
INSOLVENCY BULLETIN

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MITIGATION FOR BREACHING DIRECTORS' DUTIES UNDER DURESS

Section 212(1) Insolvency Act 1986 is the gateway which allows a liquidator to pursue a recovery for creditors where, in the course of a winding up of a company, it appears that a director or someone involved in the formation, promotion or management of a company has *"misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company"*.

Glam and Tan Limited ("the Company") was incorporated in June 2014 and traded as a beauty salon. The sole *de jure* director was Danielle Litras ("Mrs Litras") who was active in the Company for all of its life, except for 9 months whilst on maternity leave. The Company entered creditors' voluntary liquidation in July 2017.

Re Glam and Tan Limited [2022] EWHC 855 (Ch), is an unusual case, because in responding to a s212 claim, Mrs Litras gave evidence at trial that she had been subjected to extreme pressure from her husband, who forced her to make unjustified payments from the Company.

The Liquidator provided Mrs Litras with a schedule of impugned payments made from the Company, split into 3 categories: payments to third parties, payments to Mrs Litras and payments for the benefit of the Company.

Although accountants acting for Mrs Litras reviewed the schedule, it became apparent that settlement would not be achieved and a s212 application was made by the Liquidator seeking repayment of £143,358.

At trial Mrs Litras stated that she had suffered repeated violence at the hands of her husband and that there would be *"consequences"* if she refused to make certain payments from the Company. The Court heard that payments of £24,962 were made to Mr Litras and his "associates". Although she had the option to resign, dissolve or liquidate the Company, Mrs Litras considered that taking any of those options would be likely to trigger further violence from her husband.

The Court referred to s212(3) IA 1986, which allows for discretion as to what is just when requiring a misfeasor to restore, or account for money or property, or contribute to a company's assets. The Court determined that Mrs Litras should not remain liable for payments made *"when her free will had been subjugated to the will of her husband"*.

However, Mrs Litras remained liable for other payments of £24,963 for her benefit, cash payments of £15,000, scheduled salary of £16,042 (dressed as dividend payments which were unlawful) and insurance monies due to the liquidator for £14,700, all of which totalled £70,705.

Editor's Note

The Courts have habitually taken a dim view of directors who have kept incomplete records preferring to make a finding of adverse inference in respect of unexplained payments. This judgment does not change that approach, but it does allow some mitigation for a director who comes under extreme pressure from others to make payments which are detrimental to a company and its creditors.



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