Neutral Citation Number: [2026] EWHC 1135 (Ch)

Case No: CR-2024-005684

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

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

Date: 13/05/2026

Before :

ICC JUDGE MULLEN

- -

IN THE MATTER OF HSJ CONSULTANCY LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN :

(1) SIMON BARRIBALL **(2) HELEN WHITEHOUSE**	**Applicants**
- and -	
(1) KIM JACKSON **(2) ROBYN HUGHES**	**Respondents**

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Miss Georgia Purnell (instructed by **Wedlake Bell LLP**) for the **Applicants**
Mr Martin Budworth (instructed by **Neil Davies & Partners**) for the **Respondents**

Hearing dates: 9th – 11th February 2026
Further authority and representations by letters: 23rd April 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13th May 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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ICC JUDGE MULLEN

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Introduction

1. By an application sealed on 30th September 2024, Mr Simon Barriball and Ms Helen Whitehouse ("the Liquidators"), as joint liquidators of HSJ Consultancy Limited ("HSJ" or "the Company"), brought proceedings under section 212 of the Insolvency Act 1986 ("IA 1986") against the Company's directors, Mr Kim Jackson and Mr Robyn Hughes ("the Respondents"). The application was accompanied by a witness statement of Mr Barriball, dated 17th September 2024, and also by points of claim, which allege breaches of directors' duties and seek equitable compensation, together with an account of benefits received by the Respondents in consequence of the breach of duties alleged.

2. HSJ was incorporated on 9th September 2008 and carried on the business of accountants and taxation consultants. The Respondents, who were at the relevant times themselves chartered accountants, were directors of the Company from incorporation. As part of its business, the Company decided that it would introduce its clients to promoters of tax planning schemes. The Company itself also took part in tax avoidance schemes in 2010.

3. The first of these was an employee benefit trust established under a deed of trust dated 2nd June 2010 ("the EBT"), which scheme was promoted by a company called C3 Partnership Limited ("C3"). This provided for payments to an offshore discretionary trust, the trustee of which was a Guernsey registered company called Bourse Trust Company Limited. The scheme allowed loans to be made from the trust to employees of the Company. These, if they were not treated as remuneration by HM Revenue and Customs ("HMRC"), would not be subject to "Pay As You Earn" income tax ("PAYE") or National Insurance contributions ("NIC"). The Company contributed £150,000 to this scheme in June 2010.

4. The second scheme was an employer financed retirement benefits scheme set up by a deed of trust dated 16th November 2010 ("the EFRBS"), which scheme was promoted by OneE Tax Limited ("OneE"). The trustee of the EFRBS was OneE Trustee Services Limited, registered in Cyprus. The scheme was designed to reduce HSJ's corporation tax liability and payments made from the trust under this scheme, again by way of loan, were intended to be free of PAYE and NICs. £300,000 was paid to this scheme in November 2010.

5. The Respondents almost immediately applied for loans from the schemes in each case. The EBT paid £68,250 to each of the Respondents, together with loans to other employees totalling £13,750. The EFRBS paid £160,000 to Mr Jackson and £140,000 to Mr Hughes. The Liquidators say that the Respondents directed the trustees of the schemes as to how the monies should be applied and that the loans that were consequently made were never to be repaid. It is not suggested that the loans have been called in in the intervening sixteen years. In other words the Liquidators' case is that the operation of the schemes was entirely pre-ordained, with the monies being paid out of the scheme in accordance with the direction of the Respondents.

6. HMRC opened enquiries into the Company's 2010 tax return in 2011 and, over the following years, issued a number of statutory determinations of the Company's liability to tax and NIC on the basis that the schemes were ineffective to reduce that liability. The Company ceased to trade in May 2012 and its business was transferred to a limited

liability partnership ("the LLP"), a matter of months after HMRC opened its enquiry into the Company's tax return for the year ending April 2010. The Respondents say that they did not intend to abandon the Company but simply adopted the partnership structure with a view to succession planning for their retirement. Nonetheless, they applied to strike HSJ off the register of companies in 2013. Strike-off action was suspended, probably as a result of an objection from HMRC.

7. HMRC made proposals for the settlement of what it claimed were HSJ's liabilities in respect of the EFRBS in 2013 and issued notices in 2014 for liabilities of more than £250,000 in respect of corporation tax, PAYE and NIC. An accelerated payment notice ("APN") was issued in March 2015 for £92,582.38, which was reduced following representations to £78,391.14 on 17th June 2016. It appears that HSJ was a claimant in a judicial review organised by OneE,[1] which, according to the correspondence in the bundle, led to an interim order preventing HMRC from enforcing the APN. Those judicial review proceedings were ultimately unsuccessful in the High Court and in the Court of Appeal[2] and it is to be inferred that the APN became enforceable.

8. The Respondents approached the Liquidators' firm and HSJ went into creditors' voluntary liquidation on 29th March 2016. The statement of affairs prepared for the liquidation set out trade creditors of £500 and the debt to HMRC, which was said to be disputed, was set out at £1, with the notes to the statement of affairs recording that the claimed sum was £165,912.70.

9. HMRC's most recent proof of debt in the liquidation in 2023 claimed £574,453.79, which included £171,938.11 in unpaid corporation tax for the year ended 30th April 2011, £154,940.56 under a Regulation 80 determination pending appeal dated 5th April 2011, £105,912.70 under a Regulation 80 determination for income Tax for the period 6th April 2010 to 5th April 2011 and £83,727.33 under a Regulation 80 determination for income tax and NICs for the period 6th April 2009 to 5th April 2010. The status of the appeal is unclear.

10. The Liquidators now say that the Company was insolvent at the time of entry into the schemes, or was rendered insolvent by entry into them, and the Respondents were in breach of their duty as directors under section 172 of the Companies Act 2006 ("CA 2006") in, among other things:

    i) failing to take advice as to the schemes;

    ii) failing to consider the interests of creditors in entering into the scheme;

    iii) failing to consider the possibility that the schemes might not have the desired tax consequences and maintain a "responsible reserve" to meet the liability to HMRC;

    iv) failing to consider the interests of creditors in causing the Company to enter into the schemes at a time when it was insolvent; and

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[1] Identified as *R (Vital Nut Co Ltd, Zerenex Molecular Ltd and others) v HMRC*, proceeding under case number CO/2227/2015.

[2] *R (Vital Nut Co Ltd, Zerenex Molecular Ltd and others) v Revenue and Custom Commissioners* [2016] EWHC 1797 (Admin), and on appeal *R (Rowe) v Revenue and Custom Commissioners* [2017] EWCA Civ 2105.

v) failing to cause the Company to account for the tax due to HMRC.

11. In consequence they seek:

i) a declaration that the Respondents are in breach of fiduciary and/or other duty and/or breaches of trust and/or were misfeasant in their capacities as directors of the Company in causing or allowing the Company to participate in the Schemes and/or enter into the transactions pursuant to section 212 IA 1986 or otherwise;

ii) an order that the Respondents pay equitable compensation pursuant to section 212 IA 1986 or otherwise in the sum of £450,000 or such other sum as the court thinks just, together with interest;

iii) a declaration that the Respondents have received benefits from the Company as a consequence of the breaches alleged;

iv) an order that, pursuant to section 212 IA 1986, the Respondents account for their stewardship of the Company's assets and for all benefits received by them as a consequence of the facts and matters set out in the Points of Claim;

v) upon the outcome of the accounts above, an order (at the Applicants' option) either for delivery up of the relevant sums and/or property in the Respondents' hands and/or (b) the traceable proceeds of such sums and/or property and/or (c) an order for equitable compensation and interest compounded in equity or on such basis as the court thinks just;

vi) such order to restore the Company to the position in which it would have been had the transactions not been entered into; and

vii) interest compounded in equity or interest on such other basis as the court thinks just.

12. The points of defence, in summary, plead limitation, the transactions having taken place in 2010, more than six years before the Liquidators' application was made. It avers that the transactions were entered into prior to statutory reforms concerning these sorts of schemes, prior to the introduction of the General Anti-Abuse Rule ("the GAAR") in 2013 and at a time when the Respondents could not have foreseen the attitude that HMRC would take to the schemes. They reasonably believed the schemes to be lawful and effective, not least because they were supported by the opinions of leading tax counsel, and the schemes have not as yet been subject to an adverse finding by the tax tribunal. The risk that the schemes would fail was small, such that there was no need for HSJ to maintain a reserve. As such, it was not insolvent when the schemes were entered into or because of the payments thereto. In any event, the Company would, had it continued trading, have been able to pay its liability to HMRC over time. That liability, the Respondents say, remains unquantified, and HMRC's figures have been inconsistent.

13. The Respondents further contend that any breaches of duty were ratified under the principle in *In Re Duomatic* [1969] 2 Ch 365 and, in any event, they acted honestly and reasonably throughout and ought fairly to be excused from liability under section 1157

CA 2006. There is a counterclaim to an indemnity under the terms of the Company's articles of association.

14. At trial, the Liquidators' claim was focused on the restoration to HSJ of the sums that the Respondents are said to have converted to their use in the sum of £436,500, plus interest. This recognises that, of the £450,000 contributed to the schemes and loaned back, some £13,500 was loaned to other employees of HSJ. The Liquidators accept that a claim to this sum is time barred.

15. All parties were represented by counsel. Ms Georgia Purnell represented the Liquidators and Mr Martin Budworth represented the Respondents.

The witness evidence

16. Mr Simon Barriball made the witness statement on behalf of the Liquidators. Mr Robyn Hughes made a witness statement in answer, which is said to have been made on behalf of both Respondents. Both Mr Barriball and Mr Hughes gave oral evidence and were cross-examined. Mr Kim Jackson did not make a witness statement and therefore did not give evidence.

Mr Simon Barriball

17. I heard first from Mr Barriball. Mr Budworth challenged him as to what he characterised as something of a volte face as to the Respondents' culpability in entering into the schemes. On 29th March 2019 Mr Barriball had emailed Mr Hughes to say that he thought that schemes were being unfairly "lumped in" with schemes that he described as "more dubious" so that HMRC were pursuing HSJ with greater vigour than they otherwise would.

18. Mr Barriball was asked what it was about these schemes that made them less "dubious" than other schemes. He said that he had seen some "very bizarre" schemes in other cases but this one appeared to have "more backing" to it, in particular the explanations of the scheme set out in the schemes' explanatory documents, which were not present in some of the other tax schemes that he had seen. He did not accept that his view had been that, if it had not been for those "more dubious" schemes, HMRC would not have pursued HSJ. He did accept, however, that HMRC was more actively looking into tax schemes such as this one as time went on.

19. Mr Barriball said that he accepted Mr Hughes' evidence in his witness statement that the Company had been "a solvent, profitable and expanding practice with very tight financial controls." He similarly accepted the proposition put to him that it made sense for "tax boutiques" such as C3 and OneE, to market schemes such as those entered into by the Company to accountants. He agreed with Mr Budworth's proposition that a director of a company such as this would, consistently with his duty to promote the success of the company, have to consider offering such schemes to their clients, rather than "stick their heads in the sand". Mr Barriball accepted that it would be prudent to look into the schemes, though he put it no higher than to look into them. He did not know what the cost to the Company of obtaining its own advice on the merits of the scheme would have been. He similarly recognised that it was legitimate for a company to seek to incentivise its employees and accepted that other employees had received loans from the EBT scheme, albeit of a comparatively small amount.

20. Mr Barriball was of the view, however, that the schemes were designed to withdraw monies from the Company. What became of the funds is not entirely clear. Mr Hughes' evidence was that the money paid to him and Mr Jackson was paid back into the Company. Mr Jackson has not made a statement but there is in the disclosure a very few bank statements from Mr Jackson's NatWest bank account. They show the payment of a loan to him from the trust in the sum of £68,125 on 3rd June 2010 and the immediate payment out of £66,125 and £2,000 to an account ending 7868. The Company's accounts for the year ending 2011 show the directors' loans increasing from £279,693 in the previous year to £450,276. Mr Barriball was unable to offer any explanation for this payment and said that there was nothing to show what it was for either way. At interview, Mr Hughes had explained that the decision to re-introduce the funds had been in order to help with cash flow. In considering the overall effect on the Company of the schemes they had considered cashflow forecasts and client billing forecasts.

21. Mr Budworth also made various criticisms of the Liquidators' evidence. He suggested to Mr Barriball that he had not "been at the steering wheel of the case". In particular, it was said that Mr Barriball was not wholly clear as to the extent of the Company records in the Liquidators' possession. Mr Barriball said that they had received general company records, a folder of employee details and USB stick with reports. He was not sure how much in the way of records were provided but recalled that there "wasn't a huge amount" and that they were "about average" for a company that had traded for that period. He said that he had appended the records that he thought to be relevant to his statement.

22. He could not recall if he had seen the Company's SAGE records. He said that he had not seen any management accounts and nor did he recall seeing any directors' loan account ledgers to evidence whether the Respondents had paid any sums back into HSJ. It is unfortunate that there was not a clear answer to the question of whether there was a directors' loan ledger and, if so, what it showed.

23. Despite these criticisms, I consider Mr Barriball to have been a straightforward and reliable witness. His knowledge of the Company's affairs is of course limited to the information that he has obtained as one of its liquidators, and it would have been helpful to know more fully what the state of the Company records was, though Mr Budworth's criticisms would have had more force if this had been raised in correspondence much earlier. I am satisfied that he was seeking to assist the court on the basis of his recollection of the records provided to him. I accept his evidence.

Mr Robyn Hughes

24. Mr Hughes gave evidence on behalf of the Respondents. At the time of the entry into these schemes, Mr Hughes was a chartered accountant, as indeed was Mr Jackson. He had been a registered auditor since 1989 and was admitted to the Chartered Institute of Taxation in 2010. He explained that, in his practice, he advised clients on taxation, auditing and accounting issues and that he started looking at tax saving schemes because these were being offered by competitors and the Company did not wish to fall behind. It was his own research that led HSJ to C3 and OneE, initially with a view to introducing appropriate clients of the Company to the promoters of such schemes and preventing them from being poached by competitors who could effect such introductions. He accepted that he needed to understand the schemes and familiarise himself with how they worked. He and Mr Jackson had approved the entry into them.

25. It was put to Mr Hughes that he knew that HMRC were "unhappy" with such schemes. Mr Hughes said that HMRC were unhappy to the extent that they were unhappy with any tax avoidance scheme. He acknowledged that the schemes had to be registered under the Disclosure of Tax Avoidance Schemes ("DOTAS") regime. He similarly accepted that there was a risk that HMRC would consider the arrangements to be subject to tax, though he thought that this would more likely arise in relation to PAYE and NIC, rather than corporation tax. He considered that the risks identified in the scheme documentation provided by the promoters were remote and that there was no requirement for HSJ to maintain any reserve to meet them. He was of the view that HMRC had miscalculated the tax due in any event in that there was an element of double counting in claiming both PAYE/NIC and corporation tax, though this was not explained in any detail.

26. A feature of Mr Hughes' evidence was that he and Mr Jackson had been significantly underpaid compared to other accountants in the local area. He accepted both in his witness statement and in his oral evidence that the intention was to use the schemes to achieve the level of remuneration to which they felt properly entitled. In that regard there is perhaps something of a tension between Mr Hughes' evidence that the schemes were intended to give the directors a proper level of remuneration and the Respondents' case that the loan monies from the trusts were then loaned back to the Company, although it is of course possible that a director would re-invest some level of their remuneration in their company. Indeed, Mr Hughes' evidence says that the intention was that the directors would be repaid over time.

27. Mr Hughes was cross-examined about the absence of evidence of such payments to the Company. The only document, beyond what is said in Mr Hughes' witness statement and his oral evidence, was on the Liquidators' case, the bank statement, apparently belonging to Mr Jackson, showing a payment of a sum equivalent to that which he received from the EBT to the Company. Mr Jackson has not made a witness statement in these proceedings and thus there is no evidence beyond this single document, the admissibility of which the Liquidators challenged in the circumstances. Mr Hughes said that he had not realised that this was an issue until receipt of the Liquidators' skeleton argument shortly before trial. As I shall discuss, this is not quite the only document but I am troubled by the absence of evidence showing loans being made back to the Company.

28. As I shall explain, there is force in Ms Purnell's submission that Mr Hughes had a blinkered view of events, confidently maintaining that the risks identified in the scheme documentation were remote and that it was unnecessary for the Company to obtain independent advice as to the risks of the schemes, or as to the duties of the directors in deciding to enter into them. It appears to me that he has, over time, minimised this risk in his mind. I am also unable to accept his account of the loan of the monies received from the scheme, at least in full, to the Company or the account that he gave for the establishment of the LLP.

Legal framework

29. Before turning to entry into the schemes in these circumstances I shall briefly consider the legal principles.

The burden on fiduciaries to show proper application of the property under their stewardship

30. Miss Purnell referred to me to the judgment of Newey J, as he then was, in *GHLM Trading Limited v Maroo* [2012] EWHC 61 (Ch). He said at [149]:

> "In the circumstances, I agree with Mr Miles that, once it is shown that a company director has received company money, it is for him to show that the payment was proper. In a similar way, it seems to me that, where debit entries have correctly been made to a director's loan account, it must be incumbent on the director to justify credit entries on the account. That conclusion makes the more sense when it is remembered that the director (a) will have been (one of those) responsible for the management of the company's business and (b) will have had a responsibility for ensuring that proper accounting records were kept (see e.g. sections 386-389 of the Companies Act 2006)."

31. Thus Miss Purnell's submission was that, the Respondents having received company monies via trust arrangements that were pre-ordained to cause those monies to come into their hands, it is for them to show the propriety of their decision to cause that to happen; in other words, that that decision was not in breach of the duties that they owed to the Company as directors. I accept that.

Directors' duties

32. The duties of directors in the administration of a company and its assets are codified in the CA 2006. Section 172 provides as follows:

> "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
>
> (a) the likely consequences of any decision in the long term,
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> (b) the interests of the company's employees,
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> (c) the need to foster the company's business relationships with suppliers, customers and others,
>
> (d) the impact of the company's operations on the community and the environment,
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f) the need to act fairly as between members of the company.
>
> …

> (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

33. The Supreme Court in *BTI 2014 LLC v Sequana SA* [2022] UKSC 25 has confirmed the existence of the rule of law contemplated by section 172(3) CA 2006. The duty does not arise where there is merely a real and not remote risk of insolvency. There must be imminent insolvency or probability of an insolvent liquidation or administration. It is a duty to give the interests of creditors appropriate weight and those interests become paramount where insolvency is inevitable. The justices did not speak with one voice as to whether directors were required to know of the insolvency. Lord Briggs, Lord Kitchin and Lord Hodge JJSC were of the view, *obiter*, that, for the duty to arise, the directors must know or ought to know that the company was insolvent or bordering on insolvency. Lord Reed and Lady Arden JJSC left the question open.

34. In *Hunt v Singh* [2023] EWHC 1784 (Ch), Zacaroli J, as he then was, assumed that some knowledge of the insolvency was necessary. He said:

> "45. The focus of the Supreme Court in *Sequana* was therefore on the time before the company was actually insolvent when the creditor duty arose.
>
> 46. In contrast, in this case there is now no doubt that the Company was in fact insolvent (indeed substantially insolvent) throughout the relevant period. Having regard to the liabilities for NIC alone, it is established that by September 2005 (the start of the relevant period) the Company owed in excess of £3.65 million but had either no or negligible net assets from which it could pay that sum. Thereafter, the position got steadily and substantially worse as the amounts due to HMRC increased each year, but no assets were retained to cover the liability.
>
> 47. The fact that the Company disputed that anything was due to HMRC does not change the fact that it was insolvent. A disputed liability is not a contingent liability. At the time (i.e. throughout the relevant period) there either was an actual liability to HMRC or there was not: see, for example, *Integral Memory PLC v Haines Watts* [2012] EWHC 342 (Ch), per Richard Sheldon QC, sitting as a deputy High Court Judge, at §32. In fact, as is now know, there was an actual liability.
>
> 48. One of the unresolved questions following the Supreme Court's decision in *Sequana* is whether, in a case where the company was at the relevant time actually insolvent, that is sufficient to trigger the creditor duty irrespective of the directors' state of knowledge as to the company's insolvency. Ms Hilliard KC made it clear, however, that she did not contend that the duty arose simply because the company was in fact insolvent. I proceed on the assumption, therefore, that it is necessary to establish some form of knowledge of insolvency (actual or

> constructive) on the part of the directors for the creditor duty to arise, even where the company was at the relevant time actually insolvent."

He went on:

> "51. It is important to emphasise that I have heard no contrary argument at all so that my conclusions have been reached solely on the basis of the arguments advanced on behalf of Mr Hunt. For the reasons which follow, however, I consider that Ms Hilliard's contention is broadly correct. In my judgment, assuming some element of knowledge is required, where a company is faced with a claim to a current liability of such a size that its solvency is dependent on successfully challenging that claim, then the creditor duty arises if the directors know or ought to know that there is at least a real prospect of the challenge failing.
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> 52. I recognise that the language of 'real risk' of insolvency was specifically rejected by the Supreme Court in Sequana, but that was in the different context of the possibility that a company, that was undoubtedly solvent at the relevant time, might become insolvent at some point in the future.
>
> 53. There is an important difference between the two contexts, particularly in light of the rationale for the creditor duty in the first place: i.e. that there is a shift in economic interest from shareholders to creditors (either alongside or to the exclusion of shareholders depending on the depth of the insolvency): see, for example, Lord Reed at §83 of Sequana. If it turns out that the company was in fact insolvent at the relevant time, then this shift in economic interest had already occurred, and had occurred irrespective of whether the directors appreciated it.
>
> 54. Accordingly, if at the relevant time the directors were wrong in their appreciation of the risk of the company actually being insolvent, then their actions and decisions were in fact impacting on the creditors at that time, either together with or to the exclusion of the shareholders. Knowledge of a real risk that the company's challenge to the claim may fail, therefore, equates to knowledge that it is the creditors that are potentially currently being affected by the directors' actions and decisions.
>
> 55. It is important to keep in mind that the fact that the creditor duty is triggered is only the starting point in a claim for breach of duty. The consequences of it being triggered vary enormously depending on the facts.
>
> 56. In particular, it does not mean that the creditors' interests necessarily become paramount, or that the directors would be in

> breach of duty if the actions they then take turn out to have damaged creditors' interests.
>
> 57. The factors to take into account in determining the content of the duty – and whether that duty was breached – will include, as Lord Briggs put it (see above), the brightness of the light at the end of the tunnel, for which might be substituted the strength of the company's resistance to the claim, and who has the most 'skin in the game' so far as the actions the directors propose to take. The extent to which directors should act with a view to protecting creditors' interests is likely to vary significantly, for example, depending on what it is the directors are considering doing…"

I deferentially adopt Zacaroli J's approach to need for knowledge in the context of a company which is in fact insolvent and the degree of knowledge on the part of the directors which engages the creditor duty. I also note his observations as to the way in which directors might approach a potential tax liability in this context. He went on:

> "59. Any different conclusion would lead to significant difficulties, and inherent uncertainties, in determining when the creditor duty arises. Taking this case as an example, the question whether the Company was subject to existing tax liabilities to HMRC was a binary one: it either was, or it was not. It is a binary question, however, on which reasonable directors, advisors and tribunals, may reasonably differ. Identifying where, on the sliding scale between high probability of success and high probability of failure, the duty to consider the interests of creditors cuts in is inherently difficult. A conclusion that the duty to have regard to creditors' interests is triggered by actual or constructive knowledge of a real risk that the liability may exist, with questions of degree of probability of success or failure being factored into the content of the duty and whether it was breached in the particular case, is more consistent in my view with the approach suggested, for example, by Lord Reed in *Sequana*. At §82 he advocated an approach which is:
>
> '…sufficiently fact-specific to take account of differences, according to particular circumstances, in what it may be reasonable and responsible for directors to do when they find that the company is in a sufficiently weak financial situation that a conflict of interest between its creditors and its shareholders appears to arise.'"

Mr Budworth relies on this passage to caution against applying hindsight or adopting what he described as a "hypercritical approach" to consideration of what the Respondents might reasonably have concluded in 2010. I do of course bear in mind the danger of applying hindsight to the decisions of the Respondents entered into at a time when the use of trusts such as these for tax avoidance purposes was relatively novel. I must judge the position as it was at the time at which the schemes were entered into.

35. Whether the so-called creditor duty is engaged is relevant to the manner in which the court will approach the question of whether a director is in breach of duty. Registrar Barber (as she then was) helpfully summarised the authorities in this regard in *PV Solar Solutions Ltd (in CVL)* [2017] EWHC 3228, though I note that her observations at [76] must be modified following *Sequana*, which was decided some years later. She said:

> "74. The duty imposed on directors to act bona fide in the interests of the company (or, in cases of insolvency or dubious solvency, its creditors) is ordinarily regarded as a subjective one. As put by Jonathan Parker J in *Regentcrest plc (in liq) v Cohen* [2001] 2 BCLC 80 at paragraph 120:
>
> 'The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; that that does not detract from the subjective nature of the test.'
>
> 75. The general principle of subjectivity is however subject to three qualifications: *Re HLC Environmental Projects Limited* [2013] EWHC 2876 Ch (per Mr John Randall QC sitting as a deputy high court judge) at paragraph 92. These are as follows.
>
> 76. First, where (as in cases of insolvency or dubious solvency) the duty extends to consideration of the interests of creditors, their interests must be considered as 'paramount'.
>
> 77. Second, the subjective test only applies where there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective, namely, whether an intelligent and honest man in the position of a director of the company could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company.
>
> 78. Third, where there is a very material interest, such as that of a large creditor (in a company which is insolvent or of doubtful solvency) which is without objective justification overlooked and not taken into account, the objective test must equally be applied."

36. Thus, whether a director has complied with the duty to promote the interests of the company, or the interests of creditors, is ordinarily approached subjectively, that is to say the question is whether the director, in good faith, considered the matter. If he has

not considered the question at all, or failed to consider a material interest without justification, the court must approach the matter objectively and consider whether an intelligent and honest man in the position of a director of the company could have reasonably believed that his action would promote the relevant interest.

37. Registrar Barber also gave consideration as to the use of the principle in *In re Duomatic* [1969] 2 Ch 365 to ratify the actions of directors that would otherwise be in breach of duty. She said at [142]:

> "As rightly submitted by Mr Curl however, the *Duomatic* principle will only come to the aid of persons seeking to uphold a transaction if, as a substitute for a resolution at a general meeting, the shareholders had actually applied their minds to the question whether to ratify the transaction: *In re Duomatic* [1969] 2 Ch 365 at 373 B to C; *In re Queensway Systems Ltd* [2006] EWHC 2496 at paragraph 30."

Nor does the principle apply where the company is insolvent, or is rendered insolvent by the impugned transaction: *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250 and it falls to the party seeking to rely on the principle to prove that the company was solvent at the time: *Lexi Holdings Plc (In Administration) v Shaid Luqman and others* [2007] EWHC 2652.

The test for insolvency

38. Section 123 IA 1986 provides insofar as it is relevant:

> "(1) A company is deemed unable to pay its debts –
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> …
>
> (e) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.
>
> (2) A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into accounts its contingent and prospective liabilities."

39. In *Re Casa Estates (UK) Limited (in liquidation)* [2014] EWCA Civ 383, Lewison LJ considered these tests as follows:

> "27. In my judgment the following points emerge from the decision of the Supreme Court in *Eurosail* (and in particular the judgment of Lord Walker):
>
> i) The tests of insolvency in section 123 (1) (e) and 123 (2) were not intended to make a significant change in the law as it existed before the Insolvency Act 1986: para [37].
>
> ii) The cash-flow test looks to the future as well as to the present: para [25]. The future in question is the reasonably

near future; and what is the reasonably near future will depend on all the circumstances, especially the nature of the company's business: para [37]. The test is flexible and fact-sensitive: para [34].

iii) The cash-flow test and the balance sheet test stand side by side: para [35]. The balance sheet test, especially when applied to contingent and prospective liabilities is not a mechanical test: para [30]. The express reference to assets and liabilities is a practical recognition that once the court has to move beyond the reasonably near future any attempt to apply a cash-flow test will become completely speculative and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test: para [37].

iv) But it is very far from an exact test: para [37]. Whether the balance sheet test is satisfied depends on the available evidence as to the circumstances of the particular case: para [38]. It requires the court to make a judgment whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to meet those liabilities. If so, it will be deemed insolvent even though it is currently able to pay its debts as they fall due: para [42].

28. In the course of his judgment in *Eurosail* Lord Walker approved what he described as the 'perceptive judgment' of Briggs J in *Re Cheyne Finance plc* (No 2) [2007] EWHC 2402 (Ch); [2007] 2 All ER 987. Two of the points that Briggs J made bear on our case:

i) Cash-flow solvency or insolvency is not to be ascertained by a blinkered focus on debts due at the relevant date. Such an approach will in some cases fail to see that a momentary inability to pay is only the result of temporary illiquidity. In other cases it will fail to see that an endemic shortage of working capital means that a company is on any commercial view insolvent, even though it may continue to pay its debts for the next few days, weeks, or even months: para [51].

ii) Even if a company is not cash-flow insolvent, the alternative balance-sheet test will afford a petitioner for winding up a convenient alternative means of proof of a deemed insolvency: para [57].

Discussion

29. It is in my judgment clear from *Eurosail* and its approval of *Cheyne Finance* that the balance sheet test in section 123 (2) is not excluded merely because a company is for the time being in

> fact paying its debts as they fall due. In the case of *Eurosail* that is clear from Lord Walker's approval at [42] of what Toulson LJ had said in the Court of Appeal, and his description of the two tests as standing side by side. In the case of *Cheyne Finance* it is clear from Briggs J's description of the balance sheet test as an alternative test. Thus I agree with Warren J at [34] that the two tests feature as part of a single exercise, namely to determine whether a company is unable to pay its debts. In addition, even when applying the cash-flow test it is not enough merely to ask (as HH Judge Purle QC did) whether the company is for the time being paying its debts as they fall due. As Briggs J said in *Cheyne Finance* a realistic examination may reveal that a company is on any commercial view insolvent, even though it may continue to pay its debts for the time being."

40. As to the effect of future tax liabilities on a company's solvency I was referred to *Integral Memory plc v Haines Watts* [2012] EWHC 342 (Ch), in which Mr Richard Sheldon QC, sitting as a deputy High Court Judge, considered on appeal whether a claim in, among other things, negligence against a tax advisor was time barred. It was argued that the claimant had not suffered loss, and thus its cause of action was not complete, until a tax tribunal had determined its liability. The deputy judge rejected that argument:

> "28. The Claimant submits that the primary limitation period in tort commenced when it accepted the relevant liability to pay £104,096.34 on 30 October 2009 following HMRC's revised settlement proposal. Prior to that date, the liability for the relevant interest was, it is said, contingent on HMRC succeeding or failing in a tax tribunal, settling the litigation or on the acceptance by the Claimant of liability.
>
> 29. The cause of action for negligence in tort is not complete until the claimant incurs loss or suffers damage in respect of which the duty was owed. The Claimant's submissions confuse the question of whether loss or damage has been incurred with the quantification of loss. I consider that it is clear beyond doubt that the loss or damage had been incurred by the Claimant, for the purposes of its claims in tort, before 11 May 2005. Although dealt with succinctly by the Deputy Master in his judgment (see paras 22 – 24), I consider that he reached the correct conclusion. I should nevertheless elaborate in the light of the arguments which were developed before me.
>
> …
>
> 31 Mr Khan submitted that, until the settlement was reached in October 2009, the liability of the Claimant to HMRC was purely contingent. He referred to *Re Sutherland deceased, Winter v IRV* [1963] AC 235 where the concept of a contingent liability was considered and sought to draw an analogy on the facts with the various formulations of the meaning of a contingent liability in

> that case (see paragraphs 42 to 44 of his skeleton argument). Building on that argument, he then referred to *Law Society v Sephton* [2006] 2 AC 543, 554, where it was held 'the possibility of an obligation to pay money in the future is not in itself damage'; and to *Axa Insurance v Akther & Darby Solicitors* [2009] 2 CLC 793, where Arden LJ said at 809: 'the assumption of a pure contingent liability does not cause the limitation period to start to run... the concept on which all members of the House agreed was that there had to be measurable loss before time began to be run, that is to say, loss which is additional to the incurring of a purely contingent liability... a pure contingent liability is not damage'
>
> 32. However, the argument in my view breaks down on the premise which it is based. The Claimant's liability to pay interest on the unpaid NIC to HMRC was in no relevant sense contingent. A contingent liability is a liability which, by reason of something done by the person bound, may or may not arise depending on the happening of a future event (see *Re Sutherland deceased*). A classic example of a contingent liability is potential liability under a policy of insurance, which will only occur if an (insured) event occurs. That was not the position in the present case. There was either an actual liability to pay NIC and interest on arrears or there was not. The existence of such liability is not contingent on HMRC succeeding or failing in a tax tribunal (or a court) as submitted by Mr Khan. All the tribunal or court is deciding is whether or not there is an actual liability. Likewise a settlement of such litigation (at least in this case) for the reasons I have given is premised on there being such actual liability. The fallacy of Mr Khan's argument is demonstrated by his submission that where a debt is incurred but disputed, and court proceedings follow, the liability is contingent until the court gives judgment in favour of the creditor (or there is a settlement). That submission is clearly wrong."

41. So too may a liability be due though not yet payable. In *Videocon Global Ltd v Goldman Sachs International* [2016] EWCA Civ 130 considered a point of contractual construction. Gloster LJ, with whom Cranston J and Sir Stephen Richards agreed, said at [53]:

> "The first important point to note is that, as in many contracts, there is a clear distinction in the Master Agreement between, on the one hand, the underlying indebtedness obligation and the date on which such obligation accrues (i.e. the date at which the relevant amount becomes due) and, on the other hand, the payment obligation and the date upon which the obligation to pay the relevant amount arises. Although the language of section 6 might be said to be somewhat inconsistent, on occasions, between its use of words 'due' on the one hand and 'payable' on the other, nonetheless the distinction between the debt obligation

> and the payment obligation, and the different dates upon which those obligations respectively arise, is clear in the scheme of the contract. That distinction is particularly clear, for example, in the definition of payment date in section 6(d)(ii))."

42. Chief ICC Judge Briggs considered those two cases in relation to a company's solvency in *Re Implement Consulting Limited (in liquidation)* [2019] EWHC 2855 (Ch). Like this case, at least partly, *Re Implement Consulting* concerned payments into an EBT. Those payments had been made in 2009 and 2010, like here long before the decision of the Supreme Court in *RFC 2012 plc (in liquidation) (formerly Rangers Football Club Plc) v Advocate General for Scotland* [2017] UKSC 45 ("*Rangers*") as to the effect of such schemes. Chief ICC Judge Briggs considered the authorities and said at [67]:

> "Mr Curl emphasises that the Court should look to the future not only the present and also take account of liabilities that are not yet payable. He cites two authorities for propositions that support the Joint Liquidators' claim. First *Integral Memory plc v Haines Watts* [2012] EWHC 342 (Ch) for the proposition that a liability to tax is not contingent on the determination of a tax tribunal or court. The liability accrues on the occurrence of the transaction that gives rise to the taxable charge. Secondly, *Videocon Global Ltd v Goldman Sachs International* [2016] EWCA Civ 130 for the proposition that a liability may be due without being payable. I accept those submissions."

43. A liability to tax similarly arises under the terms of a statute notwithstanding that it is not until later that a competent tribunal concludes that the statute gives rise to such a liability; it is not the tribunal's interpretation that creates the liability:

> "90. The debt due to HMRC for the year ending 30 September 2010 arose (in most part) because of the unpaid tax due on EBT 09 and EBT 10. Mr Curl argues that since the Supreme Court found in July 2017 that remuneration paid to a trustee was subject to a charge to tax in the same way as if it had been paid direct to the employee, the law is deemed always been that way: *RFC 2012 plc v Advocate General of Scotland* [2017] 1 WLR 2767. In other words, the debt was due (not necessarily payable) from the time the Company transferred monies into EBT 09. The debt increased when entering into EBT 10 and the IIP.
>
> 91. The declaratory theory of judicial decisions was explained by Lord Goff in *Kleinwort Benson Ltd v Lincoln* [1999] 2 AC 349, 377. At first, I thought this may be relevant but on reflection it is of limited use in this context. More apposite is *National Westminster Bank plc v Spectrum Plus Ltd* [2005] 2 AC 680, paragraph 38 where Lord Nicholls provided a definitive answer:
>
> 'But leaving these aside, the interpretation the court gives an Act of Parliament is the meaning which, in legal concept, the statute has borne from the very day it went onto the statute book. So, it is said, when your Lordships' House rules that a previous

> decision on the interpretation of a statutory provision was wrong, there is no question of the House changing the law. The House is doing no more than correct an error of interpretation. Thus, there should be no question of the House overruling the previous decision with prospective effect only. If the House were to take that course it would be sanctioning the continuing misapplication of the statute so far as existing transactions or past events are concerned. The House, it is said, has no power to do this. Statutes express the intention of Parliament. The courts must give effect to that intention from the date the legislation came into force. The House, acting in its judicial capacity, must give effect to the statute and it must do so in accordance with what it considers is the proper interpretation of the statute. The House has no suspensive power in this regard.'
>
> 92. As *RFC 2012 Plc* was decided as a matter of statutory interpretation, namely of section 131 of the Income and Corporation Taxes Act 1988 and section 62 of the Income Tax (Earnings and Pensions) Act 2003, the answer provided by the House had prospective and retrospective effect. In light of this, it could be said that the Company was, on the evidence before it (the Court has to do its best with the material before it) insolvent by 30 September 2010."

44. Thus the law as it was held to be in *Rangers* applied as at the date of entry into these schemes, to the extent that the schemes were subject to the same statutory provisions.

HMRC's power to determine tax due

45. In this regard, a central limb of the Respondents' case is that the legislative framework applicable to such schemes and, indeed, the culture of enforcement were different in 2010. Mr Budworth made the point that cases such as *Re PV Solar* concerned schemes that post-dated in the introduction of the Finance Act 2011. It was not suggested that the 2011 Act, the GAAR or any subsequent legislative provision altered the law in such a way as to make these schemes ineffective, or less likely to be effective, than they were at the time they were entered into, as a matter of law. Of course it is well known new provisions were introduced to limit the scope of similar schemes, but it was not squarely put to me that the schemes here were in fact effective under the law as it was at the time they were entered into, or were subject to different statutory provisions from those considered in *Rangers*. I was not asked to decide on the effectiveness of the schemes. For the reasons that I shall explain, it does not seem that it is necessary, or indeed appropriate, for me to do so.

46. It was not submitted that the schemes here were not caught by the principles in *Rangers*. The highest that Mr Budworth put his case in relation to the tax due was the appeals in which the Company was involved have not been determined and that HMRC's assessments to tax are "inherently unreliable" and, as observed by Lord Woolf J (as he then was) in *Van Boeckel v Customs and Excise Commissioners* [1981] 2 All ER 505 at 507-508, based on the Commissioners' judgment.

47. Nonetheless, the statutory machinery has the effect of defining a person's liability to tax. In the context of this case, two provisions are particularly relevant. The first is regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003, which provides, as far as it is relevant:

> "(1) This regulation applies if it appears to HMRC that there may be tax payable for a tax year… by an employer which has neither been—
>
> (a) paid to HMRC, nor
>
> (b) certified by HMRC….
>
> (2) HMRC may determine the amount of that tax to the best of their judgment, and serve notice of their determination on the employer.
>
> …
>
> (5) A determination under this regulation is subject to Parts 4, 5 , 5A... and 6 of TMA (assessment, appeals, collection and recovery) as if—
>
> (a) the determination were an assessment, and
>
> (b) the amount of tax determined were income tax charged on the employer,
>
> and those Parts of that Act apply accordingly with any necessary modifications."

48. The second section is section 8 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999, which provides:

> "Subject to the provisions of this Part, it shall be for an officer of the Board—
>
> …
>
> (c) to decide whether a person is or was liable to pay contributions of any particular class and, if so, the amount that he is or was liable to pay".

49. Such determinations and decisions are subject to rights of appeal. Such an appeal does not postpone the collection of the tax, but either HMRC or the First-tier Tribunal may postpone the payment of the tax due. Mr Hughes accepted as an accountant that such postponement did not cause the tax to cease to be due and no submissions were made to suggest that it does.

50. HMRC also has power to issue penalties, which are treated as if they too were assessments: section 100A of the Taxes Management Act 1970.

51. Despite the absence of any real engagement with the underlying tax principles during the hearing, during the course of finalising this judgment in draft, the Respondents' solicitors wrote to the court to draw my attention to the decision of the Court of Appeal in *Commissioners for HM Revenue and Customs v M R Currell Limited* [2026] EWCA Civ 445. They asked whether I would wish to have submissions on its effect. In fact, both parties offered summary submissions by letter.

52. *M R Currell Limited* was a case in which a payment of £800,000 had been made in November 2010 to an EBT. The EBT immediately lent the sum to the director and shareholder, Mr Currell. The loan was for the purposes of buying shares in the company and was for a five-year term, secured by a charge over those shares. The shares were purchased from Mrs Currell, who loaned the £800,000 to the company, and were repayable to her. The loan was not repaid by the due date, save for £50,000 which was then used to pay bonuses by the EBT.

53. HMRC concluded that the payment represented the taxable earnings of Mr Currell and made determinations. That decision was upheld by the First-tier Tribunal, which held that the payment had been made to facilitate the loan, which loan it held was genuine. Mr Currell was said to be "fully conscious" of his obligation to pay it though the balance of the loan had not been repaid because of a concern as to double taxation. The tribunal concluded that the payment nonetheless represented a reward or benefit attracting liability to tax.

54. The First-tier Tribunal's decision was overturned by the Upper Tribunal and HMRC appealed to the Court of Appeal. That appeal was dismissed. Falk LJ, with whom Foxton and Singh LJJ agreed, explained the operation of the Income Tax (Earnings and Pensions) Act 2003. She said:

> "18. Part 2 of the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA') imposes the charge to tax on employment income. Relevantly for present purposes, section 6 of ITEPA charges tax on 'general earnings', defined as earnings within Chapter 1 of Part 3 of ITEPA. In that Chapter, section 62(2) defines earnings as follows: '(a) any salary, wages or fee, (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or (c) anything else that constitutes an emolument of the employment.' 'Money's worth' is defined in section 62(3) as something that is of direct monetary value to the employee, or is capable of being converted into money or something that is of direct monetary value.
>
> 19. Pursuant to section 15 of ITEPA, UK resident employees are taxed on the full amount of general earnings 'received' in a tax year. Section 18 of ITEPA sets out when general earnings are treated as received. Relevantly, this includes a time when 'payment is made of or on account of the earnings'. A similar provision applies for PAYE purposes: see section 686 of ITEPA.
>
> 20. In summary, therefore, there are two requirements for a PAYE liability to be triggered on general earnings of a UK resident employee. There must both be earnings within section

> 62(2) of ITEPA, and they must be received (which includes payment). The issue in this case relates to the first of these requirements, namely whether the Payment comprised earnings."

The loan in that case, as here, came into force before the coming into force of Part 7A of ITEPA, that is to say the disguised remuneration rules inserted by the Finance Act 2011.

55. Falk LJ explained the decision in *Rangers* in the course of her judgment. In that case, where a group company wished to benefit an employee using the trust it would make a cash payment to the trust and recommend the trustee to resettle the sum on a sub-trust, also requesting that the income and capital of the sub-trust be applied in accordance with the employee's wishes. The trustee would invariably comply with the request. In virtually all cases a loan application was also made to the trustee by the relevant employee, and the trustee almost invariably exercised its discretion to grant a loan of the full amount in the sub-trust. No security was taken in respect of the loans. The expectation of the parties was that the loans would not be repaid at their 10-year terms but would remain outstanding for life.

56. The issue in *Rangers,* as described by Lord Hodge JSC in the Supreme Court, was whether an amount that is remuneration (or a reward for services) is taxable as an emolument or earnings when it is paid to a third party in circumstances in which the employee has no prior entitlement to receive it. He concluded that there was no general legislative requirement that the employee should either receive or be entitled to receive remuneration in order for that reward to be taxable. The charge to tax on employment income extended to money that the employee was entitled to have paid as his or her remuneration whether it was paid to the employee or a third party. He found that the payments into the trust were part of the component of the footballers' remuneration in the circumstances described. The bonuses paid to managers using the same mechanism were similarly sums given in respect of the managers' work as employees and the payments to the trust were taxable accordingly.

57. The distinction identified by Falk LJ between *Rangers* and *M R Currell Limited* was that, in *Rangers,* it was not in issue that the payments were remuneration. The question of whether the payment was remuneration was the central issue in *M R Currell Limited* and it was found that it was not. Neither was the loan itself. Falk LJ considered that it might be treated as payment of earnings where it was a sham or where it was never intended that the loan be repaid.

58. The submission now on behalf of the Respondents is that *M R Currell Limited* bears similarities to this case. There are superficial similarities but *M R Currell Limited* is quite different from this case. It is not in dispute in this case that the sums paid into the trusts in this case were intended to be paid to the Company's employees, and the Respondents, as a reward for their work; in other words they were for the purpose of remuneration or bonuses. As I shall explain, that is set out in the single set of board minutes available and is indeed the Respondents' own explanation for entry into the schemes, driven in particular by their own sense of having been under-remunerated for several years. The loan documentation in respect of the EBT does not appear in the bundle but that in respect of the EFRBS suggests that the loans were repayable on demand, but have not been demanded or not been repaid. It is not suggested that the

interest provided for in the loan documentation in relation to that scheme has been paid either. *M R Currell Limited* is thus entirely distinguishable and in those circumstances, it does not appear to me to cast any doubt on the proposition that payment of earnings to an EBT scheme, which is paid back in the form of loans which are not expected to be repaid, falls to be taxed.

59. More fundamentally, the Liquidators' case is not based on the effect of the decision in *Rangers* but on the tax assessments raised, which have not been set aside in the years that have passed since they were raised. The cases concerning *Rangers* are relied upon by the Liquidators in support of the proposition that liability to tax arose by operation of the statute not by virtue of any subsequent decision. The law was not changed by *Rangers*. In this case there have also been tax determinations, which, as explained above, determine what the Company's tax liability was at the relevant time on the basis of the law as it stood in 2010 and 2011.

60. A challenge to those assessments lies to the exclusive machinery of the tax tribunals and there is limited scope for the court to go behind them. In *Chamberlin v Revenue and Customs Commissioners* [2011] EWCA Civ 271, Sir Andrew Morritt C, with whom Toulson and Sullivan LJJ agreed, said in the context of bankruptcy:

> 16. The interaction of the insolvency regime and the various tax regimes has led to a well established practice to the effect that the courts involved in the former leave the establishment of a liability to tax to the statutory procedures applicable by the latter. For instance the bankruptcy court does not usurp the jurisdiction of the VAT Tribunal by itself enquiring into matters within the statutory jurisdiction of the latter. This practice is well illustrated by *Re Calvert* [1899] 2 QB 145 and *Lam v Inland Revenue* [2005] BPIR 301 .
>
> 17. In *Re Calvert* a debtor sought to expunge a proof for schedule D tax. This was rejected by Wright J. He said, at page 147:
>
> 'I cannot think it possible that it is competent to the Bankruptcy Court, on the invitation of the trustee in bankruptcy or of the debtor, to reopen questions of that kind on a motion to expunge. It is quite impossible to conceive that it would be competent for me sitting here to go into the question of the rateable values of a union or of a parish, or any question of that sort. That seems to me to be a case which is analogous to the case in which I am at present invited to act. I think the application fails and must be dismissed with costs; but my decision will not interfere with any application the debtor may be advised to make to the Inland Revenue under the Board of Trade Regulations of May, 1888.'
>
> 18. In *Lam v Inland Revenue* the Revenue had served Lam with a statutory demand seeking payment of arrears of assessed tax and when Lam failed to comply presented a petition for his bankruptcy. Lam had throughout protested that the assessments were erroneous. He had appealed against some but not others.

The Registrar made a bankruptcy order and Lam appealed. He continued to protest that he had not made the profits on which he had been assessed to tax. In his judgment Blackburne J said:

'[12] I understand, but I have to remind myself (as [counsel for the Inland Revenue] has submitted), that authority clearly establishes that where assessments to tax are concerned Parliament has provided a clear and exclusive machinery for considering appeals against them. The statutory machinery does provide for appeals to the court. That machinery, as [counsel] correctly submits, is an exclusive machinery and an assessment, when made, is final and binding if it is not appealed. If it is appealed, the determination of an appeal is likewise final and binding, subject to any application there may be, in appropriate circumstances, to the court. In particular, she submits, it is not for the Bankruptcy Court to go behind those matters. As [counsel] also submits, there is a wealth of authority to that effect, stretching back (in relation to predecessors of the current legislation) to the latter part of the 19th century.

[13] [Counsel] is correct in that submission. It is not open to the Bankruptcy Court to review the manner in which the assessment has been made, much less to investigate the merits of the assessment. I can see that if there were evidence that the assessments had been made in some fraudulent or collusive way, or there were some other glaring miscarriage of justice, it might be that the Bankruptcy Court could go behind the assessment and not make the Bankruptcy Order based upon the debt created by the unpaid tax resulting from the assessment, but there is no suggestion of that in this case. On the contrary, as I have endeavoured to show, the Revenue have entertained attempts by Mr Lam, personally and through advisers, to reconsider the amount of the assessments, but have not been persuaded on the information that has been provided that they should do so.'

19. The same principle was expressed more broadly by Lord Nicholls of Birkenhead in *Autologic Holdings plc v IRC* [2006] 1 AC 118. That case did not concern bankruptcy proceedings but an attempt by the taxpayer to recover tax paid otherwise than by means of the statutory procedure. After referring to the statutory jurisdictions for which the Taxes Management Act and other statutes provided Lord Nicholls said:

'12. Clearly the purpose intended to be achieved by this elaborate, long established statutory scheme would be defeated if it were open to a taxpayer to leave undisturbed an assessment with which he is dissatisfied and adopt the expedient of applying to the High Court for a declaration of how much tax he owes and, if he has already paid the tax, an order for repayment of the amount he claims was wrongly assessed. In substance, although not in form, that would be an appeal against an assessment. In

> such a case the effect of the relief sought in the High Court, if granted, would be to negative an assessment otherwise than in accordance with the statutory code. Thus in such a case the High Court proceedings will be struck out as an abuse of the court's process. The proceedings would be an abuse because the dispute presented to the court for decision would be a dispute Parliament has assigned for resolution exclusively to a specialist tribunal. The dissatisfied taxpayer should have recourse to the appeal procedure provided by Parliament. He should follow the statutory route.'
>
> Later, in paragraph 15, Lord Nicholls continued:
>
> 'Lord Wilberforce's formulation indicates that, apart from cases of straightforward abuse, there is an area where the court has a discretion. In *Glaxo Group Ltd v Inland Revenue Commissioners [1995] STC 1075* , 1083–1084, Robert Walker J put the matter this way:
>
> "It is not easy to discern any clear dividing-line between High Court proceedings which are, and those which are not, objectionable as attempts to circumvent the exclusive jurisdiction principle. Possibly the correct view is that there is an absolute exclusion of the High Court's jurisdiction only when the proceedings seek relief which is more or less co-extensive with adjudicating on an existing open assessment: but that the more closely the High Court proceedings approximate to that in their substantial effect, the more ready the High Court will be, as a matter of discretion, to decline jurisdiction."
>
> I respectfully agree with this approach, subject to noting that, at least as a general principle, the taxpayer and the revenue are each entitled to insist that the statutory procedure for dealing with disputed assessments should be followed.'"

61. The position is that HMRC's assessment of tax due creates a debt in that amount as a matter of statute and statute also provides for how a tax-payer may challenge that assessment. It was open to the Respondents, when in control of HSJ, to pursue appeals against the assessments to a conclusion, or to seek to cause the Liquidators to do so. They have not done so, though there is a question about whether there is an extant appeal in the case of one assessment.

62. The case of *M R Currell Limited* goes nowhere towards persuading me that the instant case is not subject to the principles in *Rangers,* or that no tax is due, or that the assessments can be successfully challenged on appeal so that I should adjourn the matter pending the outcome of an appeal to the tribunal. It might not be the case, as the Liquidators have submitted, that I simply cannot go behind the assessments, but, given the ample opportunity the Respondents had to maintain appeals, to the extent that I have jurisdiction, in my discretion it appears to me that it is appropriate to decline it.

63. It seems to me therefore that no further submissions in respect of the effect of *M R Currell Limited* are necessary.

The entry into the Schemes

The EBT

64. The Company was provided with a document called "Pre Funded EBT Technical Overview", and Mr Hughes appears to have signed a copy of this on 24th May 2010. It explained the scheme as follows:

> "The C3 Partnership Limited (C3) Employee Benefit Trust (EBT) planning provides a tax efficient vehicle to reward key / all employees by saving tax at both the corporate and individual levels:
>
> 1) Corporate level: The sponsoring company should obtain a Corporation Tax (CT) deduction for the EBT therefore saving CT.
>
> 2) Individual: The individual can extract money from the EBT at low / no tax therefore saving any income tax that would otherwise be due on any bonuses / dividends received from the company. The EBT could therefore reduce the total tax liability from the extraction of profits from a company to very efficient level."

65. It explained the corporation tax benefits as follows:

> "1) If a company chooses to remunerate employees by way of a cash payment (salary / bonus), this should be deductible in the accounts for the period in which it is paid and the company should also obtain a CT deduction for the amount paid.
>
> 2) If instead the company chooses to remunerate employees via an EBT, then this will still be deductible in the accounts for the period in which it is paid, but the CT deduction is deferred until the EBT funds are distributed to beneficiaries in a fully taxable form (i.e. in a manner which gives rise to a charge to both income tax and NIC on the employee, such as a cash payment out of the EBT). This is the effect in Sch. 24 FA 2003 reproduced for corporation tax in si 290 Corporation Tax Act 2009 ('CTA 2009').
>
> 3) The C3 EBT planning, the acquisition for employees of an interest in a pre-funded EBT, should afford both a deduction in the accounts and for CT purposes, without the need for the funds in the EBT to be paid out to the beneficiaries in a fully taxable manner.

> 4) C3 have an opinion from Andrew Thornhill Q.C. confirming that the above strategy should give rise to a CT deduction in the year for which the payment is claimed by the sponsoring company."

66. In relation to income tax and NIC contributions it said:

> "1) No employer's and employees' Class 1 NIC liability should arise on the payment to procure the availability of the pre-funded EBT.
>
> 2) In respect of extraction of funds from the EBTs, this can be structured in such a way to avoid further NIC liabilities on the sponsoring company and beneficiaries. The basic principles are well known."

67. As to the disclosures to be made to HMRC the notes said:

> "2) The C3 EBT is a scheme registered under DOTAS. The company purchasing the EBT is required to note the DOTAS number on their CT return and this information will be provided by C3 when appropriate.
>
> 3) It is likely that the scheme will lead to an enquiry solely on the DOTAS registered scheme. C3 will deal with this enquiry up to and including the first-tier tribunal for no additional fees.
>
> 4) Provided full disclosure is made, i.e. the DOTAS number is recorded correctly on the relevant CT600, no penalties should be levied if HMRC deny the CT deduction. Interest would be due on any late payment of CT."

I note there that the notes expressly raised the likelihood of an enquiry by HMRC and subsequent tribunal proceedings.

68. Also dated 24th May 2010 is a letter from C3 to the Company to set out the terms of its engagement. The letter recorded that C3 had been instructed to:

> "provide tax advice relating to the acquisition of an interest in an Employee Benefit Trust ('EBT') and general tax advice on loans made from the interest in the EBT"

It noted that, while some commentary would be provided as to accounting matters, C3 was neither an accountant nor auditor and it was the responsibility of the Company to satisfy itself as to the accounting treatment of the scheme. It would assist the Company's professional advisors as to any initial enquiries from HM Revenue and Customs and it was again said that:

> "This support will extend up to and including hearings before the First Tier Tribunal, but if it goes beyond this we will act for the Company in such circumstances but this would necessarily involve additional professional fees to be borne by the client."

69. The letter explained that, pursuant to the Tax Avoidance Scheme (Information) Regulations 2004, it would be responsible for disclosing the scheme to HMRC under the DOTAS regime.

70. Under the heading "Liability" the letter stated that C3 carried professional indemnity insurance and said:

> "We have explained to the Company, and the Company has acknowledged, that the planning work it has asked us to undertake is not approved by any government body or fiscal authority. In particular, HMRC has not approved this planning. Therefore, the planning we have agreed to undertake on the Company's behalf may be challenged either through a formal Inland Revenue tax investigation or through the courts; C3 will only accept liability for any loss arising, where such loss arises due to the negligence of our advice, documentation, or implementation. C3 will not accept any responsibility or liability for the negligence of any third party."

Mr Hughes acknowledged that this letter stated in terms that the scheme was not an approved scheme and that a successful challenge to the scheme was possible.

71. The EBT was supported by an opinion from leading tax counsel, Mr Andrew Thornhill QC. Mr Hughes said that he had not read Mr Thornhill's opinion in relation to the EBT but one of the Company's staff, whom he described as a very knowledgeable consultant tax specialist, had. What Mr Thornhill had said in his opinion is not in evidence, and nor is the Company's employee's view of it recorded.

72. In relation to this scheme, Mr Barriball accepted that employees of HSJ had received some payments and it was not part of the Liquidators' case that they had not received loans. The scheme documents suggested that the scheme had the benefit of incentivising employees. That is indeed a purpose set out in the minutes of the board meeting on 26th May 2010 at which the C3 scheme was approved. The minutes said:

> "It was noted that it was the wish of the company to properly incentivise the company employees by providing appropriate and adequate rewards to them for their contribution to the business in the year ended 30 April 2010, the intended sum of which has previously been agreed as £150,000 of available profits or such other sum as determined once the profits are confirmed by the company auditors. The directors confirmed that it was their preference for this to be implemented by way of acquiring an interest in a Trust."

73. At interview on 7th June 2022 Mr Hughes also said that incentivising employees was "very much on our minds". Mr Hughes accepted that the minutes were a pro forma prepared by C3. The pro forma board minutes make no reference to consideration of any risks of the scheme, the impact on the solvency of the Company or of the interests of creditors. In particular, the effect on the Company's cash flow position was not addressed, and the minutes make no mention of any proposal to loan the monies

received by the Respondents back to HSJ in order to address cash flow. There are no other documents that suggest that these matters were considered.

74. Mr Barriball accepted that the scheme suggests a corporation tax saving and that the advice letter noted that it was unlikely that penalties would be payable in the event that the scheme failed. That did not of course mean that tax would not fall to be paid. Mr Barriball accepted that there might not have been reason at the time to challenge the opinion that failure of the scheme in relation to PAYE was negligible.

The EFRBS

75. On 1st November 2010, OneE wrote to the Company to acknowledge its engagement and:

> "to set out our understanding of the potential risks and rewards of the Planning ('the Planning' is defined in the enclosed Letter of Engagement). We set out below what we believe to be benefits of the Planning and we also set out what the potential weaknesses may be."

Under the heading "Risks of Planning" it set out various challenges that might be made in respect of Corporation Tax deductions and PAYE. These included the following:

> "Corporation Tax Act 2009 section 54 - HMRC may argue that the size of the contribution to the EFRBS is not commensurate with what is permissible under Corporation Tax Act 2009 section 54 as 'wholly & exclusively' for the purposes of the trade. If HMRC dispute the amount contributed, we will challenge their assertion and try to reach an amicable resolution. If no compromise can be reached then the likely outcome is that you will have to pay corporation tax plus interest (and possibly penalties however, in our view, the likelihood of penalties being charged is minimal given that we have implemented the planning following an opinion tax counsel and the EFRBS has been fully disclosed to HMRC) on the disallowed element. It may be possible to carry forward any disallowed balances against profits in future years.
>
> Distribution - Should HMRC be successful that the amount contributed to the EFRBS is not wholly and exclusively for the purposes of its trade, then HMRC could advance the further argument that the transfer of funds was a disguised distribution to the shareholders of the company. Were HMRC to succeed with this argument then it is likely that the funds would be taxed on the shareholders as a dividend. Provided the amount transferred to the EFRBS is commercial, we cannot see how HMRC could ever succeed with this argument.
>
> Corporation Tax Act 2009 section 1290 - In our opinion, the EFRBS strategy forms an 'EFRBS arrangement' and hence any payments made to the EFRBS are made under the EFRBS

> arrangement. HMRC and the courts may argue that only a payment made from an EFRBS is, for the purposes of the Corporation Tax Act 2009 section 1290 ('s. 1290'), made 'under' an EFRBS arrangement. If HMRC are successful with this argument then the provisions of s. 1290 would apply to your company's contribution to the EFRBS and hence a corporation tax deduction would be disallowed until qualifying benefits were paid out of the EFRBS.
>
> Corporation Tax Act 2009 section 1288 and 1289 - HMRC may seek to argue that the contribution to the EFRBS sub-fund is 'an amount charged in respect of employees' remuneration in a company's accounts' or 'an amount for which provision is made in the accounts with a view to its becoming employees' remuneration'. If HMRC are successful in this argument then your company will not be entitled to a corporation tax deduction in respect of contributions made to the EFRBS until amounts are paid from the EFRBS (sub-fund) to beneficiaries. Our firm view, supported by counsel, is that the contributions will not fall within the above legislation.
>
> …
>
> PAYE Risk - HMRC are seeking to argue that a payment to a sub-fund constitutes a payment to an employee and as such is taxable as earnings on the employee. If HMRC's view is ruled to be correct then your company should obtain a CT deduction on the amount contributed to the trust yet the key employees who have sub-funds will be taxed as if they received a bonus from the company. We cannot understand why HMRC are arguing this point given they have lost in key cases previously, and as such our view is that this is a negligible risk".

I note that the last of these risks is expressed in the present tense and suggests that HMRC had already identified issues with these schemes.

76. The letter also highlighted aspects of company law, on which it was said that specialist advice was recommended. These included:

> "Corporate benefit - The Directors are required to exercise their powers for the commercial benefit of the Company. Therefore the Directors should consider whether the EFRBS Arrangements will provide a commensurate commercial benefit to the Company. The Directors might, for example, conclude that an EFRBS is an effective way to incentivise the Company's management team, with the result that management's increased endeavour will provide a commensurate commercial benefit for the Company.
>
> To the extent that they do not provide a commensurate commercial benefit to the Company, then the EFRBS

Arrangements may be treated as a disguised dividend or an unlawful reduction of capital in respect of which the Directors may have personal liability.

…

Directors Duties - It is important that the Directors consider and comply with all their directors' duties in considering and implementing any EFRBS Arrangements.

…

In implementing any EFRBS Arrangements, the Directors should ensure that they exercise their powers in accordance with the Company's constitution and only for the purposes for which they are conferred, i.e. they must exercise their powers for their proper purpose.

When deciding whether to approve any EFRBS Arrangements, each Director must also act in the way that he/she considers, in good faith, would be most likely to promote the success of the Company for the benefit of its members as a whole. As such, in relation to the EFRBS Arrangements, the Directors should think about the following, among other relevant factors:

a) the likely long term consequences for the Company of the EFRBS Arrangements;

b) the interests of the Company's employees; and

c) the need to act fairly as between the members of the Company.

In making that decision, each Director must exercise the same reasonable care, skill and due diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience (i) that may reasonably be expected of a person carrying out that Director's functions in relation to the Company AND (ii) that the relevant Director actually possesses.

…

Solvency - The Directors will need to contemplate what effect the EFRBS Arrangements will have on the Company's working capital position.

If there is any question as to the Company's solvency and/or its ability to pay its debts (within the meaning of section 123 Insolvency Act 1986) either at the time that the EFRBS Arrangements are approved or as a result of implementing the EFRBS Arrangements, then the Directors' duty to act in the interests of the Company's creditors will override their other

> duties. Directors should seek specific advice on what actions they should take at that time."

77. Like C3, OneE also offered some level of support in pursuing a challenge to any rejection of the scheme, in this case at the level of the tax tribunals and above. They had some level of insurance to fund such a defence underwritten by Lloyds of London.

78. This scheme was also supported by an opinion from leading tax counsel, Mr Robert Venables QC. Mr Hughes said that he had read Mr Venables' opinion, which had been brought to a meeting. He was not provided with a copy. Again, the opinion is not in evidence and Mr Hughes's evidence does not set out what it said. Mr Hughes accepted that the opinion would have been heavily caveated and was directed to the scheme's promoters.

79. There are no minutes of the board meeting in respect of this scheme in evidence. Mr Hughes thought that there would have been such minutes. However that may be, there is again nothing to suggest that the risks of the scheme were discussed by the board or that the impact on the Company's solvency was considered. Again, however, the whole basis of the entry into these schemes was to address the perceived under remuneration of the Respondents.

Absence of advice

80. In neither case did the Company or the Respondents seek independent advice. In Mr Hughes's witness statement he said at paragraph 49:

> "My experience as a Chartered Accountant and Tax Advisor enabled me to make a value judgment as to the efficacy of the Schemes in contemplation, although I placed reliance upon the independent supporting views of leading tax counsel and was reassured by the insured defence in place. Notwithstanding, it remained my and the First Respondent's view that we should take necessary action to mitigate any potential risk. In doing so, we proactively sought to reduce the Company's exposure to HMRC enquiries, despite the relevant legislation and guidance not prohibiting (or targeting) the Schemes as contemporarily entered into."

81. Mr Hughes accepted that no reserve was established for HMRC liabilities but said that the Company was not required to carry one. There is nothing in the minutes of the directors' meetings to show how it was proposed that the liability would be met if the tax fell to be paid. Mr Hughes said that they considered that the risk was remote.

82. Mr Hughes explained in his witness statement at paragraph 50:

> "In light of the above assurances which I relied upon, and my personal experience, knowledge and skill, I did not consider it necessary to seek further independent professional advice in relation to the option to enter into the Schemes."

At paragraph 51 he said:

> "Insofar as it is said by the Applicants that further assurances and professional advice should have been obtained by me and/or the First Respondent in relation to the eventual decision to make contributions to the Schemes, we did not consider it to be proportionate to plunder further investment (having already incurred fees to OneE of £15,000 plus VAT and to C3 of £7,500 plus VAT) into obtaining advice that was more likely than not, in our view, going to positively reinforce the advice the Schemes had already obtained from leading tax counsel, and which would in any event have been redundant considering the safety net of defence insurance in favour of the Schemes."

83. Mr Barriball thought that the directors could have obtained alternative advice from a solicitor and an accountant. He did not know what the likely costs of that exercise would be. He considered that such advisors could have highlighted any concerns about the advice received. It was put to Mr Barriball that it might have been difficult to obtain a second opinion given the complexity of the scheme. Mr Barriball thought that if there were concerns about complexity that itself would cause him concern.

84. Mr Hughes told me that he did not consider it was worth obtaining further advice that would, in his view, have been likely positively to reinforce the advice already received and which would have been redundant given the safety net of the defence insurance in favour of the schemes.

85. That does appear to be consistent with what Ms Purnell described as Mr Hughes' rather blinkered approach to the merits of these schemes. The Company was warned to take independent advice in the case of the EFRBS. The November letter from OneE stated there were a number of complex company law considerations, including highlighting the need to exercise directors' powers for the benefit of the company. The need to consider the Company's solvency position and the interests of creditors was also expressly identified. There is nothing to suggest what independent advice taken by HSJ would have said, still less anything to say that it would have fortified the opinions in support of the schemes.

86. Even in the absence of advice, whatever it might have said, the effect of the schemes was evidently not settled. That is clear from the wording of the letters, particularly the November letter in respect of the OneE scheme, that HMRC might not accept that the scheme was effective. The C3 scheme documentation suggested that an enquiry into the Company's corporation tax was probable. The mere fact that the schemes were supported by opinions from senior tax counsel is indicative that they were not straightforward and open to challenge. This is made all the clearer by the reference to the provision of support in the First-tier Tribunal in both of the promoters' letters.

87. In my judgment, it would have been clear to the Respondents that there was considerable doubt about the effectiveness of the schemes. They were caveated, based on tax silks' confidential, and also highly caveated, opinions (rather than being a tried and tested scheme familiar to advisers generally), and likely to lead to proceedings in the tax tribunal and possibly beyond. Quite apart from anything else, a novel scheme that allowed the Respondents to receive substantial sums from the company free of tax (and without, I find, any real liability to repay the loans made) that would otherwise

have been due should have alerted them to the likelihood of challenge on the basis that it was too good to be true.

The HMRC enquiries, the cessation of business and the liquidation of HSJ

88. On 11th October 2011 HMRC issued a notice of enquiry into the EBT. Mr Hughes accepted that, at least by this stage, an HMRC challenge was no longer hypothetical. HSJ ceased to trade seven months later in May 2012. In the meantime the Respondents had taken the decision to transfer the Company's business to the LLP. The LLP was incorporated on 24th February 2012. Mr Budworth characterised this as a normal business decision at a time when there was one enquiry into one scheme. Mr Hughes' explanation of this in his witness statement is as follows:

> "The reorganisation came about as a result of a decision to form an LLP to involve our senior staff in the equity of the practice as a stepping stone to succession."

Why that could not be done by issuing shares to senior staff within the existing structure is not explained.

89. An application was made by the Respondents to strike the Company off the Register of Companies on 19th February 2013. Mr Hughes accepted that this was done despite knowing that HMRC continued to investigate the Company's tax affairs. The strike off action was suspended on 16th May 2023 and an HMRC enquiry into the EFRBS was opened by notice dated 19th July 2013.

90. On 28th November 2013, HMRC made two settlement proposals in respect of the EFRBS for the tax year ending 30 April 2011, stating that:

> "We are aware that you have used EFRBS arrangements designed to trigger a Corporation Tax (CT) deduction without any taxable benefit arising to employees under the scheme. HMRC strongly believe that these arrangements do not work."

The first proposal was that no deduction would be due from corporation tax profits for contributions made to the EFRBS until relevant benefits were paid out. The alternative proposal was that PAYE and NIC would be payable on the contributions made to the EFRBS and a deduction could be made from corporation tax profits for contributions made to the EFRBS. The Company responded with an expression of interest in settling the EFRBS liability in December 2013.

91. A Regulation 80 determination was issued on 21st January 2014. This determined that the Company was liable to pay £23,727.33 in respect of NIC and £60,000 in respect of PAYE for the tax year April 2009 to April 2010. This seems to be because the Company had treated the entry into the EBT scheme as arising in that tax year, although the board resolution and the payment took place in the following year. An appeal was lodged by C3 and, on 3rd February 2014, HMRC confirmed that arrangements had been made to stand the tax over.

92. OneE wrote to HMRC stating that it was instructed on the enquiry in respect of the EFRBS on 14th February 2014. On 13th November 2014, it was determined that

£104,682.68 was due in respect of corporation tax in respect of the period May 2010 and April 2011. On 27th November 2014 the Company wrote to appeal and to request a postponement. The postponement was agreed in respect of £96,642.33.

93. On 17th November 2014 HMRC raised a Regulation 80 determination in the sum of £105,912.70 in respect of PAYE and section 8 determinations for NIC for the year ending 5th April 2011 in the sum of £49,027.86.

94. On 13th January 2015 HSJ was notified an APN would be issued in respect of the tax in relation to the EFRBS and the settlement proposals in respect of the EFRBS were withdrawn shortly thereafter on 23rd January 2015. The accelerated payment notice was issued on 25th March 2015 for the period May 2010 to April 2011. It required payment of £92,582.38 by 26th June 2015 in respect of the EFRBS. The Company made representations which were rejected by a letter of 6th October 2015, such that the sum was due for payment in November 2015. The notice was amended to the reduced sum of £78,391.14 on 17th June 2016. It was this APN that appears to have been caught by an interim order in judicial review proceedings.

95. In respect of the EBT settlement proposals were withdrawn and an APN was issued on 27th November 2015 requiring the payment of £23,727.33 in respect of the tax year ending April 2010 by 29th February 2016. A further notice of the same date was issued in respect of the PAYE element in the sum of £60,000.

96. Matters had not moved on by 2016. Mr Barriball said that by this stage the Respondents had been arguing with HMRC for a couple of years and wanted to try the liquidation route. Mr Barriball was taken in cross-examination to an email of 1st March 2016 in which Ms McAllister had written to the Respondents and said:

> "Hi Both
>
> Sorry I haven't got back to you earlier, we have had so many MVL this month. I had a word with Simon regarding the liquidation of the above. As far as we are aware even though we are making the Insolvency Services aware of potential APN's in liquidation they have not taken action against any directors.
>
> As far as liquidation is concerned the process would be very simple and we would report a contingent liability statement of affairs for £1 and put the full claim if any in the notes to the SofA.
>
> The fee for this liquidation will be £2500 and £500 for disbursements plus VAT."

It was put to Mr Barriball that the gist of this email was that the Respondents did not have much to worry about. Mr Barriball said that this was not what the email said. The reference to the Insolvency Service was to highlight that they were not aware of any disqualification proceedings being taken. That does seem to me to be the gist of the email. It refers the action by the Insolvency Service, rather than the approach that was being taken by HMRC. Mr Barriball also said that his reference to the matter being "simple" was a reference to the procedure of the liquidation, not the HMRC matters,

which he had explained was "an issue". I accept that; it is consistent with what this email says.

97. The statement of affairs as at 29th March 2016 recorded HMRC's debt at £1. The notes to the statement of affairs explain as follows:

> "HM Revenue & Customs estimated the company's liabilities for under the Benefit Trusts to be £165,912.70. However this amount is wholly disputed by the directors and they have therefore been included as a contingency creditor for £1".

It was put to Mr Barriball that had it not been for the Liquidators' advice to mark the HMRC debt at £1 and let the Company go it would have been able to obtain generous payment terms and that the Company could have traded its way through the liability. Mr Barriball denied that the Liquidators had informed the Respondents that it would all go away and said that he had no idea whether it could meet the ultimate liability through trading. The Respondents had had enough of arguing with HMRC and wanted to see if the liquidation would make the problem go away. It is of course not unusual for disputed debts to be marked in this way and it appears to me that it cannot be taken as any sort of indication to the Respondents that the HMRC liability was insignificant. In any event, he said that his experience was that HMRC was only interested in settling where there was money to do so.

98. A notice of amendment in respect of the Company's corporation tax return for the period May 2010 to April 2011 was issued on 4th October 2016, specifying the amount payable to be £195,931.96.

99. HMRC issued a proof of debt on 31st October 2016 in the sum of £587,098.08, made up as follows:

i) £1,452.37 in respect of legal costs dated 8th April 2015,

ii) £2,117.60 in respect of corporation tax dated 31st May 2012;

iii) £2,964.52 in respect of corporation tax dated 30th April 2012;

iv) £78,391.14 in respect of a stood-over accelerated payment charge for corporation tax dated 30th April 2011;

v) £7,839.12 in respect of a stood-over accelerated payment charge for late payment penalties dated 30th April 2011;

vi) £154,940.56 in respect of a stood-over Regulation 80 Determination pending appeal dated 5th April 2011;

vii) £83,727.33 in respect of a stood-over Regulation 80 Determination pending appeal dated 5th April 2010; and

viii) £83,727.33 in respect of an accelerated payment dated 5th April 2010.

100. On 23rd February 2017 Mr Barriball wrote to Mr Hughes and noted that the only outstanding matter was the claim raised by HMRC. He noted that the debt was much

larger than the "worst case scenario" declared in the statement of affairs, and that, as a result of size of the debt and "recent guidelines" announced by HMRC, he was obliged to look into the matter. He asked whether OneE was still acting in the matter, whether any further tax advice had been received and whether any sums had been paid into a "fighting fund" after HMRC pursued the matter.

101. On 30th May 2018, Mr Barriball wrote to Mr Hughes and Mr Jackson and said:

> "I thought I would drop you a little update on the case. Not much has been happening so far and HMRC have been very quiet on this case and we have been waiting to see how they are going to approach things.
>
> They have been refining their stance recently and we have been contacted in regards to other cases in regards to settlements for EBT liabilities. We have mainly been contacted in regard to schemes through Root2, who have lost in court recently, which I note is a different scheme than the one that HSJ used but I consider it worth looking into.
>
> You probably know more than me about this but I gather the rules have been changed and that from 2019 the beneficiaries of the schemes are to be taxed rather than the company. This all depends on what happened with the scheme and whether loans were paid etc, so I am not sure whether this will be an issue for you or not, but it might be possible to deal with any liability beforehand via the company in liquidation.
>
> I am not sure if this is the case or is viable but I have replied to HMRC regarding a settlement for the liquidation. This shouldn't tie us in to anything and is more to keep our options open in case something can be done. They are likely to come back with a list of further questions (which I have had on other cases) rather than come back with figures but these questions might be telling as to how the tax will be treated after 2019 and will hopefully allow us to move things on a bit."

Mr Barriball thought he had replied to HMRC but the prospect of settlement did not go any further than that.

102. A revised claim was lodged, dated 10th August 2018, in the sum of £507,290.31, made up as follows:

i) £1,452.37 in respect of legal costs dated 8th April 2015,

ii) £2,117.60 in respect of corporation tax dated 31st May 2012;

iii) £2,964.52 in respect of corporation tax dated 30th April 2012;

iv) £78,391.14 in respect of a stood-over accelerated payment charge for corporation tax dated 30th April 2011;

v) £11,758.68 is claimed in respect of accelerated payment charge late payment penalties, subject to a judicial review, dated 30th April 2011;

vi) £154,940.56 in respect of a stood-over Regulation 80 Determination pending appeal dated 5th April 2011; and

vii) £83,727.33 in respect of a stood-over Regulation 80 Determination pending appeal dated 5th April 2010.

It looks as if the previous proof of debt had duplicated a payment of £83,727.33.

103. On 12th October 2018 Mr Barriball wrote again to Mr Hughes and Mr Jackson:

> "Just thought I would drop you a note re developments on the liquidation.
>
> Not much has happened on the case but we have had some movement on similar cases. HMRC have said that they are open to settlement in liquidations which might then cover/negate any personal claims against the directors after April 2019. However, even HMRC don't seem to know the full implications of the changes coming in and so we have asked them for clarification on this.
>
> I am not sure how applicable this is to you but I will let you know how we get on. Some of the correspondence we have received suggest there might be some kind of penalty incurred in April on the debts becoming personal so it might help to avoid this maybe.
>
> In the meantime, have you had any correspondence from HMRC about personal liability? Some directors claim to have been contacted already."

104. On 29th March 2019 Mr Barriball emailed Mr Hughes and said:

> "It does look to me like the scheme you did is unfairly being lumped in with all the other (much more dubious) tax schemes that have been used by people and as a result HMRC are pursuing them more than they otherwise would."

This is the email that Mr Budworth relied upon as indicating that the Liquidators had themselves regarded the schemes as legitimate for the Respondents to have entered into. I accept that Mr Barriball had seen schemes that were more obviously ill-founded than the schemes into which HSJ entered and it may be that the existence of such schemes prompted HMRC to investigate the Company's arrangements more vigorously than might otherwise have been the case. Mr Barriball's remarks in this email do not, however, constitute a recognition that the schemes were either effective or schemes that it was reasonable for the Respondents to cause the Company to enter into them.

105. HMRC issued a further proof of debt in the liquidation on 6th June 2022 in the sum of £348,813.76.

106. The Respondents attended an interview with the Liquidators on 7th June 2022 and, on 19th December 2022, the Liquidators wrote to the Respondents to say that a letter before claim would be forthcoming. The letter before claim is dated 23rd February 2023 in which the Liquidators sought payment of £450,000, together with interest.

107. A final proof of debt was lodged by HMRC, dated 23rd March 2023, in the sum of £574,453.79, made up as follows:

   i) £2,117.60 in respect of Cotax AP 12 for the period 1st May 2012 to 31st May 2012;

   ii) £2,964.52 in respect of Cotax AP 09 for the period 1st May 2012 to 30th April 2012;

   iii) £105,912.70 respect of Regulation 80 determinations for income tax for the period 6th April 2010 to 5th April 2011;

   iv) £83,727.33 claimed in respect of Regulation 80 determinations for income tax of £60,000.00 and NIC 1 of £23,727.33 for the period 6th April 2009 to 5th April 2010;

   v) £23,161.60 claimed in respect of a Regulation 80 determination dated 28th March 2016;

   vi) £15,027.95 claimed in respect of PAYE Interest dated 28th March 2016;

   vii) £1,362.37 claimed in respect of PAYE CCP Costs dated 28th March 2016;

   viii) £90.00 in respect of PAYE Fixed Costs dated 28th March 2016;

   ix) £1,452.37 in respect of legal costs dated 8th April 2015;

   x) £11,758.68 claimed in respect of accelerated payment charge late payment penalties, subject to a Judicial Review, dated 30th April 2011; and

   xi) £154,940.56 in respect of a stood-over Regulation 80 Determination pending appeal, dated 5th April 2011.

108. It appears that the 2015 APN is no longer subject to judicial review. The status of the appeal is not at all clear. No one was able to tell me what stage it had reached, to the extent it is extant at all. The £83,727.33 arising from the Regulation 80 determination dated 21st January 2014 in relation to the C3 scheme is no longer stood over.

The payments to the schemes and the effect on the Company's solvency

109. The Company paid £150,000 to the EBT in June 2010. That left the company account £84,368.41 overdrawn. A further £300,000 was paid to the EFRBS in November 2010.

110. The Company's filed accounts for the year ending 30th April 2010 showed current assets of £389,176, including cash in hand and at bank of £122, and creditors falling due within one year of £757,593. Net assets amounted to £35,105. In those for the year ending 30 April 2011, the Company reported current assets of £415,192, including cash

at £187, and creditors in the sum of £795,587. Total assets were shown at £38,011. There is nothing to show HSJ's position thereafter as no further accounts were filed at Companies House and no other financial information for the trading thereafter was shown to me.

111. On the face of it therefore the sums left in the Company were insufficient to meet any of the liabilities to HMRC that were due in the event that schemes were ineffective to any significant degree in either year. HMRC have found that the schemes were ineffective and there was a substantial liability to tax. Those determinations have not been set aside and nor my attention drawn to any reason to think that they will be. In this regard I note that the 21st January 2014 Regulation 80 determination relating to the EBT was for a sum in excess of £83,000. A further £105,912.70 was determined to be due in respect of tax for the period 6th April 2010 to 5th April 2011 under a further Regulation 80 determination. Those sums, on the material available to me, had no prospect of being paid when the tax for the relevant year fell to be paid in the following January.

112. The Respondents suggest that they would have been able to trade out of the liability having obtained advantageous payment terms. There is nothing in the material to which my attention was drawn to suggest that advantageous payment terms would have been available or that that the Company would have been able to meet them by trading, even if the liability had been the relatively modest sum set out in the statement of affairs approved by the Respondents. The only concrete suggestion as to where monies might have come from arises from what the Respondents say happened to the monies paid to the schemes.

113. The Respondents applied for interest free loans from the EBT on 2nd June 2010 in the sum of £150,000 and from the EFRBS on 29th November 2010 in the sum of £300,000. The Respondents allege that the monies that they received from the schemes, being £68,125 each in the case of the EBT and £160,000 and £140,000 respectively in the case of the EFRBS, were loaned back to the Company, enabling it to meet its liabilities at that point.

114. Mr Jackson has not made a statement but there is in the disclosure a bank statement from a NatWest bank account which appears to be his. It shows the payment of a loan to him from the trust in the sum of £68,125 and its immediate payment out to an account with a number ending 7868, which appears to be the Company's bank account. What this payment was for is not at all clear.

115. It was not clear whether the directors' loan account ledgers existed. Certainly the Liquidators have not produced them. Mr Barriball said he had not seen them. By the same token, the Respondents have not produced their own bank statements from 16 years ago, aside from the solitary bank statement produced by Mr Jackson. Ms Purnell submitted that this statement was inadmissible in any event as Mr Jackson had not made a witness statement to explain the provenance of the document or the purpose of the payment and no hearsay notice had been served in respect of it.

116. Mr Budworth however referred me to paragraph 27.2 of Practice Direction 32 to the Civil Procedure Rules, which provides as follows:

> "27.2 All documents contained in bundles which have been agreed for use at a hearing shall be admissible at that hearing as evidence of their contents, unless –
>
> (1) the court orders otherwise; or
>
> (2) a party gives written notice of objection to the admissibility of particular documents."

In this case the document appears in an agreed bundle and no notice of objection has been filed. Mr Budworth is therefore correct that that the document is admissible as evidence of its contents. It does not, however, tell me very much about the nature and purpose of this payment. Neither Mr Hughes nor Mr Jackson have produced any further bank statements. I accept that these statements would have been produced some 16 years ago, but there is nothing to suggest that the Respondents have made any efforts to maintain them or any other records to evidence the making of these payments. Whether the payments were made available to the Company to meet its liabilities was obviously highly material to the Respondents' contention that, despite appearances, the Company would, but for its later cessation of trade, have been able to meet its tax liabilities. I find it very surprising that they do not seem to have attempted to obtain this evidence and I reject Mr Hughes' evidence that it only became clear that such evidence was necessary when he received Miss Purnell's skeleton referring to its absence. Aside from being accountants themselves, the Respondents have been legally advised throughout and the significance of obtaining this evidence was obvious.

117. Mr Barriball said that he had seen no proof that the monies were reinvested and Mr Hughes and Mr Jackson were not listed as creditors in liquidation. The Company's accounts for the year ending 2011 show the directors' loans increasing from £279,693 in the previous year to £450,276, an increase of £170,583. Mr Barriball was unable to offer any explanation for this payment and said that there was nothing to show what it was for either way. At interview Mr Hughes had explained that there had been a decision to re-introduce the funds to help with cash flow. In considering the overall effect on the Company they had considered cashflow forecasts and client billing forecasts.

118. I am not satisfied that any or any sufficient monies were in fact paid into the Company. Had this been so, I consider that that the Respondents would have been able to adduce some proof of this beyond a single bank statement that is not referred to in the Respondents' evidence. The increase in the directors' loan account is not equivalent to the loans made to the Respondents from the schemes, or either of them, there are no Company bank statements to show how any cash that might have been paid was applied so as to be available to meet any tax liabilities. As I have noted, there is something of an inherent improbability in the Respondents' case in this regard. If the schemes were to give the directors a proper level of remuneration following years of, as they saw it, underpayment it might be somewhat surprising that they chose to invest the entirety of the monies they received back into the Company, interest free. The contradiction serves only to fortify the need for proper evidence of the fact of the payments and the effect that they would have had on the Company's cash flow position. Had there indeed been a plan to pay these monies into the Company and draw them out gradually over the coming years it is remarkable that there appear to be no emails, texts or other documents referring to that intention.

119. I should mention one piece of further evidence to which my attention was not drawn during the hearing in connection with investment in the Company. Mr Hughes' application for a loan from the EBT dated 2nd June 2010 did make reference to the purpose of the loan being "introducing capital into my business". Given the artificial nature of the schemes, however, I place little reliance on the statement in this document.

120. More fundamentally, I cannot see that the making of such loans to the Company assists the Respondents in any event. Mr Hughes' own evidence was that the loans were repaid to them when the business of the Company was transferred to LLP at the beginning of 2012 and then made available to the LLP. This might be why neither Mr Hughes nor Mr Jackson was shown as a creditor of the Company in the statement of affairs signed by them for the purposes of the liquidation (although it might equally be because no such payments were made). As such, even if I were to accept that some element of the loans to the Respondent sufficient to meet the HMRC liabilities were subsequently loaned by them to the Company, so as to constitute a responsible reserve of the sort contemplated in the points of claim, that reserve was not maintained to meet any liabilities that arose. It was paid away shortly after the first HMRC enquiry began.

Discussion

121. I am satisfied that the payment into each scheme meant that the Company was rendered insolvent on a balance sheet basis. Leaving aside the subsequent standing over of collection of the tax, HMRC has assessed that the Company was subject to tax of at least £80,000 that the Company had sought to avoid by the payment to the EBT and at least £150,000 in respect of the tax that the Company had sought to avoid by the payment to the EFRBS. That tax was not contingent on those assessments being raised or on there being a finding of the tribunal that the tax is due. The assessments, until set aside, establish what tax was due in the relevant years. The available financial information shows that, had the tax liabilities, even at the level calculated by Mr Hughes, being PAYE/NIC of £83,727 for 2010 and corporation tax of £78,391 for 2011, been included in the financial statements, the Company would have been balance sheet insolvent in both years.

122. I am similarly satisfied that the Company was cashflow insolvent. In that regard I am not satisfied that sufficient monies were paid back into the Company by way of loan to allow its liabilities to be met in the short or medium term. The statement that the whole of the loan monies were repaid to the Company is not borne out by the evidence. There is only one bank statement showing a payment to the Company and the most recent statutory accounts do not show the directors' loan increasing by the full amount said to be loaned. There is no statement from Mr Jackson confirming the reason for the payment. In the absence of evidence from Mr Jackson, bank statements confirming the payments or financial statements that are consistent with the Respondents' case to show that these monies, or the sums shown as due to the directors, were available to meet the tax liabilities, or would have been so available, I am unable to conclude that the Company had loan capital available to it to meet its liabilities. Nor does it appear to me that it would have been able to trade out of the financial difficulty caused by the transactions so as to suggest that there was any light at the end of the tunnel at all.

123. In fact I conclude that there was not. There are a number of factors that lead me to that conclusion. First, the Company ceased to file accounts for the period after 30th April 2011, so there is no indication of the Company's trading thereafter. That is, as Miss

Purnell submitted, an extraordinary omission on the part of chartered accountants and is suggestive of a desire to obscure the Company's trading position. Secondly, there is no information about the trading of the LLP so as to provide some guidance as to how HSJ might have traded had it continued to do so. Again, the inference that I draw is that it would not support the Respondents' case about the Company's likely ability to trade out of any financial difficulty arising from the tax liability.

124. In those circumstances it seems to me that it can be said that the Company was likely to be insolvent, or likely to go into insolvent liquidation, at the time of the putting into effect the schemes, and as a result of doing so.

125. As I have indicated above, I accept that for the creditor duty to arise, however, there must be some level of knowledge of the company's insolvency. I conclude that there was sufficient knowledge here. The Respondents had, at the very least, knowledge that there was a real risk that the Company had been rendered insolvent by the schemes. I say this for the following reasons –

i) These were, as Ms Purnell described them, aggressive tax schemes which were, as Mr Hughes accepted, heavily caveated even by those promoting them.

ii) They were sufficiently contentious to require specialist tax opinions and they were expressly said not to have been approved by HMRC. A novel tax avoidance scheme, with which, as Mr Hughes also acknowledged, HMRC would be "unhappy", is inherently subject to uncertainty and risk of successful challenge.

iii) That risk cannot have been thought to be remote. On the contrary, it was likely. C3 highlighted that an HMRC enquiry was probable and the EFRBS documentation in particular set out a large number of potential challenges and highlighted the need for the directors to take independent advice on their company law obligations. At least one of the potential challenges was expressed in the present tense as the view that HMRC "is taking". Even if the scheme did not fail as a result of the specific risks identified, it was abundantly clear that these schemes were novel and contentious.

iv) That was made all the clearer by the fact that both of the scheme promoters offered support in challenging HMRC decisions at least to the level of the First-tier Tribunal. There would have been no need for such a service if the efficacy of the schemes was uncontentious or the risk of a challenge was negligible.

v) The Respondents, as accountants, would have been able to calculate the tax due in the event that the schemes were ineffective. I have been given nothing to satisfy me that those sums would have been calculated broadly at the same level as the assessments subsequently levied. At anything like that level, even at the level set out in the statement of affairs, the insolvency of the Company should have been apparent.

126. I accept that the schemes were entered into a time when there was less of a spotlight on such schemes. The legislative climate was different in that there were fewer anti-avoidance provisions in HMRC's armoury. Nonetheless, there was on the face of the documents a real and obvious risk of challenge by HMRC and a real and obvious risk

that the Company would be unsuccessful in resisting that challenge, leading to a debt that the Company did not have a real prospect of paying. Even taking Mr Hughes' own calculation of the tax payable the available financial information suggests that the Company was unable to meet that liability.

127. That being so, the creditor duty was engaged. The Respondents should at the least have asked themselves, "If these schemes do not have the effect we intend, how are we to pay the tax due?" The Respondents were well able to calculate the likely liability and consider strategies for dealing with it. They do not appear to have done so at all. On the contrary, in my judgment, they closed their mind to the risk to the interests of creditors. They did not obtain any independent advice as to the schemes or how the risks to the Company should be addressed as a matter of company law, even when advised to do so. The tax advice they had came from the promoters of the schemes, with a product to sell, and from tax counsel whose advice was directed to those promoters. It was inevitably partial. Sophisticated financial professionals such as the Respondents cannot but have appreciated this. It was advice that they were only shown and not allowed to retain for themselves.

128. The transactions they proposed to enter into removed from the Company £450,000 and, if unsuccessful, left the Company with a six-figure liability. Yet the Respondents did not even explore the availability or cost of a second opinion. There is no basis for Mr Hughes' assertion that such advice would likely have confirmed the opinions received, not least because those opinions are not in evidence, though had some independent advice been obtained that provided a rational analysis of the merits of the scheme, and the Respondents made a good faith assessment of the likelihood of failure and how the tax liability in the event of such a failure might be met, then it might be difficult to challenge their approach to their duty. I cannot speculate as to what an alternative opinion would in fact have said but the Respondents' failure to explore one tends to suggest that they did not wish to risk being told something that they did not want to hear.

129. That view is fortified by subsequent events. The Respondents formed the LLP in early 2012 after receiving notice of the HMRC enquiry into the EFRBS. I find it difficult to accept that the LLP was part of ordinary succession planning, rather than an attempt to abandon the Company, leaving its tax debts behind. I do not see why the senior staff could not have acquired equity in the Company, rather than adopting the LLP structure. The failure to file accounts for the year ended 30th April 2012 and subsequent attempt to strike the Company off the register only add to the impression that the Company was unable to meet its anticipated liabilities. Had there been any prospect of meeting the liabilities that the Respondents must have seen may well have been fortified by assessments in due course, then I see no reason why they would not have continued to trade via company.

130. Having failed to consider the creditor's interests at all the court has to consider what an honest and intelligent director in the position of the Respondents should have done, faced with the decision they were to make in 2010. The Respondents plainly should have considered how the tax liability would be met, whether by entering into the scheme to a more modest extent, maintaining a reserve to meet the tax liability in full, or having in place a strategy to meet that liability by a mixture of a reserve and other sources of finance. Instead, the Respondents denuded the Company of the majority of its assets available to meet its liabilities. That was not within the bounds of a decision to which

reasonable directors could come in the light of the obvious risks of challenge to the scheme and the absence of any compelling advice, in the evidence before me, that those risks were minimal. In the light of subsequent events, it seems clear that the principal focus of the Respondents at the time was to extract as much of the capital of the Company as possible for their own benefit, and to a much lesser extent the benefit of other employees, without regard to the interests of HMRC as creditor.

131. That being so, I am satisfied that the Respondents were in breach of the duty to consider the interests of creditors when making each of the payments to the schemes.

132. Even if I am wrong as to that, and loan monies were made available to meet ongoing liabilities, those monies returned on a precarious basis and were withdrawn shortly thereafter, without regard for the interests of creditors at a time when HMRC enquiries had begun and against the background that I have described. By that point, the risks of a challenge to one or both of the schemes was no longer merely hypothetical. That act rendered the Company insolvent by 2012 at the latest. Such a withdrawal appears to me to fall within the ambit of the breach of duty alleged at paragraph 47(h), that is to say the failure to "maintain" a responsible reserve to meet the Company's liabilities.

133. Having concluded that the Company was in fact rendered insolvent by the payments to the schemes, and the directors being unable to satisfy me that HSJ at any point returned to solvency, there is no scope for the principle in *Re Duomatic* to operate to validate their actions insofar as the creditor duty was concerned. Nor is there any evidence that the Respondents in fact turned their mind, qua shareholders, to the question of whether they should relieve themselves of liability and so the question simply does not arise.

Limitation

134. That conclusion is subject to consideration of whether the Liquidators can maintain this claim at all, given that the cause of action against the Respondents arose more than six years before the application was made. In this regard, section 21 of Limitation Act 1980 provides as follows:

> "(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—
>
> > (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
> >
> > (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> …
>
> (3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued …."

135. A director is treated as a trustee. In *Burnden Holdings (UK) Ltd v Fielding* [2018] UKSC 14 Lord Briggs noted at [18] that section 21 is "primarily aimed at express trustees", but it is "applicable to company directors by what may fairly be described as a process of analogy". He continued at [19]:

> "in the context of company property, directors are to be treated as being in possession of the trust property from the outset. It is precisely because, under the typical constitution of an English company, the directors are the fiduciary stewards of the company's property, that they are trustees within the meaning of section 21 at all. Of course, if they have misappropriated the property before action is brought by the company (the beneficiary for this purpose) to recover it they may or may not by that time still be in possession of it. But if their misappropriation of the company's property amounts to a conversion of it to their own use, they will still necessarily have previously received it, by virtue of being the fiduciary stewards of it as directors."

As to what is encompassed by the word "recover", it is tolerably clear that it can extend to a claim for equitable compensation (see *South Bank Hotel Management Company Ltd v Galliard Hotels Ltd* [2026] EWCA Civ 56).

136. It is not alleged that there is any fraud on the part of the directors. The debate between counsel centred on whether the monies received from the Company by the trusts were retained by the Respondents or converted to their use in circumstances where, on their case, they were returned to the Company. Here the monies were paid away by the Respondents for their own benefit. In this regard I am satisfied, and it was not suggested to the contrary, that the reality of these schemes was that the proceeds of company property were "received by" the Respondents.

137. Even if I accepted that some or all of the monies had been paid back to the Company, they were nonetheless converted to the Respondents' use. Company monies were paid to trusts for the benefit of the Respondents and, having been paid to the Respondents were loaned to the Company. They ceased to be company monies and became the Respondents' monies, which they invested as they saw fit, ultimately, on their case, calling the loans back in and investing them in the LLP. On that basis it seems clear to me that the monies paid into the schemes were converted to the Respondents' use and no limitation period applies to the claim.

Quantum

138. The Liquidators seek the full sum paid from the Company to the schemes, although they conceded that some £13,500 of that is statute-barred by reason of the payments out of the trust being made to other employees. That is rather less than the sum claimed by HMRC before interest is taken into account. Mr Budworth cautions me against treating the HMRC figures as determinative and referred to me to the decision of ICC Judge Prentis in *Shahi Tandoori Restaurant Ltd; Brown v Bashir* [2021] EWHC 337 (Ch). In that case the ICC Judge had said:

> "109. To what remedy is the liquidator entitled?

> 110. Ms Julian has argued vigorously that liability against the First Respondent should be for £771,918, jointly and severally with the Second Respondent as to £321,252; in other words that it should be aligned with HMRC's findings.
>
> 111. With respect, that seems to me wrong in principle. The liquidator is seeking equitable compensation. Mr Mortell was not engaged in assessing that, but in carrying out his functions under the VATA. That is neither the same, nor even, at this stage, an equivalent. For example, as Ms Calder and Mr Timson underline in their spirited submissions, Mr Mortell agreed that his concern was outputs but not inputs.
>
> 112. On the evidence this is not a mere dry point. The figures for missing cash from the 2011 and 2012 accounts of £3,600 and £9385 were discovered because purchases for the Company had been made in those sums. Likewise, the £8,000 per quarter was to balance spending of that amount by the Company. So it appears that at least some of the cash taken was ultimately used for the Company's benefit. I add that it would not, of course, follow that all such sums had been so used."

It is of course right to say that the exercise undertaking by HMRC is not the same as that to be undertaken by the court. HMRC determines the tax due. The court has to consider the proper amount of compensation due.

139. Here, it seems to me that that Liquidators are right in their approach as to the level of compensation. It must be remembered that it falls to a director as a fiduciary to account for his dealings with the property under his or her stewardship and to restore to the company those sums which have not been dealt with in accordance with his or her duties. Here, I am satisfied that company monies were paid away from the Company to the trusts in breach of the Respondents' duties under section 172. None, save for a small amount paid to employees other than the Respondents, which is not claimed in any event, can arguably be said to have been for the benefit of the Company or its creditors. Any monies that might have made their way back to the Company by way of directors' loan were swiftly paid away again. Nor, I should say, did the Respondents show any countervailing benefit that was conferred on the Company's finances by the schemes, although a corporation tax benefit, which seems to be no more than a deferment, was suggested during cross-examination.

140. The total sum paid away was £450,000 of which £436,500 is now claimed. On the face of it the Respondents are liable to account for that sum. The assessments comfortably exceed that sum. The assessments have not been successfully challenged after many years. The circumstances in which the determinations came about were that an inquiry into the OneE scheme began in October 2011. It was not until July 2013 that an inquiry into the C3 scheme was opened. The determinations were raised in November 2014. There appears to have been limited engagement with challenging the assessments by the directors and it was not suggested that the Liquidators themselves had in any way culpably failed to pursue any extant appeal that there might be. Mr Budworth has not persuaded me that there is any prospect of challenging HMRC's determinations now, or reducing them by any significant extent. As I have noted, the fact that payment of

some £154,000 may (or may not) have been postponed does not mean that the sum is not due.

141. It is true to say that the sums claimed by HMRC over the years have increased. In answer to the Respondents' contention that the debt now stands at a much higher amount than it stood at the date of liquidation, that it is a result of their own failure to make proper provision for the Company's liabilities. The Respondents' suggestion that their liability should be capped at a level to reflect a smaller sum that could have been negotiated with HMRC seems inappropriate in circumstances where that sum is entirely speculative and there is no indication that payment could have been made. Indeed, settlement proposals made while HSJ remained under control of the Respondents did not find favour with them and were withdrawn.

142. Given that the sum for which the Respondents are liable to account, having paid those sums away in breach of duty, is exceeded by the extant assessments, it appears to me that the proper level of compensation is £436,500 together with interest thereon.

Relief under section 1157(1) CA 2006

143. Having come to that conclusion I must consider whether the Respondents are nonetheless entitled to relief under the CA 2006, either in whole or in part. Section 1157(1) CA 2006 provides:

> "If in proceedings for negligence, default, breach of duty or breach of trust against—
>
> (a) an officer of a company, or
>
> (b) a person employed by a company as auditor (whether he is or is not an officer of the company),
>
> it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit."

144. The first two elements, as they appeared in the predecessor to this section, were discussed by Robert Walker LJ in *Bairstow v Queens Moat Houses Plc* [2001] EWCA Civ 712 as follows at [58]:

> "The judge's reasons appear at pp.43-9 of the dividends judgment. He began by directing himself, correctly, that the burden of proving honesty and reasonableness was on those who were asking for relief. He also directed himself that s.727 enabled the court 'to consider the matter from an essentially subjective point of view'. That cannot, with respect, be right as regards reasonableness. It is questionable whether it is right as regards honesty. As Lord Nicholls said in *Royal Brunei Airlines v Tan* [1995] 2 AC 378, 389,

> 'The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.'"

145. As to the circumstances in which an honest and reasonable director ought reasonably to be excused, I was referred to the judgment of Judge Seymour QC, sitting as a judge of the High Court, in *Re Marini Limited* [2003] EWHC 334 (Ch) at [57]:

> "I am persuaded on the evidence that the Respondents did seek the advice of Mr Hanison in relation to the Dividend before it was paid and did act honestly and reasonably upon that advice in making the distribution. The trigger conditions for the exercise of the discretion conferred by s. 727 of the 1985 Act are thus met. However, like Rimer J. I have the greatest difficulty in seeing that it is ever likely that 'in all the circumstances of the case' it is going to be right that a defaulting director 'ought fairly to be excused for the negligence, default, breach of duty or breach of trust', if the consequence of so doing will be to leave the director, at the expense of creditors, in enjoyment of benefits which he would never have received but for the default. However honestly the director acted, however much it may have appeared at the time of the act complained of that the only person who might be harmed by the act would be the director himself, it just is not fair, as it seems to me, that if it all goes wrong the guilty director benefits and the innocent creditors suffer. For this reason I decline to exercise my discretion under s. 727 in favour of any of the Respondents in relation to their respective liabilities for breach of s. 263 in relation to the Dividend."

146. It is for a director in breach of duty to satisfy the court of the elements of section 1157(1). That presents an obvious difficulty for Mr Jackson, who has not filed any evidence at all as to his intentions in entering into the schemes.

147. There is in my judgment no basis for relieving either of the directors from liability in this case. I am satisfied that neither of the directors had any dishonest intent in entering into the schemes. In relation to Mr Jackson I feel able to come to that conclusion from the evidence as a whole. It cannot however be said that they acted reasonably. These were self-evidently schemes that included a significant degree of risk. The scheme documentation highlighted a number of warnings and caveats and, indeed, the need to produce opinions from tax silks as to the likely effect of the schemes in itself was indicative that this was not a settled question. Mr Hughes accepted that the opinions would have been subject to caveats. The Respondents knew that these opinions were directed to the promoters of the scheme and yet they took no steps to seek advice for the Company itself.

148. Given the scale of the withdrawal of funds, and the likely size of the tax liability that would follow if the schemes failed, in my judgment, even by the standards prevailing at the time, that course was not reasonable. The Respondents prioritised personal

extraction over the protection of the Company and its creditors. Nor is there any evidence that the Company, had it continued to trade, would have been able to meet the tax liabilities over time, so that the directors could reasonably have regarded the failure of the schemes as a risk that could properly be taken. Evidence of the LLP's trading could have been produced to indicate what the Company's trading might have been had it continued, but such evidence was not produced.

149. Even if I were wrong in that, I am not of the view that it would be fair, just and reasonable to excuse the Respondents in the circumstances of the case. The consequence of doing so, as in *Re Marini*, would be to throw the consequences of the Respondents' actions onto the innocent creditor, while the Respondents retain the benefits of their breach of duty.

Counterclaim

150. I can deal with this shortly. It is based on Article 24 of the Company's articles of association, which provides:

> "24. (a) Regulation 118 in Table A shall not apply to the Company. Every Director and other officer of the Company shall be indemnified out of the assets of the Company against all losses or liabilities which he may sustain or incur in or about the execution and discharge of the duties of his office or otherwise in relation thereto, including any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application under Sections 144 or 727 of the 1985 Act in which relief is granted to him by the court, and no Director or other officer shall be liable for any loss, damage or misfortune which may happen to or be incurred by the Company in the execution of the duties of his office or in relation thereto. But this Article shall only have effect in so far as its provisions are not avoided by the provisions of Chapter 7 of Part 10 of the 2006 Act.
>
> (b) The Directors shall have power to purchase and maintain at the expense of the Company an insurance policy for any Director (including an alternate Director), or Officer of the Company against any such liability as is referred to in Section 233of the 2006 Act."

151. Insofar as this attempts to limit liability for breach of duty it is void by reason of section 232 CA 2006, which provides:

> "(1) Any provision that purports to exempt a director of a company (to any extent) from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void.
>
> (2) Any provision by which a company directly or indirectly provides an indemnity (to any extent) for a director of the

> company, or of an associated company, against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company of which he is a director is void, except as permitted by—
>
> (a) section 233 (provision of insurance),
>
> (b) section 234 (qualifying third party indemnity provision), or
>
> (c) section 235 (qualifying pension scheme indemnity provision)."

That provides a complete answer to the counterclaim, which cannot succeed. It is perhaps unnecessary to note that, had the article not been negatived by that section, it would give rise to a claim against the Company, not the Liquidators in any event.

Disposition

152. The claim succeeds to the extent of £436,500 and the counterclaim is dismissed. I will hear counsel as to the basis on which interest ought to be awarded and any other consequential matters.