Approved Judgment

Neutral Citation Number [2023] EWHC 1548 (Ch)

CR 2021 001686

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF C.C.T. LOGISTICS LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 30/06/2023

Before :
ICC JUDGE BARBER

- -

Between :

LEVY & PARTNERS LIMITED

Applicant

and

(1) MR NICHOLAS BARNETT
(As liquidator of C.C.T. Logistics Limited)
(2) C.C.T. LOGISTICS LIMITED (IN LIQUIDATION)
(3) CCT INTERNATIONAL LIMITED

Respondents

- -

Ms Hilary Stonefrost (instructed by **Isca Legal LLP)** for the **Applicant**
Mr Mukhtiar Otwal (instructed by **Neves Solicitors LLP**) for the **Third Respondent**

Hearing dates: 6-7 Mar, 31 Mar, 2 May 2023

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Approved Judgment

This judgment was handed down remotely by email and MS Teams. It will also be sent to The National Archives for publication. The date and time for hand-down is 9.30 a.m. on 30 June 2023

ICC Judge Barber

1. This application is concerned with creditors' voting rights in the context of a creditors' voluntary liquidation. The Applicant, as a creditor of C.C.T. Logistics Limited ('the Company') appeals the decision made by the First Respondent ('the Liquidator') to allow the Third Respondent ('CCI') to vote on a proof of debt of £51,412.83 at a creditors' meeting held on 26 August 2021. The Applicant seeks a declaration that the votes cast by CCI on that proof were invalid and such further relief as the court thinks fit.

2. An alternative limb of the application, by which the Applicant sought an order pursuant to sections 108(2) and/or 171 of the Insolvency Act 1986 (IA 1986) that the Liquidator be removed and replaced by Mr Umang Patel, is no longer pursued. For this reason, the Applicant no longer seeks to rely upon some of the evidence given by Mr Joshi in his first witness statement and the Liquidator has been excused from attending for cross-examination.

Background

3. The Applicant is an accounting firm which until December 2020 acted as the Company's accountants. The Applicant claims to be owed £43,516.75 by the Company for its accounting services.

4. The Company was incorporated on 8 December 1993 and carried on the business of freight forwarding services. Since 2015, it has traded from leased offices at Suite 8A, AW House 6-8 Stuart Street, Luton LU1 2SJ ('AW House'). The Company's directors are Mr Ian Murray and Mr Ricardo Nash ('the Directors'). Mr Murray's wife, Mrs Suzanne Murray, was appointed as company secretary in 2019, but nothing turns on that. The Company's authorised share capital is 100 ordinary shares of £1 each; 50 are allocated to Mr Nash, 38 to Mr Murray and 12 to Mrs Murray.

5. The Company banked with Barclays Plc. In 2001, the Company granted Barclays a debenture over its assets. On 22 November 2012, Mr Murray and Mr Nash entered into a personal guarantee of the Company's overdraft facility with Barclays, limited to the sum of £125,000.

6. In 2012, Mr Nash moved to Spain. Mr Murray felt that there was a serious imbalance in the workload following Mr Nash's move to Spain. This led to a strain in their relationship, both business and personal.

7. During 2019, the Directors explored a buy-out by Mr Murray of Mr Nash's interest in the Company. Mr Murray was offering a package worth in the region of £60-70,000. Mr Nash wanted more. By email dated 24 September 2019, having put forward his latest offer, Mr Murray urged Mr Nash to come to a deal, stating (with emphasis added):

> 'I am unwilling to continue to be solely responsible for managing the company under the current circumstances and require your acceptance to the above offer. If no response is received, I will take appropriate measures.

> Having taken legal advice I am prepared to liquidate [the Company], and *have already taken steps to ensure smooth transition of clients* if necessary.'

8. The 'steps' referred to appear to have included the incorporation of CCI on 31 July 2019. CCI was set up by Mr Murray but was dormant initially.

9. Mr Murray and Mr Nash could not agree on the terms of a buyout. The email exchanges became increasingly bitter. By 20 December 2019, Mr Nash emailed Mr Murray reminding him, inter alia, that there 'would have been no [Company] without me joining'. Mr Nash also stated, in a somewhat accusing manner, '*Know all about setting up of [CCI] on 31 July with you as sole shareholder*'. Mr Murray responded the same day, stating tersely 'We will not be parting amicably'.

10. CCI began trading in or about June 2020, carrying on the same business as the Company; freight forwarding services. As with the Company, CCI traded from AW House. CCI dealt with the same or substantially the same clients and suppliers as the Company. In oral testimony Mr Murray explained that he chose CCI's name because it was 'a name known to [his] clients'. Mr Murray was initially CCI's sole director and sole shareholder. Mr Murray remains sole director but his wife and son have since joined him as shareholders.

11. CCI's trading overlapped with that of the Company for several months. The Company did not finally cease to trade until the spring of 2021, although it was clearly being 'wound down' before then; in December 2020, the Applicant ceased providing accountancy services to the Company due to unpaid fees and in the same month, Mr and Mrs Murray came off the Company's PAYE payroll. Mr Murray went onto CCI's PAYE payroll in February 2021. In some cases (over the period June 2020 to Spring 2021) the Company successfully quoted for a job but then CCI performed it. In oral testimony Mr Murray said that there was 'a lot of overlapping'.

12. In or by April/May 2021, the Company ceased trading altogether.

13. On 1 June 2021, the first compulsory striking off gazette notice was published at Companies House in respect of the Company. This warned that unless cause was shown, the Company would be struck off the register and dissolved in 2 months, for failure to file accounts. Barclays spotted the notice and wrote to Companies House objecting to the Company being struck off, on the grounds that the Company owed it money. As a result of Barclays' objection, compulsory striking off action was suspended on 12 June 2021.

14. In the meantime, on 2 June 2021, Mr Murray had an 'informal discussion' with Mr Cottingham of Libertas Associates Limited ('Libertas') at the Company's office at AW House 'about the process for liquidating the Company' (Murray (1) para 33). Libertas had a satellite office and plaque at AW House, but no physical presence there; its main office was in Bushey, Hertfordshire. Prior to his death in 2020, Mr Allen, the director of the Company's landlord AW Group Limited ('AW') had recommended to Mr Murray that he contact Libertas in the event that a deal could not be achieved with Mr Nash: Murray (1), para 35. Mr Cottingham of Libertas knew Mr Allen: Barnett (1) para 60(c). The Applicant maintains that Mr Murray was looking for a 'quiet burial'. Mr Murray denies this.

15. Following that initial informal discussion on 2 June 2021 and conflict checks, on 14 June 2021, Libertas sent a letter of engagement dated 14 June 2021 to the Company for counter-signature (Barnett (1) at para 9). The letter provided (among other things) for a pre-appointment fee of £5,212 (inclusive of VAT) ('the Libertas Fee'). The letter was counter-signed by Mr Murray on behalf of the Company on 16 June 2021.

16. By his written evidence, Mr Murray placed great store by his initial meeting with Mr Cottingham on 2 June 2021. In his first witness statement, he stated that he had expressed concerns at that meeting about the personal guarantees which he and Mr Nash had given to Barclays. At [47] he stated:

> '[47] At the first meeting with Libertas, I was asked about the debts of the Company and whether any Personal Guarantees had been given. I explained that there was a debt to Barclays bank in relation to which [Mr Nash] and I had both given Personal Guarantees. I felt that, despite the Personal Guarantees being on a joint and several basis, it was very unlikely that the Personal Guarantee could be enforced against [Mr Nash] as he was no longer resident in the UK. I was concerned that all the responsibility would fall on me but I did not personally have the funds to discharge this and I asked whether [CCI] would be able to pay it. It was suggested to me that the proper way to do this was for the Company to ask [CCI] to discharge its debt such that the Personal Guarantees would not be implemented. These monies would then be classed as a Directors Loan between myself and [CCI]. The Company therefore held a Board Meeting on 22nd June 2021 at which it was resolved that the Company would request that [CCI] pay the debt when demanded by Barclays. At a meeting of shareholders of [CCI] on 11 August 2021 it was agreed that [CCI] would pay the sum of £34,976.86 to Barclays Bank when demanded. This it did, prior to the liquidation (IM pages 61-62). I now owe this money to [CCI] by way of a Directors' Loan Account.'

17. Contrary to Mr Murray's written evidence (and as conceded by him in cross-examination), the Company did not hold a board meeting on 22 June 2021. At best, a meeting of some of the members of the Company (Mr Murray and his wife, representing 50% of the shareholders) took place that day. A document dated 22 June 2021, headed, 'Minutes of a meeting of members', states that the meeting was held 'to discuss the proposal that [CCI] be requested to arrange payment of [the Company's] liability to Barclays Bank for the overdraft facility which had been secured against the personal guarantees of the Directors'. The document records that it was 'resolved that [CCI] would be requested to arrange payment of the outstanding amount on demand from Barclays'. In cross-examination, Mr Murray accepted that the resolution meant that 'at some point in the future, the Company would ask CCI'.

18. There *was* a board meeting of the Company on 23 June 2021. The minutes of the board meeting record Mr Murray as present and Mr Cottingham (of Libertas) and Mr Nash as in attendance. At this meeting, the Directors resolved (by paragraph (a)) that Libertas be instructed to convene meetings of the Company's members and creditors for the purpose of putting the Company into voluntary liquidation, to carry out a list

of related tasks set out at (b) to (h) and, (by paragraph (i)), 'to settle the proper charges and disbursements of Libertas Associates Limited in connection with the above from the assets of the company and that there be deposited with Libertas Associates Limited £5,212.20 in respect of services to be rendered'.

19. A sum of £5,212.20 was deposited in the client account of Libertas in respect of their fees. Notice of a General Meeting of the Company that was to be held virtually on 9 July 2021 was given on 23 June 2021.

20. There was no mention in the board minutes dated 23 June 2021 of any resolution on 22 June 2021 that CCI be asked to pay off the Company's overdrawn account with Barclays.

21. Mr Murray prepared a Statement of Affairs on 8 July 2021, purportedly setting out the position of the Company as at 7 July 2021. His Statement of Affairs made no mention of the sums owed by the Directors to the Company on their directors' loan accounts, which totalled at least £137,000, of which Mr Murray owed at least £94,762. The Statement of Affairs stated that the Company had no assets at all, save for cash at bank/in hand of £5,212. No trade debtors were listed. This was surprising in context, given that, according to the Company's filed accounts, trade debtors for the years ending 30 March 2018 and 2019 stood at £367,846 and £564,546 respectively; and that, on Mr Murray's case, the Company traded until April/May 2021 (Murray (1), paras 16, 18, 48).

22. The liabilities listed in the Statement of Affairs were said to comprise:

    Barclays (overdraft): £35,346

    Barclays (bounceback loan): £50,000

    Associated Company (ie CCI): £5,212

    Employees' claims: nil

    HMRC: £30,000

    Trade Creditor: (the Applicant): £20,000

23. The estimated deficiency as regards creditors was said to stand at £135,346.

24. The Directors' Report to Creditors prepared in July 2021 stated that no transactions, other than in the ordinary course of business, had taken place between the Company and any connected parties as defined in s.435 IA 1986 during the period of one year prior to the liquidation.

25. In a section of the Directors' Report to Creditors entitled 'General Financial Information', the turnover of the Company for each of the years ending 30 March 2017, 2018 and 2019 was stated as 'unknown', as was Directors' remuneration for each of those years. This was said to be because only the abbreviated accounts filed at Companies House were available at the time of the report. The Applicant's evidence was that Libertas did not ask it for any accounting information in the run up to preparation of the Statement of Affairs and the Director's Report.

26. Again, as with the Statement of Affairs, the Directors' Report stated that assets comprised simply 'cash in hand' of £5,212.20, a sum said to have been deposited on the client account of Libertas in respect of pre-appointment fees. Liabilities set out in the Directors' Report reflected those identified in the Statement of Affairs. Barclays was said to be owed £35,346 in respect of the Company's overdraft and £50,000 in respect of a bounceback loan, unsecured creditor claims were confirmed to be those set out in the Statement of Affairs and to include the sum of £5,212 'owed to [CCI] (an associated creditor by way of a common director and shareholder) in respect of monies they have loaned to the Company'.

27. The first virtual meeting of creditors was held on 9 July 2021, but was adjourned to 10am on 15 July 2021 as the Company had failed to obtain the agreement of at least 90% of the Company's shareholders to the holding of the general meeting scheduled for 9 July 2021 on short notice. The notice of adjournment in evidence is dated 15 July 2021; the date of the adjourned meeting. Only CCI was given notice of the adjourned creditors' meeting; the Applicant was not given notice.

28. At 10.10am on 15 July 2021, the Applicant sent a proof of debt form to the Liquidator. At this stage the Applicant was under the mistaken impression that the Company had already been put into liquidation at the members' and creditors' meetings convened for 9 July 2021.

29. At the adjourned general meeting held at 10am on 15 July 2021, the Company resolved to enter creditors' voluntary liquidation and to appoint Mr Barnett as liquidator. Only Mr Murray and Mr Barnett attended, by telephone. Mr Nash did not attend.

30. The adjourned creditors' meeting commenced at 10:15am on 15 July 2021. The only people in attendance were CCI (via its proxy, Mr Murray) and Mr Barnett and Mr Humphrey of Libertas. The nomination of the appointment of the Liquidator was put to the creditors' meeting and the minutes record that the appointment of Mr Barnett as Liquidator was confirmed by the creditors.

31. The only creditor who voted at the meeting was CCI in the sum of £5,212.20; the sum used for the payment on account of the Liquidator's fees. CCI's proxy form and proof of debt were each signed by Mr Murray and dated 8 July 2021, the same date as the Statement of Affairs. In the section of the proof seeking details of any document available to substantiate the debt was written 'invoice'. No invoice has been adduced.

32. By paragraph 4 of the minutes of the creditors' meeting held on 15 July 2021, under the heading 'Disclosure of Material Transactions', the Directors confirmed that 'no material transactions, other than in the ordinary course of business, have taken place between the Company … and its directors (and connected parties including associates as defined in s435 IA 1986)'.

33. At 10.21am on 15 July 2021, the Applicant sent a proof of debt and supporting documentation for the purpose of admitting their claim in the liquidation. The amount of the claim, for accountancy services provided to the Company, was £43,516.75. The Liquidator confirmed that the Applicant had been added to the list of creditors and stated that claims would not be formally adjudicated upon unless and until the Liquidator was in a position to pay a dividend.

34. At 13.01 on 15 July 2021, the Applicant sent another email to the Liquidator's office, asking that a further meeting be convened because the Applicant wanted a different person appointed liquidator. The person nominated by the Applicant was Umang Patel of Neum Insolvency.

35. The Liquidator did not reply. The Applicant chased for a reply on 21 July 2021.

36. On 22 July 2021, Barclays Bank wrote to the Company formally demanding repayment of the overdraft plus banking charges, a total of £35,885.45. Somewhat unusually, given that the Company was by then in liquidation, the letter was addressed to the Company at AW House.

37. On 27 July 2021, the Liquidator responded to the Applicant's request for a meeting to be convened, asking for security for expenses of the procedure. The Liquidator also sought a considerable amount of information concerning the Applicant's status as a creditor of the Company.

38. On 2 August 2021, the Liquidator sent a notice to the members and creditors informing them that the members had passed a resolution to wind up the Company on 15 July 2021.

39. On 9 August 2021, the Liquidator, at the request of the Applicant, sent out a letter to all known creditors, convening a further virtual meeting of creditors at 10.30 am on 26 August 2021. The Liquidator's Report to Creditors dated 9 August 2021 stated:

    (1) that he was appointed Liquidator of the Company on 15 July 2021;

    (2) that the Statement of Affairs showed a sum of £35,346 was owed to Barclays under a 'charge', described as a debenture created on 24 July 2001 and registered at Companies House;

    (3) that whilst the Statement of Affairs had included 5 unsecured creditors with an estimated total liability of £105,212, the only claims received were from CCI in the sum of £5,212.50 and the Applicant in the sum of £43,516.75;

    (4) that based on the estimated Statement of Affairs, it was unlikely that there would be a dividend to creditors;

    (5) that the creditors had authorised the payment of a fee of £4,000 plus disbursements and VAT for his assistance with preparing the Statement of Affairs and convening the virtual meeting of creditors and that these fees 'were paid from first realisations on appointment' and were 'shown in the enclosed receipts and payments account'.

40. On 11 August 2021, (two days after the Liquidator's letter of 9 August 2021), CCI held a meeting of members. The minutes of that members' meeting, dated 11 August 2021 and signed by Mr Murray, record that the meeting was attended by Mr Murray and his son Robert, who together represented 70% of members. The minutes state:

> 'The meeting was held to discuss the request from [the Company] to make payment to Barclays in respect of the overdraft facility.

> It was resolved that [CCI] would arrange the payment on receipt of demand from Barclays Bank'.

41. The minutes did not identify the date of the 'request'. In oral testimony, however, Mr Murray confirmed that no request had been made prior to the Company entering into liquidation. As will be seen from the quote above, the resolution was that CCI 'would arrange' payment 'on receipt of demand from Barclays Bank'. This was curious, as the bank had already made formal demand, on 22 July 2021.

42. For the purpose of voting at the reconvened creditors' meeting due to take place on 26 August 2021, CCI initially lodged a proof of debt dated 20 August 2021 and signed by Mr Murray, setting out CCI's claim for the payment of the Libertas fee of £5,212.50.

43. On 24 August 2021, however, very shortly before the date of the reconvened creditors meeting, Mr Murray, acting for CCI, submitted a proof for £51,412.83. The sums covered by CCI's proof were said to be as follows:

(1) a sum representing the Company's overdraft with Barclays, which at the date of the proof had yet to be paid: £34,976.86 ('the Bank Debt');

(2) Libertas Fee: £5,212.20: allegedly paid on 8 July 2021 by CCI to Libertas as a loan to the Company;

(3) CCI (Nippon) Debt: £3,692.25: this was an unpaid invoice dated 19 March 2021 from CCI to the Company, which Mr Murray later explained related to a Nippon invoice addressed to CCI dated 2 March 2021;

(4) AB Debt: 6,580 euros: this was said to have been paid by CCI on/by 28 June 2021 to extinguish the Company's liability to AB-SPED s.r.o under an invoice addressed to the Company dated 17 March 2021 relating to transportation services provided in February and March 2021; and

(5) Petrasco Debt: US $2,160: this was said to have been paid by CCI on 24 August 2021 to extinguish the Company's liability to Petrasco Middle East under 4 invoices dated 15 March 2021.

44. Mr Murray did not include with CCI's proof submitted on 24 August 2021 the members' resolution of the Company dated 22 June 2021 or the members' resolution of CCI dated 11 August 2021. The documents by reference to which the debt claimed by the proof could be substantiated were stated in the proof to comprise 'Copy Invoices/Statements and Remittances'.

45. Mr Murray also sent to the Liquidator two new proofs of debt from AW (the Company's landlord) (£5,553) and from Prosport Consulting Limited ('Prosport') (£3,000). He denied having done so in oral testimony, but on the balance of probabilities, having regard in particular to contemporaneous correspondence in evidence, I am satisfied that he did. AW and Prosport had not been mentioned in the Statement of Affairs signed by Mr Murray. AW's proof related to unpaid rent for the

Company's leased offices at AW House for 6 monthly periods spanning January to June 2021. Prosport was based at AW House as well. Prosport's proof was based on an invoice dated 4 February 2021 said to relate to 'a review of company finances to assess the viability of the business'. It is unclear what material Prosport 'reviewed', given the statement in the Director's Report to Creditors that only historic abbreviated accounts filed at Companies House were available. Be that as it may: on 24 August 2021, the AW Proof and the Prosport proof were submitted with (but not included in) CCI's proof of debt for £51,412.83.

46. On 25 August 2021, the day before the creditors' meeting requisitioned by the Applicant, CCI paid Barclays the sum of £34,976.86. On the same day, Barclays wrote a letter to the Company, addressed to it at AW House, confirming receipt of £34,976.86 into the Company's current account and stating the 'current balance of today' to be '0.00'. Mr Murray forwarded the letter by email to Libertas the same day.

47. On 25 August 2021, Mr Cottingham of Libertas emailed Mr Murray asking why a number of the claims lodged had not appeared in the Statement of Affairs dated 8 July 2021 which he had signed. Mr Murray replied by email the same day, stating:

> 'Apologies – I was planning to deal with these through [CCI] as didn't want the deficit to appear worse than it was'.

48. In the event, CCI's proof was admitted for voting purposes at the meeting of creditors on 26 August 2021 in the claimed sum of £51,412.

49. Two of the resolutions voted on at the meeting of 26 August 2021 were for the removal of the Liquidator and the appointment of Mr Patel. The Liquidator retained his position by the votes of CCI (£51,412), AW (£5,553) and Prosport (£3,000); a total of 57.95% of creditors. The Applicant's claim (marked 'objected to') was allowed for voting purposes in the claimed sum of £43,516.75 (42.05%).

50. Had CCI not been permitted to vote in respect of the Bank Debt, the result would have been that the Liquidator would have been removed and Mr Patel appointed in his place.

Applicable legal principles on voting/an appeal against proof

51. The principles to be applied were not in dispute.

52. In a creditors' voluntary winding up, votes are calculated according to the amount of each creditor's claim, as set out in the creditor's proof, to the extent that it is admitted: rule 15.31(c) IR 2016.

53. There is a quorum for a creditors' meeting where at least one creditor is entitled to vote: rule 15.20(2) IR 2016.

54. A decision is made by creditors when a majority (in value) of those voting have voted in favour of the proposed decision: r.15.34(1) IR 2016.

55. The chair may (and must if it is so resolved) adjourn a meeting for not more than 14 days (subject to any direction of the court and to rule 15.24): rule 15.23(1) IR 2016.

56. A decision of the chair is subject to appeal to the court by a creditor: rule 15.35(3) IR 2016.

57. If the decision of the chair is reversed or varied by the court or votes are declared invalid, the court may order another decision procedure to be initiated or make such other order as the court thinks just: rule 15.35(3) IR 2016.

58. If a secured creditor fails to disclose a security in a proof, the secured creditor must surrender that security for the general benefit of creditors: r.14.16(1) IR 2016.

59. The role of the judge when hearing an appeal against the decision of the chair on a creditor's entitlement to vote is to form their own view, based on the evidence and the argument at the hearing, whether, on balance, the claim against the company is established. The judge does not conduct a review of the decision made at the meeting: Revenue and Customs Commissioners v Maxwell [2010] EWCA Civ 1379.

60. Where the appeal is a challenge to the chair's decision as to the existence of the debt, the court's task is to determine whether a debt is proven on a balance of probabilities, and the legal burden is on the creditor to establish the claimed indebtedness: Karapetian v Duffy [2022] EWHC 1053 (Ch) at [27].

The Evidence

61. For the purposes of determining this application, I have read and considered the following witness statements and their respective exhibits:

(1) The first witness statement of Mr Arvind Joshi dated 16 September 2021 in redacted form;

(2) the witness statement of Mr Barnett dated 22 October 2021;

(3) the first and second witness statements of Mr Murray dated respectively 20 December 2021 and 25 March 2022.

62. I also considered other documents contained in the agreed hearing bundle, to which reference will be made where appropriate.

63. I heard oral evidence from Mr Joshi and Mr Murray. Mr Barnett was excused from attending for cross-examination by agreement.

64. Mr Joshi did his best to assist the court truthfully and to the best of his knowledge and recollection. From his written and oral testimony, however, it was clear that he had little personal day-to-day involvement with the Company over the period to which this application relates. He was cross-examined at some length as to the quantum of the Applicant's proof, but this was of little direct relevance to the application before me, as there was no appeal against the decision to allow the Applicant's proof for voting purposes. Somewhat unsurprisingly in the circumstances, Mr Joshi had not come prepared to debate the minutiae of the Applicant's proof. He was, however, of some assistance in speaking to and explaining certain accounting documents from his review of the working papers/accounting files held by the Applicant in respect of the Company.

65. Mr Murray did have the benefit of day-to-day involvement with the Company over the period to which this application relates. Having considered both his written and oral testimony with some care, however, I have come to the conclusion that, save where supported by context or contemporaneous documentation, his evidence should be treated with caution. In this regard I take into account in particular the following:

(1) First, the characterisation in Mr Murray's first witness statement of the meeting of 22 June 2021 as a board meeting and the resolution passed at it as a board resolution. From his oral testimony, Mr Murray plainly knew the difference between a members' resolution and a board resolution, but he was not careful enough to get it right in his witness statement. In oral evidence, he accepted that the meeting held on 22 June 2021 was a members' meeting and that the resolution passed at it was a members' resolution.

(2) Second, Mr Murray's written evidence on the Prosport debt. At paragraph 36 of his first witness statement, Mr Murray stated that CCI had paid this debt, as the Company did not have the funds to pay it. This was untrue; the debt had not been paid and Prosport lodged its own proof. Mr Murray accepted in cross-examination that CCI hadn't paid the debt. This was another instance of giving written evidence without appropriate care.

(3) Third, the Statement of Affairs dated 8 July 2021, bearing a statement of truth, which Mr Murray chose to sign and which has never been updated or corrected. The only asset declared by it was the sum of £5,212 cash at bank/in hand. No mention was made of the significant sums owed to the Company by Mr Murray and Mr Nash on their directors' loan accounts. Mr Murray accepted in cross examination that the company accounts for the year ending 30 March 2019 showed sums outstanding on the director's loan accounts of £137,468 and accepted that these sums had not been repaid. There was a small quibble as to whether another £30,000 or so was owed on top of that figure, but in context this was irrelevant; Mr Murray knew that at least £137,468 remained owing. He cannot have forgotten it, or the fact that at least £94,762 of that figure was owed to the Company by him personally; a liability in such a sum was plainly material from his perspective, given his concerns (as expressed at Murray(1) para [47]) about his exposure under the Barclays guarantee in the (much lower) sum of £35,000; yet he failed to declare this highly material asset of the Company in its statement of affairs. He states in his first witness statement (at para 19) that he 'did inform the liquidator of the Directors Loan Accounts' but notably does not state in his witness statement *when* he informed him. I do not accept the suggestion in evidence that he was simply guided by the Liquidator and did not realise that that the directors' loan account should be listed as an asset of the Company in the Statement of Affairs. On the evidence overall, I am satisfied that this was a deliberate, self-serving omission.

Other omissions from the Statement of Affairs include the AW debt (representing 6 months' rent arrears, not easily forgotten) and the Prosport debt, which related to advice given as recently as January/February 2021.

There were also significant omissions in the information provided in the Directors' Report to Creditors prepared in July 2021: see paragraph 25 above. I simply do not accept that Mr Murray had no idea what the Company's turnover had been for each of the years ending 30/3/2017, 2018 and 2019, or what directors' remuneration had been

for each (or indeed any) of those years; there were only two directors and one of them was Mr Murray himself. He cannot blame the Liquidator for these omissions. He should have provided the Liquidator with this information when the Directors' Report was being prepared.

(4) Fourth, Mr Murray claimed, in both his written and oral evidence, that he owed CCI, via his director's loan account with CCI, the sum of £34,976.86 paid by CCI to Barclays. A review of CCI's accounts for the relevant accounting years revealed no reference to any such sum. Mr Murray must have known this to be the case; the accounts for CCI are professionally prepared and include a breakdown of movement on the director's loan account. As the only director of CCI, such figures must have been put together with his input and the accounts approved by him. CCI's filed accounts for the year ended 2022 do not record the sum paid to Barclays as a director's loan. Instead, page 5 of those accounts show director's advances/credit/guarantee as £380.

(5) Fifth, by his first witness statement, Mr Murray gave evidence that some of the Company's creditors paid by CCI were paid so that 'the Company could complete its contractual obligations prior to the liquidation as it did not have the funds to do so itself', not to maintain the Company's client and supplier relationships for the benefit of CCI. Yet in cross-examination, he proffered a different explanation, saying that he wished to maintain his personal reputation. By his first witness statement, Mr Murray had also stated (at para 9, with emphasis added) that he had 'continued to work for the Company throughout March, April and May without payment in order to honour its shipping transactions through to completion *and generate income/revenue for the Company*'. When asked by the court where the money from those jobs had gone (given that the only asset declared in the Statement of Affairs dated 8 July 2021 was £5,212.20 said to have been advanced by CCI), Mr Murray had no answer.

(6) Sixth, Mr Murray implied by his written evidence that the Company and CCI each had separate leasehold units at AW House. At paragraph 27 of his first witness statement, he stated that 'the Company and [CCI] both had rented office suites which are fully furnished'. He also stated or implied in oral testimony that the Company and CCI had separate offices at AW House. Yet the proofs of debt submitted by CCI all bore the address 'Suite 8A' AW House; Suite (or Unit) 8A is the unit which was occupied by the Company (and was its registered office from 2015). Lest it be thought that this was simply a change of address for CCI which followed the Company's cesser of trading, the Nippon invoice to CCI, dated 2 March 2021, considered later in this judgment, is addressed to CCI at Suite 8A AW House as well.

66. Overall, Mr Murray's written evidence was not prepared with the candour and care required of formal evidence bearing a statement of truth. His oral evidence was also inaccurate in certain material respects, a number of which are addressed in this judgment. Whilst his oral testimony was undoubtedly truthful in some respects, he was prepared to deviate from the truth when it suited his purposes. Having considered the evidence as a whole, I have come to the conclusion that Mr Murray's evidence must be considered with some care against the documents and context.

The debts in issue

67. By the time of closing submissions, Mr Otwal accepted that the AB Debt and the Petrasco Debt were not properly admitted as claims. The reason for this (as rightly conceded) is that it was clear by close of oral testimony that they were voluntary payments. From this it follows that the AB Debt (the sterling equivalent of which was roughly £5,620) and the Petrasco Debt (the sterling equivalent of which was roughly £3,692.25) – a total of approximately £9,300, on any footing fall to be deducted from the CCI claim. The overall CCI claim was £51,412. Deducting £9,300 from that sum leaves a total of £42,112.

68. In relation to the remaining three debts included in the CCI proof which were challenged by the Applicant, (the Libertas Fee, the CCI (Nippon) debt and the Bank Debt), CCI accepted that the legal burden rested on its shoulders to establish these debts on a balance of probabilities. CCI rested its case on the Bank Debt in restitution, maintained that the Libertas fee was a loan and claimed that the CCI (Nippon) debt was a sum due under a subcontract arrangement between the Company and CCI. This was a shift from CCI's opening position, as set out in paragraph 55 of CCI's skeleton argument.

69. As the Bank Debt is the most significant of the three remaining debts in issue, I shall address that first.

Bank Debt: opening positions

70. There was no dispute that the sum of £34,976.86 was paid by CCI on 25 August 2021 into the Company's bank account with Barclays or that Barclays confirmed receipt the same day and reduced the balance on the relevant bank account to nil. The issue between the parties was whether the payment was voluntary. It was common ground that if the payment was voluntary, the Company has no liability to CCI in respect of the payment.

71. CCI's opening position on the Bank Debt was as set out at paragraph 47 of Mr Murray's first witness statement, now reproduced with emphasis added:

> '[47] At the first meeting with Libertas, I was asked about the debts of the Company and whether any Personal Guarantees had been given. I explained that there was a debt to Barclays bank in relation to which [Mr Nash] and I had both given Personal Guarantees. I felt that, despite the Personal Guarantees being on a joint and several basis, it was very unlikely that the Personal Guarantee could be enforced against [Mr Nash] as he was no longer resident in the UK. *I was concerned that all the responsibility would fall on me but I did not personally have the funds to discharge this and I asked whether [CCI] would be able to pay it*. It was *suggested to me* that the proper way to do this was for the Company *to ask* [CCI] to discharge its debt such that the Personal Guarantees would not be implemented. These monies would then be classed as a Directors Loan between myself and [CCI]. The Company *therefore* held a Board Meeting on 22nd June 2021 at which it was resolved that

> the Company *would request* that [CCI] pay the debt *when demanded by Barclays*. At a meeting of shareholders of [CCI] on 11 August 2021 it was agreed that [CCI] would pay the sum of £34,976.86 to Barclays Bank when demanded. This it did, prior to the liquidation (IM pages 61-62). I now owe this money to [CCI] by way of a Directors' Loan Account.'

72. This opening position is also reflected in Mr Otwal's skeleton argument (with emphasis added) at [41]:

> 'During the first meeting Mr Murray had with Libertas, it was suggested that his concerns about being liable under his personal guarantee and having no money of his own *could be* addressed by the Company *requesting* CCI to discharge the Barclays Debt: §47 Murray 1 [134]. *Therefore, on 22.6.21*, the Company *resolved to request* CCI to arrange payment of the Barclays debt [314]'.

73. As will be seen from the above, the members' resolution of 22 June 2021 was centre-stage. This was also apparent from paragraph 62 of Mr Otwal's skeleton, which stated (with emphasis added):

> 'the decision to make the payment had been made prior to the commencement of the liquidation and while Mr Murray was a director of both the Company and CCI. *On 22.6.21* the Company expressly authorised the payment by CCI of the Barclays Debt on demand'.

74. As will be seen from this quoted extract, at the skeleton argument stage, Mr Otwal was hanging his hat firmly on the members' resolution of 22 June 2021. This is also clear from a further passage from paragraph 62 of his skeleton argument, which provides (with emphasis added):

> 'On 22.7.21, Barclays made a demand of the company for repayment. Thereafter, following authorisation by CCI on 11.8.21 to make the payment, CCI *acting on the earlier express authorisation by the Company* paid on 25.8.21 the sum of £34,976.86 to the Company [ie into the Company's overdrawn bank account], with which the Barclays Debt was directly discharged.'

75. This tallies with Mr Murray's written evidence. His explanation at paragraph 47 of his first witness statement for payment by CCI of the Company's Barclay's Bank overdraft makes no mention of any request by the Company to CCI *before or after* the members' meeting in June 2021. His second witness statement confirms the first, stating (at paragraph 14):

> 'the simple fact is that [CCI] made the payment to [the Company], having passed the necessary resolutions to do so'.

76. Ms Stonefrost's skeleton argument and her subsequent cross-examination of Mr Murray made clear the numerous difficulties with CCI's opening position.

77. The first difficulty arose from the law on voluntary payments. If a person makes a payment voluntarily, such payments cannot be recovered by the volunteer from the debtor. Where a third party has paid a creditor of the debtor, it is necessary for there to have been an express or implied request from the debtor to the third party to pay the creditor. It is not sufficient to establish that the debtor was liable to the creditor and that the debt was paid by the third party for that third party to stand in the shoes of the creditor. There must be a request.

78. This principle is set out in Chitty on Contracts (24th edn) at [32-131]:

> 'It is necessary for the claimant to prove the defendant's express or implied request to the claimant to pay the money for his use. It is not sufficient to prove the defendant was liable to a third person and that the claimant paid the third person: it must be proved that the claimant did so at the instance, express or implied, of the defendant … For no legal right to repayment will be established by the mere voluntary payment of the debt of another person; a man cannot make himself a creditor of another without his knowledge and consent ….'

79. The second difficulty arose from the effects of the commencement of voluntary liquidation on the powers of directors.

80. A voluntary liquidation is deemed to commence at the time of the passing of the resolution to wind up the company: section 86 IA 1986. The resolution to wind up the Company was passed by the shareholders on 15 July 2021. Immediately on the appointment of a liquidator, the power of the company director ceases and the liquidator takes control of the company.

81. It follows that the only person who could cause the Company to make a request to CCI after 15 July 2021 to pay the Bank Debt was the Liquidator.

82. The third difficulty related to the resolution dated 22 June 2021 relied upon by Mr Murray at paragraph 47 of his first witness statement. This was a resolution of *members*, not a board resolution. It was a prospective resolution of members of the Company that CCI *would be* requested to arrange payment of the Company's overdraft *on demand from Barclays Bank plc*. As rightly submitted by Ms Stonefrost, the members' resolution dated 22 June 2021 was plainly not, of itself, a request by the Company to CCI to pay the debt. It was a resolution that CCI *would be* requested to arrange payment of the Company's overdraft, *on demand from Barclays.* In re-examination, when asked by his own counsel what he meant by the members' resolution of 22 June 2021, Mr Murray confirmed (with emphasis added):

> 'I meant that *when we received demand* from Barclays, CCI *would be* asked to pay'.

83. As noted at paragraph 41 above, in oral testimony, Mr Murray confirmed that no request was made prior to the Company entering into liquidation. On the evidence

before me it was clear (and I so find) that Barclays made no demand for repayment of the overdraft until *after* the date upon which the Company entered liquidation. By that stage the Directors' powers had ceased; they could not make a request of CCI on the Company's behalf.

84. An additional problem with CCI's original case was that the resolution dated 22 June 2021 was not in accordance with the division of roles between the board of directors and members provided for in the Company's Articles of Association. The Company's Articles clearly vest the management of the affairs of the Company in the Board of Directors. They incorporate Table A (other than clauses 8 and 64). Table A, clause 70, provides that:

> 'Subject to the provisions of the Act, the memorandum and the articles and to any directions given by special resolution, the business of the company shall be managed by the directors who shall exercise all the powers of the company'

85. The position was described in John Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB 113 CA at 134 per Greer LJ as follows:

> 'If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of shareholders can control the exercise of the powers vested in the articles is by altering the articles …'

86. It followed that, in accordance with the Company's own constitution, the members of the Company could only interfere in the management of the affairs of the Company if they passed a special resolution to direct the Board of Directors to do something.

87. A special resolution must be passed by 75% of members: s.283 CA 2006. The resolution of 22 June 2021 was not passed by 75% of the members, because Mr Nash, who holds 50% of the Company's shares, did not attend the meeting and did not vote. Furthermore, the resolution did not give any directions to the board of directors to make a request to CCI to pay the Bank Debt.

88. In short, the members' resolution of 22 June 2021 was of little assistance to CCI.

89. Similar constitutional issues arose with regard to the document dated 9 August 2021, which recorded a resolution of some members of CCI that CCI would arrange payment of the Company's overdraft with the Bank on receipt of demand from the Bank. CCI's Articles of Association include similar provisions on the role of the board and intervention by shareholders. This was a management decision that shareholders purported to take. The only members of CCI who voted were Mr Murray and his son, who together commanded 70% of the shares. Moreover, whilst, in principle, 75% of the members could pass a special resolution to give directions to the board, that was not what the resolution did. Again, the members' resolution was of little assistance to CCI.

Bank Debt: CCI's new positions

90. Perhaps unsurprisingly in the circumstances, CCI's position on the Bank Debt shifted during the course of Mr Murray's oral testimony. There was a degree of debate about precisely what was said and no transcript of the hearing was available due to technical errors with the recording. The nub of what was said is however, sufficiently clear from the various notes taken during the hearing. In short, during the course of his oral testimony, Mr Murray attempted to shift the focus from the members' resolution of 22 June 2021 to earlier informal discussions which he claimed to have had with Mr Nash.

91. In cross-examination, when it was put to Mr Murray that Mr Nash was not involved with the members' meeting of 22 June 2021 and the resolution passed at that meeting, Mr Murray responded with words to the effect of 'but he was in agreement with it'. (CCI's legal team noted this response as 'but he was aware of and in agreement…'). In re-examination, Mr Murray was taken back to his oral testimony in connection with the members' meeting of 22 June 2021. It was put to him that he had accepted in evidence that Mr Nash was not involved with the meeting of 22 June 2021 but that he 'was aware and agreed'. He was then asked: '*why* was he aware' and answered: 'because in discussions in 2019 he was aware that if the company went into liquidation he would be liable under the guarantee'. In what appeared to me at the time to be an attempt to give Mr Murray a second bite of the cherry, Mr Murray was then asked '*how* was he aware?', to which Mr Murray responded that he had 'told him' in a 'phone conversation' in the 'summer of 2020'. Mr Murray was next asked 'how was he in agreement with it?', to which he responded 'he was quite comfortable with it as it relieved his responsibility – he was positive about that'.

92. From this evidence, Mr Otwal later invited the Court, in his proposed list of findings, to find that in the summer of 2020, Mr Nash and Mr Murray had a telephone conversation in which Mr Nash was "aware and in agreement with" CCI paying off the Company's overdraft on its Barclays account.

Bank Debt: legal principles

93. CCI based its claim in respect of the Bank Debt on the law of unjust enrichment.

94. The basic principles were not in issue. In determining CCI's claim in restitution, the court must ask itself four questions: (1) Has the Company been enriched? (2) Was the enrichment at CCI's expense? (3) Was the enrichment 'unjust'? and (4) Are there any defences available to the Company?: Goff & Jones (10th ed) at paras 4.01 and 5.01; Benedetti and Anr v Sawiris and Ors [2013] UKSC 50 at para 10.

95. The Applicant maintains that the unjust enrichment claim is untenable, as (1) the payment was voluntary and so did not discharge the debt, with the result that the Company was not 'enriched'; (2) even if the Company was enriched, no 'unjust factor' had been made out: and (3) the debt was not provable.

96. On the first factor ('enrichment'), Mr Otwal referred me to the following passages from Goff & Jones, The Law of Unjust Enrichment (10th ed):

(1) at para 4.01:

> 'A claim in unjust enrichment is:
>
> ".. not a claim for compensation for loss, but for recovery of a benefit unjustly gained [by a defendant] at the expense of the claimant".
>
> The question whether the defendant has been enriched is therefore "centre stage". It is not enough for the claimant to show that he has suffered a loss, since:
>
> "… A person cannot be unjustly enriched if he has not been enriched at all and the fact that a payment may have been made… is not by itself sufficient to justify a restitutionary remedy."
>
> The claimant must also show that the defendant has made a corresponding gain, and proving the defendant's enrichment is therefore "not merely material to success, but the whole essence of the action."

(2) at para 5.61:

> 'A defendant can be enriched by the discharge of his obligation to a creditor, whether this obligation arose in contract, tort or unjust enrichment, under a statute or for some other reason. To prove that the defendant has been enriched, the claimant must show that the creditor was paid by someone acting with the intention of discharging the liability and that this was the effect of the payment'.

(3) at para 5.64:

> 'A party can usually discharge his own obligations by paying his creditor. Hence where a defendant owes an obligation to a creditor, and he pays the creditor with money that he has traceably received from the claimant, the obligation is almost invariably discharged and it can be said that he has been enriched at the claimant's expense'.

(4) at para 5.65:

> 'Just as a party can discharge his own liabilities by paying his creditor, so too can his agent. Hence where a defendant owes an obligation to a creditor, and the defendant's agent uses their own money to pay the creditor, the defendant's liability is usually discharged. This rule applies where a claimant pays the creditor while acting as the defendant agent.'

(5) at para 5.80:

> 'The rule has prevailed in English law that a defendant's obligation to a creditor is not discharged if the creditor is paid by an unauthorised intervener acting voluntarily'.

97. On the need to establish an 'unjust factor', Ms Stonefrost referred me to Deutsche Morgan Grenfell plc v IRC [2006] UKHL 49, in which Lord Hoffman confirmed that:

> 'In England, the claimant has to prove that the circumstances in which the payment was made fall within one of the categories which the law recognises as sufficient to make retention by the recipient unjust'.

98. Claims in unjust enrichment must be pleaded by bringing them 'within or close to some established category or factual recovery situation': Uren v First National Home Finance Ltd [2005] EWHC 2529 at [16] – [18] per Mann J. Whilst 'the categories of unjust enrichment are not closed' (CTN Cash & Carry Ltd v Gallaher Ltd [1994] 4 All ER 714 at 720 per Nicholls VC), 'clear reasoning' that provides 'clear analogues with other cases' is 'required for the elaboration of any extension of unjust enrichment': Gibb v Maidstone and Tunbridge Wells NHS Trust [2010] EWCA Civ 678 per Laws LJ.

99. In the present case, Mr Otwal relies upon one of the lesser known unjust factors, known as 'the principle of free acceptance', summarised in Goff & Jones at Chapter 17. Ms Stonefrost maintains that this unjust factor is simply not open to CCI on the evidence, for reasons which I shall come onto.

Was the payment voluntary?

100. As previously addressed, CCI's original case, as set out in the evidence, was based upon the Company having requested CCI to make the payment. By the time of closing submissions, however, Mr Otwal had resiled from that position. He maintained that the Applicant's case was that there was never a request from the Company to CCI that CCI pay the Barclays overdraft. He submitted instead that there was an 'implied authorisation' by the Company.

101. In this regard he relied upon Electricity Supply Nominees Ltd v Thorn EMI Retail Ltd (1991) 63 P & CR 143 per Fox LJ at 148:

> 'If a person makes a voluntary payment intending to discharge another's debt, he will only discharge the debt if he acts with that person's authority or the latter subsequently ratifies the payment. Consequently if the payor makes the payment without authority and does not obtain subsequent ratification he normally has no redress against the debtor'

102. Mr Otwal accepted that he could not rely on ratification as, after 15 July 2021, the only person who could have ratified was the Liquidator. The Liquidator had done nothing which could be said to amount to ratification.

103. On the issue of authorisation, during the course of his closing submissions Mr Otwal relied variously upon informal shareholder approval and the possibility of an informal board resolution.

104. At one point during oral closings, when asked how the authorisation took place, Mr Otwal submitted that 'both Mr Murray and Mr Nash were agreed that CCI could pay off the Barclays overdraft', adding: 'Mr Murray may have gone down the route of a members' resolution, but that doesn't detract from the fact that both directors of the Company were aware of and agreeable to CCI paying off the Barclays overdraft'.

105. At another stage he submitted that authorisation could take place by 'all members being aware and consenting' *or* 'both directors, if agreeable, that would be sufficient authorisation as well'.

106. On the issue of informal shareholder approval, Mr Otwal relied upon the well-known case of In re Duomatic Ltd [1969] 2 Ch 365, which confirms the principle that where it can be shown that all the shareholders with the right to attend and vote at a general meeting had assented to some matter which a general meeting could carry into effect, the assent was as binding as a resolution in general meeting.

107. On the issue of informal board authorisation, Mr Otwal referred me to Charterhouse Investment Trust Ltd v Tempest Diesels Ltd (1985) 1 BCC 99,544. In this case three plaintiff companies, members of the C Group, sought an order for the specific performance of an agreement alleged to be constituted by a letter dated 20 August 1981 whereby the defendant, T Ltd, agreed to surrender its tax losses for the years 1979 and 1982 to companies within the C Group. One argument raised was that one of the directors of the defendant company, Mr Allam, had no authority on behalf of T Ltd to agree to surrender its tax losses. The court found (at 99,551) that:

> 'although there was no formal board meeting, all members of the Tempest board informally acquiesced in Mr Allam's agreement on behalf of Tempest to surrender the tax losses. This, it was conceded, would be sufficient to vest him with authority'.

108. Mr Otwal also relied upon Runciman v Walter Runciman plc [1993] BCC 223 at 230 per Simon Brown J:

> **'**The articles say nothing as to how or when the directors are to arrive at their determination. In my judgment, therefore, provided only and always that by that time the term relied upon is sought to be enforced all the other directors can be shown to have concurred in the agreement of that term, it can then fairly and properly be said that they have indeed determined it as the article requires. That directors, provided they act unanimously, can act informally appears clearly established – Re Bonelli's Telegraph Co. Collie's Claim (1871) LR 12 Eq 246 and Charterhouse Investment Trust Ltd v Tempest Diesels Ltd (1985) 1 BCC 99,544 so decide, the latter on the basis that informal acquiescence by other board members in an otherwise

> unauthorised agreement by one of their number binds the company.**'**

109. On this basis, he maintained that the first limb of a claim in unjust enrichment, that of enrichment, was established. Whilst a voluntary payment would not discharge the debt (thereby rendering it impossible to establish enrichment), an authorised payment would. The second limb, he contended, (that of enrichment 'at the expense of'), could hardly be in issue.

110. On behalf of the Applicant, Ms Stonefrost observed that CCI's position in relation to the Bank Debt in closing submissions was radically different to that set out in Mr Murray's witness statements and even in the skeleton argument. This different case was not based on the members' resolution of 22 June 2021, but on Mr Nash and Mr Murray having one conversation in 2019 and another in 2020. Ms Stonefrost was highly critical of the new factual case introduced in oral testimony and invited me to reject it. Without prejudice to that invitation, she went on to address me on certain legal points arising from it.

111. In relation to CCI's rear guard attempt to rely upon the Duomatic principle, Ms Stonefrost reminded me that it is a regulatory requirement that any Duomatic resolution is recorded in writing and filed at Companies House. No Duomatic resolution had been recorded in writing or filed at Companies House in this case. It is a criminal offence not to comply with these requirements, although a failure to comply does not invalidate the resolution.

112. Ms Stonefrost also referred me to 'Company Directors' (third ed) by Simon Mortimore QC at 25.26 and 25.27. Paragraph 25.27 provides:

> 'For the Duomatic principle to apply the court must be satisfied that all the shareholders whose consent is required have in fact assented. The court would not accept that assent has been given where the shareholder was unaware that his assent was necessary or being sought, or where inadequate disclosure is given. Since the written resolution procedure makes it simple for private companies to obtain a recorded decision of its members and companies are obliged to keep records of written resolutions and minutes of general meetings, the courts may become more sceptical about attempts to set up informal unanimous agreements that are not properly recorded, particularly when the alleged agreement is claimed to have the same effect as a special resolution.'

113. Ms Stonefrost also referred me to the guidance given by Neuberger J in EIC Services Ltd v Phipps [2004] 2 BCLC 589. At [122] he said:

> 'Although the principle has been characterised in somewhat different ways in different cases, I do not consider that that is because its nature or extent is in doubt or the subject of debate. The difference in language is attributable to the fact that the principle will have been expressed by reference to the particular facts of the case. The essence of the Duomatic

> principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreements, ratification, waiver, or estoppel, and whether members of the group give their consent in different ways at different times, does not matter.'

114. On the facts of EIC, at the time of each of the relevant telephone conversations, the three directors in question were wholly unaware of the need for shareholder approval. In context Neuberger J (at [127]) considered it unlikely that there was any question of the conversations involving a request for shareholder consent.

115. At [132], Neuberger J concluded that each of the shareholders in question:

> 'was told, on the telephone, of the projected bonus issue, and its general effect, before 15 December 1999, but that there was no question of their consents being sought or given in those telephone conversations.'

116. At [133] and [135] Neuberger J continued:

> [133] If a director of a company informs shareholders of an intended action (or a past action) on the part of the directors, in circumstances in which neither the directors nor the shareholders are aware that the consent of the shareholders is required to that action, I do not think it is right, at least without more, to conclude that the shareholders have assented to that action for Duomatic purposes. As a matter of both ordinary language and legal concept, it does not seem to me that, in such circumstances, it could be said that the shareholders have 'assent[ed]' to that action. The shareholders have simply been told about the action or intended action, on the basis that it is something which can be, and has been or will be, left to the directors to decide on, and no question of 'assent' arises…..
>
> [135] ..before the Duomatic principle can be satisfied, the shareholders who are said to have assented or waived must have the appropriate or 'full' knowledge. If a shareholder is not even aware that his 'assent' is being sought to the matter, let alone that the obtaining of his consent is at least a significant factor in relation to the matter, he cannot, in my view, have the necessary 'full knowledge' to enable him to 'assent', quite apart from the fact that I do not think he can be said to 'assent' to the matter if he is merely told of it'.

117. On present facts, Ms Stonefrost submitted, even if, contrary to her primary position, Mr Murray's testimony as to his conversations with Mr Nash in 2019 and 2020 is taken at face value, it falls far short of the requirements identified by Neuberger J in EIC.

118. In this regard she submitted that it was not enough for a given shareholder to know something might be done; they had to have full knowledge of what was proposed to be done, that their consent was being sought, and they must give that consent on a fully informed basis.

119. On present facts, she submitted, even putting Mr Murray's evidence at its highest, there was nothing to show that Mr Nash knew that he was being asked to consent or that he consented. Mr Murray's evidence was that he 'told' Mr Nash in the summer of 2020 and that Mr Nash 'was quite comfortable with it as it relieved his responsibility'.

120. Ms Stonefrost observed that there was no evidence that Mr Nash was even informed of the members' meeting/resolution of 22 June 2021 ahead of that meeting. Mr Murray accepted in cross-examination that Mr Nash had no involvement with that meeting.

121. Ms Stonefrost further submitted that any conversations in 2019 or 2020 pre-dated the members' meeting of 22 June 2021 by a very wide margin. As at the summer of 2020, the Company was still trading. The position of the Company by the time of the members' resolution of 22 June 2021, she argued, was markedly different; the Company was about to go into liquidation. At the time of the 2020 conversation, Mr Nash had not been told that the Company was going into liquidation and had not been asked to consent to it.

122. Overall, Ms Stonefrost submitted that Mr Murray's evidence on his exchanges with Mr Nash in 2019 and 2020 'doesn't come close to the requirements of Duo'.

123. She also reminded me that any such decisions were for the board and not the members, for reasons explored in paragraphs 84 to 87 above.

124. In relation to the alternative position adopted by CCI in closing, that Mr Nash and Mr Murray, acting as directors, authorised CCI to pay off the overdraft in 2020 or at some point before 15 July 2021, Ms Stonefrost observed that this alternative position was based upon the same new evidence introduced during Mr Murray's cross examination and re-examination. She invited me to reject this new evidence as an attempt to get away from the consequences of Mr Murray's written evidence.

125. Ms Stonefrost accepted that, in principle, the directors could agree informally to a course of action, but submitted that the account given by Mr Murray in his oral testimony (in particular in re-examination) was inconsistent with paragraphs 47 and 48 of Mr Murray's first witness statement and with the prospective language of the members' resolution of 22 June 2021. It was also inconsistent with Mr Murray's confirmation in both cross-examination and re-examination of his understanding of what the members' resolution meant. In cross-examination, when asked about the resolution, he agreed that the plan was that 'at some point in the future' CCI would be asked to pay it, when the Company received a demand from the bank. This was reiterated in re-examination (with emphasis added): 'I meant that *when* we received

demand from Barclays, CCI *would be* asked to pay'. The demand from the bank was in July 2021, *after* the Company entered into liquidation and after the Directors' powers had ceased.

126. Without prejudice to that position, Ms Stonefrost maintained that on any footing, even if Mr Murray's evidence in cross examination and re-examination was taken at face value, it fell far short of establishing on a balance of probabilities that Mr Nash and Mr Murray agreed a given course of action *qua directors of the Company*.

Was the payment voluntary: discussion and conclusions

127. On the evidence which I have heard and read, I am satisfied that CCI's payment of £34,976.86 into the Company's bank account with Barclays on 25 August 2021 was a voluntary payment. There was no request from the Company to CCI and no authorisation by the Company of the payment prior to the Company entering into liquidation. I so find.

128. The members' resolution of 22 June 2021 plainly did not, of itself, authorise payment.

129. The new evidence, introduced only in cross examination and re-examination, that Mr Nash and Mr Murray had conversations in 2019 and then 2020 in which they agreed that CCI would pay off the bank debt was entirely inconsistent with paragraphs 47 and 48 of Mr Murray's first witness statement.

130. No persuasive explanation was proffered for Mr Murray's failure to mention this new case in his written evidence.

131. Any conversations which Mr Murray and Mr Nash might have had in 2019 plainly did not give rise to an agreement, qua directors of the Company or otherwise, that CCI would pay off the Bank Debt. CCI was dormant in 2019. In 2019, Mr Nash was still negotiating a buyout of his shares in the Company. From the correspondence exchanged between Mr Murray and Mr Nash in December 2019 (summarised at paragraph 9 above), I consider it legitimate to conclude (i) that, as at December 2019, Mr Murray *had not even told* Mr Nash that he had set up CCI and (ii) that Mr Nash found out that he had done so through his own enquiries: I so find.

132. CCI did not start trading until June 2020. As at 30 June 2020, its cash at bank and creditors falling due in a year both stood at nil, according to its filed accounts for the year ending 30 June 2021.

133. The suggestion that Mr Nash and Mr Murray agreed in 2020, as directors of the Company, to authorise CCI to pay off the overdraft, is in my judgment impossible to reconcile with:

(1) Mr Murray expressing concerns to Mr Cottingham of Libertas on 2 June 2021 about his liability under the personal guarantee, as summarised at paragraph 47 of his first witness statement;

(2) Mr Murray asking Mr Cottingham on 2 June 2021 *whether* CCI could pay off the Barclays overdraft;

(3) Mr Murray arranging the members' meeting of 22 June 2021 *at all*; what purpose would be served by the same, one might legitimately ask, if the directors had already decided on an agreed course of action. In this regard I reject Mr Otwal's attempts to suggest that the members' meeting was called to 'evidence' the earlier agreement of the Directors. The minutes of the members' meeting make no reference to any earlier agreement of the Directors. On the evidence as a whole I find that Mr Nash was not even informed of the meeting;

(4) the prospective terms in which the members' resolution of 22 June 2021 is couched;

(5) Mr Murray's explanation, in cross-examination and re-examination, of what he understood the members' resolution of 22 June 2021 to mean: see paragraph 125 above.

134. In short, Mr Murray's new case, introduced in oral testimony, was entirely inconsistent with his written evidence and I have no hesitation in rejecting it. On the evidence as a whole, I am satisfied that by the time of trial, Mr Murray simply realised how weak his case was on the issue of whether or not the payment was voluntary and came up with a new story.

135. Moreover, even if I am wrong in rejecting Mr Murray's evidence on this issue, and he did have the conversations with Mr Nash in 2019 and 2020 that he suggests, CCI has still failed to establish on a balance of probabilities that the Company authorised CCI to make the payment prior to the Company entering liquidation.

136. In my judgment, even if, contrary to my findings, Mr Murray's new evidence was taken at face value, that evidence does not on a balance of probabilities meet the EIC threshold for Duomatic purposes. In this regard it is clear from the guidance given by Neuberger J in EIC that it is not enough to know for a member to know something might be done; they must have full knowledge of what was proposed to be done, that their consent was being sought, and they must give that consent on a fully informed basis.

137. On present facts, even putting Mr Murray's evidence at its highest, there was nothing to show that during the alleged conversation which took place in 2020, Mr Nash knew that he was being asked to consent qua member or that he consented. Mr Murray's evidence was that he 'told' Mr Nash what was going to happen and that Mr Nash 'was quite comfortable with it as it relieved his responsibility'. In my judgment that does not clear the EIC threshold.

138. I would add that any such decisions were in any event for the board and not the members, for reasons explored in paragraphs 84 to 87 above.

139. Turning to CCI's alternative case (that of an informal decision of directors), again, even if, contrary to my findings, Mr Murray's new evidence was taken at face value, it fell far short of establishing on a balance of probabilities that Mr Nash and Mr Murray agreed a given course of action *qua directors of the Company*. Mr Nash was, at best, 'told' what was going to happen. This does not establish that Mr Nash understood Mr Murray to be inviting him to agree with Mr Murray, as directors of the Company, that the Company should authorise CCI to pay the Bank Debt, or that Mr

Nash, in his capacity as a director of the Company, 'agreed' that the Company should authorise CCI to pay the Bank Debt.

140. As the payment was voluntary, it did not discharge the debt owed by the Company to Barclays. As it did not discharge the debt, the Company was not enriched.

141. That of itself would suffice to dispose of the unjust enrichment claim in respect of the Barclay's overdraft. As I have heard argument on all aspects of the unjust enrichment claim, however, I do not base my decision simply on paragraphs 127 to 140 above. I base it also on paragraphs 142 to 166 below.

The Unjust Factor

142. Mr Otwal relied upon the 'principle of free acceptance' addressed at Chapter 17 of Goff & Jones at 17-03:

> 'A defendant will be held to have benefited from the services rendered if he, as a reasonable man, should have known that the claimant who rendered the services expected to be paid for them, and yet did not take a reasonable opportunity open to him to reject the proffered services. Moreover, in such a case, he cannot deny that he has been unjustly enriched.'

143. In this regard Ms Stonefrost referred me to Goff & Jones at para 17-09:

> 'If a benefit is conferred on the defendant without his knowledge, he cannot be said to have accepted it at all. The knowledge required for liability to arise is "knowledge which will lead to the possibility of effective action by refusing to accept liability". Thus, it will be necessary for the defendant to be given sufficient notice of the impending benefit to enable a free choice to be made to refuse it. The defendant's state of knowledge will often be a question of fact, but where the defendant is a legal person (such as a company), or it is alleged that the defendant's agent knew of the receipt of the benefits, it will be necessary to establish that, as a matter of law, the knowledge of the individual concerned is to be attributed to the defendant'.

144. Ms Stonefrost also referred me to Goff & Jones at paras 17-11 and 17-12, which provide:

> '17-11 The defendant must know, or ought to have known, that the claimant expected to be paid (or remunerated in some other way) for his services. It is for the claimant to make this expectation clear to the defendant. Thus, there is no liability where a defendant freely accepts services which he was led to believe were being conferred gratuitously....

> 17-12 Free acceptance will also fail where the defendant believes, as a reasonable person, that the services he is being offered are to be paid for by a third-party. …'

145. On the evidence before the court, Ms Stonefrost submitted, there was nothing to suggest that CCI expected the Company to repay the sums paid by CCI in respect of the Barclays overdraft. The members' resolution of CCI passed in August 2021 contained nothing to suggest that CCI would prove in the liquidation. Moreover, Mr Murray was at all material times a director of the Company and sole director of CCI; and his case, in both his written and oral testimony, was that ***he*** was going to repay CCI, via his director's loan account with CCI. So there was never going to be an expectation on the part of CCI that it would be remunerated by the Company. This was consistent with CCI's original case, as set out in Mr Murray's first witness statement, which rested on the resolution of members of the Company on 22 June 2021: that the Company would ask CCI to *provide a benefit*, not to lend it money. It would make no sense for the Company to ask CCI to pay off the Barclays overdraft on terms that then required the Company to repay CCI; the Company would be no better off. Moreover, that is not what the members' resolution said.

146. Ms Stonefrost also referred me to Goff and Jones at para 17-13, which provides:

> 'Where a defendant has had no option about whether to accept the benefit principle of free acceptance does not apply. In other words, there must have been an opportunity to reject the benefit…'

147. On present facts, CCI made the payment into the Company's bank account with Barclays after the Company had entered into liquidation and without prior notice to the Liquidator. The Liquidator by this stage was the only person authorised to make a decision as to whether or not to accept the benefit on behalf of the Company; the Directors' authority to make that decision ceased on the Company entering into liquidation. The Liquidator was presented with a fait accompli. There was no meaningful opportunity given to reject the benefit.

Unjust factor: discussion and conclusions

148. On the evidence which I have heard and read, CCI has failed to establish on a balance of probabilities the unjust factor relied upon. CCI cannot demonstrate on the evidence that the Company knew, or ought to have known, that CCI expected to be paid by the Company (or remunerated in some other way by the Company). Mr Murray's own evidence, written and oral, flies in the face of any such conclusion. Mr Murray was a director of both the Company and CCI. When asked by his own counsel in re-examination why he arranged for CCI to pay rather than paying himself, he replied: 'I was going to take it on as a director's loan [of CCI]'.

149. In addition, the Company was given no meaningful opportunity to refuse the benefit. The Liquidator was presented with a fait accompli.

150. For all these reasons, even absent my conclusions on enrichment, CCI has failed to clear the third limb of any unjust enrichment claim. It has failed to establish an unjust factor.

Was the debt a provable debt?

151. A separate issue explored with the parties was whether any such debt would be provable, given its timing. In light of my earlier conclusions, this is somewhat academic, but as I heard submissions on the same, I shall address it as well.

152. Rule 14.1(3) IR 2016 provides that 'debt' means:

> '(a) any debt or liability to which the company is subject at the relevant date [the date on which the company goes into liquidation]: rule14.1(1)].
>
> (b) any debt or liability to which the company may become subject after the relevant date by reason of any obligation incurred before that date …'

153. Paragraph (a) is concerned with liabilities to which the company 'is subject' at the date of commencement of the liquidation and paragraph (b) is concerned with liabilities to which the company 'may become subject' at a subsequent date and there is no overlap between these two categories: Nortel at [68] to [70].

154. Rule 14.2(1) states that provable debts can be:

> 'present or future, certain or contingent, ascertained or something only in damages'

155. Rule 14.1(5) states that it is immaterial whether the :

> 'debt or liability is present or future, whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or a matter of opinion'

156. What constitutes a 'liability' is defined in rule 14.1(6) (subject to immaterial exceptions) as a:

> 'liability to pay money or money's worth, including any liability under an enactment, a liability for breach of trust, any liability in contract, tort or ailment and any liability arising out of an obligation to make restitution'.

157. CCI would be a contingent creditor of the Company if, before the commencement of the liquidation, the Company was under an existing obligation to CCI pursuant to which the Company would or might become subject to a present liability on the happening of some future event or at some future date: Re Dummelow: Ex p Ruffle (1873) 8 Ch App 997 at 1001; Community Development Pty Ltd v Engwirda Construction Co (1969) 120 CLR 455.

158. Mr Otwal submitted that the Company had incurred an 'obligation' to CCI within the meaning of rule 14.1(3)(b) IR 2016. In this regard he referred me to the case of In re Nortel [2013] UKSC 52, in which Lord Neuberger said that for a company to have incurred a relevant 'obligation' under this rule, the company:

> 'must have taken or been subjected to, some step or combination of steps which (a) had some legal effect (such as putting it under a legal duty or legal relationship) and which (b) resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred. If these two requirements are satisfied, it is also, I think, relevant to consider (c) whether it would be consistent with the regime under which the liability is imposed to conclude that the step or combination of steps gave rise to an obligation under rule 13.12(1)(b).'

159. Mr Otwal submitted that, for the purposes of rule 14.1 (3)(b) and 14.2 IR, an 'obligation' had arisen before liquidation and that liability crystallised when CCI made the payment. At paragraph 7 of his supplemental skeleton argument, he put the matter thus:

> 'Further, insofar as the payment of the Barclays overdraft by CCI was made after the commencement of the liquidation, it is submitted this liability arose from a pre-liquidation obligation (i.e. the authorisation by [the Company] that CCI may pay) for which [the Company] could become subject after the commencement of the liquidation.'

160. Ms Stonefrost submitted that the CCI cannot prove this debt because (a) CCI is not a contingent creditor because nothing had been done or had happened to put the Company under any existing obligation to CCI in relation to the bank debt before the liquidation; and (b) the Company had not incurred an obligation to CCI prior to the commencement of the liquidation in relation to this debt, because all that had happened before liquidation in relation to the bank debt was that on 22 June 2021, Mr Murray, as a shareholder of the Company, had passed a general resolution which he agreed in cross examination was merely a plan by the shareholders that at some point in the future the Company would ask CCI to pay money due to Barclays.

Was the debt provable? Discussion and conclusions

161. In my judgment, the Bank Debt is not a provable debt.

162. CCI is clearly not a contingent creditor because nothing had been done or had happened to put the Company under any existing obligation to CCI in relation to the Bank Debt before the liquidation.

163. In my judgment the Company had not incurred an 'obligation' to CCI within the meaning of rule 14.1(3)(b) IR 2016 either. The case of Nortel makes clear that there must have been some legal duty or legal relationship prior to the liquidation that gives rise to the obligation to pay. In this case, no legal duty or legal relationship arose prior to the Company's entry into liquidation that gave rise to an obligation to pay.

164. Mr Murray accepted in oral testimony that no request had been made by the Company of CCI prior to the bank demand on 22 July 2021, which post-dated the Company's entry into liquidation.

165. For reasons already explored, CCI has also failed to make out a case of implied authorisation prior to the Company entering into liquidation. As I have found, even if taken at face value, Mr Murray's evidence of discussions which he claims to have had with Mr Nash in 2019 and 2020 falls far short of clearing the Duomatic threshold or establishing on the balance of probabilities an informal board resolution that CCI be authorised by the Company to pay off the Barclays overdraft.

166. Moreover, even if a request had been made (or implied authorisation given) prior to the Company entering liquidation, on the evidence as a whole, that of itself would not give rise to an 'obligation' to CCI, for the reasons addressed in paragraph 148 above.

Conclusions on the Barclays Debt

167. For all these reasons, I find that the votes cast by CCI in respect of the Barclays Debt at the meeting of creditors held on 26 August 2021 were invalid.

The Libertas Fee

168. Mr Otwal submitted that CCI's payment of the Libertas fee was a loan by CCI to the Company. In support of this submission, he relied upon the Directors' Report to Creditors, prepared ahead of the first meeting of 9 July 2021, which stated that £5,212 is 'owed to [CCI] (an associated creditor by way of a common director and shareholder) in respect of monies they have loaned the Company'. The 'unsecured creditors' listed in the Statement of Affairs, prepared as at 7 July 2021 and signed on 8 July 2021, also includes a sum of £5,212 stated to be owed to an 'associated company'. Mr Otwal contended that this sum was paid by CCI directly to Libertas on or by 7/8 July 2021, to hold on account pending creditor approval. This was reflected in the Directors' Report to Creditors, which confirms that the sum had been 'secured to [Libertas'] satisfaction'.

169. Mr Otwal maintained that the payment predated commencement of the liquidation. It was made at a time when Mr Murray was a director of both the Company and CCI.

170. Mr Otwal accepted that the loan agreement was not recorded in writing, but pointed out that it was included in the original proof of debt submitted by CCI, a proof accepted by the Liquidator for voting purposes at the first effective meeting of creditors. I pause here to note that the fact that the Liquidator accepted the proof for voting purposes is neither here nor there, as the Court must decide the matter afresh on the evidence now before it.

171. Ms Stonefrost submitted that by close of evidence there was no longer any basis for CCI's original case that this was a loan. In this regard she relied upon a response given by Mr Murray in cross examination. When it was put to Mr Murray that there was no loan agreement, he responded 'not in any written form, no'. When it was then put to him that there was not any other form of loan agreement either, he responded 'no'. Ms Stonefrost took the latter response to be an admission that there was no loan agreement of any sort. In my judgment, however, Mr Murray's response, considered in the context of his oral testimony as a whole, was an expression of his disagreement with the proposition being put to him. I do not view it as an admission that there was no loan agreement in place.

172. Ms Stonefrost was also critical of the differing descriptions given of the payment in the proofs of debt lodged by CCI. The first proof, dated 8 July 2021, simply set out the sum of £5,212, gave no particulars of how and when the debt was incurred, and stated that the documentation by which the debt could be substantiated was an 'invoice'. The second version, dated 20 August 2021, set out the sum of £5,212 and gave as particulars of how and when the debt was occurred 'payment of liquidators fees'. Neither proof made express reference to a loan.

173. Ms Stonefrost submitted that the Directors' Report to Creditors relied upon was 'peppered with inaccuracies' and was not a sound evidential basis for a finding that the sum advanced was a loan. She also reminded me that Mr Murray had accepted in cross examination that no repayment date or interest rate was agreed.

174. In addition, she referred to a disparity in timing, submitting that the Libertas Fee could not have been paid on 7/8 July 2021, as the resolution to pay the debt was not until 15 July 2021 and was in prospective terms, ie that Libertas 'be paid'. This suggested, Ms Stonefrost submitted, that payment was made after the Company entered into liquidation, not before.

175. Ms Stonefrost also observed that the Statement of Affairs signed by Mr Murray referred to the sum of £5,212.20 as cash in hand. I pause here to note that the Statement of Affairs also referred to the same sum under 'unsecured creditors'.

176. Ms Stonefrost also referred to the Liquidator's Report dated 9 August 2021, which stated 'I have realised cash in hand of £5,212.20 which relates to money deposited on my client account prior to liquidation'.

177. Overall, Ms Stonefrost submitted that no loan was made out on the evidence. That being the only basis now put forward to justify the inclusion of this sum in the proof, the court should declare it as having been improperly admitted.

Discussion and conclusions on the Libertas Fee

178. On the evidence which I have heard and read, I am satisfied on a balance of probabilities that the sum of £5,212 paid by CCI on 7/8 July 2021 to Libertas was a loan to the Company.

179. I find that the loan occurred at the time of the payment to Libertas on 7/8 July 2021, on account of their fees which had yet to be approved, ahead of the Company entering liquidation. It is for this reason that the sum is identified as 'cash in hand' in the Statement of Affairs dated 8 July 2021, although in reality that 'cash in hand' was being held by Libertas on account of their fees. This is consistent with the Directors' Report to Creditors which confirms that the sum of £5,212 had been 'secured to [Libertas'] satisfaction' and with later references in the Liquidator's report dated 9 August 2021 to the Liquidator (following creditor approval of his fees) having 'realised cash in hand of £5,212'. The loan advance having pre-dated the Company's entry into liquidation, it was correctly categorised as cash in hand.

180. I accept that the loan agreement was not recorded in writing. It was however, evidenced in contemporaneous documentation, including the Statement of Affairs and the Director's Report to Creditors. Whilst these documents were far from perfect,

their imperfections rested largely on what was not included in them, rather than what was included.

181. Whilst the fact that no express terms as to repayment or interest were agreed is undoubtedly a relevant factor to take into account, I remind myself that the absence of a repayment deadline is not fatal to a loan agreement, as the default position is that the loan is repayable on demand. I also take into account the fact that the loan was made when the Company was about to enter into liquidation, which would render any express interest terms largely academic. Mr Murray's oral testimony, which in this regard I accept, was that he understood that 'in the event of a dividend coming back, CCI would be repaid.'

182. It is correct that the proofs of debt dated 8 July and 20 August 2021 do not expressly refer to the sum as a loan. In this regard however I accept Mr Murray's evidence (1) that he told Mr Cottingham of Libertas in June 2021 that the sum would be provided by CCI as a loan, as the Company did not have any money (2) that accordingly Libertas had sent its banking details directly to CCI and (3) that CCI had paid Libertas directly. As a layman completing the proofs in that context, it was in my judgment unsurprising that he did not then consider a great amount of detail regarding the debt was required in the proofs. I also accept his explanation for referring to an 'invoice' as the documentary evidence for the debt; at the time of the first proof, he had been expecting Libertas to send an invoice for the sum, but in the event they didn't. By the time of the second proof, no reference to an invoice was made; this is consistent with Mr Murray realising by that stage that no invoice would be provided.

183. Whether the loan by CCI to the Company of £5,212 may later turn out to be subject to an insolvency set off in respect of any other sums which may be due from CCI to the Company (for the Company's goodwill, for example, or for orders that the Company won but CCI then took on) were not matters fully addressed in evidence or submissions. For the purposes of my conclusions on the CCI proof, I therefore do not take them into account.

184. On the evidence which I have heard and read, CCI has made out its case on a balance of probabilities that the sum of £5,212 paid by CCI to Libertas was a loan to the Company.

The Nippon Express payment: £3,692.25

185. This alleged debt was based on an invoice dated 19 March 2021 from CCI to the Company. The invoiced sum was the same as a sum included in an invoice from Nippon Express (UK) Ltd to CCI dated 2 March 2021. CCI had paid Nippon the sum in question on 9 April 2021. In cross-examination, Mr Murray confirmed that this payment was not at the Company's request.

186. When asked in cross-examination why this was treated as a liability of the Company which had been paid by CCI, Mr Murray raised a new case not addressed in the written evidence. He said that the Company had quoted successfully for an air freight shipment. Based on the quote, the client, AAF, had issued a purchase order to the Company. The supplier, Nippon Express, however, was 'aware of the Company's financial difficulties' (Mr Murray did not state how) and would no longer work with the Company. He said that the job was therefore 'subcontracted' to CCI as Nippon did

not want to take the 'risk'. Quite what this 'risk' was, given that the Company's later Statement of Affairs dated 8 July 2021 disclosed *no trade creditors at all* other than the Applicant, is unclear.

187. As put by Mr Murray, this was a job 'started by the Company but carried on by CCI'. He said that there had been 'a lot of overlapping' and that this had become 'quite confusing' at times.

188. There was very limited documentary evidence before the court on what had happened here. By his supplemental skeleton, Mr Otwal submitted (with emphasis added) that CCI's unpaid invoice to the Company for £3,692.25 concerned 'the costs of services completed *through CCI on behalf of [the Company]*'. This begged the question of what had happened to the sums which would have been due to the Company pursuant to the purchase order placed by AAF. When asked by the court, Mr Murray had no answer to that question. There were no bank statements in evidence to show the flow of funds. If, as appears likely on the evidence as a whole, CCI had the benefit of the sums payable on the purchase order, it is difficult to see on what basis it could justify charging the Company for expenses incurred in fulfilling that order.

189. Ultimately, I remind myself, CCI bears the burden of proving the basis upon which the invoiced sum of £3,692.25 was properly payable by the Company to CCI. On the evidence which I have heard and read, it has failed to discharge that burden.

The conceded debts: Petrasco and A B Sped

190. For the sake of completeness, I should confirm the position in relation to the two conceded debts, the Petrasco debt of US$2,160 paid by CCI on 24 August 2021 and the AB Sped debt of 6,589 euros paid by CCI on 28 June 2021.

191. In cross examination, Mr Murray confirmed that there had been no request from the Company for CCI to pay the Petrasco debt. I would add that in any event, the Directors did not have authority to cause the Company to request CCI to pay any of its creditors after 15 July 2021. The payment was therefore a voluntary payment. I so find.

192. In cross examination, when asked whether the Company made any request that A B Sped be paid by CCI, he responded, 'not that I can remember'. CCI has therefore failed to establish on a balance of probabilities that this payment was anything other than a voluntary payment.

Summary of conclusions

193. The Bank Debt was a voluntary payment. Accordingly, it did not discharge the Company's liability to Barclays and the Company was not enriched. The unjust enrichment claim therefore fails at the first hurdle. Even if CCI had cleared the enrichment hurdle, it has failed to establish an unjust factor. In addition, for reasons previously explored, the Bank Debt is not a provable debt.

194. As rightly conceded, the Petrasco and AB Sped payments were voluntary. Again, therefore, any unjust enrichment claim in respect of those debts falls at the first hurdle.

195. CCI has failed to establish on a balance of probabilities any 'subcontract' arrangement pursuant to which the CCI (Nippon Express) invoiced sum of £3,692.25 was properly payable by the Company to CCI. On the evidence which I have heard and read, it appears far more likely that CCI simply took over the AAF order and did not account to the Company for the profits of the same.

196. CCI *has* established on a balance of probabilities that its payment of £5,212 on account of the Libertas Fee was a loan by CCI to the Company. Whether that loan may later turn out to be subject to an insolvency set off in respect of any other sums which may be due from CCI to the Company (for the Company's goodwill, for example, or for orders that the Company won but CCI then took on) is for another day.

197. For all these reasons, I shall reverse the decision on CCI's proof in respect of all but the Libertas fee of £5,212.

198. In light of my conclusions, it is unnecessary for me to address in this context a further argument raised by Ms Stonefrost based on National Westminster Bank v Kapoor [2011] EWHC 255 at [131] to [133].

Next Steps: legal framework

199. Rule 15.35 IR 2016 provides that:

> 'If the decision is reversed or varied, or votes are declared invalid, the court may order another decision procedure to be initiated or make such order as it thinks just'.

200. Whether a further meeting should be summoned is a matter of judicial discretion. In the case of Re a Debtor (No 222 of 1990) Ex p. Bank of Ireland 1992 BCLC 137 ('the Bank of Ireland case'), having decided that the five appellant creditors ought to have been allowed to vote, and it being clear on the figures that, had they been allowed to vote, the IVA would have been defeated, the question arose whether a new meeting should be summoned. Having considered the relevant rule in IR 1986, Harman J continued:

> 'In my view the position would prima facie be that one would expect the court in such a case to direct a further meeting'.

201. On the facts of the case however, Harman J considered that little purpose would be served by directing a further meeting. On considering the voting figures, it was clear what the outcome would be, namely, that the five creditors would vote against the arrangement and that in consequence the IVA would be defeated. In those circumstances, the learned judge directed that the chairman's decision in respect of the five creditors be reversed and that the approval given by the meeting be revoked.

202. In the case of Power v Petrus Estates Limited [2009] BPIR 141, it was argued that the passage of Harman J's judgment quoted at paragraph 201 above established a default position. Lewison J commented on this argument at [22] as follows:

> 'However, Harman J's observation must be seen in the context of a vote in which some of those entitled to vote were refused outright. Even so, Harman J decided that no new meeting needed to be called because that was not a 'useful course'. Instead, he reversed both the chairman's decision and revoked approval of the IVA. Thus the approval of the IVA was revoked despite the fact that:
>
> (i) The votes in fact cast supported approval of the IVA; and
>
> (ii) Those creditors who were entitled to vote but who were refused outright had not cast their votes at all and would never cast their votes, either at the original meeting or at any new meeting.'

203. In Power v Petrus, Lewison J also considered the approach adopted in Re a Company (No 004539 of 1993) 1995 1 BCLC 459 ('the Chelsea FC case'). In that case, the sole issue for decision at the meeting had been the choice of liquidator. A creditor (SBP) had been allowed to vote, with the result that Mr Morris had been appointed as liquidator rather than Mr Hilton. I pause here to note the similarities with the present case. Having decided that SBP should not have been entitled to vote at all, the question arose whether a new meeting should be called. Counsel argued that there was no need for a further meeting as the results, in the form of a vote for Mr Hilton, was a foregone conclusion. The Court did not direct a further meeting, but instead declared the vote of SBP invalid and ordered pursuant to rule 4.70(4) IR 1986 that Mr Hilton succeeded as liquidator, together with attendant relief.

204. In Power v Petrus, it was argued that the Chelsea FC case was the origin of a 'foregone conclusion' test. Lewison J rejected the submission as an oversimplification of the position, reasoning as follows:

> '[26] In my judgment, much will depend on the question on which the vote has been taken. In the present case there was only one question for decision at the meeting: who was to be appointed as liquidator? There were only two candidates, so that the issue was clear-cut. In other cases the matters for decision maybe more complex: for example a proposed IVA may be the subject of amendments proposed by creditors, and different creditors might vote in different ways, depending on who is entitled to vote (and hence will be bound by) the IVA. The court must also, I think, be mindful that the summoning of a new meeting is likely to involve expense both for the creditors, and also for the office holder whose fees will be paid in priority to any dividend for creditors. Where insolvency is involved, the court should be concerned to minimise the costs involved.
>
> [27] There may also be difference in approach in a case in which the chairman has refused to allow a creditor to vote for his full entitlement (either because he has rejected the proof or because he has only admitted it in part) and a case in which a

> creditor has been allowed to vote, but his vote is subsequently declared invalid. In the former case, a person with an entitlement to vote has not been permitted to cast his vote either in the full amount or at all. In such a case, the principle of creditor democracy may lead the court to re-run the meeting, so that all those who are entitled to vote have that opportunity. If the court were to decline to order a new meeting, it would be making a decision on a subject where the rules give the decision-making power to the creditors. A creditors' meeting would thus be treated as having made a decision which it had not made at all. In such a case, Harman J may well be right in saying that prima facie the court would order a new meeting, and that there must be something in the evidence to displace that default position. In the latter case, however, all those entitled to vote will have cast their votes, as well as some who were not; and the outcome of the meeting can readily be deduced by eliminating any vote that is subsequently declared to have been invalid. I do not see that in the latter case, therefore, there is a default position pointing towards the summoning of another meeting. If anything, at least in a case where there was only one clear-cut issue before the meeting, it seems to me that the default position is that no new meeting should be summoned ….'

Next steps: submissions

205. The Applicant's primary position in closing submissions was that if the court concluded that a sufficient proportion of CCI's proof should be disallowed to render the Applicant the majority voter, the court should dispense with a further meeting and appoint the Applicant's choice of liquidator in place of the existing one.

206. Mr Otwal accepted that if the decision on CCI's proof was reversed or varied by a sufficient sum, with the result that the resolution would have been passed, it would be open to the court, as a matter of jurisdiction, to appoint Mr Patel as liquidator in place of Mr Barnett. He argued however that there should be a further decision procedure. He maintained that Mr Murray might seek to pay off Barclays in his capacity as guarantor and then vote in the decision procedure himself.

207. In closing submissions in reply, Ms Stonefrost submitted that in considering whether, in the exercise of its discretion, the court should direct that a further meeting be held or simply appoint Mr Patel as liquidator in place of Mr Barnett without calling a new meeting, the court should take into account the way that CCI and Mr Murray have sought thus far to undermine a process designed to be fair to creditors. She also reminded me that if all or the bulk of CCI's proof was knocked out, it would simply be a matter of arithmetic. Her preferred relief was simply to replace Mr Barnett with Mr Patel. This was too small an estate, she argued, to warrant a joint appointment. A reconvened meeting would cost and someone would have to pay.

Next steps: discussion and conclusions

208. Having considered Counsel's submissions with some care, I have come to the conclusion that the appropriate course is to dispense with a further meeting of creditors and simply to order the appointment of Mr Patel as liquidator in place of Mr Barnett. In reaching this conclusion, I take into account all of the evidence before me, including the following factors in particular:

209. First, the meeting of 26 August 2021 involved a single clear-cut issue, namely, whether Mr Patel should be appointed in place of Mr Barnett.

210. Secondly, the reversal of the Liquidator's decisions in respect of the Bank Debt, the CCI (Nippon) Debt, the AB Debt and the Petrasco Debt means that the Applicant would have secured the majority. This is not a case where there is any doubt about what the result would have been. It is simply a matter of arithmetic. Mr Patel would have been appointed as liquidator in place of Mr Barnett. Mathematically, the outcome of the meeting can be declared.

211. Thirdly, I take into account the length of time that this matter has already taken to come to court for final resolution. The meeting of creditors to which this appeal relates took place almost 2 years ago, on 26 August 2021. Appeals of this nature are often time critical and the outcome in many cases will have far-reaching consequences as to the manner in which a given insolvency is conducted. The legislature has recognised this by imposing tight time constraints upon the issue of such appeals. Against that backdrop, the court should strive to achieve a timeous and workable solution.

212. Fourth, I also take into account the costs involved in convening a further meeting, in the context of an estate with no assets save for two or three possible claims.

213. Fifth, I take into account the lack of progress in the administration of this insolvent estate to date. According to the Liquidator's progress report dated 8 September 2022 for the year ended 14 July 2022, the Liquidator has realised cash in hand of £5,212.20 (which related to the sums deposited on the client account of Libertas prior to liquidation, in respect of its fees) and £3,825.00 (a security deposit from the Applicant in respect of its request to convene the decision procedure of 26 August 2021). Save for a fairly recent reference to Counsel for advice on the directors' loan accounts, little else appears to have happened.

214. The Liquidator's latest progress report identifies (I accept on a non-exhaustive basis) three potential lines of enquiry that he was thinking of pursuing. The first was the role, advice and costs associated with the former accountants and bookkeepers (ie the Applicant). The second and third were the overdrawn directors' loan accounts of Mr Murray and Mr Nash respectively.

215. The first is a somewhat curious line of enquiry to be pursuing at this stage. As made clear by the email of Mr Humphrey of Libertas to the Applicant dated 15 July 2021, ordinarily proofs are not formally adjudicated upon 'until such time that the liquidator is in a position to pay a dividend to the unsecured creditors'. The Liquidator seeks to justify his position in his latest progress report by stating that it is presently 'unclear' whether the Applicant is a creditor or 'whether a return of funds may be due to the

Company', yet (1) there was no appeal against the Applicant's proof; (2) the Statement of Affairs, which bears a statement of truth and was signed by Mr Murray, listed the Applicant as a creditor and estimated the debt owed to it as £20,000: and (3) Mr Murray accepted in cross examination that the Applicant was owed at least £20,000. I also note that in cross-examination, Mr Murrey accepted that Mr Barnett had demanded considerably more supporting evidence in relation to the Applicant's proof than he had demanded of CCI's proof in the run up to the meeting of 26 August 2021. In relation to two of the sums making up CCI's proof, for example, Mr Barnett had not even required bank statements to prove the source of given payments.

216. The second and third lines of enquiry mentioned in the latest progress report (the directors' loan accounts) are fairly obvious lines of enquiry to be pursued at the outset, although little progress appears yet to have been made in collecting in any of the sums outstanding on those accounts. The Liquidator's latest progress report states that £94,762 was owed by Mr Murray as at 31 March 2019 and that a further £32,428.68 was paid to Mr Murray in the following period to cessation of trade. It also confirms that on 19 April 2022 (some 9 months after the Company entered liquidation, and following issue of this application), 'formal demand' for repayment of an 'undisputed' sum of £87,912 was made of Mr Murray. Mr Murray is said to have raised a variety of set offs including unpaid salary and various expenses (none of which were mentioned in his Statement of Affairs/Director's Report to Creditors). The Liquidator stated in his latest progress report that Counsel's advice had been sought and (by para 4) that the Liquidator was 'now in a position to actively progress his claim against Mr Murray', but as at the date of the hearings before me (March and May 2023), no proceedings had been issued against Mr Murray and not a penny piece had been paid by him towards his overdrawn directors' loan account.

217. There was a similar lack of progress in respect of Mr Nash. As at 31 March 2019, Mr Nash owed the Company £42,706 and further payments totalling £34,771 had been made to him in the following period to cessation of trade, but other than a 'number of emails' said to have been sent to Mr Nash by the Liquidator, no progress had been made in recouping any part of the total sum owed by Mr Nash on his director's loan account.

218. Also of note is that the Liquidator's most recent progress report makes no mention of a potential fourth line of enquiry, which is whether any sum is due from CCI/Mr Murray to the Company in respect of (i) the Company's goodwill, which given the buy-out figures proposed by Mr Murray in his negotiations with Mr Nash in 2019 (c.£60,000 for a 50% share) must have been thought to have had some value in the not too distant past (ii) any contracts won by the Company but completed by CCI in the 'overlap' period of June 2020 to May 2021; (iii) any diversion of business opportunities from the Company to CCI in that overlap period and/or (iv) any breach of directors' duties owed by Mr Murray to the Company in relation to (iii). The work recorded in section 6 of the Liquidator's latest progress report under 'realisation of assets', does not record or reference any work undertaken in relation to that potential fourth line of enquiry.

219. Naturally I accept that Mr Barnett has been operating in difficult circumstances, with few resources to draw on in the insolvency and with this application pending. I also accept that I have not had the benefit of hearing oral testimony from him. The lack of progress in the liquidation is however relevant in this respect: in the circumstances of

this insolvency, where little has yet occurred, replacing the current office-holder will be less disruptive than in a case where detailed investigations into a number of potential routes of asset recovery are at an advanced stage. That, in my judgment, is a factor which the court can (and should) take into account when deciding what relief is appropriate in the context of this application.

220. Fifth, from the evidence filed by the Liquidator and from the tone and content of his most recent progress report, there appears to be a fairly high likelihood that if a further meeting is directed, the Liquidator will simply reject the Applicant's proof or only allow it for voting purposes in a nugatory sum. I do not consider such a stance to be justified on the evidence before me, but nonetheless, there appears to be a fairly high likelihood of it. Any such decision on the Applicant's proof for voting purposes would simply result in yet more litigation, delay and expense, in the context of an insolvency with no assets save for two or three possible claims.

221. I also take into account any known views and wishes of the creditors. In this case it is clear that both AW (£5,553) and Prosport (£3,000) voted in favour of the current liquidator at the meeting of 26 August 2021. It is entirely possible (and indeed likely) that they (together with CCI, £5,212.20, subject to any insolvency set off arguments raised) would vote the same way again, should a further decision procedure be directed. Even if all three did vote the same way, however, the Applicant would still have the majority vote, whether on the claimed sum of £43,516.75 marked 'objected to', or the sum of £20,000 acknowledged in the Statement of Affairs.

222. I also take into account that AW and Prosport are far from arms length. AW is both landlord to the Company and to CCI. Mr Allen of AW knew Mr Cottingham of Libertas ahead of the Liquidator's appointment: Barnett (1) para 60(c). Prior to his death in 2020, Mr Allen of AW recommended to Mr Murray that he contact Libertas in the event that a deal could not be achieved with Mr Nash: Murray (1), para 35. Prosport was based in AW House. According to Companies House filings, James Kelly of Prosport is also a director of AW. In short, the only truly arms-length creditor voting at the meeting of 26 August 2021 (or likely to vote at any subsequent creditors' meeting if one was called) is the Applicant. Other creditors such as HMRC have played no part in the creditors' meetings convened thus far and there is no reason to suggest that their stance would be any different if a further meeting was called.

223. I reject as fanciful the suggestion that if a further meeting was called, Mr Murray might choose, qua guarantor, to discharge the Barclay's overdraft and thereafter vote in that sum in favour of the Liquidator. As no formal demand has been made of him under the personal guarantee (or is at all likely) any such payment would be voluntary. Moreover, any artificial manoeuvrings of this sort would immediately fall foul of the principles espoused in National Westminster Bank Plc v Kapoor [2011] EWHC 255 at [131]-[133] in any event. There would be no proper commercial reasons for paying this debt and the payment would have been made for the purpose of ensuring that the members' choice of liquidator was not replaced by an independent creditor's choice of liquidator.

224. Whilst not argued before me, for the sake of completeness I also reject as fanciful any suggestion that Barclays might wish to pay back the sum paid to it by CCI and to vote in that sum itself in favour of the current Liquidator.

225. Naturally I take account of the fact that Mr Patel is a nominee of the Applicant. In any liquidation, however, there are likely to be creditors against whom the company may indicate potential disputes or cross-claims; ordinarily, they are not thereby precluded from voting in favour of a given liquidator. In this case, no persuasive principled objections were raised to Mr Patel's appointment at the time of the meeting on 26 August 2021 or indeed thereafter. The court was simply invited to infer that as Mr Patel was put forward by the Applicant, the Applicant must be hoping for more favourable treatment by him. I do not accept that as a legitimate inference. Mr Patel is a licensed office-holder and there is nothing in the evidence before me to suggest that he will not carry out his duties with the professionalism, independence and integrity required of him as liquidator of the Company.

226. Finally, I take into account the extra costs that a replacement appointment will entail. On the evidence before me however, it seems to me that these costs are likely to be outweighed by the benefits to the Company and its creditors that the new appointment will bring. The new appointment will open up the possibility of further funding for the liquidation, fuller investigations, and enhanced prospects of recoveries.

227. For all these reasons, I am satisfied that the appropriate course is to allow the appeal save in respect of the sum of £5,212 and to order that Mr Patel be appointed as liquidator in place of Mr Barnett. Mr Patel has already filed his consent to act.

Developments since circulating this judgment in draft

228. Finally, I should address certain developments since the circulation of this judgment in draft. By letter dated 29 June 2023, Mr Abrahams of Locke Lord, the solicitors acting for the Liquidator, wrote confirming the Liquidator's continued neutrality but informing the Court that the Liquidator has 'entered into a settlement with Mr Murray of his directors' loan account only (in the amount of £65,000)'. I pause here to note that the sum of £65,000 is significantly less than the sums said in the Liquidator's last Progress Report (for the period ending 14 July 2022) to be owed by Mr Murray on his director's loan account (see [216] above). I also note that the Liquidator's time costs as at 14 July 2022 stood at £49,659.

229. The letter of 29 June 2023 did not state when the settlement was achieved. In response to a follow up enquiry from the Court on the issue of timing, Mr Abrahams emailed the Court on the afternoon of 29 June to state that '[t]he settlement agreement reached with Mr Murray was dated 22 February 2023'.

230. The stated timing of the settlement agreement does not accord with the oral testimony of Mr Murray at trial in March 2023. During his cross-examination in March 2023, Mr Murray was asked about his director's loan account and said that he had not been asked to repay it. He made no reference to any settlement agreement. The exchange between Counsel and Mr Murray at this point is worth recording. In the following extract, the reference to 'AJ' is to Mr Joshi of the Applicant and to 'A' is the Applicant. The exchange went as follows:

> 'HS: You accepted a figure, AJ says it's about 20k more. You say it is somewhere in between. You haven't repaid these.
>
> IM: No.

> HS: You haven't been asked?
>
> IM: No.
>
> HS Why haven't you repaid yours?
>
> IM: Financial problems and waiting for this to be resolved.
>
> HS: Can you understand the A's frustration you haven't been required to repay?
>
> IM: I am not a liquidator.
>
> HS: You should have paid this on day 1?
>
> IM: Yes, but I can't account for the Liquidator'.

231. Whilst I have found Mr Murray to have been an unreliable witness in numerous respects, in context, he would have had no reason at this point in his cross-examination to have lied about having reached a settlement with the Liquidator regarding his directors' loan account in February 2023 and every incentive to mention it.

232. Mr Abrahams was informed of the above-quoted exchange in cross-examination by an email from Ms Stonefrost of 29 June timed at 16.39. He has been invited by the Court to respond on this issue but as at the time of writing has not done so.

233. It would appear, therefore, that the timing of the settlement agreement (and the settlement sum agreed) will require further investigation.

234. For present purposes, I confirm that these recent developments do not affect the ultimate conclusion reached at paragraph 227 of this judgment, which is that the appropriate course is to allow the appeal save in respect of the sum of £5,212 and to order that Mr Patel be appointed as liquidator in place of Mr Barnett. The precise timing of the appointment, however, may require further submissions in light of recent developments.

235. I shall hear further submissions on the form of the order and any attendant directions required on the handing down of this judgment.

ICC Judge Barber