

ENGLAND AND WALES / JUDGMENT

Hedger v Adams

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Neutral Citation Number: [2015] EWHC 2540 (Ch) IN THE HIGH COURT OF JUSTICE CHANCERY DIVISION LEEDS DISTRICT REGISTRY IN THE MATTER OF PRO4SPORT LIMITED (IN LIQUIDATION) AND IN THE MATTER OF THE INSOLVENCY ACT 1986 Case No: 188 of 2015 The Court House Oxford Row Leeds LS1 3BG Date: 2 September 2015 Before: His Honour Judge Behrens sitting as a Judge of the High Court in Leeds

- ----- Between: JOHN DAVID HEDGER (The Liquidator of PRO4SPORT LIMITED)
- and - DAVID ADAMS Applicant Respondent
- -----
- ----- James Hannant (instructed by Prodicus Legal Ltd) for the Applicant
Ian Tucker (instructed by MD Law) for the Respondent Hearing date: 4 August 2015
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Judgment

Judge Behrens :

1. Introduction
1. This is an application by the Liquidator of Pro4Sport Ltd (“Pro4Sport”) under s 212 of the Insolvency Act 1986 (“the 1986 Act”) against Mr Adams the former Director and majority shareholder of Pro4Sport.
2. The claim arises out of one transaction which took place shortly before the liquidation of Pro4Sport on 20 July 2012. On 25 June 2012 Mr Adams on behalf of Pro4Sport transferred all or practically all of the assets of Pro4Sport to an associated company, Pro4Sport.co.uk Ltd (“Pro4Sport.co.uk”) for a deferred consideration of £47,000 plus VAT of £9,400. No part of the consideration was paid at the time. The only security provided was a retention of title clause. Mr Adams is the majority shareholder and a director of Pro4Sport.co.uk.
3. At the creditors’ meeting on 20 July 2012 Mr Hedger was appointed as liquidator. It is not in dispute that Mr Hedger adopted the contract and agreed a payment schedule with Mr Adams. There is, however, a dispute as to whether he was present on 25 June 2012 and whether he agreed the schedule at that time.

4. On 18 July 2012 Pro4Sport.co.uk paid Pro4Sport the sum of £5,640 (being 10% of the purchase price); 4 other payments of £5,640 were made between August and November
2012. In December 2012 a payment of £5,460 was made (probably due to a typing error on the cheque). Between February 2013 and January 2014 four further payments totalling £2,250 were made by Pro4Sport.co.uk. No further payments were made. Pro4Sport.co.uk is insolvent having gone into creditors' voluntary liquidation ("CVL") on 31 July 2014. In summary £35,910 of the contract price of £56,400 has been paid. There is accordingly £20,490 outstanding.
5. In these proceedings the Liquidator seeks to recover his loss from Mr Adams. He contends that Mr Adams was in breach of his duties under ss 172, 174 and (possibly) 190 of the Companies Act 2006. In his skeleton argument Mr Hannant submits that the loss is £26,090 (being the value of the goods transferred (£62,000) less the money received (£35,910)). In his witness statement, however, the Liquidator put the claim at £20,490 as he accepted that the price in the contract (£56,400) was a fair price.
6. Mr Adams denies that he is in breach of duty at all. He points to the circumstances in which the agreement was made and asserts that he honestly believed that it was in the best interests of Pro4Sport. He also denies that the Liquidator has suffered any loss. He does not accept that the value of the goods received was £62,000 or anything like that sum. In effect he submits that if the Liquidator had sold the assets he would have received less than the £35,910 he did in fact receive from Pro4Sport.co.uk.
7. It will no doubt be appreciated that the sums involved in this dispute are not large. However it has been hard fought. Both sides have been represented by experienced specialist Counsel. I have been provided with detailed skeleton arguments from each of them each of which cited extensive authority. In those circumstances and in deference to the careful arguments presented I thought it right to reserve my judgment despite the sums involved. It is also right that I should acknowledge with thanks the considerable assistance I have received from Counsel.
2. The facts
8. Although there was a considerable amount of common ground between the parties there were some conflicts of evidence between the recollection of Mr Adams and Mr Hedger. It is right that I should say at the outset that I am quite satisfied that both Mr Adams and Mr Hedger were honest witnesses doing their best to assist me. The conflicts were in my view genuine differences in recollection as to the details of conversations and events that took place more than 3 years ago.

Background

9. Pro4Sport was incorporated on 23 April 2007. It carried out the business of a supplier of high end sports clothing, footwear and equipment. It specialised in sports lines for running, sailing, snowboarding, skiing and cycling. The main method of sale was by way of e-commerce supported by an office based sales team which was underpinned at Director level by a high degree of interaction with professional sports individuals and organisations.
10. Mr Adams was a director and majority shareholder of Pro4Sport as he held 59.21% of its issued shares. He was also a director of and majority shareholder in Pro4Sport.co.uk which was incorporated on 23 June 2008.
11. Pro4Sport traded from premises in Chesterfield. The premises were rented with a rent of £35,000 per annum. In the first 3 years of trading the business the turnover increased to £1.9 million with a nominal profit margin.
12. From about the beginning of 2012 key suppliers reduced their credit facility. This had a dramatic effect on the cash flow. Furthermore Ebay and Paypal suspended the account. As this was a major source of sales it exacerbated the problem.
13. It is plain from the Statement of Affairs that by May 2012 there were trade creditors in excess of £500,000. In addition Mr Adams was owed £170,000. He had also entered into a personal guarantee for £40,000. Consultation with BCIA LLP
14. BCIA Ltd ("BCIA") is a partnership of business advisors trading from the same address as Seneca IP Ltd ("Seneca"). Seneca are a Company of Insolvency Practitioners. Mr Hedger is a director or employee of Seneca. In the course of his evidence he explained that BCIA and Seneca were associated in the sense that the shareholders of Seneca were the partners in BCIA.
15. In May 2012 Mr Adams consulted BCIA over the financial position of Pro4Sport. The financial position of Pro4Sport was such that he was advised that some form of insolvency was inevitable. He was advised of the possible courses open to him. These included a sale by Pro4Sport of the assets to Pro4Sport.co.uk, a sale by a liquidator of the assets as a going concern and a sale by a liquidator of the assets on the open market at auction. Mr Adams was advised that there ought to be a valuation of the assets. Accordingly he authorised BCIA to obtain a valuation on his behalf. The valuation
16. The valuation was provided by Andrew Roe, a director of Charles Taylor. His valuation may be summarised in the following table:

	Office Furniture	Equipment	Fixtures	Fittings	Stock
Total Reinstatement Cost	Assessment 9,000	Open Market Value 3,000	Open Market Value (in situ) 5,000	Restricted Realisation 2,000	55,000
	64,000	21,000	24,000	32,000	37,000
	15,000	17,000			

17. The narrative part of the valuation included: "... the Company has very few [assets] other than stock. There is a small quantity of office furniture and equipment together with fixtures and fittings that whilst being usable have a minimal commercial resale value. A detailed analysis of the stock had to be undertaken as the Company has very limited stock control procedures. This analysis included an assessment of the likely impact of any "retention of title" ("ROT") claims that may arise as a result of the insolvency process. It is important to note that the vast majority of the £55,000 remaining stock has been supplied by creditors who are owed in excess of £300,000 and are likely to have rigorous trading terms. Approximately 30% of this stock is returns but in the main they are in near perfect condition. In terms of goodwill ... we have some grave concerns about the business model and the ability of the company to sustain profitability. ... A likely interested party would be one who has a similar business and who would looking to bolt on additional turnover ... However the internet is flooded with similar companies offering similar products and Pro4Sport does not have the benefit of any transferable sole rights of distribution. On this basis we would suggest that the maximum likely consideration for goodwill would be £15,000."
18. A number of points can be made about this valuation.
 1. It is not an expert report. However it is, as Mr Hannant points out virtually the only evidence there is on valuation.
 2. All figures in the valuation are exclusive of VAT.
 3. The reference to the in situ value is, as I understand it, a reference to the sale of the assets as a going concern. The reference to the open market value is a reference to how much might be achieved on a sale by auction. None of the figures contain any allowance for the costs of the sale.
 4. No details are given as to the extent of the ROT claims. Whilst it is clear that Mr Roe has considered the ROT claims it is not clear how he has factored them in his valuations.
 5. A number of points can be made about the goodwill. First it would only be relevant if the Liquidator were selling as a going concern. If he sold the assets at auction there would be no goodwill to sell. Second, Mr Roe has not valued the goodwill at £15,000. The expression "maximum likely consideration" is not a valuation. In my view the actual value of the goodwill is likely to be substantially less than the figure of £15,000. First there are the reasons given by Mr Roe set out above. Second there is no goodwill in the name. Pro4Sport.co.uk has a very similar name and has been trading since 2008. Furthermore its main trading outlet (Ebay and Paypal) had been closed down. Third it is difficult to see why an established company with a similar business looking for additional turnover would pay substantially more than the value of the stock it was buying. In argument Mr Hannant suggested that the goodwill included customer lists. However Pro4Sport sold by way of e-commerce to retail customers. Doing the best I can I would value the goodwill at £5,000 – a figure which may be generous to the Liquidator. The agreement

19. The only document evidencing the agreement is the Invoice dated 25 June 2012 prepared on Pro4Sport.co.uk writing paper. The relevant part of the invoice reads: To the sale of office furniture, business equipment, stock and intellectual property and associate to the above concern forming the attached inventory. The Vendor may leave the ROT Stock upon the premises after the transfer date. The Purchaser acknowledges that has no title or right of possession or use of any of the ROT stock and shall deliver it to the vendor or as the vendor may direct on demand. The purchaser shall have the option at its own expense to settle any claims which may be made against the Company by suppliers of any ROT stock Title to all goods does not pass until the Vendor is paid in full for all monies due with any deposit or payment made taken as part payment against the entire sale content and not against any individual item.
20. The price was then set out at £47,000 plus VAT of £9,400 totalling £56,400.
21. Mr Adams told me that he did not draft the agreement. He was asked to attend a meeting with BCIA and to bring with him a blank sheet of headed note paper. The invoice was then drafted for him by Mr Buchannan from BCIA. He accordingly said that the agreement was entered into on the advice of BCIA.
22. It is to be noted that the agreement makes no reference to the dates of payment. Mr Adams told me that Mr Hedger was present at the meeting and he agreed that payment could be made over 10 months. Mr Hedger accepts that he agreed a repayment schedule with Mr Adams but contends that it was not at that meeting. He says he did not attend the meeting. He thinks he agreed the repayment schedule following the creditors' meeting in July. Mr Hedger did, however accept that on 25 June 2012 his firm was instructed to commence the procedure for the CVL; so it is likely that he did speak to Mr Adams on that day.
23. Mr Adams told me that he did consider whether the agreement was in the best interests of Pro4Sport and its creditors. The sale was completed quickly and without incurring the costs of sale. In his view the liquidator would have had to sell the assets at auction and thus received a lower sum.
24. He made the point that Pro4Sport.co.uk was already trading and had a trading platform through eBay and its own web sites. Much of the stock was sailing gear which had to be sold before the end of the sailing season in September. Thus Pro4Sport.co.uk was in a good position to realise an immediate return.
25. He was aware that Pro4Sport.co.uk had cash flow issues and that is why Pro4Sport.co.uk was not in a position to pay immediately. However he contacted two of his major suppliers – Oakley and Musto - and established that they would continue to extend credit to Pro4Sport.co.uk. It was on this basis that he believed that Pro4Sport.co.uk would be able to honour the payment schedule that had been agreed.

26. Mr Adams stated that the agreement would not have gone ahead on the basis of an immediate payment by Pro4Sport.co.uk. There was no suggestion either by Mr Hedger or by Mr Buchannan that he ought to provide a personal guarantee. He would not have been willing to do so. He was already a substantial creditor of Pro4Sport and was not in a financial position to honour a guarantee.
27. He agreed in cross examination that he did not market the assets of Pro4Sport before entering into the transaction. He was not advised to do so. He consulted BCIA. He received advice from BCIA on the best course of action and followed it.
28. In so far as there is a conflict of evidence as to whether Mr Hedger was present at the meeting I prefer the evidence of Mr Adams. Although I accept that Mr Hedger was an honest witness he had limited detailed recollection of the events. There are no file notes which would have helped to refresh his memory. A number of factors lead me to accept Mr Adams's evidence. The wording of the agreement has the appearance of being drafted by a person with experience of insolvency law. Thus I accept Mr Adams's evidence that it was drafted by BCIA. Thus there was a meeting on the day it was drafted. Mr Adams thought this was after the 25 June 2012 but I think he may be wrong about this. Seneca traded from the same premises as BCIA. They were associated companies. Part and parcel of the advice involved the CVL which was to take place. It would not be in the least surprising if the proposed liquidator were involved in the discussions. Finally there is the fact that Pro4Sport.co.uk made the first payment of £5,640 on 18 July 2012 some two days before the creditors' meeting. This payment is, of course consistent with an agreement to pay at the rate of £5,640 per month by 10 monthly instalments. Subsequent events
29. At the creditors meeting on 20 July 2012 Mr Hedger was appointed as liquidator. The Statement of Affairs shows a deficiency as regards creditors in the sum of £742,599.
30. It is not in dispute that the Liquidator adopted the contract. There was no suggestion at the time that the agreement was made in breach of Mr Adams duties to Pro4Sport. Equally there was no suggestion that Mr Adams should have provided a personal guarantee.
31. In the course of his evidence Mr Adams stated that at the date of the creditors' meeting none of the stock had been sold thus the Liquidator could have sought to avoid the transaction. Mr Adams agreed that he had subsequently received a number of ROT claims and had surrendered goods to Asics and Mizuno (in relation to running shoes). He said that Pro4Sport.co.uk had taken about 6 months to sell the stock.
32. On 16 August 2012 an Insolvency Manager employed by Seneca sought advice from a valuer as to whether the sale was a true value of Pro4Sport's assets. In her instructions she acknowledged that the sale was conducted under the advice of BCIA. She also noted that there were a considerable number of ROT claims which the Liquidator was directing to Pro4Sport.co.uk. The valuer advised that "the price paid was a fair representation of the value of the assets"

33. As already noted 5 further monthly payments were made. However in early 2013 Oakley changed its internet policy and Pro4Sport.co.uk were no longer able to sell Oakley products through Ebay. This affected the business and led to Pro4Sport.co.uk being unable to maintain payments. On 17 April 2013 Mr Adams sent an email to the Insolvency manager explaining the cash flow problems. In any event only intermittent payments totalling £2,250 were made after February 2013.
3. Breach of Duty S 172 Companies Act 2006 S 172 provides: 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.
34. It is not in dispute that Pro4Sport was insolvent in June 2012 and that there was a duty owed to the creditors when Pro4Sport entered into the transaction. It is common ground that the duty under this section is subjective. Both Counsel referred me to *Re HLC Environmental Projects Ltd (in liquidation)* [2013] EWHC 2876 (Ch) at [91]. As was said by Jonathan Parker J at *Regentcrest plc v Cohen* [2001] BCC 494 at [120] "The duty imposed on directors to act bona fide in the interests of the company is a subjective one... The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the

interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test."

35. Mr Tucker drew my attention (in paragraph 29 of his skeleton argument) to the qualifications to the subjective test that are to be found in paragraph 92 of the judgment of Mr Randall QC in *Re HLC*. The most important of those is that where the duty extends to consideration of the interests of creditors, their interests must be considered as "paramount".
36. Mr Tucker submitted that this is a case where Mr Adams did consider the interests of creditors and honestly believed that his actions were in the interests of creditors. He draws attention to the fact that he consulted BCIA, that he had a valuation of the assets and that he was entered into the agreement on the advice of BCIA. He consulted his two major suppliers who confirmed that credit would be extended to Pro4Sport.co.uk. In those circumstances he was entitled to believe that Pro4Sport.co.uk would be able to honour the payment schedule under the agreement.
37. Mr Hannant contends that there was a breach of s 172 on 3 main grounds:
 1. Mr Adams took account of Pro4Sport.co.uk's interests to the detriment of Pro4Sport's interests when causing the parties to enter into the Contract.
 2. The Contract did not constitute the best deal for Pro4Sport as the sale price was not the best price available to Pro4Sport.
 3. The sale of the stock and associated items on a deferred consideration basis constituted a high risk strategy which was not in the best interests of Pro4Sport's creditors.
38. I do not accept Mr Hannant's submissions. First I accept the submissions of Mr Tucker based on *Re HLC*. I accept that he considered the interests of the creditors. I also accept that he considered that the contract was in their best interests. It avoided the costs of sale. It is to be remembered that Mr Roe had given 3 valuations for the stock and fixtures. In assessing the price to be paid Mr Adams was not obliged to take the maximum figure in respect of each. He was entitled to take into account the fact that the Liquidator might not be able to sell as a going concern. He was entitled to rely on advice. It is true that the contract involved a deferred consideration. However an immediate consideration was not on offer. The question for Mr Adams was whether a sale with deferred consideration was a better deal for the creditors than no sale at all. Mr Adams formed the view that Pro4Sport.co.uk would be able to fund the sale after checking with the 2 main suppliers. In my view Mr Adams's views were honestly held. To my mind this is supported by the fact that the Liquidator took no steps to avoid the contract after his appointment and agreed a schedule of repayments with Mr Adams when the contract was formed.

39. The claim under s 172 accordingly fails. S174 Companies Act 2006 S 174 provides: 174 Duty to exercise reasonable care, skill and diligence
- (1) A director of a company must exercise reasonable care, skill and diligence.
- (2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with--
- (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
- (b) the general knowledge, skill and experience that the director has. 40 Mr Hannant submits that Mr Adams was in breach of this section. He relies on the 3 matters I have set out above. In addition he makes the point that Mr Adams should have provided a personal guarantee to compensate for the fact that the consideration was deferred.
41. It is self evident that the terms agreed between Pro4Sport and Pro4Sport.co.uk could have been more favourable to Pro4Sport. The price to be paid by Pro4Sport.co.uk could have been higher. The consideration could have been payable immediately. There could have been a personal guarantee by Mr Adams. These factors, however, do not establish that Mr Adams was not exercising reasonable skill and care.
42. It is true that the price agreed (£47,000) was less than Mr Roe's valuation on a going concern basis (£37,000) plus "the maximum likely consideration for goodwill" (£15,000). It was, however more than the open market value of the assets (£24,000). Thus the question that had to be considered by Mr Adams and his advisors was the likelihood of any liquidator obtaining a sale as a going concern in the light of the comments in Mr Roe's report. He would also have had to take into account the costs which the Liquidator would have incurred in realising the assets. I shall elaborate more on this point in the assessment of loss in section 4 below.
43. Plainly a sale with deferred consideration carried with it the risk of default by Pro4Sport.co.uk. However Mr Adams contacted his 2 major suppliers and had to assess that risk in the light of the responses he received. Pro4Sport.co.uk was not in a financial position to make immediate payment so the question of an immediate payment did not arise.
44. The question of a personal guarantee seems to me to be redolent of hindsight. No-one asked for a guarantee at the time. Importantly Mr Hedger did not ask for one when he agreed the repayment schedule.
45. This is a case where Mr Adams sought professional advice from BCIA. The agreement between Pro4Sport and Pro4Sport.co.uk was drawn up by BCIA and entered into under their advice. Mr Hedger was present when it was drawn up and did not object to its terms. He agreed a repayment schedule at the time. He did not complain or seek to avoid the agreement when he was appointed liquidator one month later. He did not seek a personal guarantee at any time.

46. I accept that Mr Adams was obliged to exercise his own independent judgment. However the fact that he was relying on advice is to my mind an important factor in determining if he was in breach of his duty to exercise reasonable care.
47. In all of the above circumstances I am not satisfied that he was in breach of his duty under s 174. SSS 190, 191 and 195 Companies Act 2006
48. The above sections provide: 190 Substantial property transactions: requirement of members' approval
- (1) A company may not enter into an arrangement under which--
- (a) a director of the company or of its holding company, or a person connected with such a director, acquires or is to acquire from the company (directly or indirectly) a substantial non-cash asset, or
- (b) the company acquires or is to acquire a substantial non-cash asset (directly or indirectly) from such a director or a person so connected, unless the arrangement has been approved by a resolution of the members of the company or is conditional on such approval being obtained. 191 Meaning of "substantial"
- (1) This section explains what is meant in section 190 (requirement of approval for substantial property transactions) by a "substantial" non-cash asset.
- (2) An asset is a substantial asset in relation to a company if its value--
- (a) exceeds 10% of the company's asset value and is more than £5,000, or
- (b) exceeds £100,000.
- (3) For this purpose a company's "asset value" at any time is--
- (a) the value of the company's net assets determined by reference to its most recent statutory accounts, or
- (b) if no statutory accounts have been prepared, the amount of the company's called-up share capital.
- (4) A company's "statutory accounts" means its annual accounts prepared in accordance with Part 15, and its "most recent" statutory accounts means those in relation to which the time for sending them out to members (see section 424) is most recent.
- (5) Whether an asset is a substantial asset shall be determined as at the time the arrangement is entered into. 195 Property transactions: civil consequences of contravention
- (1) This section applies where a company enters into an arrangement in contravention of section 190 (requirement of members' approval for substantial property transactions).

- (2) The arrangement, and any transaction entered into in pursuance of the arrangement (whether by the company or any other person), is voidable at the instance of the company, unless--
 - (a) restitution of any money or other asset that was the subject matter of the arrangement or transaction is no longer possible,
 - (b) the company has been indemnified in pursuance of this section by any other persons for the loss or damage suffered by it, or
 - (c) rights acquired in good faith, for value and without actual notice of the contravention by a person who is not a party to the arrangement or transaction would be affected by the avoidance.
- (3) Whether or not the arrangement or any such transaction has been avoided, each of the persons specified in subsection (4) is liable--
 - (a) to account to the company for any gain that he has made directly or indirectly by the arrangement or transaction, and
 - (b) (jointly and severally with any other person so liable under this section) to indemnify the company for any loss or damage resulting from the arrangement or transaction.
- (4) The persons so liable are--
 - (a) any director of the company or of its holding company with whom the company entered into the arrangement in contravention of section 190,
 - (b) any person with whom the company entered into the arrangement in contravention of that section who is connected with a director of the company or of its holding company,
 - (c) the director of the company or of its holding company with whom any such person is connected, and
 - (d) any other director of the company who authorised the arrangement or any transaction entered into in pursuance of such an arrangement.
- (5) Subsections (3) and (4) are subject to the following two subsections.
- (6) In the case of an arrangement entered into by a company in contravention of section 190 with a person connected with a director of the company or of its holding company, that director is not liable by virtue of subsection (4)(c) if he shows that he took all reasonable steps to secure the company's compliance with that section.
- (7) In any case--
 - (a) a person so connected is not liable by virtue of subsection (4)(b), and

- (b) a director is not liable by virtue of subsection (4)(d), if he shows that, at the time the arrangement was entered into, he did not know the relevant circumstances constituting the contravention.
49. Mr Hannant submitted (1) that Pro4Sport.co.uk is connected with Mr Adams (2) that Pro4Sport.co.uk has acquired a substantial non cash asset from Pro4Sport and that accordingly the arrangement infringes s 190. Accordingly Mr Adams is liable under s 195(4) to indemnify Pro4Sport under s 195(3)(b) for its loss. He also submitted that Mr Adams was liable to account for any gain he has made from the transaction.
50. Mr Tucker raised a number of points in relation to the section and the procedure.
1. He pointed to the difference between the remedy in a misfeasance claim under s 212(3) of the 1986 Act and the remedy under s 195(3) of the 2006 Act which I have set out above. Under s 212(3) the powers of the Court are:
- (a) To repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or
- (b) To contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.
2. He made the point that that the cause of action under s 195 rests with Pro4Sport and that there is a statutory procedure under Part 49 of the CPR in relation to such claims. He drew my attention to the requirement in paragraph 5 of PD49A for the claim to be started by the Part 8 procedure.
3. He made the point that if the claim had been properly pleaded Mr Adams might well have had a defence under s 195(6). He drew my attention to the letter sent by his solicitor on 29 July 2015 and Mr Adams's belief that the shareholders had consented to the transaction. He pointed out that there was no cross examination on this point.
51. I see the force of some of the points made by Mr Tucker. There is for example no evidence of any gain made by Mr Adams as a result of the transaction. Thus the claim for such gain under s195(3)(a) fails. Insofar as the claim against Mr Adams is made against him in his capacity as a director of Pro4Sport.co.uk (i.e. under s195(4)(a)) I agree that such a claim is not within the scope of a claim under s 212. I accordingly also agree that any claim would have to be made under s 195(4)(c) or (d).
52. I accept that if the matter had been more clearly pleaded Mr Adams would have dealt with the question in more detail. This would have enabled him to deal with the extent to which he was entitled to rely on the defence under s 195(6) in more detail.

53. In those circumstances in the light of the amounts at stake I agree that it is not proportionate to deal with the claim under ss 190 – 195 of the 2006 Act. That renders it unnecessary for me to resolve the by no means straightforward question of the extent of the Court’s jurisdiction under s 212 of the 2006 Act. I prefer not to do so until it arises directly. Relief under s 1157
54. If, contrary to my view, I had held there was a breach by Mr Adams of his duties I would have held it was appropriate to grant relief under s 1157. As Mr Tucker points out the relevant principles are summarised in *Re HLC*: “(a) in order to be relieved of liability a director must establish three things: (i) that he acted honestly, (ii) that he acted reasonably, and (iii) that having regard to all the circumstances he ought fairly to be excused. The first of these is a subjective requirement, the second an objective requirement: *Coleman Taymar Ltd v Oakes* [2001] 2 B. C. L.C. 749 per Judge Reid QC at [85];
- (b) the burden of establishing honesty and reasonableness lies on the director: *Bairstow v Queens Moat Houses Plc* [2001] EWCA Civ 712; [2002] B. C. C. 91 per Robert Walker L. J. (as he then was) at [58]; and
- (c) it is only if both of the first two requirements of honesty and reasonableness are established that the court needs to consider the third requirement, that in all the circumstances the director ought fairly to be excused.”
55. I am satisfied that Mr Adams was acting both honestly and reasonably in entering into the transaction. He was acting on advice. Mr Hedger was present when it was entered into and did not object. Mr Hedger in his capacity as the liquidator did not object after he was appointed on 20th July 2012. He was content to adopt the transaction and confirmed the repayment schedule. If there was a breach of s 190 of the 2006 Act in all the circumstances it was a breach which in all the circumstances ought fairly to be excused.
4. Loss
56. In the light of my decision on liability the question of loss does not arise. However as it was fully argued it is convenient to deal with it.
57. It was common ground that the Liquidator’s loss was the difference between the amount that the Liquidator would have received if he had sold the assets of Pro4Sport and the amount that he actually received (£35,910). There was a difference as to how I should assess the amount the Liquidator would have received.
58. Mr Hannant submitted that I should assess it at £62,400 (being £37,000 for the stock and the fixtures, £15,000 for the goodwill plus VAT). This assumes that the Liquidator would have sold the whole of the stock on a going concern basis and also achieved the full £15,000 for the goodwill). It also makes no allowance for the costs of the sale.

59. Mr Tucker submitted that I should assess the amount at £28,800 (being £24,000 (the auction value) plus VAT). He also submitted that some allowance should be made for the costs of sale.
60. The main difference between Mr Hannant and Mr Tucker was whether I should take the going concern value or the auction value given by Mr Roe. In my view I should take neither.
61. If the transaction had not taken place the Liquidator would have the chance to sell the assets as a going concern and a chance to sell them at auction. If (contrary to my view) Mr Adams was in breach of duty in entering into the transaction the Liquidator has lost those chances. It is accordingly appropriate to assess the amount the Liquidator would have received on the basis of a loss of those chances. I must therefore assess the chance that the Liquidator would have achieved a sale as a going concern.
62. When I take into account the points made by Mr Roe and the fact that the Ebay and Paypal platform had been closed down I take the view that the chance of achieving a sale of the assets as a going concern was relatively low – significantly less than 50%. Doing the best I can I would assess the chance at one third. I accordingly assess the chance of the assets being sold at auction at two thirds.
63. For reasons that I have given I would assess the goodwill at £5,000 in the case of a sale as a going concern and nil in the case of a sale of the assets by auction. I also take the view that some allowance has to be made for the costs of the sale. Given the large number of items involved it is not unreasonable to estimate the costs of sale at 10% of the value. Having regard to auction commission and the costs that would inevitably have been incurred by the Liquidator that figure may be conservative.
64. The going concern value of the assets would be £45,360 (90% of (£37,000 + £5,000 + £8,400 (VAT))). The auction value of the goods would be £25,920 (90% of £24,000 + £4,800 (VAT))). My assessment of the amount that the Liquidator would have received is accordingly £32,400 (one third of £45,360 + two thirds of £25,920).
65. As this is significantly less than the £35,910 he has received I would have assessed his loss at nil.
5. Conclusion
66. For all of these reasons this application is dismissed.

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