Neutral Citation Number: [2018] EWHC 569

Case No: CH-2017-000211

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (CHD)
CHANCERY APPEALS (CHD)

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

Date: 20 March 2018

Before:

THE HONOURABLE MR JUSTICE NORRIS

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Between:

Richard Toone & Kevin Murphy	**Appellants**
- and -	
Dean Robbins & Richard Robbins	**Respondents**

- -
- -

Reuben Comiskey (instructed by **PDT Solicitors**) for the **Appellants**
Caley Wright (instructed by **Trethowans LLP**) for the **Respondents**

Hearing date: 16th February 2018

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Approved Judgment

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

....

Mr Justice Norris

MR JUSTICE NORRIS:

1. Pinetum Ltd ("the Company") is a phoenix company arising from the ashes of Pinetum Manufacturing Ltd ("PML"). In 2009 the Company acquired out of the administration of PML its furniture production business for a deferred consideration, most of which was never paid.

2. The directors of the Company were Dean Robbins and Richard Robbins ("the Directors"). They had also been the directors of PML. But, according to the judgment of Chief Registrar Baister, they had little grasp of the duties of directors. The sole shareholder of the Company was Dean Robbins, although at one point this seems to have been a matter of some doubt. Dean Robbins also claimed to be entitled to some royalty payments due under an agreement made with him at the time of the Company's acquisition of PML's business.

3. The Company was not well capitalised and ultimately came to rely on an invoice factoring arrangement. The invoice factor appointed administrators of the Company in September 2010. The Company then entered into a Creditors' Voluntary Liquidation on 23rd February 2011. Mr Toone and Mr Murphy were appointed Joint Liquidators.

4. The Company's dealings are traceable through two routes: -

   a) The Sage accounting system which it operated (on which there were maintained separate journals for wages and dividends); and

   b) The management accounts prepared by the Company's accountant.

   However not all payments out of the Company's bank account found their way in to these accounting records. In all, the Company appears to have paid some £185,216 to the Directors during the months that it traded before entering into insolvency (having left unpaid the bulk of the deferred consideration payable to PML's office holders on the acquisition of the business in PML's insolvency).

5. Between February 2010 and June 2010, the Company made payments to the Directors of £94,000. On 1st February 2010 it paid £10,000 to Dean Robbins and £9,000 to Richard Robbins. On 22nd February 2010 it paid £8,000 to Dean Robbins and £7,000 to Richard Robbins. Thereafter standing orders were set up under which £8,000 per month was paid to Dean Robbins and £7,000 per month to Richard Robbins. These payments continued during the period in which the Company must have been insolvent because of its inability to pay either the deferred consideration or substantial tax arrears.

6. The Joint Liquidators sought to recover these payments as unlawfully paid dividends (the Company not having prepared any statutory accounts and having no distributable profits). The Directors resisted repayment on the ground that these payments were a disguised remuneration. The basis of the liquidators' case was that each of these payments was recorded in the management accounts as "dividends": and the Sage accounting records also had entries for them in the "dividends" journal. The basis of the defence of the Directors was that most of the payments were made by standing order, and were similar (in amount and regularity) to the payments they had received

by way of remuneration from PML. This issue was considered at a two-day hearing in July 2017 before Chief Registrar Baister, at which each of Dean Robbins and Richard Robbins was cross examined.

7. In the reserved judgment which the Chief Registrar delivered he found (at paragraph [18]) that the payments made and described as "dividends" were indeed dividends, or purportedly so. In doing so he relied on the following matters: -

   a) Their description in the Company's own books and records (and in particular that the 1st February 2010 payment of £19,000 had originally been entered as "wages", but the entry had been reversed and a new entry made in the "dividends" journal):

   b) The failure to deduct PAYE or NIC from the payments:

   c) The fact that they were round sums to which Dean Robbins had referred in oral evidence as "provisional dividends", which suggested that they were distributions on account of anticipated dividends:

   d) The declaration of Dean Robbins in his belatedly disclosed tax return of the receipt of dividends in the sum of £26,666 gross (inclusive of associated tax credit):

   e) The original defence of the Directors (maintained both by their accountants and their solicitors) that the payments were lawful dividends.

8. The Chief Registrar accordingly ordered that the Directors were together jointly and severally liable to pay the sum of £94,000 plus interest of £27,443 to the Joint Liquidators by 31st October 2017.

9. During 2009 there had also been irregular payments of varying amounts by the Company to Dean Robbins and to Richard Robbins which were described as "remuneration" or "monthly wages". Ignoring the PAYE and NIC due on these payments (which went unpaid) the sums received by the Directors had totalled £50,122.

10. The case of the Joint Liquidators was that these payments were unlawful distributions of capital. The Joint Liquidators said that there were in existence no written contracts of employment, there were no resolutions authorising the payment of remuneration or fees to directors, and that the simple fact of payment by a company with a sole shareholder was not sufficient to validate the payments.

11. To understand that argument it is necessary to refer to the Company's constitution. The Articles of the Company incorporated Table A. Regulation 82 of Table A provides: -

> "The directors shall be entitled to such remuneration as the Company may by ordinary resolution determine and, unless the resolution provides otherwise, the remuneration shall be deemed to accrue from day to day".

12. An ordinary resolution must be passed in accordance with the provisions of Section 281 of the Companies Act 2006 ("the Act"). To be validly passed a resolution of the members of a Company must be passed at a General Meeting of which notice (both of the meeting and of the resolution) had been given, which meeting had been held and conducted in accordance with Chapter 3 of Part 13 of the Act. But Article 8 of the Articles of the Company provided :-

> "8.1 If the company has only one member and that member takes a decision which is required to be taken in general meeting……. the decision shall be valid as if a general meeting had taken place…….
>
> 8.2 A decision taken by a sole member subject to paragraph 8.1 above shall be recorded in writing and entered in to the company's minute book".

The Company's books contained no record of any general meeting at which a resolution entitling the Directors to remuneration had been passed: and the Minute Book contained no record of any decision on that matter by Dean Robbins as sole shareholder.

13. The case for the Directors was that they had each worked hard for the Company and there was an understanding between them that they would be paid for that work: but they did not always draw their full remuneration in order to help with the cash flow.

14. Chief Registrar Baister grappled with what he described as "the confused evidential material" and found the position, on the balance of probabilities, to be as follows: -

a) Dean Robbins and Richard Robbins intended that they should be remunerated by the Company (as they had been by PML). A contract came about between the Company and each of them by performance or by course of conduct (if not by the operation of TUPE).

b) The fact that the payments were irregular and of varying amounts is was no more than a reflection of the vicissitudes of the Company's trading, the Directors foregoing some of what they would otherwise have been entitled to receive.

c) The payments that were actually made must have been authorised, not in the sense of a single decision having been made as to annual remuneration, but rather by Dean Robbins as cheque signatory authorising the payment of individual sums from time to time after discussion with his brother (the Chief Registrar accepting the evidence of Dean Robbins that "we had a chat").

d) Those events evidenced decisions made by Dean Robbins wearing his director's hat and his shareholder's hat, and as such were covered by Article 8.1.

e) There was no reason why payment of intended remuneration should not have been made irregularly or even why payments should not have been made on account.

f) Payment of remuneration in that way did fall foul of Article 8.2.

g) The principle summarised in Re: Duomatic Ltd [1969] 2 Ch 365 was available to validate the decision notwithstanding that the prescribed procedure had not been followed.

(I will deal with the legal analysis at greater length later in this judgment).

15. On those grounds the Chief Registrar held that the sums paid in 2009 by way of remuneration could be retained by Directors.

16. In the concluding paragraph of his judgment the Chief Registrar said (in favour of the Joint Liquidators) that the sums recoverable by them should be identified by reference to bank statements, not from the Company's books and records; and he noted that there may be an issue about whether the sums so proved to have been to have been received might have exceeded £10,000 per month such that they could not have been properly authorised. Those matters he reserved for the handing down of his judgment.

17. When his judgment was handed down there arose an issue about £10,000. As I have indicated, according to the bank statements the Directors had received £50,192. But of this only £40,094 was attributed in the Sage records to the "wages" journal. So the Directors had received £10,098 from the Company that was simply uncategorised. (This issue was not quite that to which the Chief Registrar had briefly referred at the end of his reserved judgement).

18. In a short *ex tempore* judgment given when handing down his reserved judgment the Chief Registrar said there was no clear evidence one way or the other about this £10,000, and the matter had to be decided on the burden of proof. On the burden of proof, he thought he ought to give the Directors the benefit of the doubt "with misgivings and reluctance". He therefore held that the extra £10,000 should be treated as remuneration (so that this would also be irrecoverable by the Joint Liquidators).

19. Against these outcomes the Joint Liquidators appealed: and the Directors filed an out-of-time Respondents' Notice containing a cross-appeal for which permission had not been given.

20. It was sensibly agreed that I should deal with both the appeal and with the cross-appeal. I deal first with the appeal.

21. It is beyond controversy that a director stands in a fiduciary position in relation to the company and is accordingly under a duty not to make a profit from his position unless authorised by the company's constitution so to do. That is so if the profit is derived from charging fees for acting as director or from claiming remuneration under an employment contract or a contract for services.

22. Regulation 82 of Table A provides a source of such authority from the Company: and the Act provides a mechanism by which such authority might be conferred. Absent a written resolution, it requires the convening of a meeting of the shareholders. In the case of a company having only one member, one qualifying person present at a

meeting constitutes a quorum: see section 318(1) of the Act. The directors can therefore duly give notice of the meeting and of the business to be conducted at it to the sole shareholder. The company must keep a minute of all of the proceedings at a General Meeting: see section 355 of the Act. But the Act offers an alternative to a General Meeting where a company has only one member. Section 357 (2) of the Act provides: -

> "Where the member takes any decision that (a) may be taken by the company in general meeting and (b) has effect as if agreed by the company in general meeting, he must …. provide the company with details of that decision".

23 Article 8 of the Company's articles incorporates (with a small modification) that provision into the contract between the Member and the Company. The problem is that the formality set out in Article 8.2 was not observed.

23. The Chief Registrar held that this failure did not (on the facts) mean that the money paid to the Directors and labelled "workers' wages" was unauthorised. As I have briefly noted, he found that Directors intended that they should be remunerated, and that a contract between each of them and the Company had come about by performance or a course of conduct. Under that contract they were "entitled" to be paid. The payments that were actually made were authorised (not in the sense of a single decision being taken as to annual remuneration but rather by Dean Robbins authorising the payment of individual sums from time to time after discussion with Richard Robbins). The decision to make those payments was made by Dean Robbins both as director and sole shareholder. In terms of legal analysis, the Chief Registrar held that such a decision fell within Article 8.1. But he then ruled that the failure to observe the provisions of Article 8.2 invalidated the decision made under Article 8.1.

24. From that conclusion he moved on to direct himself (following Re: Duomatic Ltd [1969] 2 Ch 365 and 373 C) that, where it can be shown that all the shareholders who have a right to attend and vote at a general meeting of the Company assent to some matter which a general meeting of the Company could carry in to effect, that assent is as binding as a resolution in general meeting would be. He noted the observations in Re: Torvale Group Ltd [1999] 2 BCLC 605 at 617 and in Kinlan v Crimmin [2006] EWHC 779 (Ch) at paragraph [44] to the effect that (a) any such waiver of formality must not prejudice the interests of the group which the requirement or formality was intended to protect: but (b) that if the impact upon persons other than the shareholders would have been marginal and indirect then the Duomatic principle may nonetheless be legitimately applied.

25. Applying those considerations to the facts that he had found, he ruled that the Duomatic principle applied to the failure to observe the formality required by Article 8.2 because: -

> "…. the primary interest to which Article 8.2 was directed was that of the sole shareholder…. the potential impact of non-compliance on other stakeholders would always have been marginal …. or not "of the essence" …."

He further held that whilst waiving a provision in the articles arguably involved taking a conscious decision (as to which there was no evidence) the Chief Registrar was not convinced that such an active step was necessarily required.

26. At the hearing of the appeal Counsel for the Joint Liquidators supported the decision of the Chief Registrar that a failure to observe the formalities set out in Article 8.2 invalidated a decision taken under Article 8.1, but submitted that the Chief Registrar had erred in law in thinking that the Duomatic principle could apply to validate the decision, because he wrongly held that the benefit conferred by compliance with Article 8.2 would have been marginal in relation to the wider constituency of stakeholders (such as future shareholders, creditors and insolvency office holders).

27. Counsel for the Directors submitted that the Chief Registrar had reached the right answer for the right reasons (as set out in the Respondent's Notice). But in his skeleton argument he gave clear notice that the decision could also be supported on other grounds: in particular, that on a proper reading of the Articles, the failure to record Dean Robbins' decision in the Company's Minute Book pursuant to Article 8.2 did not affect the proper authorisation of the remuneration.

28. The first issue to be addressed is, therefore, what (upon true construction of the Articles) is the effect of non-compliance of the formalities in Article 8.2?

29. In my judgment the primary purpose of Article 8.2 is not to protect the sole shareholder. Ex hypothesi the sole shareholder knows what decision he has taken and does not need a formal record of it. Nor is it directed to any significant degree to the wider constituency of "stakeholders", such as future shareholders, current and future creditors or potential insolvency office holders. The primary purpose of a formal record made in the Minute Book of the Company maintained by the directors is to ensure that the directors are made aware of the decisions made by the sole shareholder (and which if made in general meeting would have been formally recorded). Such decisions of a sole shareholder may affect the directors' conduct of the company's business, the management of the company being, under the articles, entrusted to them. (The limitations on the power contained in Article 8.1 mean that the directors themselves cannot be removed by means of a decision made in accordance with that article).

30. How then, are the Articles to be construed in the light of that consideration? Counsel for the Joint Liquidators submitted that a failure to observe the formal procedure requires a sanction, because otherwise the objective sought to be achieved by the imposition of the formal requirement would not be achieved: and the appropriate sanction was to invalidate the decision taken under Article 8.1. Counsel for the Directors argued that, whilst it would have been possible to achieve that result by an appropriately worded provision, Article 8.2 did not in fact so provide. On the face of the Article the validity of the decision was not dependent upon compliance with the formal requirement.

31. In my judgment this latter construction is to be preferred. First, it reflects the actual wording of Article 8, which is not expressed in conditional terms. Second, I see no reason why the decision of a sole shareholder made under Article 8.1 should be invalidated when a resolution of a sole shareholder at a formally convened meeting of which due notice had been given would not be invalidated by a failure to comply with

the duty to keep records under section 355 of the Act. Third, Article 8 is, in my view, the incorporation (with modification) of the provisions of section 357 of the Act. The modifications are (a) the exclusion of some subjects from the scope of the decision-making power and (b) the identification of the means by which details of the decision are to be provided to the company. S. 357 (5) of the Act specifically provides that a failure to comply with the section does not affect the validity of the decision. If the draftsman of Article 8 had intended that the Articles should further modify the statutory provisions in this respect he would have so provided.

32. The Chief Registrar found that a decision was taken by Dean Robbins as sole shareholder under Article 8.1. I hold that a failure to comply with Article 8.2 does not invalidate that decision. I therefore dismiss the first ground of appeal relating to the Chief Registrar's decision that the 2009 payments designated "Wages" are not recoverable from the Directors, although my reasoning differs from that of the Chief Registrar.

33. This brings me to the second ground of appeal, namely, that the Chief Registrar erred in law in holding that the £10,092 shown by the Company's bank statements to have been paid to the Directors (but not shown on the Sage accounting system or in the Management Accounts as having been paid by way of remuneration) should be treated as "wages" and so not recoverable by the Joint Liquidators as unlawful payments.

34. In his reserved judgment the Chief Registrar dealt with "the payments made as salary": see paragraph [28]. He described the evidence in relation to those as "unsatisfactory": but felt able on the balance of probabilities to reach conclusions about what went on. He concluded his judgment by observing (paragraph [45]): -

> "the recovery should be limited to payments proved to have been paid or received by reference to the evidence derived from bank statements, not from the Company's suspect books and records".

The recovery of the Joint Liquidators was therefore limited to the amounts shown on the bank statements to have been paid (even if the Company's books and records showed that more might have been paid by way of remuneration). But this did not address the position where a payment was shown on the bank statements but was not entered at all in the Company's books and records. This was the position in relation to £10,092 difference between the wages ledger balance and the dividends ledger balance on the one hand and the bank statements on the other. The Chief Registrar had decided that the difference could not be explained by reference to the royalty payments due to Dean Robbins: see paragraph [12]. So he dealt with that issue when handing down his reserved judgment.

35. The Chief Registrar decided that, in the absence of clear evidence one way or the other, he had to decide the matter on the burden of proof. He held that the burden lay upon the Joint Liquidators to show that payments were made by the Company: and that the burden then shifted to the directors to explain them. The only proffered explanation was by Dean Robbins who had said in a witness statement: -

> "I authorised the payments to myself and Richard as remuneration for work done".

The Chief Registrar characterised this as "not much of" an explanation but that it was "fair enough, as far as it goes", inadequate though in many respects it was. He said that in those circumstances the burden shifted back to the Joint Liquidators, and they had not displaced that inadequate explanation so that he had to give Dean Robbins and Richard Robbins "the benefit of the doubt", which "with misgivings and reluctance" he did.

36. With respect to the Chief Registrar I consider that in adopting that approach he erred in law.

37. I take as my starting point the ruling of the Chief Registrar that there was an absence of clear evidence one way or the other, so that he had to decide the matter on the burden of proof. The nature of the burden of proof was conveniently summarised by Lesley Anderson QC in Re: Idessa (UK) Ltd [2011] EWHC 804 (Ch) at paragraph [2] in this way: -

> "I am satisfied that whether it is to be viewed strictly as a shifting of the evidential burden or simply an example of the well-settled principle that a fiduciary is obliged to account for his dealings with the trust estate that [Counsel] is correct to say that once the liquidator proves the relevant payment has been made the evidential burden is on the Respondents to explain the transactions in question. Depending on the other evidence, it may be that the absence of a satisfactory explanation drives the Court to conclude that there was no proper justification for the payment. However, it seems to me to be a step too far for [Counsel] to say that, absent such an explanation, in all cases the default position is liability for the Respondent directors. In some cases, despite the absence of any adequate explanation, it may be clear from the other evidence that the payment was one which was made in good faith and for proper company purposes"

I agree with this summary.

38. Once the Chief Registrar had decided (as he did) that in the absence of clear evidence one way or the other he had to determine the issue by reference to the burden of proof then (there being no dispute that the company had made the payments to the Directors) the benefit of any doubt had to be given to the Joint Liquidators (not to the recipients of the company's money). This is entirely in accordance with principle. Directors who receive money from the company cannot be heard to say: -

> "We have received company money: but our record keeping is so bad that the basis upon which we received it is unclear. So by reason of our defaults we ask you to assume in our favour that we took the money lawfully".

39. In the instant case Dean Robbins may have agreed from time to time that he and his brother should be remunerated. He may further from time to time have "authorised" the payment of company money in the sense that he signed the cheque or gave the relevant payment instruction. But the mere fact that some lawful payment could be made and that this particular payment was made does not mean that this particular payment was lawful. The director under a service contract who wrote a cheque in his own favour emptying the company's bank account would still have to show that such a payment was lawful, and would not have "the benefit of the doubt".

40. The question then arises whether Dean Robbins and Richard Robbins ought to be relieved of the obligation to account for money taken unlawfully. Section 1157 of the Act enables the Court (in proceedings for negligence, default, breach of duty or breach of trust) to relieve an officer of the company from liability if it appears to the Court that the officer: -

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

Had it been relevant to his decision, the Chief Registrar would have relieved the Directors of liability under the power conferred by that section. In so far as the liability in question is either the liability of Dean Robbins for payments made by the Company to Richard Robbins or the liability of Richard Robbins for payments made by the Company to Dean Robbins, then Counsel for the Joint Liquidators is content that the section should be applied in the way indicated by the Chief Registrar. But Counsel for the Joint Liquidators submits that section 1157 does not enable any misfeasant officer to escape liability for what he (or she) *received*: and he relies on the decision in Guinness (*supra*) at p 695 G- 696 A, where Lord Templeman said: -

> "Mr Ward had no right to remuneration without the authority of the board. Thus, the claim by Guinness for repayment is unanswerable. If Mr Ward acted honestly and reasonably and ought fairly to be excused for receiving £5.2m without the authority of the board, he cannot be excused from paying it back. By invoking [the predecessor who section 1157 of the Act] as a defence to the claim by Guinness for repayment, Mr Ward seeks an order of the Court which would entitle him to remuneration without the authority of the board. The order would be a breach of the Articles which protect shareholders and govern directors and would be a breach of the principles of equity to which I have already referred".

41. I accept this submission. In consequence in relation to the £10,092 which Dean Robbins and Richard Robbins have not demonstrated was lawfully paid to them by way of remuneration (or for that matter by way of dividend) they must each repay that part of it which each received.

42. I should briefly note a third ground of appeal that was argued. It was by some margin the weakest of the submissions made. It was argued that the Chief Registrar had found that the Directors were "entitled" to remuneration, and also that it was understandable that they may have not drawn part of their "entitlement". It was suggested that

implicit in this language was a finding that the Chief Registrar had a specific sum in mind. On the terms of the reserved judgment his might have been £7/8000 per month (referred to in the course of the judgment) or £10,000 per month each (referred to at the end of the judgment). It was further argued that it was implicit that these were gross (not net) sums. The Directors had in fact received more that the aggregate *net* sums, whatever monthly sums were assumed: and it was therefore argued that the Chief Registrar ought to have held that this excess consisted of unlawful payments (e.g. £15259 too much if the monthly sum was £10,000 gross).

43. This is to treat the judgment as if it were a statute to be construed. The tenor of the judgment is that *what the Directors were recorded as having received by way of remuneration* was, as each payment was made, authorised as the sum to be received as remuneration. What the Directors had *not* recorded in the books as remuneration receivable by them had to be determined on the burden of proof. The tenor of the judgement reflects the way the case was argued before the Chief Registrar: this subsidiary ground of appeal does not (from the skeleton argument on behalf of the Joint Liquidators) appear to have been advanced and is therefore not addressed in his judgment.

44. This brings me to the cross appeal. The Chief Registrar decided that the sums paid to the Directors and recorded on the Sage accounting system (and in the Management Accounts) in the “dividends” journal were “dividends or purported dividends”: and since no dividend was or could be lawfully declared, were repayable. Counsel for the Directors submits that the Chief Registrar thereby erred in law, and that he should have held these payments to have been by way of remuneration and lawfully made. He submitted that this would have been consistent with the finding of the Chief Registrar (in paragraph 31 (c) of his judgment) that Dean Robbins had authorised the payment of individual sums from time to time after discussion with his brother.

45. Reliance was placed on the decision of HHJ Paul Matthews in Global Corporate Ltd v Hale [2017] EWHC 227 (Ch) (a case in which the judge said he regretted the absence of adversarial argument both on the facts and the law in a case where the evidence was thin and the law complex). That was a case in which monthly sums were paid to the recipients as dividends (and declared as such for tax purposes) in circumstances in which it was to be the Company’s accountant’s decision at the end of the financial year, based on whether there were sufficient distributable profits or not, as to whether the payments could in fact be dividends. The Judge considered whether such payments might be regarded: -

a) as having been made definitively at the time of the distribution: or

b) as having been made provisionally but subject to a power in the company in effect to “un-declare” the dividends and re-characterise the payments: or

c) as having been decided only in principle, with the formal decision left to be made at the year end (when it could be determined whether or not there were distributable profits out of which dividends could be paid).

Of these three possibilities the Judge decided that the facts supported the third possibility, and that accordingly the payments were not unlawful dividends. The question then arose whether the payments had been made on any proper basis and, if

not, whether they constituted misfeasance. In answering that question the Judge raised the possibility of unjust enrichment: -

> "because of the otherwise unjust enrichment of the Company at the expense of the Respondent, in the form of the services provided to it by the Respondent".

See paragraph [46].

46. The Judge decided (in paragraphs [55] and [56]): -

> "The relevant rule of law is that, where services necessarily required are supplied on the basis that they would be paid for, and there is no other claim, the law imposes an obligation to pay a reasonable sum for them……in my judgment that is also the present case. The Respondent's evidence …. made clear the idea of paying himself in dividends was a scheme advised by the accountant as a way of saving tax on salary for the work that he did. If there had been no tax advantage there would have been no need to sign the dividend tax forms and the payments (of salary) would have been made in the usual way. Accordingly, in causing the Company to make the payments, the Respondent was causing the Company to satisfy its liability to pay for the services which he had provided. In my judgment, whatever else it may be, this is not misfeasance…."

47. Although urged to do so by Counsel for the Directors. I do not propose to adopt the analysis of HHJ Paul Matthews. He did not have the advantage of the citation of the Guinness case (*supra*). In Guinness unjust enrichment (then called "quantum meruit") was argued: and the argument failed. Lord Templeman held at p689 F-G: -

> "…the short answer to a quantum meruit claim based on an implied contract by Guinness to pay reasonable remuneration for services rendered is that there can be no contract by Guinness to pay special remuneration for the services of a director unless that contract is entered in to by the board pursuant to Article 91. The short answer to a claim for equitable allowance is the equitable principle which forbids a trustee to make a profit out of his trust unless the trust instrument, in this case the Articles of Association of Guinness, so provides. The law cannot and equity will not amend the Articles of Guinness. The Court is not entitled to usurp the functions conferred on the board by the Articles."

Whilst the foundations of the doctrine of "unjust enrichment" have been the subject of further review and analysis (its suggested basis in implied contract) the actual outcome in Guinness remains accepted. To award a company director for work done for the company by applying the doctrines of "unjust enrichment" would contradict the long-established principle that a director may not make an unauthorised profit out of his position, a principle that overrides any unjust enrichment claim.

48. The Chief Registrar found as a fact that the Directors had characterised these payments as dividends or purported dividends. They could not lawfully be so. In the case of Dean Robbins, they could not be so because there were no statutory accounts and no distributable profits out of which such dividends could have been declared. In the case of Richard Robbins, he could not receive dividends because he did not hold any shares. The "dividends" which Dean Robbins contrived to pay to himself and his brother were "unlawful dividends" and recoverable as such. It is not open to the Directors to seek to re-characterise the payments as instalments of salary: they argued before the Chief Registrar that is what they were, but he specifically held they were "dividends or purported dividends". The Directors cannot challenge that finding. It does not avail the Directors to say that if they are not allowed to keep the "unlawful dividends" then the Company will be unjustly enriched. Nor does it avail the Directors to say that there were other routes (not in fact employed) which the Company could have used to transfer its assets to them. It does not avail the Directors to say that they agreed between themselves that they could take the money and that the sole shareholder had approved of the payments because the Company in general meeting (and the sole shareholder by decision) can only enter in to transactions which are otherwise lawful under the Act. A distribution described as a dividend but actually paid out of capital is unlawful, however technical the error and however well meaning the Directors who paid it: see Progress Property Co Ltd v Moore [2011] 1 WLR 1 at paragraph [28].

49. I will therefore dismiss the cross appeal.

50. My provisional order on costs (the principal ground of appeal having failed, the minor ground of appeal having succeeded, and the cross-appeal having failed) is that the costs of the Joint Liquidators shall be an expense of the winding-up, and that the Directors shall jointly and severally be liable to pay to the Joint Liquidators 20% of the costs of the appeal and cross-appeal. If this provisional view is acceptable to the parties I will simply hand-down this judgment without attendance. If it is not, then other arrangements will be made.