

Global Corporate Limited v Dirk Stefan Hale

Case No: A3/2017/2799

Court of Appeal (Civil Division)

27 November 2018

[2018] EWCA Civ 2618

2018 WL 06173031

Before : Lord Justice Patten Lady Justice Asplin and Lord Justice Coulson

Date: 27 November 2018

On Appeal from the High Court of Justice Chancery Division Bristol District Registry

HH Judge Matthews

[2017] EWHC 2277 (Ch)

Hearing date : 25 October 2018

Representation

Mr Lawrence McDonald (instructed by Seth Lovis & Co Solicitors) for the Appellant.

Mr Crispin Hayhoe (instructed by Simon Burn Solicitors) for the Respondent.

Approved Judgment

Lord Justice Patten :

1 This appeal concerns the status of various payments, amounting in total to £23,511, which the Respondent, Mr Hale, received between 24 June 2014 and 26 October 2015 from a company called Powerstation UK Ltd ("the Company") of which at the time he was both a director and shareholder.

2 On 25 November 2015 the company was placed into creditors' voluntary liquidation. Its estimated statement of affairs indicated that there was a deficiency of some £173,594.99. The Company's internal documentation indicated that the payments were made as dividends. The liquidators took the view that as such they had been paid unlawfully because at the relevant time the Company, according to its last annual accounts, had insufficient distributable reserves of profits out of which the dividends could have been paid in conformity with s.830 of the Companies Act 2006 ("the CA 2006"). Accordingly they wrote to Mr Hale on 3 August 2016 requiring repayment of the £23,511.

3 No repayment was made. On 25 August 2016 the liquidators assigned their rights to receive the monies either as unlawful dividends or as transactions at an undervalue to the appellant, Global Corporate Limited ("Global"), and on 20 September 2016 Global issued an application against Mr Hale seeking declarations that the £23,511 was recoverable either as unlawfully paid dividends; or as a transaction at an undervalue and/or a preference; or on the basis that the payments were made in breach of Mr Hale's fiduciary duties to the Company as a director and therefore amounted to misfeasance. The application also sought repayment of the monies.

4 The application was supported by a witness statement from Mr Michael Hartley of Global setting out from the available information what he knew of the circumstances in which the payments had been made. This included a schedule showing that on 24 or 26 of each month beginning on 24 January 2014 and ending on 26 October 2015 Mr Hale received a payment of

£1,383. Each of the payments was recorded as an "interim dividend" in respect of the Company's current financial year "at the rate of £69.15 per share on the ordinary shares registered in your name" in a "dividend tax voucher" prepared by the Company's accountants and signed by Mr Hale. These documents were presented to HMRC and Mr Hale and his co-director and shareholder, Mr Richard Benton, were assessed to tax accordingly.

5 In his witness statement Mr Hartley said that the Company had been balance sheet insolvent since 2009 and that its financial position had deteriorated further during 2014 and 2015. At the time the disputed payments were made the last annual accounts for the year ended April 2014 indicated that there were insufficient distributable reserves to support the payment of the £23,511 as dividends and the payments to Mr Hale and Mr Benton had increased the losses to the Company. The notes to the accounts stated that the Company continued as a going concern only with the support of its directors.

6 Mr Hale has made two witness statements in the proceedings. In the first (dated 9 December 2016) he explained that the Company operated a vehicle tuning centre which he had previously run in partnership with Mr Benton. They had worked long hours in the business for many years and had never sought to take excessive remuneration from it. The Company had been badly affected by the global financial crisis and subsequent recession to the point where HMRC was seeking personal guarantees from the directors in respect of its future tax liabilities. At this point he and Mr Benton decided that they could no longer support the Company financially and that there was no alternative to liquidation.

7 In relation to the claim for repayment of the £23,511, Mr Hale accepted that the Company was balance sheet insolvent but denied that he had ever caused it to trade insolvently. Tax and other liabilities were discharged out of trading receipts and profits. As regards the dividends, he denied that they had been paid unlawfully:

"10. ... Richard and I had taken advice from our accountants some time ago as to how best we should deal with remuneration for ourselves as we were both officers, shareholders and employees of the Company. Our accountant calculated that we should look to take £456 through PAYE to ensure that our National Insurance contributions were made in full, and then take £1,383 as a dividend each month. This structure was adopted by us as a more tax efficient way of dealing with our remuneration and it was honestly recorded in our accounts.

11. At the end of each financial year, we would send our books to our accountant and he would review them. If it appeared that there were not sufficient distributable reserves to justify the dividends taken, he would reverse those dividends and the Company would pay the necessary tax. Indeed this is what had occurred in the two financial years prior to the 2015/2016 financial year.

12. Due to the decision to put the Company in to voluntary liquidation, the Company ceased to trade part way through the 2015/2016 financial year. Had the Company traded until the end of the financial year, our accountant would have reviewed the books as usual making any necessary adjustments before our year end accounts were prepared."

8 In a second witness dated 9 June 2017 Mr Hale again addressed the allegation that the Company may have traded insolvently and made the point that from 2012 onwards an increase in turnover and gross profit had reduced the debits on the balance sheet. But there is nothing further of substance about the basis on which the dividends were paid. What he says (in [4]) is that the laws relied on by Global in the present proceedings were not intended for ordinary owner directors "who took dividends on the advice of their accountant in order to more efficiently manage their income".

9 The Company's accountants did not provide a witness statement for use in the proceedings but they did write a letter dated 27 July 2017 which was relied on by Mr Hale as part of some submissions made after the trial. The letter says that the practice of paying a low salary and dividends is commonplace in small companies and that "the occasional reversal of such is just restructured management adjustments". The letter includes a statement that the directors did not "knowingly receive dividend payments" that they considered to be unlawful and that the dividend

payments made after April 2014 could be justified by reference to interim accounts. It is now common ground between the parties that there were no such interim accounts during the relevant period.

10 The hearing of Global's application took place before HH Judge Paul Matthews (sitting as a judge of the High Court) on 6 July 2017. Mr Hale appeared in person and gave evidence. The judge also had the evidence filed on behalf of Global which included the Company accounts and the dividend vouchers I described earlier. Mr Hale had also prepared a skeleton argument addressing the allegations that the Company may have traded whilst insolvent and that the dividend payments amounted to misfeasance. For reasons which I am about to come to, it is not necessary to refer to the detail of those submissions.

11 The judge was faced with a number of issues to decide. One of these was Global's title to sue. The deed of assignment referred in terms (in Recital (C)) to the claims to recover unlawful dividends and/or money paid under transactions at an undervalue and the judge accepted that it was effective to assign to Global the Company's rights in respect of those claims. But he held that the deed was not effective to assign the claim under s.239 of the Insolvency Act 1986 ("IA 1986") to recover the money as a preference and that the claim under s.238 IA 1986 also failed because the £23,511 was not comprised of payments at an undervalue. On the evidence the payments were made in return for services provided by Mr Hale to the Company during the period in question.

12 In relation to the misfeasance claim, the judge also questioned whether Global had title to sue. But he dismissed the claim on the basis that even if Mr Hale had an obligation to repay the money because it had not properly been paid to him, he had a maintainable claim to an equivalent sum as a *quantum meruit* for the services which he had provided to the Company and that would provide a legal justification for the payments which had been made to him. The fact that the dividends had been paid essentially as a way of saving tax on what would otherwise have been his salary as a director and employee meant that the decision to authorise the payments could not be characterised as misfeasance on his part.

13 There is no appeal by Global against the judge's dismissal of the claims based on ss.238 and 239 IA 1986 or against the claim under s.212 IA 1986 based on alleged misfeasance. It is not therefore necessary for me to say any more about the judge's treatment of those claims. There is an issue as to whether a *quantum meruit* claim (even if established) would provide an effective defence to a claim to recover unlawfully paid dividends now that the Company is in liquidation but I will come to that a little later.

14 The present appeal concerns the judge's dismissal of the claim to recover the £23,511 as unlawful dividends. The relevant statutory provisions are contained in ss.830 , 836 and 847 CA 2006 and provide as follows:-

"830 Distributions to be made only out of profits available for the purpose

(1) A company may only make a distribution out of profits available for the purpose.

(2) A company's profits available for distribution are its accumulated, realised profits, so far as not previously utilised by distribution or capitalisation, less its accumulated, realised losses, so far as not previously written off in a reduction or reorganisation of capital duly made.

(3) Subsection (2) has effect subject to sections 832 , 833A and 835 (investment companies and Solvency 2 insurance companies).

.....

836 Justification of distribution by reference to relevant accounts

(1) Whether a distribution may be made by a company without contravening this Part is

determined by reference to the following items as stated in the relevant accounts—

(a) profits, losses, assets and liabilities;

(b) provisions of the following kinds—

(i) where the relevant accounts are Companies Act accounts, provisions of a kind specified for the purposes of this subsection by regulations under section 396 ;

(ii) where the relevant accounts are IAS accounts, provisions of any kind;

(c) share capital and reserves (including undistributable reserves).

(2) The relevant accounts are the company's last annual accounts, except that—

(a) where the distribution would be found to contravene this Part by reference to the company's last annual accounts, it may be justified by reference to interim accounts, and

(b) where the distribution is proposed to be declared during the company's first accounting reference period, or before any accounts have been circulated in respect of that period, it may be justified by reference to initial accounts.

(3) The requirements of—

section 837 (as regards the company's last annual accounts),

section 838 (as regards interim accounts), and section 839 (as regards initial accounts),

must be complied with, as and where applicable.

(4) If any applicable requirement of those sections is not complied with, the accounts may not be relied on for the purposes of this Part and the distribution is accordingly treated as contravening this Part.

.....

847 Consequences of unlawful distribution

(1) This section applies where a distribution, or part of one, made by a company to one of its members is made in contravention of this Part.

(2) If at the time of the distribution the member knows or has reasonable grounds for believing that it is so made, he is liable—

(a) to repay it (or that part of it, as the case may be) to the company, or

(b) in the case of a distribution made otherwise than in cash, to pay the company a sum equal to the value of the distribution (or part) at that time.

(3) This is without prejudice to any obligation imposed apart from this section on a member of a company to repay a distribution unlawfully made to him.

(4) This section does not apply in relation to—

(a) financial assistance given by a company in contravention of section 678 or 679 ,
or

(b) any payment made by a company in respect of the redemption or purchase by
the company of shares in itself."

15 The judge accepted that because the Company had no profits which were available for distribution within the provisions of s.830(2) then the payment of the £23,511 to Mr Hale by way of dividends would be unlawful. Accordingly the money was repayable under ss.847(2) and under the general law: see s.847(3) . But he rejected the claim on two alternative grounds. The first was that the decision to make the disputed payments as dividends was no more than what he described as a decision in principle and was subject to confirmation by the Company's accountant at the end of the financial year once the accountant had ascertained whether there were sufficient distributable reserves out of which the payments could lawfully be made as dividends. The second was that, properly analysed, there had been no valid decision at all to pay the monies as dividends at the time when the monies were paid so that, the judge reasoned, ss.830 and 847 CA 2006 had no application to the £23,511.

16 I have found some of the judge's reasoning a little difficult to follow but, before I come to it in more detail, it is important to say something about the evidence on which these findings was based. As I have already mentioned, it was not originally Mr Hale's case that the £23,511 had not been paid to him as dividends. His case was that the payments he received were structured in part as dividends rather than remuneration in order to minimise the amount of tax payable on the receipts. As set out in [10] of his first witness statement, he accepted that the monies had been paid as dividends but denied that they had been paid unlawfully. There had, he contended, always been sufficient profits out of which the dividends could be paid.

17 Whatever may have been Mr Hale's belief at the time of the payments, it was apparent by the hearing that the dividend payments were unlawful distributions because the only relevant accounts for the purposes of s.836(1) CA 2006 were the accounts for the year ended April 2014. There had been no interim accounts during 2014/2015 and whatever may have been the practice in previous years the Company's accountants had taken no steps to "reverse" or re-characterise the relevant dividend payments before the Company was placed into liquidation.

18 In his oral evidence Mr Hale, under cross-examination by Mr McDonald, accepted on a number of occasions that, as stated in his witness statement, he had received £1,383 per month "as a dividend" and that matters were arranged in this way for tax reasons. He also denied that he knew that the Company had insufficient distributable reserves from which the dividends could lawfully be paid. But at the end of his cross-examination by Mr McDonald the judge proceeded to ask Mr Hale a series of questions designed to examine the basis on which the dividends had been declared having regard to the possibility that after the year end the accountants might take steps to "reverse" that process. Most of the questions are highly leading and even when Mr Hale responded negatively to the questions the judge persisted. So, by way of example:

JUDGE MATTHEWS: Thank you. Just going back for a moment, I want to understand this, to the process of paying yourself dividends throughout the year, equal amounts every month, and then at the end of the year, when the books went into the accountants to prepare the annual financial statements, the accountant, as, indeed, the accountant did in 2011/12 and 2012/13 said, 'You do not have enough distributable reserves to be able to declare dividends so I am going to reverse that', what did you understand that to mean?

A: The – the – there was an amount of approximately 5% of tax difference that needed to be paid, the difference being between Corporation Tax and personal tax.

JUDGE MATTHEWS: Right, and, therefore, what was the consequence?

A: That the tax difference had to be repaid to HMRC.

JUDGE MATTHEWS: Right, and what effect did that have on the dividend declaring during the year?

A: Not – I don't think it had any, your Honour, because it was – that was done afterwards and after the year.

JUDGE MATTHEWS: Yes, but in preparing the accounts the accountant did something which he called, or you have called, presumably because he told you –

A: Yes.

JUDGE MATTHEWS: - reversing the dividends. Now, what did you understand reversing the dividends to mean?

A: That he's removed – that he's taken them out of the company's Corporation Tax liability and moved them into the PAYE tax.

JUDGE MATTHEWS: Right, so instead of – instead of the company declaring that much by way of dividend, it has declared a lower dividend or none, whatever the figure happens to be.

A: Yes.

JUDGE MATTHEWS: - and it is increased the amount that has been paid to you under PAYE, is that what you understand?

A: No, what – what was paid to us was never changed, just what the company paid to the tax –

JUDGE MATTHEWS: Yes, that is what I am saying, that the amount that was paid to you by way of dividend was recorded as a lower figure and the amount that was paid to you by way of remuneration under PAYE -

A: Was equal –

JUDGE MATTHEWS: - was correspondingly increased so the total amount remained the same –

A: Same, yes.

JUDGE MATTHEWS: - but as one went down the other one went up?

A: That's correct, Your Honour, yes.

JUDGE MATTHEWS: Now, is that what you understand to be reversing dividends, that this process that was being done on two occasions?

A: That's – yes, that's how I understand it and, therefore, the tax that the company then paid was –

JUDGE MATTHEWS: Well –

A: - considerably increased –

JUDGE MATTHEWS: - I am not concerned with the tax consequences, that is – that maybe why you did it, that it had some kind of beneficial effect for tax purposes. I am not concerned with that, I am just concerned to understand what you did and what you thought you were doing. Throughout the year you were paying yourself dividends every month but at the end of the year the accountant advised you, on two occasions. 'You have not got enough distributable reserves –

A: That's correct, Your Honour.

....

JUDGE MATTHEWS: Does that mean that when you were busy paying yourself dividends every month you were aware that at the end of the year it might all get reversed?

A: No, because I've – since – from 2013 onwards the – our profitability gauged by –

JUDGE MATTHEWS: No. I am sorry, you did not – you are answering a different question. What I am asking you is whether because of your experience of what happened in 2011/12 and 2012/13 when at the end of the year the accountant looked at the books and said, 'You cannot declare dividends, you have not got enough' –

A: Yes.

JUDGE MATTHEWS: - were you aware that it was a possibility that at the end of 2013/14 the accountant would do the same thing?

A: I – I, yes, I was aware that could –

JUDGE MATTHEWS: Even if you thought it was unlikely?

A: Yes, I was aware – I was aware then that that –

JUDGE MATTHEWS: Yes, right –

A: – could happen.

JUDGE MATTHEWS: - that could happen, okay, so, the question I really need to ask you is this. When you were busy declaring dividends, were you doing it effectively, provisionally, in other words, on the basis that if it turned out that you did not have enough distributable reserves it would all get turned around and changed to something else?

A: Yes, Your Honour.

JUDGE MATTHEWS: Right, okay.

A: Because that's the advice we've -

JUDGE MATTHEWS: That was what the advice of the accountant –

A: Yes.

JUDGE MATTHEWS: - was.

A: Yes.

JUDGE MATTHEWS: Yes, okay I have got that point.

A: In other – in other words if- if when he calculated the accounts, it's not there, it's not a problem, he'd just reverse the ...

JUDGE MATTHEWS: So, the point is that what you were doing during the year of 2013/14 was not actually definitive because you did not know until you got to the end of the year and the accountant looked at the books whether you would be allowed to do that?

A: Exactly.

JUDGE MATTHEWS: That might be what you are doing, as it were, as you go, on account, but it was not final?

A: No.

JUDGE MATTHEWS: The final point would come when the –

A: When the accounts were –

JUDGE MATTHEWS: - books were looked at.

A: when the books were done.

JUDGE MATTHEWS: Okay."

clarify answers which he had given during his evidence. The judge was faced in this case with the difficulty that Mr Hale was acting in person. But his evidence both in chief and under cross-examination was that the £23,511 had been paid by way of dividend, although in some years the accountants would subsequently treat the payments as taxable remuneration if it turned out that the Company had insufficient reserves out of which the dividends could lawfully be paid. It was not part of Mr Hale's case that the decision to pay the dividends was provisional or so conditional as not to be a decision at all and no such suggestion was made by Mr Hale either in chief or in cross-examination. The judge's ultimate finding was based upon a new line of cross-examination introduced by the judge himself for which there was no existing evidential basis. None of this, in my view, is at all satisfactory although, for reasons which I am about to come to, the evidence it produced is also in my view irrelevant.

20 In his judgment the judge accepted that according to the 2014 accounts there were no profits out of which a distribution could lawfully be made. The payment of dividends was therefore unlawful. But he continued:

"32. There is however a question-mark over the *status* of the decisions made by the respondent, as a director of the company, in that period to pay out monies to the members as dividends on the company's shares. Should those decisions be regarded (i) as having been made *definitively* at the time of the distributions, or (ii) as having been made *provisionally*, subject to a power in the company on the advice of its accountant in effect to *undeclare* the dividends and re-characterise the payments in some other way if there turned out not to be enough distributable profits for dividends to be declared, or (iii) as having been decided only in principle, with the formal decision left to be made at the year end, when the accountant could see the figures for the full year and determine whether or not there were distributable profits for this purpose? This difficulty arises because the respondent implemented the advice of the accountant that he could on the one hand sign dividend tax forms as each payment was made, and yet on the other in effect finalise the decision as to whether there were in fact dividends being declared only later on when the reserve position was known. It is obvious that the respondent, not being a lawyer or an accountant, never saw the apparent contradiction in this position.

...

35. I begin by deciding the question of fact raised in paragraph [29] above. Did the company declare dividends at the time of the payments made to the members between June 2014 and October 2015, either definitively or subject to a power to undeclare them if it turned out that there were insufficient distributable reserves? Or did it make no legally valid decision at all at that stage, but simply paid the money?"

21 Having referred to the lack of any evidence from the accountants and the inability of Global's witnesses to cast any light on the arrangements beyond what is recorded in the documents, the judge continued:

"37. The evidence is nevertheless limited. I have set it out in summary form above. I add to that two other facts which I find to be established on the evidence. The first is the fact that, as is obvious, and as the respondent knew, the company's accountant would not be in a position to determine whether there were sufficient reserves until well after the dates on which payments were actually made and tax dividend forms signed. Second is the fact that the respondent is not an accountant or other expert in tax or company law; in these respects he relied on his professional advisers. He was advised, and believed, that it was lawful to reduce taxation by adopting the dividend route, knowing that the accountant would need to check the distributable reserve position before preparing the annual accounts.

38. If it stood alone, the fact that, acting on this advice, the respondent signed tax dividend forms for the payments would be sufficient evidence that the decisions were being made to declare dividends *definitively* at the various times of payment. But it does not stand alone. It is completely at odds with what the respondent knew, *ie* that dividends could only lawfully be declared if there were sufficient reserves, and also that it could not be known *then* whether there were, and thirdly that (as in earlier years) the

accountant would decide only once the accounts for the year showed the distributable reserve position. On the other hand, his action in signing the forms is consistent with his doing what the company's accountant advised him to do in order to achieve the apparently lawful tax saving. Accordingly, having seen and heard the respondent give evidence, I do not consider that he thought he was making definitive decisions about declaring dividends. Instead, in my view he thought that he was not making any decision at all at that stage, because it all depended on whether there were distributable reserves, and at that stage this was not, and could not be, known.

...

44. I must therefore apply the relevant law to that factual position. If no dividend was declared, but the payments were made, then, whatever the nature of the payments made to the respondent, they were not dividends, and sections 830 and 847 of the Companies Act 2006 cannot apply to them. In those circumstances, the respondent cannot be liable to repay them as unlawful dividends. I therefore turn to consider the next head of claim against the respondent."

22 I have two difficulties with this analysis. The first is an evidential one. Although under examination by the judge Mr Hale did accept in the passages quoted above that the decision to declare the dividends was not, in the judge's words, definitive, when one looks at this in the context of his evidence as a whole this means no more than that it was open to the accountants to recommend and arrange a different treatment for the payments if it subsequently transpired that they could not lawfully be paid as dividends. Whatever may be the legalities of such a process it does not mean that the payments, when made, were not declared as dividends or, as the judge put it, were not declared definitively or at all. On the contrary, the payments were expressly declared by the directors as interim dividends; were declared to HMRC as such; and were taxed accordingly. Their payment therefore had real legal consequences. In some previous years the accountants had advised that the dividend payments be treated as salary but, in relation to the payments we are concerned with, that never happened. The accountants, according to their letter, believed that the payments were lawful, and no steps were taken to adjust the arrangements retrospectively before the Company went into liquidation.

23 My second difficulty with the judge's analysis is that the payments were clearly distributions within the meaning of s.830 CA 2006 when they were made and that is the time when their legality must be tested. There was no evidence that Mr Hale and his co-director had service contracts to which these particular payments were attributable and they clearly chose to pay and receive the money to themselves as shareholders and not as remuneration for past services which would have been taxable as income under Schedule E. At the point of payment the monies were therefore gratuitous distributions from the Company's assets which had the effect of increasing the deficit on its balance sheet. Section 830 is directed to distributions as and when they are made ("may only make") and it is immaterial that a subsequent realisation that the distributions should not have been made would prompt their being treated as remuneration. That cannot cure the illegality of the original payment. The most it can do is to allow the monies to be notionally repaid and then re-applied in a way which does not contravene the provisions of s.830 and is otherwise a lawful application of the assets of the Company.

24 The judge concentrated on the intention or state of mind of the directors when authorising the disputed payments as dividends rather than on the payments themselves. Had he focussed instead on whether the payments when made were lawful distributions of the company's assets there could only have been one answer.

25 One of the issues considered by the judge in the context of the misfeasance claim was whether a potential *quantum meruit* claim by the directors could provide a defence and set-off against a claim by the Company for the return of the £23,511. There are difficulties about relying on a *quantum meruit* claim for this purpose even as an answer to a claim by the Company against the directors based on misfeasance or breach of duty. In *Guinness Plc v Saunders* [1990] 2 AC 663 the House of Lords held that the law would not imply a contract for remuneration when such could only be agreed to under the articles of association by an appropriate resolution of the board. But, more fundamentally, whatever restrictions the articles may impose, once the Company is in liquidation then a *quantum meruit* claim faces the difficulty of being an unliquidated claim for compensation for which Mr Hale will have to prove in the liquidation.

Unless the payments themselves could be re-characterised so as to be treated as payments for services lawfully made by the company prior to the liquidation then it is difficult to see how a claim for a *quantum meruit* can provide any sort of defence to Global's claim for the return of the £23,511 as an unlawful distribution. Mr Hayhoe accepted that this would not be possible in this case and I need not therefore pursue the matter further in this judgment.

26 For these reasons I would allow the appeal.

Lady Justice Asplin :

27 I agree both with Patten LJ's conclusions and with his observations in relation to the approach which the judge adopted in relation to Mr Hale's evidence. A trial judge is perfectly entitled to ask a party or other witness to clarify the answers he or she has given in evidence and it is often important to do so. Where a party is unrepresented, as a matter of fairness both to the unrepresented party and the other party or parties to the litigation, it may also be both appropriate and necessary to ask questions in order fully to understand the unrepresented party's case as pleaded, their submissions and their evidence. In doing so, the judge should take care not to ask leading questions of the unrepresented party in his capacity as a witness. It may even be necessary to ask questions of other witnesses about matters central to the issues in the case which have not been posed by the unrepresented party in cross-examination. Such questioning should be approached with caution and limited to essential matters. In this case, as Patten LJ has pointed out, the judge's finding that no definitive decisions were made about declaring dividends did not form part of Mr Hale's case at all and was based upon the judge's own line of cross examination for which there was no existing evidential basis. It is very important that whilst seeking to clarify the issues and the evidence and to be fair to all parties the trial judge does not stray from the case as pleaded and the evidence before the court.

Lord Justice Coulson :

28 I agree that, for the reasons given by Patten LJ, this appeal must be allowed. I would only wish to add that, in my view, the nature and extent of the judge's questions of Mr Hale at the end of his cross-examination (as recorded at [18] above) was inappropriate. It is always difficult when one party is represented and the other is not, and the judge was required to maintain a fair balance so as to ensure a proper hearing of Mr Hale's case. But the judge's use of long leading questions, in which the answer he considered to be correct was made all too obvious to Mr Hale, on an issue which had never before even been raised, went much too far in attempting to counter any perceived imbalance or inequality of arms.

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