OUTER HOUSE, COURT OF SESSION

[2018] CSOH 42

CA19/16

OPINION OF LORD CLARK

In the cause

CALEY OILS LIMITED (IN ADMINISTRATION), Bishop's Court, 29 Albyn Place, Aberdeen AB10 1YL and EWEN ROSS ALEXANDER and GORDON MALCOLM MACLURE, both of Bishop's Court, 29 Albyn Place, Aberdeen AB10 1YL, the Joint Administrators thereof

Pursuers

against

DAVID JOHN WOOD, residing at Bedewood House, Cullen, AB56 4XN

Defender

Pursuer: D Thompson QC; Davidson Chalmers LLP
Defender: Party

20 April 2018

Introduction

[1] In this action, the pursuers, as the joint administrators of Caley Oils Limited ("the Company"), seek recovery of certain sums from the defender, who is the sole director of the Company. The joint administrators were appointed on 20 August 2015. The first sum sought is £295,119, said by the pursuers to be the total sum of money loaned by the Company to the defender and not repaid. The second sum sought is £150,000, made up of two payments by the Company to the defender on 12 August 2015. This second sum is claimed on two separate grounds: firstly, that the payments constituted unfair preferences for the purposes

of section 243 of the Insolvency Act 1986 ("the 1986 Act"); and, secondly, that in making payment of these sums to himself, the defender acted in breach of his duty at common law to have regard to the interests of the Company's creditors.

Procedural history

[2] In terms of substantive procedure, the procedural history of the case can be summed up as follows. Following a debate on 24 August 2016, decree *de plano* was granted by the Lord Ordinary who heard the debate, for payment by the defender to the pursuers of £280,116 (the sum then sued for), and the pursuers were awarded the expenses of process. The defender reclaimed. The Inner House allowed the defender time to lodge a minute of amendment. By interlocutor dated 3 May 2017 the defender's minute of amendment was allowed to be received, the pursuers were given time to lodge answers and the interlocutors of the Lord Ordinary granting decree *de plano* and awarding expenses were recalled. Following adjustment of the minute and amendment and answers the case was once again appointed for debate and a motion for summary decree, enrolled by the pursuers, was continued to be heard on the same day as the diet of debate. On 3 November 2017, the case called before me for the diet of debate and on the pursuers' motion for summary decree. Having considered the note of argument lodged by the defender, who is a party litigant, it became apparent to me that factual matters of potential relevance to his defence were raised in the note but not in the pleadings. I also formed the view, after hearing from the defender, that he wished to explain further his position on certain matters. I therefore granted a motion by the defender, which was opposed by the pursuers, to discharge the diet of debate and to allow him to lodge a further minute of amendment. The pursuers were allowed to lodge answers to the minute of amendment, if so advised, and both parties were allowed a

period of adjustment. On 8 December 2017, I allowed the summons and the defences to be amended in terms of the minute of amendment and answers, as adjusted. On the unopposed motion of the pursuers, a debate was fixed and the pursuers' motion for summary decree was continued to the same diet. In view of the fact that there was to be a motion for summary decree in which material other than the pleadings could be considered, and that the defender was a party litigant who might well wish to explain his position more fully than was set out in his pleadings, I considered it appropriate that both parties be given the opportunity to lodge any documents and affidavits to be relied upon at the hearing. I also made orders as to the exchange of documents. Documents and affidavits were lodged. The hearing took place on 31 January 2018. The defender expressed certain concerns about documents not having been made available by the pursuers but following an explanation by senior counsel for the pursuers, in particular as to the matters to be relied upon in relation to the allegation of insolvency, the defender was content to proceed.

The pursuers' case in outline

[3] In their pleadings, the pursuers make a number of detailed averments setting out specific points about the financial position of the Company and aver that as at 12 August 2015 the Company was insolvent. These averments relate to debts due by the Company to its principal creditor, ASCO UK Limited ("ASCO"). The pursuers' position, in relation to the debate, was in short that the defender had made no relevant averments in his defences in respect of the pursuers' case that the sum of £150,000 was paid to him by the Company when the Company was insolvent or verging upon insolvency, and that he acted in breach of fiduciary duty as director of the Company by making such payment without considering or having regard to the interests of the Company's creditors. Separately, the pursuers

argued that the defender's averments to the effect that a payment of £100,000, made by Impact Trading Limited to the Company on 28 November 2013, was a payment made on his behalf, were irrelevant. In respect of the motion for summary decree, the pursuers contended that the defender had no defence to the claim for repayment of the £150,000. It was accepted by the pursuers that the remaining issues (which concerned the first sum claimed and the claim in respect of the £150,000 sum based on section 243 of the 1986 Act) should be determined, if so required, at a proof before answer.

The defender's averments

[4] In the defences, as amended, in response to the primary points raised by the pursuers about alleged insolvency of the Company and the payments totalling £150,000, the defender's main averments can be summarised as follows. The payments to him on 12 August 2015 were in fact repayments by the Company of sums due by the Company to him. They fell within the permitted scope of section 243(2) of the 1986 Act and therefore were legitimate. The repayments were within the normal course of business of the Company for the purposes of that provision. There was a clear precedent established over a period of years showing that there was a normal practice by the defender to make short-term advances to the Company on the basis of an informal arrangement that the Company would repay the advances as soon as funds were available. The sums which made up the £150,000 paid by the defender to the Company were payments made in good faith by him as short-term advances to assist cash flow. The defender was not required to make any such payments.

[5] The Company was at no point insolvent, including when it entered administration. In any case, ASCO was about to take over the Company (by exercising rights under a share

pledge agreement). It was within the parameters of the normal course of business in such circumstances for the defender to be repaid monies owed to him under his loan account. The fact that the Company was not insolvent at the point of administration was reflected in the return to creditors which had been achieved, which was said to be "of a percentage to debt ratio hard to find even when studying many thousands of insolvencies or administrations and the comparative yield to creditors".

[6] The Company was not outwith payment terms agreed with ASCO. The Company was paying invoices from ASCO within the same period as it had done consistently for three years. At no point did ASCO put the Company's account on stop, until eight days before administration, despite the same pattern of payment over three years. It was inconceivable that the monies due to ASCO (which were consistently in the region of, and often in excess of, £7m) were overdue for three years and that an organisation such as ASCO had failed to take notice or take any action during that time period. The fuel supply agreement with ASCO had no specific terms on payment and therefore the implied position was that the existence of three years of precedent established the terms on which demands for payment could be made. ASCO was making unreasonable demands verbally to the Company whereby payments effectively totalling some £7 million had to be made in order to bring the account balance down to around £3 million. This was while ASCO was simultaneously refusing to release securities to enable a finance facility to be put in place by the Company. ASCO had acted in a completely unreasonable manner. The likelihood of long-term funding being obtained was non-existent in the absence of any security being available to a new lender. Interim funding may well have been achievable, was it not for the unavailability of security. ASCO had also acted unreasonably in forcing or at least pressurising the Company to produce management account figures during a very short timescale of a few hours. The

Company's creditors would all have been paid in due course. There was no risk to creditors at the date of the two payments totalling £150,000. The Company was solvent. ASCO at this point was taking over the Company as shown in discussions during meetings with, and in emails from, the Chief Executive Officer and Chief Financial Officer of ASCO. The plan was for ASCO to trade the Company as a going concern alongside ASCO.

[7] ASCO had made no formal demands for payment prior to administration. The first communication or mention of administration which was imparted to the defender was when he was told the administrators had been appointed. ASCO was under severe financial pressure and was forced to take irrational action and exercise authority under the securities it held which resulted in the Company being put into administration. ASCO had financial and cash flow difficulties. ASCO's refusal to release the securities they held meant that ASCO was complicit in the failure of the Company by acting in an irresponsible manner. The defender would not have risked depositing £150,000 of his own money into the Company's bank account had he believed or had reason to suspect that the Company was at risk of entering administration. In any event, even if a state of insolvency had existed the two payments totalling £150,000 would still be permissible under the insolvency legislation. As the Company was solvent and the defender had no prior knowledge of the prospect of administration, the defender could not have acted differently in regard to payments to and from his loan account with the Company and therefore the two payments totalling £150,000 were legitimate and correct. The pursuers' arguments and averments should be dismissed as they were based upon false assumptions that the Company was insolvent.

[8] On the secondary matter raised by the pursuers, the defender avers that the £100,000 paid by Impact Trading Ltd to the Company on or around 28 November 2013 was a payment made from funds due to the defender by Impact. It was the defender's usual

practice to make inter-company payments rather than routing payments through his personal bank account. This was a practical way of doing things. In Answer 6, the defender makes further averments to the effect that the sum of £100,000 paid to the Company by Impact did not feature in the relevant ledgers, covering the Company's dealings with Impact, as a payment of a debt due by Impact.

Submissions for the pursuers

[9] In summary, the pursuers' submissions were as follows. It was apparent from the defender's averments that he admitted having caused the Company to make two payments to him, of £50,000 and £100,000, on 12 August 2015. While those payments were challengeable in terms of section 243 of the 1986 Act, the pursuers were content to reserve argument on that question to a proof before answer, if indeed enquiry was ultimately required in respect of that part of the claim.

[10] However, the making of such payments to the defender, on the effective eve of the administration of the Company, gave rise to an obvious breach of the duties which a director owed to the general body of creditors of the Company. Reference was made to the detailed averments on behalf of the pursuers to the effect that the Company was insolvent at the time when the payments were made. It was plain that the Company was insolvent or at least on the verge of insolvency at that time. The defender did not suggest that if the Company was insolvent or verging on insolvency the duty founded upon by the pursuers was not owed by him.

[11] The defender made repeated averments that the Company was "not insolvent" either at the time he caused the Company to make the payments or, indeed, when it entered administration some eight days later. The defender made averments about the percentage to

debt ratio in the return to creditors which had been achieved following upon administration. Those averments were obviously irrelevant since they had no bearing on the question of whether the Company was insolvent at the material time. The averments by the defender as to the Company not being insolvent were also materially lacking in specification.

[12] The defender further averred that the credit period agreed with the Company's principal creditor, ASCO, was not exceeded. This was plainly without foundation. Firstly, the averment appears to contradict the later averments by the defender that no payment terms were agreed with ASCO. Secondly, the fuel supply agreement with ASCO plainly made reference, at clause 1.4, to ASCO's terms and conditions. These required payment within a specified period. The defender made averments about implied terms and the existence of the three-year period of precedent establishing the terms on which any demands made by ASCO for payment should be based. But there was no agreement, other than the terms of the fuel supply agreement. More fundamentally, the pursuers had made detailed averments concerning the dealings between the Company and ASCO which had not been properly addressed in the defender's pleadings. The court was entitled to proceed, and should proceed, on the basis that the pursuers' averments were well-founded and that the defender had no proper answer to them. The averments to the effect that ASCO's conduct was unreasonable were also irrelevant.

[13] Further, the averments that ASCO was, at the time of the payments to the defender which are the subject of challenge, taking over the Company following discussions during meetings and emails with the Chief Executive Officer and Chief Financial Officer of ASCO, were irrelevant and materially lacking in specification. They were nothing to the point so far as the questions of whether the Company was insolvent, and whether it was in the interests of the creditors of the Company as a whole that payments to the defender be made, were

concerned. The averments that ASCO was under severe financial pressure and was forced to take irrational action were also irrelevant and materially lacking in specification. They did not provide any proper basis for a finding that the Company was solvent at the relevant time or that ASCO was demanding payment of sums which were not in fact due to be paid to it.

[14] In relation to authority, reference was made to Bell, *Commentaries*, ii 170:

> "… from the moment of insolvency a debtor is bound to act as the mere trustee, or rather as the *negotiorum gestor*, of his creditors, who thenceforward have the exclusive interest in his funds".

In the normal course, a company director owes duties to the company rather than to anyone else. However, the position changes when the company becomes insolvent or close to insolvency, when the interests of creditors become pre–eminent. Reference was made to *Colin Gwyer & Associates Ltd* v *London Wharf (Limehouse) Ltd* [2003] BCC 885, 906, in which, having referred to *West Mercia Safetywear Limited* v *Dodd and another* [1988] 4 BCC 30, 33 per Dillon LJ, it was said by Leslie Kosmin QC, sitting as a deputy High Court judge, that:

> "Where a company is insolvent or of doubtful solvency or on the verge of insolvency and it is the creditors' money which is at risk the directors, when carrying out their duty to the company, must consider the interests of the creditors as paramount and take those into account when exercising their discretion."

[15] In the present case the defender made no averments whatsoever to the effect that, in so far as the payments totalling £150,000 to him were concerned, he ever considered the interests of creditors, let alone determined that it was in the best interests of creditors that such payments be made to him. It was in any event difficult to conceive how it could ever be said that it was in the interests of the Company's creditors as a whole that the defender should cause the Company to pay him £150,000 in the circumstances.

[16] The pursuers had set out at some length the financial problems which were facing the Company at the relevant time. These included the Company's inability to make a payment to ASCO on 7 August 2015, the Company's failure to make any payments to ASCO in August 2015, and the Company's account with ASCO being placed on stop on 12 August 2015. There were also averments about the Company's payments to the defender and an unrelated company under his control in the days leading up to administration. These averments plainly established the state of actual insolvency of the Company by the time of the making of the two payments to the defender on 12 August 2015. In that regard reference was made to sections 122 and 123 of the 1986 Act. All of these averments by the pursuers were met simply by a general denial and the defender did not make any relevant averments to explain his position regarding the financial position of the Company. This was uncandid. By the time of debate, it must be assumed that the parties have said all that they wish to say on record. Reference was made to: *EFT Finance Ltd* v *Hawkins* 1994 SC 34; *Ellon Castle Estates Company Ltd* v *MacDonald* 1975 SLT (Notes) 66; and *Albyn Housing Society Ltd* v *Active Sustainable Energy Systems* [2016] CSOH 110. These cases demonstrated that a basic principle of pleadings was the need for candour on the part of the parties. If there was no candid response to the pursuers' averments the court could proceed on the basis the pursuers' case was well-founded. That was the position here. It was accordingly appropriate that decree *de plano* should be granted as second concluded for.

[17] The pursuers' alternative motion was to seek summary decree as second concluded for on the basis that no defence to that part of the pursuers' claim was disclosed in the defences. Reference was made to rule 21.2 of the Rules of the Court of Session and to *Henderson* v *3052775 Nova Scotia Ltd* 2006 SC (HL) 85. In short, there was, on the part of the defender, no relevant offer to prove that the Company was being required to pay monies by

ASCO before they were due for payment. There were no averments that it was in the interests of the Company or its creditors as a whole for the Company to make the two payments in question to the defender. Summary decree should therefore be granted.

[18] Reference was also made to *Charterbridge Corporation Ltd* v *Lloyd's Bank Ltd and another* [1970] Ch 62, which framed the question as being whether an intelligent and honest man in the position of the director concerned could, in the whole of the existing circumstances, have reasonably believed that he was acting for the benefit of, in the present case, the creditors. There was no suggestion of any such belief on the part of the defender.

[19] In the present case the court had ordered the lodging of affidavit evidence and any documents upon which parties sought to rely. The key issues which arose from that material concerned the terms in which any contract with ASCO was concluded, the question of whether the Company complied with those terms, and the question of the Company's insolvency because of its inability to pay sums properly due to ASCO. It was clear that the Company was aware of the issues. Reference was made to the affidavit of Wendy Lipkovics, a former Chief Financial Officer of the Company. She stated that the defender controlled the monies paid to creditors. She explained ASCO's demands for payment. The sum due at the end of June 2015 which required payment by the end of July 2015 was over £2.2 million. She referred to an email of 7 August 2015 which stated that the Company had not been able to make the normal weekly payment due to ASCO. Reference was made to a further email of 11 August 2015 from ASCO requesting a meeting with the defender to discuss getting the Company's debt down from some £7m to around £3m. Any meeting to discuss possible arrangements involving ASCO taking over the Company took place at some point in time after the payments to the defender had been made. There was no suggestion in any earlier correspondence of ASCO exercising its security rights (under the share pledge) and taking

over the Company. In short the Company was unable to pay anything to ASCO, and ASCO was pressing for payment and for proposals to get the total indebtedness down.

[20] Next, reference was made to an affidavit from Gordon MacLure, one of the joint administrators. He explained that by early August 2015 the Company's outstanding balance due to ASCO had increased to over £7m. ASCO, as the holder of a qualifying floating charge over the Company's assets, took the decision to appoint administrators. The Company's accounting records had not been properly maintained since March 2014. He explained that in his view the Company was insolvent on a balance sheet basis. He referred to a statement of affairs showing the sums outstanding and that payments were not being made. The outstanding debt to ASCO at the date of the administration was £7,583,902. Ultimately, taking into account the net assets of the Company, there was a £5.3 million shortfall to ASCO. He was in little doubt that the Company was insolvent as at 31 July 2015.

[21] Reference was also made to the affidavit of Mark Walker, Group Chief Financial Officer of ASCO. He referred to the fuel supply agreement and to its terms. Under that agreement, payment was due on the twentieth day of the following calendar month after delivery of the fuel by ASCO. He referred to delays in payment by the Company being tolerated by ASCO but being outwith the provisions of the contract. There was no agreement with ASCO to a different credit period. In respect of how much was outstanding at particular points in time, reference was made to debts unpaid in July and August 2015. By 31 July 2015, sums outstanding for more than 70 days totalled more than £1 million. In relation to discussions about exercise of the security rights held by ASCO, the meeting which took place was on 13 August 2015, that is, after the payments to the defender had been made. On that day, the supply of fuel from ASCO was placed on stop. There was never

any commitment by ASCO to take over the Company's business, which it could do by virtue of the share pledge granted in its favour.

[22] These affidavits contradicted what the defender stated about there being an agreement with ASCO to a takeover of the Company, said to have taken place before he paid the money to himself. It was simply wrong that ASCO had already agreed to exercise its share pledge rights. The evidence from the affidavits also showed the incontrovertible fact that there was a written contract between the Company and ASCO in which actual contractual payment terms were set out and that ASCO had been willing to tolerate payment outwith those terms. In considering whether the Company failed to pay sums due, it was clear that the debts were not being met. The Company was not able to make payment of its debts as they fell due. That material made good the pursuers' case. ASCO had no financial difficulties and was demanding payment of sums due by the Company, but did not get paid. The Company was insolvent and there was money outstanding, which the Company was due to make payment of prior to 12 August 2015, but it did not and could not pay the sums due. No alternative payment terms were ever agreed and the Company was unable to meet its payment obligations. There were no relevant averments that ASCO demanded sums which were not due for payment. The creditors of the Company were plainly prejudiced as £150,000 left the Company's assets on 12 August 2015. The pursuers did not accept that the sums of money that the defender withdrew were truly due to him. There was a loss to the Company. There was no suggestion that the payment of £150,000 did not prejudice creditors.

[23] Overall, the defender's position was manifestly irrelevant or demonstrably untrue. The Company was actually insolvent or at least of doubtful solvency, or on the verge of insolvency, when the defender withdrew the sums. Whether for the purposes of relevancy

or for the purposes of summary decree, the insolvency of the Company should be taken as established.

[24] On the subsidiary matter, the defender's averments relating to the payment of £100,000 by Impact Trading Limited ("Impact") on 28 November 2013 being a payment made on his behalf were irrelevant. The defender averred that this was a payment of sums due to him by Impact and that it was his usual practice to make inter-company payments rather than routing payments through his personal bank account. The pursuers made detailed averments, supported by the defender's loan account with Impact, showing that there was no basis to conclude that Impact already owed £100,000 to the defender and that when it made the payment it was discharging an existing obligation which it owed to the defender. The pursuers had placed calls upon the defender to specify the factual basis for his averments. These calls were unanswered. Based on the authorities as to candour canvassed earlier, the defender's bare assertion failed to respond adequately to the detailed material put forward by the pursuers. There was simply nothing to show that Impact ever owed £100,000 to the defender. This was not a matter which could properly go to proof as there was no fair notice of any basis upon which the defender offered to prove that Impact owed him £100,000. His unparticularised assertion was insufficient.

Submissions for the defender

[25] At the outset of his submissions, the defender accepted that what was stated in his affidavit about a meeting with ASCO having taken place in early August 2015, about a potential takeover, was incorrect. The meeting took place after 12 August 2015. He accepted that there was no existing agreement with ASCO about any takeover in place as at 12 August 2015, when the sums totalling £150,000 were withdrawn. He also accepted that

the point made in his affidavit about the director's loan made by him being repayable when this takeover occurred could not be maintained.

[26] The first mention of ASCO chasing money from the Company was in an email from them on 23 June 2015. His recollection was that the £150,000 had been paid to the Company by him in late June or early July 2015. This was therefore after the time at which ASCO was asking for payment. If the £150,000 withdrawn on 12 August 2015 had not just been put in by him to the Company's account, there would have been a clear disadvantage to the general body of creditors. All that happened on withdrawal was a restoration of the position over a short period. There was a clear precedent over three years of him paying in such short-term loans to the Company and the Company repaying them as soon as possible. It was a transaction in the ordinary course of business. Nothing unusual was being done. It was a two-part transaction; a debit and credit which cancelled each other out. There was no detriment to creditors from that transaction. The money was put in by him simply to assist short-term cash flow.

[27] In relation to the payment terms with ASCO, it was agreed by them that they would provide credit as and when necessary. No specific period for credit was identified. The general position was that the Company would pay outstanding invoices on the last day of the subsequent month to that in which the debt was incurred. But payment within 90 days was accepted. If ASCO had any concerns it would have done something.

[28] In general, the points made in the affidavits referred to by senior counsel for the pursuers were accepted as well-founded and truthful. However, there were significant concerns about the affidavit of Wendy Lipkovics. Much of it was untrue and didn't reflect what had in fact happened. A lot of it was also largely irrelevant. She was trying to paint a picture which hindered the defender's case.

[29] The fact that the debt with ASCO was growing was something that both sides wanted; the increase in debt was because of an increase in the value of sales. The primary thing which impacted upon the growth of the debt was ASCO's refusal to release the security it had, which would have allowed for additional funding to be obtained. Discussions about reducing the ASCO debt had gone on for some three months prior to August 2015. ASCO simply wouldn't agree to release of the security to allow other funding to be raised. That placed the Company in an awkward position. The suggestion by ASCO of reducing the debt from £7 million to £3 million over six weeks was simply impossible without some alternative funding. No company could raise that money. It was a completely unreasonable request.

[30] There had been three years of trading with ASCO with very little difference in terms of payment patterns. Nothing had occurred prior to 12 August 2015 that indicated to him that the Company was going to be placed in administration. There was a meeting with ASCO on 13 August 2015. However apart from some of what was said about that meeting, Mark Walker had not said anything false in his affidavit.

[31] In relation to the subsidiary point raised by the pursuers, the payment made by Impact to the Company was on the defender's behalf and was to expedite the movement of funds. This was the normal procedure. There was nothing unusual in a transaction of that nature. The defender was the sole director and shareholder of Impact. Impact owed hundreds of thousands of pounds to him. He was entitled to make the payment by Impact, on his behalf. It could be classed as a loan repayment by Impact to him, or as a dividend or a loan to him; it did not matter how it was classified. Basically he took money from one company that he owned and put it into another company as a loan. The reason why Impact owed him £100,000 was irrelevant; it was effectively his money.

[32] A clear defence had been set out in the documents and fair notice had been given of what the defender intended to prove. Every transaction over the three-year period referable to the director's loan account and in relation to Impact would be proved. All of the transactions were set out. The idea that the payment of £150,000 on 12 August 2015 to the defender himself was detrimental to the general body of creditors meant that a lot of other payments in the preceding six months, none of which had been challenged, had the same effect. There was no difference in the net worth of the Company arising from this transaction; sums were put in and were taken out. There was no prejudice to creditors. In terms of section 243 of the 1986 Act, this would be regarded as payment in the ordinary course of business of a debt actually due. It was in accordance with how matters had been conducted over the three-year period. Short-term advances were repayable on demand whenever the defender as director called for them. Evidence had been provided to back up each transaction and every debit and credit. Throughout the three-year period the defender had acted in the interests of the Company. His actions in making payments had been to help the Company. He was under no obligation to put monies into the Company in the first place. The kind of transaction which occurred here was quite different from those within the case law to which senior counsel for the pursuers had referred.

[33] In seeking to understand Mr MacLure's affidavit, it should be noted that the Company's trade was primarily to supply fuel to fishing vessels. This was a market which ASCO did not wish to engage in directly but did wish to do so indirectly, in effect through the Company. The sums due to ASCO included fuel duty and VAT. Fuel duty and VAT were reclaimed by the Company on a monthly basis. Accordingly, the figures stating sums said to be due to ASCO were distorted by the inclusion of fuel duty and VAT. These made the deficit seem much worse than was actually the case.

[34] In relation to the credit period with ASCO, the implicit terms worked to override the written agreement. ASCO accepted the trading terms for supply at, and during, meetings. It would provide whatever credit was needed to allow the Company to grow its business and thus grow ASCO's business.

Reply for the pursuers

[35] Senior counsel for the pursuers made five brief points in reply. Firstly, the defender's reliance on section 243 of the 1986 Act was misconceived. None of the points made about the sums being cash payments of debts actually due in the ordinary course of business assisted in relation to the case actually being advanced at debate. Secondly, there were matters of factual dispute, but the extent to which Mr Wood contested the affidavit evidence was principally in relation to Wendy Lipkovics. The essential factual propositions which had been advanced on behalf of the pursuers were plainly not in dispute. Thirdly, in relation to the subsidiary point about Impact, if the defender wished to make good the proposition that Impact used its money to pay the Company on his behalf he must make averments to that effect. It would not do to say, as he did, that it could be a dividend or loan. It was not appropriate to have various possibilities hanging in the air. The position as pled was that the £100,000 was owed to him and so payment by Impact to the Company discharged an existing obligation to him, but no averments were made in support of that assertion. Fourthly, in relation to fuel duty and VAT refunds, these had been taken into account. The figures given in the affidavit of Mr MacLure were contained in a spreadsheet he had produced which took into account these refunds, hence their characterisation in the spreadsheet as an asset. Lastly, the averments which the pursuers submitted should be excluded were identified.

Reply by the defender

[36] The defender repeated his position that the £100,000 payment by Impact was money due to him and it was irrelevant on what basis it was due. He could take money from Impact as its sole director and sole shareholder.

Decision and reasons

Insolvency

[37] In his averments and submissions the defender contended that as at 12 August 2015 the Company was not insolvent. In order for the common law duty founded upon by the pursuers to be engaged, the Company must have been, as at 12 August 2015, (to quote from the case founded upon by the pursuers) "insolvent or of doubtful solvency or on the verge of insolvency". It is, in my opinion, clear from the information provided, and in particular the contents of the affidavits of Mr MacLure and Mr Walker (which, as I have noted, were very largely undisputed by the defender) that as at 12 August 2015 the Company was not able to pay its debts as they fell due. ASCO was pressing for payment of sums due. The uncontested position put forward in Mr Walker's affidavit was that by 31 July 2015, sums outstanding for more than 70 days, and thus well outwith the credit period, totalled more than £1 million. The email of 7 August 2015 made clear that the Company had not been able to make the normal weekly payment due to ASCO but said the payment should be able to be made at the start of the next week. The sum due was in fact never paid.

[38] On the defender's own account of matters, the only way of obtaining finance to stop the debt growing would have been for ASCO to release its security so that it could be used

in security for further funding from elsewhere. It was, however, clear to all involved that ASCO would not release the security.

[39] In relation to payment terms, it is correct that historically ASCO had tolerated delays in payment by the Company, even though these had resulted in sums being paid outwith the terms of the contract. The defender submitted that ASCO had agreed that it would provide credit as and when necessary and that no specific period for credit was identified. But no real basis was presented for concluding that the terms of the fuel supply agreement had ever been altered so as to give this different, and indeed unspecified, credit period from that stated in the agreement. The defender did not contend that the fuel supply agreement was not binding on the Company. In relation to the fuel supply agreement, he averred:

> "It has no specific terms within it therefore under implied terms as held under Scots law, the existence of three years precedent established the terms on which any demands for payment should be based."

However, the defender accepted as accurate the points made in Mr Walker's affidavit, which included his explanation of the true position on the credit period as agreed in the express terms of the fuel supply agreement. I was not addressed by the defender as to how the test for implication of terms could be met, but it is trite law that an implied term cannot contradict an express term. In any event, he had in his averments wrongly (as I took him to concede) proceeded upon the basis that there were no express terms on when payments fell due. The defender has no relevant case that ASCO was seeking payment earlier than the payment terms agreed between it and the Company.

[40] The defender's averments about ASCO acting in an unreasonable manner are of no relevance and in any event do not fit with Mr Walker's undisputed evidence in his affidavit. The defender's averment that the fact that the Company was not insolvent at the point of administration was reflected in the return to creditors which had been achieved, was simply

not vouched or developed. It provides no relevant basis for a defence. It was plainly contradicted by the affidavit material, which he accepted. There was no suggestion of a full return of debts due to creditors which, on the clear evidence of Mr Walker, as accepted by the defender, was in any event impossible.

[41] Nothing was put forward by the defender which would allow me to conclude that he had a relevant case that the Company was solvent as at 12 August 2015. It was plainly unable to pay its debts to ASCO as they fell due and so was insolvent for the purposes of section 123(1)(e) of the 1986 Act. There is no basis for concluding that this was a result of merely temporary cash flow issues. The amount due was substantial. Mr MacLure stated in his affidavit that following administration there was a £5.3m shortfall to ASCO.
Mr MacLure's position, that the Company was also balance-sheet insolvent (for the purposes of section 123(2) of the 1986 Act), was not contradicted by the defender and indeed he accepted the contents of Mr MacLure's affidavit as true. I therefore also accept Mr MacLure's position on insolvency. As to the defender's knowledge of the situation, his position that there was never any mention of the possibility of the Company being placed in administration is of no direct relevance. The important point is that he was aware of the debt to ASCO and of the fact that the Company was unable to pay it as and when it fell due. Any reasonable person in his position must in any event have been aware of the true financial situation and that insolvency proceedings might well occur. I therefore conclude that the Company was not merely of doubtful solvency or verging upon insolvency but that it was actually insolvent as at 12 August 2015 and that this was something the defender knew or at least ought to have known about. I base these conclusions on the facts and circumstances as clarified by the documents and affidavits and as accepted by the defender in his submissions. I am not therefore resolving a factual dispute but simply proceeding on the

basis of the admitted facts and circumstances. The defender's assertions that the Company was not insolvent on 12 August 2015 require to be viewed in the context of his submissions, and admissions, and accordingly are irrelevant.

Directors' duties

[42] The defender contended that the £150,000 he received on 12 August 2015 was a sum due to him by the Company, which was paid in the ordinary course of business, and that there was no prejudice to the general body of creditors. He explained the background to similar short term payments by him to the Company and these being repaid in return. I have set out his averments and submissions in summary above.

[43] The duties of company directors were codified in the Companies Act 2006. Section 170(3) of the 2006 Act provides that the general statutory duties replace the common law rules and equitable principles from which they are derived. Section 172(1) provides that it is the director's duty to act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. Section 172(3) specifies that the duty to promote the success of the company for the benefit of the members as a whole is subject to any enactment or rule of law requiring directors to consider or act in the interests of creditors of the company. There is no doubt therefore that section 172(3) preserves the common law position and makes no alterations to it. The defender did not at any stage contend that the pursuers' position as to the nature and extent of the common law duty was incorrect.

[44] As I have noted above, the pursuers' case based upon the common law duty is an alternative to the claim under section 243 of the 1986 Act, which deals with unfair preferences. That section applies to preferences created in favour of a creditor in prejudice to

the general body of creditors, not earlier than six months before the commencement of, in the present case, administration. Such a payment to a creditor could of course be to a company director to whom a debt was due, but the scope and effect of the provision is much wider as it applies, subject to section 243(2), to payments to any creditor.

[45] There are other statutory provisions of relevance to actions against directors. These include the provisions which appear under the heading "Penalisation of directors and officers" in sections 212-214 of the 1986 Act. These sections are restricted to winding up and do not apply to administration. Section 212 provides for a summary remedy against directors who have committed a misfeasance or breach of any fiduciary or other duty to the company. Sections 213 and 214 deal respectively with fraudulent trading and wrongful trading. In relation to remedies open to administrators, section 246ZA and 246ZB of the 1986 Act add, respectively, remedies based on fraudulent trading and wrongful trading, in essentially identical terms to sections 213 and 214, with effect from 1 October 2015. However, there is no provision for the remedy under section 212 being available to administrators.

[46] The fact that no remedy is available to an administrator under section 212 is of no particular consequence for present purposes. Section 212 does not establish any new species of wrong but provides merely a summary remedy: it is a framework within which proceedings can be brought in respect of *inter alia* breach of fiduciary duty, but it does not restrict proceedings for breach of duty to an application under that section.

[47] In passing, and by way of contrast, I note that under section 214A of the 1986 Act where withdrawals of property (including money) from a limited liability partnership have been made by a member of the LLP within two years of winding-up, the member can be required to restore the property if, *inter alia*, it is shown that he knew or ought to have

concluded that at the time of the withdrawal the LLP was insolvent and that there was no reasonable prospect of it avoiding insolvent liquidation. I mention this provision simply to further illustrate the somewhat varied approach in the statutes to the rights of recovery, on insolvency, against those involved in corporate entities. It also illustrates that a claim based upon a statutory provision may require the satisfaction by a pursuer of criteria which are not, as I shall discuss further below, required to be met at common law.

[48] The common law duty of directors in respect of creditors is not restricted to preferences and is therefore of broader scope than section 243. If the pursuers in the present action are correct, then where a preference has been given to a company director there is an alternative basis for recovery to that under section 243.

[49] Where the only case made against a company director who has allegedly received a preference is based upon section 243, it is of course a relevant defence under section 243(2) that the transaction was in the ordinary course of business: *Liquidator of 3G Design Engineering Ltd* v *Alistair White* [2013] CSIH 20. However, where an alternative case against the director is made, based upon breach of fiduciary duty, that raises the question of whether the director is liable to restore the amount received, notwithstanding that he could have avoided liability in terms of section 243. The common law duty relied upon by the pursuers is founded on a different legal basis from section 243 and is targeted at directors, whereas liability under section 243 targets the preferred creditor, not the director who caused the preference to be made.

[50] It is important to recognise that there are significant issues of principle arising as to the scope of the common law duty relied upon by the pursuer and how it interacts with the statutory provisions on preferences. For example, where a director of an insolvent company causes a preferential payment to be made to one creditor, who is unconnected with the

company, the question arises as to whether that is a breach of the common law duty by the director who authorised the payment. If so, the further question arises as whether recovery can be made at common law where no claim could be made under the relevant statutory provision (section 239 in England or section 243 in Scotland). If these questions are answered in the affirmative, then the common law duty provides a means of recovery where the statute does not and the director can be targeted for repayment rather than the third-party creditor. That is not the issue which arises in the present case, where the recipient of the payment was not a third party but was the director. The issue here is a narrower one, but still of some significance: if the preferential payment is authorised by and made to a director, is he liable at common law to restore it to the company, even where he could invoke a defence to the claim under the statute? An essential feature of the defender's position in the present case is that he has a defence to the claim based upon section 243 of the 1986 Act. He is a party litigant and did not address the court on the legal question of how that defence might apply to the claim based upon the common law duty. It is therefore appropriate that I consider the authorities on whether that defence means that the common law duty will not provide a remedy to the pursuers.

[51] So far as the common law position in Scotland is concerned, it suffices to refer to certain authoritative observations made in a recent case, which are based upon older authority. In *Joint Liquidators of Grampian Maclennan's Distribution Services Ltd* v *Carnbroe Estates Ltd* [2018] CSIH 7, in the context of the law on gratuitous alienations, Lord Drummond Young referred to the passage in Bell, *Commentaries*, ii 170, founded upon by the pursuers in the present case (referred to above), and stated:

> "[14]…once a debtor is insolvent, his assets must be managed in such a way as to protect the interests of his creditors. The reference to acting as a trustee or *negotiorum gestor* points towards what in modern law is described as a fiduciary duty, under which a person, in this case the debtor, must always act, in a defined area, in the interests of another person rather than his own interests or the interests of his family or friends. That is the general principle that underlies the Scots law of insolvency.
>
> …
>
> [16] The foregoing summary of the law also applies, in the case of entities with legal personality, to those managing the entity. Thus company directors (who are themselves subject to fiduciary duties towards the company) must ensure that in a case of insolvency the company acts with proper regard to the interests of its general creditors. Likewise, partners (who are subject to fiduciary duties towards the partnership) must conduct the affairs of the partnership in such a way that the interests of its general creditors are not prejudiced. The "creditors" in question are the creditors as a general body."

[52] The key elements of the common law duty are further explained in *Bilta (UK) Ltd (in liquidation) and others* v *Nazir and others (No 2)* [2016] AC 1, in the judgement of Lord Toulson and Lord Hodge JJSC at paragraphs [123] - [127], under reference to *West Mercia Safetywear Ltd* v *Dodd and another*.

[53] The scope and effects of the common law duty stated in the English case law remain the subject of some uncertainty, at least as regards precisely when the duty is triggered and what is required by directors to comply with the duty (see eg Keay, *Directors' duties and creditors' interests*, (2014) 130 LQR 443) and how it applies to preferences (see eg van Zwieten, *Director Liability in Insolvency and Its Vicinity: West Mercia Safetywear Ltd* v *Dodd Revisited* (January 2017), Oxford Legal Studies Research Paper No. 38/2017, https://ssrn.com/abstract=2970913). In several cases, there has been held to be no liability for breach of the common law duty in respect of payments authorised by directors in favour of third parties. In *Facia Footwear Ltd (in Administration)* v *Hinchcliffe* [1998] 1BCLC 218, where administrators sought summary judgment against directors for repayment of sums alleged to have been improperly paid, the view was reached that, as no point had been taken about

fraudulent preference, the act of authorising the repayment in question could not be described as a misfeasance. In *Knight* v *Frost* [1999] BCC 819, [1999] 1 BCLC 364, it was concluded that *West Mercia Safetywear Ltd* v *Dodd and another* was not authority for the proposition that a director who for his own purposes caused the company to prefer one creditor to another, outside the time period covered by the statutory provision, was liable to replace that money at the suit of the company. In *Singer* v *Beckett; Re Continental Assurance Company of London Plc (in liquidation)* [2007] 2 BCLC 287, [2001] BPIR 273, it was held that the condition in section 239(5), that the company must have had a purpose of preferring one creditor over another, was not met, and that it would be entirely wrong to use a misfeasance action to get round the liquidator's inability to use the statutory provision. In *Re Brian D Pierson (Contractors) Ltd* [1999] BCC 26; [2001] 1 BCLC 275, it was observed that even if there was a breach of the statutory provision, that did not necessarily mean that the common law duty had also been breached. The judge further noted that in *West Mercia Safetywear Ltd* v *Dodd and another* and *Re Washington Diamond Mining Co* [1893] 3 Ch 95 the preference in question consisted of acts by the directors in the form of a conscious application of the company's funds for the known purpose of preferring their own, or their associate's, interests and so was a misapplication of those funds.

[54] In several more recent cases, where a preferential payment was made at least to some extent in the director's own interests, the common law duty has been held to have been breached. In *Liquidator of Cityspan Limited* v *Clark* 2007 EWHC 751 (Ch), three repayments of directors' loans, made in the month prior to the commencement of insolvent liquidation proceedings, were held to have been made in breach of the common law duty. Interestingly, one of the repayments was made to another director, but nonetheless the director who authorised it was liable to restore it. In *Re HLC Environmental Projects Ltd* [2013] EWHC 2876

(Ch) preferential payments made when the company was insolvent to the director himself, to the parent company which he also controlled and to the bank (the debt to which had been guaranteed by the parent company), were held to have been made in breach of the common law duty. An application to amend the pleadings to bring in an alternative claim based upon the statutory provisions on preferences had been refused and this case therefore supports the view that the common law duty can provide a basis for recovery irrespective of whether recovery under the statute is sought or available. In *Cosy Seal Insulation Limited (in Administration)* v *Gaffney and another* [2016] EWHC 1255 (Ch) it was held that preferential payments on insolvency made to the director himself and to a related company were breaches of the common law duty, as well as being recoverable under the statutory provision. The common law duty was also held to have been breached in *Re Micra Contracts Ltd (in liquidation)* [2016] BCC 153, when payments were made on insolvency to a related company and in *Ball* v *Hughes* [2017] EWHC 3228 (Ch), [2018] 1 BCLC 58, when credits were made to directors' loan accounts on insolvency.

[55] The relevant statutory provision in England (section 239) is not in the same terms as the provision which applies in Scotland (section 243) and it is necessary to be mindful of the differences when considering the case law. However, what in my view the more recent English cases demonstrate is the point of principle that, as Lord Drummond Young observed, the common law duty requires the director of an insolvent company to act in the interests of the creditors rather than in his own interests. There is some debate about precisely what is meant by the concept of fiduciary duty on the part of company directors, and in particular whether it connotes only proscriptive duties (negative or prohibitory duties, not to act in a particular manner, such as to have conflicts of interests or to make unauthorised personal profit) or whether it includes prescriptive duties (positive or

mandatory duties, to act in a particular manner, such as to promote the interests of the company or to exercise powers for a proper purpose). The common law duty derived from *West Mercia Safetywear Ltd* v *Dodd and another* could arguably be regarded as prescriptive. Scots law would in my view treat at least some of the prescriptive duties of company directors, including this common law duty, as fiduciary in nature (as does English law: see eg *Bilta (UK) Ltd (in liquidation) and others* v *Nazir and others (No 2)* [2016] AC 1, judgement of Lord Toulson and Lord Hodge). However, there can be no real doubt that the (proscriptive) duty of a director, on insolvency, not to put his own interests before those of the general body of creditors falls to be regarded as a fiduciary duty. It is that refined version of the common law duty, proscribing acts by the director which are in the director's own interests and not in the interests of the creditors, which I regard as applicable here.

[56] It is clear that section 172(3) preserves the common law position with regard to fiduciary duty, including the principles stated in Bell, *Commentaries* and the law as stated in *Bilta (UK) Ltd (in liquidation) and others* v *Nazir and others (No 2).* It also clear that, whatever differences as to scope and effect of the common law duty one can find in the case law, such as at what precise point before actual insolvency the duty to consider the interests of creditors would come into operation, the common law is absolutely clear that where insolvency has occurred, the duty plainly applies. I accept the view (see Palmer, *Company Law*, 8.2625) that the duty is owed by the director to the company and not to the creditors themselves, but on insolvency it is the creditors who have the interest in the company's assets. In terms of the duty I have described, on insolvency a director is obliged to take into account the interests of creditors and cannot act so as to put his own interests before theirs and leave the creditors in a worse position than on liquidation. The central approach to insolvency in Scotland is to treat the creditors as a general body, as Lord Drummond Young

explained in *Joint Liquidators of Grampian Maclennan's Distribution Services Ltd* v *Carnbroe Estates Ltd*. Preferential payments to a director himself are very obviously against the interests of the creditors as a general body.

[57] The defender maintains that the £150,000 paid on 1 August 2015 was in respect of a debt actually due. The result of the payment, he says, was not to cause any loss to the Company or to create any profit or benefit to the defender; rather the Company paid a debt which was due and hence its balance sheet was unaltered by the payment and the defender simply got back what was, he claims, due to him. In other words, so the argument ran (at least implicitly), the lines of defence under section 243 can have force also in relation to the common law claim. The view has been expressed in England that, as the duty is owed to the company, any loss, if it is going to be recoverable by way of an action for misfeasance or breach of duty, must be loss suffered by the company. Where the payment made by the company is in respect of a liability, it can be said that the company's net position is unchanged and it has suffered no loss, albeit that the general body of creditors have suffered a loss (see *Singer* v *Beckett; Re Continental Assurance Co of London Plc (in liquidation)*). Similarly, where the director has been paid sums due to him, it can be contended that he has not profited. In *GHLM Trading Ltd* v *Maroo* [2012] EWHC 61 (Ch), [2012] 2 BCLC 369, Newey J dealt with a claim for a breach of duty by a director where a preference was alleged. He said:

> "It seems to me that a company seeking redress in respect of a 'preference' to which section 239 does not apply is likely to need to show (a) that it has suffered loss, (b) that the director has profited (so that the 'no profit' rule operates) or (c) that the transaction in question is not binding on the company."

The judge went on to say that establishing the first or second of these points may be difficult. The defender here contends that they are not established. Plea-in-law 4 for the pursuers is that the Company has suffered loss and damage because of the payment.

[58] In my opinion, those arguments do not detract from, far less displace, the force of the contention that the defender is liable to make repayment on the basis that he is in breach of his fiduciary duty by putting his own interests before those of the general body of creditors. In that regard, I rely principally upon the observations by Lord Drummond Young quoted above and I note that in several cases in England a similar view has been reached. On insolvency, the assets of the company are to be managed, through the medium of the company, in the interests of the creditors. In those circumstances, it is not in my view necessary for the pursuers to prove that the Company has suffered a loss in the conventional sense. The funds available to the Company to meet the claims of the general body of creditors were depleted. The director benefited, in the sense that he received payment in full. On restoration of the sums, if it is established that he is a creditor, he can rank accordingly. It is in my view a sufficient basis for restoration to be due by the defender that the payment was made, on insolvency, by the Company to the director himself and that he caused the misapplication of the funds. Plea-in-law 4 for the pursuers must be read in the context of the duty said to have been breached: a loss was suffered in the sense that funds left the Company when insolvent, to the benefit of the defender, against the interests of its creditors, and hence on an improper basis.

[59] There is also consideration in the case law as to whether the test to be applied for breach of a director’s duty is subjective or objective. There is an established principle that the test is subjective (see eg *Re Regentcrest plc* v *Cohen* [2001] 2 BCLC 80) and hence that the question is whether the director had an honest belief that his act or omission was in the

interests of, in this case, the general body of creditors. In *Re HLC Environmental Projects Ltd*, deputy judge John Randall QC explained that this general principle of subjectivity is subject to qualifications arising from other cases, including that, where there is no evidence of actual consideration of the best interests of the company, the test is an objective one based on whether an intelligent and honest man in the position of the director could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company (see also *Charterbridge Corporation Ltd* v *Lloyd's Bank Ltd and another*). Having regard to the defender's averments and submissions, the present case falls into the latter category. However, even if the test in this case was purely about the defender's subjective belief, no averment was made, and no other basis presented, supporting a contention that the defender honestly believed the transaction on 12 August 2015 to be in the interests of the general body of creditors.

[60] I note that there is support in the case law for the proposition that in a case of this kind, based upon the common law duty, if a director is himself the recipient of a benefit from the company, the burden of proof falls upon him to prove that the payment was proper: see *Re HLC Environmental Projects Ltd*; *Idessa (UK) Ltd (in liquidation)* v *Morrison* [2011] EWHC 804 (Ch), [2011] BPIR 957; *GHLM Trading Ltd* v *Maroo*. The defender has no relevant averments which would allow him to discharge the burden of proof.

Conclusions on debate issues

[61] In moving that decree *de plano* should be granted, the pursuers relied upon the failure of the defender to provide any substantive response to the detailed averments made by the pursuers as to the financial position of the Company. It was submitted that this led to the conclusion that the pursuers' averments should be taken as having been established.

Reliance was placed upon three cases: *EFT Finance Ltd* v *Hawkins*; *Ellon Castle Estates Company Ltd* v *MacDonald*; and *Albyn Housing Society Ltd* v *Active Sustainable Energy Systems*. Senior counsel for the pursuers also referred to contrary views expressed in *Gray* v *Boyd* 1996 SLT 60, in which the Lord Justice-Clerk (Ross) and Lord McCluskey had observed, under reference to the approach taken in the first two of these three cases, that to treat a general denial as an implied admission was unsound. I note that in *Marine & Offshore (Scotland) Ltd v Hill* 2018 SLT 239, [2018] CSIH 9, *Gray v Boyd* was referred to with approval.

[62] I have come to the view that this is not an issue which I need to consider. Having heard submissions on the facts from both parties, and having afforded them the opportunity to refer to material other than the pleadings, it would in my view be artificial to ignore those submissions and that material and focus only on the averments made. I do not consider that the defender's position at the hearing was uncandid: he explained his account of matters in his affidavit, he frankly accepted in submissions that the meeting about some form of takeover by ASCO had not taken place prior to the withdrawal of the £150,000 and hence could not be relied upon, and, importantly, he also candidly accepted in submissions most of the information contained in the affidavits sworn by Mr MacLure and Mr Walker.

[63] The approach which I take is therefore to consider the defender's averments in the context of the submissions, including admissions, which he made. The result of doing so is that I reject as irrelevant the defender's position in relation to solvency of the Company as at 12 August 2015, for the reasons given earlier. In relation to the allegation of breach of fiduciary duty, the defender has no relevant averments, and made no case in submissions, to the effect that he considered or acted in the interests of the creditors. In short, I accept the pursuers' submissions that the defender has no relevant case which could constitute a

defence to the common law claim for repayment of the £150,000. On that basis, and on the admitted facts and circumstances, I grant decree *de plano* as second concluded for.

[64] I now deal with the secondary issue at debate, the relevancy or otherwise of the defender's averments regarding the payment of £100,000 by Impact Trading Limited. The defender's position on averment is that this was a payment made to the Company from funds due to the defender by Impact. He further avers that it was his usual practice to make inter-company payments and that at the time of the transfer the payment was recorded in the Company's books as a credit to the defender's loan account. The thrust of the pursuers' criticism of the defender's pleadings is that the basis upon which this sum is said to be due by Impact to the defender is not specified; despite repeated calls, the defender had failed to provide any such specification and the director's loan account for Impact contained no entry indicating any indebtedness to the defender. The pursuers aver that:

> "the defender's averments do not disclose any basis for it to be held that the payment was not simply that which the known facts establish, namely, that it was a payment made by Impact in partial discharge of the substantial sums which it then owed to the Company".

As I have noted above, in submissions the defender argued that the basis upon which the sum was due to him was not of any significance. Impact was a company owned and controlled by him and he could draw upon its funds.

[65] In Answer 6, the defender makes detailed averments about the Company's sales ledger and purchase ledger, which covered the trading account with Impact at the material time. These showed sales and purchases, and payments and receipts. The £100,000 payment does not feature. Had it been a payment due by Impact to the Company, the defender contended, it would have been recorded in the ledgers.

[66] Based on the parties’ averments and the documents incorporated therein, and their submissions, I am not satisfied that I can at this stage take the payment by Impact to the Company as having been established to be in respect of a debt due by Impact. Clearly, in determining the question of whether a sum received by the Company from Impact was in fact a payment on behalf of the defender, evidence of indebtedness by Impact to the Company will be relevant, as will evidence of whether money in the hands of Impact was owed to, or otherwise available to be used by, the defender. The defender’s position on whether the sum was owed to him, or otherwise available to him, and as to the lack of entries in the trading ledgers raise matters to be explored at proof. I am therefore of the view that this secondary issue is one upon which evidence is required and I reject the pursuers’ contention that the defender’s averments on it should be excluded from probation.

Conclusions on motion for summary decree

[67] The principles to be applied and the test to be met in order for summary decree to be granted are set out by Lord Rodger of Earlsferry in *Henderson* v *3052775 Nova Scotia Ltd*. For present purposes the key points are as follows: (i) rule 21.2 applies where the court is satisfied that there is no defence to the action disclosed in the defences; one reason why a court may be so satisfied is because the defences, taken *pro veritate*, are legally irrelevant; (ii) the test of the relevancy of a defender's averments must mirror the test of the relevancy of a pursuers’ averments, as laid down in *Jamieson* v *Jamieson* 1969 SLT (Notes) 11; thus, a pursuer may be granted summary decree on the ground that the defences are irrelevant if the judge can be satisfied, without the need for prolonged legal debate, that there is no defence to the whole or part of the action because, even if the defender succeeds in proving all that he avers, still his case must fail; (iii) a pursuer who seeks summary decree does not

need to advance an argument that the defences are irrelevant since the rule is not confined to questions of relevancy; the court is not confined to considering the defender's averments and the rule envisages that the court may look beyond the pleadings and consider what, in substance, each of the parties and, more particularly, the defender is saying; (iv) the rule must not be applied in a way that would cause injustice by denying a defender the opportunity to prove averments which could provide a defence to the whole or any part of the claim against him; (v) a judge who is considering a motion for summary decree is entitled to proceed not merely on what is said in the defences, but on the basis of any facts which can be clarified, from documents, articles and affidavits, without trespassing on the role of the proof judge in resolving factual disputes after hearing the evidence; (vi) the judge can grant summary decree if he is satisfied, first, that there is no issue raised by the defender which can be properly resolved only at proof and, secondly, that, on the facts which have been clarified in this way, the defender has no defence to all, or any part, of the action. In other words, before he grants summary decree, the judge has to be satisfied that, even if the defender succeeds in proving the substance of his defence as it has been clarified, his case must fail.

[68] I have already concluded, on the facts and circumstances as clarified by the documents and affidavits and as accepted by the defender in his submissions, that the defender has no relevant defence to the claim for repayment of the £150,000 made by the pursuers. There is no issue raised by the defender about this claim which can properly be resolved only at proof. In my view, his case on this part of the action must fail. Accordingly, the pursuer’s motion for summary decree is well-founded.

Other matters

[69] One line of defence to a claim for breach of fiduciary duty is that disclosure to and consent on the part of the person whose interests the fiduciary is looking after would negate any breach. In the present case, no such defence of informed consent is averred. In any event, the defender was the sole director of the Company and any contention that he could properly have consented on behalf of the Company, or more particularly the creditors, does not bear scrutiny; such actings would again necessarily involve an inherent conflict of interests.

[70] In *GHLM Trading Ltd* v *Maroo*, Newey J considered that the route to obtaining restoration of the sums paid out in breach of duty could be lack of authority on the part of the director concerned, and that if the counterparty (recipient) knew about this then the contract would be void. This is not an issue I need to consider further here because the pursuers do not seek to go down the route of lack of authority.

[71] Similarly, there is some support in the case law for the view that a payment to a director in respect of a debt due to him at a time when the company is insolvent can be regarded as an exercise of powers (to make payment on behalf of the company) for an improper purpose in terms of section 171 (b) of the 2006 Act (see eg *Re HLC Environmental Projects Ltd*). Again, however, that line of argument is not advanced here and I need say no more about it.

Disposal

[72] For these reasons, I shall grant decree in terms of the second conclusion. I shall also sustain the pursuers' third plea-in-law and exclude from probation the passage of the defender's averments in Answer 6 from the sentence beginning "The pursuers' argument is

irrelevant…" to and including the sentence ending "…the Company was insolvent and should be dismissed." The case will be put out by-order to deal with further procedure. In the meantime, I reserve all questions of expenses.