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Case No: CH-2019-000047

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

Date: 30/07/2019

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

**ON APPEAL FROM DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE SCHAFFER**

**IN THE MATTER OF DCL HIRE LIMITED (IN LIQUIDATION)**
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

**Before** :

**MR JUSTICE MANN**

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**Between :**

**(1) MR DOMINIC PAUL DUMVILLE**
**(2) MR TIM CLUNIE**
**(As Joint Liquidators of DCL Hire Limited)** **Appellants**

**- and -**

**Respondent**

**MR GRAHAM MICHAEL RICH**

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**Mr Daniel Lewis** and **Rachael Earle** (instructed by **Moon Beever Solicitors**) for the **Appellants**
**Mr Hugh Sims QC and Samuel Parsons** (instructed by **Brains Solicitors**) for the **Respondent**

Hearing date: 10th July 2019

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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 verion as handed down may be treated as authentic.

**Mr Justice Mann :**

**Introduction**

1. This is an appeal from a decision of Deputy ICC Judge Schaffer given on 25 January 2019. In it he dismissed one claim for misfeasance against a defendant director, Mr Graham Rich, allowed another but with a reduction to reflect what he perceived as Mr Rich's responsibility for the misfeasance in question, and awarded interest but only from the date of the liquidation of the company of which Mr Rich was a director. The liquidators of the company (DCL Hire Ltd – "DCL") appeal all three elements – they challenge the dismissal of the one misfeasance claim, the reduction of the compensation of the other and say that interest should have been awarded from an earlier date. In this appeal Mr Daniel Lewis led for the liquidators and Mr Hugh Sims QC for the respondent (Mr Rich).

2. The business of DCL was vehicle hire. It went into creditors' voluntary liquidation on 15 January 2016 with a deficit in its statement of affairs of £890,844. The original liquidator was replaced by Mr Dominic Dumville and Mr Tim Clunie, who were the claimants in these misfeasance proceedings brought against Mr Rich, the active director at the time of the events in question, under section 212 of the Insolvency Act 1986.

**The judgment and findings below**

3. The first claim adjudicated below was what I will call the "Surfacing" claim. It can be shortly stated. Mr Rich was the only effective director of DCL; there was one other director but he did not participate in the running of the company. Mr Rich had his own 48% shareholding in the company; another 48% was owned by various shareholders who in effect represented the interest of Mr Charles Brown. 4% was owned by one other person. On the findings of the deputy judge, Mr Brown was a shadow director, and Mr Rich was accustomed to acting in accordance with his directions, in particular in relation to the transactions with which this appeal is concerned. Mr Rich did not seek to hide that.

4. In January 2013 Mr Rich caused the company to make three payments, in aggregate amounting to £250,000, to a company known as O'Hara Bros Surfacing Ltd ("Surfacing"). The payments were all made on the same day. They have been treated for the purposes of this litigation as though they were one payment and the significance, if any, of there being three does not seem to have featured in argument, at least before me.

This payment was said by the liquidators of DCL to have been without consideration, that is to say without any business or other proper rationale so far as the affairs of DCL were concerned. The payment was made by Mr Rich because (as the deputy judge in fact found) he was directed to make it by Mr Brown. In those circumstances they alleged that the payment was a misfeasance.

5. The deputy judge found that the reason that the payment was made was because it was a way in which repayment, or partial repayment, of a loan made by what was called the O'Hara Pension Scheme to DCL, was made. The loan was found by the deputy judge to have been made the previous October in the sum of £535,000. He therefore held that the payment of £250,000 was not a misfeasance, and went on to hold that, if he was wrong on that, he would have relieved Mr Rich from liability under section 1157 of the Companies Act 2006. The appeal in relation to this matter is based on an averment by the appellant liquidators that the judge analysed the transactions in relation to the £535,000, and therefore the purpose of the £250,000 payment, wrongly.

6. So far as the appeal concerning the cars is concerned ("the Vehicles Claim"), this has its roots in the acquisition by DCL, acting through Mr Rich, of eight cars which were then immediately passed over to friends or associates of Mr Brown with only limited payments being made for those cars by those friends or associates over time. The total purchase price of the cars was just over £216,000. The liquidators claimed that, on the basis of the limited payments actually made by the recipients of the cars, the company had a claim for £175,869, being the difference between the cost of the cars and moneys actually received from the ultimate recipients. The basis of the claim was that there was no justification for passing over the cars with no proper arrangements being made, no terms agreed on which they were passed on, and no proper hire or any consideration agreed or paid by the ultimate recipients. The deputy judge found that the transactions took place again at the direction of Mr Brown, with Mr Rich giving no independent consideration as to whether the transactions were proper, and in this respect found Mr Rich to be guilty of misfeasance. However, calculating the sums differently as he did, and giving credit for recoveries which were not credited by the liquidators in their claim, he found that Mr Rich's liability was, as a starting point, £116,790.65, but he awarded only 75% of that sum as the proper and just contribution to the loss under section 212(3) of the Insolvency Act 1986. Alternatively, he abated that £116,000 sum by 25% pursuant to section 1157 of the Companies Act 2006. In this appeal the liquidators dispute the 25% deduction or abatement.

7. Having delivered judgment, the deputy judge considered a claim for interest on the sum which he did award. He awarded interest, but only from the date of the liquidation. The liquidators say that that was wrong; he should have ordered interest to be paid from the date or dates on which the losses were actually sustained by the company as a result of

the purchases of the cars, which they say ought to be from the date of the original purchases, but giving credit for payments from when they were received; but as a practical matter they are prepared to give full credit for interest purposes for all payments recovered from the end users as if received at the date of the purchase of the cars.

**The payments to Surfacing**

8. As I have indicated, the appeal in relation to the payments to Surfacing in January 2013 centres around the liquidators' case that the judge did not analyse the transaction properly. The payment of the £250,000 was not really documented at all, and its justification is said to lie in events some three months before when DCL was in receipt of £535,000. That money was actually received from one of Mr Brown's companies known as C&MB Publishing Ltd ("Publishing"). The money was paid by Publishing, it would seem, at the behest of Mr Brown, and Mr Rich played no part in the arrangements for its payment or in its receipt. Again, these seem to be arrangements made entirely by Mr Brown. The deputy judge found that those monies actually fell to be treated as a loan by an entity called the O'Hara Pension Scheme (of which Mr Brown was apparently the administrator), on the basis of some very thin documentation. Having thus analysed the receipt of that money, the judge found that the payment to Surfacing some three months later was a repayment of part of that loan. Although what he found to be the repayment was directed by Mr Brown, the deputy judge found that Mr Rich believed at the time that he was repaying a "shareholder loan".

9. The liquidators challenge that determination by seeking to undermine the finding that the preceding £535,000 transaction in October 2013 was a loan by the O'Hara Pension Scheme. Were it the case that those monies did not fall to be treated in that manner, then the Surfacing payment in the following January could not be a repayment of that loan (in substance), and would therefore not have the lawful justification attributed to it by the respondent.

10. Although the judge regarded Mr Rich as being an honest witness, he also found him to be evasive at times, and it is apparent that in his findings the judge did not rely much on what Mr Rich himself said about the transactions and preferred to rely on the documents. It was apparent that, insofar as Mr Rich's involvement was required, Mr Rich simply acted on the instructions of Mr Brown. In those circumstances the judge relied principally on the (very limited) relevant documentation. That documentation was as follows:

    (i) The document that the judge found to be “conclusive” was the cheque stub for the

cheque drawn on Publishing's account which paid the £535,000. It read:

> "DCL HIRE [VIA O'HARA PENSION]"

The first two words and the square brackets were subsequently scrubbed out, probably by Mr Brown (as the judge found), though they were still readable. The judge found that this evidenced the fact that the payment was to be treated as emanating from the Pension Scheme, and not from Publishing (or anywhere else). The moneys either reduced a debt owed by Publishing to the Pension Scheme, or gave rise to a debt owed by the Pension Scheme to Publishing. He made no findings as to why the parties would have gone about an injection of the moneys in this way, and there was no evidence which assists on the point. He dismissed a suggestion, made by Mr Rich at the trial, that Pension Scheme moneys were misappropriated.

(ii) An email of 4th December 2012 from Mr Hambling a director of Surfacing, to Mr Rich. This email bore the heading "Pension Fund etc" and read:

> "The attached letter arrived today. Would you be kind enough to pass it on to whoever needs to deal with it please.
>
> Also Charles [Brown] needs the following bank details from me:
>
> [Surfacing's bank details set out]"

The attached letter is not available. It may or may not have been referable to "Pension Fund etc"; the judge did not consider that.

(iii) In a letter of 15th December 2012 Mr Brown said to Mr O'Hara:

> "I have arranged for a direct payment of £250,000 to be made into O'Hara Bros Bank Account to repay the interest free loan that you gave to me to tide over the cash flow issues that I had.
>
> Thank you once again for your assistance in this matter."

11. The judge considered that those two latter communications supported Mr Rich's case as to the provenance of the October loan and an agreement as to where repayment in part was to be directed. He also found that Mr Rich never thought that the £535,000 came in

as a loan from Publishing, but also that what was being repaid by the £250,000 was a "shareholder loan".

12. Principally on the basis of that evidence, and having rejected what was said to be significant evidence pointing against that conclusion, the judge found that the £535,000 did indeed fall to be treated as a loan from the O'Hara Pension Scheme, and that the £250,000 was a part repayment of that loan.

13. The liquidators dispute this analysis, and in particular the reliance on the cheque stub. They say, through Mr Lewis, that those words cannot reasonably be taken to reflect a loan by the Pension Scheme - if it were, why would it say "via" the Fund? It ought to say the equivalent of "Pension Fund via Publishing". They also rely on other evidence as gainsaying the judge's conclusion. That evidence included the following:

> (i) A witness statement of Mr Colin Hambling, a director of Surfacing, provided in a claim made by Publishing as alleged lender of the £535,000, contained the bald statement that the £250,000 was an agreed on account repayment of various overcharges made by Mr Brown's companies to Surfacing. This is nothing like the repayment of a loan. However, I observe at this stage that it does not necessarily help the liquidators' case because it provides an alternative justification of the payment which would not amount to misfeasance by Mr Rich, or at least not necessarily, depending on the justification for DCL making recompense to other Brown companies to the extent that it did. (The proceedings by Publishing have been stayed pending the resolution of the present proceedings.)
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> (ii) A Surfacing email from its office manager to Surfacing's accountant, headed "DCL £250,000 payment" and dated 28th June 2013, which says:
>
> > "Colin [probably Hambling] has asked that I come back to you about the above.
> >
> > No final decision has been made on how to deal with the £250k, therefore it would not be wise for DCL or any C&MB Company [ie Brown company] to allow for VAT on it."
>
> Mr Lewis says that this is completely inconsistent with the repayment being treated within Surfacing as repayment of a loan the O'Hara Pension Scheme, which on its face it is.

(iii) It is not possible to identify the whole of the £535,000 sum as being attributable to O'Hara Pension Scheme moneys. One can see that in the period leading up to the payment Publishing had virtually nothing in its bank account, but some 2 weeks or so before the payment by Publishing it received a payment in of just over £543,000. This payment apparently came from another Brown company called Cardbar Ltd, not the Pension Scheme. Evidence from the Scheme's accountant in proceedings between the Scheme and Mr Brown's trustees in bankruptcy states that on 11th October 2012 the Scheme paid £240,000 to Cardbar Ltd. (A corresponding credit is not reflected in Cardbar's bank statements until a week later.) Thus if the £535,000 is said to be a loan of moneys attributable to the Pension Scheme, and channelled through Cardbar, it is not possible to see where the other £343,000 got to Cardbar. There is no chain of money going back to the O'Hara Scheme.

(iv) Mr Rich did not know that the money coming in was a loan from the Pension Scheme at the time, and did not know the repayment was a repayment of that loan. Mr Brown only told him about a loan from the Pension Scheme a year later.

(v) I was also taken to other parts of the evidence (particularly the transcripts) which Mr Lewis said supported his case of a faulty analysis on the part of the judge.

14. Before considering the effect of these submissions it is important to bear in mind the nature of the appellate process in a situation such as this. The essence of the finding that is under appeal is one of a factual conclusion drawn from various strands of evidence, albeit that in this case the central findings do not seem to be particularly dependent on oral evidence and the assessment of the credibility of witnesses. It is a finding which depends on an assessment of the effect of various bits of documentary evidence, undisputed fact and (to a degree, probably) the probabilities. Despite the fact that assessment of witnesses did not play much part in the exercise, the hurdle that the appellant has to cross is not a low one. The position has been recently, and conveniently, set out by Lewison LJ in *Staechlin v ACLBDD Holdings Ltd* [2019] EWCA 817:

> "29. If I may repeat something I have said before (*Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29 at [114]): "
>
> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. …The reasons for this approach are many. They include

i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

ii. The trial is not a dress rehearsal. It is the first and last night of the show.

iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

30. Thus, it is a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong: *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477. What does "plainly wrong" mean? The Supreme Court explained in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600 at [62]:

"Given that the Extra Division correctly identified that an appellate court can interfere where it is satisfied that the trial judge has gone "plainly wrong," and considered that that criterion was met in the present case, there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb "plainly" does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

31. The mere fact that a trial judge has not expressly mentioned some piece of evidence does not lead to the conclusion that he overlooked it. That point, too, was made in *Henderson* at [48]:

> "An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration."
>
> 32. At [57] Lord Reed added:
>
> "I would add that, in any event, the validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although, as I have explained, it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him, subject only to the requirement, as I shall shortly explain, that his findings be such as might reasonably be made. An appellate court could therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration *only if the judge's conclusion was rationally insupportable*." (Emphasis added)"

15. I therefore consider whether the decision of the deputy judge falls outside what is permitted him by those statements. I do not consider that it does. One can certainly raise challenges to aspects of his decision. The source of the moneys paid into DCL's account, if they were said to be Pension Scheme moneys, was not established and it cannot be seen how Pension Scheme moneys got to Card Bar Ltd (if they did). The 2013 Surfacing email is inconsistent with the judge's conclusions, and he does not seek to explain it away. He rejected Mr Hambling's clear statement apparently directed to the actual point in question, albeit with some reasons (Mr Hambling's version came 3 years late, he was not involved in the original advance and he produced no evidence of the overcharges).

16. However that is all part of the evaluative exercise which the judge was entitled to conduct and which is entitled to respect. On the other side of the coin there seemed to be no answer to the question of why the cheque stub for the £535,000 bore a reference to the O'Hara Pension Scheme if the moneys had no connection with it. Mr Lewis submitted that the word "via" made no sense in that context because the money did not come through the Scheme, but there is a possible sense in which that word could have been used by Mr Brown to indicate the source - he might have intended it to mean that he was putting the money in through ("via") the Scheme.

17. I need not go on. There are various views that might be taken of the evidence, and it cannot be said that the deputy judge's was "rationally unsupportable", or one that "no reasonable judge could have reached". In no way did the judge misuse the opportunities of the trial in arriving at his decision.

18. Accordingly, though it cannot be said that there are not very significant contra-indications to the judge's findings, his own findings are rational and were open to him. The case was one in which useful facts were a bit thin on the ground, and the participants in the transaction had created their own obscurity. An analysis had to be drawn from the thin material available, and the judge's was rational.

19. Therefore the appeal in relation to this finding fails. At the end of the day the deputy judge had to try to make sense of a transaction which was sparsely documented, in which some of the main participants did not give evidence, and in which the evidence of the defendant was not particularly helpful. While there remain obvious oddities, he reached a view that he was entitled to reach, and did not err in principle in so doing. I therefore dismiss the appeal on this ground.

20. It follows that it is unnecessary to consider the relieving provisions of section 1157 in this context and I do not do so.

**The Vehicles Claim**

21. The outline of this dispute is set out above. The deputy judge summarised his findings in 10 numbered sub-paragraphs under paragraph 65 of his judgment. The essence of his findings is that the matter was orchestrated by Mr Brown and Mr Rich had no real input. The transaction was of no benefit to the company. No documentation was prepared identifying the terms on which the end users acquired the cars, and any payments made were agreed directly between Mr Brown and the end users. Only modest payments were made to DCL, and other payments were made by end users to Mr Brown (even after his bankruptcy in 2014) and to Mrs Brown, for which they did not account. Recovery of money was delegated to the Browns by Mr Rich, who derived no personal benefit from the eight transactions in question. The loss to the company was found to have been £116,790.65 (a figure propounded by Mr Rich), being the cost of the cars paid by the company (£216,319) less certain credits which the deputy judge allowed.

22. The deputy judge then went on to consider whether Mr Rich was in breach of his duties in relation to these matters and he held that he was, for 16 reasons set out in paragraph 81. Putting the matter shortly, Mr Rich did not know what his responsibilities as sole director were, he failed to keep proper records and did not know the true position as to the cars; he sanctioned the purchase of the cars believing they were to be hired but had no documentation in place, he had no idea what payments were made and did not make formal inquiries of Mr Brown until August 2014; he knew Mr Brown was receiving some payments but did little to recover them, failed to exercise independent judgment and basically ceded control of the purchase procedures and consequential transactions to Mr Brown. Although the deputy judge did not put it in this way, it is a not unfair summary to say that Mr Rich allowed Mr Brown to part with a very significant part of the company's assets for no good corporate reason and to retain some of the proceeds for

himself (Mr Brown, not Mr Rich - there is no suggestion that Mr Rich benefited from these transactions).

23. The deputy judge then turned to the question of the amount of compensation that Mr Rich ought to pay. He held that he had a discretion as to that amount (*Re Loquitur* [2003] EWHC 999 Ch). He arrived at the conclusion that Mr Rich should bear 75% of the total loss for the following reasons:

> "90. Here, with regard to the Vehicles Claim, there was put in place by Mr Brown a series of transactions which were of no benefit to DCL and Mr Rich did nothing to stop him. That said I am satisfied that Mr Rich should not be regarded as wholly responsible of [sic] the loss. He has to make a substantial contribution which reflects his conduct in the matter. To some this may seem similar to pinning the tail on the donkey but assessing what that contribution should be cannot be an exact science.
>
> 91. I am in no doubt that these losses suffered by DCL can be plainly laid at the door of Mr Brown and whilst I do not resile from my finding that some responsibility must be borne by Mr Rich, plainly that compensation should not be viewed [as] a punishment visited on Mr Rich but more an approbation by the court that directors who turn a blind eye and do nothing when they could have done something which **might** have had an effect on the total loss suffered, have to expect to pay a contribution to that loss. With that in mind I order that Mr Rich make a contribution of 75% to the Vehicle Claims. This figure as I have said is not reached scientifically but Mr Rich, as the "active de iure" sole director of DCL must share the blame for the loss and will therefore pay £87,592.98 plus interest on that sum. The rate of interest and from when it should be paid can be addressed when this judgement is formally handed down." (The emphasis is the deputy judge's)

24. He went on to consider whether section 1157 justified a reduction in the compensation payable by Mr Rich in the event that he was wrong to award only 75% of the loss and should prima facie have awarded 100%. He concluded that in those circumstances he would have allowed a 25% abatement (reducing the figure to 75% again) for three "primary" reasons:

> "94.1 Although in breach of exercising reasonable care, Mr Rich did act reasonably in dealing with the problems he faced – see *Re D'Jan of London per Hoffmann LJ ....*
>
> 94.2 Mr Rich took no personal benefit from the Car Transactions and the subsequent dealings.
>
> 94.3 Mr Richard trusted, albeit misguidedly, Mr Brown. Had he asked questions at the time it is **possible** that the transactions could have been recalibrated. I appreciate this is speculative but I am prepared to give Mr Rich some credit if that eventuality had arisen." (The emphasis is the deputy judge's)

25. The parties on this appeal both seem to have accepted that the sort of discretion which the deputy judge first exercised under section 212 was capable of operating at the level at which the judge operated it, in reliance on *Re Loquitur*, though I confess that for my part I am far from sure that what *Re Loquitur* decided was quite to that effect. It seems to me that the discretion was invoked in that case (on its complex facts) to reflect what the judge saw as the real loss in the circumstances. See also *Holland v Revenue and Customs, Re Paycheck Services 3 Ltd* [2011] BCC 1. However, since the point was not questioned I will not consider it further and will deal with the judge's determination under section 212 that Mr Rich should pay only 75% of what the loss could be said to be.

26. What Mr Rich did was to part with company assets in a transaction which the judge found was of no benefit to DCL. He had no business doing that. He did so at the behest of someone who was not a director, though he had (indirectly) a substantial shareholding. He had no business doing that either. It does not reflect reality to say that Mr Rich did nothing to stop Mr Brown; he went further and "sanctioned" it (in the words of the judgment) and controlled the bank account - para 81.5, from which I infer he actually made the payments. He did not do anything to ensure the company was paid for the cars, in terms of documentation and procedures, and did "very little" to recover payments made to Mr Brown (which he should never have allowed to happen in the first place). True it is that he and Mr Brown were the substantial shareholders in the company, but the company was by then seriously balance-sheet insolvent (see the judgment at para 6), though it traded with the support of its main creditors (Mr Brown, essentially, as Mr Rich saw it).

27. The judge below set out correctly the nature of the duties of a director, including the wrongfulness of improper delegation. He described graphically the shortcomings of Mr Rich in all areas of the transaction, summarising them in paragraph 82:

> "Mr Rich, given all the above, never gave any thought to what was in the best interests of DCL. If he had, these transactions may have stopped at inception. He did nothing. He did not exercise reasonable skill and judgment and is therefore liable for the loss suffered by DCL."

He rejected Mr Rich's evidence that he "reasonably" believed the transactions were hire transactions (para 84); and he rejected the suggestion that as non-profitable transactions in favour of Mr Brown's associates/friends there might be a benefit to the company by a side wind (para 87). In paragraph 88 the judge concluded that it was Mr Rich's failure which caused "the loss" to the company, and held that if Mr Rich had inquired and acted honestly "those losses may never have happened".

28. The judge's decision on the disputed quantum point was one of discretion, and is therefore entitled to all the respect on appeal generally afforded to such decisions. However, I consider that in this case his decision can and should be impeached because he reached a decision which depended on erroneous reasoning or which was not really open to him on the basis of all the serious breaches that he said had occurred. All his findings of breach are entirely justified and correct. It is therefore surprising to find that Mr Rich should only be liable for 75% of the loss (see paragraph 91). The only basis for the reduction appears in paragraph 91, where the judge's emphasis on the word "might" suggests that he was implementing a separate principle that directors should expect to have to contribute to a loss which they "might" have prevented, whilst being given credit for the uncertainty imported by the "might".

29. In one sense the judge is correct in that statement. A director who acts as described could well find himself liable to contribute. But that does not govern the amount of the contribution, and does not pre-determine that the director should necessarily pay less than 100% of the loss. The determination of the deputy judge suggests that the uncertainty introduced by the "might" requires some sort of deduction, and that is incorrect. It may or may not do so, but the judge does not analyse whether that should be the case on the facts of this case. It is not inevitable that the amount of the contribution should be tempered on a loss of a chance basis. That, in my view, presents an arguable error of principle.

30. Furthermore, even if there is something justifiable behind that sort of approach, I do not see how it is applicable to this case on the judge's own findings of what happened. This is not a case in which a director had a single chance to stop a disadvantageous transaction carried out by someone else and failed to take it in a manner which was perhaps understandable but technically not justifiable. This is a case in which a director mindlessly but intentionally implemented a transaction or transactions to which he gave no thought, at the behest of another, in an undocumented manner, and having done so failed hopelessly to make sure that moneys which might have been recovered were recovered. In those circumstances I do not think it is open to a court to find that Mr Rich is liable for anything other than the whole of the loss which results. The judge made no findings from which one could assess now the degree of likelihood of the transactions taking place anyway, without his participation (as to which see further below). It is hard to see how they could have been made to take place without his intervention, and in any event his failure to ensure that moneys were collected remains.

31. In the circumstances it seems to me to be clear that the judge's attribution of only 75% of the lost sums to Mr Rich as being a fair sum for him to pay is unprincipled and not justified by the evidence in the case or the nature of the breaches of duty (which were several) of which he found Mr Rich guilty in strong terms. I allow the appeal in relation that finding and determine that Mr Rich should be liable for 100% of the losses, subject to the next point.

32. It then becomes necessary to consider the judge's findings under Companies Act 2006, which I have set out above. That section provides:

> "1157(1). If in proceedings for negligence, default, breach of duty or breach of trust against –
>
> (a) an officer of a company…
>
> It appears to the court hearing the case that the officer or person is or may be liable that he acted honestly and reasonably, and that having regard to all the circumstances of the case… 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."

As appears above, the judge relied on that section to relieve Mr Rich from 25% of the attributable loss if he was wrong to attribute less than 100% of the loss to Mr Rich under section 212. His reasoning appears above. Again, his decision on this point is one of discretion, and the same limits to an appeal exist in relation this discretion as to the one under section 212.

33. The three reasons given to by the deputy judge appear in his paragraph 94 (see above). The first seems to me to be unsustainable on his own findings. Mr Rich, at the direction of another, effectively parted with significant sums for no good reason and under circumstances which made recovery difficult if not, in part, impossible, and which certainly exposed the company to a large commercial risk. He created a problem unreasonably, and on the judge's own findings did not take reasonable steps to fix it. I do not see how it can be said he acted reasonably at all, and it is not clear what the judge meant by "act[ed] reasonably in dealing with the problems he faced."

34. His second factor is true, but does not get Mr Rich very far.

35. The third (trust in Mr Brown) is described accurately but it is hard to see how it was reasonable to do that, or why, in the circumstances it is fair for Mr Rich to be excused.

36. The second and third sentences of paragraph 94.3 really introduce a further factor - a question-mark about causation. It is not clear what the judge meant by "recalibrated", but presumably he meant that the transaction could have been made to go ahead on a different, more justifiable basis. The judge described this as "speculative", which seems to me to be a fair word, and I do not see how the speculative possibility of a different justifiable transaction would make it fair to excuse Mr Rich in the particular transaction in question. A "recalibrated" transaction would have had to have been one for the company's benefit, which would have required better terms for the company and which would have secured reimbursement from the end users. It is not apparent that that would have been remotely attractive to the end users. It would also have required proper policing and collection, and it is not apparent that that would have happened at all. On the facts of this case such speculation is of no relevance to the assessment under section 1157.

37. Accordingly, the judge exercised his discretion by taking irrelevant factors into account, which means that his decision cannot stand. I can and should make the decision afresh myself, and I have little hesitation in saying that Mr Rich does not qualify for relief under section 1157. I have already described the nature of the wrongs in general terms, and given some details. This was in my view a bad case, and although I am happy to say that Mr Rich acted honestly, I do not think that it can properly be said that he acted reasonably in any relevant respect and there is no reason why in fairness he should be excused. I therefore find that he is entitled to no relief under section 1157 and allow the appeal under this head.

**Interest**

38. The deputy judge awarded interest at 2.5% from the date of the liquidation. His judgment on the point is short:

> "Yes. I have heard both of you. I think my view is that the loss is clearly crystallised when the company went into liquidation, so I am going to take it from 15 January [2016], and the interest rate should be 2.5 per cent. Simple."

39. The liquidators criticise this exercise of discretion as based on a faulty analysis. The loss is said to have crystallised before the liquidation, essentially on the occasion or occasions when the company parted with the money for the cars, with credit being given for recoveries as and when made, though for ease of calculation they are prepared to give full credit against the purchase cost for later recoveries as from the date of the purchase and not from the date of the recoveries themselves.

40. Mr Sims, for Mr Rich, disputed that analysis. The loss did not crystallise from the outset. Money continued to be received in respect of the vehicles and it was only on the liquidation that it became apparent that there would be no further recoveries, whereupon the loss was crystallised. It is right to take a broad brush approach rather than a recovery by recovery, vehicle by vehicle, approach. One could have taken a number of dates - a set number of months from each vehicle transfer (to allow time for the vehicles to be paid for), from when Mr Rich first made an inquiry of Mr Brown, from the date of the liquidation or from the date of the letter before action. All had a theoretical rational basis, and they were open to the deputy judge. The judge therefore chose a date open to him and which was eminently practical. The chosen date was one as at which the defaulting party could reasonably be expected to have made good the loss in the sense that there was little doubt that the actual final loss had crystallised.

41. I agree with Mr Lewis that the judge's basis of assessment, which he expresses in terms of a principle, is not appropriate. It is not true to say that the loss crystallised at the date of the liquidation in the judge's, or any other, sense. It did not crystallise then as a matter of law, and if he was intending to say that the loss was not clear until then, then it did not crystallise in that sense, as a matter of fact, either. The liquidation did not make it inevitable that there would be no further recoveries; and on the facts it might have been apparent before the liquidation that there would be no further recoveries. As a matter of

principle the company incurred loss when it parted with property in an uncommercial and unjustifiable transaction in circumstances when it was not clear what, if any, payments would be received in respect of the cars. That gave rise to a loss at that time. If it had been necessary to value it strictly as at that time one would have had to have put a figure on the likely subsequent recoveries so as to deduct that from the cost of the cars, which would have been difficult, but since we can now look at the matter historically it is possible to see and rely on what actual recoveries there were. As and when there were recoveries the original loss (of cash) was, to that extent and at that point, reduced, but until then the company was out of its money. In my view the more principled way of dealing with interest is to start with the cost of the cars, charge interest from then, but reduce the principal sum as and when recoveries took place. Rather than do that, or some other similar exercise, the liquidators have adopted the practical expedient of treating all recoveries as having been made at the outset and to seek interest on the constant net balance arising. That, in my view, is the correct principled approach tempered with practicality (in favour of Mr Rich).

42. I shall therefore allow the appeal on interest and allow interest on the total sum paid for the cars, as at the date of the last of them to be purchased (again tempering principle with practicality) giving credit for all recoveries. There is no challenge to the judge's rate of 2.5%.

**Conclusion**

43. I therefore dismiss the appeal on the claim in relation to the £250,000 paid to Surfacing, allow the appeal in relation to the quantum of the liability for the vehicle transactions, and allow the appeal as to interest.