



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 107

CA109/24

OPINION OF LORD RICHARDSON

In the cause

PHLO TECHNOLOGIES LIMITED

Pursuer

against

NADEEM SARWAR

Defender

**Pursuer: Dean of Faculty; Roxburghe; Addleshaw Goddard LLP
Defender: Bowen KC; BTO Solicitors LLP;**

28 October 2026

Introduction and background

[1] This case is one aspect of a broader dispute between the parties. There are currently four other cases ongoing before the Court of Session which principally involve the parties to this case (A294/24; CA109/24; CA119/24; CA134/24). These actions are all presently before me. (For completeness, there are further proceedings for interdict brought by the pursuer against the defender (P17/25) which are the subject of my opinion dated 26 June 2026[2026] CSOH 62. These are presently the subject of a reclaiming motion).

[2] In summary, the broader dispute concerns the control and leadership of the pursuer. (I have set out some of the background in my opinion in the related case CA119/24 [2025]

CSOH 55). The pursuer is a company which operates in the online pharmacy sector. The defender was the founder of the pursuer. Prior to 30 August 2024, the defender was also the chief executive of the pursuer. The pursuer contends that, as at 30 August 2024, the defender ceased to be a director of the pursuer. The defender disputes this and contends, for various reasons, that he remains a director. That dispute is the subject of ongoing litigation between the parties (CA119/24).

[3] The present case relates to payments which were instructed by the defender in the period between 4 August 2022 and 30 March 2023. The payments were made in two stages: first, from the pursuer's bank account with the Royal Bank of Scotland (the "RBS Account") to the pursuer's bank account with Tide Platform Limited (the "Tide Account"). These payments totalled £1,738,001.38. Thereafter, payments were made from the Tide Account to Universal Pharmacy Limited ("UPL"). These payments totalled £1,756,998.00.

[4] The defender was a director and shareholder of UPL from 2015 onwards. Subsequently, UPL entered into administration on 4 August 2025.

[5] The pursuer contends that these payments were made in breach of the duties owed by the defender, as a director, to it in terms of sections 171 and 172 of the Companies Act 2006. The defender accepts that the payments were made at his instruction but advances a number of defences to the pursuer's claim.

[6] I heard the case at proof.

Joint minute

[7] The background narrated above is uncontentious. Based on the pleadings and a joint minute agreed by the parties in advance of the proof, the following matters have also been agreed.

[8] When the payments were made, the pursuer operated three bank accounts: the RBS Account, the Tide Account and a bank account held with Revolut Limited (the “Revolut Account”). At the material time, the defender, as CEO of the pursuer, was an authorised signatory on all of the pursuer’s bank accounts.

[9] In respect of the Tide Account, at the material time, the defender was the only person who could access the account on behalf of the pursuer. The defender was also the only person who could view details of transactions on the Tide Account during that time.

[10] The pursuer carried out its accounting using a system operated by Xero Limited. At the material time, the system was used for processing the pursuer’s accounting entries for, among other things, sales, purchases and payroll. As CEO, the defender was also the systems administrator for the pursuer’s Xero system. The pursuer’s Tide Account was not linked to the Xero system.

[11] The joint minute also agreed a significant number of documents without the need for them to be spoken to by a witness. In particular, the parties agreed the terms of the statements from the various bank statements from the three bank accounts. As such, the parties were agreed that during the period from 4 August 2022 to 30 March 2023, payments totalling £1,738,001.38 were made from the RBS Account to the Tide Account. These payments were instructed by the defender.

Evidence

[12] As is normal in commercial actions, all of the factual witnesses gave evidence in chief by adopting statements which had been prepared, lodged and intimated to the other side in advance. These witnesses were then subject to cross-examination.

[13] It was notable, not least from the parties' submissions at the end of the proof, that the scope of the matters covered in the witnesses' statements was considerably wider than factual issues upon which the present dispute actually turns. In all likelihood, this discrepancy reflects, as I have noted above (at [1] and [2]), that this action is only part of a broader and ongoing dispute between the parties.

[14] Against the background of that broader dispute and being aware the various other cases currently before me, I have restricted myself in this opinion to narrating the evidence and making findings which I consider to be relevant to the issues in dispute in this action.

The pursuer's factual witnesses

Adam Hunter

[15] Mr Hunter is a director of the pursuer. He has been in office for 5 years. So far as the pursuer is concerned, Mr Hunter is its CEO (albeit that is contentious insofar as it relates to the departure of the defender -see [2] above). Mr Hunter was the pursuer's chief commercial officer from January 2019 to August 2025. Mr Hunter is also a qualified solicitor.

Paul Munn

[16] Mr Munn is the director of Par Fund Management Limited and Par Equity Holdings Limited. These are investment companies and, as co-founder, Mr Munn holds the position of managing partner leading the business. The pursuer received investment from Mr Munn's companies in March 2024. As part of the process, the pursuer, the defender and the investors entered into a subscription agreement and a shareholder agreement. A

disclosure letter was also issued. Following this, Mr Munn became a director of the pursuer on 30 August 2024.

Aidan McMillan

[17] Mr McMillan is an investment director at Par Equity LLP. He has held this position since December 2018. Mr McMillan has been Par's Investor Director at the pursuer since March 2024. Mr McMillan is a chartered accountant.

Christopher Cullen

[18] Mr Cullen has been the pursuer's finance director since May 2023. He has been a qualified chartered accountant for more than 10 years.

Lauren Nicholson

[19] Ms Nicholson is also a qualified chartered accountant. She has been employed by the pursuer since November 2019. She was appointed CFO in April 2020. In July 2023, Ms Nicholson went on maternity leave. She returned to work for the pursuer as Chief of Staff in August 2024. As CFO, Ms Nicholson was responsible for the day-to-day management of the pursuer's finance team.

[20] In submissions, counsel for the defender did not make any challenge in respect of the evidence of the pursuer's factual witnesses. Overall, in respect of the matters which are relevant to my decision in this case, I consider that all were doing their best to assist the court and gave their evidence honestly. I have taken account of the evidence of these witnesses in the narrative of facts I have set out below.

The defender's factual evidence

[21] The defender was the only factual witness called on his behalf. He was the founder of the pursuer. He served as its Chief Executive Officer from its incorporation until the end of August 2024. He remains the pursuer's largest shareholder.

[22] In short, the defender accepted that he had made the payments from the Tide Account to UPL. His position was that he had done so in order to enable UPL to make payments to a lender, Cubefunder, in respect of loans which had been taken out by UPL for the benefit of the pursuer. These were loans which were the subject of a cross-guarantee in favour of Cubefunder which had been granted by the pursuer. According to the defender, the circumstances surrounding the funding of the pursuer resulted in many transfers between it and UPL which often took place at a high frequency. In his view, these transactions ought, properly, to be considered as part of a continuous running account between the two companies.

[23] The defender denied that he had concealed the arrangements between UPL and the pursuer from either his fellow directors or the pursuer's investors. He had used the Tide Account for operational reasons in order to isolate the transactions not to conceal them. Furthermore, the inter-company balance between the pursuer and UPL had been visible as it formed part of the pursuer's management accounts.

[24] Overall, the defender strongly and vehemently denied that he had misappropriated funds. He took the actions he had in order to ensure the pursuer's financial survival. The defender also denied that he had ever benefitted personally from any of the payments made from the Tide Account.

[25] In submissions, the Dean of Faculty argued that I ought to treat the defender's evidence with caution. It was suggested both that the defender had been defensive in his

evidence and that rather than answering questions directly, he had sought to advocate for what he perceived would be advantageous to his position. Given the nature of the questioning to which he was subjected in cross-examination, I did not find the way in which the defender responded to be particularly surprising or, in itself, to found a general submission that the defender's evidence ought to be treated with caution.

[26] Senior counsel for the defender submitted that the defender had given his evidence honestly and I ought to accept it. However, it was notable to me that during his evidence the defender frequently made emphatic general assertions which appeared to be unsupported by any other evidence whether documentary or otherwise. For example, the defender's position was that all the payments which had been made to UPL, via the Tide Account, had then been paid to Cubefunder. No evidence was produced which corroborated this. The defender also frequently gave evidence on matters without reference to particular dates or details. By way of example, the defender spoke to the existence of a cross-guarantee apparently granted by the pursuer in favour of Cubefunder which related to the loans taken out by UPL. No such guarantee was produced. There was also no evidence as to when or in what circumstances this guarantee had been granted. Also on occasion, the defender's evidence appeared to be contradicted by contemporaneous documents. For example, the defender gave evidence that UPL's bank account with Tide had been closed in 2023. On examination, this did not appear to be consistent with the pursuer's Tide bank statements.

[27] Furthermore, as I discuss further below, in the course of his evidence, the defender admitted that he had intentionally falsified a bank statement from the Tide Account which he had then provided to the pursuer's CFO, Mr Cullen. This is obviously a very serious matter. There was also unchallenged evidence from both Ms Nicholson and Mr Cullen of

what appears to have been repeated attempts by the defender to conceal the contents of the Tide Account from the pursuer's senior staff with responsibility for financial matters. I consider that this undisputed evidence of the defender's actions does raise significant questions as to the defender's credibility.

[28] Overall, both of these factors taken together do cause me to treat the defender's evidence with caution where it was unsupported by either contemporaneous documentation or the evidence of other witnesses. On this basis, I have taken account of the evidence of the defender in the narrative of facts I have set out below.

Narrative

Relationship with UPL

[29] The pursuer was created as technology "spin-out" from UPL with a view to developing digital infrastructure for modern pharmacy services. UPL, on the other hand, was a long-established, revenue-generating bricks-and-mortar business.

[30] It is clear that, from the time when the pursuer commenced business in 2016, there was a close relationship between UPL and the pursuer. The two companies shared resources: staff; physical premises; IT infrastructure and supply chains. When the pursuer was originally set up, the defender was also the controlling mind of both companies.

[31] During its initial "start-up" phase -the early years of its operations, the pursuer was not generating any revenue but had a significant requirement for cash in order to develop software. As a result, during this period, the pursuer was dependent on obtaining financing from UPL. In November 2019 the pursuer and UPL entered into an agreement in terms of which UPL provided a £700,000 revolving loan facility to the pursuer in return for annual facility fees of £50,000. The final repayment date of the loan was 4 November 2024.

[32] However, by the time Mr Hunter joined the pursuer's board in April 2020, he was clear that the finances of the two companies operated separately. Neither he nor Ms Nicholson, who became CFO of the pursuer in April 2020, had any access to or visibility of the finances of UPL. So far as both were concerned, the financial inter-relationship between the companies was as shown by the UPL account ledger and, in the case of the defender himself, the director's loan account. Both the UPL account ledger and the defender's loan account formed part of the pursuer's management accounts.

[33] Perhaps unsurprisingly, the defender, who was a shareholder and director of both companies, had a different perspective. His view was that the two companies remained deeply financially linked and that the inter-company account was a "fluid, open-ended mechanism".

[34] Multiple payments between UPL and the pursuer appears to have been a consistent feature of the pursuer's finances. Ms Nicholson spoke to there regularly being multiple payments to and from UPL in a day. Her evidence was that the payments did not follow any pattern discernible by her. Ms Nicholson saw these transactions in the RBS and Revolut accounts and accounted for them in the pursuer's management accounts including the UPL loan account on Xero. The evidence of both Ms Nicholson and Mr Cullen was that their intention was that, at the end of each financial year, any outstanding balances on both the UPL loan and the director's loan accounts would be paid to bring them to zero.

[35] The defender spoke to a further agreement which varied the original loan agreement. According to the defender, this variation agreement was concluded on 1 June 2021. In terms of this agreement the loan facility was increased to £1,500,000 and the facility fees were increased to £250,000. A copy of this agreement was lodged as a production by the defender. However, the consistent and unchallenged evidence of the pursuer's witnesses

was that none of them had been aware of the existence of the variation agreement until it was produced by the defender in the context of the present dispute. As I understood the defender's position, the variation agreement formalised an informal running account mechanism between the two companies. However, he did not suggest that the pursuer's board had either known about or approved the agreement.

[36] In its pleadings, the pursuer sought the reduction of the variation agreement *ope exceptionis* (see the second plea in law). However, in the event, in submissions, the pursuer advanced its case in respect of quantum on the basis that the variation agreement was valid and did not insist on its second plea in law.

[37] The defender also gave evidence as to the existence of cross guarantees entered into by UPL and the pursuer. According to the defender, UPL had guaranteed the pursuer's invoice finance facility which was provided by Castlebridge Finance. The existence of this guarantee appeared uncontroversial.

[38] According to the defender, the pursuer also guaranteed borrowing by UPL from Cubefunder. The funds obtained from this borrowing by UPL were then passed on to the pursuer. The defender did not give evidence as to the timing or other details of these guarantees. No guarantee granted by the pursuer in favour of Cubefunder was produced.

[39] In relation to the Cubefunder guarantee, Mr Cullen's evidence was that, other than the defender, neither the pursuer's board nor those responsible for the pursuer's finances were aware of the Cubefunder guarantee until September 2024 after the departure of the defender. His evidence on this was unchallenged.

The role of the defender

[40] The defender exercised considerable control over the pursuer's bank accounts. In respect of the RBS Account, Ms Nicholson only ever had "read-only" access meaning that she could see transactions but could not instruct payments or do anything else on the banking platform. In respect of the Revolut Account, Ms Nicholson had been provided with full access in December 2022 and could make payments from that account. However, she explained that as funds were not held in that account, the making of payments by her was dependent on funds being transferred to it by the defender. Mr Cullen was in a similar position to Ms Nicholson. He had no authority to make payments from any of the pursuer's bank accounts until after the defender had departed in September 2024.

Operation of the Tide Account

[41] It was clear that until September 2024, only the defender had control and visibility of the Tide Account. Ms Nicholson first became aware of it from August 2022 when she saw a transfer of funds into it from the RBS Account. Her evidence was that, despite repeated requests by her to the defender to provide bank statements, none were ever provided by him. She also asked the defender to prepare a Xero bank feed for the account but he did not do so. Based on what the defender told her in respect of the balance in the Tide Account, Ms Nicholson's impression was that it was in credit and that the pursuer's funds were being held there.

[42] Mr Cullen's evidence was that he first became aware of the Tide Account shortly after he started working for the pursuer in May 2023. He gave evidence of the need to confirm the balance in the Tide Account as at 31 March 2023 in order to prepare the pursuer's statutory accounts. As a result, Mr Cullen had asked the defender to provide a

bank statement for the Tide Account. By email dated 6 December 2023, the defender had provided Mr Cullen with a bank statement. The statement provided showed a balance in the Tide Account at 31 March 2023 of £1,737,999.00.

[43] In fact, there was no dispute that this bank statement had been falsified by the defender and that, in fact, the true balance at that time was zero.

[44] Unsurprisingly, the defender was closely questioned about this falsified bank statement in the course of cross-examination. Prior to this passage of questioning, I warned the defender of his right not to incriminate himself. The defender accepted that he had altered the bank statement. He referred to it as “an administrative error”. The defender’s position was that he had done this for what he felt were the best interests of the pursuer at the time. He regretted his actions. He had made the decision while the pursuer was under extreme financial pressure and was in the process of trying to obtain further funding. His view was that had the true position been disclosed this would have derailed the pursuer’s attempts to obtain additional funding.

[45] Mr Cullen also gave evidence that in March 2024, he had agreed with the defender that the balance in the Tide Account ought to be transferred to the pursuer’s RBS and Revolut accounts. This was not done. Also, despite further requests, the defender did not provide any further bank statements in respect of the Tide Account. According to Mr Cullen, matters came to a head at the end of April 2024 when the pursuer was required to submit financial information to its investor, Par Equity. During a telephone conversation, Mr Cullen told the defender that in the absence of any documentation, he assumed that the defender had transferred the sums out of the Tide Account and so Mr Cullen would require to reclassify the balance of the Tide Account as being sums owed by Mr Sarwar via his director’s loan account. Mr Cullen’s evidence was that when confronted in this way, the

defender did not dispute Mr Cullen's assumption and, instead, became angry and threatened to sack him. This evidence was unchallenged in Mr Cullen's cross-examination.

[46] As I have summarised above (at [20] to [23]), the defender's explanation for the payments to UPL from the Tide Account was that he had made them in order to enable UPL to repay loans taken out from Cubefunder. According to the defender, these loans had been taken out by UPL for the benefit of the pursuer. The defender also expressly rejected the suggestion that he had used the Tide Account to conceal his actions.

The defender's alleged admissions in July 2024

[47] There was evidence from three of the pursuer's witnesses – Mr Cullen, Mr Munn and Mr Hunter – as to admissions which had been made by the defender in July 2024.

[48] Mr Cullen spoke to a telephone call he had with the defender on 15 July 2024. Jason McGibbon, a director of the pursuer, was also on the call. The background to the call was that the pursuer had failed to make certain payments which were due. According to Mr Cullen, the defender had admitted to misappropriating funds from the pursuer in order to pay his personal debts. Mr McGibbon had instructed the defender to speak to Mr Munn, who was the director of Par Equity, a major investor in the pursuer, to explain the position. During cross-examination, Mr Cullen accepted that the defender may not have used the word "misappropriate". However, it was not suggested to him either that his evidence was untrue or that the broad thrust of it was inaccurate.

[49] Mr Munn's evidence was that the defender had called him on 15 July 2024. Mr Munn had a clear recollection of the call and had made notes of what was said at the time. The defender had been emotional during the call. According to Mr Munn, the defender had said that he had done something really bad and really stupid and that he

wanted to make it right. Mr Munn was specific in his recollection that the defender had admitted to transferring the pursuer's funds both to his personal account and to UPL. Mr Munn had been very surprised to discover this. According to Mr Munn, later the defender has advised him and the rest of the pursuer's board that he wished to make amends and to repay the sums he had misappropriated. Mr Munn's evidence in respect of the call was not challenged by the defender.

[50] Mr Hunter spoke to having received a WhatsApp message on 16 July 2024 from the defender asking Mr Hunter to visit him to talk. In the message, the defender said it was important that they talk as the defender had "made a bit of a mistake" and could do with chatting it through. Mr Hunter's evidence was that when they met later that day, the defender had admitted to misappropriating monies from the pursuer to pay off personal debts. Mr Hunter remembered that the defender had provided a figure in respect of the sums of money involved but he but could not now remember this. His recollection was that it was over £1 million. Mr Hunter also referred to the defender's subsequent agreement to repay the sums which he had had misappropriated. These proposed repayments had been set out in a schedule. In cross examination, Mr Hunter was challenged that the defender had never used the word "misappropriated" and accepted this. It was also put to him that the defender had indicated that the money had been used to pay off UPL's debts. However, Mr Hunter was clear that the defender had referred to personal debts.

[51] Notably, despite having given three witness statements, the defender did not address these admissions in any of them. In cross examination, the defender was asked directly whether he accepted the accounts of Mr Munn and Mr Hunter. As I understood his evidence, it broadly mirrored the position put to each of those witnesses in cross examination. The defender accepted Mr Munn's account as truthful. As to Mr Hunter, the

defender's position was that he had made clear that the money had been used to pay off UPL's debts which had been taken out for the pursuer's benefit.

Cubefunder

[52] As noted above, the defender's evidence was that UPL had taken out significant loans from Cubefunder and the funds obtained from these loans had then been transferred to the pursuer via the revolving loan facility which had been agreed with UPL. The defender emphasised that, as a result of this arrangement, the pursuer benefitted from the funds that were being advanced to it, without having to pay the very significant interest costs which UPL paid to Cubefunder. Based on Mr Hogan's first report (see [59] below), the defender estimated this cost as being £2.8 million.

[53] The position of the pursuer's witnesses was that they were completely unaware of this arrangement with Cubefunder. The evidence of Mr Hunter, Mr Cullen and Ms Nicholson was that, although they had been aware of Cubefunder this was only in relation to that company having lent money to UPL and the defender personally.

Ms Nicholson gave evidence about noticing a payment made by the pursuer to Cubefunder in June 2023. When she asked the defender about it, he explained that it was in relation to a personal debt. On this basis, she recorded it in the defender's director's loan account.

Ms Nicholson was not challenged on this.

[54] So far as the pursuer's witnesses were concerned, prior to the departure of the defender in August 2024, they had been unaware that the pursuer had entered into any formal relationship with Cubefunder. Mr Hunter spoke to discussions having taken place in late 2023, initiated by the defender, which involved Cubefunder loaning £1.5 million to the

pursuer. However, so far as both he and Mr Cullen were concerned the proposed facility had never been commenced.

Investigations in September 2024

[55] In September 2024, following the defender's departure, investigations were undertaken by the pursuer's management into its financial position.

[56] The investigations included getting in touch with Tide in order to obtain access to the Tide Account. It was as a result of these investigations that the pursuer became aware that the Tide bank statement previously provided by the defender to Mr Cullen was false (see [43] above). The pursuer also became aware of the extent of the payments made from the Tide Account to UPL. At this time, the pursuer also became aware of a second Tide account in its name which had been operated from 1 April 2023 until 30 August 2024.

[57] After the pursuer obtained access to the Tide accounts, the pursuer's finance team re-constituted the pursuer's inter-company ledger with UPL to take into account all transactions between the companies. Mr Hunter's evidence was that this exercise was carried out in order to understand the full extent of the losses caused to the pursuer by the defender. Subsequently, the pursuer's financial statements for the year ended 31 March 2025 also recorded the inter-company balance with UPL recording that a debt was owed to it by UPL.

[58] The pursuer's management had also discovered that, from June 2023, the defender had entered into a series of loan agreements with Cubefunder on behalf of the pursuer. Following enforcement action being taken by Cubefunder, the pursuer had reached an extra-judicial settlement in respect of Cubefunder's claims, albeit the terms of the settlement were not the subject of evidence.

Expert evidence

[59] Both parties instructed expert chartered accountants to give evidence on their respective behalves. The pursuer originally instructed Stuart Preston of Grant Thornton UK Advisory & Tax LLP. The defender instructed Mr Paedar Hogan of Interpath (Ireland) Limited. Mr Hogan prepared an initial report dated 2 July 2025. Mr Preston prepared a responsive report dated 12 November 2025. Shortly before the proof, Mr Hogan prepared a second report dated 16 January 2026. Notably, Mr Hogan's second report was not a response to Mr Preston's report. Rather it addressed a separate and discrete issue: namely, whether the specific payments claimed by the pursuer in the present proceedings had, in fact, been repaid by UPL on a "first in, first out" basis.

[60] In advance of giving evidence, the experts met and prepared a joint statement detailing areas of agreement and disagreement. In the course of that process, Mr Preston set out his views on the issues raised by Mr Hogan's second report.

[61] At the outset of the proof it became apparent that Mr Preston would be unable to give evidence for personal reasons. As a result, the pursuer sought permission for Mr Preston's place to be taken by his colleague, Claire Probert. Mrs Probert had been involved in assisting Mr Preston in the preparation of his report and had also attended the joint meeting of experts. The defender did not oppose this substitution and I allowed it.

[62] The two experts gave evidence concurrently and, as it transpired, they were, to a very large extent, in agreement. At the outset of the concurrent evidence, Mrs Probert adopted Mr Preston's report as her evidence together with Mr Preston's contributions to the joint statement. During the course of the concurrent evidence session, Mr Hogan was taken

to parts of his second report and I understood his answers to be consistent with that report.

Notably, Mr Hogan was not taken to and did not adopt his first report.

[63] The experts were agreed that UPL owed the pursuer the sum of £1,864,500. This figure had been originally calculated by Mr Preston and Mrs Probert, having carried out a detailed reconciliation of the various bank statements. Mr Hogan, having reviewed this information, was in agreement with Mr Preston. (It should be noted, for completeness, that this calculation assumed that the loan arrangements between the pursuer and UPL had been varied in June 2021 – see [35] above).

[64] The only real issue between Mrs Probert and Mr Hogan related to the question of the proper approach to the ascription of payments. Both agreed that the debtor and creditor in an agreement could specifically ascribe payments to any particular debt between them.

They also agreed that, when dealing with a continuous running account, in the absence of any evidence that might indicate otherwise the rule in *Clayton's case* would apply. They agreed that this meant that, absent an intention to the contrary, it would be presumed that the parties intended that credits to the account would be ascribed to the earliest debits – that is on a “first in, first out” or “FIFO” basis. They each agreed that the court’s conclusion of legal issues relating to the application of *Clayton's case* would impact upon their analyses.

[65] In his report dated 16 January 2026, Mr Hogan had carried out an analysis of the re-constituted inter-company ledger and concluded that, applying FIFO, the payments to UPL forming the basis of the present action had been extinguished by payments to the pursuer by 12 December 2023. In evidence, Mr Hogan adhered to this position. Mrs Probert agreed with this calculation but did not agree that it was appropriate for FIFO to be applied.

[66] Ultimately, the main difference between the two experts related to two issues: first, where one party was not aware of all of the transactions that had taken place; and, second,

where a third party was involved in the transfer of funds. In those circumstances, Mrs Probert's position was that it would be inappropriate to apply FIFO to discharge liabilities which were not contemporaneously included in a running account: ascription was determined by what was done at the relevant time. In contrast, Mr Hogan considered that it was necessary to reconstitute the ledgers to include all transactions between the parties (known and unknown). He accepted, however, that ascription was the key to a FIFO analysis, and that one cannot ascribe payments of which one is unaware.

Pursuer's submissions

[67] The pursuer seeks damages from the defender for breach of his fiduciary duties - specifically those duties contained in sections 171 and 172 of the Companies Act 2006. The pursuer's case was that the payments made in the period between 4 August 2022 to 30 March 2023 were made in breach of those duties. The defender admitted that he caused the pursuer to make the payments.

[68] The pursuer made two submissions in respect of the payments. First, the payments had been in breach of section 171 because they were made without the knowledge or approval of the pursuer's board and, in addition, were not made for a proper purpose. Second, the pursuer submitted that making the payments represented a breach of section 172 because they had not been made to promote the best interests of the company. As such, the making of the payments constituted a breach of the defender's fiduciary duties owed to the pursuer.

Section 171

[69] In respect of its first submission, the pursuer relies on the terms of the pursuer's articles. From 13 July 2022 until 27 February 2023, Article 6.1 provided:

"6.1 The general rule about decision-making by Directors is that any decision of the Directors must be either a majority decision at a meeting or a decision taken in accordance with article 7."

Article 7 provided for a unanimous decision-making process which could take place without a meeting. (The articles adopted by the pursuer on 27 February 2023, which remained in place until 29 March 2024, contained broadly similarly worded provisions.) The pursuer submitted that the decision to make payments of the scale of those involved in the present case was governed by these articles. There was no dispute that there had been no such approval. Accordingly, the defender by making the payments had acted in breach of section 171(a) of the 2006 Act.

[70] In this regard, the existence of the revolving loan agreement was not relevant. Apart from anything else, given the very significant excess in payments made to UPL over what was received from UPL during the relevant period, the payments could not be characterised as loan repayments.

[71] Separately, the pursuer submitted that even if, contrary to its first argument, the defender did have power to make the payments, the defender had exercised those powers for purposes other than for which they had been conferred in breach of section 171(b) (see *Extrasure Travel Insurances Ltd v Scattergood and anr* [2003] 1 BCLC 598 at paragraph 92).

If there was a power for the defender to deal with the pursuer's assets such a power was delegated to the directors in order to enable the directors to promote the company's commercial interests and ensure its survival. In these circumstances, the court required to

determine what the defender's dominant or primary purpose was in transferring the sums to the Tide Account (*Howard Smith Ltd v Ampol Petroleum* [1974] AC 821 at 832).

[72] In the present case, there was evidence of the movement of money from the RBS Account to the Tide Account and then to UPL. However, there was no evidence to suggest that the money had been used for the benefit of the pursuer. In particular, the pursuer relied on the analysis contained in Mr Preston's first report in relation to the Cubefunder payments. Mr Preston had carried out an analysis of the pursuer's bank statements and identified all payments made by the pursuer to Cubefunder. He had then reconciled those payments with Cubefunder's own records of the loans made to the pursuer and the payments received by them. On this basis, Mr Preston could find no evidence to suggest that the payments made to UPL via the Tide Account had been paid to Cubefunder for the pursuer's benefit. Mr Preston's report had been adopted by Mrs Probert and she had not been challenged on this. Furthermore, no contrary evidence had been produced from either Mr Hogan or anywhere else. In this regard, the pursuer highlighted the fact that Mr Hogan's first report (see above at [62]) had not been adopted by him and did not form part of the evidence before the court.

[73] The pursuer also founded on the fact that the defender had not produced any bank statements from either himself or UPL evidencing what had become of the monies transferred out of the Tide Account. The defender was, of course, a director of UPL. Notably this information had not been provided to the pursuer despite being sought in a specification of documents in February 2025. It had also not been provided to the defender's own expert, Mr Hogan. The pursuer submitted that this non-disclosure represented a pattern of behaviour on the part of the defender and that the court should infer that the

defender had not produced the UPL bank statements because they were unfavourable to his case (Phipson on Evidence, 21st edition at paragraph 45-36).

[74] Against this background, the pursuer submitted that the clear purpose for the defender to transfer funds from the RBS Account to the Tide Account was to enable the defender then to transfer funds to UPL and himself without alerting the other directors of the company to what he was doing. In cross examination, the defender had been unable to provide any plausible alternative explanation for what the pursuer described as “the merry-go-round” of funds. That inference was supported by the defender’s admitted actions involving the falsified bank statement. This, in turn, strongly gave rise to a further inference that the purpose of the transfers to the Tide Account was to benefit UPL and the defender personally. If the defender had been acting for the best interests of the pursuer, as he had claimed in evidence, there would have been no need for him to act surreptitiously. The defender’s explanation that he was trying to avoid causing panic and prejudicing the funding of the pursuer simply did not explain why the defender had not told his fellow directors what was going on at the beginning of the relevant period in 2022.

[75] That the defender was acting in his own interest was consistent with what he had told a number of witnesses in July 2024. The pursuer submitted that the defender had now clearly tried to change his position in respect of these admissions. The idea that these conversations related simply to a failure to obtain investor approval and personal guarantees rather than personal debts was simply not consistent with the evidence of Mr Munn, Mr Cullen and Mr Hunter. If all the defender had been doing was acting to ensure the pursuer’s survival in a situation which was well known, there would have been no need for the “sackcloth and ashes” as it was put. The evidence of the defender’s

agreement personally to make repayments was also not consistent with the position now being adopted.

[76] Equally, the pursuer submitted that the suggestion from the defender that the reason he had used the Tide Account was simply to keep track of the transfers was not credible. The obvious way to keep track of the transfers would have been to account openly for them.

Section 172

[77] In respect of section 172, the pursuer accepted that the test was a subjective one. The question is whether the director honestly and genuinely believes the action in question to be in the best interests of his company. However, determining whether someone has acted honestly or dishonestly requires an objective assessment of the conduct of the relevant person, in the light of the facts as they knew or believed them to be when they embarked on their course of conduct (see *Saxon Woods Investments Ltd v Costa* [2025] BCC 902 at paragraphs 107 to 112 and 122 to 123).

[78] The pursuer submitted further that the subjective test was subject to a number of qualifications. In particular, where there was no evidence of any actual consideration of the best interests of the company, the proper test was objective: whether an intelligent and honest person in the position of a director of the company could have reasonably believed that the transaction was for the benefit of the company (*Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62 at 74).

[79] The pursuer submitted that, in the present case, the defender did not honestly and genuinely believe that he was acting in the best interests of the pursuer in making the payments to the Tide Account. The basis for this submission was the same as that advanced in respect of section 171. Had the defender genuinely believed he was acting in the best

interests of the pursuer, there was no need for him to take such elaborate steps to conceal what he was doing from the pursuer's other directors. Further, and in any event, there was no evidence that the defender had, at the material time, any consideration of the interests of the pursuer. Viewed objectively, a reasonable person, in the position of the defender could not have considered his or her actions to have been in the best interests of the pursuer. The defender had caused the pursuer to make payments to UPL without any consideration of the risk to which that exposed the pursuer. In the event, UPL had entered administration. The defender's evidence to the contrary was no more than unsupported assertion.

Loss

[80] The damages sought by the pursuer were quantified at the level of the payments on the basis that this represented the extent to which the pursuer's acts had depleted the cash assets of the pursuer.

[81] The pursuer submitted that the general approach to loss in a case of breach of fiduciary duty had been set out by the UK Supreme Court in *Mitchell v Al Jaber*

[2025] 3 WLR 849. The pursuer derived two propositions from this case. First, that the general objective of a court in awarding damages in the case of a defaulting fiduciary, like a director, who had misapplied the assets of his or her principal, was, where the property could not be returned, to restore to the company the value of property misappropriated at the expense of the defaulting fiduciary (see paragraph 93). Second, the onus of showing that there had been no loss rests upon the fiduciary (at paragraph 111).

[82] The pursuer submitted further that where a director, in breach of duty, causes a company to make payments for which the company receives no value the loss to the company is the amount by which its cash assets are depleted. In those circumstances, the

director is liable to pay compensation to the company equal in amount to the payments made (see *Re Loquitur Ltd* [2003] 2 BCLC 442 at paragraphs 135 to 137 and *Auden McKenzie (Pharma Division) Limited v Patel* [2020] BCC 316 at paragraphs 32 and 58).

[83] Applying this approach in the present case, the pursuer's cash assets were, as a result of the actions of the defender, depleted by £1,756,998 this being the total sum transferred from the Tide Account to UPL during the relevant period. One could also test this conclusion using a simple "but for" test – but for the breaches of duty by the defender, the sums which the pursuer was unable to recover from UPL would have been reduced to £100,000 or thereby. This had been agreed by both Mrs Probert and Mr Hogan.

[84] The pursuer submitted that the defender had failed to advance any basis for diminishing the loss to the pursuer. The defender had argued that the payments made to UPL were made to reduce the pursuer's indebtedness to Cubefunder. However, there was simply no evidence to support that contention. Furthermore, it was undermined by the unchallenged analysis contained in Mr Preston's report. Separately, the defender had argued that UPL was creditor of the pursuer and so the payments had reduced the pursuer's indebtedness. Again, the pursuer submitted that there was no evidence to support the defender's position. The experts were agreed that the overall sum owed by UPL to the pursuer was over £1.8 million. (As noted above, this calculation assumed that the defender was correct as to the validity of the variation to the loan agreement contended for by the defender). It was also no answer to the pursuer's claim for the defender to argue that the pursuer could have made a claim against UPL. In cases of breach of fiduciary duty, it was trite law that the principal's primary remedy was against the trustee with the fiduciary having a right to recover from the ultimate recipient of the asset (see for example Walker, *Civil Remedies*, at page 1081).

[85] The pursuer emphasised that the sum it was seeking in damages had been intentionally restricted. It did not advance a case challenging the variation to the UPL loan agreement.

The defender's arguments on repayment – FIFO

[86] The pursuer submitted that the defender's argument based on the contention that the payments had been extinguished by later credits made by UPL applying a "first in, first out" or FIFO methodology was misconceived.

[87] As a starting point, the pursuer emphasised that its claim was a claim for damages for breach of fiduciary duty by the defender. It was not a claim seeking to trace the payments and concluding for their repetition from UPL. As such, it was a claim in which the "but for" test fell to be applied rather than one in which the rule in *Clayton's case* might be appropriate. The pursuer submitted that it was telling that the defender had been unable to find any authority, anywhere in the Commonwealth, in which the rule in *Clayton's case* had been applied to extinguish the consequences of a breach of fiduciary duty. The defender's attempt to apply this rule to the present case ignored the fact that, unlike a conventional running account, three parties were involved – the pursuer (the creditor), UPL (the debtor) and the defender (the "inter-meddlers").

[88] The underlying facts were not in dispute. The defender accepted making the payments from the RBS Account to the Tide Account and then to UPL. The pursuer also accepted that the payments were not included in the inter-company ledger maintained by the pursuer. The defender accepted that he had provided the pursuer's employees with the falsified bank statement for the period ended 31 March 2023 which showed that around £1.7 million was being held in the Tide Account. In relation to the payments made

by UPL, the defender did not contend that he had instructed that these payments be ascribed to any of the payments which he had made from the Tide Account. He could not have done this without first disclosing to the pursuer that the payments had been made. Without knowledge of the original payments on the part of the pursuer, there could be no ascription.

[89] As to the law, the pursuer accepted that where a debtor that owes more than one debt to a creditor can ascribe any payments it makes to a particular debt. When this is not done, the creditor may ascribe the debt as it chooses. The question was always one of what was intended by the parties. The pursuer relied on a passage taken from *Bell's Principles* (s.536) which had been approved by the Lord President, Lord Clyde, in *Macdonald, Fraser & Co v Cairn's Exrs* 1932 SC 699 (at 704):

“When no appropriation has been made by either party, and especially, e.g., in the case of an account current between the parties, such as a banking account, the law appropriates payments to the various debts in their order; it presumes, for instance, where there is a running account, that the parties intended to apply the first item on the credit side to discharge the first item on the debit side, and so on. But this rule suffers exception when a particular mode of dealing, or express arrangement, shows a different intention of the parties.”

[90] The pursuer also relied on a decision of the English Court of Appeal in *Bradford Old Bank v Sutcliffe* [1918] 2 KB 833 per Pickford LJ at page 839 as authority for the proposition that where an individual holds two bank accounts with a financial institution, each is treated as a separate running account: they are not combined together.

[91] Applying the law to the facts, there were two insurmountable difficulties for the defender's argument.

[92] First, there could be no appropriation between the payments made by the defender from the Tide Account to UPL and the subsequent payments by UPL to the pursuer because the two sets of payments related to separate accounts. The payments made by the defender

had not, as a result of his concealment, been included in the pursuer's inter-company ledger. This had created two separate accounts: the inter-company ledger – which was known about by the pursuer; and, the account created by the defender by his secret payments known only to him.

[93] Second, the pursuer could not be presumed to have intended that UPL's subsequent payments were to extinguish the debts created by the defender's payments to UPL from the Tide Account because the pursuer was unaware of the creation of those debts. The pursuer relied on of the English Court of Appeal in *Lacey v Hill* (1876) 4 Ch. D. 537. That case involved a partnership where one partner had withdrawn money from the partnership and concealed those drawings by fictitious entries in the partnership books. The partner had also made *bona fide* drawings and payments to the account after that time. It was argued that the payments made into the account had repaid the payments which had been concealed. That argument was rejected. As James LJ, with whom the remainder of the Court of Appeal agreed, explained, at page 554:

"I am of opinion that Clayton's Case cannot be applied to fraudulent items. If, indeed, a partner fraudulently draws out £10,000, and then pays in a sum of £10,000, specifically appropriating it with his partner's knowledge to meet the sum drawn out, there is an end of it; but if he goes on manipulating the accounts, and concealing the fraud from his partner, the fraud must be made good when it is discovered. Sums of money which he paid in and entered in the books must be attributed in the first place to moneys drawn out, which were also entered in the books."

[94] The fact that the pursuer had, following the raising of the present proceedings, reconstituted its ledgers to take into account the transactions recorded in the Tide accounts in order to identify the total sums due to it by UPL did not affect this analysis. The fact of the creation of this combined ledger could not alter the attributions made prior to the raising of the present proceedings (see *Jackson v Nicoll* (1870) 8 M 408 at 413). Mr Hunter had

spoken to the creation of the combined ledger. His evidence was that the step was taken to identify the quantum of its claims against the defender.

[95] For completeness, the pursuer also noted that Mr Hunter had given unchallenged evidence that, had the pursuer been aware in March 2023 of the true position – namely, that more than £1.7 million had been paid by it to UPL – it would have required repayment by UPL and would have authorised no further payments to UPL.

Section 1157

[96] The pursuer submitted that the defender failed under each of the three hurdles imposed by the section (see *Gillespie Investments Limited v Gillespie* [2010] CSOH 113 at [53]. The defender had not acted honestly. He had deliberately concealed his actions from the pursuer's other directors and, to this end, had provided the pursuer's employees with a falsified bank statement. Second, the defender's conduct was not reasonable. A reasonable person in the position of the defender would not have acted without authority far less tried to conceal it from his or her fellow directors. In any event, the defender had failed to provide any evidence of what UPL had done with the monies which had been transferred to it. In the absence of evidence from UPL it was unclear whether the money had, in fact, been used to pay off the defender's personal debts as he had told witnesses in July 2024. In the absence of this evidence, the defender had not proved his actions were reasonable. Finally, essentially, for the same reasons, the pursuer submitted that in all of the circumstances the actions of the defender ought not to be excused.

Defender's submissions

Background

[97] The defender submitted that the background of the present case was unique. The defender had used the greater borrowing power of UPL, which was also owned by him, to support the pursuer which was a tech start up. In order to achieve this, the two companies operated a revolving credit facility and provided cross-corporate guarantees. The pursuer had required considerable capital injections. These were provided by UPL. These capital injections then required to be repaid. Furthermore, the fact that UPL had borrowed money on behalf of the pursuer had been of significant benefit to the pursuer because UPL had not passed on the very significant interest charges which it had incurred to Cubefunder. The board was or ought to have been aware of the balances from monthly management accounts. The defender's actions required to be assessed against this background.

Sections 171 and 172

[98] Against that background, the defender submitted that the payments were made lawfully under the revolving loan facility which had been agreed between UPL and the pursuer. The outflow of funds was authorised by clause 3.4 of the agreement. Clause 9.3 allowed for mutual set-off between the pursuer and UPL. The determination of whether a power had been exercised for a purpose required to be made in context (see *Palmer* at 9.2508). The pursuer's board was aware of the agreement. There was no requirement for approval by the pursuer's board for every payment made under the agreement. As the defender had made the payments to the Tide Account and then to UPL pursuant to the revolving loan agreement, in so doing he had acted for a proper purpose.

[99] On the basis of the defender's evidence, it was submitted that the payments had been made to prevent the pursuer's insolvency and ensure its survival. The defender's position was that he had failed to obtain investor approval for the payments to UPL and he recognised that this was a mistake. This was what had been referred to in the conversations in July 2024. Despite the heavy use of the term by the pursuer, the pursuer's witnesses had accepted that the defender had never used the word "misappropriated". The references in those conversations to personal "debts" related to personal guarantees which the defender had provided. On the basis of the defender's evidence, had he disclosed the true – financially distressed – position of the pursuer it would have caused panic among his fellow directors and the pursuer's creditors. This would have brought the pursuer's funding to an end.

[100] The defender noted that the pursuer had, by adjustment to its pleadings, removed any case that the defender had benefited personally from the payments made to UPL in advance of proof. It was not open to the pursuer to advance such a case now. On the basis of the defender's own evidence, it was clear that he had obtained no benefit from the payments.

[101] It was submitted that it would be going too far too fast to draw an adverse inference from the fact that the defender had not produced bank statements from the UPL Tide account. The defender had produced documentation in response to the pursuer's specification. Thereafter, UPL had entered into administration and the pursuer's agents had had discussions with the administrator. If the pursuer had wished to obtain UPL's banks statements, it could have done so.

[102] On this basis it was submitted that the pursuer's case of the defender having acted for an improper purpose or contrary to section 172 ought to be rejected. Overall, the

defender's evidence was clear. He had acted for the best interests of the pursuer and its creditors by seeking to ensure its continued survival. The pursuer was still loss making as its accounts for the year ended 31 March 2025 indicated. The good faith business judgments of directors must be calculated to promote the success of the company (*Palmer* at 8.2606).

FIFO

[103] In any event, on the basis of Mr Hogan's evidence, the payments during the relevant period, which formed the basis of the pursuer's claim, had been extinguished by 12 December 2023 by application of the principle of FIFO.

[104] The principle discussed in *Clayton's case*, in terms of which, where one has a running account, the first item on the debit side of the account is discharged or reduced by the first item on the credit side was not limited to bank accounts. The essential characteristic of such accounts was that the parties had expressly or impliedly agreed that the monetary outcome of each transaction shall not be settled separately. A running account was predicated on a continuing relationship of debtor and creditor. (See *Docklock Limited v Christo & Co Limited* [2024] EWCA Civ 45 at paragraphs 15 and 16). The defender submitted that the authorities did not prevent the application of the principle to situations in which payments were not known to the creditor at the time they were made. The focus was on the monetary outcome. The pursuer could not rebut the application of this principle to the present case purely because it was unaware of the debts owed by UPL.

[105] That extinction defeated any claim for breach of fiduciary duty and that the pursuer had suffered any loss. The defender highlighted the fact that the pursuer's accounts for the year end 31 March 2025 had, at Note 27, incorporated the inter-company balance between it and UPL. This was based on an integration into the pursuer's financial statements of the

information relating to the Tide accounts. Mr Hunter had accepted that the pursuer was acknowledging the debt. This was a tacit acceptance that there was a running account between the two companies.

[106] The pursuer's attempt to rely on "but for" causation was also misconceived. The counter-factual required to take into account the proper context. On the basis of the defender's evidence, if UPL had not made payments to Cubefunder, a default would have been triggered. As a result of the guarantee granted by the pursuer that would have resulted in the insolvency of the pursuer.

Relief from liability

[107] In the alternative, the court should exercise its discretion to grant relief in whole to the defender in terms of section 1157.

[108] A director was entitled to relief under section 1157 of the 2006 Act if it appears to the court hearing the case that the director is or may be liable, but that he acted honestly and reasonably, and that having regard to all the circumstances of the case he ought fairly to be excused. The defender accepted that he bore the burden of proving he acted honestly and reasonably. The test for the reasonableness of a director's actions was whether he or she had acted "in the way in which a man [or woman] of affairs with reasonable care and circumspection could reasonably be expected to act in such a case"; see *In Re Duomatic Ltd* [1969] 2 Ch 365; applied in *PNC Telecom plc v Thomas (No 2)* [2007] EWHC 2157.

[109] In the present case, on the basis of the defender's evidence, the defender had admitted to making a mistake. He had provided full disclosure of the nature of his mistake and, in all the circumstances, it would be appropriate for the court to relieve him of liability.

Decision

Breach of fiduciary duty

[110] The pursuer alleges that the making of payments by the defender from the RBS Account to UPL via the Tide Account was a breach of his fiduciary duties in terms of sections 171 and 172 of the Companies Act 2006.

[111] The two sections provide as follows:

“171 Duty to act within powers

A director of a company must

- (a) act in accordance with the company’s constitution, and
- (b) only exercise powers for the purposes for which they are conferred.

172 Duty to promote the success of the company

- (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to
 - (a) the likely consequences of any decision in the long term,
 - (b) the interests of the company’s employees,
 - (c) the need to foster the company’s business relationships with suppliers, customers and others,
 - (d) the impact of the company’s operations on the community and the environment,
 - (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
 - (f) the need to act fairly as between members of the company.
- (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.
- (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.”

Section 171

[112] The pursuer advanced two alternative arguments in respect of section 171: first, it was submitted that, in making the payments to UPL, the defender had not acted in accordance with the pursuer's constitution; and, secondly, it was submitted that, in any event, if the defender had power to make the payments, the defender had used that power for an improper purpose.

[113] As I understood it, the defender's answers to these arguments were: that the payments had been made in accordance with the revolving loan agreement between the pursuer and UPL; and, as the defender had made the payments in order to enable UPL to repay loans which had been taken out for the benefit of the pursuer, he had acted for a proper purpose.

[114] The pursuer's first argument was based on an alleged breach by the defender of Articles 6 and 7 of the pursuer's articles. The basic contention was that, in terms of these articles, in order to make the payments the defender required a majority decision of the board taken at a meeting or a unanimous decision of the board taken in accordance with Article 7.

[115] I am not persuaded by the pursuer's first argument. It seems to me to be shrouded in an air of unreality. In terms of the pursuer's articles at the relevant time, directors were made responsible for the management of the company's business and were given general authority, to exercise all the powers of the company (Article 3). In the absence of any relevant restriction contained within the articles (of which there is none), this would plainly empower a director to effect payments.

[116] This reading of the articles is consistent with the evidence I have heard as to the way in which the pursuer was managed. It was apparent that from the incorporation of the

pursuer in 2016, the defender was primarily responsible for making payments on behalf of the pursuer. This was certainly the position with regards to the RBS Account as no-one else was able to do so. It is also clear that both before, during and after the period when payments were made to UPL via the Tide Account, the defender had made payments to, among others, UPL. These payments were apparent to the pursuer's financial management, Ms Nicholson, and his fellow directors, Mr Hunter. However, there was no suggestion in the evidence from any of the pursuer's witnesses that a board decision, of the kind envisaged by Articles 6 and 7, either was or had been necessary as a precursor to exercise by the defender of the power to effect payments.

[117] I consider that fallacy of this part of the pursuer's argument is that it confuses the question of whether, in terms of the articles, the defender had the power to make the payments with the related, but separate question of whether the purpose for which the payments were made was a proper one. The first question is what is addressed by section 171(a), the second by section 171(b) to which I now turn.

[118] There was no disagreement between the parties that the correct approach to determining whether a power has been exercised for a proper purpose was the four-stage test set out in *Extrasure Travel Insurances Ltd*: namely, (1) identify the power whose exercise is in question; (2) identify the proper purpose for which that power was delegated to the directors; (3) identify the substantial purpose for which the power in fact exercised; and (4) decide whether that purpose was proper. The test is an objective one in that, in proving a breach of this duty, it is not necessary to demonstrate that a director was acting dishonestly or that he or she was knowingly pursuing a collateral purpose. Determining the substantial or dominant purpose for which the power was exercised – the third stage – involves identifying, as a matter of fact, the motives of the director at the time.

[119] In the present case, the power involved is that of dealing with the pursuer's assets: specifically, operating and making payments from the pursuer's bank accounts. It was this power that was exercised by the defender in making payments from the RBS Account to UPL via the Tide Account.

[120] Turning to the second stage of the test, the pursuer submitted that insofar as any power to deal with the pursuer's assets was delegated to its directors, the purpose was in order to promote the pursuer's commercial interests and to endeavour to ensure its survival. In my view this appears to be unobjectionable mirroring, as it does, the formulation of the duty in section 172 and I did not understand the defender to take any issue with it.

[121] Consideration of the third stage of the test brings into focus the main area of factual dispute between the parties. The defender's position in evidence was that the payments had been made in terms of the revolving loan facility between the pursuer and UPL with the purpose of preventing the pursuer's insolvency by enabling UPL to make loan re-payments to Cubefunder. The pursuer disputes this.

[122] As a starting point, it is important to note that the only evidence I heard in respect of the final destination of the payments made to UPL being Cubefunder came from the defender himself. This part of the defender's evidence was unsupported by any documentary evidence. So, for example, the defender did not produce either bank statements from UPL showing payments to Cubefunder or loan documentation from Cubefunder relating to UPL. The defender also did not produce any guarantee granted by the pursuer in favour of Cubefunder.

[123] I have noted above my reasons for treating the defender's evidence with some caution when it was unsupported by other evidence (see [28]). However, I reject the pursuer's argument that, in light of the non-production of the UPL bank statements by the

defender, I ought to draw an inference adverse to the defender's case. On the pursuer's argument, in order to draw such an inference, I would require to be satisfied that the defender had access to the UPL bank statements and was responsible for their absence (see Phipson at 45-36). I am not so satisfied. The point was not explored to any significant extent in evidence. In particular, the defender was not challenged at proof or at any earlier stage in respect of the documents produced by him in response to the pursuer's specification in February 2025 (No. 11 of process) or any perceived inadequacies therein. Furthermore, there was no evidence from either side as to any steps taken to obtain this documentation from the administrators of UPL.

[124] The fact remains that the only evidence supportive of the defender's position came from the defender himself. On the basis of the evidence I have heard, I am not satisfied that the defender has established that the payments were made for the purpose of benefitting the pursuer. I have reached this conclusion for two principal reasons.

[125] First, the underlying logic of the defender's position is that the payments were being made to UPL in order to facilitate the flow of funds to the pursuer. That is consistent with the fact that, on the defender's position, the payments being made to UPL were re-payments by the pursuer due under the revolving loan facility. However, when one considers the evidence of the flow of funds taking account of all bank accounts, between the pursuer and UPL during the period of the payments from the Tide Account, from 4 August 2022 to 30 March 2023, one finds the opposite. Although there were transfers back and forth between the pursuer and UPL, UPL became indebted to the pursuer on 5 August 2022 and remained continuously indebted to the pursuer from December 2022 onwards with the level of that debt gradually increasing over the period. That trend continued if one considers the period up to August 2024 (when the defender ceased to have any involvement in the

management of the pursuer). (This trend can be seen, for example, by considering the transactions listed in Appendix 3 to Mr Hogan's second report). The level of UPL's indebtedness to the pursuer at the end of the period is confirmed by the agreement of the experts that, once all transactions were taken into consideration, the final position was UPL owed the pursuer £1,864,500.

[126] In the absence of any additional evidence or analysis, I consider that the evidence of UPL's growing indebtedness to the pursuer is fatal to the defender's position. The notion that the making of the payments, effected by the defender, by the pursuer to UPL via the Tide Account was in some way promoting the pursuer's commercial interests is completely undermined by the fact that those appear to have resulted solely in an increasing loan to UPL. A loan which was, unlike the revolving loan agreement in terms of which UPL was the creditor, unregulated by any terms.

[127] Second, I do not consider that the defender's evidence to the effect that the making of the payments was in some way for the benefit of the pursuer can be reconciled with other evidence which I have accepted concerning the circumstances in which the payments were made.

[128] To begin with, it is plain from the evidence that, from the outset of its use, the defender concealed the Tide Account from those responsible for managing the pursuer's finances. Despite being asked for information in respect of the Tide Account repeatedly by Ms Nicholson from August 2022 onwards, the defender did not provide this. The defender's attempts to conceal this information went to extraordinary lengths. That much is apparent from the evidence concerning the defender's falsification, in December 2023, of the Tide bank statement as at 31 March 2023. I am unable to reconcile this clear and undisputed evidence of the defender's attempts to hide the true position with his explanation that the

payments from the Tide Account were actually made to promote the commercial interests of the pursuer. The obvious question is why, in that case, was there a need to go to such lengths to conceal these payments from the pursuer's own management? I do not consider that the defender provided any adequate answer to this point. The defender's suggestion, made during cross-examination, that he had falsified the bank statement in December 2023 in order not to prejudice the pursuer's attempts to secure funding does not explain why, by that point, the activity in the Tide Account had been concealed for more than 12 months.

[129] Furthermore, I also consider that the defender's position in respect of the purpose of the payments made from the Tide Account is fundamentally inconsistent, in a number of respects, with the evidence of three separate witnesses as to the admissions made by the defender in July 2024. First, it is striking that none of those witnesses understood that the use of the funds by the pursuer was actually for the benefit of the pursuer. Mr Cullen and Mr Hunter both understood that the funds had been used by the defender to pay personal debts. Mr Munn's recollection was that the defender had referred to personal debts and the debts of UPL. Second, the defender was unable to explain why, if the money taken from the pursuer had been used for the pursuer's benefit, the defender agreed to repay it. Finally, the defender's demeanour while making these admissions, particularly as reported by Mr Munn is simply not consistent with the position adopted by defender during submissions before me. The defender provided no explanation as to why he would have been so upset making these admissions if what he had done was to make payments for the benefit of the pursuer.

[130] For completeness, I also do not consider that the defender's submissions relating to the need to make the payments to UPL because of the existence of cross-guarantee in favour of Cubefunder make any difference to this analysis as this submission lacked any proper evidential basis. The defender adduced no evidence either as to the terms of any guarantee

or in relation to the circumstances in which it was entered into. Accordingly, even assuming for the sake of the argument that it could be established that the payments were made to UPL via the Tide Account to be paid on to Cubefunder because of the terms of the guarantee, this would simply beg the question as when and for what purposes the guarantee had been granted by the defender on behalf of the pursuer in the first place.

[131] On this basis, I reject the defender's position as to the purpose for which the payments were made to UPL from the Tide Account. In the absence of any alternative explanation based in the evidence, I am not satisfied that it has been established that the payments were made to UPL for the purpose of either promoting the economic interests of the pursuer or endeavouring to ensure its survival.

[132] In all the circumstances, I consider, that, on the balance of probabilities, that the payments were made to UPL for the purpose of promoting the economic interests of that company. This finding would be consistent with the evidence of the flow of funds from the pursuer to UPL. It would also explain both the defender's reluctance to disclose the position to the financial management of the pursuer and the evidence surrounding his admissions in July 2024.

[133] In light of that conclusion, the fourth stage of the test is straightforward: the defender did not exercise the power to make payments to UPL for a proper purpose as he did not do so for the benefit of the pursuer.

[134] It follows that I am satisfied that the pursuer has established a breach by the defender of his duty in terms of section 171(b) of the Companies Act 2006.

Section 172

[135] As the pursuer recognised, the duty imposed by section 172 requires a consideration of a director's subjective belief: a director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company.

[136] However, the pursuer drew attention to the fact that the section requires a director to act in good faith and a core requirement of good faith is honesty. The test of whether a director has acted honestly or dishonestly requires an objective assessment of his or her conduct (see *Saxon Woods* at paragraph 122). The pursuer submitted further that the subjective element of section 172 was qualified when there was no actual evidence of actual consideration by the director of the best interests of the company. In those circumstances, an objective test fell to be applied.

[137] I accept the pursuer's argument in relation to the consideration of good faith and respectfully agree with the analysis of the English Court of Appeal in *Saxon Woods* on which it is based (see, in particular, paragraphs 107 to 112). It follows that determining the question of whether the defender acted in good faith in making the payments to UPL via the Tide Account requires, first, that I ascertain the defender's belief as to the facts at the time; and then, second, determine whether the defender's conduct was honest or dishonest by applying objective standards of ordinary decent people.

[138] The defender's evidence was that, at the time of making the payments, he had believed that he was acting in the best interest of the pursuer. For the reasons I have set out above in relation to section 171, I struggle to reconcile the defender's position in evidence before me as to his belief with his actions at the time. In particular, I do not consider that the defender was able convincingly to explain why, if he genuinely believed what he was doing was in the best interests of the pursuer, he went to such lengths to conceal his actions from

his fellow directors and the pursuer's financial management. Furthermore, I also do not consider that the defender's position as to his belief can be reconciled with the evidence of the admissions he made in July 2024.

[139] I do not require to reach a conclusion on this point because, even if the defender's belief was genuinely held, I am entirely satisfied that, applying objective standards, the defender acted dishonestly. I do not consider that the defender's actions in concealing the activity in the Tide Account and in falsifying the March 2023 bank statement can, objectively, be characterised as anything other than dishonest. It follows that, in making the payments to UPL via the Tide Account, the defender was not acting in good faith and was acting in breach of his duty under section 172.

[140] Furthermore, it is notable that, when one looks behind the defender's general assertions that he had acted in the best interests of the pursuer, no evidence was presented to me to support the suggestion that there was any actual consideration of the interests of the pursuer at the time the defender made the payments to UPL via the Tide Account. For example, it is striking that nowhere in the defender's three witness statements is any attempt made to explain the individual circumstances of any of the 26 payments effected by the defender to UPL. In these circumstances, approaching the question objectively, in accordance with the decision of Pennycuik J in *Charterbridge Corporation Limited* (at 74), I do not consider that an intelligent and honest director of the pursuer would have reasonably believed that making the payments to UPL was for the benefit of the pursuer. I reach this conclusion for the reasons I have set out above, in considering the duties under section 171, relating to the flow of funds from the pursuer to UPL (see [120] and [121]). In short, I do not consider that an intelligent and honest director would reasonably have believed that making an increasing unsecured loan to UPL was reasonably for the benefit of the pursuer.

Conclusion on breach of fiduciary duty

[141] It follows from the reasons I have given above that I conclude that in making the payments to UPL via the Tide Account, the defender acted in breach of his statutory duties both in terms of section 171 and section 172 of the Companies Act 2006.

Loss

[142] The UK Supreme Court in *Mitchell v Al Jaber* has clearly set down the general approach to be taken by a court in determining the appropriate level of damages to be awarded to a company where it has suffered loss as a result of misappropriation by breach of fiduciary duty by one of its directors (at paragraph 93). The general objective, where the property itself cannot be restored, is to restore to the company the value of the property misappropriated. In the same judgment, the court highlighted that the onus of seeking to explain that, in fact, no loss has arisen from the breach of fiduciary falls upon the director (paragraph 111).

[143] The pursuer seeks damages in the sum of the payments to UPL effected by the defender via the Tide Account between August 2022 and March 2023. The underlying logic of the pursuer's claim was the application of "but for" causation. In short, if the defender had not effected the payments to UPL via the Tide Account, the pursuer would have retained the money.

The defender's arguments on repayment

[144] The principal argument advanced by the defender in respect of loss was that the pursuer had suffered no loss as a result of the making of the payments to UPL via the Tide

Account between August 2022 and March 2023 because subsequent payments by UPL to the pursuer had extinguished them. This argument was based on the analysis of Mr Hogan set out in his second report (see [65] above).

[145] The defender's argument was straightforward. The relationship between the pursuer and UPL had been a continuing one. Each had made payments to the other. These payments ought to be treated as a running account of the sort described by Sir William Grant MR in *Clayton's case*. As such, the parties could be taken to have impliedly agreed that the monetary outcome of each transaction would not be settled separately. Rather, the transactions fell to be treated as a single blended fund in which the first item on the debit side of the account is extinguished by the first entry on the credit side. According to the defender, the authorities did not prevent the application of this outcome to cases in which a creditor was unaware of certain payments.

[146] Mr Hogan had carried out this analysis in respect of the payments which formed the basis of the pursuer's claim and had concluded that those payments had been extinguished by 12 December 2023.

[147] As I have summarised above (at [80] to [89]), the pursuer set out a series of reasons which were said to demonstrate that the defender's argument was misconceived.

[148] I consider that the key to determining whether the defender is correct in his argument is a recognition that the appropriation of payments to debts in a running account on a "first in, first out" basis is a presumption which arises because the parties to that account are taken to have agreed, either expressly or impliedly, to this. That is clear from both the passage taken from *Bell's Principles* (s 536) founded on by the pursuer (at [83] above) and from the summary given by Lord Justice Newey in *Docklock Limited* (at [98] above) referred to by the defender. In other words, where, as in the present case, there has

been no express agreement between the parties as to the way in which payments fall to be appropriated to debts, it will be necessary to consider the circumstances and determine whether they show, as Bell put it, a different intention.

[149] In the present case, as was acknowledged by the defender, there was no express agreement between UPL and the pursuer relating to appropriation either at the time the payments were made by the defender to UPL, via the Tide Account, or when the payments identified by Mr Hogan were made to the pursuer by UPL. Of course, such express agreement was prevented because of the defender's actions in concealing the payments from both the pursuer's financial management team and the defender's fellow directors.

[150] Accordingly, the question comes to be: what can be inferred from circumstances as to what was impliedly agreed by the two parties to the transactions in question? When the question is approached in this way, the answer is clear. As the pursuer was unaware of the payments to UPL made by the defender via the Tide Account, there is obviously no basis for suggesting that it intended or agreed that they should form part of the pursuer's inter-company ledger with UPL. As a matter of fact, being unaware of them, these payments were not, at the time, recorded in that ledger by those responsible for the pursuer's financial management. Equally, when the subsequent payments identified by Mr Hogan were made, there is, again, no basis whatsoever for suggesting that the pursuer intended that they should be appropriated to the earlier payments made to UPL by the defender via the Tide Account of which the pursuer was still unaware.

[151] Approached in this way, the facts of the present case are quite different from the situation posited by the defender in which parties to a single running account – like a bank account – may, at any particular time, be unaware of all the transactions that have effected but may, nonetheless, be taken to have agreed to appropriation on a “first in, first out” basis.

In the present case, there was not a single running account because the defender, by his concealment of the payments to UPL via the Tide Account, had separated them from the remainder of the inter-company ledger.

[152] In my view, the payments made to UPL via the Tide Account fall to be treated in the same way as the fraudulent payments made in *Lacey v Hill* referred to by the pursuer. I consider that the example given by Lord Justice Mellish is equally apt in the present case:

“Suppose a partner fraudulently draws out £20,000, and then draws out openly £10,000 more, which he enters in the books, so that it is a simple overdrawn without, fraud. He then pays in £30,000. It is contended that he has repaid the £20,000, and that unless he makes further fraudulent overdrawings there is no right of proof against his separate estate. But suppose he openly draws £30,000 out again, the firm is cheated of the £20,000 just as much as if he had never paid in the £30,000. I am of opinion, therefore, that *Clayton’s Case* cannot be applied to fraudulent debts of this nature.” (at 554)

[153] For completeness, I do not consider that this conclusion is altered by the mere fact that, having discovered about, amongst other things, the payments from the Tide Account, the pursuer subsequently prepared a complete record of the transactions between itself and UPL in order to establish what was owed to it by UPL. In my view, neither the retrospective calculation of this debt nor the recording of it in the pursuer’s financial statements for the year ended 31 March 2025 can alter the absence of intention or agreement by the pursuer to the appropriation of payments in 2023.

The defender’s remaining arguments on loss

[154] The defender both in his evidence and in the submissions made on his behalf sought to advance arguments the thrust of which was the pursuer had not suffered any loss as a result of the payments made via the Tide Account essentially because those payments resulted in benefit to the pursuer and ensured its survival.

[155] For the reasons I have set out above in respect of the defender's breach of his duties under section 171(b) (at [118] to [126]), I am satisfied that the defender has failed to discharge the onus on him to demonstrate that the pursuer did not suffer a loss as a result of the payments made to UPL via the Tide Account.

[156] In summary, the evidence does not support the contention that the pursuer obtained any benefit from the payments made to UPL. In particular, as I have noted, the evidence of the cash flows between the pursuer and UPL shows that UPL, rather than the pursuer, was the beneficiary of those transfers. No evidence, other than that of the defender himself, was led of the loan arrangements which the defender contended were in place between UPL and Cubefunder. Again, only the defender spoke to the cross-guarantees which he contended were in place between the pursuer and Cubefunder. I have set out above my reasons for treating the defender's own evidence with caution (at [28]) and also why I do not consider that the defender's evidence to the effect that the making of the payments was in some way for the benefit of the pursuer can be reconciled either with the evidence of the defender's concealment of his actions or his admissions in July 2024.

[157] Furthermore, there was no challenge to the analysis of Mr Preston, adopted by Mrs Probert, which concluded that there was no evidence that the payments made to UPL via the Tide Account had been paid to Cubefunder to reduce the pursuer's indebtedness.

Conclusions on loss

[158] It follows that I conclude that the loss caused to the pursuer by the defender's breaches of duty in making payments to UPL via the Tide Account between August 2022 and March 2023 is appropriately quantified as the total of those payments being £1,756,998. That conclusion is in accordance with the general objective identified by the UK Supreme

Court in *Mtichell v Al Jaber*. It is also consistent with the approach taken by the English Court of Appeal in analogous circumstances in *Auden McKenzie (Pharma Division)* with which I respectfully agree.

Section 1157

[159] The final question which I require to consider is whether I ought to exercise my discretion and grant relief to the defender in terms of section 1157(1) of the Companies Act 2006. That section provides as follows:

“1157 Power of court to grant relief in certain cases

- (1) If in proceedings for negligence, default, breach of duty or breach of trust against
 - (a) an officer of a company, or
 - (b) a person employed by a company as auditor (whether he is or is not an officer of the company),

it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit.”

[160] In light of the evidence I have heard and the conclusions I have reached, I consider that the answer to this question is straightforward.

[161] For the reasons I have set out above at [133], I have concluded that the defender, in making the payments to UPL via the Tide Account did not act honestly. I do not consider that the defender’s actions in concealing the transactions being made via the Tide Account from his fellow directors and financial management of the pursuer, including the falsification of a bank statement, can reasonably be characterised as anything else. As such,

any attempt by the defender to seek relief in terms of section 1157 falls at the first hurdle (*cf Gillespie Investments Limited* at [53]).

[162] Furthermore, on the basis of my conclusion as to the purpose for which the payments were made (at [126]), I am satisfied that the defender has failed to demonstrate that he has acted reasonably. I do not consider that to have made payments to and for the benefit another company, without authority, unregulated and unsecured by any loan agreement, can sensibly be characterised as reasonable.

[163] Accordingly, as the defender has failed to demonstrate he acted either honestly or reasonably, I am satisfied that the defender has no entitlement to seek relief in terms of section 1157(1).

Disposal

[164] In light of the foregoing, I will sustain the pursuer's first and second pleas in law and grant decree as first concluded for.

[165] The parties were agreed that expenses should follow success. As it has been entirely successful in its action, I will also award the pursuer the expenses of the action.