OUTER HOUSE, COURT OF SESSION

[2023] CSOH 47

CA105/20

OPINION OF LORD BRAID

In the cause

DMWSHNZ LIMITED (in liquidation) and MARK WILSON AND JAMES ASHLEY DOWERS, the liquidators thereof

Pursuers

against

BANK OF SCOTLAND PLC

Defender

Pursuers: D Thomson KC, Watt; Anderson Strathern LLP
Defender: Borland KC, Roxburgh; Addleshaw Goddard

13 July 2023

Introduction

[1] In this commercial action the pursuers, who are, respectively, a company now called DMWSHNZ Limited (in liquidation) and the liquidators thereof, are suing the defender, Bank of Scotland plc, for (in round terms) £26.6m, being the sum allegedly due by virtue of a breach of fiduciary and other duties said to have been owed to DMWSHNZ (which I will henceforth refer to as the company) by the defender as a shadow director. In the alternative, the pursuers seek recovery of that sum on the grounds of unjust enrichment. The case called before me for debate on the defender's preliminary plea that the pursuers' pleadings in support of both causes of action are irrelevant, *et separatim* lacking in essential specification,

and that the action should be dismissed. It is common ground that the court may dismiss an action as irrelevant only if the action is bound to fail even if all the pursuers' averments are proved: *Jamieson* v *Jamieson* [1952] AC 525.

[2] The circumstances giving rise to the action arose out of a tax avoidance scheme dubbed Project Raindrop. To put the arguments about shadow directorship and unjust enrichment into context, I will first describe that scheme.

Project Raindrop

[3] The following account is based upon the pursuers' averments. For present purposes they must be assumed to be true, although the mechanics of how the scheme worked, and what it achieved (as opposed to what instructions were given, to whom they were given and in what capacity they were given), are largely uncontroversial.

Countrywide Banking Corporation Ltd

[4] The company, previously known as BOS Holdings (New Zealand) Ltd, was, at the outset of Project Raindrop, a subsidiary of the defender. It in turn owned a 100% subsidiary, Countrywide Banking Corporation Ltd, which it sold in September 1998 for NZ$850m, payable under loan notes. The sale gave rise to a chargeable gain of £203,753,103 which would be triggered on redemption of the loan notes. Liability to tax on that gain was deferred until the loan notes matured. As at year ended 31 December 2002, the provision in the company's accounts for that deferred liability was £62.5m. At that date, the company also owed the defender £199.162m. By this stage, the company was a shell company, pregnant (as the summons puts it) with a substantial chargeable capital gain.

GIIT

[5] At the same time, the defender was a secured creditor of an insolvent investment trust, Geared Income Investment Trust plc (GIIT), to the tune of some £41.4m with an anticipated shortfall of £27.2m. Lloyds TSB Bank plc was also a secured creditor. GIIT had accrued but unrealised tax losses estimated at £200m. One means by which the defender might seek to recover its debt was by the appointment of an administrative receiver.

The EY plan

[6] By April 2002, Ernst and Young (EY) were developing a plan to realise value from losses suffered by split capital investment trusts such as GIIT, one target market for that plan being banks appointing receivers. In simple terms, the EY plan would potentially enable the defender to match capital losses within GIIT with assets in the defender's group of companies which were pregnant with capital gains, such as the company, in such a way that the resulting tax saving would accrue to the receiver of GIIT, ultimately securing payment to the defender of an enhanced dividend from GIIT.

[7] The plan conceived by EY for the defender became known as Project Raindrop (from a metaphor coined by EY that it relied upon "tiptoeing through the raindrops of complex anti-avoidance rules without getting wet"). The first step in the plan was the appointment of administrative receivers to GIIT. Securities pregnant with capital losses would be hived down into newly created subsidiaries and the losses crystallised. The company would be divested of its interest in some of the loan notes in preparation for their acquisition by a subsidiary of GIIT, GIIT Realisations 3 Ltd (GIIT3). Certain of the newly crystallised losses of GIIT would be transferred to GIIT3. The company's remaining loan notes would be sold or redeemed, creating a chargeable gain, which would be transferred by election to GIIT3

and netted off against available losses. Liability to tax associated with the sale or redemption of the loan notes would thereby be extinguished. Cash that would otherwise have had to be set aside by the company on redemption of the loan notes to settle its tax liability would be available and would be paid by the company to GIIT3 as an election consideration, distributed by GIIT3 to GIIT as a dividend and a corresponding distribution would be paid by the receivers of GIIT to the defender.

Steps taken to implement Project Raindrop

[8] That plan was duly implemented. On 8 April 2003 the defender (and Lloyds) appointed two insolvency practitioners, Patrick Brazzil and Margaret Mills of EY (the IPs), as joint administrative receivers of GIIT. On 9 October 2003 the company transferred its interest in the amount of loan notes which it no longer required (NZ$480m) to a separate company in the defender's group, leaving the value of the remaining loan notes as NZ$370m. The company entered into a loan agreement with the defender for a loan of NZ$370m. On 15 October 2003 the shareholders of the company resolved that the existing issued share capital of the company be reclassified, which, among other things, involved the reclassification of the company's 99,999 ordinary £1 shares registered in the name of the defender as A ordinary shares of £1 each. Several subsidiaries of GIIT were formed, including GIIT3, of which GIIT was appointed as sole director. The defender made a loan of £99,999 to GIIT. GIIT in turn made a loan of that amount to GIIT3, enabling GIIT3 to acquire from the defender its 99,999 A ordinary shares. The company's completion balance sheet recorded among its assets its remaining interest in the loan notes, NZ$370m, and cash in its bank account of £28.558m. Its liabilities included a deferred liability to corporation tax on the capital gain associated with the loan notes of £26.6m and the sum of NZ$370m owed

to the defender. On 23 October 2003 GIIT and GIIT3 were appointed directors of the company and the existing directors resigned, with the exception of one Kerr Cruickshank of Horizon Capital (a division of the defender which was responsible for deriving value from distressed assets), who was still, at that time, a director.

[9] On 27 October 2003 the company's board decided to redeem the loan notes and NZ$370m of loan notes were redeemed on 28 November 2003, giving rise to a gain of £88.6m upon which a tax charge was payable. NZ$370m was paid by the company to the defender.

[10] On 1 December 2003, the company's board (by this time, GIIT and GIIT3, Mr Cruickshank having resigned as a director immediately beforehand) resolved at a meeting to enter into the joint election agreement with GIIT3. Consequently, the following things all occurred on that date. The company and GIIT3 entered into an agreement whereby they made a joint election to deem the loan notes to have been transferred to GIIT3: the agreement provided for the company to pay consideration of £26.6m (equating to the tax due on the gain) to GIIT3 in exchange for the making of the election. An election was submitted to HMRC under section 171A of the Taxation of Chargeable Gains Act 1992. GIIT and GIIT3 submitted an election to HMRC under section 179A of the 1992 Act to treat losses accruing on deemed disposals of assets by GIIT as accruing to GIIT3. The defender released the company from an obligation to deposit £26.6m with it. The actings of all of the company, GIIT and GIIT3 were carried out by Mr Brazzil, wearing several different hats.

[11] The company subsequently paid the election consideration of £26.6m (which equated to the provision for deferred liability to corporation tax on redemption of the loan notes in its completion accounts) to GIIT3 on 5 December 2003, following a board resolution to that effect passed on that day. GIIT and GIIT3 were still the sole directors. In calculating GIIT3's

liability to tax, the gain deemed to have accrued to it on redemption of the loan notes was set off against, and extinguished by, the losses treated as having accrued to it.

[12] GIIT3 paid a dividend to GIIT of £26.5m on 8 December 2003, being the entire balance of the election consideration received from the company under deduction of GIIT3's liabilities. On 9 December 2003 GIIT paid a distribution to the defender as a secured creditor of £26.6m, made up of the sum received from GIIT3 and £99,999 repayable by GIIT to the defender in respect of the loan to fund the acquisition of the company's shares.

The outcome

[13] The outcome of all of this "tiptoeing through the raindrops" was that by the end of 2003 the company's total assets had reduced to some £7,000, the balance of the funds which it previously held having been "upstreamed" to the defender, as the summons puts it.

[14] On 7 October 2005 HMRC opened an inquiry into the company's tax return. On 8 November 2007 it notified EY that it considered the election under section 171A had been ineffective and as a result an assessment to tax was to be made on a chargeable gain of £88.6m in the hands of the company. The overall liability to corporation tax was not less than £26.6m. For present purposes it is unnecessary to go into the subsequent history in detail. Suffice to say that all appeals against HMRC's assessment have failed and the company has entered insolvent liquidation, having a substantial liability to tax which it was and is unable to meet, its funds having been "upstreamed" in the manner described.

[15] It is against this background that the pursuers seek to recover the sum sued for on the basis that the defender, as shadow director, breached its fiduciary duty to the company, and its duty to act with reasonable care and skill in the company's interest; and, in the

alternative, if the defender is held not to have been a shadow director, that the defender has been unjustly enriched at the company's expense.

The shadow directorship case

Shadow directors - the law

[16] The first matter to note is the peculiarity that, at the material time, the sole *de jure* directors of the company were the companies GIIT and GIIT3; and the sole director of GIIT3 was GIIT. None of those companies had, as a director, any natural person. Until the enactment of section 155(1) of the Companies Act 2006, which provides that a company must have at least one director who is a natural person, that was perfectly lawful: *Revenue and Customs Commissioners* v *Holland* [2010] 1 WLR 2793, Lord Collins at [95]. Nonetheless, any instruction to the directors of the company would, of necessity, require to be given to a natural person not themselves a director; and the corporate directors would also require to act through the medium of such natural person; as it happened, in this case, Mr Brazzil.

[17] Turning to the statutory definition of shadow director, section 741(2) of the Companies Act 1985 (which applied at the material time) provides:

> "In relation to a company, *'shadow director'* means a person in accordance with whose directions or instructions the directors of the company are accustomed to act. However, a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity".

[18] The judicial guidance relied on by the defender as to what is required for a person to be deemed a shadow director is that of Millet J in *Re Hydrodan (Corby) Ltd* [1994] BCC 161 at 163, where he said that to establish that a defendant was a shadow director it was necessary to allege and prove: (1) who are the directors of the company, *de facto* or *de jure*; (2) that the defendant directed those directors how to act in relation to the company or that

he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so to act. He added that what was needed was a board of directors claiming and purporting to act as such; and a pattern of behaviour in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directors of others. That is useful guidance, but the context in which it was given was in a passage where Millet J was explaining the difference between a shadow director and a *de facto* one, and the emphasis was perhaps different than it might otherwise have been.

[19] More authoritative guidance on the approach to the construction of section 741(2) was given by the Court of Appeal in *Secretary of State for Trade and Industry* v *Deverell* [2001] Ch 340. Morritt LJ at [35] set out five propositions which he derived from the authorities, including *Hydrodan.* Of relevance to the present case are the first three of those. The first is that "shadow director" is to be construed in the normal way to give effect to the parliamentary intention ascertainable from the mischief to be dealt with and the words used. In particular, as the purpose of the Act is the protection of the public it should not be strictly construed because it also has *quasi*-penal consequences. Second, the purpose of the legislation is to identify those with "real influence" in the corporate affairs of the company (which need not be exercised over the whole field of its corporate activities). Third, whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained by the court in the light of all the evidence.

[20] In *McKillen* v *Misland (Cyprus) Investments Ltd* [2012] EWHC 521 (Ch), Richards J observed that the guidance given by Millet J in *Hydrodan* still largely held true but that two qualifications emerged from the authorities: first, it is sufficient that a majority of the

directors should act in accordance with the directions of the shadow director; and second, echoing the qualification to the second proposition in *Deverell*, it is not necessary that the shadow director should exercise control through the instructions which he gives over all the matters which are decided by the board.

[21] Where a person qualifies as a shadow director, by dint of having given the requisite instructions to the board, that person acquires a legal status from which certain consequences follow (for example, where the company has become insolvent, when liability for wrongful trading may be imposed). However, in the realm of fiduciary and other duties, a shadow director will not necessarily be held to have owed the full gamut of duties to the company as owed by a *de jure* (or a *de facto)* director: *Standish* v *The Royal Bank of Scotland plc* [2020] 1 BCLC 826, per Trower J at [55] to [61]. This necessarily flows from the fact that the shadow director need not exercise control over all matters decided by the board. Rather, there is a direct link between the instruction which founds the status of shadow directorship, and the nature and extent of the duty owed by the shadow director to the company. In the absence of a relationship or causal link between the instruction and the duty said to be owed and breached, a shadow director will not be liable for breach of duty: *Standish*, para [61].

[22] Finally, it is not enough that instructions be given to a person who happens to be a director. The instructions must be given to that person in their capacity as director, and the director must have acted in that capacity in accordance with the instructions: *Re Coroin Limited (No 2)* [2013] 2 BCIC 583, David Richards J at [594].

[23] It follows from all of the above that for the pursuers to succeed in establishing that the defender was a shadow director and that it breached a fiduciary duty owed to the company, they will have to aver, and prove: that the defender had "real influence" in the company's corporate affairs; that the company's directors were accustomed to act in

accordance with the defender's instructions; that instructions regarding the payment of the election consideration were given by the defender; moreover, that such instructions were given to the company's directors in their capacity as directors (but always bearing in mind, as pointed out above, that any instructions, of necessity, would require to be conveyed to the directors through the medium of a natural person); and that the directors (again, of necessity through the medium of a natural person) acted on those instructions.

The pursuers' averments

[24] In assessing the adequacy of the pursuers' pleadings it is worth bearing in mind that this is a commercial action, where, subject to a requirement to give fair notice, the summons need only summarise the circumstances out of which the action arises (RCS 47.2(3)(c)); and the pleadings should be in abbreviated form: Practice Note no 1 of 2017, paragraph 13(a). The summons, at least as it has evolved through an adjustment period lasting more than a year, is now in a more traditionally voluminous form, setting out the pursuers' position at some length, and with some unnecessary repetition (for example, repeated averments that the IPs were at all material times acting on the defender's instructions and directions).

[25] These observations aside, the common themes pervading the pursuers' pleadings are that Project Raindrop was a scheme devised solely for the defender's benefit in an attempt to circumvent anti-avoidance rules introduced by the Finance Act 1993 and Finance Act 1998; that the defender made clear to the IPs throughout that they were expected to follow the various steps in the plan through to fruition, such that the IPs were at all material times acting on the defender's instructions and directions; and that the plan was carried out entirely at the behest of the defender. So, in article 3 of condescendence, there is an express averment that the scheme was carried out on the instructions of the defender, for its direct

benefit, and that its implementation was directed and controlled by the defender's staff and directors. There are averments to similar effect in articles 7, 8 and 15.

[26] The main facts upon which the pursuers rely in support of their contention that Project Raindrop was carried out at the defender's behest can be summarised as follows.

Initial advice given by EY

[27] In article 5 the pursuers make averments about the advice given by EY to the defender in 2002 and 2003. They aver that Kerr Cruickshank took a particular interest in the issue; that EY's corporate recovery team, including the IPs, were party to the discussions; that they sought input from EY's tax department; and there are averments about how the plan evolved. They also aver: that EY advised that receivership was a pre-requisite and that an EY-appointed receiver would facilitate implementation of the plan; that on that basis the defender supported the appointment of the IPs as receivers; and that the defender proceeded on the basis that the IPs would implement Project Raindrop in accordance with their directions. An example, said to show that the defender had ultimate control of the scheme, is an email from Mr Cruickshank to Ian Hunter of EY on 11 June 2003, in which he stated that:

> "I'm also assuming that the Receiver will secure Lloyd's consent to the proposed asset split because if he doesn't, and Raindrop involves sharing the tax savings with Lloyds, it won't happen."

Fees paid by the defender

[28] In article 7 the pursuers aver that the defender paid EY's implementation fee, as well as the fees of the IPs, and the IPs' solicitors. They identify the individual members of the defender who were provided with advice by EY, including Kerr Cruickshank,

Graham Mackie and Charles Simpson, and aver that it was they who, as Raindrop progressed, instructed (i) among others, Ian Hunter and Lynne Sneddon of EY Edinburgh (who in turn directed the IPs) and (ii) the IPs and the IPs' staff, thereby controlling the day-to-day implementation of Project Raindrop.

The step plan

[29] In article 8 the pursuers refer to a "step plan" developed by EY, which set out the steps to be taken by various parties, including the IPs, to implement the plan. It involved the various steps described above. The pursuers aver that the plan was possible because the defender could take control of GIIT by appointing administrative receivers with authority to act on its behalf who had agreed with the defender to implement the plan. There is an express averment that GIIT and GIIT3 acted according to the defender's directions and instructions in relation to the implementation of Project Raindrop and that the IPs entered into the transactions forming part of Project Raindrop on behalf of the defender.

The deed of indemnity

[30] Article 10 narrates the appointment of the IPs as receivers of GIIT, as described in [8] above and avers that they were appointed on the recommendation of EY's Edinburgh tax team, "on the understanding that their appointment was necessary to implement Project Raindrop and that the IPs would co-operate to that end". The pursuers aver that: EY insisted upon a deed of indemnity from the defender, indemnifying the IPs in relation to tax liabilities they might incur, as a condition of EY implementing the scheme; the defender sought to persuade EY to implement the scheme without the grant of an indemnity, on the basis that EY had designed the scheme; but on 10 June 2003 EY refused to implement the

scheme in accordance with the directions of the defender unless the IPs were granted an indemnity by the defender. The terms of the indemnity had been settled by the IPs and the defender by 28 November 2003 but had been under discussion since June 2003. One term of the indemnity was that it was conditional on the IPs implementing the scheme according to the terms of the prescribed step plan. Thus, had the IPs failed to follow the step plan they would not have been indemnified by the defender if the scheme failed and they incurred liability for the tax avoided as a result. Accordingly, so the pursuers aver, the IPs took care to ensure that they did follow the defender's directions, working closely with the members of the EY advisory teams who identified themselves as acting for the defender, particularly Lynne Sneddon and Ian Hunter, to implement the scheme according to the defender's directions. The pursuers make detailed averments giving examples of what instructions were given, by whom and to whom at EY, including instructions about the need for the receivers to follow the step plan, and to use an opinion obtained from counsel as a basis to instruct the IPs so that they might follow the proposed timetable. The pursuers aver that the IPs gave no independent consideration to the merits of Project Raindrop beyond considering whether Project Raindrop was in the interests of GIIT's creditors, in particular the defender, and their own interests were protected if the scheme failed and tax became payable.

[31] Having set out the facts on which they rely, the pursuers then aver in article 15 that, in implementing Project Raindrop, Mr Brazzil was subject to the influence of and acting on the instructions and directions of the defender; that GIIT and GIIT3, as directors of the company acting by the IPs, were, in implementing Project Raindrop, acting in accordance with the defender's instructions and directions; and that it was a condition of the indemnity granted by the defender to Mr Brazzil that the company enter into the joint election with GIIT3. This theme is repeated in article 16, where the pursuers aver that at the material time,

GIIT and GIIT3 were acting by Mr Brazzil, who, in implementing Project Raindrop, was subject to the influence of and acting on the instructions of the defender. It is averred that it was a condition of the indemnity granted by the defender to Mr Brazzil that the company pay £26,607,758 to GIIT3 for entering into the offset election. There are then yet further averments in articles 17 and 18 to the effect that when Project Raindrop was implemented, the IPs controlled GIIT and GIIT3, and latterly the company, and that the IPs, in turn, were subject to the influence of and acted on the instructions and directions of the defender.

[32] Finally for present purposes, all of the foregoing averments are drawn together in article 23 of condescendence, where the pursuers aver (referring to the defender in the plural, and to the company as the pursuers):

> "The defenders were shadow directors of the pursuers. The defenders were not appointed to the pursuers' board of directors. However in the implementation of Project Raindrop the directors of the pursuers were accustomed to act in accordance with the directions or instructions of the defenders. The defenders procured that the pursuers participate for their benefit in the scheme. To that end the defenders appointed the IPs as GIIT's administrative receivers on the understanding that they would implement Project Raindrop…Once appointed as such the IPs as GIIT's agents controlled GIIT and the boards of GIIT's subsidiaries including GIIT3 and, in due course, the pursuers. After 23 October 2003 a majority of the pursuers' directors (i.e. GIIT and GIIT3) acted by the IPs. After 1 December 2003 all the directors of the pursuers acted by the IPs. As hereinbefore condescended upon, moreover, the IPs had been appointed, as a stage of Project Raindrop, in order to give effect to the Defender's instructions to implement Project Raindrop. The IPs were acting at all material times on the defenders' directions or instructions in implementing Project Raindrop."

Submissions

Defender

[33] Senior counsel for the defender, focussing on *Hydrodan*, *Standish* and *Coroin*, and propositions derived from those cases, subjected the pursuers' pleadings to detailed scrutiny. The essence of his submission was that since there must be a causal link between

the fiduciary duty said to have been breached and the instruction giving rise to the alleged breach, the pursuers must aver what instruction was given to the company's directors in their directorial capacity; but one searched in vain for averments of any such instruction. The averments focused on the IPs but there were no averments that any instructions to them were in relation to any directorial activities in relation to the company as opposed to being given in their capacity as receivers; not surprisingly, as they were never directors of any of the company, GIIT or GIIT3. Developing this submission, counsel advanced five main arguments as to why the pursuers' shadow directorship case was fundamentally irrelevant (and not simply lacking in specification). First, there were no averments that the company's directors (as opposed to the IPs, acting as receivers) were at the material time accustomed to act in accordance with the defender's instructions. Second, the pursuers merely averred that various representatives of the defender gave instructions to Mr Hunter and Ms Sneddon of EY Edinburgh but did not aver either that anything said to them was translated into an instruction or direction to the IPs; or that the IPs acted on any such direction or instruction when agreeing to implement the transaction. Third, there were no averments of direct instruction by the defender of the IPs themselves, specifically no averments of (i) which representative of the defender issued any instruction to the IPs, (ii) the form such instruction took, (iii) what the instruction was or (iv) when it was issued. Nor were there any averments indicating when and how the IPs became accustomed to act in accordance with the defender's instructions. Fourth, the general suggestion that the IPs were subject to the influence of the defender did not constitute a properly pleaded case of instructions or directions being issued by the defender to the directors of the company. Fifth, the bold assertion that the deed of indemnity effectively compelled the IPs to implement the scheme

was irrelevant, because (i) the deed was signed some days after the transaction complained of and (ii) it was entered into freely and voluntarily by the IPs.

Pursuers

[34] Senior counsel for the pursuers submitted that the defender's focus on a selected portion of the company's averments was misplaced. Instead, one must look at the big picture painted by the pursuers' averments, which was that Project Raindrop was a scheme entered into at the behest of the defender which would not have happened had the defender not wished it to, or had the other participants not danced to the defender's tune. Having regard to the totality of the facts which the pursuers were offering to prove, it could not be said that they were bound to fail. Contrary to the position advanced in the defences (that each party was acting in its own interests, taking independent advice) the pursuers' case was that the IPs would be appointed as receivers only if they did what the defender wished and did not seek independent advice but relied upon the step plan as the basis for proceeding. All of the defender's arguments came back to the same point, that instructions to the IPs were irrelevant, but the pursuers' case, properly understood was that GIIT and GIIT3 were acting in accordance with the defender's instructions, and of necessity they were acting through the medium of the natural persons in the shape of the IPs.

Decision on the shadow directorship case

[35] If the defender is correct in arguing that there must be express averments of a particular instruction given to the IPs, acting in a directorial capacity, and specification of what that instruction was, and how and when it was given, then the pursuers' case is bound to fail, because there are no such averments, nor could there ever be, as the IPs were not

directors of the company. The defender's argument is founded on what was said in *Hydrodan*, but the guidance given there, as already pointed out, was in the context of drawing a distinction between shadow, and *de facto*, directors and the case is not authority as to the manner in which instructions or directions must be given to a company's board in order for a person to be deemed a shadow director. As such, I do not consider that *Hydrodan* is a helpful starting point in the present case. Rather, the task for the court (if a proof is allowed) will be to determine whether, in the circumstances averred by the pursuers, the defender ought to be held to be a shadow director within the meaning of section 741(2) of the 1985 Act, which is ultimately a matter of statutory construction. In that regard, *Deverell* provides more useful guidance than *Hydrodan*: the purpose of section 741(2) is to identify those with real influence in the corporate affairs of the company, and whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained in the light of all the evidence. It is clear from that proposition, in particular, that there need not always be an express instruction but that an instruction may be inferred from conduct.

[36] Viewed in this light, the key averments which the pursuers make are that Project Raindrop was conceived solely for the defender's benefit; that it was made clear by the defender on numerous occasions to EY that the step plan must be followed; that the (EY-appointed) IPs were aware of the step plan; that the effect of the deed of indemnity was to oblige them to follow the step plan; that part of the step plan was the entering into of the joint election agreement and the payment of the consideration to GIIT3; that the natural person who made the necessary decisions on behalf of the directors of the company was Mr Brazzil, one of the IPs; and that no independent advice was taken by the IPs.

[37] In my view, these averments, if proved, are capable of establishing the key facts, as set out in para [23] above, and of justifying the conclusion that the defender was a shadow director within the meaning of section 741(2). They are averments that the defender was the person who, in relation to what was effectively the company's sole business at that time, exercised real influence over the company. While it is true that Mr Brazzil was the receiver of GIIT and not a director of any of the companies, in one sense that is nothing to the point since a creditor is not entitled to instruct a receiver in the performance of his or her duties: *Goode, Principles of Corporate Insolvency*, 10-77. The averments taken as a whole are habile to prove that Mr Brazzil was, in essence, directed to act as he did, which was pre-ordained from the outset, and that the directions that he do so emanated from the defender via EY, who were closely involved throughout in the planning, evolution and implementation of Project Raindrop. That is not to say that there are no potential hurdles in the pursuers' way. In particular, there may be a live question as to whether the company's directors were accustomed to act in accordance with the defender's instructions, if this in substance was the only transaction which the company entered into on its instructions. The ultimate outcome of the case might come down to precisely what the phrase "accustomed to act" means, in a context where, at the material time, the company was a shell company which did not act much at all. As regards the point made by the defender about the indemnity, it is ultimately a question of fact as to whether it influenced the IPs or not. Although it was formally entered into after the material transactions, it had been under discussion for some time. Whether the IPs entered into it voluntarily is neither here nor there; the pursuers' case is not that they were compelled to enter it, but that the effect of their having done so was to compel them to act in a particular way.

[38] These, and other questions which arise, can be decided only after the court has heard evidence. For all of the foregoing reasons, I am unable to conclude that the pursuers are bound to fail if all their averments are proved, and I refuse the defender's motion to sustain its plea to the relevancy insofar as directed towards the shadow directorship case.

[39] For completeness, there is no question of the pursuers' averments failing to give adequate specification. The defender has ample and fair notice of the case which it has to meet (and has in fact been able to aver its own counter-position at some length).

The unjust enrichment case

Introduction

[40] The pursuers' unjust enrichment case is predicated on the same facts as are pled in support of shadow directorship, in particular that Project Raindrop was implemented on behalf of the defender by the IPs (and by GIIT and GIIT3, both acting by the IPs) according to the defender's directions and instructions. The pursuers' position is that if (contrary to their principal contention) those facts are not habile to support the claim of shadow directorship, they are habile to support the claim for recompense. The averments of unjust enrichment are in article 29 of condescendence, where the pursuers aver that the dividend paid by GIIT3 to GIIT and the distribution paid by GIIT to the defender from the proceeds of the election consideration were paid in error without lawful basis and without intention of donation; that the payment was part of a set of pre-ordained co-ordinated transactions of which the defender was fully aware and which were implemented for its direct benefit on the assumption that the election under section 171A was valid, which assumption was erroneous; and that the defender was therefore enriched at the company's expense.

Submissions

Defender

[41] Senior counsel for the defender submitted that the unjust enrichment case was irrelevant for two reasons. First, the party averred to have been enriched by payment of the election consideration was GIIT3, and so any claim for unjust enrichment ought to be directed against that company. There were no averments justifying a claim being directed against the defender, missing out the intermediate parties, GIIT3 and GIIT. Reference was made to the *Stair Memorial Encyclopaedia Reissue, Unjustified Enrichment*, paragraphs 902 and 903. Second, the pursuers' claim also failed to take account of the fact that the payment by GIIT to the defender discharged a valid debt. The defender had not been enriched: *Stair Memorial Encyclopaedia*, paragraph 689; *Thomson* v *Clydesdale Bank* [1893] AC 282.

Pursuers

[42] Senior counsel for the pursuers submitted that the pursuers' claim was not of the type being discussed in paragraphs 902 and 903 of *Stair*, concerned with the rules applicable to tracing, which were anyway said not to apply to cases of unjust enrichment based on fraud or comparable wrong. Paragraph 693 of the *Stair* reissue recognised that there were several categories of exception to the general rule that only direct transfers of benefits were recoverable in actions for unjustified enrichment, including for example the author's fraud, and cases where an agent or other fiduciary, B, makes a transfer to C, and B's principal seeks repetition or recompense to himself.

Decision on the unjust enrichment case

[43] There are two general rules in play, both founded on by the defender. The first is that in Scots law a pursuer can make a claim only against the person who is directly enriched at his expense, and that the transfer of value must not have taken place by way of a third party's estate or patrimony: *Stair* reissue, 689. The second is that where a creditor, C, receives payment from his debtor B using A's money, A cannot sue A in recompense: *Stair*, 708; *Thomson*, above. However, these are simply general rules, to which there are, inevitably, exceptions, as *Stair* also recognises at 903. Senior counsel for the pursuers disavowed any suggestion that the pursuers' claim was founded to any extent on the tracing rules. Further, although there is no suggestion of fraud in the present case, the facts averred by the pursuers, if proved, are far removed from the facts in *Thomson*, inasmuch as the whole series of payments could, if the pursuers succeed in proving all of their averments, be regarded as part of one transaction which was planned and pre-ordained from the outset; and, at least on one view of the facts, the parties through whom payment was made were acting for the defender. In the English case of *Investment Trust Companies* v *Revenue and Customs Commissioners* [2018] AC 302, Lord Reed, at para [48], in a passage dealing with situations in which the parties have not dealt directly with one another, but the defendant has nonetheless received a benefit from the claimant, said that one such situation is where the agent of one party is interposed between them, and another is where a set of co-ordinated transactions has been treated as forming a single scheme or transaction, on the basis that to consider each individual transaction individually would be unrealistic. In the present circumstances, a similar approach might well be taken, with the defender being held to have been enriched at the company's expense on a realistic view of the various transactions, planned, as they were, from the outset. Again, I am unable to conclude that if

the pursuers succeed in proving all of their averments their unjust enrichment claim is also bound to fail.

Disposal

[44] I will repel the defender's second plea in law (that the pursuers' averments ought not to be admitted to probation) and refuse its motion that the action should be dismissed. Parties agreed that the expenses of the debate should follow success and I shall find the defender liable in the expenses of the debate. Thereafter, as invited by senior counsel for the pursuers, I shall put the case out by order to discuss what orders should be made next.