Neutral Citation Number: **[2021] EWHC 2740 (Ch)**

Case No: CR-2020-004373

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

IN THE MATTTER OF BRONIA BUCHANAN ASSOCIATES LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
The Rolls Building
EC4A 1 NL
Date: 14/10/2021

Before :

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

- -

Between :

(1) JONATHAN DAVID BASS
(2) LAURENCEN PAGDEN **Applicants**
(3) BRONIA BUCHANAN ASSOCIATES LIMITED
(in liquidation)

- and -
MS BRONIA RACHEL BUCHANAN **Respondents**

- -
- -

Samuel Parsons (instructed by **Isadore Goldman**) for the **Applicants**
Amit Gupta (instructed by **T W Drew & Co**) for the **Respondents**

Hearing dates: 29 July 2021

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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.

This judgment will be handed by email to the parties representatives. The time and date of judgment shall be 10.30am on 14 October 2021

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INSOLVENCY AND COMPANIES COURT JUDGE BURTON

ICC Judge Burton :

1. This is an application commenced by the joint liquidators of Bronia Buchanan Associates Limited (the "Company") against Ms Bronia Buchanan by application notice dated 30 November 2020. Directions were given for a trial of the issues raised in the application. Ms Buchanan was the sole director of the company during the period when it traded. By the application, the liquidators seek the following relief together with interest and costs:

   i) A declaration that Ms Buchanan is a debtor of the Company in the amount of £286,421.45, or such other sum as the Court shall think fit.

   ii) A declaration that the reclassification of the sums outstanding on the director's current account on 10 September 2014 as 'drawings' was ineffective to release Ms Buchanan's liability to the Company.

   iii) Alternatively, a declaration that if Ms Buchanan's act on 10 September 2014 was effective to transfer anything and/or to reduce or release any liability due and owing from her to the Company, it was a transaction at an undervalue within the meaning of section 238 of the Insolvency Act 1986 (the "IA1986") and/or a breach of her duties as a director (brought via section 212 of the IA1986).

   iv) An order for payment of such amount by Ms Buchanan to the Applicants as the Court shall think fit, whether pursuant to IA1986 sections 212(3), 234, 238(3), 241, or at common law."

2. The application is supported by:

   i) two witness statements of the first Applicant, one of the Company's liquidators, Jonathan Bass, the first made on 30 November 2020 and the second on 4 June 2021 (primarily to correct various cross referencing errors in his earlier statement);

   ii) a witness statement made on 3 June 2021 by Barry David Lewis who, together with Mr Bass, was appointed joint liquidator of the Company on 2 December 2014 and was formerly the senior partner of the firm of insolvency practitioners in which Mr Bass is a partner. Mr Lewis was replaced as joint liquidator by the Second Respondent by a block transfer order made on 9 December 2019.

3. The Respondent's defence to the claim is set out in her witness statement dated 19 April 2021 together with a statement by her husband and solicitor, Mr Terence William Drew dated 19 April 2021.

Background

4. The Company was incorporated on 13 June 2003 and carried on business providing client representation for actors. It has a share capital of £100 divided into 100 ordinary shares with a nominal value of 1 pound each.

5. Ms Buchanan was appointed as sole director of the Company with effect from 23 June 2003 and remained its sole director until 29 October 2014. Between 13 June 2003 and 1 July 2003, 98 ordinary shares in the Company were issued and

following transfers of subscriber shares, by 26 March 2013, Ms Buchanan held all of the shares in the Company.

6. The Company's articles of association incorporated Table A to the Companies (Tables A to F) Regulations subject to the express variations set out within the articles filed at Companies House.

7. In her witness statement dated 19 April 2021, Ms Buchanan states that the Company traded profitably for several years and that as the business grew, it became her principal source of income.

8. In 2007, she was introduced to Keith Cunningham who traded under the name "Harley Street Computing" ("HSC"). He provided book-keeping services and despite being introduced to the accountants whose services Ms Buchanan states she was very happy with, he encouraged her to switch to a new firm of accountants, Blinkhorns. He told her that they could provide attractive tax structures specifically tailored to the theatrical industry. Ms Buchanan states that between 2007 and 2010, she was very busy working both for the Company and various other agencies. She provides this information, she says, to explain why she became increasingly reliant upon HSC's services. Throughout this period, Mr Cunningham always assured her "that all was well financially". However, and notwithstanding that Mr Cunningham informed her that the Company was in credit, in late 2012 Ms Buchanan received demands for unpaid tax from HMRC and "it became apparent that there were problems with the accounting carried out by [HSC]". She dismissed HSC and employed a new bookkeeper, Kerrie Cronin. HSC refused to provide relevant electronic files "without my paying them a substantial sum which I refused in view of the difficulties we were facing as a result of their actions". Ms Cronin received bags of unsorted, out-of-order paperwork. She advised Ms Buchanan that the records were incomplete.

9. The accounts for the year ended June 2013 were produced by Blinkhorns. Ms Buchanan states that she "considered it best to continue using them as part of the year was under [HSC's] remit and they obviously had a good relationship with Keith Cunningham". She states:

> "…at the time I was asked to sign off the account in March 2014 I was heavily pregnant and had been diagnosed with Pre-eclampsia and was in significant pain and on medication. I was advised by the hospital to become an inpatient in February but instead I attended hospital on an almost daily basis to be monitored. If my blood pressure was considered too high they would keep me in for a few days until it reduced. As a result I was not able to devote time to considering matters in great detail and I signed off the accounts prepared by Blinkhorns for 2013 without having met them or discovered if they had received input from Keith Cunningham as had always been the case."

10. By now, HMRC was demanding monies which Ms Buchanan says she was not aware were due. She sought to agree a repayment schedule:

> "However, HMRC then changed their approach without warning and demanded payment in full of £127,541.04 within 7 days by letter dated 18/8/2014"
>
> Clearly the Company could not meet that demand in that time frame and I immediately instructed my solicitor to advise. His clear advice was that in the current circumstances the Company was insolvent and so we took steps to consider how best to proceed and my solicitor sought the advice of Harris Limpan. That resulted in the Company ceasing trading in September 2014 and thereafter entering liquidation".

11. The solicitor whose advice Ms Buchanan sought, was her husband, Mr Drew. Mr Drew states in his witness statement:

> "Initially my thoughts were that the company was a prospect for administration as it appeared to be trading profitably on a day-to-day basis. It was only after investigating the position more closely with the company's bookkeeper that the historic directors loan/drawings were identified as problematic."

12. Mr Drew sought the professional advice of Mr Lewis with whom he had worked previously. On 20 August 2014, he sent a formal memo instructing Harris Lipman, stating inter alia:

> "The balance sheet shows a directors loan has been in existence since 2007 and currently has a balance of £201,562".

13. Mr Drew's witness statement explains that on 4 September 2014, he met Mr Lewis at the Ivy Club in Covent Garden. This meeting takes on some importance, and I shall refer to it as "the Ivy Meeting". He recalls that Mr Lewis's advice was that a creditors' voluntary liquidation appeared more realistic than the administration originally proposed by Mr Drew, "but we agreed to consider further". Mr Drew continues:

> "On the question of the directors loan/drawings Mr Lewis's advice was to identify these as drawings rather than loans as it appeared that was what they were, given the minimal salary the Company had paid the Respondent. It was recognised this would raise separate issues with the Inland Revenue and which would have to be dealt with separately when the matter arose.
>
> I continued to consider the matter further and in view of the pressure being placed upon the Company by the Inland Revenue I filed at court notice of intention to appoint an administrator on 8 September 2014 whilst we continued to consider matters.
>
> Following further consideration of the matter generally it was agreed that the appropriate course of action was to seek to place the Company in creditors voluntary liquidation and I was instructed by the Respondent to proceed on that basis.

> On the question of the directors loan/drawings I again sought Mr Lewis's advice which remained as that he had provided at our meeting on 4 September 2014.
>
> After relaying Harris Lipman's advice to the Respondent, with which she agreed, and discussing the same with the Company's bookkeeper from a recording viewpoint the appropriate entries were made into the Company's accounts to correct the outstanding "loans" as drawings. This was done to regularise the position prior to liquidation whilst updating the financial records as much as possible and in accordance with the factual matrix and the professional advice received from Harris Lipman.
>
> The company ceased trading on 22 September 2014 and work was commenced preparing for the CVL. I was instructed to handle the day-to-day mechanics of the liquidation along with Harris Lipman and as a result I acquired the shareholding and was appointed the director of the company on 29 October 2014. This allowed me to more easily deal with third parties, a prime example being Barclays Bank with whom the Company held client monies and which it was clear the bank were not intending to simply release having frozen the company's accounts."

14. Mr Drew's contention is that it was on Mr Lewis' advice that the adjustment was made to the Company's accounts described in the penultimate paragraph above: "correcting the outstanding 'loans' as 'drawings'". I shall describe this adjustment as the "Reclassification".

15. Following the Company entering liquidation, Ms Buchanan and Mr Drew were invited to attend an interview at the liquidators' office. During the interview on 9 July 2015, Mr Caldecott of the liquidators' staff asked Ms Buchanan about a debit entry on the director's 'drawings' ledger dated 10 September 2014 of £225,571.58 described as 'Adjustment to Historical Data' and a corresponding credit entry on the director's current account ledger (the "DCA") for the same amount and with the same description. This was the transaction which effected the Reclassification and I shall describe the £225,571.58 as the "Reclassification Amount". Ms Buchanan stated that the Reclassification was done on her instructions. Mr Drew then interjected and offered to explain it, as "it was something I provided advice on":

> "Historically this account has obviously been a problem. It was a Directors Loan Account er, and, er, Bronia had been following the advice of Keith Cunningham as to how it operated. Obviously, when they left, no details were provided as to the manner in which he was operating it or an explanation as to how it had been dealt with in this way, erm, and clearly it was problematic. What we decided to do was to transfer it to Drawings account, to treat it as Drawings, cos, physically it couldn't be repaid and, er, it's been treated as Drawings".

16. On 24 July 2015, following the interview, Mr Bass wrote to Ms Buchanan explaining that he did not consider that the Reclassification accurately recorded the true nature of the payments made and that in his view, she remained indebted to the Company for the Reclassification Amount.

17. Three months later, on 26 October 2015, Mr Drew responded to the liquidator's correspondence. He said that HSC handled all day-to-day book-keeping and appeared to have given Blinkhorns instructions "to treat Ms Buchanan's drawings as a loan rather than as dividends/income as had previously been the case". He said that this was never explained to Ms Buchanan. He continued:

> "As I have explained, once HSC's services were terminated in 2012 it was impossible to fully reconcile the true position due to missing details and no explanation was ever forthcoming from them to explain matters. It is for this reason that we query whether the so-called loan account was in fact that. There is no clear record of the loan ever having been entered into between the company and Ms Buchanan and that is not Ms Buchanan's recollection.
>
> When it came to presenting the accounting information that I oversaw in dealing with the liquidation the ledger entitled loan account was reclassified to drawings as that seemed to more accurately reflect the position at that time and because, in retrospect, it seemed appropriate. It was not intended to be an acknowledgement that there was in fact a loan of some £225k or that there was any actual liability from Ms Buchanan in respect of it."

18. The liquidator replied by letter dated 11 January 2016 highlighting that Ms Buchanan had signed and approved the Company's accounts for a number of years, clearly stating that it was a loan account, that the funds in question must be either dividends, remuneration or a loan and that as the payments had not been treated as remuneration, and there were insufficient profits from which any dividends could have been paid, he considered the full sum to be outstanding as a loan. Mr Bass's witness statement says:

> "in any event, the Applicants' position is that drawings are themselves simply another name for an advance made to the director, which must be repaid if those funds are not applied to (for example) dividends."

19. Pre-action correspondence in 2017 did not lead to a resolution of the matters. Three years later, on 30 November 2020, the liquidators' application was issued at court.

The Applicants' claim

20. The various heads of the liquidators' claim rely primarily on the assertion that the Reclassification Amount is a debt due to be repaid by Ms Buchanan to the Company.

Ms Buchanan's defence

Entitlement to salary

21. The crux of Ms Buchanan's defence is that the amounts she received from the Company should at all times have been recorded as salary. She was officially paid an annual salary of £6,000 but that was not commensurate with a director who often worked 15 hours a day for a business with an approximate annual turnover of £500,000, eight employees and, at one time, more than 400 clients. The payments were never, as suggested by the liquidators, intended to be on account of future dividends; Ms Buchanan was not waiting for the end of the financial year before a reconciliation exercise could be undertaken. At all times, she was entitled to the money as "drawings" and entitled to retain them.

22. Ms Buchanan concedes that she ought to be criticised for not declaring the payments to HMRC as income. She seeks to excuse her failure to do so, by saying that at all material times she relied on the advice of professional advisers who assured her that "financially matters were fine" and that if Mr Cunningham had advised her:

> "…at any time to declare my drawings in another manner I would have done so."

Limitation issues

23. Mr Gupta's skeleton argument raised, for the first time, an assertion that if, contrary to Ms Buchanan's case, the court accepts that the Company is entitled to recover the amounts claimed as a debt due to it, then that claim is statute barred.

24. He refers to section 5 of the Limitation Act 1980 that an act founded on simple contract shall not be brought after six years from the date on which the cause of action accrued.

25. The working papers provided to the subsequently appointed liquidators by Blinkhorns showed that the outstanding balance on the 'Directors Current Account' were as follows:

i) 2010: £47,787

ii) 2011: £83,780 after interest and dividends had been credited

iii) 2012: £107,607 after interest and dividends had been credited

iv) 2013: £191,193 before a dividend of £27,000 was credited.

26. Mr Gupta submits that if each of the amounts comprising the Reclassification Amount are to be regarded as sums due under a contract, then pursuant to section 5 of the Limitation Act 1980, at the latest, each became due when they were included and shown as debts due to the Company, in each of the Company's year-end accounts. As the limitation period starts running when the claim first arises, the six-year period had long expired by the time the application was issued.

27. The liquidators objected to this line of defence being raised for the first time in skeleton argument and not in Ms Buchanan's evidence or pre-action correspondence.

28. At the beginning of the trial, Mr Gupta submitted that in an action such as this, which includes misfeasance claims against the respondent, the court would ordinarily direct the exchange of statements of case so that a respondent can fairly and squarely understand the allegations being made against them. He said that as no such direction was made, the court should strike out the claim or adjourn the trial with directions for the service of points of claim.

29. For the reasons set out in a short oral judgment, I declined to do either. A number of cases proceed in this court on the basis of the exchange of witness statements only, with directions for cross-examination pursuant to the Insolvency Rules 2016. The advantages of such directions are well known and include expedition and a reduction in costs. However, the risk that an applicant takes by seeking directions which do not include statements of case, is that defences such as limitation of action may not be raised until trial. As the liquidators cannot claim that there is a breach of rules of pleading and as the limitation defence is a point of law I find that it is not unfair to permit the defence to proceed to determination. Much depends on the Court's characterisation of the effect, in law, of the Reclassification. I shall return to limitation issues after my analysis of the evidence and principal findings.

Transaction at an undervalue

30. Ms Buchanan refutes the Liquidators' claim that if, contrary to their primary case, the Reclassification had some legal effect, it could be overturned by the Court as a transaction at an undervalue. In her witness statement she said that the payments to her could not have been at an undervalue because she was the principal of the agency and without her knowledge, experience and contacts it would not have operated effectively. If the Company's annual accounts had correctly recorded payments to her as "drawings" rather than loans, "then such payments unquestionably benefited the company at the relevant times".

31. Mr Gupta submits that the Reclassification did not amount to a "transaction" within the meaning of the section as no payments were made to Ms Buchanan; there was simply an accounting adjustment to reflect the true position. Authority states that:

    i) other than cases where the Company gifts something to another, there must be some "dealing" between the Company and another party (*Knights v Seymour Pierce Ellis* [2001] 2 BCLC 176);

    ii) the company must have "entered into" the transaction; it must in some way be party to or involved in the transaction so that it can properly be said to have entered into it (*Hunt v Hosking and another* [2013] EWCA Civ 1408); and

    iii) the unilateral misappropriation by a director of the assets of a company does not constitute a "dealing" between him and the company (*Hunt v Hosking supra)*.

32. He submits that in this case, there was no such "dealing": the Reclassification was simply an internal adjustment in the Company's accounts to reflect the true

position. If the court is against him and determines that the Reclassification could constitute a "dealing", there was, in any event, an "equal and opposite claim for remuneration".

Misfeasance

33. It is Ms Buchanan's case that once the court determines the true nature of the Payments, then it will become clear that the Reclassification resulted in no material change to the Company's financial position, it merely reflected the true position regarding the remuneration properly paid to Ms Buchanan for committing her services to the Company. Seen in this way, it should be clear to the Court that she did not breach the duties she owed to the Company. She relied at all times on professional advice. Even if, contrary to this, the Court determines that she did breach her duties, she can be seen to have acted honestly and reasonably, such that having regard to all the circumstances of the case, pursuant to section 1157 of the Companies Act 2006, she ought fairly to be excused from liability.

Relevant legal principles

34. Mr Parsons' skeleton argument refers to the relevant binding principles succinctly summarised by District Judge Kelly in his approved ex tempore judgment in ***Henderson & Jones Limited v Garry Patrick Price*** [2020] EWHC 3276 (Ch):

> "13. The claimant brings this case and has to prove the claim on the balance of probabilities. However, there is a shift of evidential burden if the claimant can establish that the relevant payments were made to the defendant in his capacity as a director.
>
> 14. The claimant relies upon the case of ***Re Idessa (UK) Limited*** [2011] EWHC 804, where Lesley Anderson QC addressed the burden of proof as follows:
>
> > "I am satisfied that, whether it is to be viewed strictly as a shifting of the evidential burden or simply an exchange of the well-settled principle that a fiduciary is obliged to account for his dealings with the trust estate, that Mr Aslett 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 upon 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 Mr Aslett 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 an adequate explanation, it may be clear from other evidence that the payment was one which was made in good faith and for proper company purposes."

15. The case of ***Re Mumtaz Properties Limited*** [2011] EWCA Civ 610 considers the status of a ledger in the context of a case of this nature. In that case the company had been using an electronic Sage ledger described as a director's loan account. Arden LJ, at paragraph 17, stated as follows:

> "…it was not open to the respondents to the proceedings in the circumstances of this case to escape liability by asserting that, if the books and papers or other evidence had been available, they would have shown that they were not liable in the amount claimed by the liquidator. Moreover, persons who have conducted the affairs of limited companies with a high degree of informality, as in this case, cannot seek to avoid liability or to be judged by some lower standard than that which applies to other directors simply because the necessary documentation is not available…"

16. Arden LJ continued at paragraph 57:

> "In my judgment, he (the judge) was entitled to find, in the absence of evidence as to how and why the entry had been made, that it was what it appeared to be, namely a debit entry duly made and increasing Munir's liability on his director's loan account. Munir produced no evidence showing how the entry had come about and provided no explanation for the absence of such evidence. The judge was entitled to infer that he could have made enquiries about this entry if there was any evidence or explanation that would support his case."

17. The case of ***GHLM Trading v Maroo*** [2012] EWHC 61 , considered by Newey J (as he then was), agreed with the proposition that the evidential burden shifted to the director to justify entitlement to sums of money appearing on the director's loan account. He said as follows:

> "…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."

18. The theme is continued in ***Toone & Murphy v Robbins*** [2018] EWHC 569 where Norris J said:

> "…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 case is of further relevance to the facts of the matter before me today in so far as Norris J went on to hold, at paragraph 40,

> that section 1157 of the Companies Act 2006 does not allow relief to be granted to a director to enable him to escape liability in respect of sums received by him.
>
> 19. The claimant further relies on ***Re The Sky Wheels Group of Companies Limited*** [2020] EWHC 1112, in which Snowden J, said as follows:
>
> > "49 …It is frequently the case in small private companies that persons who are both directors and shareholders are paid only a relatively modest amount of remuneration for their work through the PAYE system. They then enter into an informal agreement or arrangement between themselves to draw sums of money from the company periodically during the year. Those sums are then debited to the directors' loan accounts in the expectation that, at the end of the year, the company will be in a position to declare a dividend. The intention is that the resultant debt created by the declaration of dividend (of the company to the shareholders) will be set off against the indebtedness of the directors on their loan accounts. Under such an arrangement, the periodic drawings are not declared as remuneration for the purposes of PAYE and NIC. Instead, the directors and shareholders benefit from the more favourable tax treatment accorded to dividend payments.
> >
> > 50. In light of the manner in which such arrangements are presented to HMRC, in general terms, I do not consider that such periodic drawings can simply be re-characterised as remuneration as and when it might suit one of the recipients so to contend. Or at least that cannot be done without acknowledging that the manner in which they had previously been disclosed to HMRC had been incorrect, with all the consequences in terms of the payment of additional tax, interest and penalties that this might entail."

35. Mr Parsons also relied upon the decision of Arden LJ (as she was) in ***Global Corporate Ltd v Hale*** [2018] EWCA Civ 2618. In that case, the claimant (an assignee of the liquidator's claim) sought to recover sums paid to a company director by way of interim dividends during a period when the company was in financial difficulty. In previous years, the monthly payments had been made subject to a reversal when the accounts were audited at the end of the relevant financial year and it was determined whether the company had made sufficient distributable profits to be able to declare dividends.

36. At paragraph 25 of her judgment Arden LJ said:

> "One of the issues considered by the judge in the context of the misfeasance claim was whether a potential quantum meruit claim by the directors could provide a defence and set-off against a claim by the company for the return of the £23,511.

> There are difficulties about relying on a quantum meruit claim for this purpose even as an answer to a claim by the company against the directors based on misfeasance or breach of duty. In ***Guinness Plc v Saunders*** [1990] 2 A.C. 663; [1990] B.C.C. 205 the House of Lords held that the law would not imply a contract for remuneration when such could only be agreed to under the articles of association by an appropriate resolution of the board. But, more fundamentally, whatever restrictions the articles may impose, once the company is in liquidation then a quantum meruit claim faces the difficulty of being an unliquidated claim for compensation for which Mr Hale will have to prove in the liquidation.
>
> Unless the payments themselves could be re-characterised so as to be treated as payments for services lawfully made by the company prior to the liquidation then it is difficult to see how a claim for a quantum meruit can provide any sort of defence to Global's claim for the return of the £23,511 as an unlawful distribution. Mr Hayhoe accepted that this would not be possible in this case and I need not therefore pursue the matter further in this judgment."

37. Mr Gupta relies on section 5 of the Limitation Act 1980 which provides

> "An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued".

38. Section 238 IA86, transactions at an undervalue, provides:

> (1) This section applies in the case of a company where—
>
> (a) the company enters administration, or
>
> (b) the company goes into liquidation;
>
> and "the office-holder" means the administrator or the liquidator, as the case may be.
>
> (2) Where the company has at a relevant time (defined in section 240) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section.
>
> (3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.
>
> (4) For the purposes of this section and section 241, a company enters into a transaction with a person at an undervalue if—

> (a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or
>
> (b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.
>
> (5) The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied—
>
> (a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and
>
> (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.

39. Pursuant to section 240 IA1986, a transaction takes place at a "relevant time" if it is within two years of the onset of insolvency and if, at that time, the company is unable to pay its debts, or becomes unable to do so, as a result of the transaction. There is a rebuttable presumption that the company is unable to pay its debts at the relevant time if the transaction is with a connected party.

Witness Evidence

40. Mr Bass was cross-examined only on a couple of points in his evidence. He replied clearly and in a straightforward manner. He confirmed that he did not attend the Ivy Meeting and that he could not recall whether Mr Lewis told him of any of the details of the advice that he had given to Mr Drew at that meeting.

41. During cross-examination, he was taken to a paragraph in his email to Mr Drew dated 28 November 2014 in which he asked whether, "if it still remains" there had been any movement on the amount stated in Mr Drew's instructions to Harris Lipman as being due in respect of Ms Buchanan's loan account. Mr Gupta asked Mr Bass what he meant by "if it still remains" and suggested that his chosen wording pre-supposed that it might not still be owing. He asked whether Mr Bass chose to use those words because he was aware of the Reclassification advice that Mr Lewis had given Mr Drew at the Ivy Meeting. Mr Bass said that he could not recall why he worded it in that manner. He said it was the type of issue that would usually be raised when, having become aware of the loan account, he was looking to clarify the situation before helping a director prepare their statement of the company's affairs.

42. Mr Bass resisted agreeing with Mr Gupta's suggestion that £500 per month is not commensurate with a £500,000-turnover company saying that it is for a company's board of directors to decide on suitable remuneration by reference to their duties and to the company's profits, and that they can do so in a variety of ways, principally either by extracting money by way of shareholder dividends or by salary. He said that his enquiries regarding the Company revealed that Ms

Buchanan chose to fix her remuneration at £6,000 per year to take into account PAYE and National Insurance thresholds.

43. Mr Bass did not accept that the Liquidators had delayed in bringing the proceedings but conceded that between November 2017 and November 2020 no correspondence passed between the parties regarding the proposed claim.

44. Other than his assertion regarding delay, Mr Bass's evidence was not undermined.

45. Prior to his retirement from full-time practice, Mr Lewis was a chartered accountant and, from 1986 to 2016, a licensed insolvency practitioner. In his witness statement he referred to the Ivy Meeting and said:

> "9. During that meeting Mr Drew and I discussed all the various matters which I had raised in my email to Mr Drew dated 21 August 2014, including for example the bank balances, the client account etc. My e-mail dated 21 August 2014 would have been the working document for that meeting. However. I have no recollection whatsoever of saying to Mr Drew anything about the director's loan account and what should be done with it in the manner which Mr Drew has set out at paragraph 7 of his witness statement dated 19 April 2021 and nor would I have done so. I have been a licensed insolvency practitioner since 1986. I have been appointed on thousands of cases and I have never given advice of the type that Mr Drew describes. I have never been involved in anything like that discussion as alleged by Mr Drew.
>
> 10. I would have told Mr Drew at our meeting on 4 September 2014 that the overdrawn director's loan account was a big issue as it would need to be recorded on the Company's statement of affairs as an asset of the Company and it would have to be repaid by the Respondent. This is why I said to him in my e-mail of 21 August 2014 that a further discussion would be required in relation to the director's loan account. However again, I seriously underline that I would not have recommended to Mr Drew that an overdrawn director's loan account be converted to or identified as 'drawings' because it is highly irregular, illegal and in breach of the relevant tax legislation, so a non-starter as far as I am concerned. As an aside, even if I had given the advice that Mr Drew alleges I did, which I categorically reaffirm I did not, the entries that were made on the Company's QuickBooks ledgers do not in any event achieve the purpose of converting or re-classifying the overdrawn director's loan account to 'drawings'.
>
> 11. Mr Drew also asserts at paragraph 10 of his witness statement dated 19 April 2021 that he later (at an unspecified date and time) sought my advice again 'on the question of the directors loan/drawings". Again I refute this entirely. As can be seen from my follow up e-mail to Mr Drew on 5 September 2014 following our meeting the previous day, there is no reference at

> all to the director's loan account and certainly not to any re-classification or re-identification of it. I repeat that I absolutely did not have any type of conversation with Mr Drew whereby I advised that the overdrawn director's loan account could be re-categorised or re-identified as 'drawings'."

46. During cross-examination Mr Lewis explained that he would not use the term "drawings" in relation to a company. He accepted that it is a word within his vocabulary but said that "drawings" would be used to refer to money taken out of a business by a sole trader or partnership; directors draw money out of a company as "salary" or by way of "remuneration": those are the terms he would use. He emphatically stated that "drawings" was not a term he would use when talking about the remuneration of a director of a company. It was perhaps surprising then, that later, when asked whether during the Ivy Meeting he specifically advised Mr Drew that the Reclassification could result in a liability for tax, Mr Lewis replied:

> "If the monies had been reclassified as salary, then those – it's after the horse has bolted - monies drawn that way from a company must be taxed and subject to NI at the time of drawing; you can't go backwards. There are ramifications if people draw salary from companies".

47. Counsel pressed the points and asked again whether Mr Lewis specifically mentioned to Mr Drew, during their meeting, a potential liability to HMRC. He replied:

> "I would not like to say specifically. It was a meeting 7 years ago. In a general context I may have mentioned that any drawings from a company are subject to Revenue rules, of course I would have done – in that sense - but specifically I can't say and I wouldn't be certain if I did."

48. Counsel highlighted that Mr Lewis had just used the word "drawings" in his reply, even though he was referring to money being paid to a director of a company. Mr Lewis replied that he had used "the vernacular in the context of Mr Drew's words".

49. Mr Lewis was affronted by Mr Gupta's suggestion that he might intentionally have omitted any reference to discussions at the Ivy Meeting regarding the Reclassification in his follow-up email of 25 September 2014 because it concerned a suggested course of action which Mr Lewis would not want formally to record – something which he might want to "shy away from" now, or at the time of the email. Mr Lewis replied that there was no need for him to say anything further in the follow-up email about the director's loan account. He had advised generally on the treatment of outstanding loans and there was nothing specific he or Mr Drew could achieve at that time in relation to it. As for potentially wanting to "shy away" from the Reclassification advice, Mr Lewis replied that he has been a chartered accountant for 50 years with an unblemished record and that he would "not ever think to do anything of that sort".

50. When Mr Gupta returned to the same issue at the end of cross-examination, asserting that the truth of the matter is that Mr Lewis told Mr Drew "to treat this as

drawings" and advised him regarding the HMRC consequences of doing so, Mr Lewis replied very clearly that counsel's statement was totally incorrect. When Mr Gupta asked "And you can remember that 7 years on?", Mr Lewis replied:

> "Not only that, but even if I did not have the memory of it, there is absolutely nothing that I have put in writing - that you quite rightly say - that even suggests that. Even if it were not my memory working properly, certainly my follow-up note would have mentioned it. So the answer is, I would not give that advice."

51. Counsel suggested that as a result of this last statement, rather than being able to remember what happened, Mr Lewis was now saying that either he does not remember or that he was speculating about what happened at the meeting. Mr Lewis came back very quickly saying that counsel's interpretation of his answer was not correct: he did not give the advice and he would not give the advice.

52. In my judgment Mr Lewis was a credible witness. The evidence he gave was consistent with contemporaneous documents and consistent with his own written evidence. The fact that Mr Lewis used the word "drawings" once in his replies was adequately explained and does not, in my judgment, undermine his clear evidence that he would not advise a director in Ms Buchanan's position to try to avoid having to repay monies shown in a company's books as outstanding loans due from the director. Such evidence is inconsistent with the assertion made that he advised that the accounts be altered so that the loan was cancelled and treated as remuneration. I accept Mr Lewis's evidence, that he did not give such advice to Mr Drew during the Ivy Meeting.

53. Ms Buchanan was invited to take a few moments before being sworn in as she was visibly very upset by the prospect of giving evidence. Her evidence was clear on the following issues:

i) she relied on Mr Cunningham to ensure that the Company's financial affairs were properly recorded;

ii) she trusted him and signed what he presented for her to sign even though she did not understand the full implications of each document;

iii) she was not paying herself large sums of money but just the amounts which, he assured her, she could draw from the Company;

iv) she could not confirm or deny whether any of the figures in the Company's accounts which she approved by signing them each year were correct, because Mr Cunningham did not give her the requisite information to check their veracity;

v) she was not paying due care and attention to the Company's finances and it was only when she received demands from HMRC that she realised the true extent of the "mess" and fired Mr Cunningham immediately.

54. Each time Ms Buchanan was questioned about figures set out in the Company's accounts, she acknowledged that they appear to show a debt due from her to the Company which grew each year. She also confirmed that they appeared to show the relatively small amounts paid to her by way of salary. However, she said that she did not believe the statements in the accounts to be true and has no confidence in the accounts.

55. Ms Buchanan was taken to a file note from Blinkhorns dated 2 March 2011 – some three and a half years before the Company entered liquidation – in which Mr Martin of Blinkhorns recorded that he had met Ms Buchanan together with Mr Cunningham and Mr Cunningham's assistant, Inda, on 2 March 2011 to discuss and review the year end accounts:

> "The main issue is Bronia's overdrawn director's loan account. This stands at overdrawn by £42,000. At the moment the draft accounts show no reserves are available.
>
> We talked about the possibilities as follows:
>
> 1. Doing nothing.
>
> 2. Bronia making a repayment to the company.
>
> 3. Preparing some management accounts to the end of January or the end of February and declaring a dividend based on these figures.
>
> We could of course do any combination of these as well.
>
> I explained to all of them that if HM Revenue & Customs were to look at this and the loan was not repaid within nine months of the year end that the company would be asked to pay advance corporation tax.
>
> The chances are that they will deal with a combination of the above.
>
> Keith is going to provide me with some draft accounts and when these are available I will calculate the maximum dividend. I will then contact Keith to confirm how much Bronia needs to put back into the company and she will work out if she can deal with this or not.
>
> I should also remember that the £6,500 salary can be included in this calculation as well.
>
> We then reviewed the year end accounts for the company.
>
> Bronia felt that one or two of the prepayments could be left out and this would help to reduce the profit.

> We agreed these final adjustments and Costa will make the journals."

56. Ms Buchanan was also taken to her letter of instruction to Blinkhorns dated 28 March 2012 in which she expressly acknowledged, at the end of the letter and before the declaration also copied below:

> " 19. I confirm that the balance on my directors loan account is £83,780.96. I understand that this overdrawn balance is subject to corporation tax but have advised you that I will pay this loan back within nine months of the year end date.
>
> I confirm to the best of my knowledge and belief that the above representations are made on the basis of enquiries of management and staff with relevant knowledge and experience and, where appropriate, of inspection of supporting documentation sufficient to satisfy ourselves and we can properly make each of the above representations to you."

57. She agreed that it was a letter of authority in which she was instructing the accountants what to do in relation to the Company's accounts. However, she sought to distance herself from it, saying that she did not draft the letter: it had been drafted by Mr Cunningham. He told her he would sort out the loan account in the following year and that it did not have to be repaid.

58. When the accounts for the year ended 30 June 2011 were prepared they included a notation to the accounts, that as at 1 July 2012, the DCA balance was £42,787:

> "During the year, the company paid drawings and personal expenses of £47,772. The director made repayments of £10,000. Interest was charged at a commercial rate. As a result, at the balance sheet date the director owed the company £83,781."

59. When asked whether that was correct, Ms Buchanan said that it was not what had been discussed with her. She understood and accepted that she had signed it, but the written words were not as explained to her by Mr Cunningham. She did not understand the full implications of what she had signed.

60. When asked whether money was earmarked as future dividends, she said she did not know: that was what she was relying on Mr Cunningham to do. She said that before she had met Mr Cunningham she had never heard of a director's loan account:

> "Mr Cunningham had said that money would be offset in future years and that I would not have to pay any money back because I'd make a profit in future years."

61. This led Mr Parsons to ask whether, having not made a profit and gone into liquidation, she accepts that she is liable to repay the sums claimed by the liquidators. She replied that she did not accept that was the case, that she was not working for free, and was working sometimes 18 hours a day. Mr Parsons reminded her that he had already been through her remuneration package in cross examination: an arrangement where she would be paid £6,000 or, as was the case for the tax year 2014/15, £2,438. She interrupted saying that she had agreed it would be accounted for like that because that was what Mr Cunningham had told her.

62. Ms Buchanan was taken to an email sent to her by Graham Martin of Blinkhorns dated 27 March 2014 in which he said:

> Myself and Costa met with Kerry this morning to run through the 30 June 2013 accounts.
>
> The accounts themselves are quite straight forward. They show a profit of roughly £60,000. However, we agreed with Kerry that we would write off the investment in "Taboo" which reduces the profit to £26,932. On this the corporation tax liability will be £7,760 and this is due for payment on 1 April. However, there are other issues on the accounts that you need to be aware of.
>
> 1. As at 30 June 2012 your director's loan account stood at £107,000. By 30 June 2013 this had increased to just over £190,000. I will put through the maximum dividend possible of £27,000 which means that the balance to carry forward is £164,193.
>
> I need to be clear on this point: This is monies that you have drawn from Bronia Buchanan Ltd over the years which have not been cleared by either a salary or dividends and therefore, they stand to be repaid.
>
> 2. This means that if the company did go into liquidation that the creditors would seek repayment of these amounts from you personally. I do not need to tell you but there are substantial amounts now owed for corporation tax, PAYE and VAT and it is a struggle to hold them at bay. If they were to take further action against the company then it does not end there, as in my view it would lead on to you personally.
>
> 3. There is a further issue with the director's loan account. If a director's loan cannot be repaid within nine months of the year end then there is a requirement to pay a 25% charge which is known as "advance corporation tax". This is effectively a loan to HMRC and it is repaid when the director's loan account is repaid.
>
> In previous years, we have discussed this requirement and agreed to ignore on the basis that the loan accounts have been

> cleared. However it is now clear that that is not the case and it is not likely to be the case and I am not comfortable and l am not advising you to take this position any longer. The reason for this is that I have had other enquiries in the past year or two where HMRC have been extremely strict on this point. The question is penalties as they can charge up to 100%. This is unlikely but even if they charged a penalty of 25% or a third it would be a substantial amount.
>
> 4. For this reason I am going to resubmit the corporation tax return for 30 June 2012 showing the loan account outstanding. When I submit the corporation tax return for 30 June 2013 this will also show the loan account outstanding. The combined effect of this is that it increases the corporation tax liabilities by 25% of your director's loan account which is a further £41,048.25.
>
> 5. I appreciate this is a big amount, but not to do this is far too great a risk. I take the view that given we have long term tax liabilities anyway, which we need to settle over time that it is better to add this to the mix rather than filing an incorrect return.
>
> I hope all of the above is clear and if you have any questions please let me know."

63. She was also taken to her email of 28 March 2014 thanking Mr Martin for his advice on the director's loan account. She apologised in the email for not being able to attend the meeting the day before: "The final few weeks of pregnancy are proving to be a challenge to say the least".

64. When asked, in light of this exchange, whether she accepted that the monies shown as outstanding on her loan account had to be repaid sooner or later, she replied: "No". She offered no further reasoning for her answer. Ms Buchanan conceded that she said in her witness statement that prior to working with Mr Cunningham it had been her practice to receive most of her income as dividends from the Company. She volunteered that she operated three bank accounts, one of which was used to hold monies likely to be due to HMRC. She was asked whether she agreed that largely the same arrangement was reflected in the accounts prepared by Blinkhorns. She vehemently denied that was the arrangement and expressed disparaging views regarding Mr Cunningham. However, she was unable to say how, if not being paid the sums she received by way of salary or on account of future dividends, she thought she was entitled to receive the monies paid to her.

65. Ms Buchanan's evidence regarding the circumstances surrounding, and upon whose instructions, Ms Cronin effected the Reclassification in the Company's accounts was inconsistent. She said in her witness statement that she instructed Ms Cronin to make the necessary adjustment to the Company's books having been advised by her solicitor husband in September 2014:

> "that he had received advice that the "loan account" could be transferred to "drawings" as the reality was that that was what it had been in fact."

66. During cross-examination, she said that she thought it was Mr Drew who instructed Ms Cronin to make the change: "It was not a conversation I was desperately involved in". I do not consider that much turns on this particular inconsistency.

67. Ms Buchanan honestly accepted that she failed to exercise due care and attention over the Company's financial affairs. On her evidence, she was content, for a period of approximately five years, to carry on the business with no understanding or visibility of the manner in which HSC and Blinkhorns were preparing the Company's accounts. When faced with very clear statements in the accounts and correspondence that clearly showed that she owed the Company significant amounts of money, she claimed that Mr Cunningham had told her that she did not have to repay them immediately, but would be able to do so from the Company's future profits. Despite the apparent similarity with this proposal and the arrangements which her former accountants operated, whereby most of her income from the Company was paid on account of dividends and reconciled at the end of the year (relying, if necessary, on monies held in a separate account to meet any tax liability) Ms Buchanan obdurately refused to accept that Blinkhorns were adopting the same approach.

68. Ms Buchanan struck me as an intelligent woman. She no doubt appreciates the severe financial liabilities that could land at her door if the Applicants' claim against her succeeds. The Applicants have not challenged her statement that she worked very hard for the Company. When counsel suggested that she was not entitled to receive more than £6,000 per annum by way of salary, she appeared to be affronted, saying that "of course" she was entitled to receive more than that - otherwise she could not possibly afford to pay her mortgage. This, to me, lies at the heart of Ms Buchanan's defence and evidence: having expended significant efforts running a £500,000 turnover business, she felt she was entitled to be paid for her services. She would rather blame her own negligence and incompetence in failing to manage, or even seek to understand the Company's financial affairs, and for failing to challenge Mr Cunningham or insist that he explain what she was being asked to sign and, when giving evidence, to make serious allegations about his business practices, than risk saying anything which might suggest that she might have to pay the money back. I treat her evidence with corresponding caution.

69. Mr Drew appeared to me to be very guarded in his evidence to the point that I consider his answers to some of counsel's questions were less than candid. He is a solicitor, with experience appearing on behalf of clients in the bankruptcy and winding-up courts. As such, whether as part of his training or from experience in practice, it is more likely than not that he would have a basic understanding of company accounts. When asked whether he agreed that the Company's 2011/12 accounts were prepared on the basis that sums due from Ms Buchanan were an asset of the Company, he replied that he could not agree as he does not have a detailed knowledge of the Company's accounts going back through the years. This is despite: (a) the accounts, included in the bundle of documents, clearly recording for the year 2011/12 a debt due from Ms Buchanan of £83,781; and (b) his letter of instruction to Mr Lewis dated 20 August 2014 expressly stating that the balance

sheet shows a director loan has been in existence since 2007 and "currently has a balance of £201,562".

70. Similarly, when counsel asked him to confirm that Ms Buchanan never paid anything to HMRC in respect of the sums now claimed to have been "drawings", he said that he could not say, as he did not know about her personal tax affairs at the time. Whilst he may not have known the full details of her personal tax affairs, his witness statement stated in relation to the proposed Reclassification that "this would raise separate issues with the Inland Revenue and which would have to be dealt with separately when the matter arose". This suggests to me that contrary to his evidence, he was aware that Ms Buchanan had not declared the sums she received from the Company as income, for tax purposes.

71. Mr Drew said that he was never clear that the DCA was genuinely a loan account. The true position was, to his mind, unidentifiable as "the paperwork wasn't there". He said that the money was paid to Ms Buchanan as compensation for her role as principal of the business: that was where the drawings came from. It was treated as money paid to her "as compensation for her time and effort".

72. Mr Drew was adamant that Mr Lewis had advised him to arrange for the loan account to be reclassified as drawings. This strikes me as inconsistent with his replies during the interview on 9 July 2015 when, even though he was being interviewed by one of Mr Lewis's colleagues, he made no mention of Mr Lewis's advice and described the loan account as having been a historical problem which was reclassified "cos, physically it couldn't be repaid". He said that if, prior to liquidation, Mr Lewis had advised that the money would have to be repaid, he would not have put the Company into liquidation. He would have tried to have agreed a time-to-pay arrangement with HMRC in order that the Company could continue trading. In light of the Revenue's petition, and Ms Buchanan's apparent inability to repay the loan, the Company's options, at that stage, appear to me to have been limited.

The Reclassification

73. Mr Gupta submits that having heard the evidence, the Court must conclude that the true nature of the payments made to Ms Buchanan was salary. I find no grounds for, or basis upon which to reach such a conclusion. I reject his submission.

74. The Company's profit and loss accounts for each of the following years showed profit/losses, salary and dividend payments as set out below. The far right hand column shows Blinkhorns' records of the amounts due in respect of Ms Buchanan's loan account:

YEAR ended	P&L Profit after tax	Salary to Ms Buchanan	Dividend	Blinkhorns note of DLA
2006	£52,195	-	£51,184	
2007	£95,678	Possible contribution to her pension scheme of £8,665	£61,165	
2008	£(62,266)	Remuneration £5,000	-	

		Pension £11,000 Total £16,000		
The Company's former accountants, Hard Dowdy were replaced by Blinkhorns				
2009	£(16,410)	£6,000	-	
2010	£19,936	£12,500	-	£42,787
2011	£40,286	£6,000	£10,000	£83,780
This was the first and only year the accounts included a note expressly referring to the directors' loan account: "At 1 July 2010, the directors current account balance was £42,787. During the year the company paid drawings and personal expenses of £47,772. The director made repayments of £10,000. Interest was charged at a commercial rate. As a result at the balance sheet date the director owed the company £81,781".				
2012	£38,862	£6,000	£40,000	£107,607
2013	£19,172	£6,000	£27,000	£191,193

75. The Company's annual accounts clearly dealt separately with the salary and dividend payments made to Ms Buchanan each year. Those are the only two methods (other than directors being reimbursed expenditure incurred on a company's behalf) by which a director/shareholder may lawfully take money out of a company.

76. For the first two of the three years for which I have seen Company accounts prepared by Hard Dowdy (years ending 30 June 2006 and 2007) the Company was making a profit. Ms Buchanan was paid approximately £51,000 and £61,000 respectively in dividends. No amount appears to have been paid to her in those years as salary.

77. A significant item appeared in the 2008 accounts: £125,000 for "Theatre production costs". This resulted in a loss after tax of approximately £62,000. That year, Ms Buchanan was paid £16,000 in respect of salary (£5,000) and pension contributions (£11,000) and no dividend. According to her evidence, £5,000 salary would not have been sufficient to meet her day-to-day living expenses. It is at that point, if she continued to take money out of the Company at a similar rate to preceding years, that her accountants would most likely have recorded the amounts she withdrew from the Company's account(s) as a loan to her, with a view to it hopefully being repaid from future dividends once the Company returned to profitability.

78. It took another two years before the Company once again made a profit: for the year ending 30 June 2010, it made a profit after tax of £19,936. The annual accounts prepared by Blinkhorns for that year, showed Ms Buchanan receiving £12,000 as salary but no dividend.

79. The following year, 2011, profits after tax improved to £40,000 and Ms Buchanan received £10,000 by way of dividend and £6,000 as salary.

80. For the year ending 30 June 2012, the Company made a profit after tax of £38,000. Ms Buchanan was paid a healthier dividend of £40,000 in addition to £6,000 salary.

81. Not all of the Company's bank statements have been included in the bundle, but a review of statements from November 2012 to October 2014 reveal £3469.80 being paid by way of standing order to "Bronia Buchanan" around the 17th to 19th of every month until March 2013 when it was reduced to £3,143.39 until February 2014. Similar amounts were paid around 17th April and May 2014 and then, during the period leading up to the Company's liquidation (the Company having become aware of the Revenue's claim for arrears in late 2012) the monthly standing orders were increased by approximately 45% to £4,593 per month, paid again on or around the 17th of each of June, July, August and September 2014.

82. The amounts recorded in the accounts as having been paid to Ms Buchanan for 2010 and 2011 were significantly lower amounts than she received in 2008 and 2009 by way of dividend. Unless the Company resolved correspondingly to increase her remuneration from £6,000, to the extent that she withdrew greater sums from the Company, those amounts would be treated as a loan from the Company to her.

83. If these monthly payments are added together with Ms Buchanan's official salary of £6,000 per annum, they would give rise to payments to her at an annual rate of approximately £61,000 in the period leading up to the Company's liquidation.

84. Neither Ms Buchanan nor Mr Drew responded to the Applicants' Request for Information in which they were asked to explain what the payments were for, if not salary or dividends. Neither was able to give a clear answer in evidence. As noted, the thrust of Ms Buchanan's evidence was that she simply did not understand the Company's annual accounts once Blinkhorns took over and that she trusted Mr Cunningham who assured her that despite very clear statements that she owed the Company large amounts of money, she did not, or perhaps just that she did not have to repay it. Mr Drew purported not to know how Ms Buchanan had been remunerated for her services.

85. In so far as the defence relies on the payments received by Ms Buchanan from the Company being "drawings", it recognises the need to make retrospective declarations to the Revenue. This is precisely the type of arrangement described by Snowden J in *The Sky Wheels Group of Companies.* At paragraph 50 of his judgment (set out at paragraph 35 above) he said that such drawings cannot simply be recharacterised as remuneration when it suits the recipient so to contend. He qualified this by saying that they could not do so, "at least" without paying the additional tax, interest and penalties that this would entail. He did not have to expand on this "at least" provision further. When he put to the director/shareholders' counsel whether being remunerated in that way was consistent with the manner in which the regular payments had been presented to HMRC, the argument was withdrawn.

86. In my judgment, it is simply not open to a director to recreate history and the basis upon which they have historically received money from a company. Following *Re Idessa,* having established by reference to the Company's accounts that significantly more was paid to Ms Buchanan than was expressly accounted for as salary or dividend, the burden of proof lies with Ms Buchanan to show that she was entitled to receive those monies.

87. Taking into account:

i) the amounts paid to Ms Buchanan by way of dividend in 2006 and 2007;

ii) the modest salary declared in the Company's accounts which she signed every year, knowing that it was insufficient to meet her living expenses;

iii) the advice given by Blinkhorns in Mr Martin's letter of 2 March 2011 which explained that there were insufficient reserves to meet the amounts Ms Buchanan had taken out of the Company and to repay the amounts due on her loan account and suggesting that Mr Cunningham would provide some draft accounts from which Mr Martin would calculate the maximum dividend that could be paid enabling him then to inform Ms Buchanan how much she would need to put back into the Company;

iv) the clear statement in the 2011 accounts that Ms Buchanan owed the Company £87,871;

v) the generous sums she continued to draw on a regular basis, even after learning of the significant tax liability claimed by HMRC,

I find on the balance of probabilities that it was at all times intended or hoped that the Company would ultimately make enough money to declare dividends that would cancel out the sums due on the loan accounts. As such, the sums shown as owing on Ms Buchanan's director's loan account were taken as payments on account of future, anticipated dividends. The approach employed by the Company whilst using Hard Dowdy as its accountants was the same as that employed by Blinkhorns: the key difference being that the Company and its overheads grew and it failed to make sufficient profits to continue to pay dividends at the rates Ms Buchanan had enjoyed in 2006 and 2007.

88. As reflected by Ms Buchanan's failure to declare them as such, the payments she received or took from the Company's account were not, nor were they ever intended to be salary for which she would be liable to pay income tax and national insurance.

89. Article 82 of Table A provided that the directors of the Company would be entitled to remuneration as fixed by ordinary resolution of the members from time to time. No evidence has been provided to the Court of such a resolution having been passed in relation to the amounts which Ms Buchanan now claims to have been paid to her by way of "drawings".

90. The last-minute attempt to reclassify the payments as "drawings" could not alter the basis upon which they had been paid and received throughout the Company's prior trading periods. I have little doubt that if such a retrospective accounting adjustment were possible, most companies' owner-directors would adopt a similar practice. They would approve payment to themselves of a salary below the income tax threshold and then take more than that amount out of the company on a monthly basis in the hope of earning sufficient dividends by the end of the year to repay any debt due from them to the company. If it then transpires that the company makes a loss, or worse, enter liquidation, they would change the accounts to show that

whilst creditors may not be paid in full, they should nevertheless receive what they consider to be a fair amount to compensate themselves for the hours they spent working for their own company, even though it has not been sufficiently successful to pay all of its debts.

91. There was no board resolution at the relevant time and the Reclassification was of no legal effect: ***Global Corporate.***

92. I also reject Mr Gupta's submission that Ms Buchanan has a corresponding claim for remuneration, on what appears to be a quantum meruit basis, which can be set off against the overdrawn loan account. In ***Global Corporate,*** Arden LJ suggested that once a company is in liquidation, such an unliquidated claim would need to be proved for in the liquidation and that unless the payments can be validly re-characterised as payments for services lawfully made by the company prior to the liquidation, it was difficult to see how they could provide a defence. I have found that the sums cannot be re-characterised. No question of set off arises. They were sums borrowed by Ms Buchanan from Company money against the hope of future dividends. Such dividends did not materialise and the loan must be repaid.

Limitation of action

93. Mr Gupta contends that because the sums due under the loan account were shown in the Company's accounts as "debtor" sums, that they thereby either became immediately due and owing at the time they were incurred or, at the latest, when the Company's year-end accounts were prepared. Consequently, the limitation period prescribed by section 5 of the Limitation Act 1980 expired before the Applicants' application was issued.

94. The liquidators sent a letter demanding repayment of the Reclassified Amount on 10 March 2017. Mr Parsons referred to time running from the date of the liquidators' demand for repayment, on the basis that there was no contractual period within which the loan was to be repaid. That being the case, the relevant section is section 6. Paragraph 28-036 of *Chitty on Contracts* (33rd edition) explains section 6:

> "At common law, where no time for repayment was specified in a contract of loan, or where the loan was expressed simply to be repayable "on demand", the lender's cause of action in general accrued when the loan was made and time began to run from that moment. As a result, once the loan was outstanding for more than six years (which not infrequently happens in the case of loans between friends or members of a family) the lender's right to recover the money lent became barred notwithstanding that no demand for repayment had been made.
>
> But by s.6 of the Limitation Act 1980, if: (a) a contract of loan does not provide for repayment of the debt on or before a fixed or determinable date; and (b) does not effectively (whether or not it purports so to do) make the obligation to repay the debt conditional on demand for repayment made by or on behalf of the creditor or any other matter, then the right of action on the

> contract of loan is not barred after six years from the date of the loan. Instead, the six-year period does not start to run unless and until a demand in writing for repayment of the debt is made by or on behalf of the creditor (or, where there are joint creditors, by or on behalf of any one of them)."

95. Pursuant to section 6(2) of the Limitation Act 1980 time for payment did not begin to run until a demand was made by the Company for Ms Buchanan to repay the debt. As director of the Company she made no demand upon herself to repay it. The first formal demand was made following interview, investigation and correspondence between the parties, on 10 March 2017. These proceedings were commenced within six years of that date and consequently within the six-year Limitation Act period.

Quantum

96. The liquidator's evidence states that by 9 September 2014 the balance on the director's loan account appeared to show a debit balance of £225,571 – the Reclassification Amount. He has added to that sum, £60,838 which was shown as an outstanding liability on Ms Buchanan's drawings ledger as at 8 September 2014 and following further adjustments set out in a schedule entitled "Transaction by Account as at 30 June 2017". By adding together those two amounts in the manner set out in Mr Bass's witness statement, he arrives at the total now claimed against her of £286,421.45.

97. Neither Ms Buchanan nor Mr Drew sought in their evidence to challenge the quantum or any of the specific items: their case hung entirely on Ms Buchanan having been entitled to receive the amounts recorded in the Company's records as due from her. Both explained why they had no confidence in the figures set out in the records and accounts prepared by HSC and Blinkhorns. Both blamed HSC and Blinkhorns' conduct for their subsequent inability to prepare what they would consider to be reliable accounts. Ms Buchanan chose not to pay the amount claimed by Blinkhorns to release the electronic accounting records.

98. In closing submissions, Mr Gupta said that if, as has proved to be the case, I am against Ms Buchanan's case on all counts, then the court should consider the amount in question to be the Reclassification Amount. He submitted that if it was Ms Buchanan's intention to wipe out the debt due from her to the Company, why would she leave any amounts outstanding. The reason, it appears, is that she had not taken into account the amount outstanding on the "drawings ledger" described in paragraphs 25 to 28 of Mr Bass's first witness statement. Ms Buchanan has provided no evidence to refute any of the specific amounts shown in the detailed accounts as having been advanced to her including the "Transactions by Account" schedule. The figures in that schedule appear to me to be credible.

99. I find, on the balance of probabilities that the total amount advanced to Ms Buchanan which has not been accounted for as either salary or dividend, is £286,421.45. Notwithstanding her attempts, on the advice of her husband solicitor, to re-characterise the payment as "drawings", this sum remained due and owing to the Company as a debt. It fell to be repaid when the Company entered liquidation. It must now be repaid, together with interest.