Neutral Citation Number: [2016] EWHC 2893 (CH)

Case No: 7466 of 2012

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 November 2016

Before :

David Foxton QC
(sitting as a Deputy Judge of the Chancery Division)

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Between:

(1) PHILIP ANTHONY BROOKS
(2) JULIE ELIZABETH WILLETTS
(Joint Liquidators of Robin Hood Centre plc in liquidation) — **Appellants**

- and –

(1) KIERON ARMSTRONG
(2) IAN WALKER

Respondents and Cross-Appellants

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James Couser (instructed by **Nelsons**) for the **Appellants**
Tiran Nersessian (instructed by **Ashton Bond Gigg**) for the **Respondents/Cros-Appellants**

Hearing dates: 18, 19 and 20 October 2016

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JUDGMENT

David Foxton QC (sitting as a Deputy Judge of the High Court):

1. This is an appeal against two judgments of Mr Registrar Jones brought by the Joint Liquidators of the Robin Hood Centre Plc. (who I shall refer to as "the Company") which operated a Robin Hood-themed tourist attraction in Nottingham.

2. The hearing before Mr Registrar Jones concerned claims for wrongful trading contrary to s.214 of the Insolvency Act 1986 brought by the Claimants ("the Liquidators") against the Respondents, who are two directors of the Company and who I shall refer to as "the Directors". It was alleged that the Directors should be made liable to contribute to the Company's assets because they knew or ought reasonably to have concluded before the date of the Company's actual liquidation on 6 February 2009 that there was no reasonable prospect of the Company avoiding insolvent liquidation. The Liquidators also sought compensation from the Directors for breach of duty.

3. Registrar Jones found that the Directors were jointly and severally liable to pay compensation of £35,000 for wrongful trading. At a subsequent hearing, Registrar Jones held that there should be no order as to costs. Both the Liquidators and the Directors appealed aspects of those decisions as follows:

    a. In their appeal the Liquidators challenge Registrar Jones' rejection of parts of their case as to the date when wrongful trading began, as well as the Registrar's conclusion on the amount of compensation awarded. That appeal involves six grounds of appeal.

    b. In their cross-appeal, the Directors challenge Registrar Jones' conclusion that wrongful trading did occur on certain of the dates advanced by the Liquidators, as well as the Registrar's conclusion on the amount of compensation awarded. That appeal involves seven grounds of appeal.

    c. Finally, the Liquidators challenge the Registrar's decision that there should be no order as to costs.

4. For the purposes of the appeal, I was provided with 16 hearing bundles, four bundles of authorities and over 110 pages of skeleton arguments. The judgments appealed against were 71 pages long. The reading estimate was originally ½ a day, which compares favourably with the one day's reading time suggested to the Registrar who had to determine many more issues than arose on this appeal. Fortunately the hearing before me was conducted with considerable efficiency, and it was possible to conclude the argument within 2 days.

5. The case was commenced on 20 September 2012, some 7 years after the first date of wrongful trading for which the Liquidators were contending, and 5 years after the date established at trial. The trial finally began on 1 July 2015. It lasted 7 days, and the Registrar handed down his final judgment on 31 July 2015. The submissions made to me by the Directors on the costs appeal suggest that by the start of the trial, at which

they recovered £35,000, the Liquidators' costs were of the order of £1 million. The costs incurred will necessarily have increased further as a result of this appeal.

The background

6. The background facts are set out in the judgment of Mr Registrar Jones of 31 July 2015 ([2015] EWHC 2899 (Ch)) and it is not necessary for me to repeat them at length here. I provide a brief summary below, giving paragraph references to the Registrar's judgment as appropriate. Such further background as is necessary to understand the particular grounds of appeal is set out when the relevant ground of appeal is considered.

7. As I have stated, the Company carried on business running a Robin Hood themed tourist attraction. On 6 February 2009, the Company entered into a creditors' voluntary liquidation. After investigation, the Liquidators (who had been appointed in that liquidation) brought proceedings against the Directors:

    a. under s.214 Insolvency Act 1986 claiming that the Directors should be made liable to contribute to the Company's assets because they knew or ought reasonably to have known before 6 February 2009 that there was no reasonable prospect of the Company avoiding insolvent liquidation; and

    b. under s.212 Insolvency Act 1986 claiming compensation against the Directors for breach of duty.

8. The allegation of wrongful trading raised two issues:

    a. First, whether, at some point before 6 February 2009, the Directors or either of them knew or ought reasonably to have concluded that there was no reasonable prospect that the Company would avoid going into insolvent liquidation: an issue referred to by the Registrar as "the Knowledge Condition".

    b. Second, to the extent that the Knowledge Condition was satisfied, whether the Court was satisfied in relation to the relevant Director that he took every step with a view to minimising the potential loss to the Company's creditors as he ought to have taken: an issue referred to by the Registrar as "the Minimising Loss Defence".

9. The Liquidators' pleaded case alleged that the Knowledge Condition was met on five dates: 31 January 2005, 31 January 2006, 9 October 2006, 31 January 2007 and 3 May 2007. The Registrar held that the Liquidators were obliged to prove the existence of the Knowledge Condition prior to the start of the winding-up, but a starting date did not have to be specified. However, the Registrar concluded that the Directors were entitled to know the case they had to meet, and therefore the Liquidators could not rely on a different date or period at trial to one capable of being identified from the application and evidence in support ([13]-[14]). There was no challenge to this part of the ruling before me.

10. The Registrar rejected the Liquidators' case that the Knowledge Condition was established for any of the dates prior to 31 January 2007, but held that it was established for that date ([253]) and, independently of that finding, for 3 May 2007 ([258]). The Registrar found that the Directors were in breach of their directors' duties from the same date, for the purposes of s.212 Insolvency Act 1986. The Registrar then considered the Minimising Loss Defence, and held that this succeeded up to 3 May 2007, but not thereafter ([283]).

11. The Registrar then turned to the issue of compensation. I will need to consider how the Liquidators deployed their case on compensation at some length below. For present purposes I will merely summarise the Registrar's conclusions. In brief the Registrar rejected the basis on which the Joint Liquidators had calculated compensation at the relevant date in the amount of £388,570.29 as "wrong and wholly unrealistic" ([286]). The Registrar performed his own calculation as follows:

    a. First, the Registrar sought to compare the net deficiencies between 1 January 2007 and 6 February 2009 (the former date was chosen in the absence of accounts as at 3 May 2007 from which a comparison could be made). On this basis the Registrar concluded that continued trading was for the benefit of trade creditors, but to the detriment of two creditors, Tesco and HMRC, and possibly a third, Nottingham City Council ([282]).

    b. The Registrar identified the amount by which debts due to Tesco and HMRC had increased between 31 January 2007 and 6 February 2009 as £305,000 which he held was the maximum figure for any liability, subject to the debt owed to Nottingham City Council ([292]).

    c. The Registrar then deducted the debt due to Tesco (which he found to be £226,798.76) from that figure of £305,000 because he concluded that Tesco would have proved in the same amount in a liquidation on 3 May 2007 as it did on 6 February 2009, subject to a discount under Rule 11.13(2) of the Insolvency Rules to reflect accelerated receipt ([294]). He concluded that it would be disproportionate to make any allowance for the Rule 11.13(2) calculation, and therefore fixed the maximum amount recoverable at £78,500.

    d. The Registrar considered the Nottingham City Council claim and noted that he had not been addressed on the claim because it was "irrelevant to the approach adopted by the Liquidators" ([299]). The parties were given the opportunity to make further submissions on it. As a result of those submissions, I am told that the Registrar decided that it would not be appropriate to make an order in respect of that debt, although I have not seen an order or judgment to this effect.

    e. The Registrar then considered the exercise of his discretion overall, for which purpose he also took into account the benefits to the Company from continuing trading ([302]). He concluded that the Directors had acted honestly, had kept Tesco and HMRC informed of what the Company was doing, that trading

provided the Company with a chance to improve its position when it had no assets of significant value and did produce some benefits, and that Mr Walker worked very hard to ensure the attraction benefited the tourist trade in Nottingham.

f. Taking all of these factors into account, he held that the Directors should only be liable for 50% of the compensation otherwise calculated ([306]). He also held that the Minimising Loss Defence should be given effect on a pro rata basis. The Judge awarded the same compensation for the s.212 claim.

12. The appeal before me was addressed solely by reference to the s.214 claim, and neither party invited me to give any separate consideration to the s.212 claim. Accordingly I say nothing further about that claim in this judgment.

13. After hearing further submissions, the Registrar ruled that the appropriate costs order was no order as to costs.

The issues on the appeal and the order in which they arise

14. Against this background, it is necessary to say a little more about the issues on the appeal and the order in which they arise. I have addressed these issues in a different order to that in which they featured in the parties' submissions, to present the issues in the order in which they arise, whether originally raised in the Liquidators' appeal or the Directors' cross-appeal.

15. Stage 1: The point which first arises is the Liquidators' challenge to the Registrar's rejection of their case that the Knowledge Condition was satisfied on 9 October 2006. This would appear to encompass Grounds 2 to 3 of the Liquidators' appeal.

16. Stage 2: Next it is necessary to consider Ground 4 of the Liquidators' appeal, which challenges the Registrar's finding that the Minimising Loss Defence succeeded to 3 May 2007. It is the Liquidators' case, as confirmed at the hearing before me, that the Minimising Loss Defence should have failed on the earlier dates for the same reason that the Liquidators contended that the Knowledge Condition was satisfied on 9 October 2006, alternatively on 31st January 2007.

17. Stage 3: At this point, it is necessary to detour to the Directors' cross-appeal Grounds 2, 3, 4, 5, 6 and 7. These challenge the Registrar's finding that the Knowledge Condition was satisfied on 3 May 2007, on the basis that it was not open to the Registrar to have regard to the non-payment of the June 2007 quarter's rent and that the Registrar's reliance on the accounts for the year-ending 31 January 2008 was inappropriate and wrong.

18. Stage 4: On whatever date the Knowledge Condition is found to be satisfied and the Minimising Loss Defence is found to have failed, Ground 1 of the Liquidators' appeal challenges the approach adopted by the Registrar to determining the compensation

payable. The Liquidators contend that due to the deficiencies in the books and records of the Company, the Registrar should have determined the amount of compensation by aggregating the debts owed to creditors incurred after the relevant date with the increases in the liabilities to HMRC.

19. Stage 5: It is then necessary to turn to the Directors' cross-appeal Ground 1. The Directors say that the process by which the Registrar went about calculating the compensation payable was unfair, the Registrar having effectively adopted an approach of his own devising which was not considered at the hearing and on which the Directors did not have a fair chance to adduce evidence and make submissions.

20. Stage 6: The penultimate stage is the Liquidators' Ground 5 which concerns the Registrar's deduction of the rent due to Tesco when calculating the amount of compensation.

21. Stage 7: The Liquidators' final substantive ground of appeal (Ground 6) concerns his decision to order the Directors to pay compensation in an amount of 50% of the figure he had arrived at.

22. It will be apparent that I have not included the Liquidators' Ground 7, challenging the Registrar's cost decision, in this sequence. With the parties' agreement, I held this issue over until after the determination of the challenge to the Registrar's findings on the s.214 claim, to be determined (as necessary) at the same time as the costs of the appeal. I adopted this course because if either party succeeded on any part of their respective appeals, the issues of the costs before the Registrar would be at large in any event.

The proper approach to be adopted

23. A number of the grounds of appeal seek to challenge findings of fact made by the Registrar who had the benefit of seeing the witnesses give evidence during a substantial trial. The correct approach for an appellate court asked to interfere with factual findings has been set out in a number of cases. There is a good summary of the relevant principles (which I do not believe to be in dispute) in Lewison LJ's judgment in Fage UK Ltd v. Chobani UK Ltd [2014] EWCA Civ 5 at [114]:

"Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc [1977] RPC 1* ; *Piglowska v Piglowski [1999] 1 WLR 1360* ; *Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23 [2007] 1 WLR 1325* ; *Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33 [2013] 1 WLR 1911* and most recently and comprehensively *McGraddie v McGraddie [2013] UKSC 58 [2013] 1 WLR 2477* . These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include

i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

ii) The trial is not a dress rehearsal. It is the first and last night of the show.

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done".

24. There are other aspects of the appeal which seek to challenge exercises of discretion by the Registrar. Once again the principles which apply on the hearing of an appeal against the exercise of a discretion are also clear. A useful summary was provided by Stuart Smith LJ in Roache v News Group Newspapers Ltd [1998] EMLR 161 at 172:

"Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

Stage 1: The Liquidators' challenge to the Registrar's conclusion that the Knowledge Condition was not satisfied on 9 October 2006

The relevant background

25. The various accounts of the Robin Hood narrative record his attempts to minimise the amount of taxes collected by King John. Whether inspired by that example or not, from 1999 the Company operated a VAT-avoidance scheme by which entry tickets were sold for a price which included the value of discount vouchers that could be redeemed at a future date for purchases inside the Robin Hood tourist attraction. VAT was applied only to that part of the ticket price attributable to the entry tickets, with VAT only attributed to the voucher value should the voucher be used.

26. However there was a change to the material VAT Regulations in 2003, of which the Company and the Directors became aware following a visit of HMRC to the Company on 16 February 2006. By letter dated 15 September 2006, HMRC informed the Directors that VAT should have been paid on the full ticket price since 2003. On that basis, the Company had failed to account for the VAT due on the element of the price attributable to the voucher for the last 3 years.

27. The Company sought advice from Mr Stephens of Deloitte LLP about the VAT position at a meeting on 9 October 2006. Mr Stephens advised that HMRC's position was "technically robust" and it was "therefore likely" that VAT was payable on the full ticket price. Four options were identified. The first was to accept the debt, and seek to negotiate a Time To Pay Agreement ("TTPA"). The second was to request immediate reconsideration by HMRC, but the chances of a successful outcome were described as "very low". The third option was to appeal and apply for relief on grounds of hardship pending an appeal. The prospects of obtaining a stay of any payment in the event of an appeal were described as "good" but no technical grounds for a successful appeal were identified, and the chances of a successful appeal were described as "slim". The final option was to ask for leniency by reason of prior statements by the VAT officer, but a successful outcome to this option was described as "remote".

28. It is against the background of this advice that the Liquidators argued that the Knowledge Condition was made out on this date.

The Registrar's findings

29. The Registrar concluded that the Directors knew or ought to have known of the lack of merit in the Company's challenge to the VAT liability, but that they decided to "park" that liability by asking for reconsideration or appeal without at any stage being advised of or knowing of any grounds for a successful appeal ([224-226]). However, he concluded it was reasonable for the Directors to investigate the possibility of a TTPA but noted that they had not done so. He described the issue of whether the Knowledge Condition was made out at this date as "a near run thing" ([241]). However, he noted the issue he had to decide was "whether the Knowledge Condition was satisfied in the context of a Company with a previous year's operating profit of near to £40,000 and what can be presumed to be a consistent further 8 months [profit] knowing that a TTPA could be sought". He concluded that while the position of the Company was "very difficult due to this liability", it was "too early to rationally expect that the Company could not avoid insolvent liquidation" ([242]).

30. In particular, he held that the Company was entitled to investigate what to do, in circumstances in which "subject to the VAT liability the Company was commercially solvent and making a consistent profit". The Registrar identified various avenues which it was reasonable for the Directors to investigate, including (i) a report called "the PLB Report" which reviewed the Company's commercial options, (ii) borrowing funds from the Company's bank which had been providing continuing support, and had seen the Company's borrowing fall significantly and (iii) the possibility of lending secured by Mr Walker's equity in his house and possibly Mr Armstrong ([243]). He also noted that a liquidation would have left very little for the creditors [244]). He concluded ([244]):

"In my judgment no reasonable director at that stage would conclude the future review consequences could not be dealt with. Nor that there was no reasonable prospect of avoiding insolvent liquidation".

The Ground 2 appeal

31. Mr Couser's first ground of attack on this finding is to suggest that the Registrar applied the wrong test when assessing Mr Armstong's conduct. This issue arises by reason of s.214(4) Insolvency Act 1986 which provides:

"For the purposes of subsections (2) and (3), the facts which a director of a company ought to know or ascertain the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both –

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to a company; and

(b) the general knowledge, skill and experience that that director has".

32. The editors of Totty, Moss & Segal on *Insolvency* Vol 2 Para. F3-01.2 observe:

"The first part of the standard is objective and general incompetence is not to be sanctioned. Further, the standard is twofold and cumulative, and the second part is the standard of a reasonably diligent person having the general knowledge, skill and experience that the director actually has. This test is partly objective (the reasonably diligent person) and partly subjective (the general knowledge, skill and experience of that director). The director's actual ability will have to be assessed and be grafted upon the reasonable diligent person. The effect of making the standard a blend of the subjective and objective is that the minimum standard is that of the general knowledge, skill and experience of a reasonably diligent person carrying out the same functions as the director, but the actual standard by which the director is judged may be much higher if in fact his general knowledge, skill and experience is that much greater than might reasonably be expected. The talented director will be judged by his own standard, while the incompetent director will be judged by the standard of a reasonably competent director".

33. In this case, the Liquidators contend that Mr Armstrong was to be judged to a higher standard, because he was a director of a number of other companies, including companies significantly larger than the Company. The Registrar found that Mr Armstrong was an experienced director who understood the need to scrutinise accounts ([148]). However he rejected the suggestion that Mr Armstrong should be judged by reference to a higher standard than that of the reasonably diligent person, holding that Mr Armstrong's other experience was in a different field, and that having seen Mr Armstrong give evidence, he was satisfied that "higher standards do not fit his cloth".

34. I have concluded that the Liquidators' appeal against this finding is without merit. There is no material here which could justify substituting my own view for the findings the Registrar made as to Mr Armstrong's general knowledge, skill and experience, and the significance of Mr Armstrong's other experience as a director for the issues faced by the Directors in this case. The Registrar had the benefit of seeing how Mr Armstrong performed under cross-examination, and expressly referred to this when making his finding that section 214(4)(b) was not engaged. In any event, I have been shown nothing to suggest that Mr Armstrong's role as a director in other companies (whatever it was) was such as to demonstrate greater talent, knowledge, aptitude or experience than a reasonably diligent director so far as relevant to the specific issues which faced the Company here, whether on 9 October 2006 or 31 January 2007. Mr Couser made no attempt to link the other directorial roles which it is accepted that Mr Armstrong had with the respects in which he criticised Mr Armstrong's conduct on those key dates. All that was said was that as an experienced director, Mr Armstrong should have taken "a more hands on role". However it was not explained how this would or should have led to different decisions on the Directors' part.

35. Accordingly I am satisfied that this second ground of appeal is without merit.

The Ground 3 Appeal

36. Mr Couser enters into more promising territory with his third ground of appeal. I have set out above the challenge which HMRC made to the VAT scheme operated by the Company, and the £150,000 VAT liability for previously unpaid VAT which the Company faced. One of the reasons why the Registrar concluded that the Knowledge Condition was not made out 9 October 2006 was that the Company had an operating profit of £40,000 in its most recent accounts, and "what can be presumed to be a consistent further 8 months profit", in circumstances in which 4-5 years of consistent profits would achieve repayment ([242]-[243]). On the evidence before me, which was not disputed, the £40,000 figure reflected a profit-calculation during a period in which the VAT scheme was operating, and the Company continued to operate (and intended to continue to operate) the VAT scheme going forward. In these circumstances, Mr Couser submits that the Directors could not reasonably have proceeded on the basis that the Company was making and would continue to make an operating profit, without taking account of the effect of HMRC's position that the VAT scheme was ineffective as regards future trading as well as regards its historic effect.

37. My initial reaction to this point was that it was one of substance. While it would have been open to the Company to increase its ticket prices to allow for a higher VAT obligation, that would have raised issues as to whether there would have been a fall in demand had they done so (depending on price elasticity of demand considerations), and in any event, the Company carried on operating the same scheme and it is not suggested that it responded or considered responding to the HMRC letter and the Deloitte LLP advice by a price increase.

38. However this is not a point which was taken before the Registrar or put to the Directors in cross-examination. I asked Mr Couser to point me to those parts of the transcript of the Directors' cross-examination in which this point was addressed with the Directors. Mr Couser was able to point to certain passages in the transcript showing that the VAT scheme was continued after the meeting with Deloitte LLP. However I was shown nothing in which the issue of whether the VAT issue precluded the Company from making an ongoing profit going forward, or would have a significant impact on the amount of that profit, were canvassed either with the witnesses or before the Registrar. Further Mr Nersessian was able to point to evidence which at least suggested that the position as the Directors understood it was that the VAT scheme could legitimately be operated going forward if certain changes were made to the manner of its operation and administration. In his first witness statement at paragraph 41, Mr Walker gave evidence that after HMRC had taken issue with the operation of the VAT scheme, he had taken advice from Mr Stephens "on what needed to be done to comply with the VAT law as it now stood" including:

"practical things such as what the tickets the customers received needed to say about the vouchers, what signage should be displayed and how to account for vouchers in the Company's receipts. It was all practical stuff to ensure that the Company complied with the VAT law [as] it stood going forward. I followed his advice and implemented those recommendations when I got back to the Company's premises".

39. The issue of whether any measures taken were or might be sufficient to preserve the operating profit of £40,000 otherwise disclosed by the Registrar's analysis of the accounts was not considered at the hearing, and it is not possible (and would not be fair to the Directors) to seek to resolve it now.

40. There is a further reason why I do not believe it would be appropriate to revisit the Registrar's finding as to the 9 October 2006 date on the grounds raised by the Liquidators' appeal. It is clear from the Registrar's judgment that the issue of exploring a TTPA agreement having regard to the Company's operating profit was only one of the reasons why he concluded that the Knowledge Condition was not satisfied at that date, and that it was but one manifestation of a wider view that the Directors should be allowed a reasonable time to explore the options for responding to the £150,000 HMRC claim following the receipt of advice from Deloitte on 9 October 2006. He found that the Directors were "entitled to time to investigate what to do rather than to be criticised for acting too quickly", and that there were "many potential avenues to investigate" (as set out at [30] above).

41. In this regard, a key factor which the Registrar identified was that an immediate liquidation would have left very little for creditors in any event ([244]). I understand the Registrar to have been of the view that one of the reasons why the Directors were entitled to a reasonable time to investigate what to do so was that there was no or only limited likelihood of further prejudice to the Company's creditors by the Company continuing to trade during that period.

42. While Mr Couser valiantly challenged the finding that these were prospects which the Directors were reasonably entitled to investigate, taking me to certain passages in the transcript, I have seen nothing which could safely lead me to the conclusion that the Registrar's factual finding on these issues was wrong. Even if, therefore, I had been prepared to allow the issue of the effect of HMRC's decision on ongoing operating profit to be raised on appeal, I would not have concluded that the Registrar's factual conclusions were clearly wrong, having regard to the full range of considerations on which the Registrar relied.

43. For these reasons, I reject the Liquidators' third ground of appeal.

Stage 2: The Liquidators' challenge to the Registrar's finding that the Minimising Loss Defence succeeded to 3 May 2007

The relevant background

44. S.214(3) Insolvency Act 1986 provides:

> *"The court shall not make a declaration under this section with respect to any person if it is satisfied that after [the Knowledge Condition] was first satisfied in relation to him, that person took every step with a view to minimising the potential loss to the company's creditors as (assuming him to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation) he ought to have taken".*

45. The Registrar found that the Knowledge Condition was satisfied by both of the Directors at the fourth of the Liquidators' suggested dates, 31 January 2007, but as at this date he was satisfied of the matters in s.214(3) (referred to by the Registrar as "the Minimising Loss Condition").

46. He reached this conclusion for the following reasons:

    a. The Company was making a profit (in the second year in the region of £40,000) "subject to its failure to pay the VAT liability", with profit at that level being one which should not lead to additional liabilities, should provide a source of potential repayment of the VAT liability, and at least cover future interest and penalties on that VAT liability to allow the Directors to realise assets in order to minimise loss ([260]).

    b. If the Company had been placed into liquidation in January 2007, it was highly unlikely an assignee of the lease would have been found, and the lease would not have had value; the Company's assets would have produced very little for creditors, and there would have been no further profits from continuing trading ([261]). The Registrar described these as the "Adverse Consequences of Liquidation".

c. In those circumstances, the only realistic prospect if loss was to be minimised was to continue trading ([262]).

The Liquidators challenge: Ground 4

47. Mr Couser described his fourth ground of appeal as "largely predicated upon the same argument as the Third Ground", namely the failure to consider the effect of HMRC's response to the VAT scheme on the Company's ongoing operating profit. To the extent that the Liquidators rely on the argument that there would be no ongoing profit due to increased VAT liabilities going forward (which in what he described as a rough and ready estimate, Mr Couser quantified for the purposes of his appeal at £45,000 per year), I hold that the argument is not open on appeal for the reasons I have set out in relation to Ground 3.

48. The Liquidators also criticised the Registrar's conclusions on the Adverse Consequences of Liquidation issue. To understand this argument, it is necessary to say a little bit more about the Company's accounts, and the Registrar's analysis of them. The Company's accounts recorded a loss for each relevant year, of which a significant component was the depreciation of the Company's assets (and in particular a ride at the tourist attraction called the "Dark Ride" which was its principal physical asset). The Directors submitted that for the purposes of assessing the s.214 case against them, it was appropriate to ignore the effects of the depreciation. Although the value of the "Dark Ride" on any sale was limited, the ride was still serviceable and the business was making a profit on a cash flow basis by using it ("the Depreciation Deduction Argument"). For the purposes of considering when the Knowledge Condition was established, and the points of time at which the Minimising Loss Defence succeeded, the Registrar accepted the Depreciation Deduction Argument ([183]-[184]).

49. The Liquidators did not directly challenge the Registrar's conclusion on this issue but used the conclusion to attack the Registrar's decision on the Minimising Loss Defence. Mr Couser's skeleton argument at paragraph 30 stated that the Registrar's approach:

> "may (but only may depending upon the facts of the case) be correct in respect of understanding the accounts in terms of the Company's profit and loss account and balance sheet, [but] it is demonstrably incorrect in respect of gaining a proper understanding of the Company's ability or inability to avoid going into insolvent liquidation, which is the relevant consideration when assessing wrongful trading. The sums provided for as depreciation represent the indisputable fact that assets lose value over time, thereby reducing the value of what is available to meet the demands of creditors upon a liquidation (and thereby determining whether any such future liquidation is likely to be solvent or insolvent). In refusing to take into account depreciation for the purposes of the Depreciation Deduction Argument but then allowing it as the second of the Adverse Consequences of Liquidation (on the basis that the sale of the Company's assets would produce little for creditors in a liquidation) the learned Registrar has erred in both law and fact".

50. In my view, this conclusion does not fairly reflect the Registrar's reasoning on the Minimising Loss Defence. The Registrar had accepted the evidence of Mr Walker that the Company's equipment was sufficient to allow the business to continue operating without substantial investment up to the date of the Company's actual liquidation, finding that Mr Walker was "extremely knowledgeable" on this issue ([190]-[197]). The Registrar also found that the Company's assets were such as to leave "very little for creditors", not least because the fixed assets of the business could not be sold without the lease, and the lease would be forfeit or disclaimed if the Company entered liquidation ([244]). He concluded that even if a sale of the main fixed assets within a liquidation was possible, it would have been a "fire sale and reasonable to conclude that this would have produced very little for creditors" ([261(b)]).

51. It seems to me that there was no inconsistency between the Registrar finding that the assets of the Company would have realised little or nothing for the Company's creditors on a sale within a liquidation, and yet that the assets could continue to generate positive cash flow within the business while the business was still operating. The Registrar had identified the very consequence to which Mr Couser refers – the depreciation in the assets in the accounts reflecting a reduction in the value available to creditors from those assets on any sale – but had concluded that the negative impact had already occurred by 31 January 2007, and was not going to get worse if the Company continued to use those assets to seek to trade profitably.

52. For these reasons, I reject Ground 4 of the Liquidators' appeal.

Stage 3: the Directors' cross appeal Grounds 2 to 7

53. At this point, it is necessary to detour to the Directors' cross-appeal Grounds 2, 3, 4, 5, 6 and 7 which challenge the Registrar's finding that the Knowledge Condition was satisfied on 3 May 2007. The common theme which unites these grounds is the contention that the Registrar unfairly and inappropriately had regard to certain events after 3 May 2007 when arriving at his conclusion that the Knowledge Condition was satisfied, and the Minimising Loss Defence not made out, as at that date:

    a. The reference at [257(b)] to the fact that the Company did not pay the rent and service charge for the June quarter (Grounds 2 and 3) in which context the Directors criticise the Registrar for not having regard to the fact that some rent (£10,999.18) was paid on 31 August 2007 (Ground 5).

    b. The reference at [257(c)] to the fact that a rent review was moving nearer, with its adverse future consequences of a back-dated rent increase (Grounds 2 and 3).

    c. The Registrar's reference at [266] to the result of the rent review decision on 29 August 2007 (Ground 4).

    d. The Registrar's reference at [267] to Mr Seagrave's hardship letter of 31 January 2008 (Ground 6).

e. The Registrar's reference to the 31 January 2008 accounts at [257(e)] (Ground 7).

54. Mr Nersessian criticises these references because, he submits, they involve the impermissible use of hindsight for the purpose of determining whether the Knowledge Condition was met. In this regard he refers to Lewison J's decision in Re Hawkes Hill [2007] BCC 937 at [41]:

> "Accepting as I do that the directors ought to have known that the company was insolvent, it still leaves open the question: did they know (or ought they to have concluded) that there was no reasonable prospect that the company would avoid an insolvent liquidation? The answer to this question does not depend on a snapshot of the company's financial position at any given time; it depends on rational expectations of what the future might hold. But directors are not clairvoyant and the fact that they fail to see what eventually comes to pass does not mean that they are guilty of wrongful trading".

55. Mr Nersessian also says that the Liquidators were limited to trying to establish the satisfaction of the Knowledge Condition at one of the pleaded dates, and that it was not therefore permissible to consider events at other later dates for this purpose (referring in this connection to Re Sherborne Associates Ltd [1995] BCC 40).

The complaints concerning rent

56. I first consider the Directors' complaints about the rent. The suggestion that the reference to the non-payment of the June quarters rate at [257(b)] of the Registrar's judgment involved the impermissible use of hindsight is without merit. The Registrar expressly considered whether or not, at the pleaded date of 3 May 2007, the Directors knew or ought reasonably to have known that it would not be possible to pay the rent and concluded that they should have known this. In circumstances in which no one suggested that some unforeseeable or unlikely event occurred between 3 May 2007 and the date when the June quarter's rent fell due, this was an inference the Registrar was entitled to draw having regard to all of the evidence before him, and one which involves a finding as to the position on the relevant date (3 May 2007) rather than an exercise in hindsight. For the same reason, the suggestion that the Registrar allowed the Liquidator to advance a case that the Knowledge Condition was satisfied on a date which had not been pleaded is misconceived.

57. Mr Nersessian said that the Registrar's reliance on the non-payment of the June quarter's rent was unfair to the Directors, as this had not been pleaded or referred to during the hearing. However the non-payment of rent from 2007 was relied upon in Mr Brooks' witness statements of 12 September 2012 and 27 February 2014. The statement of 27 February 2014 expressly referred to the payment of rent on 31 August 2007, but stated (based on surrounding correspondence) that this must have related to an earlier period because a contemporary email showed that Tesco, and not the

Company, had paid all rent for every quarter since June 2007. Mr Wetherell, who worked for the landlord's agents, also gave evidence that the Company had stopped paying rent for the period from 23 June 2007. None of this evidence appears to have been challenged in cross-examination. Mr Walker gave evidence on the issue of rent in his witness statement of 27 February 2013 in which he acknowledged that the debts claimed included rent "to the second half of 2007", and again in his witness statement of 31 March 2014 which effectively acknowledged that rent had not been paid in respect of the period from 27 June 2007 onwards. While I only have transcript extracts, it is clear from the transcript of 7 July 2015 (page 91 and following) that the issue of rent was canvassed with Mr Walker in his cross-examination, including the fact that the Company had stopped paying rent. The issue of rent was also explored with Mr Armstrong (transcript of 8 July 2015 pages 81 and 93). I am satisfied that this issue was fairly "in play" at the hearing and the Directors were able to address it.

58. So far as the rent review is concerned, the review itself was due from 29 September 2006 ([76(c)], there were negotiations which failed to produce an agreement, and the appointment of an arbitrator was requested on 16 February 2007. The Directors knew or ought to have known that whatever rent figure emerged from the review would be imposed retrospectively. The Company put forward a suggested figure of £53,000 in the course of that review and the landlord sought a significantly higher figure. After a visit by the arbitrator to the premises on 18 May 2007, the dispute was resolved in favour of a figure of £92,000 on 29 August 2007. I saw no material which would lead me to question the Registrar's conclusion that, as at 3 May 2007, the Directors ought to have appreciated that the outcome of the review was likely to involve an increase in rent in some amount. Once again, this does not involve the impermissible use of hindsight, but addresses the issue of what the Directors either knew or ought reasonably to have known on the pleaded date of 3 May 2007.

59. For these reasons, I reject the Directors' appeal in so far as it concerns the non-payment of rent or the rent review. I am fortified in this conclusion by the fact that the references to the expected non-payment of rent and the adverse expectations of the rent review were two among five reasons why the Registrar concluded that it was even more clear that the Knowledge Condition (which he had already found was established on 31 January 2007) was also established on 3 May 2007.

The other complaints

60. I can deal with the remaining two complaints more briefly. When referring at [267] to Mr Seagrave's hardship letter of 31 January 2008, the Registrar stated that it reflected the inevitable consequences of the VAT liability which the Registrar had found the Directors to be aware of as at 3 May 2007. The Registrar stated "its content was equally applicable by 3 May 2007". Absent any suggestion that there had been some material change of circumstances between 3 May 2007 and 31 January 2008, such that the position recognised by the Company on the latter date could not fairly be said to reflect its outlook on the earlier date, this was clearly an inference the Registrar was entitled to draw. No such change of circumstance was suggested by the Directors.

61. So far as the reference to the accounts as at 31 January 2008 at [257(e)] is concerned, the Registrar was entitled to infer that the deterioration shown by those accounts would have manifested itself to some extent by May, in circumstances in which those accounts covered the months of February, March and April, and when the Directors themselves gave evidence that monthly management accounts were produced ([91]).

62. In respect of both complaints, therefore, I reject the Directors' contention that they involved either the impermissible use of hindsight, or had the effect of allowing the Liquidators to advance a case that the Knowledge Condition was satisfied on a date which had not been pleaded.

Stage 4: The Liquidators' Ground 1

The calculation of the compensation payable under s.214

63. As s.214 Insolvency Act 1986 is a compensatory rather than punitive provision, it is necessary to consider what effect the wrongful trading had. The issue of what, if any, causal nexus was required in the s.214 context was considered by Park J in In re Continental Assurance Co. of London Plc [2001] BPIR 733. Park J. had rejected the liquidators' case of wrongful trading, but held that in the alternative he would have ordered that no compensation was payable (at [294]). That was because the liquidators' case on quantum was based on evidence of "dubious admissibility", drawn from unreliable sources, such that "it would be wholly unsafe … to base any monetary orders against the directors on it".

64. However Park J. went on to give valuable guidance as to the proper approach to determining the amount of s.214 compensation. He began by considering the maximum amount which could be awarded:

> "296. The statute merely provides that, where the conditions for a director to be liable exist, the court may declare that the director *'is to be liable to make such contribution (if any) to the assets of the company as the court thinks proper.'* So clearly there is a major element of discretion. However, no-one suggests that the discretion is entirely at large. Counsel agree that the court should start with a maximum, which should be ascertained on an appropriate objective criterion, and that within that maximum the court's discretion comes into play. I could require the directors to contribute less than the maximum, but not more than it. In this part of my judgment I am concerned with what, on the facts of this case, that maximum is. There could also be another stage at which the court's discretion would come into play. This would concern whether any liabilities imposed on more directors than one are to be joint and several, or only several, or partly one and partly the other. I will say something about that in a subsequent part of this judgment, but for the moment I consider the quantum question globally, considering the company as a whole and the members of the board collectively.
>
> 297. I first had to consider the maximum quantum of liability for the purposes of the interim ruling which I gave, my judgment on which is in Annex B. I ruled that

the measure was not, as the liquidators were contending, 'the 10C basis' which in my view was a calculation of loss to Continental's creditors, but rather what I called in that ruling and in this judgment the 'increase in net deficiency', which in my view reflects the loss to Continental itself as a result of liquidation being delayed. The concept is that, if the directors had decided on 19 July 1991 that Continental was insolvent, and had caused it to be put in liquidation then or soon thereafter, there would have been a deficiency in the hypothetical 1991 liquidation of one amount, say £x. In the actual case Continental did not go into liquidation until 27 March 1992, and in the actual 1992 liquidation there was a deficiency of a different amount, say £y. If £y is greater than £x the excess is the increase in net deficiency".

65. Later in his judgment, he considered how the Court should determine what amount the amount the directors should be ordered to pay up to that maximum:

"377. I do not pause to consider whether this is something which can be perceived, between the lines rather than by express enactment, as part of the substantive structure of section 214, or whether it is merely an aspect of the manner in which I would think it appropriate to exercise the discretion which is given to me by the section's plain words ('such *contribution (if any) to the company's assets as the court thinks proper'*). Nor do I think it necessary to say whether, in considering this aspect of the case, I am importing principles of causation into section 214. The section does not use the terminology of causation, and in the recent Simmon Box case (2000, as yet unreported), to which I referred at an earlier point, Chadwick LJ said this: *'I am content to assume (without so deciding) that, on an application under* section 214 of the Insolvency Act 1986 *, it may not be necessary to establish a causal link between the wrongful trading and any particular loss'* . Another concept which might have some influence in this area is reasonable foreseeability, but again I would prefer not to tie down what I say to one particular factor.

378. My general point is that, before a court will be prepared to impose liability on directors in a case where there has been an unjustified decision to carry on trading, it is not enough for a liquidator claimant merely to say that, if the company had not still been trading, a particular loss would not have been suffered by the company. There must, in my view, be more than a mere 'but for' nexus of that type to connect the wrongfulness of the directors' conduct with the company's losses which the liquidator wishes to recover from them. In many cases the connection will be obvious and may not require any discussion. If the company's business was inherently loss-making, and the directors ought to have known that but unjustifiably turned a blind eye to it, it is plainly inappropriate to use the section to seek recovery from them of continued trading losses of precisely the kind which they ought to have known would result if the company carried on with its trading operations.

379. However, not every loss which a company may sustain after the directors have reached a wrongful decision to trade on (or wrongfully failed to consider at all the question of whether to trade on or not) is like that. One of the previous cases under section 214 which was cited to me was *re Brian D Pierson (Contractors) Ltd [1999] BCC 26* . The judge (Hazel Williamson QC, sitting as a High Court

judge) held that the directors were in principle liable under the section, but, from the amounts which she considered that they ought to be required to pay to the company, she sought to exclude the element of worsening of the company's position which was attributable to particularly bad weather conditions of 1994-95. The company's business was to construct and maintain golf courses, so it was vulnerable to bad weather entirely independently of whether the directors took justifiable or unjustifiable decisions about trading on or closing down instead.

380. The well-known decision of the House of Lords in South Australia Asset Management Corporation v York Montague Ltd and associated cases, *[1997] AC 191* , was not concerned with section 214 but rather with common law principles about damages for negligent valuations, but I am struck by one short sentence in the important speech of Lord Hoffmann (at page 213): *'Normally the law limits liability to those consequences which are attributable to that which made the act wrongful'* . I believe that a similar principle has an important role to play in section 214. If it mattered, there are several aspects of the liquidators' calculation of the increase in net deficiency which I would not think it right to require the directors to make good to the company. A major one is that part of the comparison between the two balance sheets (the actual balance sheet of the actual 1992 liquidation and the constructed balance sheet of the hypothetical 1991 liquidation) to which Mr Gill referred as 'unexplained difference'. When he began his evidence the unexplained difference was £353,000. By the time of Mr Atherton's closing submissions it had increased to £1,708,000. Indeed, as I have observed at an earlier point, it ought to be increased further, to something like £2.3m, to take account of the part of the increased costs of the 1991 liquidation (compared with the costs of a hypothetical 1991 liquidation) which the liquidators are not able to explain. I would not in any event have been prepared to order the directors to pay an amount to the company where the liquidators are unable to explain whether, and if so how, it was attributable to factors which allegedly made wrongful the decision by the directors on 19 July 1991 that Continental was solvent and should continue to trade".

66. In Grant v Ralls [2016] EWHC 243 (Ch) at [242] Snowden J also referred to the need for "some causal connection between the amount of any contribution and the continuation of trading". In that case, the liquidators had placed schedules before the Court which it was accepted were not simply statements of the loss caused by the wrongful trading, but included losses caused by the process of ceasing to trade and realising the assets of the company ([254]). The schedules were subjected to a number of criticisms at trial. Snowden J was not satisfied on the balance of probabilities that the continuation of trading had caused any increase in the company's net deficiency (finding that, if anything, there might have been a modest reduction): [268].

What happens when the maximum amount cannot be determined?

67. There are cases in which the increase in net deficiency resulting from the wrongful trading cannot be calculated due to the failure of the directors to keep proper books and records of the company's affairs. In these circumstances, the Courts have

identified alternative approaches to determining the starting-point for the compensation calculation.

68. I was referred to a number of authorities in relation this issue.

69. The first was in Re Purpoint Ltd [1991] BCC 121, in which Vinelott J considered an application under s.212 Insolvency Act 1986. He stated at p.128:

"The difficulty is that it is impossible, because of Mr Meredith's total failure to ensure that proper records were kept and that proper cash flow calculations and net worth calculation were made, to ascertain the precise extent of the company's net liabilities at the end of 1986 or the extent to which the net liabilities were increased by the continuance of the company's trading after the end of 1986. I think the only solution to this difficulty is to quantify the loss caused by the continuation of trading after the end of 1986 by aggregating the debts owed to creditors incurred after 1 January 1987 and unpaid when the company ceased trading and the amount of the Crown debts incurred after 1 January 1987".

70. There are two features of this passage which are worth noting. First, the problem had arisen because of the directors' failure to keep proper records during the operation of the business. Second, the problem Vinelott J. faced was the inability to calculate the difference between the net liabilities of the company at two points in time. His solution was to allow recovery by reference to all debts incurred between the two dates but unpaid, even though that might not reflect the increase in the company's net liabilities (not least because of the failure to reflect the effect of credits and the value of assets at both points in time).

71. The second case to which I was referred was In Re Idessa (UK) Ltd [2011] EWHC 804 (Ch), a decision of Leslie Anderson QC, sitting as a Deputy High Court Judge. That case involved claims to recover unlawful loans or expenses from the directors under ss.330 and 337 of the Companies Act 1985, an unlawful distribution to a de jure director under s.263 of the 1985 Act, for restoration of transactions at an undervalue under ss.238 and 423 Insolvency Act 1986 and for wrongful trading under s.214 Insolvency Act 1986. In considering where the burden of explaining particular transactions lay, the Deputy Judge held that once the liquidators had proved that the relevant payment had been made, the evidential burden was on the particular director to offer a satisfactory explanation for it (at [28]). The Deputy Judge then considered the directors' submission that they could not offer that explanation because of the absence of relevant books and records. The Deputy Judge concluded that at least some relevant documents had existed, but noted that the directors had not sought to place that evidence before the court, but to rely on the documents exhibited to their statements (at [32]). The Deputy Judge noted that "the absence of complete documentary and other materials undoubtedly makes the court's task a more difficult one" but that she was "unable to accept in this regard anything other than that the respondents are authors of their own misfortune" because the evidence placed by the directors before the court "was not directed to the specific allegations", the admissible

evidence before the court "comprised only general rebuttals" and that in several instances she had "formed the view that the respondents were using the absence of books and records as a smokescreen to avoid answering questions" (at [34]).

72. This was, therefore, a case in which the directors faced an evidential burden to explain particular payments, but had chosen not to place available material before the court for the purpose of doing so. The Deputy Judge suspected that they had adopted this course to provide a smokescreen. The issues raised by that case, therefore, are very different from those raised by this part of the Liquidators' appeal.

73. The third case to which I was referred was Re Kudos Business Solutions Ltd [2012] 2 BCLC 65, a decision of Sarah Asplin QC sitting as a Deputy Judge of the High Court. This was a wrongful trading case in which no accounts had been compiled for one of the financial years in question, and in which the Deputy Judge found that no proper check on the state of the company's finances was kept during that period ([37]). The Judge held at [62]:

"In the light of the lack of accounts I adopt the course in Re Purpoint Ltd [1991 BCLC 491 and declare that pursuant to s.214, Mr Stevenson be liable to make a contribution to the company's assets equal to the loss caused by the continuation of trading after 17 March 2006 quantified in terms of the aggregate of its debts incurred after that date".

74. Finally, in Grant v. Ralls [2016] EWHC 243 (Ch), Snowden J considered a s.214 claim in which reliance was placed by the liquidator on the Re Purpoint approach. Snowden J made various findings as to shortcomings in the company's management accounts but rejected the suggestion that he "should simply order the Directors to make a contribution to the Company's assets equal to the aggregate increase in the purchase ledger" ([274]). Snowden J stated at [274] to [277]:

"274. I also reject the Joint Liquidators' alternative submission that I should order a contribution based upon the increase in trade creditors over the relevant period. I do not think that the shortcomings that have been identified in the Company's management accounts produced directly from the SAGE records, or indeed in the Company's accounting systems more generally, mean that I should simply order the Directors to make a contribution to the Company's assets equal to the aggregate increase in the purchase ledger over the period from 1 September 2010 to 13 October 2010 of about £600,552.

275 The reasons for which such a course was adopted in Re Purpoint and Re Kudos were markedly different from the facts of the instant case. In both those cases, there was simply no attempt to maintain proper accounting records upon which any form of accounts could be produced or reconstruction could be attempted. In Re Purpoint, no accounts had ever been produced, and Vinelott J described the accounting records as "exiguous". He indicated that the only documents available consisted of bank statements, a wages book and a cash book: [1991] BCC 121 at page 123C. In Re Kudos , although accounts appear to have been prepared for earlier periods, the director gave evidence uncorroborated by any

documents that he had "tried to keep a sales-type book on his personal computer" and that he "was aware of the general overheads of the company and the wages and salary costs": [2011] EWHC 1436 (Ch) at paragraph 37.

276 Further, in both cases it was clear that throughout the relevant period of wrongful trading, the company in question was making heavy losses rather than engaging in profitable trading. In Re Purpoint, Vinelott J expressed the view that it was doubtful that a reasonable director would have allowed the company to commence trading at all due to its lack of a capital base and the fact that it had inherited a loss-making business from another company that had failed. And in Re Kudos, it was found as a fact that the company was never in a position to fulfil the relevant contracts for which substantial pre-payments had been made; that those monies had been largely dissipated to the directors; and that the company did not derive any significant profits from other activities.

277 In the instant case, in contrast, the Company had an accounting system which was operated by a number of staff and overseen by Mrs. Warman. It is certainly true that criticism can be made of the manner in which accounts produced directly from the SAGE system were not reliable and would have to be manually adjusted by Mrs. Warman. I also accept that it is not satisfactory that no accurate management accounts were produced which show the position of the Company as at 31 August 2010. But a claim for wrongful trading is not designed to penalise directors for keeping inadequate accounting records. Further, I do not think that it would be appropriate simply to resort to the increase in trade creditors in circumstances in which that increase in the Company's debts was off-set to a significant extent by the repayment of other liabilities of the Company to the Bank".

The Liquidators' case

75. The Liquidators relied in both their Points of Claim and skeleton argument on the Re Purpoint and Re Kudos cases in support of a claim that the Court should quantify the maximum loss as all unpaid debts incurred after the date on which it was alleged the Company should have stopped trading.

76. The Liquidators contention was summarised in their skeleton argument before the Registrar in the following terms:

"Where the financial records of a company are in disarray such that it is impossible or impracticable for the Court to ascertain what the company's net liabilities were at any given date, it is permissible for quantum to be arrived at by aggregating the debts owed to creditors that are incurred after the relevant date" (paragraph 34.3).

77. The Liquidators' case on quantum was enlarged upon in schedules served on the first day of the trial (although, as I have explained below, drafts of these schedules had been served on a "without prejudice" basis before the trial). The schedules listed the Company's debts, the date when they were incurred (so far as this was ascertainable) and the payments made on those debts. However they also set out what was described as a Creditor Deficiency Calculation at each of the relevant dates, which was what

Park J. had referred to as a calculation of the increased net deficiency said to have resulted from the wrongful trading. The calculation performed for 3 May 2007 assessed the increase in net deficiency at £388,570.29. This was the figure for which the Liquidators sought an order for compensation from the Registrar, as is clear from the judgment at [285].

The Registrar's findings

78. In the event the Registrar rejected that figure as "wrong and wholly unrealistic" ([286]). While the Registrar was criticised for not expanding on this criticism, his reasons for making it appear from the following paragraphs of his judgment. In particular, the Registrar concluded that the asset realisation values which the Liquidators were assuming had the Company gone into liquidation earlier were unrealistically high.

79. However the Registrar was able to and did perform an increase in net deficiency calculation, by using accounts available as at 1 January 2007 and comparing these with the position at the date of the Company's actual liquidation. The Registrar arrived at a different figure to the Liquidators for the "net deficiency" figure, and then proceeded to adjust that figure downwards by reference to the "nexus" requirement mentioned by Park J in Re Continental Assurance and set out above, and by reference to discretionary considerations.

80. There was a dispute before the Registrar concerning the books and records of the Company. Mr Brooks, one of the Liquidators, had attended at the Company's premises on 29 March 2009 in circumstances in which the landlord had indicated an intention to take possession of the site in the near-future. Mr Brooks' contemporary notes record that he took away 5 boxes of documents, but there is a dispute between Mr Brooks and Mr Walker as to whether Mr Brooks was told of other books and records of the Company which were not removed before the landlords took possession of the site, and which were thereafter not available. The Registrar found that Mr Brooks did not take away more than 5 boxes of papers ([167]), but held that given the time which had passed, and the fact that he was dealing with two honest witnesses, he did not feel able to resolve the dispute as to whether Mr Brooks was told of the existence of other books and records ([168]-[169]). The Registrar noted that there had been no follow-up request or visit by the Liquidators, and found that other documents had clearly existed (because auditors had been able to audit the Company's financial statements). Finally, he noted that the computer hard drives for the Company were not searched by the Liquidators until very late in the day, and it was not known what was in those files. The Liquidators had sought to adduce some of that material "at the very last minute" but had been refused permission to do so.

The Liquidators' appeal

81. In brief summary, Mr Couser's case on this ground of appeal was as follows:

    a. The Directors were under a legal duty to produce the Company's papers to the Liquidators and were therefore responsible for their absence. He relied for this

purpose on R v McCredie [2000] 2 BCLC 438, which was cited to the Registrar and which he criticised the Registrar for not referring to. However the principle was not in dispute, and I note that the Registrar acknowledged at [168] that "both directors owed a continuing duty to deliver up all of the property of the company". Given that duty, Mr Couser submitted, it did not matter whose evidence was right on the issue of the disputed conversation.

b. In the alternative, the Registrar should have preferred the evidence of Mr Brooks given what Mr Courser submitted were unsatisfactory responses by Mr Walker in cross-examination on this issue, and given the Registrar's own finding that Mr Walker had given false evidence on another issue in the course of his cross-examination (referred to at [227]).

c. In these circumstances, the Court should have calculated the compensation payable on the Re Purpoint and Re Kudos basis and not performed an "increase in net deficiency" calculation.

Conclusion

82. This ground of appeal is misconceived, and fails at a number of levels.

83. First, and perhaps most significantly, the Liquidators were not contending at the hearing that the absence of the books and records meant it was impossible to perform an "increase in net deficiency" calculation, nor did the Registrar find that it was impossible to perform such a calculation. The Liquidators provided their own "increase in net deficiency" calculations, which the Registrar held were deficient. The Registrar was able to perform an "increase in net deficiency" calculation by reference to the accounts as at 31 January 2007. In these circumstances, the conditions in which the approach in Re Purpoint and Re Kudos might be brought into play never arose in this case.

84. Second, this was not a case in which there was any finding that there was a failure to keep records contemporaneously. The Registrar found that such records had been kept (because the auditors had been able to audit the Company's accounts). Rather the issue was who was responsible for the fact that records had not been collected on 29 March 2009. Given the lapse of time, the Registrar did not feel able to reach a conclusion on this issue, with the result that there was no finding that the Directors had not discharged their duty to make these documents available to the Liquidators.

85. Third, in circumstances in which the Liquidators had not searched the computer hard drives until "very late in the day", and had been refused permission to adduce the material emanating from that search because it had only been produced "at the very last minute", it is simply not possible to say what, if any, documents relevant to the enquiry before the Registrar were not in fact provided or available to the Liquidators.

86. Finally, had it been necessary to consider the dispute of fact as to whose evidence was to be preferred on this issue, it would not be right for a court sitting on appeal, and

who (unlike the Registrar) did not have the benefit of seeing the relevant witnesses being cross-examined, to substitute its own view of the honesty of Mr Walker on this issue for that reached by the Registrar, absent compelling reason to do so. The material which Mr Couser relied upon in this context did not provide such a compelling reason.

Stage 5: the Directors' cross-appeal Ground 1

87. The fifth stage is Ground 1 of the Directors' cross-appeal. The Directors contend that the process by which the Registrar went about calculating the compensation payable was unfair and inappropriate, because it involve adopting an approach of the Registrar's devising which was not deployed at the hearing and on which the Directors did not have a fair chance to adduce evidence and make submissions.

88. In order properly to consider this ground of appeal, it is necessary to consider the way in which the Liquidators' case on causation and compensation was advanced during the action. As the issue (like the action itself) was played out over a substantial period, it is necessary to review a significant number of communications between the parties for this purpose.

The Liquidators' case on causation and quantum

89. The proceedings were commenced by an Application Notice issued on 20 September 2012 which sought a declaration that the Directors were liable to make a contribution of £596,704. The application was supported by a witness statement from Mr Brooks dated 12 September 2012. This did provide an outline calculation of loss if wrongful trading was found as at 9 October 2006, which involved taking the entire deficiency as at the date of liquidation of £600,423, and deducting from this the amount of £3,718.89 which it was suggested would have been the deficiency if the Company had gone into liquidation on 9 October 2006, producing a total claim of £596,704.11.

90. In a responsive witness statement filed on 27 February 2013, Mr Walker complained that no positive case had been put as to the losses caused and that the losses which he and Mr Armstrong were alleged to have caused were "far from clear" (witness statement of 27 February 2013 para. 93). Mr Walker then proceeded to mention certain items for which it was said that the Directors could not on any view be responsible. These included the VAT assessment liability, and the rent claim by Tesco.

91. On 9 April 2013, the Directors sent the Liquidators a letter which contained a very clear analysis of the issues raised by considerations of causation and quantum within s.214. The letter rejected the Liquidators' attempt to recover "the entirety of the net deficiency in the liquidation" (a reference, presumably, to the £596,704.11 figure which was not quite "the entirety of the net deficiency in the liquidation") and pointed out that the rationale of s.214 liability "is effectively that through delaying the liquidation of the Company, the directors exacerbated the loss to creditors". The letter stated that the Liquidators' pleading "will need to address the dates when all liabilities contributing to the net deficiency arose" and that "it is important for the

court to see a true and realistic figure for the quantum of your clients' claim". The letter warned that "in the event that Points of Claim are received which do not address these issues then we envisage that there will be an immediate request for further information under CPR Part 18 covering the matters set out above".

92. The Liquidators served Points of Claim on 18 April 2013. Their pleaded case on causation and compensation is to be found at paras. 43 to 45 of that document. Paragraph 43 sought contribution in the sum of £701,646 (the then best-estimate of the entire deficiency in the liquidation) or such other sum as the Court found represented the total deficit to creditors, or such other sum as the Court thought fit "with regard to the increase in the deficit to creditors arising after the date upon which the court finds the Directors had the requisite state of mind or otherwise". No calculation was offered as to what the increase in net deficiency was said to be on any particular date.

93. The Liquidators provided some limited clarification of their new case on 25 April 2013, stating that the £701,646 figure represented the total deficiency on the actual liquidation as at 17 April 2013, and that it was the Liquidators' contention that on the earliest date at which it was alleged that the Knowledge Condition was satisfied, the Company could have been wound up in a solvent liquidation. The letter noted that the Court had a discretion and that the figure would "vary if the Court determines a date of knowledge which falls after the date of balance sheet insolvency". However there was no attempt to quantify or particularise the Liquidators' case, if it failed in its contention that the Company should have stopped trading at a time when a solvent liquidation was still possible.

94. On 10 May 2013, the Directors wrote noting that "the increased quantum of your clients' claim remains wholly unclear" and asserting that the Liquidators needed to identify "the extra losses which have [sic] alleged to have been caused by delaying the liquidation of the Company". As previously indicated, Part 18 Requests were served on 11 June 2013. Request 11 sought particulars of when it was alleged that the Company first became balance sheet insolvent and Request 13 asked the Liquidators to identify the increased costs of liquidation which had also been claimed in the Points of Claim. In response to this latter request, the Liquidators stated that these costs could not be particularised until the Court had made its findings of fact.

95. During the period of these exchanges, there was also correspondence about whether any, and if so, what directions should be given for adducing expert evidence at the hearing. The Directors raised this issue in a letter dated 20 June 2013, which stressed the need for the Liquidators to prove causation, and to show what the actual losses were. The letter suggested that expert evidence was required on the quantum of losses, both as to the appropriate method of calculation and as to the correct amounts. In response on 24 June 2013, the Liquidators stated that they remained unconvinced that the case required expert evidence, and suggested that the Court could order such evidence once liability had been determined or that the trial judge might be willing to decide the case without it. This first suggestion was, of course, predicated upon the

assumption that the Court might split the trial of the issues of the Knowledge Condition and Minimising Loss Defence on the one hand, and the amount of compensation on the other. However, no such split order was ever sought, still less granted, with the result that it remained the Liquidators' responsibility properly to formulate and to prove their case on the amount of compensation.

96. In directions given on 27 June 2013, the Registrar made provision for the Directors to serve proposals for expert evidence, to which the Liquidators were to respond, with the Directors having liberty to apply for permission to adduce such evidence in the event of a dispute. On 11 July 2013, the Directors served their list of issues on which they contended that expert evidence was required. This identified a vast (and somewhat unrealistic) list of issues on which it was said expert evidence was required, including the issue of which debts arose at which times for quantum purposes. The issue of whether expert evidence was required to determine which debts had been incurred and when was raised again by the Directors on 19 July 2013. The Liquidators' response, on 5 August 2013, was that these were issues for the enquiry into damages once fixed (another response which appeared to assume a hiving off of compensation issues which had never been sought or ordered). On 6 August 2013, the Liquidators stated that the figure representing the deficiency to creditors was a starting point, but that the amount of compensation would ultimately depend on the Court's finding as to when any wrongful trading had begun.

97. The Directors wrote again on 3 September 2013, commenting on Responses 11 and 13 given by the Liquidators to the Request for Further Information. The Directors complained that "until [they] have some idea of the asserted provable quantum, they are hampered in their defence of the claim". Specifically in relation to the suggestion in Response 13 that the increased costs of liquidation would be particularised after the Court had made its findings of fact, the letter stated (correctly) that "no such order for a split hearing has been made and accordingly the Applicants are required to bring forward their case in its entirety". The Liquidators' response of 27 September 2013 repeated their assertion that, on the earliest wrongful trading date for which the Liquidators were contending, the Company could "possibly have avoided the creditors' deficiency in its entirety" and continued:

> "The absence of the precise quantum claimed in each particular scenarios does not affect your clients' ability to answer the case. We have already disclosed the proof of debts forming the basis of the Claim. The Court will first need to decide upon the date of knowledge, the date of Balance Sheet Insolvency and take account of any other factors it considers necessary. The case in its entirety is put forward".

98. On 23 December 2013, the Directors wrote again, referring the Liquidators to a decision of Registrar Derrett in another case, and suggesting the decision "suggests that the Applicants' approach to quantum … is clearly wrong".

99. In a witness statement filed on 31 March 2014, Mr Brooks responded to the complaints in the Directors' witness statements that no case as to the amount of compensation had ever been set out by stating:

"I am advised that these issues will be matters for submission at trial. I would just point out that my solicitors have proposed that a mediation should take place on numerous occasions … which would have provided the ideal form to discuss issues such as causation and quantum" (witness statement of 31 March 2014 para. 16).

The suggestion that a defendant to a claim for compensation must mediate in order to find out the claimant's case as to causation and quantum is plainly misconceived. Mr Walker filed a further statement on the same day, in which he once again complained about the Liquidators' failure to address the issues of causation and loss "to any meaningful extent". The witness statement clearly articulated the Directors' position that the last opportunity for the Liquidators to remedy this deficiency in their case had now passed.

100. The Directors repeated their complaint about the Liquidators' case on causation and quantum being "wholly unclear" in a further letter of 23 April 2014 in which they stated:

"You clearly accept that quantum is an issue because it is listed as the last bullet point in the case summary that you lodged … but no discernible case on that issue has ever been advanced … The suggestion (apparently upon advice) in paragraph 16 of Mr Brook's third witness statement that issues of quantum (he ignores causation) are only matters to be addressed at trial or that the Respondents should have engaged in mediation to find out the Appellants' case on those fundamental issues is, with respect, ridiculous. These are vital parts of the Applicants' case that have not been set out so far (they should in fact have been pleaded, hence the Respondent's First Request for Further Information) and it is too late to introduce them now, let alone at trial. Any attempt to do so at trial will be resisted".

101. There was yet further correspondence on this issue in 2015. The Directors complained of the absence of any discernible case as to the quantum of loss in a letter of 17 April 2015, which noted the lack of any positive case to show "any failure on the part of the Respondents was causative of any additional loss to Creditors of the Company" or that "there is any discernible quantum to that loss". The Directors asserted that the Liquidators' case was so obviously deficient, inter alia, on quantum that it would "fail in such a way at trial as to merit an award of indemnity costs". The Directors wrote again on 20 April 2015, summarising the effect of the relevant authorities and stating:

"The applicants have not produced any deficiency accounts (or similar) for any of their dates and there is no good reason why they have not done so … It is too late to address this further shortcoming in the Applicants' case now".

The letter complained that the Liquidators had "made no attempt whatsoever to address the issue of quantum in their pleadings or evidence" and asserted that even if wrongful trading was found by the Registrar:

"there is no evidence of increased losses clearly flowing from either of them which could form the basis for a substantive compensatory award. There is no good explanation why 5 deficiency accounts have not been produced. The Court is clearly reluctant to make a rough and ready calculation; indeed it is far from clear if that would be possible at all in this case given the contingent nature of the VAT liability".

102. On 22 April 2015, the Directors repeated their complaint about the failure on the part of the Liquidators to advance "a positive case on causation and quantum of loss" and said that the Liquidators' case on quantum was "grossly exaggerated".

103. On 18 May 2015 Liquidators applied to adduce expert evidence on certain issues concerning depreciation. They defined the suggested issues as follows: "(1) what the proper accounting practice was with regard to depreciation; (2) whether there are circumstances in which the effect of depreciation upon a balance sheet can be disregarded or minimised by the Directors of a Company; (3) If yes in what circumstances and (4) whether those circumstances applied here". That application was rejected by Registrar Briggs on 22 May 2015. However there was no application to adduce any other expert evidence.

104. On 21 May 2015, the Liquidators wrote a lengthy letter to the Directors stating that their case was that the company could have been wound up with a surplus on 31 January 2005, on which basis the Liquidators would contend that the entire creditor deficiency as at 6 February 2009 was recoverable. The letter continued:

"We have now almost completed a 'working' Schedule of Debts to assist the Court in ascertaining the level of contribution which may be made on any specific debt and which tabulates the proofs filed. We shall provide you with copies so you can consider it prior to the Trial".

105. Perhaps in response to the numerous letters from the Directors sent in April, on 8 June 2015, the Liquidators served a series of what were described as draft schedules on the Directors under cover of a "without prejudice save as to costs" letter. Those schedules included what were described as "five calculations of loss that will serve as useful tools to the parties and the Court at trial". The schedules comprised a list of all the agreed claims in the liquidation, and the dates when the debts were alleged to have been incurred where it was possible to identify such a date; and for each date relied upon by the Liquidators for the purpose of its wrongful trading case, an "increase in net deficiency" calculation.

106. The Liquidators served their skeleton argument on 28 June 2015. Paragraph 34 of that skeleton stated:

"The JL's case on causation and quantum is set out in paragraphs 43 to 45 of the Points of Claim …. As will be understood, the actual figures will only be arrived at once the relevant dates are fixed".

The Directors' skeleton argument, served on 26 June 2015 described the Liquidators' case on causation and loss as "confused and incoherent" and complained that "the Applicants have not made any attempt to calculate the increase in net deficiency in relation to their chosen dates as a starting position". Mr Nersessian submitted:

"The authorities do not endorse a `wait and see' approach on causation and quantum. The Applicants were obliged to set out their case on these aspects of the claim in the Points of Claim. They have not done so and should not now be permitted to modify their position".

107. On the first day of the hearing, the Schedules previously served under cover of a "without prejudice save as to costs" letter were served, with cross-references to the bundles to explain the source of the figures where available. Unfortunately neither the oral openings, nor Mr Nersessian's oral closing (the Directors did not produce a written closing argument) are available to me on this appeal. I asked Mr Nersessian what the Directors' response had been to these documents. He said that the Directors' position was that the documents were not evidence in the case and were objected to as "evidence". However, once produced, there had been no determination of their status and the parties had simply got on with the hearing. While the schedules are not mentioned in Mr Couser's written closing argument, it is not possible to discern from the materials before me how far (if at all) the parties actually engaged with them in the course of the hearing before the Registrar. I was told that Mr Brooks had been cross-examined by reference to them,

The Registrar's approach and the criticisms of it

108. The Registrar dismissed the Liquidators' calculations as "wrong and wholly unrealistic" ([286]). The reasons why he took that view, however, are important and for this reason it is helpful to consider the Liquidators' "increase in net deficiency calculation" as at 3 May 2007:

a. The Liquidators had assumed that if there had been a liquidation on 3 May 2007, there would have been "shareholder funds" of £118,959 (taken from the Company's 31 January 2007 accounts), and liabilities of (a) £154,750.47 for VAT and (b) £25,277.24 for redundancy and notice pay. They contended that there would have been a deficiency of £61,068.71 had the Company stopped trading on that date. However there was no attempt to explain what those assets could have been realised for in the event of a liquidation. Further the only debts which were assumed to exist as at 3 May 2007 were the VAT liability and Redundancy and notice pay. The Company's overdraft with the bank was not mentioned, nor the position of trade debtors and creditors. No consideration was given to the liability which the Company would have had if (as seemed inevitable if it had stopped trading) it has disclaimed its lease. In short, the

belated attempt to perform an "increase in net deficiency" calculation as at 3 May 2007 was clearly deficient in a number of respects, and raised a number of areas of potential dispute.

b. Turning to the actual liquidation, the Liquidators said that there were no shareholder funds, and that the Company's assets would only realise £7,028.96. To be set against this was £415,297.20 said to represent unsecured creditors incurred from 3 May 2007, and the increase in the Company's overdraft of £66,648. This produced a total deficiency in the actual liquidation of £474,916.24 (although on appeal Mr Couser corrected this figure to £408,268.24 on the basis that the overdraft figure of £66,648 should be removed).This included £25,277.24 which would also have been incurred if the Company had gone into liquidation of 3 May 2007.

c. Deducting the £25,277.24, and the £61,068.71 deficiency which would have been incurred in a liquidation on 3 May 2007, the Liquidators calculated the "increase in net deficiency" at £388,570.29 (after allowing for the correction made by Mr Couser on appeal, this figure became £321,922.29).

109. The Registrar reviewed the constituent elements in the 31 January 2007 accounts and rejected the assertion implicit in the Liquidators' calculation that there would have been additional assets of just over £110,000 to contribute to the Company's liabilities had the Company stopped trading in early 2007, holding that there would have been no significant difference ([291]). He went through various items in the Schedule, and concluded that matters would have been no different, or only minimally different, had the Company entered liquidation at an earlier stage ([290]). On the basis of his analysis, the Registrar concluded that the only practical difference between a May 2007 and a February 2009 liquidation was the position of 2, and possibly 3, creditors: an increase in VAT liability due to penalties and interest of £70,000, an increase in unpaid rent to Tesco of £226,798.76 and, possibly, in the amount of £31,906.38 for a debt due to Nottingham City Council. The Registrar concluded that the position of the Nottingham City Council debt had not been sufficiently analysed before him to enable him to reach a conclusion on it, and after hearing further submissions from the parties, he decided that it would not be fair to allow the Liquidators to rely upon it for the purpose of quantifying the s.214 relief. One of Mr Nersessian's arguments was that it was not clear how the figure was arrived at, which was important given the approach adopted by the Court on causation and quantum. There has been no appeal against that conclusion.

110. By adding together the HMRC and Tesco claims, the Registrar reached the figure of £305,000 which he described as "the total increase in debt attributed to these 2 debtors" and which "set a maximum loss figure as the increase in the deficiency based on those debts … It is to that figure that the discretion applies" ([292]). It is clear from this description that the Registrar was treating the £305,000 figure as the equivalent of Park J's "increase in net deficiency" figure as discussed in Re Continental Assurance Company of London which set the maximum figure for s.214 relief, albeit

considerations of the relevant "nexus" between that loss and the directors' conduct, and the exercise of the Court's discretion, might result in an order against the Directors for a lower amount.

111. The Registrar then went onto consider the Tesco claim in more detail. He noted that the Liquidators' calculation has not taken account of the fact that, had the Company gone into liquidation at an earlier date, the liquidators appointed would have been likely to disclaim the lease, giving Tesco a statutory right to claim compensation for their loss in respect of the balance of the term of the lease for which they would have proved in the liquidation ([293]). The Registrar appears to have concluded that, in respect of rent falling between the date of the hypothetical liquidation on 3 May 2007 and the actual liquidation on 9 February 2009, Tesco would still have been proving for rent during that period in the earlier liquidation, albeit by way of a claim for statutory compensation subject to a discount for accelerated receipt [294]. The Registrar referred to Rule 11.13(2) of the Insolvency Rules in relation to the quantification of that discount, pursuant to which a discount at an annual rate of 5% is applied to dividends on future debts. It was common ground before me that Rule 11.13(2) was not applicable, as Tesco would not have been proving for a future debt, but a claim for statutory compensation to be assessed on the same basis as the quantum of damages recoverable if the lease had been terminated for a repudiatory breach of contract (see In re Park Air Services Plc [2000] 2 AC 172). However it was also common ground, and clearly correct, that on conventional principles, a claim for contractual damages for breach of a contract to make payments over various dates in the future does fall to be discounted for early receipt (see for example Moschi v. Lep Air Services [1973] AC 331 at 356, 358). In the event, the Registrar concluded that it would be disproportionate to perform the calculation ([296]).

112. On this basis, the Registrar concluded that "it would be wrong in the exercise of [his] discretion to require the Directors to compensate for the increase in this debt", which left the increase in the HMRC, NI and PAYE debt of £78,500. Having regard to a variety of criteria, which I refer to below, the Registrar concluded that the Directors should be liable to compensate the Company for 50% of that amount.

113. On the handing down of the judgment, the Directors made the same complaint about the Registrar's approach as they have taken before me. Their skeleton argument seeking permission to appeal complained:

> "On causation the Court has adopted an analysis that was not advanced by the liquidators. Causation and quantum is ... an integral part to the claim as liability. The Court has found the liquidators approach to be 'wrong and wholly unrealistic'. The claim should have failed at that hurdle even if liability was established. It is unjust to the Respondents for the liquidators to advance an entirely impotent case on causation on quantum but nevertheless succeed on an analysis adopted entirely of the Court's own volition".

It is right to note that the Registrar himself accepted, in his judgment on costs, that "the case won on looks very different to the case brought" and that "the judgment identifies a substantially different case" to that advanced by the Liquidators (Costs Judgment of 6 October 2015 at [4]-[5]).

What approach should the Registrar have taken to the issue of causation and compensation?

114. I have concluded that the approach taken by the Liquidators to setting out and particularising their case as to the amount of compensation which the Directors should be ordered to pay was fundamentally deficient throughout. The importance of one party setting out the parameters of the case it is advancing so that the other party may prepare for the case it has to meet, both in its evidence and its argument, is obvious. If authority is needed for this proposition notwithstanding its obviousness, it can be found in any number of authorities, including McPhilemy v. Times Newspapers Ltd [1999] 3 All ER 75 at 792-793, Guild v. Eskander [2003] FSR 23 and Jones v Environcom Ltd [2011] EWCA Civ 1152. It is obviously the best course, and in some cases the required course, for those parameters to appear from statements of case and particulars of statements of case. However, the authorities make it clear that where the details of a party's case emerges sufficiently from the material it has served, including witness statements, the Court will want to decide the real points in issue between the parties, where this can be done without unfairness to the other party, rather than allowing one party to take a stand on a "pleading point" in respect of a point of which it has had fair notice and a fair opportunity to address.

115. However the deficiencies in the Liquidators' case here, so far as concerns causation and quantum, go far beyond a failure to keep the terms of pleadings up to speed with the pitch of their arguments as they fairly appeared from the other documents they had served. Despite persistent warnings from the Directors, with highly pertinent references to the relevant authorities, there was no attempt to set out the "increase in net deficiency" case being advanced until the schedules served on a "without prejudice" basis on 8 June 2015, and, in open correspondence, only on the first day of the hearing. Those schedules raised a number of issues of controversy, and were deficient in numerous respects. Had the Registrar adopted or relied upon them for the purposes of his judgment, the Directors would have had legitimate grounds to complain that they had been brought forward at far too late a stage of this long-running trial, despite numerous warnings from the Directors about the need for these issues to be grappled with at a much earlier stage, and of the consequences of not doing so.

116. In the event, the Registrar did not rely on those schedules, and therefore this issue does not arise. What he did do was arrive at his own conclusions based on the materials before him, but following an analysis which had not (so far as I am able to ascertain) been advanced by either party at the hearing, and which had not been the subject of submissions at the hearing. I have every sympathy for the position in which the Registrar found himself. The Liquidators had neither properly set out a case on

these issues, nor grappled with many of the issues which the claim raised and which the Registrar himself identified. Given the very substantial nature of the hearing before him, and the natural desire to resolve this long-standing dispute on the merits rather than on procedural or burden of proof grounds, I can well understand why the Registrar wanted to identify and resolve the relevant issues himself.

117. However it seems to me that unless I am satisfied that the analysis adopted by the Registrar is one to which the Directors could have raised no legitimate objection had it been raised at the hearing, either as to their ability to address the analysis on the existing evidence, or by way of objections to its inherent soundness, then the Directors are entitled to succeed on their first ground of cross-appeal.

118. I have reluctantly concluded that, had the analysis ultimately adopted by the Registrar been considered at the hearing, the Directors would have been able to raise legitimate objections to it, either on the basis that there was insufficient evidence on relevant issues, or because, if the analysis was followed through to a proper conclusion, the Registrar should have concluded on the facts he found that no compensation was payable.

119. In particular, I have concluded that the Registrar's analysis did not properly identify what, on the findings he had made, was the "increase in net deficiency" caused by the decision to continue trading after 3 May 2007:

    a. I referred above to the Registrar's conclusion that the amount of £305,000 arrived at by adding the additional rent debt due to Tesco and the increase in HMRC, NI and PAYE debt, represented the "maximum loss figure as the increase in deficiency based on those dates" ([at 292]).

    b. However, the effect of the Registrar's conclusion on the Tesco debt was that the true increase in the amount due to that creditor was much lower than the £226,789.76 for which it had proved, but, at best, the amount by which its proof would have been reduced had that figure been assessed on a discounted basis in May 2007. This calculation was not performed by the Registrar, but even using the 5% discount rate prescribed by Rule 11.13(2), Mr Couser calculated that the amount was of the order of £15,000. The effect of these conclusions, therefore, was that on the Registrar's approach, the maximum increase in net deficiency would not have exceeded £92,500. The Registrar noted that the discounting point had not been argued before him ([294]), and it inevitably follows that the Directors had no opportunity to make submissions as to the appropriate rate. It may well be for this reason that the Registrar concluded it would not be proportionate to take the loss of discount into account.

    c. However elsewhere, the Registrar had noted that the effect of trading after 3 May 2007 had been a reduction in the amount due to the bank of £16,000, and a reduction in trade creditors of £89,095: a total improvement of about £105,000 ([301]: it was agreed before me that the reference to £115,000 in this paragraph

was an error). On this analysis, the positive effects of continuing trading substantially exceeded the negative effects in relation to the HMRC debt and (if relevant) the loss of discount to the Tesco debt, and this remained the position even if the reduction of available assets of £1,000 referred to at [291(b)] is taken into account.

d. The Registrar dealt with this issue at [302] to [303], suggesting that it would "obviously be wrong to simply deduct those figures from the maximum compensation because the resulting sum would fail to reflect the fact that those reductions were at the expense of other creditors whose debts increased". However, it is only possible to arrive at the "increase in net deficiency" which represents the maximum amount of compensation by considering the overall effect of continuing trading, both beneficial and adverse.

e. While these calculations do not take into account the £31,906.38 Nottingham City Council debt (referred to at [290(e)]), after hearing submissions the Registrar decided that it was not appropriate to take this account, and there has been no appeal against this conclusion.

120. If the Registrar was concluding that s.214 gave relief to or in respect of individual creditors whose position had been worsened by wrongful trading even though the overall effect had not been to increase the net deficiency, in circumstances where there had been a conscious decision to favour one set of creditors at the expense of another, then that conclusion was wrong in law:

a. Any contribution which a director is ordered to make under s.214 is an asset held for the benefit of the creditors as a whole to be distributed among the general body of unsecured creditors *pari passu*, rather than for the benefit a particular creditor or group of creditors. In determining the contribution which the directors who have engaged in wrongful trading must make, it is the effect of the wrongful trading on the net assets of the company as a whole which is relevant, rather than the effect on a particular creditor or group of creditors: see Vinelott J in Re Purpoint [1991] BCC 121 at 128-129; Park J. in Re Continental Assurance Plc [2001] BPIR 862 at 864 and Snowden J. in Grant v Ralls [2016] EWHC 243 (Ch) at [236]-[243].

b. S.214(1) does not provide a remedy to address the position where, during the period of wrongful trading, there has been discrimination against one creditor or group of creditors, who have suffered to a greater extent that the body of creditors as a whole, but there has been no increase in the net deficiency for the creditors as a whole: Grant v Ralls at [241] to [243], [250]-[251].

c. The position is different where there has been an increase in net deficiency, and the directors seek to rely on the s.214(3) defence. As Snowden J concluded in Grant v Ralls at [243]-[246], for the purpose of determining whether the s.214(3) defence is made out, it would not be enough for directors to show that

their actions were aimed at reducing the net deficit of a company for the benefit of the unsecured creditors as a whole, if that involved discriminating against a creditor or particular group of creditors for the purpose of reducing the overall net deficit.

121. In these circumstances, I have concluded that the Directors succeed on ground 1 of their cross-appeal, and that in the circumstances the Registrar should not have ordered any payment by the Directors to the Liquidators under s.214 (a) because the Liquidators failed to advance and establish a properly formulated case that there had been any increase in net deficiency during the period of wrongful trading, and (b) on the approach adopted and facts found by the Registrar, there was no such increase.

122. In any event, I have concluded that the Directors were denied the opportunity to adduce additional evidence or explore further issues to address the Registrar's analysis. In particular the Registrar arrived at the figure of £70,000 for the increase in HMRC debt by taking the VAT liability of £151,867.95 at [290(c)] and comparing it with the figure for which HMRC proved in the liquidation of some £70,000 more than that ([290(e)]). However the first figure represented the position as at 31 January 2007, and not 3 May 2007, and the make-up of the figure was not explored. It is not possible to know how much of the £70,000 figure represented amounts for which the Company had only become liable after 3 May 2007, and how much represented interest which had accrued by, or penalties accruing by reason of events which had occurred before, that date. Similar issues may have arisen as to whether some part of the Nottingham City Council debt pertained to the period up to 3 May 2007: the issue was simply not explored at trial.

123. Finally, I should note that the Liquidators too were denied the opportunity to make submissions on the approach adopted by the Registrar, in particular on the Registrar's conclusion that the only effect of the wrongful trading between 3 May 2007 and 9 February 2009 on the Tesco debt was the loss of the discounting differential between the debt claims for unpaid rent which had accrued on the latter date, and the claim for statutory compensation following the disclaimer of the lease as at 3 May 2007.

124. In their submissions following the handing-down of judgment, the Liquidators challenged the Registrar's conclusion to "decline ... to order compensation in respect of the Tesco Claim on the basis that the lease was not readily assignable and so Tesco would be proving in the liquidation for the totality due under the lease in any event". The Liquidators suggested that if the lease had been determined shortly after 3 May 2007 this would have been "prior to the financial downturn of 2008", with the result that Tesco had been denied "the opportunity of marketing the premises at the most – or at the very least a more – opportune moment in time". It was also suggested that Tesco could "simply have opened a store on part of the premises as they in fact did …. Thereby enabling them to mitigate at least part of their losses through trading".

125. The Registrar was invited "to revisit the judgment in respect of Tesco claim". I do not have a transcript of the Registrar's judgment addressing this issue, but it is clear that

the argument was rejected. A sub-set of these issues, together with some new arguments, are raised on the appeal and are addressed below. However the Liquidators' primary position on appeal is that the Registrar should have adopted a completely different approach to quantifying compensation (that contended for by ground 1 of their appeal which I have rejected). The difficulty for the Liquidators is that if the approach adopted by the Registrar raises disputed factual issues about the Tesco lease on which the parties did not adduce evidence or make submissions, this simply provides further support for the Directors' contention that the approach was not fairly open to the Registrar. In those circumstances, the Liquidators are stuck with the consequences of their failure to advance any proper "increase in net deficiency" calculation at a time and in a form which could be fairly considered at the hearing. Mr Nersessian stated the position accurately in paragraph 113 of his skeleton argument on this appeal:

"The fundamental difficulty that L [the Liquidators] has is that having rejected L's case on quantum completely (there is no appeal against that decision – L's solution is instead the First Ground of Appeal) … if the Registrar's own reasoning is found wanting there is no case on quantum to look to and L has gained nothing".

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126. The Liquidators complain that the Registrar "has misdirected himself as to the facts and/or erred in the exercise of his discretion in paragraphs 293 to 296 of his judgment in finding that the Respondents were not liable to compensate the Company at all in respect of any of the rent that was incurred by it after the Knowledge Condition was satisfied, despite the Company's continued trading being at the expense of the Company's landlord and HMRC".

127. In Mr Couser's skeleton argument, that ground of appeal was expanded to raise a number of different issues, many of which were not addressed, or only addressed very briefly, in the course of the oral argument.

128. The first complaint appears to be that the Registrar did not take sufficient account of the policy of discrimination adopted – that the Company had carried on trading in order to buy time, but did so by discriminating against HMRC and Tesco (paragraphs 34 to 36 and 39 of Mr Couser's skeleton argument). As to this, for the reasons set out above, this was a factor which is not relevant at the stage of establishing whether there was an increase in net deficiency and, if so, what the maximum amount of compensation was (Stone v Ralls *supra*) but was something capable of being relevant both in determining whether the Minimising Loss Defence was made out, and in exercising the Court's discretion to determine whether some payment below the maximum amount might be ordered. For reasons I have explained, I have concluded that the Registrar's conclusion in relation to the Tesco debt was a matter which was relevant to the determination of whether the wrongful trading had caused an increase in the net deficiency, and that, for this purpose, the issue of discrimination was irrelevant. However, in so far as the issue of discrimination consideration came into consideration at later stages of the analysis, the Registrar clearly had it in mind and

took it into account. Thus in rejecting the Minimising Loss Defence from 3 May 2007 onwards, the Registrar noted that trading involved adopting "a policy of discriminating against Tesco and HMRC" ([275]-[277]). The Registrar also took account of discrimination when considering the exercise of his discretion at [303].

129. Given the conclusion I have reached above that on the approach adopted by the Registrar and on the factual findings he made, the Liquidators had failed to establish that the wrongful trading caused an increase in the Company's net deficiency, the complaint raised by the Liquidators concerning the effect of discrimination does not arise. However, if it had been relevant to consider how the Registrar had treated the issue of discrimination when it came to exercising his discretion, in circumstances in which he clearly had the policy of discrimination in mind, I would not have thought it appropriate to substitute my own exercise of discretion on appeal for the Registrar's.

130. The second complaint is an attempt to challenge the Registrar's factual conclusion that Tesco would have proved for the same amount (save for the benefits of a discount for accelerated receipt) in a liquidation occurring on or shortly after 3 May 2007 as it did in the actual liquidation (advanced in paragraphs 38 to 39 and 42 of Mr Couser's skeleton). The submission involves an attempt to appeal various findings of fact: whether the Mazars plan (or at least the fact that the Company was considering some form of plan) was brought to Tesco's attention and if so when; the reasons why Tesco did not exercise distraint before they did; what effect the collapse of Lehman Brothers would have had on Tesco's ability to assign the lease (an issue on which I was asked to reach a conclusion on the basis of "judicial notice") and whether the Registrar's conclusion that Tesco would have proved for substantially the same amount in May 2007 as in February 2009 could successfully be challenged by considering what Tesco did in fact prove for in the actual liquidation.

131. There are two formidable difficulties with this submission.

132. First, to the extent that these were issues properly before the Registrar on which he was entitled to come to conclusions of fact, then it is simply not possible or appropriate for me to substitute alternative conclusions based on the very limited factual references to which I was taken in the course of appeal. In Fage UK Ltd v. Chobani UK Ltd [2014] EWCA Civ 5 at [114], Lewison LJ warned that "in making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping". On this issue I have barely glimpsed an atoll.

133. Second, to the extent that this issue was not canvassed before the Registrar, such that there is no sufficient basis in the record for the conclusions he reached, then this provides further support for the Directors' cross-appeal that the Registrar should simply have stopped once he had rejected the Liquidators' case, and not gone on to formulate and determine an alternative analysis which had not featured in the evidence before him.

134. The final complaint is that the Registrar erred in principle in attributing the discount which would have been achieved on compensation for lost rent in an earlier liquidation to IR 11.13(2), and that he should not have held that it was disproportionate to calculate the amount of the lost discount (Mr Couser's skeleton paragraphs 40, 41 and 44). As I have explained above, the first of these points is common ground but leads nowhere: discounting would still be used to calculate the amount for which Tesco was entitled to prove following the disclaimer of the lease, albeit that there was no evidence as to the appropriate rate. As to the second, for the purposes of considering whether, on the facts found by the Registrar, there had been an increase in net deficiency, I have taken into account the possible loss of discount in the amount at which the Liquidators now calculate it, and it does not affect the conclusion that on the facts found by the Registrar, no increase in net deficiency was made out. Further, the Registrar noted that this issue had not been argued before him ([[294]), and he took it into account in exercising his discretion in any event ([306]).

135. For all these reasons, the final set of complaints advanced by the Liquidators under this ground of appeal take them nowhere.

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136. The Liquidators' final substantive ground of appeal concerns the Registrar's decision to order the Directors to pay compensation in an amount of 50% of the figure he had arrived at. This finding reflected a number of considerations:

a. The Registrar referred to his finding that the Directors had adopted a policy of discrimination and should not have done so as a potential factor operating against the Directors in the exercise of his discretion, but he held that this was counter-balanced by his findings that there was no dishonesty on the Directors' part or intent to commit a wrongdoing as such, and that Tesco and HMRC had been kept informed: [303].

b. The fact that the Adverse Consequences of Liquidation were such that there were no real assets, which meant that the Directors had allowed the Company to continue trading "because otherwise nothing would be left" and because continuing to trade provided a chance of some benefit, and did produce some benefit: [304].

c. He was satisfied Mr Walker tried his best to ensure that the attraction remained for the benefit of the tourist trade in Nottingham: [305].

d. He also took into account the £1,000 reduction in stock value during the period of wrongful trading; the fact that he had not included the loss of the discount applicable to future rent if the Company had been liquidated in May 2007 and the "mitigation", or improvement in the position of trading debts, between the two dates: [306].

137. The Registrar's reasoning is open to the criticism that it mixes issues which are properly relevant to the issue of discretion, and issues which go to the threshold issue of whether the wrongful trading caused an increase in net deficiency at all, and if so in what amount. In particular I have in mind the references to the £1,000 stock; the discount issue and the issues described as "mitigation". This is, in effect, the same criticism I have made of the Registrar's treatment of the issues concerning the Tesco debt as a matter going to the discretionary stage, rather than being relevant to the issue of whether there had been an increase in net deficiency at all.

138. However that is not the complaint which the Liquidators make. This ground of appeal contends that:

> "The learned Registrar has erred in the exercise of his discretion and/or taken into account an irrelevant consideration and/or erred in law in holding that a perceived lack of any dishonesty on the part of the Respondents meant that the learned Registrar was entitled to and should reduce the quantum of compensation paid by the respondents by 50%".

139. Thus formulated, the criticism has some force. Section 214, as opposed to section 213, is premised on conduct by directors which does not meet the standard of competence objectively to be expected of directors, as appropriately adjusted if the director under consideration has greater knowledge or skill in a relevant respect. Section 213, by contrast, requires dishonesty as a pre-condition of liability. There would, to put the matter no higher, be room for argument as to whether the mere fact that the higher level of misbehaviour necessary to trigger liability s.213 was absent in a s.214 claim could, of and by itself, be a valid reason for substantially reducing the compensation otherwise payable by the directors under s.213.

140. However the criticism as formulated does not fairly reflect the Registrar's conclusion, which addressed the issue of honesty principally as a reason why the policy of discrimination was given less weight than might otherwise have been the case when the discretion was exercised ([303]), and was only one of a number of factors referred to by the Registrar. I think that the Registrar was entitled to bring his conclusions as to the state of mind of the directors into account as part of this balancing exercise: see for example Knox J in Re Produce Marketing Consortium Ltd (1989) 5 BCC 568 at 597 and Brian D. Pierson (Contractors) Ltd [1999] BCC 26 at pp.56-57. If the Registrar's analysis had otherwise withstood challenge, I would not have thought it appropriate to substitute my own exercise of the s.214 discretion for the one he had adopted, which fell within the broad ambit open to him.

141. Mr Couser also brought a factual challenge to the Registrar's conclusion that the Directors had acted honestly. However such evidence as I was taken to in the course of the appeal did not come close to enabling me to disturb such a fundamental factual finding by the Registrar about the witnesses who he saw cross-examined at length.

Conclusion

142. For these reasons, I allow the appeal by the Directors against paragraph 1 of the Registrar's order of 31 July 2015 which ordered that the Directors were jointly and severally liable to pay compensation of £35,000, because I have found that the Liquidators did not establish that the wrongful trading had caused any increase in the Company's net deficiency.

143. I reserve all consequential issues which follow from this conclusion, including its effect on the issue of costs before the Registrar and the costs of this appeal. Pursuant to Practice Direction 52A paragraph 4.1(a), I have adjourned this hearing to a subsequent date at which all consequential issues will be dealt with.