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CR 2016 002220, CR 2016 002221, CR-2016-002222, CR-2016-002224

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST

IN THE MATTER OF BHS GROUP LIMITED, SHB REALISATIONS LIMITED (FORMERLY BHS LIMITED), DAVENBUSH LIMITED, LOWLAND HOMES LIMITED (EACH IN LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

19 August 2024

Before:

MR JUSTICE LEECH

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B E T W E E N:

(1) ANTHONY JOHN WRIGHT AND GEOFFREY PAUL ROWLEY (LIQUIDATORS OF BHS GROUP LIMITED, SHB REALISATIONS LIMITED, DAVENBUSH LIMITED AND LOWLAND HOMES LIMITED (ALL IN LIQUIDATION) **(2) BHS GROUP LIMITED (IN LIQUIDATION)** **(3) SHB REALISATIONS LIMITED (FORMERLY BHS LIMITED) (IN LIQUIDATION)** **(4) DAVENBUSH LIMITED (IN LIQUIDATION)** **(5) LOWLAND HOMES LIMITED (IN LIQUIDATION)**	**Applicants**
– and –	
(1) DOMINIC JOSEPH ANDREW CHAPPELL **(2) LENNART DAVID HENNINGSON** **(3) DOMINIC LEONARD MARK CHANDLER**	**Respondents**

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MR JOSEPH CURL KC and **MR RYAN PERKINS** (instructed by **Jones Day**) appeared on behalf of the Applicants

MS LEXA HILLIARD KC and **MS RACHAEL EARLE** (instructed by **Bark & Co**) appeared on behalf of the Second Respondent

The First Respondent was not represented and did not appear

Hearing dates: 24 and 25 June 2024

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APPROVED JUDGMENT

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Mr Justice Leech:

I. Introduction

1. In this judgment I adopt the defined terms and abbreviations which I used in the principal judgment which I handed down on 11 June 2024 the NCN of which is [2024] EWHC 1417 (Ch) (the "**Judgment**"). Where I refer to paragraphs below, I intend to refer to paragraphs in the Judgment unless otherwise stated. In the Judgment itself, I dealt with all issues of liability, causation and quantum except one. Given the potential amount at stake and the fact that it involved a developing area of the law, I reserved for further hearing the quantum of equitable compensation recoverable for the breaches by Mr Henningson and Mr Chandler in respect of what I described as the modified "*Sequana* duty" and any set off or contribution to which they might be entitled to claim against each other: see [1131] and [1158]. In this judgment, I deal with the first of those issues.

2. On 21 June 2024 and shortly before the resumed trial I made a Tomlin Order in which the Liquidators and Mr Chandler agreed to compromise all of the claims which they made against him and he and his legal team played no part in the resumed hearing on 24 and 25 June 2024. On 15 November 2023 I had severed the claims against Mr Chappell from the claims against Mr Henningson and Mr Chandler and at the hearing on 24 and 25 June 2024 I also listed a series of applications relating to the claims against Mr Chappell. He did not appear on either day and I therefore proceeded in his absence. Having heard submissions by Mr Curl and Mr Perkins on behalf of the Liquidators and Ms Hilliard and Ms Earle on behalf of Mr Henningson, I reserved judgment in relation to the quantum of the Trading Misfeasance Claim.

3. On 25 June 2024 I gave an ex tempore judgment in which I held that Mr Chappell was bound by admissions under CPR Part 16.5 and that he had no real prospect of defending any of the claims against him. I made declarations which reflected the findings which I had made in the Judgment, I refused him relief from sanctions, I struck out his Points of Defence and I ordered summary judgment against him in respect of the Wrongful Trading Claim, the Trading Misfeasance Claim and all of the Individual Misfeasance Claims. In particular, I ordered that he make a contribution to the Companies' assets of £21.5 million under S.214. I also ordered that he make a

contribution to the Companies' assets in an amount to be determined by the Court in relation to the Trading Misfeasance Claim.

4. In this reserved judgment, I set out the quantum of equitable compensation for which both Mr Henningson and Mr Chappell are liable in relation to the Trading Misfeasance Claim. Because Mr Chappell did not appear, he is arguably entitled to make an application under CPR Part 39.3 for a rehearing. He is also entitled to apply for permission to appeal. I make no observations about the application of CPR Part 39.3 to this judgment or his prospects of success on either application. But I direct that when the Liquidators serve this judgment upon him and any order which I make, they draw his attention to this paragraph.

II. Findings

A. Factual Findings

(1) Mr Henningson

5. It may be useful if I begin by summarising the relevant findings of fact or mixed fact and law which I made in the Judgment in relation to the Trading Misfeasance Claim. First, I found that Mr Chappell and Mr Henningson agreed to the terms of ACE II and that Mr Chappell signed both the ACE II Facility Agreement and the ACE II Mezzanine Agreement in breach of S.171(b) of the CA 2006 for improper purposes: see [981]. If it was necessary for me to do so, I also found that the dominant purpose was to enable Mr Chappell to obtain the ACE II arrangement fee of £2 million and to secure a secret commission of £300,000 for Mr Henningson which he had agreed earlier with Mr Dellal: see [978].

6. Secondly, I found that on 23 June 2015 Mr Henningson and Mr Chandler ought to have known that it was more probable than not that the Companies would go into insolvent administration because BHSGL had been unable to obtain a sustainable working capital facility to implement the July 2015 Turnaround Plan, that the board did not consider the interests of creditors before entering into ACE II or the Loan and Framework Agreements, that they ought to have concluded that the interests of creditors were paramount and that if they had done so (or put those interests first), they ought to have

concluded that it was in the interests of creditors to put the BHS Group into administration immediately: see [982] to [991].

7. I considered Mr Henningson's position separately from the other members of the board and I held that he failed to consider the interests of creditors in breach of S.172 even though he was not present at the meeting to approve ACE II: see [992]. I also found that in breach of S.174 Mr Henningson and Mr Chandler failed to exercise reasonable care in relation to ACE II and, in particular, to take and act on the advice of Mr Roberts of Olswang: see [993] to [995].

8. Thirdly, I found that on 8 September 2015 Mr Chandler and Mr Henningson ought to have known that it was more probable than not that the Companies would go into insolvent liquidation for the detailed reasons which I had given in relation to the Wrongful Trading Claim: see [904] and [999]. I also found that they did not consider the interests of creditors and that if they had done so and balanced their interests against the interests of RAL, they would have come to the conclusion that the interests of creditors were paramount and that it was in the creditors' interests to put BHSGL and the other Companies into administration immediately and to instruct an insolvency practitioner before the September quarter day: see [908] to [1004].

9. Fourthly, I held that if Mr Henningson and Mr Chandler had complied with their duties under S.171(b) (in the case of Mr Henningson) and both S.172 and S.174 (in the case of both directors), then the Companies would not have entered into ACE II and continued to trade but would have gone into administration: see [1111] to [1113]. I also held that if Mr Henningson and Mr Chandler had complied with their duties under S.172 and S.174 the Companies would not have entered into the Grovepoint Facility and continued to trade but would have gone into administration: see [1114]. I set out my detailed reasons for reaching this conclusion in relation to the Wrongful Trading Claim at [1110](2) to (5).

(2) Mr Chappell

10. As I recorded at [19], I tried to avoid making findings of fact against Mr Chappell unless they were necessary to my findings against Mr Henningson and Mr Chandler. In relation to the Trading Misfeasance Claim, it was necessary for me to find (and I found) that in breach of S.171(b) Mr Chappell entered into ACE II for an improper purpose.

But I made no findings against him in relation to the other allegations of breach of duty or causation. However, in my ex tempore judgment on 25 June 2024 I held that Mr Chappell had no real prospect of defending any of those allegations (or, indeed, challenging that finding) and I made a declaration to that effect: see the Order dated 25 June 2024, paragraph 1.2.

B. Legal Findings

11. In relation to causation, I held that the test was the same for both the Wrongful Trading Claim and the Trading Misfeasance Claim. In particular, I held that the Court had to consider whether the Company would have continued to trade and suffered the individual losses if Mr Henningson and Mr Chandler had not committed the relevant breaches of duty: see [508]. I also held that it was not necessary for the Joint Liquidators to prove that the conduct of Mr Henningson and Mr Chandler was the sole or only effective cause of the loss which the Companies had suffered: see [509]. Finally, I held that the Joint Liquidators had to give credit for £3.5 million for the settlement sum which they received from Mr Smith: see [1141].

III. The Law

C. Measure of Compensation

(1) The Issue

12. Mr Curl and Mr Perkins submitted that a "but for" test applied when assessing losses caused by a breach of fiduciary duty, the prima facie loss caused by misfeasance trading is the increase in net deficiency of the company's assets or IND and that where, as here, two or more directors have in breach of fiduciary duty caused the same loss to a company, their liability is joint and several. They relied on my original findings (above) and the agreement between the parties in relation to the IND at each of the relevant dates.

13. Ms Hilliard and Ms Earle submitted that in order to find Mr Henningson liable for the entire IND, his breach of duty must have caused this loss. They also submitted that the Joint Liquidators had not pleaded or proved how in causing BHSGL to enter into ACE II or the Grovepoint Facility Mr Henningson had caused the total IND of the

Companies during the relevant period. Secondly, they argued that any liability for a breach of the *Sequana* duty was limited to the single transaction or venture which the directors authorised. Finally, they submitted that a finding that Mr Henningson was liable for the total IND would have wider consequences because liquidators would elect to bring claims under S.212 instead of S.214.

14. It was unnecessary in *Sequana* for the court at first instance or at both appellate levels to consider the measure of compensation for a breach of the *Sequana* duty and, in particular, whether the measure of compensation extends to the recovery of losses incurred by the company as a consequence of its continuing to trade. It was unnecessary because the judge dismissed the claim on the facts and his decision was upheld by both the Court of Appeal and the Supreme Court. It is necessary, therefore, for me to determine this issue by reference to the wider authorities on both equitable compensation and S.212.

(2) Equitable Compensation

15. Mr Curl and Mr Perkins relied on the well-known decisions in *Target Holdings Ltd v Redferns* [1996] AC 421 and *AIB Group (UK) plc v Mark Redler & Co* [2015] AC 1503 in support for their first proposition. The second of those decisions involved a challenge to the correctness of the first but Lord Toulson JSC applied *Target* and explained the principles upon which compensation is awarded at [62] and [64] to [67]:

> "62. There are arguments to be made both ways, as the continuing debate among scholars has shown, but absent fraud, which might give rise to other public policy considerations that are not present in this case, it would not in my opinion be right to impose or maintain a rule that gives redress to a beneficiary for loss which would have been suffered if the trustee had properly performed its duties."
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> "64. All agree that the basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law. Where there has been a breach of that duty, the basic purpose of any remedy will be either to put the beneficiary in the same position as if the breach had not occurred or to vest in the beneficiary any profit which the trustee may have made by reason of the breach (and which ought therefore properly to be held on behalf of the beneficiary). Placing the beneficiary in the same position as he would have been in but for the breach may involve restoring the value of something lost by the breach or making good financial damage caused by the breach. But a monetary award which reflected neither loss caused nor profit gained by the wrongdoer would be penal.

> 65. The purpose of a restitutionary order is to replace a loss to the trust fund which the trustee has brought about. To say that there has been a loss to the trust fund in the present case of £2.5m by reason of the solicitors' conduct, when most of that sum would have been lost if the solicitors had applied the trust fund in the way that the bank had instructed them to do, is to adopt an artificial and unrealistic view of the facts.
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> 66. I would reiterate Lord Browne-Wilkinson's statement, echoing McLachlin J's judgment in *Canson* 85 DLR (4th) 129 , about the object of an equitable monetary remedy for breach of trust, whether it be sub-classified as substitutive or reparative. As the beneficiary is entitled to have the trust properly administered, so he is entitled to have made good any loss suffered by reason of a breach of the duty.
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> 67. A traditional trust will typically govern the ownership-management of property for a group of potential beneficiaries over a lengthy number of years. If the trustee makes an unauthorised disposal of the trust property, the obvious remedy is to require him to restore the assets or their monetary value. It is likely to be the only way to put the beneficiaries in the same position as if the breach had not occurred. It is a real loss which is being made good. By contrast, in Target Holdings the finance company was seeking to be put in a better position on the facts (as agreed or assumed for the purposes of the summary judgment claim) than if the solicitors had done as they ought to have done."

16. Both decisions provide authority for the Joint Liquidators' first proposition. They also provide authority for the proposition that once causation is established, it is unnecessary to plead or prove remoteness or any further causal nexus between the breach of duty and the loss. Indeed, Lord Browne-Wilkinson stated in *Target* that equitable compensation is to be assessed with the full benefit of hindsight after taking a common sense view of causation and questions of foreseeability do not arise: see [1996] AC 421 at 439 (cited by Lord Toulson in [2015] AC 1503 at [36]). But neither decision establishes that the measure of compensation will be the same for every breach of fiduciary duty. Nor does either address the question how to decide which individual losses are recoverable. This is hardly surprising because both cases were concerned with the payment away of client funds by a solicitor without authority.

17. In *Auden McKenzie (Pharma Division) Ltd v Patel* [2019] EWCA Civ 2291 a director caused or authorised his company to pay sham invoices totalling £13 million to himself and a fellow director in breach of fiduciary duty and pursuant to an agreement to defraud HMRC. When the company brought proceedings to recover these sums, Robin Knowles J granted summary judgment because the payments were ultra vires and could

not be ratified under the *Duomatic* principle. He also dismissed the director's defence that the company had suffered no loss because the payments could have been made lawfully (e.g. by distribution of dividends). The decision was a striking one because the director had been at the time the sole shareholder and because he had reached a comprehensive settlement with HMRC. The director appealed on the second ground but not on the first.

18. David Richards LJ (as he then was) gave the principal judgment in the Court of Appeal and both Newey and Lewison LJJ agreed with his reasons. He began by addressing the use of the term "equitable compensation" at [35] and [36]:

> "35. The use of the phrase "equitable compensation" in this context has attracted some controversy, principally because it has been suggested that it detracts from the basic purpose of the remedy to make good the deficit in the fund. In *Libertarian Investments Ltd v Hall* [2013] H.K.C.F.A. 93, a decision of the Final Court of Appeal of Hong Kong, Lord Millett said at [168] that the order was "not compensation for loss but restitutionary or restorative" but he accepted that the order is sometimes described as the payment of equitable compensation. While noting this point, it is said in *Lewin on Trusts*, 19th edn (London: Sweet & Maxwell, 2015), para.39-002 that the remedy is generally called equitable compensation.
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> 36. The present appeal is concerned with equitable compensation in this sense. It is not a case concerned with compensation for loss caused by a breach of duties of skill and care. Nor is it a case involving a claim to profits made by Mr Patel and his sister. Although the relief claimed in the particulars of claim includes such further accounts and inquiries as shall be necessary, it is not necessary for the company to seek, first, an order for an account. Given the evidence and Mr Patel's admissions, the company is entitled to seek, and there is no reason why the court should not proceed to order, payment of equitable compensation. As *Lewin* says at para.39-003: "Very often, however, claims for compensation for breach of trust are not brought by way of action for an account, but simply as a direct claim for such a monetary remedy, by way of equitable compensation or for the return of the missing trust property". See also *AIB* at [90]-[91] (Lord Reed) and *Barnett v Creggy* [2016] EWCA Civ 1004, [2017] Ch 273 at [22] (Patten LJ). Moreover, an order to make good a loss following the taking of an account should not result in liability for a greater sum than an order for payment of equitable compensation without first taking an account: *AIB* at [108] (Lord Reed)."

19. The present case falls into the same category as *Auden McKenzie*. Although I made findings that Mr Henningson had committed breaches of his duty of care, my principal findings were that he committed breaches of his statutory duties in S.171 and S.172 and the purpose of the order which I will make following this judgment is to make good the

losses suffered by the Companies. The principal issue which the Court of Appeal had to consider in *Auden McKenzie* was whether the Court could take into account the hypothetical possibility that the company could have distributed the funds lawfully to the director. David Richards LJ concluded that the Court could take into account a hypothetical situation but only in limited circumstances which he set out at [49] and [52]:

> "49. While *Target Holdings* and *AIB* establish that equitable compensation in respect of unauthorised payments is not *invariably* for a sum equal to the payments, the decisions in those cases provide no further direct assistance to Mr Patel's case. They are restricted to circumstances where the beneficiary obtained the full benefit for which it bargained or where, if the trustee had fully performed its obligations, the loss would have been less than the amount of the unauthorised payment made by the trustee. In each case, the reduced figure is the loss that flowed directly from the breach of trust. In the case of Mr Patel, not only were the hypothetical dividends not paid but there was no obligation on the company or its directors to pay any such dividends. There is no analogy with the decision in *AIB*."
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> "52. As already mentioned, the point is illustrated by Lord Browne-Wilkinson's citation of *Re Dawson, Decd*. If the amount required to replace the misappropriated asset is less or more at the date of trial than it was at the date of misappropriation, either as a result of changes in value or (as in *Target Holdings*) the grant of security, it is that amount which will be awarded as compensation. This was extended in *AIB* to the limited extent discussed above."

20. David Richards LJ then dealt with a line of authority dealing with the unlawful or unauthorised payment of dividends. In the course of his discussion he pointed out that directors are to be treated as trustees of the assets under their control. In a passage upon which Ms Hilliard placed strong reliance, he also pointed out the flexibility of the equitable compensation remedy at [60]:

> "The assumed facts are striking. Mr Pymont is right to say that the position of all parties would by now have been precisely the same as it was immediately after the payments were made. The company would not have the money and Mr Patel and his sister would have received the money (whether directly or through companies controlled by them). Moreover, as the only shareholders, Mr Patel and his sister were able at all material times to procure this result. No case of which counsel or the court are aware has raised facts as stark as these. While the decisions in *Target Holdings* and *AIB* do not directly assist Mr Patel for the reasons I have given, they do demonstrate a willingness on the part of the courts to develop the equitable remedies for breach of trust and breach of fiduciary

> duty and, where required to do what is practically just, to entertain some departure from the strict obligation of trustees and fiduciaries to restore the fund under their control. This potential for flexibility has been emphasised in many cases and commentaries, not least *Target, AIB* and *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* at [47]."

21. None of these authorities provide the answer to the question posed in the present case. They establish that it is necessary to plead and prove that the loss claimed was caused by the breach of duty and that the common law principle of remoteness of damage does not apply. But they do not answer the question whether the "but for" causation test is satisfied by the findings which I have already made and, if so, whether the Joint Liquidators are entitled without more to recover the entire IND as equitable compensation.

(3) S.212

22. Mr Curl and Mr Perkins relied on *Re Continental Assurance Co of London Ltd (No 4)* [2007] BCLC 287 as authority for the proposition that the starting point for the assessment of compensation for both S.212 and S.214 was the IND: see Park J's interim judgment at 294b-g (paragraphs (2) to (5)). However, the judge ultimately dismissed the claim against the directors and in an important passage he rejected the argument that the IND would have been recoverable because the breaches of duty did not cause the relevant losses. He identified the relevant breaches at [397] and gave his reasons why the claim failed on causation at [405] to [410]:

> "397. So what does the alleged misfeasance consist of? In the particulars of claim the main allegation was the same as that relating to wrongful trading. It was that Continental's systems of books and records were so inadequate that it was impossible at any particular time to ascertain whether the company was solvent or not. It was said to have been misfeasance on the part of the directors to allow Continental to carry on business with such defective systems."
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> 405. Moreover, there is another independent reason which would also lead to the same conclusion. This brings me to the matter of causation. If a claimant has suffered some kind of loss and wishes to obtain judgment recovering it on the ground of a breach of duty by a defendant, the claimant has to establish that the defendant's breach of duty caused the loss. In this case the loss alleged by the liquidators is that the actual 1992 liquidation resulted in Continental having a greater deficiency than it would have had if it had gone into liquidation in 1991 instead. In my judgment, that result, if it happened at all, was not caused by the directors having failed in earlier years to ensure that Continental adopted better

accounting policies than those which it did adopt. It may be true that, if the directors had caused Continental to have better accounting policies, the loss which the liquidators are complaining about would not have happened, but that would only be sufficient if the courts adopted a 'but for' test of causation.

406. The courts do not adopt a 'but for' test of causation. I agree with counsel for the respondents that this is clearly laid down, in a similar context, by the decision of the Court of Appeal in *Galoo Ltd v Bright Grahame Murray* [1995] 1 All ER 16. The plaintiffs' case was that a company's auditors, negligently and in breach of duty, prepared accounts which did not accurately reflect the company's true financial position. If the accounts had been properly prepared they would have shown that the company was in such an unsatisfactory financial condition that it would have ceased trading immediately. In fact, given the negligently prepared accounts, the company carried on trading and sustained losses in doing so. It sought to recover the losses from the auditors. The Court of Appeal held that the alleged breach of duty did not cause the losses. The losses were trading losses, and were not caused by the auditors' negligence. The losses could only be regarded as having been so caused on the basis of a 'but for' test of causation, but that was not the test which English law applied. The auditors' breach of duty did not cause the trading losses. Rather, as Glidewell LJ put it, it 'gave the opportunity' to the company to incur them. I take the Lord Justice's words to be equivalent to saying that the auditors' alleged breach of duty meant only that the company did not cease to be exposed to the risk of incurring trading losses.

407. In my view, if, contrary to my opinion, the directors were in breach of their duties to Continental in respects concerned with its accounting policies, there would be an obvious parallel with the circumstances in the *Galoo* case. If the increase in net deficiency which the liquidators rely on existed it would have been caused by such matters as adverse trading results of Continental's insurance business in the period from July 1991 to March 1992 or heavy expenditure incurred by the liquidators on such matters as bringing legal proceedings over the attempt by AC Milan and Continental's reinsurers to keep the reinsurance moneys out of the liquidators' clutches. Those matters were not in any sense caused by the accounting policies, good or bad, which Continental applied in determining whether it was insolvent or not at 19 July 1991. The decision of the directors, based on those accounting policies, that Continental was solvent and could trade on left Continental exposed to the risk of suffering losses of the type which the liquidators allege, but it did not cause those losses.

408. Mr Atherton refers me to *Sasea Finance Ltd v KPMG* [2000] 1 All ER 676, in which *Galoo* was distinguished. In my opinion, however, the present case is clearly comparable with *Galoo*, not with *Sasea*. The loss being sued about in *Sasea* was one of the types of loss against which the duty alleged to have been infringed by the auditors was intended to provide protection. In this case, in so far as the directors of Continental had a duty to the company in connection with the selection and application of accounting principles, it was not one of the purposes of

> that duty that it would protect Continental against losses from, for example, adverse trading conditions or legal costs incurred because of manoeuvres concocted between a policy-holder and a reinsurer.
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> 409. Mr Atherton also refers me to *British Racing Drivers' Club Ltd v Hextall Erskine & Co* [1997] 1 BCLC 197, another case in which *Galoo was distinguished* . It shows that there can be sets of facts which are close to the borderline drawn in *Galoo* between something which is a cause of a loss and something which merely creates the opportunity for the loss to be suffered. In the present case, however, I do not consider that the facts are near the borderline. They are very clearly analogous to the facts in *Galoo*.
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> 410. If it mattered I would hold that another reason why these misfeasance claims by the liquidators' fail is that, even if the directors were in breach of their duties to Continental in the way which the liquidators allege, the breach was not a cause of the loss which the liquidators seek to recover in reliance on it."

23. Mr Curl and Mr Perkins referred me to decisions in which the Court has awarded compensation by reference to the IND (or to trading losses) or by reference to a single transaction. In *Re Centralcrest Engineering Ltd* [2000] BCC 727 His Honour Judge Boggis QC ordered a liquidator to compensate the company for the total loss which it had incurred during the period in which she permitted it to trade without court sanction or a liquidation committee. In *Brooks v Armstrong* [2016] BPIR 272 Registrar Jones made a concurrent award under S.212 and S.214 although the decision was over-turned on appeal on a different ground: see [2017] BCC 99 (David Foxton QC).

24. Ms Hilliard and Ms Earle also referred me to decisions in which the Court had awarded the loss arising out of a single decision. In particular, they relied on the leading case *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250 itself as an illustration of the proposition that the measure of compensation is limited to a single transaction. In that case, the Court of Appeal ordered a director to repay £4,000 which he had improperly used to reduce the amount which he owed under a personal guarantee. The principal issue was whether he should be ordered to repay the full amount and the Court held that he should because the payment was an obvious preference. But this was not a case in which the company had continued to trade as a consequence of the breach of duty. The payment was made in May 1984 and the company went into liquidation in June 1984.

25. In *Re Simmons Box (Diamonds) Ltd* [2002] BCC 82 the Court of Appeal allowed an appeal of a 19 year old director on the basis that the liquidator had failed to plead or

prove that his breach of duty in failing to supervise his father caused a loss. Chadwick LJ made it clear that this was not just a pleading point because he considered that the case gave rise to difficult questions of causation and the evidence did not establish a sufficient causal link between the son's breach of duty and the loss of jewellery worth £395,000: see [31] and [32]. But again this was not a case in which the company continued to trade. On 11 December 1993 the loss took place and in January 1994 the company was wound up.

26. Finally, Ms Hilliard and Ms Earle relied on the discussion between Lord Hodge and Lady Arden in *Sequana* in the passages which I set out in the Judgment at [472] and [545]. They submitted that both clearly had in mind a situation in which the directors cause the company to gamble its remaining assets on a single transaction which increases the deficiency. But as they themselves pointed out in their Skeleton Argument: "Their Lordships were clearly not considering a situation whereby a company borrows money to fund a turnaround plan, the trading company in the group trades thereafter for another 10 months or 7 months respectively."

27. I accept Mr Curl's submission that the starting point for the assessment of compensation for misfeasance under S.212 is the IND where the company continues to trade as a result of the individual breaches of duty and I reject Ms Hilliard's submission that compensation is limited as a matter of law to the loss suffered by the company arising out of a single transaction or single venture. Compensation may be limited to the loss which a company suffers as a result of a preference (as in *West Mercia*) or the loss of an asset (as in *Simmons Box*) but it is not necessarily limited to that loss if the purpose of the transaction is to enable the company to continue to trade.

28. Nevertheless, I am not satisfied that it is enough for the liquidator to prove that but for the breach of duty the company continued to trade and that as a consequence the IND increased. A liquidator must also prove that the breaches of duty were not simply the occasion for the losses which the company has suffered by continuing to trade but an effective cause (but not the sole or only effective cause). In *Continental* Park J held that the failure by the directors to keep proper accounts was no more than the occasion for the losses which the company had suffered by continuing to trade. If they had prepared proper accounts, the company would have ceased trading. But the losses themselves were unrelated to this breach of duty.

29. In *Continental* Park J followed the line of authorities beginning with *Galoo* in which the company considered claims against auditors for trading losses. I gratefully adopt the same analysis. The law has moved on since *Galoo*. But in my judgment the reasoning is still sound and I put a particular example to Mr Curl in the course of argument. It was common ground that the IND of the Companies fluctuated because the pension deficit increased (or reduced) over time. It was also common ground that this fluctuation was the result of movements in the bond market and valuation adjustments made by the Trustees or the Schemes' actuary. If the Companies had traded profitably from 26 June 2015 until 25 April 2016 but the IND had increased solely because of increases in the pension deficit which were unrelated to the stewardship of the Companies, then, in my judgment, those losses would not be recoverable.

(4) Scope of Duty

30. As I have stated, the law has moved on since *Galoo* and the principal control mechanism method by which the Court excludes the recovery of incidental losses in auditors claims and other professional liability cases is by analysis of the "scope" of the defendant's duty. The Court analyses the purpose of the relevant duty in terms of the risk of harm against which the defendant assumed a duty to protect the claimant and decides whether there was a sufficient nexus between the duty and the loss claimed: see *Clerk & Lindsell* 24th ed (2023) at 2—184. Neither party cited the Supreme Court decision in *Manchester Building Society v Grant Thornton LLP* [2022] AC 783 and the common law principles to be derived from that case and it would be wrong, therefore, for me to apply them without detailed argument.

31. However, in support of her submissions Ms Hilliard cited *Swindle v Harrison* [1997] 4 All 705 in which the Court of Appeal rejected the argument based on *Brickenden v London Loan & Savings Co* [1934] DLR 465 that it was unnecessary for a principal to prove that a breach of fiduciary duty caused loss (at least in cases where dishonesty was not alleged). In that case a firm of solicitors made a bridging loan to an elderly client which enabled her to meet an obligation to pay a deposit on the acquisition of a hotel for her son secured by a first charge. It turned out to be a disastrous venture and when the firm of solicitors brought proceedings for possession the client counter-claimed for breach of fiduciary duty. The judge at first instance held that the solicitors had committed a breach of fiduciary duty in failing to disclose the profit on the loan but

dismissed the counter-claim because it caused no loss. Mummery LJ (with whom Hobhouse LJ agreed) adopted a scope of duty analysis applying *SAAMCO* at 734j-735d:

> "In one sense it is true that, "but for" the acquisition of the Aylesford Hotel, Mrs Harrison would not have mortgaged her home and she would not have subsequently suffered the loss of her equity in it. The Recorder held that there was no breach of duty of care by Alsters to Mrs Harrison in relation to the acquisition of the hotel. There is no appeal on that point. Further, it was never alleged that there was any breach of fiduciary duty by Alsters to Mrs Harrison in connection with the acquisition of the hotel. The fiduciary duties which have been held to have been breached were solely in connection with the bridging loan. What loss has Mrs Harrison suffered as a result of breach of fiduciary duty in connection with the bridging loan? It is asserted by Mr Bannister QC, on Mrs Harrison's behalf, that she has suffered substantial loss as a result of that breach of duty. She could not have acquired Aylesford hotel without Alsters' bridging loan; Alsters were in breach of fiduciary duty in making that loan; they are liable for the loss of her equity in her home, even if that was unforeseeable even if another firm of solicitors would have advised Mrs Harrison to take up Alsters' offer of assistance.
>
> That argument is flawed by the fallacy identified by Lord Hoffmann in the *South Australia* case, *i.e.* not starting from the correct point. The correct starting point is to identify the relevant cause of action, *i.e.* the relevant wrong. That involves identifying the scope of the duty breached and the purpose of the rule imposing the duty. In *Banque Bruxelles*, for example, Lord Hoffmann drew a distinction, in the context of a negligent valuation, between a duty to provide information for the purpose of enabling someone else to make a decision on a course of action and, on the other hand, a duty to advise someone as to what course of action he should take. The extent of liability for loss suffered would not be the same in each case. A wrongdoer is only liable for the consequences of his being wrong and not for all the consequences of a course of action. In the present case, there was no fiduciary duty on Alsters to abstain from lending money to Mrs Harrison in all circumstances or to prevent her from completing the purchase of Aylesford Hotel in accordance with the contract to purchase. Alsters' duty was to make full disclosure of material facts relevant to the bridging loan to enable her to make a fully informed decision about it. They were in breach of that duty; but, as found by the judge, the probabilities are that Mrs Harrison would still have entered into the bridging loan, even if that breach of duty had not occurred, because she was intent on completing the purchase of the Aylesford Hotel, whatever independent legal advice she received. The loss which she suffered did not flow from that breach of fiduciary duty. It flowed from her own decision to take the risk involved in mortgaging her own home to finance her son's restaurant business at the hotel. Alsters were

> not under a duty to decline to act for Mrs Harrison on the purchase or to stop her from going ahead with the purchase, if that is what she wanted to do.
>
> In brief, the loss of the equity in 13, Warwick Place was not a result of Alsters' breach of fiduciary duty in relation to the bridging loan which enabled Mrs Harrison to complete the contract for the acquisition of the Aylesford Hotel. It would be contrary to common sense and fairness to put upon Alsters the whole risk of the purchase transaction on the basis that they had failed to make full disclosure in a related loan transaction, when disclosure would not have affected the client's decision to proceed with the purchase. Mrs Harrison's position would have been the same even if there had been no breach of duty."

32. Again, I respectfully adopt that analysis and apply scope of duty principles to the measure of equitable compensation to be recovered for breach of a director's duties (and whether the claim is made by a liquidator under S.212 or by the company independently). I add that Lord Hoffmann's example of the mountaineer's knee would also fit my example of the pension deficit (above). I also add that although *Swindle v Harrison* pre-dates *AIB* and is a relatively early authority in the debate about equitable compensation, the Court of Appeal accepted that scope of duty principles applied to equitable compensation almost without argument in *Various Solicitors v Giambrone & Law* [2018] PNLR 2. I accept that both cases are concerned with solicitors claims. But this should not affect the principles which the Court applies in assessing the measure of compensation.

(5) Overlap

33. Finally, Ms Hilliard and Ms Earle submitted that if the Joint Liquidators were able to recover the IND for breach of the *Sequana* duty, liquidators would try and "shoe-horn" wrongful trading claims under S.214 into misfeasance claims under S.212 and by-pass the stringent knowledge requirement in S.214(2)(b). They relied on Lady Arden's judgment in *Sequana* at [319] to [326] (most of which I have set out in the Judgment at [472]).

34. I reject that submission. The authorities show that a liquidator is entitled to pursue alternative claims under both S.212 and S.214 and, indeed, that the measure of loss may be the same: see, e.g., *Re Purpoint Ltd* [1991] BCC 121 (Vinelott J) and *Brooks v Armstrong* (above). Moreover, I did not understand Lady Arden in *Sequana* to be

suggesting that the two sections are intended to be mutually exclusive but only that they do not have the same legal requirements and that S.212 provides a procedure for bringing existing claims whereas S.214 creates a substantive cause of action. In my judgment, the limits to recovery which I have identified (and, in particular, that the losses must fall within the scope of the duty) provide an adequate control mechanism to limit the overlap between S.214 and S.212.

35. Indeed, the difference between the operation of both sections is well illustrated by the facts of this case. I held that Mr Henningson and Mr Chandler were not liable for wrongful trading under S.214 because the stringent knowledge requirement (as Ms Hilliard put it) was not satisfied. However, I held that Mr Henningson had committed breaches of both his duty under S.171(b) and his duty under S.172 because he agreed to ACE II for an improper purpose to secure a secret commission and because he knew or ought to have known that insolvency was more probable than not but failed to consider the interests of creditors.

36. I do not consider that it would compensate the Companies and their creditors to limit their recovery to the compensation which I ordered under S.214. Moreover, the common law authorities show that a company or individual does not suffer loss simply by taking a loan and granting security over its assets. The transactions themselves were neutral when viewed in isolation. Their vice was that they enabled the Companies to continue trading at a loss on terms which were highly disadvantageous and contrary to the interests of other creditors. Apart from the unlawful fees paid to RAL, this was the damage which Mr Chappell and Mr Henningson caused to the Companies between 26 June 2015 and 25 April 2016.

37. Moreover, Mr Chappell and Mr Henningson were able to act with impunity because neither they nor RAL had any real stake in the BHS Group. Indeed, Mr Chappell used the extended period of continued trading to misappropriate further sums (or, at least, to try to) whilst Mr Henningson turned a blind eye to his conduct. In my judgment, these were the kind of "egregious circumstances" to which Lord Hodge was referring in *Sequana* at [238].

D. Joint and Several Liability

(1) The common law principle

38. Mr Curl and Mr Perkins submitted that the principle of joint and several liability for defaulting trustees has been well-settled for many years. Ms Hilliard and Ms Earle did not dispute this proposition or cite any authority to the contrary and I accept it: see *Re Englefield Colliery Co* (1878) 8 Ch D 388, *Re Exchange Banking Co* (1882) 21 Ch D 519 and *Re Duckwari plc* [1999] Ch 253 where Nourse LJ stated as follows at 262H-263A:

> "The basis on which trustees would have been liable to make good the misapplication is well settled. If a trustee applies trust moneys in the acquisition of an unauthorised investment, he is liable to restore to the trust the amount of the loss incurred on its realisation: see *Knott v. Cottee (1852)* 16 Beav. 77. He is also liable for interest. Where more than one trustee is responsible for the acquisition their liability is joint and several. If these rules were to apply to the present case, the directors responsible would prima facie appear to be jointly and severally liable to restore to Duckwari the difference between the gross acquisition cost, £505,923, and the £177,970 which has since been realised on the sale of the property, plus interest, credit being given for the amount of any rents and profits received before completion of the sale."

(2) S.212(3)(b)

39. Ms Hilliard and Ms Earle relied instead on S.212(3)(b) which confers a power upon the Court to contribute such sum as the Court considers just to the Companies' assets. I should set out the subsection in full and it provides as follows:

> "(3) The court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him— (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."

40. Ms Hilliard and Ms Earle submitted that S.212(3)(b) conferred the power on the Court to apportion liability between individual directors in the same way as I apportioned liability under S.214: see [1142] to [1145]. They cited no authority in support of this submission and I doubt whether the discretion is wide enough to enable the Court to impose liability on a several basis rather than a joint and several basis or to limit an award of equitable compensation for breach of the statutory duties of a director once a

liquidator has proved liability to the civil standard. Nevertheless, I will assume that the Court has such a discretion and I will go on to exercise it below.

IV. Determination

E. Measure of Compensation

(1) The Calculations

41. The parties agreed the IND between 26 June 2015 and 25 April 2016 as £133.5 million and the IND between 8 September 2015 and 25 April 2016 as £45.5 million: see [13]. Mr Shaw and Mr Pilgrem addressed the IND in some detail in their first joint statement but did not address it at all in their second joint statement because it had been agreed for all Knowledge Dates. For their opening submissions Mr Curl and Mr Perkins produced a summary of the individual heads of loss which made up the agreed consolidated IND between each Knowledge Date and 25 April 2016 (which they described as "key drivers"). For KD3 those individual heads of loss were as follows (and positive figures represent an increase in the net deficiency and negative figures represent a decrease in net deficiency):

    (1) Property: £64 million;

    (2) Pension deficit: £19 million;

    (3) Intercompany creditors: £25 million;

    (4) Other Liabilities: £25 million;

    (5) Fixed charge creditors: (£12 million); and

    (6) Other Assets: £15 million.

42. The principal differences between KD3 and KD6 was a reduction in the size of the pension deficit of £31 million and an increase in the value of other assets of £15 million. For KD6 the individual heads of loss were as follows (and, again, positive figures represent an increase in the net deficiency and negative figures represent a decrease in net deficiency):

    (1) Property: £64 million;

(2) Pension deficit: (£31 million);

(3) Intercompany creditors: £19 million;

(4) Other Liabilities: £23 million;

(5) Fixed charge creditors: (£15 million); and

(6) Other Assets: (£15 million).

43. Mr Henningson and Mr Chandler did not challenge these individual figures at any time during the trial. But they did not agree them either. Indeed, in the second joint statement Mr Pilgrem made it clear that Mr Henningson and Mr Chandler had agreed the final figures but not the basis for each figure, its underlying rationale or calculations. Having gone back to consider the expert reports I am satisfied that the dispute between the expert witnesses was about the calculations rather than the underlying rationale or methodology and that in relation to property values this dispute was generated by the disagreement between the property valuation experts. I say this for the following reasons.

44. It is clear from the evidence of Mr Shaw and Mr Pilgrem that the principal differences between them related to the valuation of the BHS Group's property assets, the calculation of the pension deficit and a number of technical accounting issues. Mr Shaw explained his methodology and how he had calculated the IND for each Knowledge Date in Shaw 1, Appendix 17 (footnotes omitted):

> "20 The IND between 17 April 2015 and 25 April 2016 arises as a result of four principal events and two lesser events as follows.
>
> ***Principal events resulting in IND***
>
> *Property*
>
> 21 The principal diminution in the property assets available to creditors on appointment of the administrators arose because on 26 June 2015 BHSL pledged the Oxford Street property as security for ACE II.
>
> 22 On 8 September 2015, BHSL subsequently pledged the Oxford Street property as security for the Grovepoint Facility. The Oxford Street property was sold on 31 March 2016 with the majority of proceeds being used to discharge part of the liability under the Grovepoint Facility.
>
> 23 The encumbrance of Oxford Street and other properties, in effect to raise funds to support trading losses and eventual sale resulted in them

> ultimately being unavailable to unsecured creditors as at 25 April 2016 and hence the IND.
>
> 24 In determining the value of the property assets as at 17 April 2015, I have relied upon the Expert Report of Victoria Seal dated 29 March 2023, who has estimated the market value of the property portfolio. Ms Seal's analysis states that there was no change in the market value of the properties encumbered and subsequently sold between 17 April 2015 and 25 April 2016.
>
> *Pension liabilities*
>
> 25 I set out in paragraphs 17.15 to 17.19 my comments regarding the assessment of the Pension Deficits in the Orderly Wind Down Scenario and how I am presenting these as a range of values using the values calculated by Mr Scott.
>
> *Inter-company creditors (£52 million increase)*
>
> 26 The inter-company creditors are analysed as follows in tabs 1.6.3, 1.6.4 and 1.6.5 of each spreadsheet model and arise principally as a result of the accumulation of rental payments owed by BHSL to BHSPL, Davenbush and Carmen.
>
> 27 As noted in section 7 of my Report, trading losses within the Group were running at circa £7 million per month. Those losses had historically been absorbed/supported by Taveta with whom a significant inter-company debt had built at a similar rate over the preceding five years.
>
> 28 In calculating the increase in inter-company creditors, I have relied upon the JD Edwards records at each Alternative Date for Wrongful Trading and 25 April 2016.
>
> *Net increase in other liabilities (£39 million)*
>
> 29 Net increase in other liabilities consists of increases in amounts owed to: (a) trade creditors (i.e., trade suppliers of stock for re-sale, and other establishment expenses such as utilities (increase of £23 million). (b) amounts owed to HMRC (increase of £14 million). (c) deficits arising from amounts owed in excess of fixed charges (£15 million); and (d) change in the amount owed to Taveta in relation to the remaining balance of £40 million of the £256 million intercompany debt which had accrued to Taveta prior to the acquisition by RAL (£5 million).
>
> 30 These amounts are netted against changes in asset values consisting of: (a) recoveries of balances escrowed against letters of credit; (b) movements in cash assets; and (c) increase in book debts.
>
> 31 I have derived each of the amounts set out in paragraphs 29 and 30 from analysis of the JD Edwards accounting records and management accounts."

45. Mr Shaw and Mr Pilgrem annexed as Appendix JS1 to their first joint statement a comparison of the components of their calculations of the IND at each Knowledge Date in a balance sheet form. Mr Shaw calculated the IND at KD3 to be £135.3 million and

Mr Pilgrem calculated it to be £114.6 million (excluding pension liabilities). Mr Shaw calculated the IND at KD6 to be £72.9 million and Mr Pilgrem calculated it to be £60.3 million (again excluding pension liabilities).

46. Following the joint statement Mr Pilgrem produced a table showing that there was a £29 million difference between Mr Shaw's assessment of the IND and his own assessment for KD3 and a £6 million difference in relation to KD6 because of the dispute between the property valuation experts: see Pilgrem 2, table 8.1. Mr Pilgrem also explained the remaining differences between Mr Shaw and himself in Pilgrem 2 at ¶8.6:

> "In the remainder of this section, I explain differences in my and Mr Shaw's assessments as regards:
>
> (1) treatment of events as at the 26 June 2015 Knowledge Date;
>
> (2) treatment of events as at the 8 September 2015 Knowledge Date;
>
> (3) property;
>
> (4) secured debt: charges against ACE II;
>
> (5) secured debt: the balance of the Gordon Brothers loan as at 25 April 2016;
>
> (6) landlord, trade and other creditors: double-counting of external loans;
>
> (7) landlord, trade and other creditors: error in assessing BHSL's retail accrual balance as at 26 August 2015;
>
> (8) landlord, trade and other creditors: exclusion of 'Duty' balance as at 25 April 2016;
>
> (9) landlord, trade and other creditors: estimation of book value of trade and other creditors as at the Knowledge Dates;
>
> (10) landlord, trade and other creditors: capital contribution liabilities;
>
> (11) landlord, trade and other creditors: landlord claims;
>
> (12) landlord, trade and other creditors: proportion of book value claimed;
>
> (13) cash: cash at bank at Knowledge Dates up to 13 July 2015;
>
> (14) cash: cash at bank as at 26 August 2015 and 8 September 2015;
>
> (15) stock: effect of seasonality;
>
> (17) intercompany debt: BHSL's debt to BHSPL;
>
> (18) intercompany debt: measurement of BHSPL's intercompany debt;

(19) intercompany debt: claims arising from settlement of secured debt;
(20) intercompany debt: Carmen's debt to BHSL;
(21) unsecured debt: identification of the book values of the Companies' VAT liabilities as at the Knowledge Dates;
(22) unsecured debt: BHSPL's VAT dividend to HMRC;
(23) unsecured debt: debt position with RAL (including the Lady Green loan);
(24) unsecured debt: Arcadia Loan balance as at the Knowledge Dates;
(25) other assets: £ 3.1 million receivable in Mr Shaw's calculations; and
(26) the Section 75 deficits of the Schemes."

47. Some of these issues were quite significant. For example, Mr Pilgrem did not agree Mr Shaw's figures for the inter-company debt owed by BHSL to BHSPL because the figure fluctuated on an almost daily basis: see Pilgrem 2, ¶8.72 to ¶8.74. He also criticised Mr Shaw's calculation of the inter-company creditors because he had not included at least £6 million of debt owed by Carmen to BHSL: see Pilgrem 2, ¶8.76. But what Mr Pilgrem did not suggest was that Mr Shaw had been wrong to calculate the IND by reference to inter-company creditors or that the reason for the increase in inter-company creditors was that BHSL was unable to meet its rent payments to BHSPL.

(2) The Total IND

48. The parties agreed the total IND figure for each Knowledge Date but they did not agree the individual components of it. Moreover, Mr Chappell did not participate in the trial and did not agree both the total IND figures for each Knowledge Date or the individual components of it. I accept the Joint Liquidators' submission that the total IND is the proper starting point for the assessment of equitable compensation for breach of the *Sequana* duty. The issue which I have to consider is whether there are good reasons to depart from it and, in particular, whether I can be satisfied on the limited evidence before me that the breaches of duty which Mr Chappell and Mr Henningson committed were the effective cause of the total IND or merely the occasion for it.

49. Ms Hilliard did not challenge Mr Shaw's evidence in Shaw 1, Appendix 17 (above) and I accept it. For the reasons which I have given, I am also satisfied that there was no dispute between the expert witnesses about the reasons for the IND given by Mr Shaw

but only about the relevant property values, the pension deficit and the calculation of the remaining figures. Finally, it is clear from the evidence of both Mr Shaw, Mr Pilgrem and the contents of JS1 that the principal reasons for the IND were the decrease in property assets held by the group and continued trading at a loss resulting in the failure by BHSL to pay rent due to BHSPL and other members of the group, an increase in the liability to HMRC and an increase in trade and other creditors.

50. Whatever the correct figures, I am satisfied that there is no reason to depart from the usual measure of compensation and that the breaches of duty which Mr Chappell and Mr Henningson committed were the effective cause of the total IND and, in particular, the reduction in the Companies' property assets between KD3 and 25 April 2016 and between KD6 and 25 April 2016. I have found that if Mr Henningson had complied with his duties then the Companies would not have entered into ACE II but would have gone into administration. I have also found that the consequences of ACE II were both negative and very expensive and that Mr Henningson knew and understood this and, in particular, that ACE II would increase the net deficiency by £5.9 million: see [766] to [773].

51. I have also found that if Mr Henningson had complied with his duties, then the Companies would not have entered into the Grovepoint Facility but would have gone into administration. But I also went further and held that Mr Henningson knew or believed that it was highly unlikely that there would be any surplus available from the sale of Oxford Street once the Grovepoint Facility was repaid: see [850]. Indeed, I specifically found that Mr Chappell's strategy was to sell off the crown jewels to keep trading even though there was little or no chance of achieving the Target Business Plan and that Mr Henningson ought to have known this: see [904](7) to (9). Finally, on 25 June 2024 I held that Mr Chappell had no real prospect of contesting my findings.

52. Ms Hilliard argued that Mr Henningson (and by extension Mr Chappell) was not liable for the losses which the Companies made by continued trading because I dismissed the Wrongful Trading Claim and the Trading Misfeasance Claim for KD4 and KD5. I reject this submission. I dismissed the claims in relation to KD4 because the BHSGL board did not approve the July 2015 Turnaround Plan until October 2015 and, therefore, after KD6. I also dismissed the claims in relation to KD5 because I found that the damage was done on 11 March 2015 when BHSPL charged Atherstone to ACE and,

therefore, before KD3. But in any event, I found that at KD5 Mr Henningson should have known that the Companies were bordering on insolvency and that the BHS Group could barely afford to use £6 million of the proceeds of sale of Atherstone to repay RAL's debts: see [900].

53. Finally, it is important to stand back and keep in mind the breaches of duty which I have found that Mr Henningson and Mr Chappell have committed. It is unnecessary for me to find that they were the sole effective cause of the losses which the Companies suffered: see [11] (above). However, I must be satisfied that they were an effective cause of those losses and not just the occasion for them: see [28] (above). In *Continental* the principal allegation was that the directors' books and records were so inadequate that it was impossible to ascertain at any particular time whether the company was solvent or not: see [397]. Although this breach of duty may have enabled the company to continue trading, it was unconnected with losses which the company suffered: see, in particular, Park J's detailed analysis of the facts at [397] to [400] just before the discussion of the principles which I have set out above.

54. In the present case I have held that Mr Henningson and Mr Chappell entered into ACE II for the proper purpose of enabling it to continue to trade past the June quarter day but also for the improper and dominant purpose of personal gain. I have also held that on both KD3 and KD6 they failed to have regard to the interests of creditors even though the debts which RAL owed to BHSGL had wiped out the small investment which it had made in the group and continued to trade knowing that it was more probable than not that the Companies would go into insolvency. I am satisfied that those breaches of duty were not just the but for cause of the Companies' continuing to trade but an effective cause of the total IND and, in particular, the property and trading losses which the Companies suffered between KD3 and 25 April 2016. Indeed, I am satisfied that those breaches of duty were the principal if not the sole effective cause of those losses.

55. I reach this decision subject to the following qualifications. I am not satisfied that the breaches of duty which Mr Henningson and Mr Chappell committed were an effective cause of the increase in the pension deficit between KD3 and 25 April 2016. Indeed, Mr Curl and Mr Perkins' summary of the IND shows that the deficit increased by £19 million between 26 June 2015 and 25 April 2016 but decreased by £31 million between 8 September 2015 and 25 April 2016. What this shows, therefore, is that the pension

deficit was extremely volatile and that its increase or decrease was unrelated to the breaches of duty which I have found. I, therefore, decline to award equitable compensation for the £19 million IND between KD3 and 25 April 2016.

56. However, I do not consider it appropriate to exclude the decrease in the pension deficit of £31 million from the calculation of the IND in relation to KD6 because Mr Henningson and Mr Chandler agreed to the IND figures on that basis. The parties no doubt agreed those figures on a pragmatic basis but in the spirit of compromise and to reduce the number of complex issues which the Court would be required to decide. In my judgment, the Joint Liquidators should be held to that agreement. I now go on to consider the individual components of the IND if I am wrong to assess equitable compensation by reference to the overall IND. I consider this alternative measure of compensation either because Ms Hilliard is correct and I ought to assess equitable compensation by reference to single transactions only or because this is a case in which it is appropriate to depart from the starting point which Park J identified in *Continental* (above).

(3) KD3: 26 June 2015

(i) Property

57. Mr Shaw's evidence in JS1 was that the IND of the Companies' property assets between KD3 and 25 April 2016 was £73.9 million (including unencumbered properties). Mr Pilgrem's evidence was that the IND of those assets between the same dates was £45 million (including unencumbered properties). The explanation for this difference was that the valuation experts did not agree about the valuations to be placed on the properties in the BHS portfolio on each of the relevant Knowledge Dates: see Pilgrem 2, table 8.1. Moreover, Mr Pilgrem made it clear that unlike Mr Shaw he had not used the actual sums which the BHS Group had realised on the sale of its portfolio but hypothetical values based on the views expressed by the Respondents' property experts about the amounts which the relevant properties would have realised in an administration.

58. On 31 March 2016 BHSL completed the sale of Oxford Street to O&C for the sale price of £50 million and the proceeds of sale (less costs) were used in their entirety to repay the Grovepoint Facility. Immediately before 26 June 2015 the property had been

secured to HSBC and BHSGL used £5,907,404.14 of the proceeds of ACE II to repay Noah II. Moreover, on the findings which I made Arcadia would not have entered into the Framework and Loan Agreements and paid the balance of £10 million of Noah II to HSBC.

59. It follows, therefore, that if the Companies had gone into administration on or shortly after 26 June 2015, HSBC would have retained a first fixed charge over Oxford Street to secure the repayment of £16 million. If the Joint Liquidators had later sold Oxford Street for £50 million then the additional sum available for creditors would have been £34 million. Moreover, this analysis is broadly consistent with the contemporaneous documents and, in particular, the GT Report in which GT advised that if Oxford Street was sold for £50 million in September 2015, this would generate £37.6 million in cash: see [746].

60. In my judgment, this is the loss which flows directly from the breaches of duty committed by Mr Henningson and Mr Chappell and which the Companies suffered as a consequence of entering into ACE II and then as a result of entering into the Grovepoint Facility and discharging ACE II. I make this finding applying commonsense and with the benefit of hindsight. I am also satisfied that it is not appropriate to make any hypothetical assumptions about the price at which the property might have been sold if administrators had been appointed at an earlier date or if the market had perceived it to be a distressed sale: see *Auden McKenzie* (above). In any event, BHSL surrendered the lease and there is no evidence that O&C, which was a special purchaser, would have paid substantially less even if BHSL had gone into administration.

61. Although there were a number of contemporaneous valuations of the BHS property portfolio which I deployed to make findings of fact, I cannot be satisfied that the IND in relation to the other property assets exceeded £11 million between KD3 and 25 April 2016. Nor can I be satisfied that the total IND in relation to the property assets was greater than the £45 million which Mr Pilgrem accepted in evidence rather than £64 million. I suspect that the remaining difference of £19 million between Mr Shaw and Mr Pilgrem can be explained by the hypothetical assumptions made by the Respondents' property valuation experts and, in particular, the hypothetical assumption

that the assets would be sold at distressed values and for much less than they were. But there was no evidence before me to that effect.

62. If it is necessary, therefore, for me to make a specific finding in relation to the IND of the Companies' property assets, I adopt Mr Pilgrem's figure and I find that the IND was £45 million. For the reasons which I have given above, I am fully satisfied that the breaches of duty which Mr Henningson and Mr Chappell committed were an effective cause of this head of loss. I recognise that the true amount of this loss is likely to have been substantially more than £45 million and to have been the £64 million shown in Mr Curl and Mr Perkins' summary. But the Joint Liquidators, having agreed the IND, chose not to call evidence in relation to the values of the individual property assets or to prove the amounts which they realised for creditors on sale and they must live with that decision.

(ii) Pension deficit

63. Mr Curl and Mr Perkin's summary showed an increase in the pension deficit of £19 million. For the reasons which I have explored above, I am not satisfied that the breaches of duty committed by Mr Chappell and Mr Henningson were the effective cause of this increase and no evidence was adduced before me to suggest that it was.

(iii) Liabilities

64. Mr Curl and Mr Perkins' summary also showed a net increase in liabilities of £35 million consisting of a £25 million increase for inter-company creditors, a £25 million increase for other liabilities offset against a £15 million decrease in fixed charge creditors. I am satisfied that the breaches of duty committed by Mr Chappell and Mr Henningson were the effective cause of this net increase in the Companies' overall liabilities between KD3 and 25 April 2016. The liability which BHSL incurred to other group companies for unpaid rent and the liabilities to HMRC, trade creditors and utilities were direct consequences of Mr Chappell's strategy of continuing to trade whilst he sold off the crown jewels. However, the Joint Liquidators must also give credit for the decrease in liabilities owed to fixed charge creditors.

65. Mr Pilgrem did not challenge Mr Shaw's description of these liabilities or their cause only the way in which he had calculated them. In JS1 he accepted that there was an

increase in the liability to HMRC of £13.5 million and an increase in inter-company landlords claims of £12.1 million. He also accepted that there was an increase in total liabilities (including these sums) of £48.9 million but a decrease in fixed charge creditors of £15.7 million giving a net increase of £33.2 million. In my judgment, those figures are sufficiently close to the figures given in the summary to establish their reliability. However, if it is necessary for me to make a specific finding in relation to these heads of loss, then I find that the total IND for these three heads of loss was £33.2 million which was the amount which Mr Pilgrem accepted in evidence.

(iv) Other assets

66. Mr Curl and Mr Perkins' summary showed a net decrease in net assets of £15 million. Again, I am satisfied that the breaches of duty committed by Mr Chappell and Mr Henningson were the effective cause of this decrease in the Companies' assets between KD3 and 25 April 2016. Mr Shaw described these assets as balances secured against letters of credit, movements in cash assets and book debts and the use of these assets enabled or assisted the BHS Group to continue to trade up until 25 April 2016. Moreover, in JS1 Mr Pilgrem accepted that there was a net decrease in other assets of £27.5 million including £18.6 million for letters of credit balances. I therefore find that the IND for other assets was £15 million.

(4) KD6: 8 September 2015

(i) Property

67. Mr Curl and Mr Perkins' summary showed the same figure of £64 million for the IND of property assets at KD6 and Mr Pilgrem adopted the same figures for both KD3 and KD6 in JS1. For the reasons which I have set out in relation to KD3 I find that the IND for this head of loss was £45 million and that the breaches of duty committed by Mr Chappell and Mr Henningson were the effective cause of this decrease in the Companies' property assets.

(ii) Pension deficit

68. Mr Curl and Mr Perkins' summary showed a net decrease in the pension deficit of £31 million. I have considered whether I should exclude this figure for the reasons set out

above. However, the Joint Liquidators accepted and agreed the IND as at 8 September 2015 and, in my judgment, they are bound by that agreement. I therefore accept that the IND must be reduced by the amount of £31 million to take account of the reduction in the pension deficit.

(iii) Other Liabilities

69. Mr Curl and Mr Perkins' summary showed a net increase in liabilities of £27 million consisting of a £19 million increase for inter-company creditors, a £23 million increase for other liabilities offset against a £15 million decrease in fixed charge creditors. Mr Pilgrem accepted that there was a net increase in total liabilities of £22.2 million. Given that it is impossible for me to reconcile the figures on the evidence, I adopt Mr Pilgrem's figure of £22.2 million and I find that the net IND for these individual heads of loss was £22.2 million. But given the nature of these liabilities I am satisfied that the breaches of duty committed by Mr Chappell and Mr Henningson were the effective cause of this net increase in the Companies' overall liabilities between KD6 and 25 April 2016.

(iv) Other assets

70. Mr Curl and Mr Perkins' summary of key drivers showed a net increase in other assets of £15 million. Given that the Joint Liquidators accepted and agreed the IND as at 8 September 2015, they must give credit for that sum.

(5) Scope of Duty

71. I am also satisfied that whichever measure of damage is appropriate, all of the losses fell within the scope of the *Sequana* duty which Mr Henningson and Mr Chappell owed to the creditors of the Companies. In particular, I am satisfied that there is a clear nexus between the risk of harm against which they assumed a duty to protect the Companies' creditors and the losses which the Companies have suffered. Lord Briggs set out the scope of the duty in *Sequana* at [176]:

> "In my view, prior to the time when liquidation becomes inevitable and section 214 becomes engaged, the creditor duty is a duty to consider creditors' interests, to give them appropriate weight, and to balance them against shareholders' interests where they may conflict. Circumstances may require the directors to treat shareholders' interests as subordinate to

> those of the creditors. This is implicit both in the recognition in section 172(3) that the general duty in section 172(1) is "subject to" the creditor duty, and in the recognition that, in some circumstances, the directors must "act in the interests of creditors". This is likely to be a fact sensitive question. Much will depend upon the brightness or otherwise of the light at the end of the tunnel; ie upon what the directors reasonably regard as the degree of likelihood that a proposed course of action will lead the company away from threatened insolvency, or back out of actual insolvency. It may well depend upon a realistic appreciation of who, as between creditors and shareholders, then have the most skin in the game: ie who risks the greatest damage if the proposed course of action does not succeed."

72. I have found that it was more probable than not that ACE II and the Grovepoint Facility would not lead the Companies away from insolvency and that, as between the creditors of the Companies and RAL, a realistic appreciation would have led both Mr Henningson and Mr Chappell to appreciate that RAL had no skin in the game. In my judgment, they either knew or ought to have known that there was a significant risk to the Companies body of creditors (rather than to RAL) if the Companies continued to trade at a loss and were unable to obtain a sustainable working capital facility or implement the July 2015 Turnaround Plan.

73. The Companies continued to trade at a loss and funded those losses in part by charging their property assets on disadvantageous terms. When they were unable to obtain a sustainable working capital facility and implement the July 2015 Turnaround Plan the risk of damage to the Companies creditors eventuated. This was the very risk against which Mr Chappell and Mr Henningson assumed a responsibility to avoid and could and should have avoided if they had complied with their duties. There is a clear nexus between the scope of their duties and the losses which the Companies suffered.

(6) The pleading point

74. Finally, I reject Ms Henningson's pleading point. Once the IND was agreed, the Joint Liquidators re-amended to plead the measure of compensation for breach of the *Sequana* duty by reference to the total IND:

> "309. Had the Respondents not breached their duties as set out in these Points of Claim, they would have caused the Companies to cease trading on the Cessation Date. In the premises set out above, the entirety of the Companies' trading after the Respondents should have ceased trading was misfeasant. Had the Respondents not breached their duties in that

> way, then the Companies and their respective unsecured creditors would not have suffered the IND particularised at Paragraphs 302C to 302E above, or alternatively such sum as the court thinks just upon consideration of expert evidence, and subject to the caps identified in those Paragraphs."

75. Moreover, Mr Henningson did not challenge the measure of compensation. He simply denied the relief sought, he denied that the trading misfeasance was a claim known to law or that the Joint Liquidators were entitled to re-frame their wrongful trading claim as a claim for misfeasance. He did not, however, advance a positive case that the appropriate measure of loss for breach of the *Sequana* duty was limited to the losses associated with a single transaction or venture.

76. In my judgment, the Joint Liquidators have adequately pleaded that they are entitled to recover equitable compensation calculated by reference to the total IND and I have found that they are entitled to recover compensation on that basis. It is unnecessary, therefore, for me to go on and consider whether the general plea at the end of paragraph 309 would have been sufficient to enable them to recover compensation by reference to any alternative measure in the absence of any challenge by Mr Henningson to the pleaded measure of compensation. But I have set out my conclusions on each of those alternative measures for the sake of completeness and should it be necessary to consider them on any appeal.

F. Joint and Several Liability

77. I hold that Mr Henningson and Mr Chappell are jointly and severally liable to pay equitable compensation to the Companies. It would involve a very substantial change in the law for me to hold that directors (or, for that matter, any other joint wrongdoers) are severally liable for breaches of the same duties which they have owed to a company and Ms Hilliard did not submit that I should do so.

78. I also decline to exercise my discretion under S.212(3)(b) to limit or apportion the liability of Mr Henningson. As Lady Arden pointed out in *Sequana* the difference between S.212 and S.214 is that one is procedural and the other is substantive. Moreover, S.212 is primarily designed to enable a liquidator to short cut the process of issuing separate proceedings and to obtain a summary remedy in clear and obvious cases.

79. I see no reason why the Joint Liquidators would not have been able to commence separate proceedings against Mr Henningson by issuing a Claim Form under CPR Part 7 to recover equitable compensation for the breaches of S.171 and S.172 which he committed. Moreover, in those circumstances the Court would have had no discretion to apportion or limit the equitable compensation to which the Companies were entitled. In my judgment, they should not be denied full compensation because they have brought proceedings under S.212.

80. I accept that I exercised the Court's discretion to apportion liability under S.214. But I did so because I followed *Continental* and adopted a practice which has received judicial recognition: see [513]. But I would not have exercised my discretion to relieve Mr Henningson from joint and several liability in the light of my findings that his breaches of duty were an effective cause of the losses which the Companies incurred and my findings more generally in relation to his conduct. He committed a number of very serious breaches of his duties as a director and as a result he was disqualified for a substantial period of time. This is a reflection of his disastrous stewardship of the Companies over a short period of time.

G. Credit

81. Mr Curl and Mr Perkins conceded that the Joint Liquidators should give credit for the £3.5 million which Mr Smith paid to settle the claims against him in relation to the Wrongful Trading Claim: see [1141]. They did not suggest or submit that the Court should take a different approach to the Trading Misfeasance Claim and I am satisfied that they were right not to do so. The parties were also agreed that the Joint Liquidators should give credit for the sum paid by Mr Chandler to settle the claims against him pursuant to the agreement set out in the schedule to the Tomlin Order. I, therefore, hold that the Joint Liquidators must give credit for the total sum of £4,230,000 against any award of equitable compensation.

V. Disposal

(1) Primary Measure: total IND

82. I find that Mr Henningson and Mr Chappell are liable to pay equitable compensation calculated by reference to the total IND of the Companies between KD3 (26 June 2015)

and 25 April 2016 less the increase in the pension deficit of £19 million and the credit of £4.23 million. This is a total sum of £110,230,000 and I will make a declaration to this effect and an order that Mr Henningson and Mr Chappell should pay this sum to the Joint Liquidators. If I am wrong to award equitable compensation on this basis I go on to summarise my alternative conclusions.

83. I also find that Mr Henningson and Mr Chappell are liable to pay equitable compensation calculated by reference to the total IND of the Companies between KD6 (8 September 2015) and 25 April 2016 after taking into account the decrease in the pension deficit and the settlement sum paid by Mr Smith. This is a total sum of £42 million. However, the losses which the Companies suffered between 26 June 2015 and 25 April 2016 include the losses which they suffered between 8 September 2015 and 25 April 2016 and I have taken them into account in awarding the Joint Liquidators the total sum of £110,230,000.

(2) Alternative Measure: individual IND

84. Alternatively, if I am wrong to find that Mr Henningson and Mr Chappell are liable to pay equitable compensation by reference to the total IND between the relevant dates, then I find that the Joint Liquidators are entitled to recover equitable compensation calculated by reference to the decrease in the value of the Companies' property assets (£45 million), the increase in their other liabilities (£33.2 million) and the decrease in their other assets (£15 million) between KD3 (26 June 2015) and 25 April 2016. This is a total sum of £93.2 million. After giving credit for £4.23 million, I find that Mr Henningson and Mr Chappell are liable to pay equitable compensation of £88,930,000 and I would have awarded equitable compensation on that basis in the alternative to the primary measure.

85. I also find that Mr Henningson and Mr Chappell are liable to pay equitable compensation calculated by reference to the decrease in the value of the Companies' property assets (£45 million) and the increase in their other liabilities (£22.2 million) between KD6 (8 September 2015) and 25 April 2016. This is a total sum of £77.7 million but the Joint Liquidators must give credit for the decrease in the pension deficit of £31 million and the increase in the value of their other assets totalling £15 million. After giving credit for £4.23 million, I find that Mr Henningson and Mr Chappell are

liable to pay equitable compensation of £27,470,000 million. However, the losses for the first period include the losses for the second period and I have already taken them into account in assessing compensation on the alternative basis of £88,930,000.

(3) Second Alternative Measure: single transaction basis

86. Finally, if I am wrong in relation to the primary measure of compensation and the first alternative measure of compensation and the Joint Liquidators are only entitled to recover compensation by reference to the individual transactions ACE II and the Grovepoint Facility, then I find that the Companies suffered loss of £34 million as a result of entering into ACE II and then entering into the Grovepoint Facility and using the proceeds of the new facility to repay ACE II. This sum represents the value of BHSL's unencumbered equity in Oxford Street as at 26 June 2015 and which it was unable to realise thereafter.

(4) Consequential Orders

87. The parties have agreed that I will deal with permission to appeal and costs on paper. I anticipate that they will have other points to raise after considering this judgment and, in particular, the extent to which the Joint Liquidators should give credit for the sums which I have already awarded against both Mr Henningson and Mr Chappell. I propose to deal with those issues on paper and at the same time as I deal with the outstanding applications (unless the parties invite me to do otherwise).