he acted in breach of his duties under s.172(3) CA 2006. I shall therefore order the First Respondent to restore that sum to the Company pursuant to s.212 IA 1986.

The salary payments to the Second Respondent and Steven Montague: £15,422.20

193. The Applicants further seek an order that the First Respondent restore to the Company sums totalling £15,422.20 paid to the Second Respondent and Steven Montague by way of salary; in the case of the Second Respondent £11,080.60 for the period 17 February 2017 to 10 November 2017: and in the case of Steven Montague £4341.60 for the period 12 February 2017 to 30 March 2017.

194. As presented to me, the Applicants' primary case is that the First Respondent 'caused or allowed' these salary payments; that, at the time that they were made, the Company was or was likely to become insolvent, and that accordingly the First Respondent was under a duty pursuant to s.172(3) to act in the best interests of the creditors as a whole. They say that in causing or allowing these payments, he acted in breach of his duty under s.172(3) and accordingly should restore these sums to the Company.

195. On the evidence which I have heard and read, I am satisfied that the First Respondent knew that the Second Respondent and Steven Montague worked for the Company and were each paid a regular weekly salary by the Company up to cesser of trading. To that extent at least, in relation to the regular weekly salary payments of £599.60 received by the Second Respondent and Steven Montague up to cesser of trading, I am satisfied that the First Respondent 'caused or allowed' the same. He may not have known the precise amount they were paid each week, but he knew that they each drew a regular weekly salary and he allowed it.

196. On the evidence as a whole I am not satisfied that the First Respondent knew that the Second Respondent and Steven Montague received double their usual salary on 10 March 2017 (the date trading ceased) or that they continued to receive any sums by way of salary after that date. I will return to this point.

197. On the evidence before me I am not satisfied on a balance of probabilities that, from the date of the first salary payment relied upon (12 February 2017), the Company was insolvent or likely to become insolvent. The evidence before me on the timing of insolvency was scant, but from such evidence as there was, it was clear (and I so find) that the Company did not become insolvent as a result of the ICO penalty. It became insolvent as a result of a series of misappropriations spanning February and March 2017. Whilst the Company's fate was well and truly sealed by 20 March 2017 (the date of repayment of the First Respondent's loans), the position for most of February 2017 was unclear.

198. Moreover even if I am wrong in that conclusion, and that, as at 12 February 2017 the Company was or was likely to become insolvent, it does not inexorably follow that the First Respondent was misfeasant in 'causing or allowing' a salary payment of £599.60 per week to be made to each of the Second Respondent and Mr Montague from 12 February 2017 down to cesser of trading on 10 March 2017.

199. Applying the objective test (it being clear on the evidence that the First Respondent gave no thought to the interests of the Company or its creditors at any material time), in my judgment a reasonable and honest man in the position of a director of the Company would have reasonably believed that the weekly salary payments made to the Second Respondent and Steven Montague in the standard sum of £599.60 up to the cesser of trading (and indeed, up to the end of March 2017) were for the benefit of the Company (and, at the point at which it became or was likely to become insolvent), the creditors as a whole.

200. The Second Respondent and Steven Montague undoubtedly provided services to the Company up to cesser of trading and drew a fairly modest regular salary for the same. Whilst the Company ceased to trade on 10 March 2017, on the evidence overall I am satisfied on a balance of probabilities that up to the end of March 2017, the Second Respondent and Mr Montague continued to provide valuable services to the Company, including services relating to the winding down of the Company's business operations following cesser of trading (such as emptying the Company's office premises, cancelling utilities, and addressing maternity leave issues for one of the employees). I am also satisfied that a reasonable and honest man in the position of a director of the Company would reasonably have believed that the services provided post cesser of trading down to 30 March 2017 were for the benefit of the creditors as a whole.

201. It follows that, in relation to the standard salary payments of £599.60 per week made to the Second Respondent and Mr Montague over the period 12 February 2017 to 30 March 2017, the Applicants' primary case fails. In my judgment their secondary case in relation to these payments also fails; on the evidence as a whole, they have failed to establish on a balance of probabilities that the payments caused the Company any loss.

202. The 'double-salary' payment of £599.60 made to each of the Second Respondent and Mr Montague on 10 March 2017, and the purported salary payments made to the Second Respondent in the period 1 April 2017 to 10 November 2017 (collectively, the 'extra salary payments'), fall for separate consideration. On the evidence which I have heard and read, I am satisfied that the First Respondent did not know of, or receive

any personal benefit from, the extra salary payments. I am further satisfied that he did not 'cause or allow' the extra salary payments. It follows that the Applicants' primary case in relation to the extra salary payments, totalling £8682, must fail. The Applicant's alternative case in relation to these payments will be addressed further below, together with the 'Remaining Payments'.

The Remaining Payments

203. The remaining payments forming the subject matter of this application may be categorised as follows:

(1) The Peace of Mind/I4Sign Payments: £35,400

(2) Bakery Equipment: £3,762

(3) In branch cash withdrawals: £22,240

(4) Cash Machine withdrawals: £5985.55

(5) Miscellaneous/unknown payments: £5112.08

(6) Personal expenditure: £4091.29

Collectively, 'the Remaining Payments'.

(1) The Peace of Mind/I4Sign Payments: £35,400

204. The Company's bank statements record a number of payments from the Company's bank account to Peace of Mind Plans Limited and I4Sign Limited, purportedly in respect of 'database purchases'. All payments save for that of £2000 paid on 13 March 2017 were paid to Peace of Mind Plans Limited, a company of which the Second Respondent was sole director. The remaining £2000 was paid to a business known as I4 Sign. The payments were as follows:

1 February 2017: £7500

3 February 2017: £7500

6 February 2017: £3900

17 February 2017: £7500

20 February 2017: £1500

13 March 2017: £2000

14 March 2017: £7,500

205. On the evidence which I have heard and read, I am satisfied that none of these payments were made for the benefit of the Company. All such payments were misapplications of Company funds. I so find.

206. By her witness statement the First Respondent confirmed that she was a director and shareholder of Peace of Mind Plans Limited and that it had 'never traded'. In oral testimony, she volunteered that Steven Montague had arranged the payments to Peace of Mind, adding:

> 'Steve asked me to transfer the money [from Peace of Mind] to another account which was used to buy the bakery. He said it was money he had put aside.'

207. The 'bakery' referred to by the Second Respondent was a bakery purchased by Monty's Bakery Ltd, a company incorporated in January 2017, of which both the Second Respondent and Steven Montague were directors and shareholders. The Second Respondent resigned as a director in July 2017 as a result of her brother's heavy drinking and inappropriate behaviour with customers. In oral testimony she said that her brother had left the bakery 'massively in debt'.

208. From the Company's bank statements, it was clear that the monies paid to Peace of Mind did not truly represent sums 'put aside' by Steven. From the timing of the payments, compared with the timing of receipts into the Company's bank account from Checkout Pay, it was clear (and I so find) that the monies represented trading income of the Company.

209. From the timing of the payment to I4Sign, which post-dated cesser of trading by the Company and again bears the reference 'database purchases', on a balance of probabilities I am satisfied that payment to I4 Sign was also a misapplication of Company funds.

(2) Bakery Equipment: £3,762

210. The Company's bank statements also show payments in relation to catering and bakery equipment in March 2017, the month in which the Company ceased trading. The payments were as follows:

9 March 2017: H2 Products: £222

15 March 2017: Brock Food Process: £3540

Total: £3762

211. H2 Products are the suppliers of commercial catering equipment. Brock Food Process are suppliers of bakery equipment. At all material times, the Second Respondent and Steven Montague were directors of Monty's Bakery Limited, whose registered office is the residential address for the Respondents.

212. By her witness statement the First Respondent states (at para 33)

> 'I can only think that the payments in respect of the bakery equipment were Steven's contributions towards Monty's the sandwich shop… I did not ask him to do this and at the time

> that the equipment was purchased I simply recollect Steven mentioning that he had put some money aside to help with this.'

213. The bank statements for the Company account, however, show no credits from Steven in the run up to these payments being made and I was taken to no other evidence to suggest, still less establish, that these payments were indirectly funded by Steven, or to explain why an indirect payment would have to be made.

214. These payments were plainly not for the benefit of the Company. On the evidence I have heard and read, I am satisfied that the payments were further misapplications of Company monies. I so find.

(3) In branch cash withdrawals: £22,240

215. The Company's bank statements detail 18 debit transactions in the sum of £22,240 in the period 14 February 2017 to 1 December 2017, as follows:

14/2/2017	£1000
17/2/2017	£ 900
27/2/2017	£1500
7/3/2017	£2000
8/3/2017	£2000
14/3/2017	£1000
17/3/2017	£2000
24/3/2017	£1600
5/5/2017	£840
15/5/2017	£1350
24/5/2017	£500
24/5/2017	£850
31/5/2017	£920
2/6/2017	£970
9/6/2017	£940
23/6/2017	£640

28/11/2017	£2000
1/12/2017	£1230
Total:	£22,240

216. The last two payments post-dated the date of presentation of the petition and so are void transactions under s.127 IA 1986.

217. I was taken to no evidence to suggest that any of these cash withdrawals were for the benefit of the Company. Given the business model of the Company it is difficult to see what need it would have for cash withdrawals in these sums, even whilst trading; still less after it ceased to trade on 10 March 2017. On a balance of probabilities, I am satisfied that these cash withdrawals, totalling £22,240, were not for the benefit of the Company but were instead misapplications of Company funds. I so find.

(4) Cash Machine withdrawals

218. The Company's bank statements detail cash withdrawals in the sum of £5985.55 in the period 3 March 2017 to 17 July 2017. Of these, cash withdrawals totalling £5645.55 were made on or after 10 March 2017, at a time when the Company had ceased to trade.

219. The Second Respondent's evidence, which in this regard I accept, was that she was from time to time told by Steven Montague to refresh petty cash, for use purchasing stationery and other equipment used on a day to day basis within the business of the Company. There would also have been a selection of 'one-off' costs in the run-up to cesser of trading. Overall, I consider it legitimate to conclude that the cash withdrawals of £340 on 3 March 2017 and £200 on 10 March 2017 were used for company purposes.

220. I was taken to no evidence to suggest that any of the remaining cash withdrawals, totalling £5445.55, were for the benefit of the Company. These were all made after the Company had ceased trading. I consider it legitimate to conclude that these cash withdrawals were not for the benefit of the Company but were instead misapplications of Company monies. I so find.

(5) Miscellaneous/unknown payments: £5112.08

221. The Company's bank statements also disclose a number of payments the purpose of which is said to be unknown. These comprise a payment of £4300 on 6 March 2017 made to 'Simon', a payment of £9.58 made to Eastergate 04 2Esg on 24 March 2017, and four payments over the course of July and August 2017 marked 'tpdo'.

222. On a balance of probabilities it is more likely than not that the four payments bearing the description 'tpdo' relate to third party debt orders. I consider it legitimate to conclude that these payments were for Company purposes.

223. In relation to the remaining two payments in this category, I was taken to no evidence to suggest that either payment was for the benefit of the Company. Set against the pattern of other misapplications of Company money already addressed and given the

timing of the same, on a balance of probabilities I find that these two payments, totalling £4309.58, were not for the benefit of the Company but were instead misapplications of Company monies. I so find.

(6) Personal/Non-business expenditure: £4091.29

224. The Company's bank statements also contain a number of payments which do not appear to be genuine business expenditure, including vehicle maintenance and petrol charges totalling £2,087.12, supermarket expenditure of £286.41, hardware store charges of £373.61 and sky charges of £771.62. A full breakdown of the payments appears in the exhibit to Mr Bramston's first witness statement. The bulk of the payments post-date cesser of trading in March 2017. Overall, the payments run to October 2017, some seven months after the Company ceased to trade.

225. I was taken to no evidence to suggest that the payments in this category were for the benefit of the Company. Set against the pattern of other misapplications of Company money already addressed and given the timing of the majority of the same, on the evidence as a whole I find on a balance of probabilities that these payments, totalling £4091.29, were not for the benefit of the Company but were instead misapplications of Company monies.

The Remaining Payments: Position of the First Respondent

226. On the evidence which I have heard and read, I am satisfied that the First Respondent did not personally receive or benefit from any of the Remaining Payments. I so find.

227. I am further satisfied that the First Respondent did not know of any of the Remaining Payments. He had nothing to do with the Company or its banking arrangements. Notwithstanding Steven Montague's assertions on this issue, I accept the First Respondent's evidence that he did not have or use mobile or internet access to the Company's bank account at any material time. I also accept his evidence that he and the Second Respondent kept their financial arrangements separate.

228. I am also satisfied that the First Respondent did not know of any improper practice being perpetrated by those managing the Company's affairs. The fact that the First Respondent 'caused or allowed' repayment of his loan of £10,000 in breach of s.172(3) CA 2006 does not justify a conclusion that he was aware of any improper practice; he did not know that the repayment of his loan was improper. This is not a case falling within the category of cases identified in Lexi Holdings v Luqman (No 1) [2007] EWHC 2652 at [202].

229. For all of these reasons, the Applicants' primary case in relation to the Remaining Payments, that the First Respondent 'caused or allowed' or 'caused or permitted' such payments, therefore fails.

230. The next question therefore is whether the Applicants can make out their alternative case in relation to the Remaining Payments and the extra salary payments (collectively, 'the Payments').

231. According to paragraph (k) of the re-amended application notice, the Applicants' alternative case is that the First Respondent was 'in breach of his duties as a director

and misfeasant under s.212 Insolvency Act in abdicating his duties and responsibilities as a director and/or failing to supervise and thereby enabling' the Payments.

232. I have some concerns over the manner in which the Applicants have presented their alternative case on the Payments in their re-amended application notice and written evidence. As made clear by Chadwick LJ in Cohen v Selby, in a case based on abdication of duties, it is necessary to set out with some particularity what it is that the director ought to have done that he did not do; and what it was that he failed to do that caused the loss which the company suffered. These matters should be fully pleaded or, in the absence of pleadings, set out clearly in the written evidence in support.

233. An officeholder wishing to rely upon abdication of duties as the basis of a misfeasance claim under s.212 should particularise and evidence his case as he would a common law negligence claim; he must identify the duty, give particulars of the breach of that duty (including when the breach occurred), and show, on a 'but-for' basis, that the breach has caused the loss or damage complained of. As put by Chadwick LJ in Cohen: 'the court has to be satisfied that the negligence has caused a loss in respect of which compensation can be awarded. The position, in this respect, is the same as it would be if the company had brought an action in its own name'.

234. In the present case Mr Cole submits that the Applicants have failed by their re-amended application notice and written evidence adequately to particularise the breaches of duty relied upon or to demonstrate that the breaches relied upon caused the loss represented by the Payments.

235. Had paragraph (k) of the re-amended application notice alleged simply abdication of duties, I would have accepted this submission. Paragraph (k) however, contains a further allegation, that of a 'failure to supervise'. In the context of the application notice and supporting evidence read as a whole, in my judgment this falls properly to be construed as referring to (or including reference to) a failure to monitor or supervise use of the Company's bank account over the period forming the subject matter of this application in relation to the Payments (1 February 2017 to 1 December 2017).

236. I accept that the drafting is far from ideal. In my judgment however, it is sufficiently clear, read in the context of the application notice and supporting evidence as a whole, to indicate the basis of the alternative claim in relation to the Payments. In this regard I remind myself that the Respondents, when represented by solicitors, consented to the amendment of the application notice which resulted in the inclusion of paragraph (k). I was taken to no evidence to suggest that they objected to the formulation of paragraph (k), sought directions for pleadings or made a request for further information in relation to paragraph (k). In the circumstances it is in my judgment legitimate to conclude that the First Respondent understood, in broad terms, what was being alleged against him by this paragraph.

237. With these considerations in mind, I turn next to address the following issues, following the approach adopted by the Court of Appeal in Lexi Holdings:

(1) what the First Respondent knew, or ought to have known, had he performed his duties as a director;

(2) what steps the First Respondent should have taken, consistently with his duties, in light of the knowledge that he had or should have had; and

(3) what would have happened if the First Respondent had complied with his duties, and that, but for the breach, the transaction or loss complained of would not have occurred:

238. With regard to (1): by the time of the first of the Payments (that of 1 February 2017 in favour of Peace of Mind), had he performed his duties as a director, the First Respondent ought to have known that the Company was subject to the ICO penalty and that there was a significant risk that any appeal would fail. He ought also to have discussed with Steven Montague the impact of the ICO penalty on the Company. From such discussions he would know that, whilst Steven intended to appeal the penalty (thereby deferring the due date for payment of the same), Steven was also considering shutting the business down, as a result of the reputational impact of the penalty.

239. With regard to (2): by 1 February 2017, if not before, the First Respondent should have undertaken a review of the Company's cashflow position (and, as part of that process, the Company's recent banking transactions) and should have put in place a system of regular reviews thereafter. As sole director of a company employing staff paid weekly, in my judgment the First Respondent should have undertaken such reviews on a weekly basis.

240. With regard to (3): a review on 1 February 2017 would not have led to the conclusion that the Company was or was likely to become insolvent and (depending on the timing of that review) may not have alerted the First Respondent to the fact that a substantial payment of £7500 had been made out of the Company's account on 1 February 2017 in favour of Peace of Mind. Regular weekly reviews thereafter, however, would have revealed a pattern of unexplained substantial payments being made out of the Company's bank account in favour of Peace of Mind Plans Limited; payments of £7500, £7500 and £3900 were made in rapid succession to Peace of Mind on 1, 3 and 6 February 2017. Had the First Respondent undertaken weekly reviews of the Company's cash position from 1 February 2017 as he should have, on a balance of probabilities I am satisfied that he would have discovered these misappropriations by the end of the second week of February 2017.

241. Having discovered these misappropriations, he should have raised them with Steven Montague, as the individual having access to and day to day control of the account. As there was no conceivable basis upon which Steven Montague could begin to justify these misappropriations in context (he would have been unable to prove if challenged that the monies were his, and would not have been able to justify loans to a start-up company such as Peace of Mind at a time when the Company was about to cease trading), the First Respondent should have rejected Steven Montague's excuses and assurances and should have taken control of the Company's bank account himself.

242. As sole director and shareholder of the Company and as sole signatory of the Company's bank account, the steps required to secure control of that account and to ensure that Company funds were preserved and used only for legitimate purposes were well within his grasp. He should have alerted the bank, changed the codes for online access to the Company's bank account, arranged for the cancellation of any existing bank cards for the account, and arranged for the issue of a new bank card for his sole use, in order to ensure that thereafter, no payments out of the account were made without his informed authority and that all transactions on the account were for the benefit of the Company.

243. By 10 March 2017 he ought also to have known that the Company had ceased trading and was or was likely to become insolvent. Thereafter he should have taken all steps reasonably required to preserve the assets of the Company for the benefit of the creditors as a whole pending the Company's entry into a formal insolvency process.

244. Causation in this case is relatively simple. It was accepted by the First Respondent in cross examination that had he known of the misapplication of funds in the Company's bank account, he 'could have taken steps to stop that happening.'

245. In my judgment the First Respondent should have known by the end of the second week of February 2017 that Company funds were being misappropriated. By 13 February 2017 at the latest, he should have taken control of the Company's bank account.

246. On the evidence which I have heard and read, I am satisfied (1) that the First Respondent failed to monitor and supervise the Company's cashflow position (including banking transactions) from 1 February 2017 (2) that such failure was a breach of duties which he owed to the Company pursuant to s.174 CA 2006 and (3) that such breach caused the Company loss. I am further satisfied that the loss suffered by the Company as a result of his said breach comprises such of the Payments found by this judgment to have been misapplications of Company monies as were made on or after 13 February 2017; a total of £63,908.50. But for his breach, the loss caused by all such payments could readily have been avoided. The total of £63,908.50 is calculated as follows:

Extra salary payments: £8682

Peace of Mind/14Sign: £16,500

Bakery/catering equipment: £3762

In branch cash withdrawals: £21,240

Cash machine withdrawals: £5445.55

Miscellaneous payments: £4309.58

Personal payments: £3969.37

Total: £63,908.50

247. Moreover in case I am wrong to conclude that, in failing to monitor and supervise the Company's cashflow position from 1 February 2017, the First Respondent was in breach of duties owed by him to the Company pursuant to s.174 CA 2006, I would add that, on the evidence which I have heard and read, I am in any event satisfied that in failing to monitor and supervise the Company's cashflow position (including banking transactions) from 10 March 2017 (the date of cesser of trading), the First Respondent was in breach of such duties. I am further satisfied that the loss caused by this breach would comprise such of the Payments found by this judgment to have been misapplications of Company monies as were made after 10 March 2017; a total of £44,262.42, calculated as follows:

Extra salary payments: £8682

Peace of Mind/14Sign: £9500

Bakery/catering equipment: £3540

In branch cash withdrawals: £14,840

Cash machine withdrawals: £5445.55

Miscellaneous payments: £9.58

Personal payments: £2245.29

Total: £44,262.42

248. By 10 March 2017 the First Respondent ought to have known that the Company had ceased trading. At that stage if not before, he should have undertaken an immediate review of the Company's cashflow position (including banking transactions), with regular reviews thereafter. He ought to have concluded from the first of such reviews that the Company was or was likely to become insolvent. He ought also to have concluded from the first of such reviews that monies had been misappropriated from the Company's account from 1 February 2017 onwards. At that stage, even if not before, he should have taken the steps summarised in paragraphs 241 and 242 above. He should also have taken all other steps reasonably required to preserve the assets of the Company for the benefit of the creditors as a whole pending the Company's entry into a formal insolvency process. Had such steps been taken, the loss caused to the Company of £44,262.42 could readily have been avoided.

Conclusions

(1) The First Respondent

249. For the reasons which I have given, I conclude that:

(1) In failing to take appropriate steps (1) to inform himself of the PECR requirements applicable to the Company's business and (2) to take reasonable steps to ensure that the Company traded only with PECR compliant data, the First Respondent acted in breach of the duties owed by him to the Company pursuant to s.174 CA 2006 and

thereby caused the Company loss of £40,000. He shall be ordered pursuant to s.212 IA 1986 to compensate the Company in respect of that loss in the sum of £40,000.

(2) In causing or allowing the Company to make payments to himself of £10,000 on 20 March 2020, the First Respondent acted in breach of the duties owed by him to the creditors of the Company as a whole pursuant to s.172(3) CA 2006. He shall be ordered pursuant to s.212 IA 1986 to restore that sum to the Company but shall be at liberty to prove in the liquidation of the Company for the same.

(3) The First Respondent has failed to satisfy the court that the payment to him of £600 from Company funds on 18 July 2017 was proper and accordingly is liable to account to the Company for that sum. He shall be ordered pursuant to s.212 IA 1986 to restore that sum to the Company.

(4) In failing to monitor and supervise the Company's cashflow position (including banking transactions) from 1 February 2017 onwards, the First Respondent is in breach of the duties owed by him to the Company pursuant to s.174 CA 2006 and has caused the Company loss of £63,908.50. He shall be ordered pursuant to s.212 IA 1986 to compensate the Company in respect of that loss in the sum of £63,908.50.

(2) The Second Respondent

250. For the reasons which I have given, the Applicants have not made out their case that the Second Respondent was a de facto director of the Company. The case against the Second Respondent shall therefore stand dismissed.

251. I shall hear submissions on the terms of the order, interest and costs on handing down judgment.

ICC Judge Barber

24 September 2020