Neutral Citation Number: [2025] EWHC 2294 (Ch)

CR 2024 000526

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

IN THE MATTER OF ONE LEGAL SERVICES (TRADING AS ONE LEGAL) LIMITED - IN ADMINISTRATION
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 10/09/2025

Before :

ICC JUDGE BARBER

- -

Between :

MANOLETE PARTNERS PLC

Applicant

- and –

TREVOR HOWARTH

Respondent

- -

Raj Arumugam (instructed by **Schofield Sweeney LLP)** for the **Applicant**
The Respondent appeared in person

Hearing dates: 4-6 and 11 June 2025

- -

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 time and date for hand-down is 9.00 am on 10 September 2025

ICC Judge Barber

1. This is the application of Manolete Partners Plc ('the Applicant') by application notice issued on 30 January 2024 against Mr Trevor Howarth ('the Respondent') seeking orders under sections 238 and 239 of the Insolvency Act 1986 (IA 1986) in respect of payments totalling £101,000 ('the Payments') made to the Respondent by One Legal Services (trading as One Legal) Limited ('the Company') of which the Respondent was one of two directors.

2. The Payments were made by the Company to the Respondent between 25 April 2019 and 2 December 2019, during the course of a trading CVA which the Company entered on 22 February 2019 and which terminated on 17 December 2019. Mr Robert Adamson and Mr Kienlen (both of Armstrong Watson LLP) ('AW') were both supervisors of the CVA but only Mr Adamson played any part in the same.

The Applicant's case- overview

3. The Applicant maintains that, as at 25 April 2019, the Company was indebted to the Respondent in the sum of £89,159.68 in respect of his director's loan account.

4. The Applicant alleges that the Payments (totalling £101,000) comprised (i) preferential payments of £89,159.68 contrary to section 239 IA 1986 and (ii) transactions at an undervalue of £11,840.32 contrary to section 238 IA 1986.

5. The Applicant seeks repayment of those sums under section 238 and 239 IA 1986 and attendant relief.

The Respondent's case - overview

6. The Respondent fully contests this application. He maintains that:

   (1) at the time of the Company's entry into CVA, the Company owed him the sum of £97,445 on his director's loan account, plus ongoing contractual interest at 8% per annum;

   (2) under the terms of the trading CVA, the Respondent, his fellow director and other staff were entitled to continue to be paid their pre-CVA salaries. The Respondent's gross salary at the time of the Company's entry into CVA was £200,000 per annum (or £16,666 per month) and his salary net of PAYE and NIC came to approximately £10,377 per month;

   (3) in April 2019, on the advice of Mr Adamson, the lead supervisor, he came off the Company's PAYE payroll, ceased to be paid salary, and received payments in reduction of his director's loan instead. Mr Adamson recommended this change to save the Company the PAYE and NIC that would otherwise be payable on the Respondent's salary, thereby reducing the cost to the Company of trading in the CVA ('the salary/loan swap arrangement');

   (4) the loan repayments made to the Respondent between April and December 2019 in place of salary were calculated at £10,000 per month, the rough equivalent of

what the Respondent's net monthly salary would have been had he remained on the Company's payroll;

(5) the overall total of £101,000 paid by the Company to the Respondent from 25 April 2019 to 2 December 2019 is the equivalent of £97,445 owed to him on his director's loan account plus contractual interest at 8% totalling £4,463.77, leaving a balance of unpaid interest as at the time of the last payment on 2 December 2019 of £908.77;

(6) the salary/loan swap arrangement saved the Company in the region of £80,000 in PAYE and NIC;

(7) Mr Adamson was at all material times fully aware that the loan/salary swap arrangement had been put in place on his advice and at no time during the course of the CVA did he indicate that there was any problem with it;

(8) at no material time during the 18 months or so which Mr Adamson had then spent as lead administrator, in the administration put in place on 3 January 2020 following termination of the CVA on 17 December 2019, had Mr Adamson indicated any problem with the salary/loan swap arrangement, still less intimated proceedings against the Respondent;

(9) it was only after the unexpected death of Mr Adamson in June 2022, when Mr Kienlen took over as lead (by then sole) administrator, that anyone had intimated a claim in respect of the salary/loan swap arrangement.

7. By the conclusion of trial, it was common ground that the Respondent had come off the Company's payroll and stopped receiving salary from April 2019 onwards.

8. The Respondent's fellow director, Mr Jason Lartey and the other members of staff (none of whom had lent the Company monies) remained on their respective payrolls and continued to receive their salaries during the course of the trading CVA.

Background

9. The Applicant is a well-known litigation and claims acquisition company.

10. The Company was incorporated on 11 September 2012. It was granted an ABS (Alternative Business Structure) licence in July 2013 and traded in the provision of legal services, predominantly criminal legal aid work.

11. The Respondent was at all material times a director and CEO of the Company, earning an annual salary of £200,000 gross from the Company, the equivalent of £16,666 gross per month. He has been involved in the provision of legal services for over 40 years. Until February of this year, he was an SRA approved manager and held a Bar Standards Board Licence. From about January 2019, he was also sole shareholder of the Company. On the evidence which I have heard and read, it is clear (and I so find) that at all material times the Respondent took the lead role in the Company and was its directing mind.

12. In March 2016, the Company acquired the practice of Kaim Todner Solicitors Limited ('KTS'). The principal of that practice was Karen Todner. Following the acquisition, numerous undisclosed liabilities were discovered. As the Company was the successor practice, it was responsible for discharging these. Overall, the Company had to pay more than £600,000 in undisclosed liabilities. In addition, it became apparent that the work in progress of KTS had been significantly overstated. These factors caused serious financial issues for the Company.

13. To help with the Company's cashflow difficulties, the Respondent loaned it the sum of £75,000. Contractual interest on that loan was payable at 8% per annum.

14. In September 2017, Mr Andrew Tinkler became a major investor in the Company's business, investing sums totalling £2.9m. Mr Tinkler was a person of significant personal wealth, involved in several large multi-national companies throughout the United Kingdom and Europe. As a matter of transactional mechanics, Mr Tinkler's investments in the Company were provided indirectly, via the Respondent, as the Respondent had SRA approval.

15. Despite such assistance, by 2018, the Company had serious cash flow difficulties. These led to it accruing significant Crown debts, principally PAYE/NIC, totalling £833,379. HMRC was threatening to enforce the debt.

16. In or around August 2018, Mr Tinkler recommended that the Respondent seek advice from Mr Robert Adamson of AW. AW were already instructed by Mr Tinkler on other projects. Mr Tinkler knew Mr Adamson and met with him regularly.

17. In August 2018, the Respondent sought insolvency advice on behalf of the Company from Mr Adamson. AW was initially retained by the Company to undertake a review of the Company's affairs with a view to exploring (inter alia) the feasibility of proposing a CVA to its creditors. By late September 2018 it had been concluded that a CVA would be the best way forward.

18. The Company agreed two engagement letters with AW. The initial engagement letter of 24 August 2018 stated that the AW engagement team would be led by Mr Adamson. The second, dated 27 September 2018, enlisted AW's services in preparation for a CVA and stated that Mr Adamson would lead the AW team, assisted by Ms Heather Bamforth.

19. Over the period August 2018 to December 2018, the Respondent had a number of meetings with Mr Adamson. These took place at nearby hotels and were usually attended by the Respondent, Mr Richard Botting, (a chartered accountant of 32 years' standing who was the Company's CFO), and Mr Adamson and Ms Bamforth of AW.

20. It was at one of these meetings, on 20 December 2018, that the issue of the Respondent's director's loan was discussed. The Respondent maintains that it was at that meeting that Mr Adamson first raised the possibility of excluding the Respondent's director's loan from the proposed CVA and of the director's loan being repaid to the Respondent on a monthly basis at a rate consistent with the monthly salary he usually received in place of salary, as a means of saving the Company the additional PAYE and NIC liabilities which it would ordinarily have to pay on the Respondent's salary.

21. The Company's CFO, Mr Botting, took notes at the meeting of 20 December 2018. The attendance notes state, inter alia, as follows (with emphasis added):

> 'Rob still to advise (from Jim Meakin) re tax issues
>
> -corporation tax for KT (£36k)
>
> -write off/write back of Andrew's loan
>
> In addition Andrew's tax position re £600k (loan premium or share premium?)
>
> HMRC need to receive some form of proposal tomorrow (21/12/18)
>
> If Andrew Tinkler's £600k not included he has less than 75% (of HMRC + AT liabilities) but more than 75% if it is included*
>
> Creditors to be included? Need to have good reason for non-inclusion
>
> -All chambers and disbursements not to be included (when paid for by LAA/HMCTS)
>
> -Mazars – general consensus is to include
>
> *Trevor [the Respondent] can / can not be included depending upon argument
>
> -included – [part] of bank covenant
>
> -not included – *paid instead of payroll*'

22. On 25 January 2019, the Company's directors filed a CVA proposal at Companies House. This proposed a trading CVA, with monthly contributions of £2,400 per month from trading profits over a period of 18 months. In addition, any damages recovered from proceedings by then underway against Ms Karen Todner net of costs were to be paid into the Arrangement.

23. The CVA proposal was signed by the Respondent and his co-director, Jason Lartey, with a statement of truth. The statement of affairs included within the proposal showed an estimated deficiency to creditors of £3,842,130.

24. In the definition section at paragraph 2.1 of the proposal, 'Excluded Creditors' were defined as:

> 'an Unsecured Creditor, whose debt has arisen through their instruction by KTS and relates to professional fees for which payment has been requested from the Legal Services Commission'.

25. 'Unsecured Creditors' were defined in the proposal as:

> 'any person other than a Secured Creditor and a Preferential Creditor who has or claims to have any claim against the Company arising out of or having its origin in any matter occurring prior to the Effective Date or arising out of any transaction, act or omission of the Company or any person on or before the Effective Date whether the claim may be present, future or contingent or prospective or whether liquidated or for damages and whether in contract or tort howsoever arising'.

26. Paragraph 3.4 of the proposal provided:

> 'This Arrangement is in full and final settlement of all claims by creditors against the Company, with the exception of the Excluded Creditors. The Excluded Creditors are not included as pursuant to the Solicitors Accounts Rules 2011 payments received from the Legal Services Commission in respect of unpaid Professional Fees relating to a client matter must be treated as client money. Any breach incurs a duty to remedy, which is personal to the Director and must be remedied in full and in the circumstances, will not form part of the Unsecured Creditors for the purposes of the Company Voluntary Arrangement.'

27. The Respondent was listed as a creditor of the Company in respect of his director's loan to the Company. In the statement of affairs forming part of the proposal, his director's loan was stated to stand at £97,445 plus ongoing statutory interest at 8%.

28. Paragraph 15.1 of the proposal provided that the Respondent's claim in respect of his director's loan was to be '*excluded from the Arrangement, to assist with costs savings to the Company*.'

29. Paragraph 33 of the proposal provided that:

> 'The Supervisor shall observe the requirements of Rule 2.41 [IR 2016] with regard to the records kept by them, and records to be issued from time to time to the various persons set out in that Rule.'

30. The CVA proposal was not accepted in its original form, although no changes were made to Paragraph 15.1 of the proposal. In the run-up to the meeting of creditors, Mr Adamson had been confident that Mr Tinkler (who had lodged a proof for £2.9m) carried 75% or more of the voting power, but in the event, Mr Tinkler's proof was rejected. The reason for this (in very broad terms) was that following a last-minute review by AW's lawyers of the underlying transactional documentation said to support Mr Tinkler's proof, AW's lawyers advised that Mr Tinkler had invested money into the Company indirectly, via the Respondent (who had SRA approval), rather than directly, and so could not vote. No-one had been prepared for this development.

31. The result was that HMRC's vote had far more sway on the day than anticipated. HMRC insisted on significant modifications which at the time the Respondent felt he had no option but to accept.

32. The Company's creditors approved the CVA with modifications on 22 February 2019. Mr Adamson and Mr Kienlen of AW were appointed as supervisors.

33. The modified CVA as approved was a trading CVA which provided for monthly payments of £4000 into the arrangement over a period of 5 years. This was in marked contrast to the original proposal, which provided for monthly contributions of £2400 over a period of 18 months. HMRC also insisted on a modification which provided that the CVA could not be treated as successfully concluded unless all unsecured creditors had received a minimum of 80 pence in the pound.

34. The Respondent was shocked by these developments and pressed Mr Adamson for a 'post-mortem' meeting shortly after the creditors' decision procedure. He says that it was at that 'post-mortem' meeting, which took place in late February 2019 following the Company's entry into the CVA, that Mr Adamson again raised the issue of the salary/loan swap arrangement mentioned in the earlier pre-CVA meeting on 20 December 2018. He says that by the time of the post-mortem meeting, Mr Adamson's firm advice was that the salary/loan swap arrangement now *had* to be put in place, in order to save the Company the additional PAYE/NIC which it would otherwise have to pay in respect of the Respondent's salary if he remained on the payroll. The Respondent says that Mr Adamson also told him not to come off the payroll immediately but instead to take £10 in salary in March, to trigger a tax rebate; and thereafter to come off the payroll and put the salary/loan swap arrangement in place.

35. The Respondent says that he followed that advice, taking only £10 in salary in March 2019 and then coming off the payroll completely from April 2019 onwards.

36. The Respondent's co-director (who was not owed any money by the Company by way of director's loan) remained on the payroll and continued to be paid his salary at all material times, as did the Company's other employees.

37. It was common ground that between 25 April 2019 and 18 November 2019, the Company made 8 payments to the Respondent totalling £101,000 ('the Payments'). The Payments comprised the sum of £20,000 on 25 April 2019, £20,000 on 3 June 2019, £10,000 on 26 July 2019, £10,000 on 23 August 2019, £10,000 on 7 October 2019, £10,000 on 4 November 2019, £11,000 on 18 November 2019 and £10,000 on 2 December 2019.

38. On 17 December 2019, the CVA was terminated due to the Company's failure to meet the monthly contributions promised under the CVA proposal.

39. In the run-up to its formal termination, Mr Adamson wrote off approximately £35,000 in work in progress/unpaid fees. Mr Adamson also explored possible next steps with the Respondent. Initially a CVL was discussed, but ultimately (following service of a statutory demand on the Company) an administration was decided upon.

40. On 8 December 2019 (prior to termination of the CVA on 17 December 2019), Mr Adamson asked the Respondent to transfer the Company's cash funds, which at that

stage stood at approximately £77,000, to AW. The Respondent has produced in evidence contemporaneous text messages exchanged with Mr Adamson on Sunday 8 December 2019 which support his account of this request being made.

41. The cash funds of c.£77,000 held by the Company at that time included legal aid monies which had to be applied in payment of given disbursements. The Respondent maintains that he sought confirmation from Mr Adamson that any funds which the Company sent to AW at that stage (December 2019) would be ring-fenced to pay any legal aid disbursements. His evidence was that Mr Adamson confirmed to him by telephone in December 2019 that the funds sent across would be ring fenced as requested.

42. On 10 December 2019, the Company transferred funds totalling £77,000 to AW in accordance with Mr Adamson's request ('the Transferred Funds').

43. By email from Ms Bamforth to the Respondent dated 11 December 2019 (timed at 15:10 and 'cc'd' to Mr Botting, Ann Probert of AW and Mr Adamson), Ms Bamforth wrote (with emphasis added):

> 'Whilst writing, please can you let me have a copy of the latest remittance advice from the LAA *as we need to understand what disbursements were included in that payment*'.

44. The Respondent maintains that Ms Bamforth's reference to 'that payment' in her email of 11 December 2019 was a reference to the payment of sums totalling c.£77,000 transferred by the Company to AW the previous day, on 10 December 2019.

45. On 3 January 2020, the Company entered administration via directors' appointment, with Mr Adamson and Mr Kienlen appointed as joint administrators. Mr Adamson took the lead role in the administration until his sudden death on 23 June 2022. Mr Kienlen's only involvement in the administration relates to the period after Mr Adamson's death.

46. The Respondent later discovered that the Transferred Funds were not ring fenced for payment of legal aid disbursements but were instead applied in payment of fees charged by AW. This caused the SRA to open an investigation into the Respondent in respect of the non-payment of legal aid disbursements.

47. In the spring of 2020, access to the Company's server (including the Company's media and cloud account and in particular the Company email account) was terminated. This was a consequence of the Administrators failing to keep up payments for the service. This would later prove to be particularly detrimental to the Respondent, as all written communications between the Respondent as director of the Company and Mr Adamson were (in respect of the Respondent) facilitated via the Company's email account.

48. On 23 June 2021 a meeting took place between Mr Adamson, Ms Jo Smith (then acting as solicitor for AW) and the Respondent by MS Teams. Mr Adamson took handwritten notes at the meeting. Those notes are in evidence. The Respondent contends that at that meeting, Ms Jo Smith asked why in April 2019, during the

course of the CVA, the Respondent had come off the payroll and had drawn monies in repayment of his loan account instead. Mr Adamson's notes of the meeting (which refer to the Respondent as 'TH' and Mr Adamson as 'RDA') record the following exchange (with emphasis added):

> 'Repayment of directors loan – why did Mr Howarth come off the P.A.Y.E in April and start make [sic] payments to reduce his directors loan account. *TH stated it was on the advice of RDA* and Richard Botting had a note of the conversation and when did the conversation take place T.H. could not provide this information.'

49. Mr Adamson's note stops abruptly there, although the Respondent maintains that the meeting continued for some time thereafter.

50. The Respondent's evidence was that at no time after that meeting of 23 June 2021 prior to Mr Adamson's death in June 2022 did Mr Adamson, or anyone else from AW, or Ms Jo Smith (who was at the meeting of 23 June 2021), or anyone else from AW's solicitors, ever raise with him, in correspondence or otherwise, any questions regarding the salary/loan swap arrangement put in place in April 2019 or intimate a claim against him in respect of that arrangement. He says that he met Mr Adamson in person again at a meeting at Mr Tinkler's offices in October 2021 and that no mention was made of the salary/loan swap arrangement at that meeting.

51. Shortly after Mr Adamson's death in June 2022, the SRA contacted AW for further information regarding the Transferred Funds. By email dated 20 July 2022 from Ms Lindsay Barrowclough, a forensic investigation officer at the SRA, to Ms Ann Probert, a senior manager at AW, Ms Barrowclough wrote as follows:

> 'Dear Ann
>
> 'You will remember when I attended your offices last week, I asked whether Armstrong Watson would be willing to provide a witness statement in respect of payments made to them as part of the administration.
>
> My investigation into the [Company] has been to review whether monies paid to the [Company] by the Legal Aid Agency (LAA) for professional disbursements incurred prior to the administration were paid out. The investigation has identified that monies from the LAA to the value of £57K were paid into the [Company's] office account but were not paid out to the third parties to which they were owed.
>
> I have had limited contact with Mr Howarth via email to try to obtain his comments on the findings of the investigation. In an email to me dated 17 November 2021, he wrote:
>
> "I was instructed by Mr Robert Adamson to transfer to him £80,000 that was in the office account in order as he called [it]

"to ring fence those funds". Those funds should have been applied to the disbursements."

In a further email dated 24 November 2021, he wrote:

"In respect of the payments to Armstrong Watson they were on the explicit instruction of Robert Adamson. That instruction specified the reason being "those funds would be ring fenced".

I have reviewed the Nat West bank statements I hold for various accounts held for the [Company] and have identified a bill payment of £51,000.00 made from One Legal's "tax account" to Armstrong Watson on 10 December 2019 (01-10-01-65381122) and the Nat West bank account statements for the [Company's] main office account (01-10-01- 65381114) recorded a bill payment to Armstrong Watson for £26,000 on the same date.

[£51,000 + £26,000=£77,000].

I presume these are the payments to which Mr Howarth is referring as I have been unable to find any other around the time the [Company] went into administration. In order for me to try to draft a statement for you to consider with regard to this issue, would you be able to provide me with some further information as follows:

1. The reason for those payments being made to Armstrong Watson;

2. Whether those monies have been "ring fenced" as stated by Mr Howarth, and if so, what they have been ring fenced for;

3. Whether those monies have been used to make payments as part of the administration to date and if so, what they have been used for.

4. If you have any documentary evidence which could assist me in verifying Mr Howarth's statement in respect of those monies and the instructions of Mr Adamson. I am obviously aware that Mr Adamson is now sadly deceased so am not sure whether you have any access to records of communications between him and Mr Howarth. (I did ask Mr Howarth if he was able to provide anything to evidence Mr Adamson's request, but he said he was unable to do so as he did not have access to the One Legal server).

Many thanks for your assistance. I enclose a copy of Mr Howarth's email of 17 November 2021 in which he referred to the payment, for your information.'

52. By email dated 21 July 2022, Ms Probert of AW responded to Ms Barraclough, copying in Mr Kienlen, as follows:

> 'Lindsey,
>
> Thank you for your email and providing details of your investigation to me.
>
> Following our discussion last week, I discussed your query in relation to whether a witness statement could be provided by the Administrator, Mike Kienlen, who is now in sole office and also the Administrator's legal advisers, Knights Plc.
>
> Unfortunately Mike Kienlen was not party to the communications between Rob [Adamson] and Mr Howarth and therefore would not be able to provide the witness statement you require.
>
> I can confirm that the sum of £77,013.14 was transferred to the Armstrong Watson client account. Following the commencement of the Administration this was subsequently transferred into the Company's Administration bank account so that it was held for the benefit of the creditors as a whole and to defray the costs of the Administration.
>
> In addition unfortunately I do not have any documentary evidence in relation to Mr Howarth's statement.
>
> I have copied in my colleagues Liz and Whitney as I am on leave from today.
>
> With kind regards
>
> Ann'

53. No reference was made in Ms Probert's email of 21 July 2022 to Ms Bamforth's email of 11 December 2019 (see [43]-[44] above), or the chain of correspondence around that email.

54. A few months later, in October 2022, Mr Kienlen (as sole administrator of the Company) acting by his solicitor Ms Jo Smith intimated a claim against the Respondent in respect of the Payments.

55. The letter before claim dated 21 October 2022 sent by Ms Jo Smith on Mr Kienlen's behalf stated that it was sent in accordance with the Practice Direction on Pre-Action Conduct and Protocols. The letter briefly summarised a proposed claim based on ss 238 and 239 IA 1986 in respect of the Payments but contrary to paragraph 6(c) of the practice direction did not enclose any key documents relating to the proposed claim.

56. The Respondent replied by letter dated 17 November 2022, stating inter alia as follows:

> 'It is clear that you have not considered the notes of the meetings which took place with Mr Robert Adamson and Ms Heather Bamforth. The sums which you refer, were paid to me on the specific instruction of Mr Adamson.
>
> Also present at the meetings was Mr Botting. I have contacted Mr Botting since receipt of your letter. Mr Botting confirmed that he has retained his contemporaneous notes of each meeting, specifically the instruction given by Mr Adamson.
>
> It is for these reasons that CPR make it clear that the relevant documents should be disclosed.
>
> Furthermore, had you bothered to provide a copy of the [Company's] bank statements you will have noted that during this period I received no salary. It was on the specific instruction of Mr Adamson, that in order to save the Company the PAYE and N.I. that instead of me receiving my salary through payroll, that Mr Botting arranged my outstanding loan be discharged on a monthly basis.
>
> Mr Adamson's instructions were then followed.
>
> I look forward to receiving your letter of apology.
>
> Should your client still instruct that proceedings are to be issued, I confirm that the proceedings will be strenuously defended.
>
> I also place your clients on notice that having failed to comply with CPR in order to obtain an unfair advantage in the failure to disclose the relevant documents, I will bring this communication to the attention of the court in support of any application for costs.'

57. By letter dated 23 November 2022, Ms Jo Smith replied, stating:

> 'We note that you make reference to meetings which took place with yourself, Mr Adamson and Mr Botting and you assert that Mr Adamson instructed you to make the payments. Please can you provide all supporting evidence of the meetings in your possession and the contemporaneous notes taken by Mr Botting.'

58. Ms Jo Smith repeated this request by letter dated 15 December 2022, demanding a response in 7 days.

59. On 12 January 2023, Mr Kienlen and the Company assigned all rights of action regarding the Respondent to the Applicant.

60. By letter dated 9 February 2023, Ms Jo Smith (still at that stage of Knights solicitors) wrote to the Respondent confirming that she now acted for the Applicant. The letter again described itself as a letter before claim drafted in accordance with the practice direction but did not enclose any documents.

61. This second letter before claim related to the Payments, but this time was not based upon ss238 and 239 but rather ss171-175 of the Companies Act 2006. The letter claimed that the transactions could not be said to have been in the best interests of the Company and that the Respondent had benefited to the detriment of the creditors. The letter demanded copies of any documentation relied upon by the Respondent within 30 days.

62. At the time the second letter before claim was sent, on behalf of the Applicant, Ms Jo Smith had not withdrawn her first letter before claim, sent on behalf of Mr Kienlen.

63. The Respondent replied by letter dated 10 February 2023. Insofar as material, his letter (which includes square brackets in the original) read as follows:

> 'Re: Client 1. Messrs Armstrong Watson. Client 2 Manolete Partners Plc
>
> I write further to your [client 1] purported letter before action dated 21 October 2022, and to my response 17 November 2022. It can be seen in compliance with the pre-action protocol, I requested copies of Mr Adamson's and Ms Bamforth's meeting notes, in respect of all the meetings they attended, [and charged], for their attendance.
>
> I received no notes, or explanation of your clients failure, to provide copies of the notes with the purported letter before action.
>
> In addition, I directed you to the company's payroll for the periods to which you refer.
>
> I also refer to your letter sent on behalf of [client 1] 23 November 2022 in which you wrote:
>
> "can you provide all supporting evidence of the meetings in your possession and the contemporaneous notes taken by Mr Botting".
>
> It can be seen from my letter, the notes of the meetings were taken by Mr Botting, I am unaware that I am required to provide copies of material that is not in my possession, or under my control. Furthermore, I am also unaware that having received a purported letter before action, that the burden is reversed.
>
> I refer to your letter dated 9 February 2023 sent on behalf of [Client 2].

> There cannot be a clearer example of a "conflict of interest". I therefore should be grateful if you would ensure your compliance partner is on notice of this correspondence.
>
> I refer to the scandalous statement you make in this letter:
>
> "In the circumstances, by authorising the Company to make the payments totalling £101,000 to yourself, was in breach of your duties as a director of the Company. The transaction cannot be said to have been in the best interests of the Company. Indeed you [benefited] to the detriment of the creditors ."
>
> Firstly, I did not authorise the Company. Mr Botting, acting on the instruction of Mr Adamson, arranged for the payments to be made to me in place of salary payments. It was Mr Adamson's position, that contrary to your assertion, this was in the "best interests of the Company". Mr Adamson explained that in not paying salary the Company would save the P.A.Y.E and N.I.
>
> I cannot make my position any clearer.
>
> In the event your client intends to proceed with this matter, I confirm that I intend to rely upon this and all previous correspondence, in support of my claim for costs.'

64. By letter dated 3 March 2023, Ms Smith replied as follows:

> 'We refer to the above matter and write in response to your letter dated 10 February 2023.
>
> Our client has fully particularised its claim against you for the payments you received prior to the Company going into administration in the sum of £101,000 (Payments).
>
> You state that you attended meetings with Robert Adamson and Heather Bamforth, both [formerly] of Armstrong Watson and Richard Botting. You state that you were advised by Mr Adamson at those meetings to make the Payments.
>
> Given that you rely on those conversations at those meetings and you have referred to contemporaneous notes [taken] by Richard Botting it is for you to provide copies of the notes.
>
> Please also confirm the dates of the meeting [sic] and we will ask Armstrong Watson to check their files accordingly.
>
> In our letter dated 9 February 2023 we explained that we now act for Manolete in relation to this matter…

> In the circumstances we no longer act for the Administrator in connection with the Claims and our letter dated 21 October 2022 can be disregarded.
>
> We look forward to receiving the following from you within 14 days:
>
> . The contemporaneous notes of Richard Botting, and
>
> . Confirmation of the dates of the meetings to which you refer.
>
> In the alternative you can make payment of the sum of £101,000…
>
> We look forward to hearing from you.'

65. By letter of reply dated 15 March 2023, the Respondent noted the unconventional withdrawal of a letter before claim for one client when writing on behalf of another client and again alleged that Ms Jo Smith was in a position of conflict. He also expressed concerns (a) that no evidence had been provided with the first letter before claim contrary to the practice direction (b) that copies of the Company's bank statements, which by his letter of 17 November 2022 he had stated would confirm that he received no salary during the period April to December 2019, had not been provided and (c) that no copies of Mr Adamson's and Ms Bamforth's notes of their meetings with the Respondent and Mr Botting had been provided.

66. The Respondent went on by his letter of 15 March 2023:

> 'I am more than content to provide you with details of the meetings with Mr Adamson and Ms Bamforth. In order to assist I should be grateful if you would provide copies of Messrs Armstrong Watson's invoices with the narratives confirming the dates, which will assist my investigation.
>
> Furthermore, I should be grateful to receive details of the access to the One Legal server.'

67. By letter dated 28 April 2023, Ms Smith responded on behalf of the Applicant. The letter did not provide any of the documentation requested by the Respondent or access to the Company's server. Insofar as material, the letter read as follows:

> 'You state that you attended meetings with Robert Adamson and Heather Bamforth, both [formerly] of Armstrong Watson and Richard Botting. You state that you were advised by Mr Adamson at those meetings to make the Payments.
>
> Given that you rely on those conversations at those meetings and you have referred to contemporaneous notes taken by Richard Botting it is for you to provide copies of the notes.

> Please also confirm the dates of the meeting and we will ask Armstrong Watson to check their files accordingly.
>
> In our letter dated 9 February 2023, we explained that we now act for Manolete in relation to this matter. …
>
> We have not acted for Manolete and the Administrator at the same time in relation to the Claims against you and therefore no conflict has arisen…
>
> You have requested copies of invoices to assist you. We do not consider that any invoices raised by the Administrator will provide the dates of the meetings, but we will ask the Administrator to confirm…
>
> We believe that the Administrator no longer has access to the server of the Company, but we will confirm that to you.
>
> In your letter dated 17 November 2022 you did not request copies of the bank statement or the notes of the meetings – you simply made reference to them. If you require copies of the bank statements these can be provided.
>
> In our letter dated 3 March we asked you to provide the following:
>
> . The contemporaneous notes of Richard Botting and
>
> . Confirmation of the dates of the meetings to which you refer.
>
> You have failed to do so. You are relying on the notes of the meeting in support of your position and as such it is your responsibility to provide the notes….
>
> ..
>
> In the event that the documentation referred to above is not received within 7 days we will advise our client passed the papers to Counsel for proceedings to be drafted.'

68. By letter dated 12 May 2023, the Respondent again pressed for relevant documents to be provided, including copies of the meeting notes made by Mr Adamson. The letter also reminded Ms Smith that he had requested access to the One Legal server, to assist him in his search for relevant meeting dates and other information, and that she had initially responded 'we believe that the Administrator no longer has access to the server of the Company, but we will confirm', yet had not gone on to provide any such confirmation. The letter ended by stating that the Respondent did not propose to litigate the matter any further in correspondence and stated that should the Applicant wish to issue proceedings, all correspondence and the failings to comply with CPR would be brought to the attention of the court.

69. On 31 May 2023 the Respondent attended a meeting at AW to discuss a potential claim against the SRA. This meeting was attended by the Respondent, Ms Smith, Mr Kienlen and Ann Probert of AW.

70. There then appears to have been a period of silence in correspondence on the part of Ms Smith's firm, then Knights solicitors. That silence was broken by letter from Ms Smith to the Respondent dated 25 September 2023, enclosing draft particulars of claim together with documents described as 'Exhibit PO1' and 'Exhibit PO2'. The draft particulars of claim (relating to the Payments) were based on a range of claims, including alleged breaches of directors' duties, alleged breaches of the CVA, s 238 and s 239, and unlawful return of capital under CA 2006. Exhibit PO1 comprised simply the CVA proposal with its various appendices. Exhibit PO2 comprised simply the assignment agreement between the Company, Mr Kienlen and Manolete. None of the documents flagged by the Respondent in earlier correspondence were provided. The letter warned that unless a satisfactory offer of settlement was received within 14 days, proceedings would be issued.

71. By letter dated 26 September 2023, the Respondent replied, complaining of the lack of disclosure of documents previously requested. The letter provided inter alia as follows (with emphasis added):

> 'I also draw your attention to the following [going on to quote from Ms Smith's earlier correspondence]:
>
> "You have requested copies of invoices to assist you. We do not consider that any invoices raised by the Administrator will provide the dates of the meetings, but we will ask the Administrator to confirm".
>
> No confirmation was provided.
>
> You further wrote-
>
> "We believe that the Administrator no longer has access to the server of the Company, but we will confirm that to you".
>
> No confirmation was ever received.
>
> *You have previously requested a copy of Mr Botting's contemporaneous note.*
>
> *I have now had a meeting with Mr Botting who handed me a copy of his contemporaneous note which I now serve.*
>
> *I draw [your] attention to Trevor- paid instead of payroll. This I am informed was written in respect of the discussion of how I received repayment of my directors loan.*
>
> This contemporaneous note taken at a meeting with Mr Adamson and recorded Mr Adamson's instruction.

> *In addition, you will be aware that on a number of occasions I have requested copies of Mr Adamson's notes of the many meetings. No such notes have ever been served.*
>
> *I have now spoken to Heather Bamforth who always accompanied Robert Adamson. She has confirmed to me that notes were taken at every meeting.*
>
> *I do not intend to repeat the failure to comply with CPR and the disclosure provisions. At no time has your client provided disclosure of the documents that they seek to rely upon*. On the contrary, I have requested on numerous occasions, copies of the payroll for each of the months which your client alleges a fraudulent payment was made to me.
>
> The requests remain unanswered…'

72. Enclosed with the letter of 26 September 2023 was a copy of Mr Botting's attendance note of the meeting of 20 December 2018.

73. I was not taken to any response to the Respondent's letter of 26 September 2023 in the bundle.

74. Behind the scenes, however, it would appear that AW was reviewing its files. AW's detailed WIP summary contains the following entries logged by Ms Ann Probert, senior manager for AW:

> (i) 28/9/2023: 'Checking files for evidence docs re Trevor Howarth claims'
>
> (ii) 4/10/2023: 'One Legal – copies of Rob's notes from various meetings. Jo.smith@knightsplc.com. Notes to Jo Smith'.

75. In the event, following a pause of several months and a change of solicitors on the Applicant's part, the current proceedings were issued by way of an Insolvency Act application notice on 30 January 2024, based simply on sections 238 and 239 IA 1986. By this stage the Applicant had changed solicitors, moving from Knights to Schofield Sweeney. Ms Jo Smith moved to Schofield Sweeney as well and continues to act for the Applicant.

76. Whilst the run of correspondence included in the bundles is not complete, it is clear that the Respondent continued to press thereafter for access to contemporary notes, narrative and records.

77. In April 2024, the Respondent issued a strike out application on the grounds that the claim was unfair and an abuse of process, contending that it was not possible for him to have a fair trial given the absence of and inability to cross-examine Mr Adamson, the lack of access to the Company's server, the absence of contemporary notes, narrative and records, the procedure engaged by the Applicant in pursuing the claim (which avoided formal disclosure); and the substantial delay in bringing the

proceedings. The Respondent was briefly represented by Counsel for the purposes of the strike out application.

78. Pending the hearing of his strike out application, the Respondent continued to press for disclosure of documents. His requests included a request by email dated 24 May 2024 to Ms Jo Smith (by then of Schofield Sweeney). That email, together with the response to it dated 28 May 2024, do not appear to be included in the bundle. They are however referred to in a further letter dated 31 May 2024 from the Respondent to Ms Smith, the material parts of which provide as follows (with emphasis added):

> 'I refer to my email dated 24 May 2024 timed 1:32pm in which I set out my further request for disclosure. I also refer to your letter in response dated 28 May 2024.
>
> It is clear that you are conflating two distinct separate issues. It is your suggestion that I await your client serving the evidence in response to then see if the disclosure requested is provided.
>
> You are aware from the correspondence that has passed between us over the years since your first Letter of Claim, which I was later instructed by you to disregard, that I have been requesting disclosure, and the requests have simply been ignored.
>
> It is therefore unrealistic to await as you suggest, to then find that disclosure is not provided, and an application is required at that time.
>
> In the circumstances I should be grateful to receive disclosure within the next 7 days of the following;
>
> 1. Copies of all documents/information that Michael Christian Kienlen refers to in paragraph 3 of his witness statement dated 24 January 2024, that was provided to him by your firm.
>
> *2. Copies of all meeting notes of Robert Adamson and Heather Bamforth including text messages throughout the period 10 August 2018 until the death of Robert Adamson in respect of One Legal and/or Trevor Howarth*.
>
> 3. Copies of the Armstrong Watson invoice along with the narrative which Robert Adamson stated he had written off in the sum of £35,000.
>
> 4. Copies of the One Legal Armstrong Watson Client Account Ledger.
>
> *5. A copy of the Teams video and meeting notes of Robert Adamson and Ms Smith of the meeting dated 23 June 2021, and*

> 6. A copy of the payroll records of One Legal in respect of Trevor Howarth.'

79. Ms Smith responded by letter dated 2 July 2024. In so far as material, her responses were as follows (with emphasis added):

> '1. In his witness statement at paragraph 3 Mr Kienlen states "My knowledge of the matters to which I depose is derived either from my own knowledge gained during my conduct of the Company's affairs as one of the joint administrators, my consideration of the books and records of the Company, and publicly available information in relation to the Company, or from information supplied to me by my current solicitors, Schofield Sweeney (who are also instructed by the Claimant) or my former solicitors Knights Professional Services Limited ("Knights") (who were also instructed by the Claimant), or from the Claimant. Accordingly, I am able to confirm that the contents of this Witness Statement are true to the best of my knowledge, information and belief." Information supplied to Mr Kienlen by this firm, Knights or Keebles is covered by legal privilege and as such we are unable to provide that.
>
> *2. You request copies of all meeting notes of Robert Adamson and Heather Bamforth. This request is too wide. We are prepared to use our best endeavours to obtain copies of any notes taken by Heather Bamforth and Robert Adamson in the meetings held on 11 and 20 December 2018 which are in the possession of the Administrator, by requesting the Administrator to search for and provide copies of the same. These are the meetings referred to in the evidence. We can confirm that the Administrator does not have access to the text messages sent by Robert Adamson*.
>
> 3. We confirm that we will request and provide copies of the invoices raised by Armstrong Watson to the Company and confirmation of any time which was written off.
>
> 4. We confirm that we will request and provide a copy of the One Legal client account ledger from Armstrong Watson.
>
> *5. The MS teams meeting on 23 June 2021 was not recorded. The meeting notes taken by the writer are covered by legal privilege and therefore we are unable to disclose those*.
>
> 6. We confirm that we will request and provide copies of the payroll records of One Legal relating to you which are in the possession of the Administrator'.

80. By letter dated 2 July 2024, the Respondent replied inter alia as follows (with emphasis added):

> '*2. It is not accepted that the request is too wide. It can be seen from my witness statement the first meeting with Robert Adamson was 15 August 2018. The second meeting being 21 August 2018. There were numerous meetings in which Robert Adamson provided advice and which that advice was acted upon without question. It is therefore important, that in order to participate in a fair trial, I can demonstrate the advice being provided throughout the period, not simply restricted to two meetings. Armstrong Watson will have time records of those meetings, which they used to bill the attendances. They therefore must have the meeting notes to support such time records….*
>
> *I therefore should be grateful if you would review your position on this matter and confirm that [ALL] meeting notes will be provided*.
>
> 3. To be clear, I request a copy of the invoice in the sum of £35,000 along with the narrative which Robert Adamson stated he had written off, in addition to all other invoices with narratives.
>
> 4. No comment
>
> *5. I accept that the writer claims legal privilege on the notes taken. However, my request is for the meeting notes of Robert Adamson taken during my interview on the Teams Call. There is no privilege that can be attached to those*.
>
> 6. No comment.
>
> 7. In addition, I should be grateful for a copy of the meeting notes of Robert Adamson of the meeting that took place in the offices of Andrew Tinkler in Carlisle in around October 2021. Present at that meeting was Andrew Tinkler, Robert Adamson and myself. Robert Adamson made notes of the meeting in my presence. I have been reminded of this meeting by Andrew Tinkler, in which [at] no point when discussing One Legal, and the events prior and post CVA relating to Mr Tinkler investments, and the closure of One Legal, did Robert Adamson raise any issue with the directors loan….
>
> The requests I have made for disclosure are proportionate and are all documents within the control of Armstrong Watson. I therefore look forward to receiving full disclosure.

81. By letter dated 17 July 2024, Ms Smith replied into alia as follows (with emphasis added):

> '*2. Our client's position is unchanged. This request is too wide. We are prepared to use our best endeavours to obtain copies of any notes taken by Heather Bamforth and Robert Adamson in the meetings held on 11 and 20 December 2018 which are in the possession of the Administrator, by requesting the Administrator to search for and provide copies of the same. These are the meetings referred to in the evidence.*
>
> 3. We have already confirmed that we will request and provide copies of the invoices raised by Armstrong Watson to the Company and confirmation of any time which was written off. We will ask Armstrong Watson to provide copies of <u>all</u> invoices.
>
> 4. No response required.
>
> *5. We confirm that we will request that Armstrong Watson search for and provide copies of the notes of the MS teams meeting on 23 June 2021*.
>
> 6. No response required, and
>
> 7. We confirm that we will request that Armstrong Watson search for and provide copies of the notes of the meeting held in or around October 2021 in Carlisle'.

82. Some, but not all of the documentation which Ms Smith had agreed by her letter dated 17 July 2024 to provide was thereafter provided under cover of a letter of 31 July 2024. The letter of 31 July 2024 is not included in the bundle but is referenced in later correspondence. The documents provided under cover of the letter of 31 July 2024 included, at pages 50-53 of a paginated bundle enclosed with that letter, the handwritten notes of Mr Adamson relating to the meeting on 23 June 2021.

83. By letter to Ms Smith dated 5 August 2024, the Respondent acknowledged receipt of the letter of 31 July 2024 and asked:

> 'For the avoidance of doubt, can your client confirm that throughout the entire period from the date of the first meeting 15 August 2018, throughout all the various meetings thereafter, these are the only notes of Mr Adamson.'

84. By letter dated 12 August 2024, Ms Smith responded:

> 'It is not the case that the notes at pages 50-53 are the only notes. As stated in paragraph 26 of the second witness statement of Michael Kienlen we asked for a search to be undertaken for any notes in relation to the meeting dates which are referred to in your evidence, namely 11 December 2018, 20

> December 2018, 23 June 2021, and October 2021. The notes at pages 50-53 are the only notes for those specific dates.'

85. By letter dated 21 August 2024, the Respondent (inter alia) wrote:

> 'I am grateful for your confirmation that the notes disclosed of Mr Adamson, are not the only notes. I respectfully remind you of your duty under CPR 31.6 and I have previously set out, and repeat, the notes I require disclosure ….
>
> In the event, having confirmed that you have located "other notes of Mr Adamson" that your client still refuses to disclose the same, I will invite the Court to draw an adverse inference that those documents must undermine your client's case. Hence the refusal to provide disclosure of the same.
>
> In addition, your client's failure to comply with its disclosure obligations under CPR will be drawn to the attention of the court.'

86. By email dated 27 August 2024 (again, not included in the bundle but referred to in other correspondence), Ms Smith confirmed that she was taking instructions.

87. By a chasing letter dated 7 October 2024, the Respondent reminded Ms Smith of the foregoing exchange and asked if she would provide the disclosure sought by his letter of 21 August 2024.

88. By letter dated 22 October 2024, Ms Smith enclosed some estate account ledgers from Armstrong Watson in relation to the CVA and administration of the Company. The letter also confirmed that Mr Kienlen was prepared to grant the Respondent access to view the Company's (hard copy) books and records, which were said to be located in a storage unit, but only for a fee, which Ms Smith estimated would be in the region of £500. The letter inter alia continued:

> '3. You refer to CPR 31.6 which concern standard disclosure. For the avoidance of doubt, the Court has not ordered standard disclosure under CPR 31.6 in this case. Instead, and as you are fully aware, the Court's Order dated 24 May 2024 provided for the parties to exhibit to their witness evidence any documents upon which they intend to rely.
>
> 4. Your request for documents set out at number paragraphs 1 to 4 of your letter is plainly too wide and impermissible… Our client has complied with its duty of disclosure under CPR 31.14 by providing copies of documents in its possession or control which are referred to in its witness evidence. Our client is concerned that your piecemeal request for disclosure are unnecessarily escalating costs and amount to nothing more than a fishing expedition.

> 5. As stated in our letter dated 12 August 2024, our client has provided you with copies of the notes of Mr Adamson in respect of the four meeting dates referred to in your evidence. The "adverse inference" you see you will be inviting the Court to draw is not accepted…'

89. After several chasing letters, some further documents, including invoices and time records (requested by the Respondent inter alia to chart the timeline of given meetings attended and work undertaken by Mr Adamson in relation to the CVA and subsequent administration) were thereafter provided under cover of a letter from Ms Smith dated 21 January 2025. The documents provided did not include any further meeting notes of Mr Adamson or Ms Bamforth.

90. At a hearing on 2 February 2025, Deputy ICCJ Schaffer dismissed the Respondent's strike out application but granted him permission to bring an 'additional claim' against AW within these proceedings. Pursuant to that permission, the Respondent served an additional claim on AW on 17 February 2025.

91. By application dated 17 March 2025, AW challenged the order of Deputy ICCJ Schaffer dated 2 February 2025 order. By order dated 7 May 2025, Deputy ICCJ Passfield set aside the parts of the 2 February Order permitting the Respondent to bring an additional claim against AW in these proceedings and directed that the additional claim should thereafter continue as separate proceedings under CPR 7 and be transferred to the business list within the Chancery Division ('the Part 7 claim').

92. The SRA investigation into the Transferred Funds culminated in the Respondent receiving notice from the SRA on 19 February 2025 that he is disqualified from working in the legal profession. The reason for his disqualification was a failure to pay legal aid disbursements of c.£55,000 from the Transferred Funds. The Respondent told the court that as sole breadwinner for his family, this development has had devastating consequences for him.

93. The Part 7 claim remains pending in another court. The issues arising in that claim are not before me.

Legal Principles: Effect of approval of a CVA

94. Section 5(2) IA 1986 provides that:

> 'Effect of approval
>
> (2) The voluntary arrangement-
>
> (a) takes effect as if made by the company at the time the creditors decided to approve the voluntary arrangement, and
>
> (b) binds every person who in accordance with the rules –
>
> (i) was entitled to vote in the qualifying decision procedure by which the creditors' decision to approve voluntary arrangement was made, or

> (ii) would have been so entitled if he had had notice of it,
>
> as if he were a party to the voluntary arrangement'.

95. The CVA operates as a statutory contract: Wright v Prudential Assurance Co Ltd [2018] EWHC 402 (Ch) at [20]. Ordinary principles of interpretation applying to contracts apply also to the interpretation of a CVA: Heis v Financial Services Compensation Scheme Ltd 2018 WL 02766887.

96. A summary of the general principles of interpretation applying to contracts is helpfully set out in the case of Arnold v Britton [2015] AC 1619 at [15]:

> 'When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"…. And it does so by focusing on the meaning of the relevant words… in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the paragraph, (ii) any other relevant provisions of the [contract], (iii) the overall purpose of the paragraph and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial commonsense, but (vi) disregarding subjective evidence of any party's intentions…' .

97. A CVA may provide for different treatment of different creditors or classes of creditors. A CVA that does so is not for that reason alone outside the jurisdictional scope of s.1(1) IA 1986 or necessarily unfairly prejudicial: Lazari Properties 2 Ltd and Ors v New Look Retailers Ltd and Ors [2022] 1 BCLC 557 per Zacaroli J (as he then was) at [156]. The New Look Retailers case, for example, involved at least three separate deals with different groups of creditors and yet withstood a jurisdictional challenge, a material irregularity challenge and an unfair prejudice challenge (loc cit at [66], [157 and [330]).

Section 238: Transactions at an undervalue

98. Section 238 provides as follows:

> '(1) this section applies in the case of a company where-
>
> (a) the company enters administration, or
>
> (b) the company goes into liquidation,
>
> and "office-holder" means the administrator or the liquidator, as the case may be.

> (2) Where the company has at a relevant time (defined in section 240) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section.
>
> (3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.
>
> (4) For the purposes of this section and section 241, a company enters into a transaction with a person at an undervalue if-
>
> (a) the company makes a gift that person or otherwise enters into a transaction with that person on terms that provide for the company to provide no consideration, or
>
> (b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.
>
> (5) The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied –
>
> (a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and
>
> (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company'.

Section 239: Preferences

99. Section 239 IA 1986 provides:

> '(1) This section applies as does section 238.
>
> (2) Where the company has at a relevant time (defined in the next section) given a preference to any person, the office-holder may apply to the court for an order under this section.
>
> (3) Subject as follows, the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference.
>
> (4) For the purposes of this section and section 241, a company gives a preference to a person if –
>
> (a) that person is one of the company's creditors …

> (b) the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.
>
> (5) The court shall not make an order under this section in respect of a preference given to any person unless the company which gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (4)(b).
>
> (6) A company which has given a preference to a person connected with the company (otherwise than by reason only of being its employee) at the time the preference was given is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (5).
>
> (7) The fact that something has been done in pursuance of the order of a court does not, without more, prevents the doing or suffering of that thing from constituting the giving of a preference'.

100. The meaning of 'connected person' is governed by s. 249. It includes a director of the company.

101. It will be noted that section 239 requires *a preference in fact* (s.239(4)(b)) as well as a desire to prefer (s. 239(5)), although a desire to prefer is rebuttably presumed in certain cases (s.239(6)).

102. In Re M C Bacon Ltd [1990] BCC 78 at 87, Millett J confirmed that, unlike intention, 'desire' is subjective. As he put it:

> 'Intention is objective, desire is subjective. A man can choose the lesser of two evils without desiring either…. A man is not to be taken as desiring all the necessary consequences of his actions… It will still be possible to provide assistance to a company in financial difficulties provided that the company is actuated only by proper commercial considerations….'

Discretion

103. Even where the court concludes that the threshold requirements of ss238 and/or 239 IA 1986 are made out, its power to grant relief is discretionary. In appropriate cases the court may decline to grant any relief: In re Paramount Airways Ltd [1993] Ch 223.

Witness Evidence: Approach

104. The court's approach to assessment of witness evidence has been the subject of numerous explanations and comments in the authorities. For present purposes, I will

employ the following summary, taken from the case of Reynolds v Stanbury [2021] EWHC 2506 at [10]-[13]:

> '10. In Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm), Leggatt J opined (i) (at [18]) that memory is especially unreliable when it comes to recalling past beliefs, which are revised to make them more consistent with our present beliefs (ii) (at [19]) that the process of civil litigation itself subject the memories of witnesses to powerful biases because witnesses often have a stake in a particular version of events; and (iii) (at [20]) that the process of preparing for trial can of itself interfere with memory, the effect of the process of preparing being to establish in the mind of the witness the matters recorded in his or her own statement and other material and to cause the witness's memory of events to be based increasingly on this material rather than on the original experience of the events.
>
> 11. These observations caused Leggatt J to conclude in Gestmin (at [22]) that:
>
> "… the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose - though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of the witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".
>
> 12. The Court of Appeal made related observations in the case of Simetra Global Assets Ltd v Ikon Finance Ltd [2019] 4 WLR 112. At [48] Males LJ said:
>
> "[48] In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see.

> Indeed, it has become a commonplace of judgements in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour when giving evidence."
>
> 13. I pause briefly to note that the observations of both Leggatt J and Males LJ arose in the context of commercial cases. In Martin v Kogan [202] FSR 3, the Court of Appeal again addressed the issue of witness evidence. At [88] Floyd LJ said this:
>
> "[48] Gestmin is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed.. But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental shortcuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence."

105. I remind myself of the guidance given by Arden LJ in Re Mumtaz Properties Ltd [2011] EWCA Civ 610, where she said (with emphasis added):

> '14. In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, *and that the party using oral evidence is responsible for its nonproduction*, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.'

106. I also remind myself that the absence of documentary evidence does not necessarily lead to a default position of liability: In re Wolverton Investments Ltd (unrep 18 May 2015), Chief Registrar Baister at para 59-60, citing Re Idessa UK Ltd [2012] 1 BCLC 80 at paras 24-28. The court must look at the facts quite closely and in the round.

The Evidence

107. For the purposes of the trial I have read and considered (i) the first, second and third witness statements of Mr Kienlen dated respectively 24 January 2024, 31 July 2024 and 20 May 2025; (ii) the first second and third witness statements of the Respondent dated 19 April 2024, 17 February 2025 and 24 April 2025; and (iii) the first and second witness statements of the Company's CFO, Mr Richard Botting, dated 29 March 2024 and 24 April 2025, together with their respective exhibits. I have also read the other documents included in the agreed trial bundles, including the first and second witness statements of Ms Harriet Hill of RPC, the solicitors now acting for AW in connection with a Part 7 claim which the Respondent is pursuing against AW, dated 17 March and 28 April 2025, to which reference will be made where appropriate. In addition, I have read and considered the documents in a number of supplemental bundles, to which no objection was taken.

108. Ms Bamforth did not file evidence. The Applicant did not call her as a witness.

109. I heard oral evidence from Mr Kienlen, the Respondent and Mr Botting.

Mr Kienlen

110. Very shortly before trial, on the Applicant's application, Mr Kienlen was granted permission to give his oral evidence remotely from Greece. This proved to be a mistaken indulgence, as Mr Kienlen then treated his time in cross-examination as an unwanted interruption to a family vacation, expressing impatience at the time that the cross-examination was taking and stating that he had children to look after. This was an unprofessional approach for Mr Kienlen, as an officer of the court and as the Applicant's only witness, to adopt when giving evidence at trial.

111. In the event, from Mr Kienlen's responses in cross-examination it was clear that he knew very little of any probative value about the issues arising in this case. He had not attended any of Mr Adamson's meetings with the Company during the run-up to its entry into CVA or at any time during the course of the CVA itself. He had no knowledge of when and where such meetings took place or what was discussed at the same. He had nothing to do with the CVA and was a joint supervisor in name only. He had nothing to do with the administration that followed, for the first 18 months of that administration up to Mr Adamson's death in June 2022.

112. He had taken few if any steps to investigate matters properly. He confirmed in cross examination that he had not discussed the Payments with Mr Adamson at any time prior to Mr Adamson's death. He said that he 'could not comment' on why Mr Adamson had not taken any action in relation to the Payments.

113. He had met the Respondent once, for 15 minutes, at the Respondent's request and had never met Mr Botting, the Company's CFO. I was taken to no evidence to suggest that he had attempted to interview Mr Botting or the Respondent's co-director, Mr Jason Lartey, or that he had ever sought information regarding the Payments from Ms Bamforth, formerly of AW, who had attended many of the meeting which Mr Adamson had with the Company in the run up to its entry into CVA and during the CVA itself. In the absence of any such evidence I consider it legitimate to conclude that he had not.

114. Notwithstanding the Respondent's repeated requests for copies of the attendance notes typed by Mr Adamson and his assistant Ms Heather Bamforth on their laptops during the numerous meeting which they had attended with the Respondent and Mr Botting, Mr Kienlen had not exhibited any of these typed notes to his witness statements. He stated that he had been 'unable to find' Mr Adamson's notes and that there were not any meeting notes at his offices: see [74] above. He had not taken any steps to arrange a download of any relevant notes stored on the laptops used by Mr Adamson and Ms Bamforth during their meetings with the Respondent. When asked in cross examination whether there had been such a download, he responded, 'not so far as I am aware'. The only material file note produced by Mr Kienlen was Mr Adamson's handwritten note of the MS Teams call between Mr Adamson, Ms Jo Smith (then acting as AW's solicitor) and the Respondent on 23 June 2021. This was exhibited to Mr Kienlen's second witness statement, following the Respondent's specific requests for the same: see [78] above.

115. Mr Kienlen's written evidence contained demonstrable inaccuracies. At paragraph 14 of his second statement, for example, he stated that the payments made to the Respondent between April and December 2019 'were not equivalent to his salary' when, averaged out on a monthly basis and net of PAYE/NIC, they plainly were.

116. By his second and third witness statements, Mr Kienlen wrongly stated that the Respondent had continued to draw a salary over the period April to December 2019 whilst also repaying his loan account. This was a particularly troubling inaccuracy, given that (i) by the time of his second witness statement, Mr Kienlen had reviewed an email dated 5 February 2020 from Studholme Bell (the payroll providers) ('SB') to Ms Bamforth (formerly of AW) attaching a P45 which SB had prepared for the Respondent for the period April 2019 to December 2019 confirming the salary received to be *nil* (ii) AW had by letter dated 24 March 2020 to the Respondent (reviewed by Mr Kienlen before it was sent out) confirmed that P45 position (ie that no salary had been received over the relevant period) without qualification and that (iii) by the time of Mr Kienlen's *third* witness statement, Ms Hill of RPC, AW's own solicitors in the Part 7 claim brought by the Respondent against AW, had already filed a witness statement on behalf of AW in those proceedings confirming that the Respondent had *not* drawn a salary over the relevant period. Yet Mr Kienlen made no attempt in chief to correct his second and third witness statements in this respect. He remained defiant and entirely unapologetic on the issue throughout his oral testimony.

117. Mr Kienlen could not confirm the provenance of a number of documents exhibited to his own witness statements, including inaccurate documents relating to salaries and PAYE paid which, on the evidence as a whole, must have been put together by his own office or by his solicitors; they certainly did not form part of the Company's books and records. At paragraph 8 of his third witness statement, for example, he referred to 'monthly payroll summaries for the period April 2019 to November 2019', which he stated that he had been 'provided with', without stating who provided them or who had prepared them. This was potentially misleading, as in the same paragraph he referred (with emphasis added) to '*the Company's* payroll summaries' which, when read in context, could be taken to imply that the 'payroll summaries' which he claimed to have been 'provided with', and which were exhibited to his second witness statement, formed part of the Company' *own* books and records, when it was plain from the evidence as a whole that they did not. This appears to have been an attempt

to 'bolster' a false narrative that the Respondent had continued to receive a salary over the period April to December 2019, when he had not.

118. Mr Kienlen's written evidence also contained assertions of purported fact without reference to any supporting documentation. At paragraph 27 of his first witness statement, for example, Mr Kienlen asserted that as at 25 April 2019, the Respondent was a creditor of the Company pursuant to his director's loan account in the sum of £89,159.68, without stating the source of that figure (which differed from the figure of £97,445 given in the statement of affairs), without exhibiting to his statement any documents to vouch or explain the lower figure and without any reference to or acknowledgement of the contractual interest rate of 8% payable on the debt owed by the Company to the Respondent (evidenced by the Company's statutory accounts), of which he later admitted in cross examination that he had been unaware.

119. Mr Kienlen's written evidence also contained expressions of opinion and comment which, whilst ultimately of negligible if any probative value, again appeared designed to 'bolster' the Applicant's case. At paragraph 13 of his second statement, for example, he stated that he '[did] not accept that Mr Adamson, who was an experienced insolvency practitioner and who eventually became the supervisor of the CVA, would have advised the Respondent or the Company at any stage to take any steps which contradicted statements made in the CVA proposal to the creditors.'

120. Mr Kienlen's written evidence also included his subjective views on Mr Botting's notes of the meeting which the Respondent and Mr Botting attended on 20 December 2018 with Mr Adamson and Ms Bamforth; a meeting which Mr Kienlen did not attend and knew nothing about. He went on to claim in oral testimony that he did not think Mr Botting's notes of the meeting on 20 December 2019 were contemporaneous, without offering any explanation or evidential basis for that opinion. Mr Botting's evidence (which I accept) was that the notes were contemporaneous. Even the Applicant confirmed by Counsel that it was no part of their case that the attendance note was not contemporaneous.

121. By his second witness statement, Mr Kienlen introduced a 'spin' on an email exchange between Ms Bamforth and Studholme Bell, the payroll providers, in early 2020. Having summarised that email exchange, Mr Kienlen went on to comment: 'It is clear that HB [Ms Bamforth] understood that the Respondent had been receiving salary. It should be noted that HB was present at the meeting on 20 December 2018.' As previously observed, there is no evidence that Mr Kienlen ever discussed the Payments with Ms Bamforth before preparing his evidence and I have considered it legitimate to conclude that he did not. The email exchange which Mr Kienlen had thought fit to summarise and then comment upon did not, of itself, come anywhere close to making 'clear' what Ms Bamforth's understanding was on the issue whether the Respondent was receiving a salary over the relevant period. This was again a plain attempt to 'boost' the Applicant's case without justification.

122. Mr Kienlen also asserted (at paragraph 34 of his second witness statement) that the notes of the meeting held on 23 June 2021 and attended by Mr Adamson, Ms Jo Smith, then acting as AW's solicitor and the Respondent (which, again, Mr Kienlen did not attend) (with emphasis added) '*show that* the Respondent was asked *by Mr Adamson* why he came off the PAYE in April and started making payments to reduce

his loan account'. Mr Kienlen then went on to comment: 'The rationale behind that decision does not therefore appear to have been known to Mr Adamson at the time'; when in fact from the Respondent's evidence (which in this regard I accept), the relevant question was asked at the meeting of 23 June 2021 not by Mr Adamson but by *Ms Jo Smith;* who now acts as solicitor for the Applicant in these proceedings and who has refused to disclose her own attendance notes of the meeting of 23 June 2021 on grounds of 'privilege' – see [79] above.

123. Overall, Mr Kienlen's written evidence was not prepared with the care and candour required of formal evidence bearing a statement of truth. Whilst Mr Kienlen made more of an effort in oral testimony to answer questions put to him honestly and to the best of his recollection, it was clear from his testimony overall that he knew little of any probative value about the case and that he lacked objectivity. When asked why he had made his third witness statement, he said that he had been 'told to'. Having considered the evidence as a whole, I have concluded that save where admitted or supported by context or contemporaneous documentation, his evidence should be treated with a degree of caution.

The Respondent

124. The Respondent's written evidence contained timeline errors in certain respects. Paragraphs 47 and 57 of his first witness statement, for example, referred to Mr Botting's contemporaneous attendance note of the meeting of 20 December 2018 and stated that it was at that meeting that Mr Adamson (variously) 'suggested' the loan/salary swap arrangement or 'instructed' the Respondent to put it in place. This conflating of events occurred in the second witness statement too; at paragraph 17 of the second witness statement, for example, the Respondent stated that it was at the meeting in December 2018 that Mr Adamson advised him to put in place the salary/loan swap arrangement and (by paragraphs 18 and 25) that Mr Adamson had 'reiterated' that advice, or 're-advised' to the same effect, at a 'post-mortem' meeting following the Company's entry into CVA. Similar conflating occurs in the third witness statement at paragraphs 5, 15-17, and 24-25.

125. The Respondent was also a little confused in his written evidence as to when the post-mortem meeting with Mr Adamson took place. In his third witness statement at paragraph 23, he said that it was on or about 29 February 2019, but 2019 was not a leap year.

126. In my judgment these timeline errors are completely understandable when considered in context. No witness has perfect recollection of all material events. Events leading up to the meeting of creditors and the course that the CVA then took were a stressful time for the Respondent and Mr Botting and there were numerous meetings with Mr Adamson.

127. The Respondent and Mr Botting have had no access to the Company's server since the spring of 2020 and so were without ready access to records (including emails) from which to chart out the timeline with greater precision. The Respondent's requests for copies of the attendance notes of Mr Adamson and Ms Bamforth had not been complied with, save to the limited extent of the belated production of Mr Adamson's hand-written note relating to the meeting on 23 June 2021.

128. These difficulties in accessing documentation relevant to the proceedings also serve to explain the difference between the Respondent's account of the meeting he had with Mr Adamson and Ms Smith on 23 June 2021 in his first witness statement and his account of that meeting in his second witness statement. In the first statement he said that no questions had been raised about the salary/loan swap arrangement at that meeting. In the second he confirmed that a question had been raised.

129. As in any case, the recollection of a witness must be considered against the backdrop of available documentation. In this case the attendance note of Mr Adamson for the meeting of 23 June 2021 was only made available to the Respondent after he had prepared his first witness statement. On production of the attendance note (which was only produced at the Respondent's request and was not exhibited to Mr Kienlen's first, but rather his second, witness statement), it was clear that a question had been raised at that meeting regarding the fact that the Respondent had come off the PAYE payroll in April 2019 and had started receiving repayments in respect of his director's loan instead. The attendance note also recorded the Respondent's answer, which was that it was done on the advice of Mr Adamson. The Respondent's memory having been prompted by sight of that attendance note, he very properly gave a corrected account of that meeting in his second witness statement.

130. Overall, I am satisfied that the Respondent's written evidence was prepared honestly, to the best of his knowledge and recollection of material events.

131. In closing, Mr Arumugam argued that the Respondent was 'evasive' in oral testimony. I reject that contention. The Respondent was entirely transparent in his responses in cross examination. He readily accepted that he had conflated the timeline in his written evidence in certain respects and very properly corrected such errors in oral testimony. The corrections he volunteered made sense when considered in context and against the documentary evidence available.

132. The Respondent was refreshingly frank about the limits of his own knowledge and recollection on given issues. He accepted that he had no actual recollection of the meeting of 20 December 2018, for example, and that he was reliant on Mr Botting's attendance note as to what was discussed at that meeting, explaining that there had been numerous meetings. When questioned on given figures and certain accounting related points, he made clear that such questions were better addressed to Mr Botting, as the chartered accountant tasked with running the finance department of the Company, which was an entirely reasonable response in context.

133. When questioned on matters which did fall within his knowledge and recollection, however, the Respondent answered freely and fully. Whilst some of his responses were a little argumentative, this was unsurprising given the range of questions that were being put. The Respondent was questioned at length in somewhat granular detail on the terms of AW's two engagement letters with the Company, for example, in a line of questioning that at times appeared designed to establish that any advice given by Mr Adamson and/or AW was given to the Company and not to the Respondent personally; given the pendency of the Part 7 claim, the Respondent expressed understandable concerns that such questions had an alternative agenda, although Counsel maintained that this was not the case. At other points in the cross examination, it was put to the Respondent that he had taken advantage of the CVA

route to 'escape the liabilities' of the Company, that he had caused the Company to 'abuse' the CVA process to avoid Crown debts, that paragraph 3.1 of the original CVA proposal was 'pulling a fast one on HMRC', that it was '[his] fault that the CVA went off the rails', and that the loan/salary swap arrangement was variously 'a way of cheating HMRC out of taxes due', 'avoiding tax', and 'disguised salary'. He was also pressed repeatedly on whether the original plan had been to repay Mr Tinkler in full whilst leaving HMRC with 19 pence in the pound. These unheralded and aggressive lines of questioning formed no part of the s238/239 case being brought. Mr Howarth unhesitatingly denied these allegations with some feeling, pointing out that he had been taking the advice of specialist insolvency practitioners for over four months (from August 2018) prior to the Company's entry into a CVA. In my judgment it was entirely understandable in the circumstances that the Respondent felt the need to 'push back' at times. Overall, I am satisfied that he did his best in oral testimony to answer questions put to him truthfully and to the best of his knowledge and recollection. He was plainly an honest witness.

Mr Botting

134. Mr Botting and the Respondent had not worked together since 2020.

135. Again, in Mr Botting's written evidence, there was an (entirely understandable) conflating of the timeline in certain respects. My observations in relation to the Respondent's written evidence in this regard apply mutatis mutandis to that of Mr Botting.

136. Overall, I am satisfied that Mr Botting's written evidence was prepared honestly, to the best of his knowledge and recollection of material events.

137. In oral testimony, Mr Botting was an entirely straightforward witness. In closing, Mr Arumugam accepted that Mr Botting had given his evidence in a straightforward manner and that he had tried his best to assist the court. Mr Botting admitted that he had no actual recollection of what was said at the meeting on 20 December 2018 and was dependent on his notes of the meeting. He also readily accepted that the notes of themselves did not evidence definitive advice being given one way or the other on the issue of whether to put in place the salary/loan swap arrangement.

138. As with the Respondent, Mr Botting was subjected in cross examination to granular questioning regarding the terms of the engagement letters. He was also subjected to aggressive lines of questioning which formed no part of the s 238/239 case being brought. These included questions put that the Company had 'evaded' PAYE/NIC, that the salary/loan swap arrangement was 'just a tax fiddle' or a 'form of disguised remuneration'; allegations which Mr Botting firmly but patiently refuted, explaining that PAYE/NIC are payable on salary and that no salary was being drawn. Notwithstanding these unheralded attacks, Mr Botting listened keenly and politely to questions put to him and took care to answer the questions put. I have every confidence in the honesty of his testimony.

Discussion and conclusions

139. I shall deal first with the role played by Mr Adamson in the salary/loan swap arrangement.

140. On the evidence which I have heard and read, I am satisfied that at the meeting on 20 December 2018 attended by the Respondent, Mr Botting, Mr Adamson, and Ms Bamforth, Mr Adamson raised the possibility of the Respondent's director's loan being excluded from the proposed CVA and of that director's loan being repaid to the Respondent on a monthly basis at a rate consistent with the monthly salary he usually received in place of salary, as a means of saving the Company the additional PAYE and NIC liabilities which it would ordinarily have to pay on the Respondent's salary. This finding is supported by Mr Botting's note of the meeting of 20 December 2018, which I am satisfied was a contemporaneous note, written during the meeting itself, and the oral testimony of the Respondent and Mr Botting, which in this regard I accept.

141. Mr Botting gave evidence (which I accept) that he was struck by Mr Adamson's suggestion of the salary/loan swap arrangement at the time. He said that Mr Adamson had not particularly impressed him up to that point, but that when Mr Adamson suggested the salary/loan swap arrangement, he thought: 'oh you've shown some commercial nouse there'.

142. On the evidence which I have heard and read, I am further satisfied that in late February 2019, shortly after the Company's entry into the CVA, Mr Adamson positively advised the Respondent (i) to draw only £10 in salary in March 2019 to trigger a tax rebate and (ii) thereafter to put in place the salary/loan swap arrangement, in order to save the Company the sums which would otherwise be payable by way of PAYE and NIC on the Respondent's salary. I so find.

143. The Respondent's oral evidence, which in this regard I accept, was that whilst the salary/loan arrangement was raised by Mr Adamson *as a possibility* at the 20 December 2018 meeting, by the time of the 'post-mortem' meeting held in late February 2019, Mr Adamson's firm advice was that the salary/loan swap arrangement *had* to be put in place, in order to save the Company the additional PAYE/NIC which it would otherwise have to pay in respect of the Respondent's salary if he remained on the payroll. In March 2019, the Company did not have sufficient funds to make a loan repayment to the Respondent, but in April 2019 the Company was better placed. The Respondent's evidence, which I accept, is that it was 'with Mr Adamson's knowledge and [on] his advice' that the sum of £20,000 was repaid to him in April 2019 in reduction of his director's loan, in lieu of salary for March and April. Thereafter the remainder of the loan repayments were made in lieu of salary on the dates set out at [37] above.

144. Mr Botting gave supportive evidence in oral testimony, which again I accept. He said that whilst he could not recall the specific meeting in late February 2019 at which the advice was given, 'we were following his [Mr Adamson's] instructions' and 'we weren't in the habit of doing things rogue. We took the advice of an insolvency expert.'

145. On the evidence I have heard and read, I am satisfied that it was in reliance on Mr Adamson's advice that (i) the Respondent received a reduced salary payment of £10 in March 2019 and that (ii) the Respondent was taken off the payroll completely in April 2019, receiving, in place of salary, repayments of his director's loan in monthly sums which were the rough equivalent of what had been his net monthly salary (in

fact slightly less), in order to save the Company the PAYE and NIC that would otherwise have been payable on the Respondent's salary.

146. By close of play at trial, it was common ground that the Respondent came off the Company's payroll in April 2019 and thereafter did not receive a salary from the Company. In oral testimony Mr Kienlen accepted that under the terms of the CVA the Respondent was entitled to continue to draw his usual salary from February 2019 onwards and said that he had no idea why the Respondent had stopped doing so. He did accept, however, that the salary/loan swap arrangement would have saved sums otherwise payable by way of PAYE and NIC in respect of the Respondent's salary.

147. On the evidence which I have heard and read, which included tax and NIC calculations helpfully prepared by Mr Botting using tax and NIC information taken from HMRC's website for the year 2019/20, I am satisfied that the salary/loan swap arrangement saved the Company sums totalling approximately £55,000-£56,000 in PAYE/NIC that would otherwise have been payable in respect of the Respondent's salary. Whilst this is slightly less than the sum of £80,000 estimated by the Respondent, it remains a significant saving.

148. On the evidence which I have heard and read I am also satisfied that the Respondent's co-director (who was not owed any money by the Company by way of director's loan) remained on the payroll and continued to be paid his salary at all material times, as did the Company's other employees.

149. I am further satisfied that Mr Adamson was at all material times aware that the salary/loan swap arrangement had been put in place in accordance with his advice. The evidence of the Respondent and of Mr Botting, which I accept, was that they had regular meetings with Mr Adamson on a weekly/10 day basis in 2019 in which monthly management accounts, payroll, weekly cashflow forecasts and profit and loss forecasts were discussed. Mr Botting's evidence, which I accept, was that Mr Adamson would often combine these meetings with a visit to Mr Tinkler in Carlisle, as the hotel they usually met at was close to the M6.

150. Mr Botting also gave evidence, which again I accept, that the loan repayments 'would have been a separate item in the spreadsheets' that were discussed with Mr Adamson, plain for all to see; as he put it in re-examination, 'we hid nothing'. This accords with Mr Kienlen's acceptance in oral testimony that the loan repayments were readily apparent in the Company's books and records. It is also supported by the question asked at the meeting in June 2021 referred to at [48] above and [152] below. Ms Jo Smith was plainly able to identify from the Company's books and records that from April 2019 onwards, the Respondent had received repayments of his loan and had come off the payroll, as this was the premise of her question.

151. The evidence of both Mr Botting and the Respondent was that at no point during the CVA did Mr Adamson ever suggest that the Respondent should stop taking repayments of his director's loan and resume drawing his salary instead. I accept their evidence on this issue.

152. I further find that at the meeting which took place between Mr Adamson, Ms Jo Smith and the Respondent on 23 June 2021, it was Ms Jo Smith, and not Mr Adamson, who asked the Respondent why he had come off the payroll in April 2019 and had drawn

monies in repayment of his loan account instead. I accept the Respondent's evidence on this issue. I am satisfied that Mr Adamson would not have asked that question, as he already knew the answer. I am also satisfied that Mr Adamson's note of the meeting of 23 June 2021 accurately records the Respondent's explanation for having come off the payroll in April 2019 and having drawn monies in repayment of his loan account instead; namely, that it was on the advice of Mr Adamson. The Respondent's evidence, which I accept, was that Mr Adamson did not challenge the Respondent's explanation at the meeting. I would add that I was taken to no evidence to suggest that Mr Adamson challenged the Respondent's explanation at the meeting. As will be recalled, Ms Smith declined to disclose her own notes of the meeting of 23 June 2021 on grounds of privilege: see paragraph 5 of Ms Smith's letter of 2 July 2024 at [79] above. (Quite how Ms Smith's notes of that meeting could be covered in their entirety by privilege has never been explained. It should have been possible to disclose an appropriately redacted version at least, even if the notes contained comments).

153. I accept the Respondent's evidence that at no time after that meeting of 23 June 2021 prior to Mr Adamson's death in June 2022 did Mr Adamson, or anyone else from AW, or Ms Jo Smith (who was at the meeting of 23 June 2021), or anyone else from AW's solicitors, ever raise with the Respondent, in correspondence or otherwise, any questions regarding the salary/loan swap arrangement put in place in April 2019 or intimate a claim against him in respect of that arrangement. Had there been any such follow-up or intimation of a claim, whether by correspondence or otherwise, at any time after the meeting of 23 June 2021 and prior to Mr Adamson's death in June 2022, I would have been taken to evidence of it. I was taken to no such evidence.

154. Mr Botting gave evidence that he attended a zoom meeting with Mr Adamson and Ms Jo Smith in January 2022 to discuss some issues relating to the Company. His written evidence, which in this regard I accept, was that '[a] number of topics were raised by these two individuals but the repayment of Mr Howarth's loan was not one of them'.

155. I find that it was only some months after Mr Adamson's death in June 2022 that Mr Kienlen, by then sole administrator, acting by Ms Jo Smith, intimated a claim against the Respondent in respect of the Payments for the first time.

156. On behalf of the Applicant, Mr Arumugam argued that the only document relied upon by the Respondent as evidence of the advice he claimed to have received from Mr Adamson regarding the salary/loan swap arrangement was the meeting note of 20 December 2018. That is not entirely correct. The Respondent also relied upon Mr Adamson's note of the meeting of 23 June 2021.

157. The paucity of documentation produced by the Respondent must also be considered in context. The Respondent has had no access to the Company's server (including the Company's email account) for the purposes of preparing his defence to these proceedings; access to the server was terminated in the spring of 2020. The Applicant and Mr Kienlen/AW have failed properly to seek out, preserve and/or disclose numerous other documents which would have been relevant to the issue of the advice received, including (i) the meeting notes and working papers of Mr Adamson and Ms Bamforth prepared on their respective laptops during the course of the CVA and (ii) Ms Jo Smith's own notes of the meeting on 23 June 2021.

158. Mr Arumugam also argued that given the terms of the two engagement letters between the Company and AW dated 24 August 2018 and 27 September 2018 respectively, it was difficult to see how the Respondent could credibly suggest that he was relying on advice given to him in his personal capacity by AW. The clear evidence of both the Respondent and Mr Botting, however, which in this regard I accept, was that whatever the two engagement letters may have said, in reality Mr Adamson did not limit himself to advising the Company at the meetings which they attended with him, and proffered advice to the Respondent in his personal capacity as well.

159. Moreover, in the context of these proceedings, little turns on this distinction in any event. Whether the advice to put in place the salary/loan swap arrangement is seen as advice to the Company or to the Respondent and the Company, I am satisfied that Mr Adamson gave that advice in late February 2019– and that it was on his advice that the salary/loan swap arrangement was put in place.

160. By his skeleton argument Mr Arumugam also argued that any advice given by Mr Adamson in December 2018 was 'superseded' by the time that the CVA proposal was made on 25 January 2019, on the grounds that the proposal 'makes clear that R's loan was excluded from the CVA' (skeleton at [25b]).

161. This argument suffered from several challenges. The first is my finding that Mr Adamson unequivocally advised the Respondent in late February 2019, following the Company's entry into CVA, to put in place the salary/loan swap arrangement.

162. The second is that Mr Arumugam's argument rests on a narrow construction of what is meant by the 'exclusion' of the Respondent's loan from the CVA. It was clear from questions put by Mr Arumugam during the course of cross examination and from his closing submissions that he construed the reference to 'exclusion' in paragraph 15.1 of the proposal as meaning either (i) that the Respondent's director's loan would not be repaid at all (ie waiver) or (ii) that the Respondent's director's loan would not be paid until competition of the CVA (ie deferment). A third (and in my judgment correct) meaning, however, applying the general principles of interpretation summarised in Arnold v Britton at [15], against the backdrop of s.5(2) IA 1986, is that the Respondent's director's loan was to remain *unimpaired*. As made clear in the case of New Look, it is perfectly possible for a CVA to treat different classes of creditors differently. In New Look itself, for example, Category A landlords (comprising two landlords of New Look's distribution centre) were left completely unimpaired (save for minor, immaterial changes), on the ground that the directors considered the leases of the distribution centre to be critical to the Group's continued operations.

163. In the definition section at paragraph 2.1 of the CVA proposal, the term 'exclusion' is employed in a way consistent with the 'unimpaired' construction. The term 'Excluded Creditors' in that section is defined as 'an Unsecured Creditor, whose debt has arisen through their instruction by KTS and relates to professional fees for which payment has been requested from the Legal Services Commission'. Read in the context of paragraph 3.4, paragraph 8.1 and the proposal as a whole, against the backdrop of section 5(2) IA, it is clear that this provision in the definition section is identifying a class of creditors bound by the arrangement *whose debts are left unimpaired by the arrangement*.

164. Whilst I accept that the definition of 'Excluded Creditors' in the definition section at paragraph 2.1 of the proposal does not expressly include any further classes of creditors left unimpaired, as with many CVA proposals, the proposal is a far from perfect document.

165. Paragraph 28.1, for example, leaves lessors of leasehold premises which the Company continues to occupy after approval of the arrangement 'unimpaired'; it provides that all rent liabilities arising after approval of the arrangement are to be paid by the Company as and when they fall due, even though the obligation to pay rent derives from a lease or contract pre-dating the arrangement which would otherwise be caught by the full and final settlement provision contained in paragraph 12.1 of the proposal. In a perfectly drawn CVA proposal, these lessors would have formed another sub-category of 'Excluded Creditors' in the definition section. The failure to include the Respondent as a sub-category of 'Excluded Creditors' in the definition section is thus not of itself fatal to the construction of 'excluded' in paragraph 15 of the proposal as 'unimpaired'.

166. I do not see the estimated outcome statement as inconsistent with the construction of 'excluded' in paragraph 15 as 'unimpaired'. The 'CVA' column in the estimated outcome statement simply demonstrates what sums are to be paid *out of the sums paid into the arrangement*, and to whom. By note 8 to the estimated outcome statement, it is confirmed that the Respondent's director's loan was 'excluded' from the CVA, with a cross reference to paragraph 15 of the proposal. That is to say: the Respondent's director's loan was *not* to be paid out of the sums agreed to be paid into the arrangement.

167. This was a trading CVA; not all the Company's turnover (or anticipated profits) were to be paid into the CVA, simply set monthly sums, together with any net recovery in the claim brought against Ms Todner. Paragraph 8.2.6 of the proposal expressly provided that '[a]ll other assets are to be excluded from the Arrangement as they are needed for the continued operation of the Company'. Paragraph 25 of the proposal confirmed that to facilitate continued trading, the Company would require supplies of goods and services throughout the period of the arrangement. It states that '[p]ayment for such goods and services will be made from the trading receipts of the Company in the ordinary course of its continued business'. Paragraph 26 goes on to provide that the conduct of the Company's business 'remains the Director's responsibility' and that 'the Company shall be solely responsible for timely payment of all debts and liabilities incurred by the business'.

168. The fact that the Respondent's director's loan *is* included in the 'liquidation' column of the estimated outcome statement is not inconsistent with the construction of 'excluded' as used in paragraph 15 as 'unimpaired' either. The estimated outcome statement is premised on the Company immediately entering into liquidation and ceasing to trade in the event that the CVA is not approved; in that scenario, the Respondent's director's loan would have remained outstanding in full.

169. A further argument raised by Ms Hill in a statement filed on behalf of AW in the related Part 7 proceedings is that the repayment of the Respondent's director's loan account is inconsistent with the cashflow projections annexed to the proposal. Mr Botting's evidence, however, which in this regard I accept, is that the cashflow

projections in question were prepared in December 2018, ahead of the meeting on 20 December 2018 and ahead of finalisation of the proposal signed off in February 2019. He also made the point that as the loan repayments were in place of salary and were in broadly similar sums to the net salary that the Respondent would otherwise have been made over the relevant period, the salary/loan swap would not have adversely affected the cashflow forecast in any event. I would add that this is in any event a somewhat arid debate given that HMRC then insisted on modifications requiring significantly higher monthly contributions not envisaged at the time the cashflow projections were prepared.

170. Mr Arumugam also relied upon Mr Kienlen's comment at paragraph 13 of his second witness statement, that:

> 'I do not accept that Mr Adamson, who was an experienced insolvency practitioner and who eventually became the supervisor of the CVA, would have advised the Respondent or the Company at any stage to take any steps which contradicted statements made in the CVA proposal to creditors'.

171. Building on that, Mr Arumugam argued (at paragraph 25d of his skeleton) that it was 'inherently extremely unlikely that an experienced IP would have advised the Company to take steps which violated his professional obligations as supervisor of the CVA'.

172. Even putting to one side the fact that Mr Kienlen's comments at paragraph 13 of his second witness statement were little more than a bald statement of subjective opinion and of limited if any probative value, for the reasons explored above, I do not accept that the salary/loan swap arrangement which Mr Adamson advised the Respondent to put into effect did 'contradict' the CVA.

173. In my judgment, on a true construction of paragraph 15 of the proposal, applying the general principles of interpretation summarised in Arnold v Britton at [15] against the backdrop of section 5(2) IA, paragraph 15 of the proposal left the Respondent as an 'unimpaired' creditor.

174. I would add that even if I am wrong in that construction, in considering (at Mr Arumugam's invitation) 'inherent likelihoods' of what Mr Adamson would or would not have been prepared to advise or do in the context of this CVA as an experienced insolvency practitioner, the court must consider how Mr Adamson himself would have construed paragraph 15 of the proposal. (Whilst subjective intention is not to be taken into account when construing the proposal itself, it is relevant to the 'inherent likelihood exercise' which Mr Arumugam has invited this court to undertake in relation to what Mr Adamson would or would not have been prepared to advise or do in the context of this CVA as an experienced IP). Paragraph 15 of the proposal is not a standard 'template' provision. In my judgment, considered against the backdrop of the 'not included – paid instead of payroll' language employed in relation to the Respondent's director's loan at the meeting on 20 December 2018, it is in my judgment more likely than not that Mr Adamson himself considered that paragraph 15 of the proposal left the Respondent an unimpaired creditor and therefore free without breaching the terms of the arrangement to engage in a salary/loan swap in order to

save the Company PAYE and NIC. The 'not included – paid instead of payroll' reference is not consistent with either the 'waiver' or 'deferment' constructions contended for by Mr Arumugam but is consistent with 'lack of impairment'. It also makes sense of the stated purpose of the proposed exclusion referred to in paragraph 15 (with emphasis added) – 'to assist with *costs* savings to the Company'; in context the obvious 'costs' savings are the PAYE and NIC that would otherwise be payable on the Respondent's salary. This in turn feeds into the inherent likelihood of Mr Adamson advising the Respondent to put the salary/loan swap arrangement in place.

175. When considering inherent likelihoods, I also take into account the fact that no alternative explanation was put forward as to why the Respondent would suddenly stop taking monthly salary and instead receive repayments of his director's loan in sums roughly equivalent to (in fact slightly less than) his net monthly salary, if not pursuant to the advice of Mr Adamson.

176. Mr Arumugam invited the court to take account of the fact that Mr Adamson is now deceased and is unable to comment on the evidence of the Respondent and Mr Botting. I do take that into account. This is, however, something of a double-edged sword for the Applicant. Ms Bamforth attended many of the meetings in the run-up to and during the course of the CVA and was party to much of the email correspondence between AW and the Respondent/Mr Botting over that period and yet was not called as a witness by the Applicant. Even if Ms Bamforth had changed firms by the time of issue of these proceedings, it remained open to the Applicant to call her as a witness. Mr Adamson himself had ample opportunity to instigate proceedings (and to file his own evidence therein) before his unfortunate death in June 2022 and did not do so, notwithstanding being lead Supervisor throughout the CVA in 2019 and thereafter lead administrator from 2 January 2020 to June 2022, for the first 18 months of the administration. A full year elapsed after the June 2021 meeting at which the salary/loan swap arrangement was expressly raised and Mr Adamson took no steps to intimate, still less instigate, a claim. Mr Adamson's failure to take or intimate any action against the Respondent in respect of the Payments even after the June 2021 meeting is in my judgment entirely consistent with the evidence of both the Respondent and Mr Botting that the salary/loan swap arrangement was put in place on Mr Adamson's advice.

177. Mr Arumugam also relied upon Mr Kienlen's evidence to the effect that he (Mr Kienlen) had checked AW's records and could not find any record of the advice having been given. As I have already concluded, however, Mr Kienlen has failed to conduct proper investigations in this case and lacks objectivity. For reasons already given, I have concluded that his evidence must be treated with caution: see [111]-[123] above. His claims in oral testimony that he had been 'unable to find' Mr Adamson's notes and that there were not any meeting notes *at his offices* ([114] above) are particularly concerning, as are his claims in written testimony to have undertaken 'a thorough search' (Kienlen(2)[26] and [29]) and his claim that '*the notes are not in [his] possession*' (Kienlen(2) [29]), given AW's own WIP entries confirming that Ms Ann Probert of AW was able to locate and send to Ms Jo Smith in a matter of days 'copies of Rob's notes from various meetings' relating to the Company on 4 October 2023, very shortly after Ms Smith's receipt of Mr Botting's attendance note of the meeting of 20 December 2020: see [72] and [74] above. Mr Kienlen (and through him the Applicant) could have disclosed a full set of the

meeting notes taken by Mr Adamson and Ms Bamforth during the course of the CVA in AW's possession or control but declined to do so, notwithstanding the heightened importance of such notes in light of Mr Adamson's unfortunate sudden death. To adopt with gratitude a phrase employed by Arden LJ in Mumtaz, such documentation is in my judgment 'conspicuous by its absence'.

178. I turn next to consider the ss 238 and 239 claims against the backdrop of the foregoing findings and conclusions.

The s238 claim

179. The Applicant's s238 claim is premised on the Respondent being owed only £89,158.68 on his director's loan account at the point at which the salary/loan swap arrangement was put in place. It is on that basis that, of the total payments of £101,000, the Applicant alleges that payments totalling £89,158.68 are preferences contrary to s239 and that payments totalling £11,840.32 are transactions at an undervalue contrary to s238.

180. The Applicant has, however, adduced no documentary evidence in support of its contention that the sum owed to the Respondent in respect of his director's loan account at the point of entry into the salary/loan swap arrangement was £89,158.68. At paragraphs 27-28 of his first witness statement, Mr Kienlen states simply:

> '27 As at the date of the first payment on 25 April 2019 (during the period of the CVA) the Defendant was a creditor of the Company pursuant to his director's loan account, with the Company being indebted to the Defendant in the sum of £89,159.68 ("the DLA Balance").
>
> 28 The payments referred to in paragraph 25 above were caused by the Defendant instructing the Company to make the payments and which had the effect of repaying in full the amount due under his loan account. Furthermore, in receiving the Payments, and having discharged the DLA Balance in full, the Defendant was in receipt of £11,840.32 resulting in an overdrawn balance on his loan account'.

181. Mr Kienlen does not state the source of the figure of £89,159.68, which differs from the figure of £97,445 given in the statement of affairs dated 18 January 2019 prepared shortly prior to the Company's entry into CVA.

182. Mr Arumugam argued that the Respondent did not 'seriously challenge' the £89,158.68 figure. I disagree. A fundamental premise of the Respondent's defence all along has been that the Payments were loan repayments, received in place of salary. Moreover, by paragraph 61 of his first witness statement, the Respondent put the amount of the DLA Balance in issue. Whilst paragraph 61 expressly referred only to paragraph 28 of Mr Kienlen's first witness statement, read in context it is clear that the Respondent was contesting both paragraphs 27 and 28. It read:

> '61 Paragraph 28 is denied. The loan had interest applied at the same rate the investors were paid. This was arranged by Mr

> Botting. In not having access to the One Legal server, the full details of the loan cannot be produced.'

183. Mr Kienlen went on to file two further witness statements after this point but failed to exhibit to either his second or third witness statements any documents to vouch or explain the lower figure of £89,159.68. He also failed to make reference to or acknowledge the contractual interest of 8% payable on the debt owed by the Company to the Respondent, which was formally recorded in the Company's statutory accounts for the year ending 31 August 2017. In cross examination he later admitted that he was unaware that the loan carried interest at 8% per annum.

184. Mr Arumugam argued that in cross examination the Respondent had not formally 'put' to Mr Kienlen that his director's loan account stood at £97,445 (or that figure plus some interest) at the point of entry into the salary/loan swap arrangement. I accept that. The Respondent did however ask whether Mr Kienlen was aware that his director's loan carried interest at 8% per annum, to which Mr Kienlen responded that he was not. He also asked whether the figure of £11,840.32 took account of that interest, to which Mr Kienlen had responded that he couldn't say without checking. Mr Kienlen could not 'check' during the course of his oral testimony as he had adduced no documentary evidence on the issue. Further questions on the amount outstanding on the director's loan account would have been pointless in context, without reference to the underlying documentation and workings, which had not been adduced in evidence. This was not the Respondent's fault. It was on the Administrators' watch that access to the Company server was terminated. Mr Kienlen had the hard copy books and records of the Company and had not produced them.

185. Overall, I am satisfied that Mr Kienlen had a fair opportunity to adduce evidence on the sum outstanding on the director's loan account after it had been put in issue by the Respondent's first witness statement. He filed two witness statements after that point yet failed to address the issue. The fact that the Respondent did not put the point in cross-examination must be considered in that context. It is not fatal to the Respondent's case. I would add that Mr Arumugam did not put the lower figure of £89,159.68 to Mr Botting in cross-examination either, even though the Respondent had made clear in his oral testimony that Counsel should ask Mr Botting, explaining that 'that was what he hired chartered accountants for'.

186. The only documentation in evidence relating to the director's loan account supports the higher figure of £97,445 (plus ongoing interest at 8% per annum).

187. Note 15 to the Company's accounts for the year ending 31 August 2017, for example, records the sum of £88,980 as owed by the Company to directors at the balance sheet date and confirms that interest had been charged to the Company at a rate of 8% per annum on a principal amount of £75,000. I was taken to no evidence to suggest that the Company owed sums to any director other than the Respondent at the balance sheet date. In the absence of any such evidence I consider it legitimate to conclude that it did not.

188. The Respondent's evidence, which in this regard I accept, was that his loan, (which continued to accrue interest at 8% after the balance sheet date for the Company's

accounts for the year ending 31 August 2017), 'had remained wholly unpaid by December 2018' (Howarth (2), para 14).

189. The statement of affairs, the list of creditors and the estimated outcome statement which formed part of the CVA proposal filed on 25 January 2019, signed by both directors and bearing a statement of truth, each provide that the sum owed to the Respondent on his director's loan account stood at £97,445.

190. On the evidence which I have heard and read, I am satisfied that, at the time of the Company's entry into CVA on 22 February 2019, the Respondent was owed a minimum of £97,445 plus interest at a rate of 8% per annum on his director's loan account. I was taken to no evidence to suggest still less establish that (save for ongoing interest) the sum owed by the Company to the Respondent on his director's loan account changed between 25 January 2019 and 22 February 2019. In the absence of such evidence, I consider it legitimate to conclude that it did not.

191. The Applicant has adduced no documentary evidence in support of its contention that by the time that the salary/loan swap arrangement was put in place, the sum owed by the Company to the Respondent on his director's loan account had reduced to £89,159.68. Its case on that issue rests simply on the bare assertion of Mr Kienlen, in a witness statement prepared several years after access to the Company's server was terminated. Mr Kienlen had no involvement in the CVA, was unaware that the loan carried interest at 8% and is a witness whose evidence I have concluded should be treated with caution.

192. Mr Arumugam claimed on instruction that the figure of £89,159.68 came from 'the books and records' of the Company. No such books and records were produced in evidence, however. The court must proceed on the evidence.

193. In closing submissions Mr Arumugam also produced his own analysis of the alleged transaction at an undervalue claim, working from a starting figure of £89,159.68 (based simply on para 27 of Kienlen (1)) and allowing for interest at 8% per annum; a process which reduced the alleged s 238 claim from £11,840.32 to £9,960.13. Again, however, this figure was not supported by any documentary evidence vouching or explaining the starting figure.

194. During the course of trial, Mr Botting had also prepared his own analysis, working from a starting figure of £97,445 (taken from the statement of affairs) and allowing for interest at 8% per annum. This showed a balance of £908.77 remaining due to the Respondent after deduction of the Payments of £101,000.

195. I also take into account inherent likelihoods. The evidence of both the Respondent and Mr Botting, which in this regard I accept, was that throughout the course of the CVA they met frequently with Mr Adamson (every 7-10 days). As put by the Respondent in his third witness statement at para 26, for example:

> 'In the course of those meetings, we considered and discussed the cashflow of the Company and its income and expenditure. Whilst the Company continued to manage all the bank and business accounts, copies of all statements, weekly cashflow, invoices and records were printed off by Richard Botting and

> handed to either Adamson or Bamforth. As such, it was openly disclosed in documents and bank statements produced to Armstrong Watson that payments were being made to me by way of loan repayments within the period of April to December 2019. At no point within this period, were any of these transactions challenged or questioned by Armstrong Watson or and in particular, Adamson'.

196. Given the frequency of these meetings, it is in my judgment inherently implausible to suggest that no one would have noticed if the Company had reached the point of paying off the Respondent's director's loan account in full ahead of the termination of the CVA. Mr Adamson was an IP. The Company hired two chartered accountants as part of its finance team, one of whom, Mr Botting, was closely involved in the meetings with Mr Adamson and in the preparation and collation of documentation produced for consideration at those meetings. Had the director's loan account reduced to nil ahead of termination of the CVA, this would have been noticed and discussed. At any stage during the course of the CVA it was open to the Respondent simply to go back on the payroll and draw his salary instead.

197. A further factor I take into account is the absence of any questioning regarding the £11,840.32 (or as adjusted, £9960.13) at the time of the Respondent's meeting with Mr Adamson and Ms Jo Smith in June 2021. This was not a chance meeting; it is clear from AW's detailed WIP reports that some time was spent preparing for it. Mr Adamson logged time preparing and considering the agenda for the meeting. Ms Bamforth logged time on 1 June 2021 bearing the descriptor 'Interview questions for Jo [Smith] re Trevor Howarth'. Mr Kienlen stated in his evidence that the director's loan repayments were readily apparent from the Company's books and records. Jo Smith's question at the June 2021 meeting made clear that she knew the Respondent had come off the payroll in April 2020 and had received loan repayments instead. In my judgment it is legitimate to conclude that, had the director's loan account balance reduced to nil ahead of termination of the CVA, questions as to the status of any payments by the Company to the Respondent after that point would have been raised at the June 2021 meeting.

198. Similar considerations apply regarding the failure of Mr Adamson and Ms Jo Smith to raise the point at their subsequent meeting with Mr Botting in January 2022.

199. Mr Arumugam also argued that interest should not be treated as continuing to accrue on the director's loan during the course of the CVA. In this regard he relied on an 'order of priority' provision in paragraph 17 of the proposal, which provided that any dividend paid to unsecured creditors would be paid 'without interest'. As I have found, however, under the terms of the arrangement, the Respondent's director's loan was left unimpaired.

200. I would add that the undervalue claim also completely fails to take into account the impact of the 'back to back' arrangements agreed between Mr Tinkler and the Respondent in 2017, touched on briefly at [30] of this judgment, pursuant to which, in transactional terms, (in broad summary) Mr Tinkler loaned monies to the Respondent which the Respondent then invested into the Company. As shown by the transactional documentation exhibited to Mr Kienlen's second witness statement, this arrangement

entailed (among other things) the Respondent discharging, from the monies loaned to him by Mr Tinkler, a sum of £1.3m owed by the Company to Davic Properties Limited (the 'DPL Loan'). Having reviewed these 'back to back' arrangements between Mr Tinkler and the Respondent, Mr Dickson of AW by letter dated 24 March 2020 (exhibited to Mr Kienlen's third witness statement) concluded that:

> 'Trevor Howarth is therefore a £2M creditor of the Company, not Andrew Tinkler'.

201. Mr Arumugam even asked Mr Botting in cross-examination why the Respondent had not voted at the meeting of creditors in February 2020 in respect of the 'investor loan'.

202. Ultimately, I remind myself that the burden of proof rests with the Applicant to establish an undervalue for the purposes of its s238 claim. On the evidence which I have heard and read, it has failed to discharge that burden.

203. It follows that the s.238 claim fails.

204. I would add that on the evidence which I have heard and read, I am satisfied that the Company, acting by the Respondent, made all the Payments in good faith, for the purpose of carrying on its business and with reasonable grounds at the time for believing that the transactions would benefit the Company. I am satisfied that Mr Adamson, an experienced IP, advised the Respondent and the Company that the Payments would positively benefit the Company by saving it the PAYE and NIC that would otherwise be payable in respect of the Respondent's salary. I am further satisfied that the Respondent (and through him the Company) relied upon such advice and that such reliance was reasonable. As I have found, that the Company made significant tax savings as a result of the salary/loan swap arrangement. In my judgment the Respondent and the Company had reasonable grounds for believing that the Payments would benefit the Company. It follows that even if the Applicant had been able to establish a small undervalue, the s.238 claim would still fail by virtue of s238(5).

205. I turn next to consider the preference claim.

The s.239 claim

206. The Applicant's case on the s.239 claim relates to that part of the Payments totalling £89,158.68 (the alleged preference payments). The Applicant contends that

(1) The Respondent is an individual connected with the Company. The alleged preference payments were made within 2 years of the Company entering into administration on 3 January 2020;

(2) The Respondent was a creditor of the Company at the time of each of the alleged preference payments;

(3) The making of the alleged preference payments (and each of them) by the Company had the effect of putting the Respondent into a position which, in the event of the Company going into administration or insolvent liquidation, was a

better position than if the alleged preference payments (and each of them) had not been made;

(4) The alleged preference payments (and each of them) were made at a time when the Company was insolvent, as evidenced by the CVA proposal;

(5) The Company and the Respondent were influenced in deciding to make the alleged preference payments and each of them by a desire to put the Respondent into a better position in the Company's administration or insolvent liquidation than would have been the case had the payments not been made. The desire to prefer is presumed pursuant to section 239(6) IA as the Respondent is connected with the Company by virtue of being a director.

207. In light of my findings in respect of the s 238 claim, I shall treat the preference claim as extending to the full £101,000 of payments made over the relevant period.

208. In my judgment the preference claim fails. On the evidence which I have heard and read, the Applicant has failed to establish that the Company did anything or suffered anything to be done which had the effect of putting the Respondent into a position which, in the event of the Company going into insolvent liquidation, would be better than the position he would have been in if that thing had not been done: s239(4)(b). That is to say: no '*preference in fact*' has been made out on the evidence. Whilst the Respondent received repayments of his director's loan over the period April to December 2019, that was *in place of his salary*. He was *not* better off as a result of the salary/loan swap arrangement. In fact, he was slightly worse off. His net monthly salary came to approximately £10,377 per month. He took £10 in salary in March 2019 and then came off the payroll completely. The loan repayments he received in place of salary, calculated with reference to the period March 2019 to December 2019, averaged out at approximately £10,100 per month.

209. Even if the salary/loan swap arrangement had satisfied the 'preference in fact' requirements of s239(4)(b), in my judgment the preference claim would still fail. On the evidence which I have heard and read, the presumption of a desire to prefer is plainly rebutted.

210. On the evidence which I have heard and read, I am satisfied that in making the Payments, the Company, acting by its directing mind the Respondent, was *not* influenced by a desire to put the Respondent into a position which, in the event of the Company going into insolvent liquidation, would be better than the position he would have been in if that thing had not been done. In putting the salary/loan swap arrangement in place and thereafter effecting the Payments pursuant to such arrangement, the Company acting by the Respondent simply wished to save the Company the PAYE and NIC that would otherwise have been payable on the Respondent's salary. I so find.

211. For the sake of completeness, I confirm that I reject Mr Arumugam's argument that a desire to prefer was positively evidenced by Mr Botting at paragraph 17 of his second witness statement. By that paragraph Mr Botting was simply addressing a 'consequence' of the salary/loan swap arrangement and paragraph 17 must in any event be read together with paragraph 18.

Summary of conclusions

212. For the reasons which I have given, I conclude that:

(1) in relation to the preference claim, (a) the Applicant has failed to establish on the evidence a *preference in fact*; and (b) even if I am wrong in that conclusion, on the evidence as a whole I am satisfied that the presumption of desire to prefer has been rebutted; and

(2) in relation to the transaction at an undervalue claim, (a) the Applicant has failed to establish a transaction at an undervalue on the evidence; and (b) even if the Applicant had been able to establish a small undervalue, the s.238 claim would still fail by virtue of s.238(5).

The Way Forward

213. For the reasons given I shall dismiss the Application.

214. In conclusion, I would add that, on the evidence which I have heard and read, in my judgment the Respondent has at all material times acted responsibly and with integrity as a director of the Company. He very properly sought and acted on the advice of a specialist firm of insolvency practitioners for several months prior to placing the Company into CVA, a process which involved a detailed review of the Company's finances. He was utterly transparent in his dealings with Mr Adamson throughout the course of the CVA and reasonably relied on Mr Adamson's advice when putting in place the salary/loan swap arrangement, motivated only by a wish to save the Company the PAYE and NIC that would otherwise have been payable on his salary. In doing so he genuinely believed that he was acting in the Company's best interests. It is highly regrettable that he has been put through the stress of these proceedings.

215. I shall hear submissions on costs and any attendant matters on the handing down of this judgment.

ICC Judge Barber